THE INTERFACE BETWEEN TRADITIONAL LEADERSHIP IN SHARED RURAL LOCAL GOVERNANCE

by

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DISSERTATION

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SUMMARY

The study deals with the nature and problems of traditional leadership and the variables that influence the interface between traditional leadership in shared rural local governance within the context of an interactive government framework. Due to South Africa’s specific history and the power that the Apartheid regime instilled on traditional leaders, the country has somewhat of a unique situation. Therefore, the emphasis falls on the South African context. The general aim of the study is, therefore, to analyse the concepts and legislative requirements related to traditional leadership. Furthermore, it aims to determine how traditional leaders could help Government in its rural development effort to deliver more effective services to rural people.

This enquiry is premised on the view that the institutionalisation of traditional leaders has been constitutionally and statutorily recognised and can make an important contribution to shared rural local governance on a political, economic, social and cultural level. It remains an important link between the local government and rural communities. As such, traditional leaders play a vital role in the development process. Furthermore, traditional leaders are important with regard to resource mobilisation, political stability and policy implementation in shared rural governance.

In general, the study reveals that, despite modernisation, traditional leaders are still influential actors in the rural life of communities in South Africa. Furthermore, attempts to strip them of their formal powers, such as the allocation of land and jurisdiction in criminal cases, have not reduced their influence. In the light of the above argument, the institution of traditional leaders remains influential because it has been able and continues to adapt itself to the changing modern environment.
KEY TERMS:

District municipality; Local authority; Local governance; Municipality; Traditional leader; Tribal authority.
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I dedicate this achievement to my late parents, Nkgotho and Tlakale, as well as my deceased youngest sister, Makgantshi, who remains the torch-bearer of tertiary education in our family.

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CHAPTER ONE

GENERAL ORIENTATION

1.1 Introduction

This study focuses on the interface between traditional leadership in shared rural local governance. This chapter aims to contextualize the study by providing a background and rationale for the problem statement. More specifically the study’s research questions will be addressed and the aims and objectives will be set out. The research design and collection of information will be set out. The terminology and the limitations to the study will also be addressed. Lastly, an overview of the chapters in the dissertation will be provided.

1.2 Background, rationale and statement of the problem

Traditional leaders and traditional authorities were important institutions and “played an essential role in the day-to-day administration of their areas and the lives of traditional people. With the coming of colonialism, the leadership authority of traditional leaders changed; traditional leaders became the agents of the colonial governments” (Rugege 2003:172). “Nationalist and liberation movements that fought for independence regarded traditional leaders (or chiefs, as they were renamed by colonialists) as collaborators in colonial oppression and at independence they were marginalised in most countries in Africa” (Rugege 2003:173).

“In 1994, South Africa entered a new constitutional dispensation based on democracy, equality, fundamental rights, the promotion of national unity and reconciliation that would considerably affect the rule of traditional leaders. South Africa is not unique in this regard, as several other African countries have also recognised the significant role of traditional leaders after liberation from colonialism. These include Botswana, Zimbabwe, Ghana, Namibia and Uganda” (Sithole and Mbele 2008:18). Several studies also “indicated that traditional leaders have a role to play as an institution at local government level” (Du Plessis and Scheepers 1999:22).
However, the situation in South Africa was rather unique since traditional leaders had substantial local government power devolved to them by the Apartheid’s Government. It was expected that after the post-1994 democratic dispensation the “elected local government would extend to all areas of South Africa including the areas under traditional rule” (Khunou 2009:85). Section 151 (I) of the Constitution of the Republic of South Africa of 1996 (hereafter referred to in the dissertation as the Constitution or the Constitution of 1996 or the Constitution of the Republic of South Africa of 1996) determines “that the local sphere of government consists of municipalities which must be established for the whole of the territory of the Republic” (Khunou 2009:85). According to the Constitution, traditional leaders are “obliged to ensure full compliance with the core constitutional values namely: human dignity, equality, non-sexism, human rights and freedom. This means that the system of traditional rule is influenced and qualified by the Constitution” (Constitution of 1996).

The Constitution makes no mention of traditional authorities however, in accordance with Principle VIII the “institution, status and role of traditional leadership according to indigenous law was recognised and protected. However, the roles and functions of traditional leaders were not clearly defined in this Principle” (Khunou 2009:85). Traditional leaders were initially ignored during the negotiations leading to democracy, but after showing their unhappiness with the situation they were brought into the negotiation circle.

According to the Constitution of 1996, the objects of local government are:

(a) “to provide democratic and accountable government for local communities;
(b) to ensure the provision of services to the communities in a sustainable manner;
(c) to promote social and economic development;
(d) to promote a safe and healthy environment; and
(e) to encourage the involvement of communities and community organisations in matters of local government”.

The dilemma at the time of the 1994 general election was that all these matters except the first were still in the domain of traditional authorities and traditional leaders. Section 156 “sets out the executive powers and functions of municipalities by referring to their rights to administer the powers assigned to them by national or provincial legislation. To confuse matters further these powers could easily fall (and in 1994 it in fact did fall) under that of traditional authorities who still operated under the pre-1994 statutes” (Rugege 2003:7).

“Rural development and strengthening of structures that deliver basic and essential services to grassroots communities have been the primary focus areas of government since 1994” (Khunou 2009:85). In June 1999 South Africa's newly elected president, Thabo Mbeki, announced the governments' intention to design a rural development programme, saying: "The rural areas of our country represent the worst concentrations of poverty. No progress can be made towards a life of human dignity for our people as a whole unless we ensure the development of these areas" (Mbeki 1996:8). "The launch of the new rural development strategy places rural development and poverty alleviation at the forefront of the government's agenda and is a further confirmation of a shift in South Africa's rural development policy. The government's 1995 National Rural Development Strategy was criticized for its failure to adequately address the potential of the rural economy, and for ignoring issues of local governance, including traditional leadership. In 1997 the government began to address these deficiencies and published the revised Rural Development Framework, marking a shift in the focus of the rural development strategy to incorporate issues of local governance (and in particular the role of rural municipalities in service delivery) and sustainable livelihood" (Khunou 2009:85). According to Ellis (1998:14) “the Sustainable Rural Livelihood (SRL) (or livelihood diversification approach to rural development focuses on the ways in which individuals, families and communities construct a diverse portfolio of activities and social support in their struggle for survival and in order to improve their standards of living” (Ellis 1998:15). This approach “moves away from a compartmentalized approach to rural development, attempting to develop a holistic assessment of how rural communities draw together resources from disparate sources to assemble their livelihoods. This significant shift has important ramifications for communities, institutions and organizations occupying the rural domain. The approach advocated
by the Rural Development Framework places increased emphases on the role of rural municipalities in creating sustainable livelihoods and reducing poverty in South Africa - a role they are currently ill-equipped to perform” (Ellis 1998:15).

Thus “in rural areas municipalities have powers and functions that largely overlap with those that are supposed to be exercised by traditional authorities. This left traditional leaders with the uncertainty of negotiating for a place in local government” (Khunou 2009:117). Despite the confusion, traditional leaders in South Africa, as the saying goes, were not willing to fade into the woodwork. Unlike in other countries, they were not prepared to dissolve their role into that of mainly fulfilling a ceremonial one.

The “place and role of traditional leaders in South Africa's new democratic political system have not been clearly defined. In some circles it was felt that more effort could have been made to try to accommodate traditional leaders in the country's Constitution. When the process of negotiations for a new democratic dispensation began at the Conference for a Democratic South Africa (CODESA) in December 1991, traditional leaders tabled their concern that the new Constitution needs to recognise their powers and functions” (Khunou 2009:107). As it stands, traditional leaders feel that the Constitution does not inform them about their powers and future role. The champion negotiator in the process to clarify the role of traditional leaders is the “Congress of Traditional Leaders of South Africa (CONTRALESA) which claims to represent 90 per cent of the country's traditional leaders” (Mail and Guardian 16 September 2011).

The Constitutional provisions could be regarded as a “victory for traditional leaders in the new democratic South Africa. Although Chapter 11 of the Constitution recognised and protected the institution, status and role of traditional leadership according to customary law, recognition of customary law and traditional leadership was subject to the supremacy of the Constitution and the Chapter on the Bill of Rights. In his inaugural address, former South African President, Mr Nelson Mandela, admitted that the new constitution did not define in sufficient detail the status and role of traditional leaders and that it did not oblige government to set up a council for traditional leaders” (Sithole and Mbele 2008:37). The Interim Constitution
of the Republic of South Africa of 1993 (Act 200 of 1993) (hereafter referred to as the Interim Constitution) “provided a function for traditional leadership at the local level of government. It also provided for a National Council of Traditional Leaders at national level and a Provincial House of Traditional Leaders at provincial level. These constitutional allowances were once again a victory for traditional leaders in a democratic South Africa” (Khunou 2009:110). In view of this victory traditional leaders had the necessary powers to negotiate for a type of agreement that would respect and uphold their powers and that would afford them a place in local government structures (Khunou 2009:110).

As noted before the Constitution stipulates out the role of local government in democratic South Africa. “Local Government must be developmental, whereas in the past, Local Government was mainly concerned with providing services to White communities including traffic regulations, issuing licenses and looking after parks and recreation facilities. Now Local Government must ensure that all communities have access to basic services, everyone can participate in decision making and planning, that the local economy grows, that job opportunities increase and that local resources are used wisely to improve the quality of life for everyone” (Khunou 2009:85). The White Paper on Local Government of 1999, deals with the relationship between Local Government and traditional leadership though not in detail with all the other aspects related to the functions and powers of traditional leadership. The White Paper proposed a “co-operative relationship between municipalities and traditional leadership. Traditional leaders will have representation on the local and district councils regarding the needs and aspirations of their people. This role is different from the role of voting for the ward councillors. Traditional leaders, particularly in KwaZulu Natal, vigorously opposed the re-drawing of municipal boundaries and the establishment of primary municipalities in traditional authority areas” (Khunou 2009:85). The traditional leaders were opposed to the primary role of municipalities in traditional authority areas instead of traditional authorities themselves to be regarded as primary municipalities.

Rural poverty is strongly linked to the policies of the colonial and Apartheid governments, which alienated Black people from their land by forcing them to farm as tenants into the Bantustans (homelands). Black commercial farming was
systematically destroyed through past legislation, including the Natives Land Act of 1913 (Act 27 of 1913) and the Native Trust and Land Act of 1936 (Act 18 of 1936), which restricted Black people's access to land, and the amount of land they could farm. For the majority of homeland dwellers, profitable farming was impossible as forced removals of Black people from urban areas zoned for Whites only, and from White farms in the 1970s - led to overcrowding, landlessness and environmental degradation. Discriminatory practices in the provision of government subsidies, taxation, extension services and rural infrastructure development restricted Black people's access to land, capital and markets. The consequences of discriminatory rural development policies and the legislative construction of a dualistic agricultural system in South Africa have been to concentrate poverty within rural areas, particularly former homelands. These factors, over which Government at the national and local sphere had significant impact, all influenced the comparative advantage between the rural and urban areas, influencing individual decisions about whether or not to move from one location to another. South Africa's policy towards rural development and rural poverty alleviation has undergone significant transformation between the first and second terms of the ANC-led government. The first phase extends from the adoption of the Reconstruction and Development Programme (RDP) as the manifesto of the ANC at the time of the 1994 general election. This phase focused on land restitution, land redistribution and centralized infrastructure provision as the central pillars of rural development policy. The second phase was triggered by the transition from the RDP to the Growth, Employment and Redistribution (GEAR) strategy in 1996, which reduced the amount of resources available for large-scale land redistribution and for central departments to fund major infrastructure. The policy approach outlined by the Rural Development Framework begins to shift the burden of responsibility from the national focus to the local economy by advocating an enhanced role for rural local economic development, local provision of infrastructure and service provision and for rural local governments as the principle facilitator of rural development.

Although the role of the traditional leader has become clearer through recent legislation, especially the National Traditional Leadership and Governance Framework Act (Act 41 of 2003), the last word on the participation of traditional leaders in local government has not been said. In fact some traditional leaders still
feel that they are kept at the mercy of national, provincial and local government. At the heart of this conflict lies the fact that the provisions for traditional leaders overlap with those of elected local government officials (Sithole and Mbele 2008:44). “Giving traditional leaders a role with regard to functions already allocated to elected local government would require amendment of the Constitution” (Rugege 2003:178). This leads to confusion as to what the role of traditional leaders must be especially in the governance of rural areas.

The rationale of this study is that a shared governance model is important if local governments want to develop and deliver effective services to rural communities where traditional leaders have a strong presence. Rural development has been the primary focus area of government since 1994, however, to date not much has been achieved. The former legislation and policy on traditional leadership and the House of Traditional Leaders was inadequate to ensure development in the areas under traditional leadership. The capacity of traditional leaders needs to be enhanced so that they can play an effective role in Government’s Rural Development Strategy and the strengthening of structures that deliver basic and essential services to grassroots communities.

The Traditional Leadership and Governance Framework Amendment Bill of 2008 indicate that government is seriously considering an integration of traditional leadership within the South African system of governance. Government is therefore, finally agreeing that traditional leaders have a role to play. However, the question is what role is needed to best serve the more than 28 million people in South Africa living as members of traditional communities. One thing is clear “(t)here should be an effective way for them to express their views and to uphold their traditions and customs and also to ensure that they are not left behind in the development of the country ” (Du Plessis and Scheepers 1999: 22).

To gain a clear understanding of the role of traditional leaders in a shared governance context it is necessary to undertake a conceptual analysis and therein discussing the concept traditional leadership and other related concepts from different perspectives. Shared governance is one strategy for local government, traditional leadership and the people, to maximize development in rural communities.
The main problem the study attempts to investigate is whether in the light of the history and traditional role of traditional leaders in South Africa, shared governance can promote better service delivery in addressing the issues within the defined jurisdiction of the proposed Traditional Leadership and Governance Framework Amendment Bill of 2008.

Now that the research problem has been delineated and explicated, it is necessary to state the subsequent research questions of the study.

1.3 Research questions

In the light of determining the interface between traditional leadership in shared rural local governance, the study aims to provide a conceptual framework gained from the literature in order to explain the issues, concerns and challenges surrounding traditional leadership and the role traditional leaders should play in rural local government. In conceptualising traditional leadership the emphasis will be on the phenomenon as well as an exploration of the inputs that may impact positively as well as negatively on traditional leadership in South Africa.

More specifically the following research questions need to be addressed:

- What does the concept traditional leadership entail and what variables are important to understand the concept better?

- What role do traditional leaders undertake to effectively meet the needs of their people?

- What is the role of traditional leadership in rural local government?

- Do traditional leadership institutions have any role to play in co-operative governance in South Africa?
How can a more meaningful and dynamic relationship be engendered between the traditional leaders and municipal councillors?

How did the current powers of the institution of traditional leadership evolve since 1994, leading to the establishment of the Department of Traditional Affairs?

What was the historical role of traditional leaders in Africa?

What important variables need to be explored to gain a comprehensive understanding of the African tribal system?

What important concepts of local government need to be explored to gain a better understanding of the role of traditional leaders in local government?

How do present legislation, policy and practices in national, provincial and local government impact on traditional leadership?

Is the system of traditional leadership still relevant for democratic South Africa?

Do traditional leaders still have a meaningful role to play in their communities?

Is shared governance possible between elected local municipalities, Provincial Government and traditional leadership within the context of the new legislation?

What are the different viewpoints of traditional leaders and Government regarding the role of traditional leaders in Local Government?

Could shared governance result in a partnership or co-operative governance under the new legislation that could provide more effective services and enhance the development of rural people?
1.4 Aims and objectives of the study

To answer the above questions regarding traditional leadership, the study will deal with the problems of traditional leadership and the variables impacting on the interface between traditional leadership in shared rural local governance in the context of an interactive government framework. Since South Africa has, because of our specific history and the power given to traditional leaders by the Apartheid regime, a somewhat unique situation, the emphasis will fall on the South African context. The general aims of the study is, therefore, to analyse the concepts related to traditional leadership as well as to determine how traditional leaders could help government in their rural development efforts and the delivery of more effective services to rural people. In order to achieve this general aim, the following serve as more specific objectives of the study:

- To describe the historical background and context of traditional leadership and how the role of traditional leaders in local governance evolved.

- To describe the essential aspects of traditional leadership and to provide a description and explanation of the variables influencing the foundations, meanings and understanding of the concepts related to traditional leadership;

- To define and understand the place and role of traditional leadership as a customary system in the new institutional system of democratic governance in local government;

- To explore how the traditional leadership system can be transformed to be in-line with the constitutional imperatives in local governance and development.

- To explore the development of legislation since the 1994 democratic dispensation and to determine its impact on the institution of traditional leadership in South Africa;
• To study and establish the specific rules, regulations, laws and legislation which govern and facilitate co-operation between government and traditional leaders; and

• To provide an overview of key strategies to enhance cooperation between traditional leaders and government and provide guidelines for cooperative governance.

1.5 Research design and data collection

The purpose of this section is to present a brief introductory discussion of the research methodology used in the dissertation.

1.5.1 Research design

“A research design is [basically] a set of guidelines and instructions on how to reach the goal that the researcher has set for the study. These guidelines and instructions should be followed when addressing the research problem” (Mouton 2001:108).

Simply put, “a research design consists of a plan, a roadmap, that allows a researcher to test the validity of his/her hypothesis or answers the research questions, taking into account the factors that he/she believes might affect the relationship between the dependent and independent variables. A research design is simply the way that the researcher proposes to go about testing the hypotheses or answering the research question (Auriacombe 2010:54).

As is clear from the preceding, no empirical research will be undertaken in this study. Information will be gathered by analysing the context and role of traditional leadership and related concepts in the literature. The researcher started by generating questions to guide the research. As the researcher gathered data, core theoretical concepts were identified. Provisional linkages were developed between theoretical and core concepts in the literature. The core concept, “role of the traditional leader”, was discovered and fleshed out in detail.
The research methodology is based on a conceptual analysis of multiple sources covering a wide spectrum of themes, literature on concepts, theories and approaches to traditional leadership as well as relevant legislation, regulations, official documents, policy documents, newspapers, journal articles and internet websites.

1.5.2 Data collection

Traditionally, the literature review has often been described as the foundation on which one’s own work is built. This fits with views of science as progression from previous work and ‘adding to knowledge’. The significance of a literature review is to afford the researcher the opportunity to hinge his/her rudimentary ideas, thoughts and views on the well-researched, peer-reviewed and prudent ideas of published scholars in the field of study (Mouton and Marais 1996 in Auriacombe 2011:17). The literature review may well be constructed as the narration and arguments addressing the related questions and problems. A good literature review offers a synthesis of what has already been written on the topic and an argument about what has not been done adequately or what still needs to be dealt with—“It is the scaffolding for building the justification for one’s own study” (Massey 1996:2).

It shares with the reader the results of related studies and relates the study and the reasoning of the study and the conceptual framework used to the “larger, ongoing dialogue in the literature” (Creswell 2009:25). Mouton (2001:179) describes conceptualisation as follows: “A review of the literature is essentially an exercise in inductive reasoning, where you work from a “sample” of texts that you read in order to come to a proper understanding of a specific domain of scholarship”.

It is important to note that the conceptual analysis of the concept “traditional leaders”, therefore, involved much more than reading the perspectives of various scholars about the topic. It concerned a critical study of the state of the art of traditional leadership in South Africa and a personal and professional assessment of both the content and quality of the text (Creswell 2009:25). More specifically, the researcher had to engage in a dialogue with the writings and arguments concerning traditional leaders and their role in local government.
1.6 Terminology

Comprehensive conceptual clarifications of terms specific to the research appear in appropriate chapters. Specific concepts used throughout the study are defined to enable the reader to understand and follow the argument being pursued. The concepts defined hereunder are in line with the prevailing legislation so as to avoid ambiguity or uncertainty in interpretation. Other concepts used in the study will be explained as necessary in the chapters that follow.

1.6.1 Area of jurisdiction

An area of jurisdiction means the area of jurisdiction designated for a traditional community and traditional council that have been recognised as provided for in Sections 2 and 3 of the Traditional Leadership and Governance Framework Amendment Bill of 2008.

1.6.2 Custom, customary law and customary institution

**Custom** is the accepted way of acting in a community or other group; a long-established habit that has almost the force of law (The World Book Dictionary 1992: 76).

**Customary law** is law which is derived by immemorial custom from ancient times (The World Book Dictionary 1992:76).

**Customary institution or structure**

According to Section 1(1) of the Traditional Leadership and Governance Framework Amendment Bill (2008) “customary institution or structure means those institutions or structures established in terms of customary law”.
1.6.3 District municipality

According to the Constitution (Section 155(1) (c) and Section (1) of the Municipal Structures Act, 1998 (Act 117 of 1998), a District municipality is “A municipality that has municipal executive and legislative authority in an area that includes more than one municipality.”

1.6.4 Headman or headwoman

“This is a traditional leader who is under the authority of, or exercises authority within the area of jurisdiction of, a senior traditional leader in accordance with customary law; and is recognised as such” in terms of the Traditional Leadership and Governance Framework Amendment Bill of 2008.

1.6.5 King or Queen

A king or queen is “A traditional leader under whose authority, or within whose area of jurisdiction, senior traditional leaders exercise authority in accordance with customary law; and recognised as such in terms of this Act” (Section 1(1) of the Traditional Leadership and Governance Framework Amendment Bill of 2008).

Section 1 of the Act of uses the Setswana titles of kgosi and kgosigadi in lieu of king and queen. To define these concepts thus: “kgosi or kgosigadi means the kgosi or kgosigadi of a tribe as an heir to bogosi (kingship) who has been appointed by the family of bogosi (royal family) in accordance with their succession.

On the other hand, Section 1 of the North West Traditional Leadership and Governance Act of 2005 defines the same titles thus: “Kgosigadi as the person who in accordance with the laws and customs of a particular Community is recognized as the hereditary head of such traditional community and who is a citizen of the Republic of South Africa.
1.6.6 Kingship

According to Section 2A of the Traditional Leadership and Governance Framework Amendment Bill of 2008 kingship is “A number of traditional communities which are grouped together”.

1.6.7 Royal family

This is “The core customary institution or structure consisting of the immediate relatives of the ruling family within a traditional community, who have been identified in terms of custom, and includes, where applicable, other family members who are close relatives of the ruling family” (Traditional Leadership and Governance Framework Amendment Bill of 2008 Section 1(1).

1.6.8 Senior traditional leader

According to Section 1(1) of the Traditional Leadership and Governance Framework Amendment Bill of 2008 a “senior traditional leader is ... a traditional leader of a specific traditional community who exercises authority over a number of headmen or headwomen in accordance with customary law, or within whose area of jurisdiction a number of headmen or headwomen exercise authority”.

1.6.9 Tribe

A tribe is a group of people united by race and customs under the same leader; a group of people forming a community and claiming descent from a common ancestor (The World Book Dictionary 1992).

In terms of traditional leadership legislation a tribe “means a tribe that was established or recognised under legislation in force before the commencement of the Traditional Leadership and Governance Framework Amendment Bill” of 2008 Section 1(1).
1.6.10 Tribal authority

According to the Bantu Authorities Act of 1951 (Act 68 of 1951) Section 6 tribal authority refers to the authority that is bestowed on a tribal leader within a tribal area in a hereditary succession system.

1.6.11 Traditional council

This is a council established in terms of Section 3 of the Traditional Leadership and Governance Framework Amendment Bill of 2008 section 1(1).

1.6.12 Traditional leader

A traditional lead is “Any person who, in terms of customary law of the community concerned, holds a traditional leadership position, and is recognised in terms of this Act” (the Traditional Leadership and Governance Framework Amendment Bill of 2008 Section 1(1); the North West Traditional Leadership and Governance Act of 2005 (Act 2 of 2005) Section 1(1)) emphasizes that it includes a kgosi/kgosigadi, a kgosana and/or regent.

1.7 Limitations of the study

This literature study about traditional leadership is embedded in legislation affecting traditional leadership and the role of traditional leaders. Legislation is seldom, if ever, static. It is continually subjected to changes, repeals and amendments. This implies that the laws which are used to govern municipalities, including the institution of traditional leadership, will from time to time be revised to meet the needs of communities and suit the times. Such fluidity of the legislation poses a challenge and imposes a limitation on a conclusive analysis of the legal and/or legislative context and development of the role of traditional leaders in co-operative government.
1.8 Summary

Chapter one introduces a background of the variables influencing the interface between traditional leadership in the South African context of co-operative governance in shared rural local governance. This introductory chapter provides a background and rationale for the study and contextualises the problem and significance of the study. The research questions and the study objectives are fleshed out. The research design involving the explanation of the data collection methods is described. Central terms needed to follow the argument in the dissertation are described. The chapter concludes with an overview of the chapters contained in the dissertation.

In Chapter two the historical background of traditional leaders in South Africa will be described. Specific emphasis will be laid on the role of traditional leaders as it evolved through the years under different forms of government.

Chapter three describes the context of the African tribal government system.

Chapter four provides the context of the legislative framework for traditional leadership.

Chapter five addresses the role of traditional leaders in national, provincial and local governance.

In Chapter six the focus will be on effective strategies and appropriate measures of application and recommendations made in this regard.
CHAPTER TWO

HISTORICAL BACKGROUND OF TRADITIONAL LEADERSHIP IN SOUTH AFRICA

2.1 Introduction

South Africa has a “dualistic societal system, clearly divided along rural and urban lines – the so-called rural-urban dichotomy. This dualism is most apparent in the legal-administrative and social division of the rural areas into commercial farming areas owned by the white commercial farmers, and trust lands which are owned by the state but historically administered by tribal authorities, as well as communal lands owned jointly and collectively by rural communities often under the stewardship of a traditional leader. Colonial dispossession of the land belonging to the indigenous population in the period leading up to the 1890s was ratified in law with the passing of the Land Act of 1913 (Act 27 of 1913) and subsequent legislation, including the Native Trust and Land of 1936 (Act 18 of 1936). Between them these laws set the legal framework for placing the African population onto less than thirteen per cent of the land, and allowing the remainder to be carved up into private and state land for the exclusive benefit of the minority white population. The history of the rural areas is therefore dominated, on the one hand, by attempts by the government and White landowners to enforce these laws, and, on the other, sporadic open resistance by the African population against these attempts” (UJ Internal Handbook 2010:78).

To provide background for later chapters, this chapter reviews the role of traditional leaders in the pre-colonial era in Africa. The chapter also elaborates on the role of traditional leaders in colonial South Africa. Finally, the chapter provides an overview of the role of traditional leaders in post-colonial Africa in general.

2.2 Traditional leaders in the pre-colonial era in Africa

Traditional leadership is an institution that has developed over many decades in Africa. History informs the understanding of traditional leadership and the changes
that took place in the role of traditional leaders throughout the different governments. Throughout history traditional leadership has been the basis of local government in most of Africa. “It has served the people of Africa through wars, periods of slavery, famine, freedom struggles, economic and political restructuring, and during colonial and apartheid periods. The role of traditional authorities during the post-colonial era in Africa was debated long before it became an issue in South Africa. The debate is as old as the independence of Ghana, the first African country on the continent to gain independence in the 1950s. Its origins are in the imperialist imposition of multiparty democracy and decentralization of power after the Cold War” (Maloka 1995:42). Maloka (1995:42) stated that “the country – South Africa – has traversed through multiple eras encountering different experiences with each era. The changes in the country’s composition and demarcation started in the pre-colonial era when the country was one with confining boundaries, through … the Republic. It has survived colonialism; it survived apartheid; and has yet to survive the challenges of a new [democratic] order in post-apartheid society”.

“Before the introduction of colonialism, social organisation in South Africa was characterised by a number of tribal regimes based on patriarchy. Each tribe had a traditional leader who was the central figure. The role of these traditional leaders was to serve as political, military, spiritual and cultural leaders who looked after the welfare of their people by defending them and providing them with land and the means to survive” (Rugege 2003:172). “Pre-colonial traditional leadership was based on the centralised authority of hereditary leaders known as ‘chiefs’” (Spiegel and Boonzaier 1988:49). “The chief was the highest authority in the territory. He had to perform various functions in collaboration with a tribal council that represented the people. Traditional leaders ruled over the members of their tribes as kings-in-council according to the principles of African democracy and accountability. He ruled the tribe and the tribe considered him as both father and son. His leadership role was a bonding factor as he was responsible for the common good. Traditional leaders ruled over the members of their tribes as kings-in-council and according to the principles of African democracy and accountability” (Department of Provincial and Local Government 2000: 9).
"In the pre-colonial era, every tribal chief was an authority on all aspects of life in the community he served" (Davidson 1992:59:64). Davidson (1992:64) "identifies three important principles which underpin the functioning and existence of pre-colonial indigenous political institutions in Africa which help to explain the concept of African democracy. These are firstly, unity of purpose acknowledging the supremacy of the “golden stool”. Secondly, the unifying force depended on participation which must be publicly seen as working and lastly, it was the principle of “systematic distrust of power” with systems that had built-in mechanisms to prevent the abuse of power” (Davids 1992:66).

2.3 Traditional leaders in colonial South Africa

The 1652 arrival of Jan van Riebeeck in South Africa marked the initial stages of colonialism in South Africa. “While he personally was never recorded as a colonial master – he could be said to have been more of an exploratory settler – he opened the floodgates of colonialism by the Dutch colonialists and later the British. At the time of the arrival of the colonialists the African people did not have an organized system of government as is known today. They probably lived in small tribal formations under some form of organized communal co-existence to suit their lifestyle and meet their needs. But that changed when the colonizers landed on the shores of what would later be known as the Cape Colony and they began to interfere with the tribal governing systems of the African tribes” (Roodt, Rusch and Tandy (1993:19). Roodt et al. (1993:19) states that “Pre-colonial chiefs were a product of their tribe and were answerable to their tribe and its structures. Post-colonial chiefs became the instruments of state policy charged with carrying out instructions from the state”.

Once the African people were conquered and subjugated by the colonial masters, a systematic process of manipulation commenced. The chiefs were denuded of all semblances of power and authority and turned into servants of the state. “With the arrival of colonialism, the African traditional government was systematically weakened, and the bond between traditional leaders and their subjects was gradually eroded” Maubane (2007:4). As early as 1847, the colonial administration in Natal viewed the tribe as a basic unit that was expected to exercise authority and act
as an agent of the colonial government. According to Maubane (2007:7) this was partly because “the Zulus in Natal were very resistant to the colonial administration, Sir Theophilus Shepstone decided to use tribal leaders to govern, and did so by recognising customary law.” According to Roodt et al. (1993:19), “The lieutenant-governor of the Natal colony operated a Court of Appeal which meant that all traditional authority which had vested in chiefs, paramount chiefs or monarchs now rested with the lieutenant-governor. He therefore had the power to appoint and dismiss chiefs”. “It is however important at this stage to note that the systematic decimation of the system of hereditary leadership was not confined to the Natal region where mainly the British settlers had established themselves. It was a country-wide phenomenon also perpetrated by the descendants of the Dutch colony. From 1883 to 1900 Paul Kruger served as President of the Transvaal Republic and proved to be no different from the British colonizers when dealing with the institution of traditional leadership” (Maubane 2007:7). This is evidenced by the following statement, “In 1885, the President of the ZAR [Zuid Afrikaansche Republiek] was declared Supreme Chief with powers to appoint and vest chiefs with the limited criminal jurisdiction and unlimited civil jurisdiction in matters between their tribes” (Mamdani 1996:89). In subsequent years, the Black Administrations Act of 1927 (Act 38 of 1927) was promulgated and stated succinctly in “Section 5(1)(a) that the Head of State in South Africa (Governor-General or State President) was empowered to create new tribes; divide existing tribes; and to demarcate the area occupied by the members of the tribe. The colonial legacy thus continued right up to the inception of the apartheid policy in later years” (Khunou 2009:85). According to The Gatsha Buthelezi (in Holomisa 2004): “As early as 1925 General Hertzog [architect of the 1936 Land and Trust Act] had described his policy as a continuation of that established by the Land Act of 1913. He stated that he would encourage local native councils and a union native council which would be created for consultation. During the second reading of the Hertzog Land Bill of 1926, he explained that the “first duty of the White man is to himself. Whatever the rights of a native may be, they have no right to call upon us to do anything which might jeopardise our supremacy.” According to Holomisa (2004) “this abovementioned Land Bill caused an outcry and Mr Sol Plaatje had described the Bill as a jackal trap”.

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While Shepstone “was destroying the power of hereditary chiefs, he nevertheless influenced the institution of chiefs. Through his control of chiefs, he could therefore control the people” (Roodt et al. 1993:19). David Welsh (1973:776) quotes Theophilus Shepstone as saying in 1864: “It is by the gradual and judicious extension of this system, in combination with, and under the control of white magistrates, that I think will be the shortest and safest means of breaking down the power of the hereditary chiefs, without losing the machinery, as yet indispensable to us, of tribal organisation; I would without anxiety let the hereditary houses crumble and their chiefs lose power so long as the material does not become confused rubbish, but can be built into other, although smaller edifices, which passes none of the dangerous associations of ancient tradition; the Government will then become practically, what to a great extent is now only theoretically, the source of all rank and power in the colony”.

It is very clear from the above statement that the colonial administration had gone on a major campaign of disruption and destruction to divide and rule the African people, to set the leaders against their followers and followers against their leaders, as long as it served the interests of the colonizer and the Crown. “With the advent of colonialism, the African traditional government was systematically weakened, and the bond between traditional leaders and their subjects was gradually eroded. Colonialism deprived people not only of their land and property but also of their dignity and culture. The ancient African societal system, which was the basis of its humanity and mutual co-operation and protection, was destroyed” (Seiler 2000:10).

Under this policy, Africans were given administrative and judicial powers to “govern” themselves in line with their customs and traditions provided these customs did not contradict the policies of colonialism. In terms of the Bantu Authorities Act of 1951 (Act 68 of 1951) and “other laws relating to traditional leadership still applicable in South Africa’s provinces today, provision is made for the institution of tribal, community and regional authorities or councils. Tribal authorities have the general function of administering the affairs of the tribe and assisting the chief in carrying out his responsibilities. Regional authorities have the general function of advising and making representation to the government on all matters affecting the general interests of Blacks within their specific jurisdictions. They also have the power to
make by-laws and to acquire and hold land or any interest in land” (Seiler 2000:10). Their powers were reinforced by various acts for example the Bantu Authorities Act of 1951 and the Black Administration Act of 1927 (Act 38 of 1927). According to these acts the “Governor-General was made the supreme chief of all traditional leaders in the Union of South Africa. Through the years successive colonial governments of South Africa enacted a considerable number of legislative measures to change the pre-colonial structures, roles and powers of the traditional leaders” (Roodt et al. 1993:19).

What occurred in the homelands during the Apartheid era is a good example of how traditional leaders were used to adopt and promote the objectives and aims of colonial leaders. This resulted in erosion of the leadership roles of the traditional leaders (Spiegel and Boonzaier 1988:49). Traditional leaders could no longer be accountable to their communities. “Colonialists justified ‘indirect rule’ on the basis that ‘tradition’ and ‘custom’ were indigenous forms of social organization. But, they reinforced and used these identities to divide and manage rural Africans” (Ntsebeza 2003: 69).

“In view of the preceding discussion, it is evident that both the Apartheid and homelands' legislative frameworks altered the roles, powers and functions of traditional leaders. Moreover, the various pieces of legislation further eroded the foundation upon which the institution of traditional leadership was founded and established” (Ntsebeza 2003: 69).

2.4 Post- colonial South Africa

The gates to negotiations for a new political dispensation in South Africa opened in earnest when on February 2, “1990 the then ruling National Party (NP), under the presidency of De Klerk, un-banned political organizations, released political prisoners, including Mandela, and allowed exiles to return home and to be part of the early talks. In May 1990 the ANC tabled a proposal for multi-party negotiations - the Conference for a Democratic South Africa (CODESA). The NP accepted it in January 1991. The CODESA negotiations deadlocked and were suspended in May that year when the ANC argued that the Inkatha Freedom Party's use of 'traditional'
The formation of the Congress of Traditional Leaders of South Africa (CONTRALESA) was critical for the recognition of traditional authorities in both the interim and final Constitutions” (Oomen 1996:65). “CONTRALESA was officially launched on 20 September 1987 by a group of traditional authorities who were opposed to the declaration of the state of emergency. This group of traditional leaders saw the United Democratic Front (UDF) as an organization that could give them protection and help them organize other traditional authorities” (Oomen 1996:65). "CONTRALESA was formed in 1987 by some of the traditional leaders of the erstwhile homeland of KwaNdebele, under the auspices of the UDF, with the material and political support of the ANC. It was due largely to the resistance of these traditional leaders, as part of the mass democratic movement, that the apartheid programme of homeland-style independence was derailed" (Holomisa 2004).

The “question is how one explains what appears to be a contradiction in UDF policy. On the one hand, the 1987 rural report denounced chiefs and promised to replace them with democratically elected village structures, while on the other, and in the same year, the UDF was instrumental in establishing CONTRALESA. Could this be the so-called politics of convenience? The apparent contradiction can partly be explained in terms of the growing influence of the African National Congress (ANC) on the United Democratic Front (UDF) and the close links that Nkosi Holomisa has with the ANC. Unlike the UDF, the ANC was not keen to write off the traditional authorities, preferring to categorize them into ‘progressive and collaborating chiefs’. The ANC had relied on ‘progressive chiefs’ as their rural organizers, but what the role of traditional authorities would be in a liberated South Africa was not clear in the ANC policy. The establishment of CONTRALESA was clearly informed by the ANC’s ambiguous and expedient policy towards traditional authorities. That it was the UDF that played a leading role can only be attributed to the influence the ANC had on the UDF” (Van Kessel 1995:174). According to Van Kessel (1995:174), “it was largely due to the effects of the national state of emergency declared in June 1986, which...
resulted in the detention of many political activists, while others went underground or fled the country”. According to Amrit Manga in the *Sowetan* (*Sowetan* 08-11-2002), “During apartheid though, many traditional leaders assumed active roles in politics within the apartheid establishment and in the struggle against racism … for example, Contralesa was a product of the anti-apartheid struggle [and] during 1994, many traditional leaders contested elections under the banners of political parties.

The ANC’s position on traditional authorities has always been ambivalent. When the ANC was established, traditional authorities opposed to the 1910 Union of South Africa were among its founding members and held in high regard”. “As the ANC radicalised from the 1940s onwards, with strong pressure from its Youth League and growing alliance with the communists, two broad streams began to emerge. There were those, such as Chief Albert Luthuli and Nelson Mandela, who supported the Traditional authorities who were critical of government policies, and those, clearly under the influence of communists, who argued that the institution of traditional authority belonged to a previous feudal era and needed to be replaced by democratic structures. Govan Mbeki represented the latter: If Africans had Chiefs, it was because all human societies have had them at one stage or another. But when people have developed to a stage which discards chieftainship, when their social development contradicts the need for such an institution, then to force it on them is not liberation but enslavement” (Mbeki 1984: 47). “However, the ANC was inclined to continue its strategy to woo ‘progressive’ traditional authorities. Indeed then, the ANC in the rural areas was considerably weak and never had a coherent programme to build alternative democratic structures there. Even Mbeki at times did not seem consistent on the question of discarding traditional authorities. He argued that if traditional authorities failed ‘the peasants’, the latter would ‘seek new ones’ (Mbeki 1984:146). Therefore, they would not discard the traditional authorities. What eluded Mbeki is that the institution of traditional authority, insofar as its incumbents are hereditary leaders and thus unrepresentative, and is inherently undemocratic. Its subjects are not given the chance to choose their leaders” (Mbeki 1984:145).

The “role of traditional authorities in the liberation struggle received renewed attention from the ANC and its alliance partner the South African Communist Party
(SACP) when traditional authorities such as Chief Mangosuthu Buthelezi accepted Tribal Authorities in the 1950s, and the debate continued after political organizations were banned in 1960 (Mbeki 1996). Mbeki, incarcerated on Robben Island, was the leading figure in cautioning against working with traditional authorities operating within the system. Mandela, it appears was the leading proponent of the strategy of working with Bantustan leaders such as Buthelezi. There seems to have been less debate amongst ANC and SACP members in exile just before the formation of CONTRALESA in 1987" (Mbeki 1996:92). According to Mbeki (1996:92), “the exiled members ‘encouraged Buthelezi to establish a political party in Natal’. It appears from Mbeki, something which the exiled members’ position met with strong opposition from underground members in Natal that the people, one should add, were in the thick of things. The exiled members compelled Mbeki to make the following powerful observation: The ANC leadership in exile seems to have seriously underestimated the capacity of government created institutions to fulfil their intended role. They continued to believe that people who were not affiliated to the ANC could be trusted to fight apartheid from inside the apartheid created institutions. This confidence led to a situation in which MK cadres who were being infiltrated into the country were instructed to call on Buthelezi. But the Chief Minister of the KwaZulu Bantustan was playing a different game from that of the ANC in exile" (Mbeki 1996:92).

“During the deliberations on the Constitutional Guidelines for a Democratic South Africa, the ANC formulated constitutional principles for an envisaged ‘truly just and democratic South Africa’, and one of these had stated thus: (c) The institution of hereditary rulers and chiefs shall be transformed to serve the interests of the people as a whole in conformity with the democratic principles embodied in the constitution” (Pampallis 1991:311).

“Despite attempts to involve traditional authorities when negotiation talks resumed in December 1991, they were not an integral part of the process. Where individuals participated, they did so as part of the delegations of the former Bantustans. Chief Buthelezi proved to be critical of this lack of involvement. He demanded separate delegations for his KwaZulu government and King Goodwill Zwelithini advocating for a Zulu Kingdom. When this was not granted, Buthelezi and the King pulled out of the
process. There was also a deadlock over regional powers, but before this could be resolved there was a massacre at Boipatong Township in June 1992, and the ANC decided to suspend negotiations accusing F W de Klerk of double-dealings” (Pampallis 1991:311).

“After a series of discussions, a Record of Understanding between the NP and the ANC was signed on September 26, 1992 and the negotiations, now called the Multi-Party Negotiating Process (MPNP), resumed in March 1993. By then, both the NP and the ANC had accepted that the institution of traditional leaders is still relatively widely supported, especially in rural areas where they fulfil an important government function at local level” (Henrard 1999:397). According to Oomen (1996:56), “the ANC and the NP saw traditional authorities as ‘important vote brokers’. The broader context is that by this time, the question of non-racial elections was squarely on the cards and wooing the voters was very crucial for all the parties at the talks. What cannot be disputed, though, is that in areas where traditional authorities ruled heavy-handedly, some rural residents could be intimidated to vote for a candidate preferred by a traditional leader. CONTRALESA rejected the ANC’s vision that the institution of traditional leaders is ceremonial and advisory, and the election of Chief Patekile Holomisa as president of CONTRALESA seems to have been critical to this rejection”. It was, however, “during Holomisa’s presidency that CONTRALESA pushed for the recognition of traditional leaders and their institutions as the primary level of government in rural areas. In the early 1990s, CONTRALESA rejected the notion that in the rural areas of the former Bantustans, municipalities and elected councillors should be the primary level of local government. It is arguably due to this uncompromising stand that there was no provision in the Local Government Transition Act (Act 209 of 1993) for the form that local government would take in rural areas. Seventeen years since the advent of democracy in South Africa, there is still confusion regarding the form local government will take in South Africa. This includes the precise role of traditional authorities” (Ntsebeza 2006:70).

Since the advent of democracy in 1994, “South Africa has embarked on a process of democratic decentralization in a range of areas. This included reforms of local government and the governance of traditional leaders. The focus was on local government reform and land administration. This democratization process faced
serious problems due to the power being given to traditional rural authorities by the Apartheid regime. In particular, rural communities still resided under the leadership of traditional leaders (chiefs and headmen) who were not part and therefore not accountable to government. In the run-up to the 1994 elections, the majority of rural areas in the former Bantustans were characterized by deep tensions and clashes between traditional authorities and groups in civil society led by residents associations” (Ntsebeza 2006:71). Traditional leaders made it clear “in their early negotiations with the new government that they were either opposed to primary municipalities in traditional authority areas or wanted traditional authorities themselves to be recognized as primary municipalities.

Since 1994 the ANC-led government has attempted to dismantle the ‘clenched fist’ of the Tribal Authorities and their incumbents. The Constitution of 1996 establishes three spheres of government namely national, provincial and local government. The local sphere of government is made up of municipalities. Municipalities made up of elected councillors were established throughout the country as stipulated in the Constitution. After the November 2000 local government elections the country was heavily laden with 843 municipalities throughout the Republic including rural areas. This proliferation of municipalities has to be understood in terms of the ANC’s RDP policy of democratizing the state and government. Developmental local government aimed not only to democratize local government, by introducing the notion of elected representatives in all areas including rural areas, but also to transform local governance, with a new focus on improving the standard of living and quality of life of previously disadvantaged sectors of the community” (Pycroft 1998:155). Developmental local government requires municipalities “to co-ordinate all development activities within their areas of jurisdiction and to perform integrated development planning. Developmental local government also requires that citizens should actively participate in development initiatives in their areas” (See Section 152(1)(e) of the Constitution, African National Congress 1994: 2-3 and Ntsebeza 1999:2001).

The Constitution further states that “the national or a provincial government may not compromise or impede a municipality’s ability or right to exercise its powers or perform its function. During the transition period up to 2000 either the White minority
or traditional authorities had veto powers in the transitional municipalities. With regard to land reform, the 1997 White Paper on Land Policy drew a crucial distinction between ‘ownership’ and ‘governance’ of land in rural areas, introducing a separation of these functions” (Department of Land Affairs 1997:18).

The Communal Land Rights Act of 2004 (Act 11 of 2004) (CLaRA) has in the preamble “… to provide for the co-operative performance of municipal functions on communal land” and that “… when a traditional council act as a land administration committee … its functional area of competence is the administration of land affairs and not traditional leadership as contemplated in Schedule 4 to the Constitution” (Section 21 (4). This distinction “was blurred during the colonial and apartheid eras, as the state was both legal owner and administrator of the land. By 1998, the Department of Land Affairs had developed principles that would guide its legislative framework and implementation, including the following:

- The rights should vest in the people who are holders of the land and not in institutions such as tribal or local authorities. Where the rights to be confirmed exist on a group basis, the rights-holders must have a choice about the system of land administration that will be used to manage their land rights on a day to day basis.

- In situations of group-held rights, the basic human rights of all members must be protected, including the right to democratic decision-making processes and equality. Government must have access to members of group-held rights in order to ascertain their views and wishes in respect of proposed development projects and other matters pertaining to land.

- Systems of land administration, which are popular and functional, should continue to operate” (Thomas, Sibanda and Claassens 1997:45).

It can be deduced that “the post-1994 policies and laws on local government and land reform subjects traditional authorities to democratic and accountable processes. At the same time, their roles remain unclear. In rural areas where councillors were elected, the Local Government Transition Act of 1993 (Act 209 of 1993) reduced the status of traditional leaders in local government to that of interest groups with no
voting powers. The intention of establishing democratically elected municipalities with ‘developmental functions’ and ‘democratic decision-making processes’ regarding land use and reform was to separate local government and land administration functions and introduce this particular form of democracy, even in rural areas. Quite clearly, at least on paper, this is a major departure from Tribal Authorities, in which power was concentrated in a single functionary who certainly was not democratically elected. Traditional authorities were not happy with the situation and remained opposed to it. However, (deliberate) ambiguities in the formulations both in the Constitution and in the laws have allowed traditional authorities to contest the reading that they are subject to democratic and accountable processes.

What is striking about the post-1994 period is that traditional authorities, despite earlier divisions, seem to be drawing closer and closer to one another. Traditional authorities in both CONTRALESA and the IFP took the ANC-led government to the Constitutional Court (ConCourt) over the issue of establishing municipalities throughout the country, including the rural areas under their jurisdiction” (Sowetan 03-07-2003). Holomisa (2009:44) states that “CONTRALESAs opposed the certification of the final constitution by the Constitutional Court on the grounds that the relevant chapters affecting the role of traditional leadership did not comply with the applicable constitutional principles”.

“While the initial collaboration was around local government, it is quite clear that the main issue that brings traditional authorities together is their opposition to what they perceive to be a lessening of their powers by the democratic processes. They are also opposed to any attempts to introduce alternative structures that could compete with them, hence the rejection of the demarcation of municipal boundaries required by the Constitution and related legislation between 1998 and 2000. They did not want any interference with ‘their’ boundaries and repeated their position that they do not want municipalities in rural areas and that if they were not listened to, they would mobilize their subjects to boycott any local government elections in their areas of jurisdiction. Sections of the traditional leadership, especially in KwaZulu-Natal, under the auspices of the Coalition of Traditional Leaders of South Africa” (Sowetan 03-07-2003), which is a “Coalition of Traditional Leaders of South Africa composed of all
the Provincial Houses of Traditional Leaders of South Africa, the National House of Traditional Leaders of South Africa, Congress of Traditional Leaders of South Africa and the Royal Bafokeng Nation … constituted so that the traditional leadership of the country can speak in one voice on all issues pertaining to the institution of traditional leadership and traditional communities” (Sowetan 03-07-2003), had vigorously opposed the re-demarcation “of municipal boundaries and the establishment of primary municipalities in traditional authority areas. With regard to tenure reforms, traditional authorities agree with government that land in the rural areas of the former Bantustans should not be the property of the state. However, they reject the notion that where land is held on a group-basis it should be transferred to democratically constituted and accountable legal entities” (Sowetan 03-07-2003).

Some ANC members, such as Albie Sachs (1992:89), “a constitutional expert, envisaged that traditional authorities, as hereditary authorities, would have a primary role in local government”. Sachs (1992:35) “predicted that there would be a growing tendency towards creating democratically elected councils to work with traditional authorities in local administration. In other words, the role of traditional authorities would be subordinated to that of elected representatives. How this arrangement would be operationalised was never spelt out”. Clause 5.12.5 on Democratising the State and Society (White Paper on Reconstruction and Development 1994:129) spells it out clearly that … “Elected local government … should be extended into rural areas, including traditional authority areas”.

However, there were always sceptics around. Writing in the South African Communist Party (SACP) organ, the African Communist (Maloka 1995:43) “warned that although there were ‘genuine and dedicated' traditional authorities who might play an advisory and ceremonial role in elected local government structures, others ‘survive on the fringes of our society through clientalism and coercion’. However, Maloka has not provided any evidence of who the ‘genuine and dedicated chiefs’ were, and on what grounds he bases his claim. The guidelines were formulated in the midst of the political negotiations of the early 1990s”. Finally, the ANC declared that “Traditional leaders will be accorded the status they deserve in line with the principles of democracy” (African National Congress 1992).
Since the un-banning of the ANC, and other political organizations on February 2, 1990, its policy on traditional authorities has been, as before, difficult to pin down. Oomen (1996:101) has argued “that traditional authorities have never been officially denigrated in ANC documents, quoting Mandela on the occasion of his release from prison on February 11, 1990: ... I greet the traditional leaders of our country - many of you continue to walk in the footsteps of great heroes like Hintsa and Sekhukhune” (1996:101). By 1991, according to Oomen (1996:101 “it was common to hear traditional authorities mentioned by some ANC members as part of the coalition forces struggling for national liberation, which is alongside “black workers, students, the rural poor, professionals and black business people” (1996:101). An attempt to clarify the role of traditional authorities was, however, made in 1992 when the ANC formulated its policy guidelines: “The institution of chieftainship has played an important role in the history of our country and chiefs will continue to play an important role in unifying our people and performing ceremonial and other functions allocated to them by law. The powers of chiefs shall always be exercised subject to the provisions of the Constitution and other laws. Provision will be made for an appropriate structure consisting of traditional leaders to be created by law and other matters relating to the powers and functions of chiefs will be made by parliament after such consultation has taken place” (Oomen 1996:103).

Traditional leaders continue using “all structures made available to them by Government to wage campaigns and to lobby government, to ensure their role in the emerging South African democracy. For example the government established Houses of Traditional Leaders in all six provinces and the National Council of Traditional Leaders was used by traditional authorities to consolidate their position” (Oomen 1996:103).

In addition, the collaboration between traditional authorities, CONTRALESA and Inkatha has further strengthened the position of traditional leaders. The ANC now finds itself in a position where it has to nurse its relationship with CONTRALESA so as not to lose the support of traditional authorities or to strain relationships with Inkatha especially given the history of political violence in KwaZulu Natal in the 1980s and early 1990s (Ntsebeza 2006:289-290). The fact that the ANC did not have a stronghold in rural areas drove it into accepting that traditional leaders had a
role to play. Oliver Tambo confessed: “We have not done and are not doing sufficient political work among the millions of our people who have been condemned to the Bantustans” (Mbeki 1996:95).

2.5 Conclusion

The main focus of this chapter has been on the evolvement of the role of traditional leaders in governance. The section also indicated how the traditional authorities, including those of CONTRALESA are united in their fight to reject the viewpoint that traditional leaders should only fulfil the ceremonial roles most traditional leaders in Africa and Europe now play. It is clear from the evolvement of traditional leadership in South Africa that traditional leaders perceive themselves as part of local government and especially the primary structures of local government and land administration in rural areas. It has endeavoured to show that the ANC-led government - despite its internal differences and murky history on traditional authorities, particularly during the apartheid era – has now realised that traditional leaders could and should play a major role in rural development.
CHAPTER THREE

AFRICAN TRIBAL GOVERNMENT SYSTEM

3.1 Introduction

Chapter three reviews the variables of the African tribal government system generally practised by the African people in South Africa. It focuses on understanding the African tribal system as another form of government unique to South Africa and brings familiarity to concepts commonly used to refer to the primary actors in the system. It also shows how the tribe can exercise control over the chief, and the intertribal relations which are built between and among the different tribes.

Over many centuries the indigenous African government system has given very little attention to the study of government organisation. Throughout Africa, the Western model of democratic government was imported from Europe and remains a legacy of the colonial era. In some of the African countries this Western model was not very successful, leading to one-party autocratic political systems ruled by strong and autocratic traditional leaders. Judging from the number of coup d’etat and the political turmoil in Africa, it seems that the Western model was not as successful as was expected by the former colonies. The lesson to be learnt from this is that the indigenous African political system cannot be ignored in the organisation of government in African countries. The indigenous African system is as old as the history of Africa and remains inherent to African government systems (cf. Gildenhuys and Knipe 2000:13).

South Africa has always had an indigenous African political system that differs from the Western democratic system. This system is locally based and rural in nature, making it important to the study of local government at any given time. It is called the tribal system which forms the basic unit of a larger community. Tribal governments played and continue to play an important role in supporting and uplifting rural communities in South Africa. They are at the forefront of cooperating with all three
spheres of government and other government agencies in providing land, housing, schools and healthcare facilities in the rural areas.

Chapter 12 of the Constitution of the Republic of South Africa of 1996 recognises “the institution, status and role of traditional leadership, according to customary law. The Constitution allows traditional authorities that observe systems of customary law to function subject to any applicable legislation and customs, including amendments to or repeal of that legislation or those customs. Furthermore, the South African courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. The Constitution and other legislation also acknowledge the role of traditional leadership as an institution at the local level on matters affecting local communities” (the Constitution of the Republic of South Africa 1996: Section 211, Section 212).

In this chapter, the philosophy of ‘ubuntu/botho’ (a way of life) and the general features and organisation of the symbiotic traditional tribal system will be discussed.

3.2 Definition of key concepts

3.2.1 “Ubuntu/Botho” (Zulu/Setswana)

The African tribal tradition is based on a philosophy called "ubuntu/botho". Ubuntu/botho is an old African term for "humanness" - for caring and for sharing. It is a way of life. Ubuntu/botho as “an ideal means the opposite of being selfish and self-centred. It promotes cooperation between individuals, cultures and nations. Ubuntu/botho thus empowers all to be valued to reach their full potential in accord with all around them. An ubuntu/botho style of government means a "humane" style of government based on collective solidarity and communality rather than individualism and particularity. Ubuntu/botho is a literal translation of collective brotherhood (personhood) and collective morality. It is best expressed by the African proverb, "umuntu ngumuntu ngnabantu" (Xhosa) or “motho ke motho ka batho” (Setswana) which means "I am because we are". One has to encounter the collective ‘we’ before one can emphasize the individualistic ‘I’. This means that one is only a fully completed person through others. Ubuntu/botho therefore means ‘we
are who we are because of other people’. Or, put another way, a human being can only be a human being through other human beings because people live through the help of others and depend on one another for a successful co-existence. As Chief Gatsha Buthelezi puts it, “Ubuntu is our common humanity or [is] Humanism” (*Rand Daily Mail* 13-11-1973).

One can say that the essence of ubuntu/botho is a basic requirement of a small to medium-sized community which is interlinked and intertwined, wherein all members of that community are generally familiar with and are known to one another. Ubuntu/botho is difficult between or among strangers. By its very nature, ubuntu/botho is viewed by many commentators as having its roots deeply embedded in the lifestyle of rural communities while urban communities tend to pay more lip-service to the philosophy of ubuntu/botho than live it (The Significance of Ubuntu in the Development of an ANC Cadre Internet source n.d.).

To live and work by the principle of ubuntu/botho requires, inter alia:

- Thanks to the community for any successes, material or otherwise.
- Hospitality at home and in the workplace.
- Familiarity and mutual trust and respect among members of the community.
- Rituals in the form of providing food and drink to celebrate all occasions.

Prayers of thanks to the ancestors and offerings of slaughtered animals to ensure the ancestors' favour (The Significance of Ubuntu in the Development of an ANC Cadre Internet source n.d.).

These values form the basis of the organisation of the traditional tribal system including those in South Africa.

### 3.2.2 Divine rulers

The most important indigenous political (and religious) institution was the divine kings called the rainmakers, who were seen as the representatives of God on earth.
They were the kings of thunder, rain, wind and the skies, and were interested in nature preservation and maintaining ecological balance. Spirits in nature, such as those in animals and places, assisted the rainmaker in this task. The most popular animal spirits were the lion, the baboon and the eland. The spirits of oracular places normally resided in specified locations such as trees or in mountain caves (Mbigi 1997:26 and Gildenhuys and Knipe 2000).

The rainmakers were divine kings on earth. They claimed to be God's representatives on earth, interested in the integrated flow and equilibrium of universal forces, as well as the moral, spiritual and cultural conscience and development of the nation. They were the highest political, cultural and spiritual authority. The rainmakers were the checks and balances of the traditional African political system. If there was a national or political crisis, the rainmakers as divine beings would offer sacrifices and lead the revolution to remove the corrupt earthly king and replace him with a new legitimate king. However, the rainmakers would not indulge in normal secular governance and political power struggles. They were above the dust and mud of secular politics (Mbigi 1997:26 and Gildenhuys and Knipe 2000).

The rainmakers were also the highest spiritual leaders who gave guidance to secular spiritual mediums and traditional healers - the so-called sangomas. The rainmakers were also the highest cultural authorities, being responsible for the preservation and development of culture and morality. They were assisted in this regard by so-called soothsayers whose role it was to help traumatised groups and families to understand their own reality, and to act on their behalf to inform those in authority of their needs (Mbigi 1997:27 and Gildenhuys and Knipe 2000).

The role of the rainmakers was expected to be taken over by modern African intellectuals, but most of them have become so obsessed with political patronage and political correctness that they have become praise singers and ideologues rather than critics (Mbigi 1997:26).
3.3 Tribe as basic unit

The basic unit of African politics is the tribe, which, for all practical purposes, is organised as a group of individuals and family units under the rule of the tribal chief. Each tribe has its own name, occupies its own defined area of land and controls all of its own affairs. As a result of their loyalty to their chief in particular, the members of the tribe are a close-knit unit, and they are very aware of this unity. The nucleus of a tribe usually consists of individuals and families laying claim to the fact that they are descended from the same ancestors as their chief. However, even the smallest tribe contains foreign families or groups, while in large tribes only a small number of the members are descended from the original tribal family. As a chief’s status becomes more important in terms of power, prestige and welfare, his tribe grows through the addition of "refugees" from other tribes headed by an unpopular chief (Schapera 1962:173).

In the execution of his duties, the chief is assisted by various institutions. A small local council or committee controls the local affairs of subdivisions within the tribal area. Each small local unit (of a district, sub-district, township or section) is, in the first place, responsible to the head of the next largest political unit within whose area it is situated. The latter is either directly, or through one or other senior local government [representative], responsible to the chief (Schapera 1962:174). Therefore, the government of the tribe, in the final analysis, rests with the tribal chief, while social and other local affairs are left to subordinate political units.

3.4 Tribal chieftainship

Tribal chieftainship is hereditary although some cases do exist where the chieftainship was obtained unlawfully or by violent means. Generally speaking however, the person having the right of succession succeeds as chief. The Batswana say "kxosi ke kxosi ka a tsetswe", meaning 'the chief is chief because he was born chief'. The successor is inaugurated as chief only after the death of the reigning chief. Therefore, the chieftainship is held for life. Sometimes the leading members of the tribal council, if they regard the heir as incompetent, conspire
against him and nominate a more acceptable junior member of the ruling family as chief (Gildenhuys and Knipe 2000:175).

3.4.1 Rights and privileges attached to chieftainship

The chief holds a position of outstanding privilege and great authority. He is symbolic of tribal unity, and the central figure around which the activities of the whole tribe and their lives revolve. He is simultaneously legislator, ruler, judge, and preserver of welfare, distributor of gifts, war leader and priest [divine ruler]. He has been elevated to an almost godlike being; his person regarded as holy and his followers bow to him in humble admiration and obedience (Schapera 1962:176).

3.4.2 Functions and duties of the chief

The chief has a considerable number of duties (Schapera 1962:178 and Gildenhuys and Knipe 2000):

- He must serve the interests of his subjects, and keep himself abreast of the affairs of the tribe.
- He is expected to personally consider grievances, problems and appeals of people of his tribe, notwithstanding their rank, and to adjudicate on them.
- The chief is the chief executive officer of the tribal government. Nothing of importance may be done without his consent. In the administration of tribal affairs, he must always consult his advisers, and it is one of his duties to summon his advisers and to act as chairperson of the meeting.
- The chief must also ensure that the headmen are managing the local division of the tribe effectively and efficiently.
- The chief controls and distributes the use of tribal land, of which he is regarded as the owner [custodian] - he actually holds the land in trust for the tribe.
- The chief is also the head of the tribe's ‘army’, and he himself arranges military expeditions.
• The chief is also the tribe's spokesperson in the case of external relations with other tribes, organisations, institutions and authorities.
• The chief must maintain law and order. He is the chief judge whose judgement is final. As judge, he has to protect the rights of the people of his tribe, determine whether justice is being done to the injured and the oppressed, and punish offenders. He also acts as judge of appeal on judgements made by subordinate tribal courts.
• The chief also has legislative authority. He may initiate legislation and, after consultation with his advisers and discussion at an open meeting of the tribe, he may promulgate the legislation.

In summary, it may be stated that the chief has legislative, executive and judicial powers, and that there is no question of the separation of powers as applied in the Western democratic model.

3.5 Tribal council and advisors

In the management and administration of the tribe, much consultation and deliberation takes place. There are confidential advisers, and Indunas/dikgosana, the tribal council (lekgotla) and a general tribal meeting (kgothakgothe) that have to be consulted before a decision is made and a policy executed (Gildenhuys and Knipe 2000).

3.5.1 Confidential advisers

The chief is assisted by a small group of confidential advisers (baKgoro le matona), with whom he consults informally and in secret. Most of his confidential advisers are next of kin, such as uncles and brothers, while a few may be influential chieftains and headmen. These confidential advisers assist the chief in policy making, and discuss with him each measure to be referred to the tribal council. The influential advisers must keep the chief abreast of public opinion and of everything occurring within the tribe in general. They also have to remind him of matters that he must attend to. However, the chief is not obliged to follow the counsel given by his confi-
dential advisers, although he will usually not disregard unanimous advice (Gildenhuys and Knipe 2000).

3.5.2 Induna

One of the chief’s advisers is the *Induna* who, as a rule, is not a member of the royal family but an ordinary citizen with outstanding loyalty, abilities and reliability. The *Induna* of a chief will usually hold his position under different chiefs, although a chief may appoint his own *Induna*. The *Induna* is the chief’s right-hand man who liaises with the chief and members of the tribe, and he acts as the chief’s formal spokesman. All matters requiring the attention of the chief must first be submitted to the *Induna* for submission to the chief (Schapera 1962:182).

3.5.3 Formal tribal council (lekgotla)

The chief must often consult a larger body, namely the tribal council, before making a decision. The structure of the tribal council differs from group to group. In general the tribal council consists of the chief, confidential advisers, all chieftains and headmen of local divisions, and a number of ordinary citizens who are nominated due to their specific skills and abilities. The tribal council handles the policy matters of the tribe, and no action may be taken or new law implemented unless and until the chief has given his approval. Decisions taken beforehand by the chief and his confidential advisers are submitted to the tribal council. Usually the recommendations are discussed freely and criticised, and are then accepted, amended or rejected entirely. The tribal council accepts the decision, and it is final and has to be applied. This implies a form of participatory government present in the African tribal government system, albeit on a limited scale (Gildenhuys and Knipe 2000).

3.5.4 General tribal meeting (Kgothakgothe in Setswana)

In some groups, such as the Sotho, a general tribal meeting also exists in which all the male inisiandi of the tribe participate. The general tribal meeting is called by the chief whenever necessary, usually after a meeting of the tribal council. The chief acts
as chairperson and puts forward the matters for discussion. Anyone present may participate in the discussions, but usually participation is reserved for the influential older members of the tribe. The members of the tribal council will lead the discussions and their views are decisive. Should they support the chief; the general tribal meeting will approve the decisions or proposals. In theory, there is a large measure of freedom of speech within the general tribal meeting but, in practice, freedom of speech is not always practised because of fear of victimization and revenge by the chief. The exception would be in cases of great provocation or basic grievances (Gildenhuys and Knipe 2000).

3.6 Controlling the tribal chief

Viewed superficially, it seems as though the chief is an autocratic despot. In practice, however, this is usually not the case. The existence of the tribal council system limits the chief in the actual application of his powers. The political and consultative system is organised in such a way that effective government is possible only through harmonious cooperation between the chief and his advisers, the tribal council and the general tribal meeting. The Batswana say “kxosi ke kxosi ka morafe”, which means that ‘a chief is a chief as a result of the grace or goodwill of the tribe’. In spite of the fact that the eventual control of almost all affairs of the tribe is vested in the chief, it seldom happens that a chief degenerates into an autocratic despotic leader. Any attempt by a chief to act without the support of his/her advisers and tribal members is not only unconstitutional, but will also not succeed (Schapera 1962:184).

The chief himself is not above the law. If he/she acts in contravention of the accepted tribal standards regarding right and wrong, he will be severely reprimanded by his advisers, tribal council and members of the tribe. Should he harm one of his subordinates, he is expected to compensate the person and, in some tribes, he may even be tried and disciplined by his tribe. Should he persevere with malpractice, the tribe will leave him or civil war may break out in an attempt to overthrow him and appoint someone else in his place. He may even be assassinated (Schapera 1962:184).
3.7  Headmen

Apart from the central authority, consisting of the chief, chieftains, headmen, *Indunas*, tribal council and general tribal meeting, each tribe has a system of local government. The tribal area is subdivided into local areas (units) which vary in size and importance, each under the control of an acknowledged authority. The smallest effective local political unit is the sub-district or ward under the control of a local headman. In some cases headmanship is hereditary. Sometimes he/she is a member of the family of the chief, sometimes an ordinary citizen. A chief will appoint the headman, and, in the case of hereditary succession, he will confirm the nomination (Schapera 1962:185).

3.7.1 Functions of a headman

The headman acts on behalf of the chief, is responsible for the maintenance of law and order and sound government in his ward. He must help the inhabitants of his ward solve their problems and represent them in tribal matters. He regulates the occupation and use of land, controls the influx of foreigners, acts as mediator in disputes between heads of the ‘kraal’ and acts as judge in cases directly referred to him, he may even impose fines and other punishment. Appeals may be lodged with higher authority against his decisions, and he must refer severe problems to higher authorities. He must ensure that tribal members honour their obligations toward the chief and must report to the chief from time to time (Schapera 1962:185).

3.7.2 Privileges of a headman

The headman has few privileges compared to those of the chief. His official residence is built on a selected site in his ward and he has first choice as far as farming land is concerned. He may utilise some members of his ward for ‘public’ service, such as the maintenance of his official residence, but not for private purposes (Schapera 1962:186).
3.7.3 Headman's council

A small council or committee assists the headman. It consists of senior male members of his family, the most important heads of the kraal, and other older males who enjoy great respect. This Council:

- Serves as a court, together with the headman, to try cases.
- Discusses public matters of his ward with him.
- Advises him on tribal matters to be considered by the tribal meeting.
- Controls the conduct of the headman.
- Reprimands the headman if necessary and, when he is negligent, incompetent or has been unnecessarily severe, reports him to the chief and appoints someone else in his place (Schapera 1962:186).

3.8 Chieftains and paramount chiefs

In some tribes, such as the Tswana, large districts or distant towns are administered in the same way as wards by chieftains. The chief appoints chieftains as his personal representatives and deputies. They may be members of the family of the chief or prominent ordinary citizens, sometimes headmen or heads of the kraals of subordinate tribes. The functions of chieftains, as far as local government and administration are concerned, are virtually the same as those of headmen (Gildenhuys and Knipe 2000).

Notwithstanding the autonomy of chiefs, there is a system of paramount chiefs. A paramount chief is the 'senior' chief according to birth. Among the Xhosa, for example, the paramount chief is the chief who was appointed by junior chiefs of tribes who stemmed from the main tribe, and he is acknowledged as their superior. Such a paramount chief serves primarily as judge in disputes among chiefs (Gildenhuys and Knipe 2000).
3.9 Inter-tribal relations

In the indigenous political system of Southern Africa, tribes were independent self-governing [autonomous] political units. Natural barriers, such as rivers and mountain ranges, roughly defined boundaries between tribes. Boundary disputes between two chiefs were often resolved by war or by the mediation of a third chief. Diplomatic relations were maintained by a system of accredited messengers through whom information between chiefs was exchanged (Schapera 1969: 191).

3.10 Key political aspects summarized

The key political aspects of the traditional tribal system can be summarised as follows:

- Consensus, not majority vote, is important in making political decisions and in formulating tribal policies because it ensures the accommodation of minority groups and preserves political solidarity to avoid tribal wars.
- Grass-roots bottom-up participation and communication are practised in both policy making and effective policy implementation.
- Good tribal governance requires the “avoidance of confrontation and a focus on political accommodation, compromise and tolerance” (UJ Internal Handbook 2011:45).
- “Freedom of expression, broad consultation and democracy are essential elements of good tribal governance” (UJ Internal Handbook 2011:45).
- “The preservation of good tribal government institutions and traditions is more important than charismatic individual leaders” (UJ Internal Handbook 2011:45).
- Separation of religion and secular politics is important for good tribal governance and stability.
- A system of checks and balances in the tribal political system is important to prevent the abuse of power by the tribal leadership.
- Tradition and cultural values are more important for good tribal governance than foreign ideologies.
The traditional African tribal political system and the values of democracy, such as freedom of expression, consensus, grass-roots participation, consultation and institutionalisation to preserve the collective solidarity of Ubuntu/Botho, in contrast to confrontation, foreign ideologies and personal cults, ensure political stability and unity.

3.11 Evaluation

It is necessary to analyse the tribal government system on the basis of fundamental directives and to compare it to Western models. Because hereditary succession, instead of popular election, is the most important way in which chiefs and even headmen succeed and are appointed, the system must be regarded as autocratic. As a result of the fact that the chief’s family is privileged when appointments to offices are made, the system may also be regarded as nepotistic. As a rule, however, mutual consultation and public debate by representatives from grass-roots upward mark the government and administration as very democratic.

As a result of tribal and ward meetings there is a strong element of participatory democracy. Political accountability and responsibility to members of the tribe is not as prominent and direct as that expected in a participatory democracy. Accountability towards higher authority by subordinate political and administrative actors, and even by the chief toward the tribal meeting, does exist. The fact that in one way or another (even unconventionally) a political official may be removed does involve an element of political accountability and responsibility. Access by ordinary tribal members to higher authority does exist, although mainly in an indirect way. The system of consulting private advisers and the fact that consultation and deliberation takes place on a large scale comply with characteristics of the plural democratic model.

It may be accepted that a chief or headman will allocate resources (land for agriculture and housing) as reasonably and equitably as possible, otherwise the tribe would relocate elsewhere, thereby narrowing the chief’s power base. The most efficient and effective allocation of public resources does not figure prominently, because there is no sophisticated system for rendering public services. Central and provincial government departments usually render public services.
The most important resource to fulfil the collective needs of tribal members is land for housing, agriculture and grazing. Therefore, it may be argued that the chief will have to fulfil the democratic value of equity if he is to maintain the loyalty of his tribe.

Political participation is evident from the fact that individual members of the tribe have a large degree of direct participation in the decision-making process. The participation is also well organised and takes place in a particular regulated order. In addition, indirect participation in the decision-making process exists on a large scale through a whole system of decentralised representation, from the head of the kraal and the headman through to the chief, who is himself assisted by a system of councils.

Public accountability is also present. Although the chief acts largely in an autocratic way, there are ways in which he may be called to account in order to ensure his responsibility towards the tribe.

Considering inter-tribal relations and how the tribal system functions, it is without doubt a decentralised political system, containing the greatest degree of self-government without external interference. Within the system itself, there is a considerable degree of hierarchical and geographical distribution of political authority and, in the nature of the system; there is virtually no external administrative control.

### 3.12 African spirit of Ubuntu

Some argue that anything a person does (attitude, behaviour, conduct, etc.) is subject to the person’s culture. People are thus creatures of culture. Culture can be described as the accumulated experience and wisdom of the past. It enables us to adapt to the requirements of the particular society in which we are born. Culture is regarded as being acquired through our upbringing and education. The ways we adapt are a product of a long developmental effort; therefore these ways cannot be changed overnight, and, in fact, some may not be capable of change at all because of the very early age at which they were implanted.
Africa is characterised by **instability** and **volatile political dynamics**. Africa can be regarded as a marginal continent in this sense. Successful communities, notably the Asian “tigers” (Singapore, South Korea, Malaysia, etc.) have stuck to their cultural values in their efforts to succeed. They always held fixed cultural positions. It can be argued that Africa has not.

The African culture and philosophy is often captured in one word: *ubuntu* as noted before which means, “a person is a person through persons”. To have the qualities of *ubuntu* is to be “generous, hospitable, friendly, caring and compassionate” (Van Rensburg 2007:49). Desmond Tutu states that “it also means my humanity is caught up, is inextricably bound up, in theirs. We belong in a bundle of life” (in Van Rensburg 2007:49).

Mbigi (1997:2) further explained that “Ubuntu is both a uniquely African and a universal concept that is implicitly expressed elsewhere in the world.” According to Mbigi (1997:2) “Ubuntu has the following effects on institutional leadership:

- It facilitates the healing process in repairing polarised performance relationships
- It helps to create a concern for people in the workplace
- It helps organisations to focus on the social determinants of productivity
- It helps to create a culture of racial, political and cultural tolerance based on unconditional respect, acceptance and human dignity
- It builds a culture of empowerment and team work in the workplace
- It brings the black African heritage into the workplace, which helps to integrate black employees
- It helps to give culturally marginalised employees a strong cultural identity, which may help build confidence
- It helps to develop a theory of organisational cooperation, which is necessary in a racially and socially divided society”.
3.13 Summary

It is clear from the above discussion that the tribal government system is an aristocratic system, with a strong chief invested with legislative, executive and judicial powers. The chief may act autocratically, but is restricted by a democratic system of public participation in decision-making (directly or indirectly) and a system of counterbalances. The system has the positive characteristics of the participatory representative and the plural perceptions of democracy. The only difference is the absence of popular elections for electing representatives and other public officers. The public officers are appointed either by nomination or by hereditary succession. Therefore, a system of universal suffrage and popular elections, in terms of the modern Western democratic systems, is foreign to traditional indigenous African tribal government system.

The imposition of the system of modern Western democratic governance with its norms and values had intended to transform and modernize (westernize) the African tribal system but with not much success in South Africa and many other countries on the African continent. The following chapter deals with the statutory and regulating framework and mechanisms under which traditional leaders have to operate to meet the service needs of their people and to be part and parcel of rural development.
CHAPTER FOUR

CONTEXT OF THE LEGISLATIVE FRAMEWORK FOR TRADITIONAL LEADERSHIP

4.1 Introduction

The institution of traditional leadership in South Africa and on the rest of the continent is as old as the African societies themselves. While communities all over the world have mostly graduated through various forms of traditionalism to modernity many Third World and developing nations still follow traditional leadership as a system of government. Rural South Africa is no exception to this practice. The White Paper on Traditional Leadership and Governance of 2003 states that: “Traditional Leadership is indigenous to South Africa and the rest of Africa. Its existence predates the colonial conquests and the apartheid era” (Department of Provincial and Local Government 2003). South Africa’s foremost African traditionalist, King Goodwill Zwelithini of the Zulu people, during the Global Conference on Traditional Leadership held at the Inkosi Albert Luthuli International Convention Centre in Durban, admonished traditional leaders who dabble in politics. The Zulu Monarch is not mincing his words on the position of traditional leadership in South Africa. He says, “Traditional leadership is supposed to be an umbrella institution. It was there before the formation of political parties and it will continue to exist long after the demise of political parties and governments” (Sowetan 26-10-2007). How true, or shall one say prophetic, remains to be seen. The essence of the statement is that the sentiments the king espouses are shared by the majority, if not all, the traditional leaders of South Africa.

It is against such deep-seated conviction that the government is confronted with a mammoth challenge of finding space for the system of traditional leadership within the governance system of the Republic. The institution cannot be wished away nor be done away with as was the case in some post-colonial African states such as the 1966 Constitution of Uganda which abolished kings and kingdoms; and Zimbabwe which dismantled the system to form a single, politically united ‘non-tribal’ nation (but
later reversed the decision) (Department of Provincial and Local Government 2003). The inception of the Constitution of the Republic of South Africa of 1993 (Act 200 of 1993) (hereafter referred to as the Interim Constitution) marked the severing of the political umbilical cord in the country, the cut between the Apartheid ideology and the democratic dispensation. The Interim Constitution opened a way forward for South Africa to move into a new era of democracy. One of the very urgent issues on the political menu was to make laws compatible with democracy. Among such laws were the laws which affect the institution of traditional leadership throughout the country. This chapter investigates the laws which have been enacted, commencing with the Interim Constitution itself up to and including the Traditional Leadership and Governance Framework Amendment Bill of 2008 to establish the extent to which the legal and/or legislative framework has accommodated the aspirations of the institution of traditional leadership.

4.2 Pre-1993/94 legislative environment

At the time when South Africa had to cross the Rubicon, very few people here at home and elsewhere believed that the hurdle would be run successfully. The legacy of apartheid left the country a divided nation, a nation divided along ethnic and racial lines. At this stage the country had separate constitutions for each of the African ethnic groups; one for the Coloureds; one for the Indians; and yet another one for the White population. The challenge at the doorstep of the country was to undo this legacy and to reconcile and unite the people of South Africa under ‘one law, one nation’. It is for this reason that the first term of the democratically elected government had to focus mainly on nation-building and reconciliation rather than service delivery which, to date, remains a burning issue for government. To bolster this endeavour, the Promotion of National Unity and Reconciliation Act of 1995 (Act 34 of 1995) was later enacted to comply with Section 22 of Schedule 6 of the Constitution of 1996. During this term of office Parliament passed over 500 pieces of legislation to level the playing field and bring together a diversely divided nation. It is thanks to the astute and visionary leadership of former State President Nelson Mandela that the Rubicon could be crossed successfully.
4.3 Interim constitution and ensuing legislation

The difficult road to democracy commenced in earnest in December 1989 when representatives of most of the political formations gathered to discuss the future of the Republic of South Africa at what was initially called a Conference of a Democratic Future. These stakeholders included the statutory forces representing government on the one hand, and the non-statutory forces on the other representing all other participants, constituting the multiparty negotiating forum.

The pressure that weighed heavily on the shoulders of the negotiators was enormous. The dealings took place under a murky cloud of suspicion with no one trusting anyone. “However, in spite of all the tensions and stalemates punctuated by breakdowns and walkouts, the focus remained steadfastly fixated on the proverbial ‘political lighthouse’: A free, democratic, non-racial and non-sexist South Africa as envisaged in the 1955 Freedom Charter; the 1994 RDP policy framework; and finally the Constitution” (Holomisa 2004).

4.3.1 Interim Constitution and Traditional Leadership

The outcome of the multiparty negotiations was the first-ever commonly shared piece of legislation, the Constitution of the Republic of South Africa of 1993 (200 of 1993). As a result of the traditional leaders’ participation in the Constitutional Talks the Interim Constitution was much clearer on the place of traditional leadership in the era of a freshly baked democracy than it is in the final Constitution. CONTRALESA had even sent a congratulatory message to the President of the ANC after the December 2007 Polokwane Conference to apprise him on the relationship between the two organizations, which read in part as follows: “Under the former interim Constitution all legislatures were obliged to refer relevant draft legislation to the appropriate House of Traditional Leaders before they could be passed into law. At the local level heads of traditional authorities were automatically members of municipal councils having jurisdiction over their areas of rule. Traditional authorities were allowed to continue to perform their tasks and exercise their powers as local government structures and as courts of justice” (Holomisa 2004).
The Interim Constitution was handsomely generous to the wishes and aspirations of the traditional leaders. Chapter 11 of this law consists of four substantive sections devoted to traditional authorities. It recognizes traditional authorities which observe the system of indigenous law (law originating in the region or country where found; native), and not customary law (law which is derived by immemorial custom from ancient times) as it states in the Constitution of 1996, and further leaves room for the continuation of the exercise and performance of their powers and functions which existed prior to 1993 albeit subject to the laws and customs by a competent authority (Section 181(1)). Possibly this preface to the chapter went a long way in allaying the fears of traditional leaders and to some extent buying their cooperation into future negotiations. Section 182 of the Interim Constitution grants *ex-officio* status to traditional leaders who reside within the area of jurisdiction of an elected local government and who observe the system of indigenous law. The *ex-officio* status accords traditional leaders the opportunity to participate in the discussions and deliberations, and to be elected to any office of such local government. However, it is important to note that they could still not cast a vote when local government took decisions on matters so deliberated upon. Some critics argue that this violates the fundamental human rights of the traditional leaders as citizens. In effect it takes away their right to equality, human dignity, freedom of expression, and freedom of association. It denies them the opportunity to influence the decisions taken by the municipality.

In Section 183, each provincial legislature is allowed to establish a House of Traditional Leaders thus affording traditional authorities the opportunity to engage in cooperative governance as envisaged in Chapter 3 of the final Constitution. This is an important step as it in a way promotes their freedom of association curtailed by the *ex officio* status alluded to in the above. Such a Provincial House would have wide-ranging powers and functions to serve and service the interests of traditional communities, subject to the laws and the Constitution. They would also be consulted by the Provincial Government to seek their advice and proposals before any provincial laws were passed. Any provincial Bill which affects traditional leaders and their interests would be referred to the Speakers of the provincial legislature for their comment before it is enacted. But Idasa argues in their submission on the
Framework Bill that if the Bill suggests that the national and in some cases the Provincial Government may provide roles for traditional leaders, affording provinces powers could signal weak directive from the national Government and may also lead to variation of powers and functions of traditional leaders per province. Strong guidelines from the national Government may instil uniformity regarding the roles and responsibilities of traditional leaders nationwide (selina@idasa.org.za 18 July 2003 in Traditional leaders 2011).

Finally, the Interim Constitution makes provision for the establishment of a Council of Traditional Leaders consisting of a chairperson and nineteen representatives elected by an electoral college constituted by the members of the Houses of Traditional Leaders in the Republic as referred to in section 181. Among the powers and functions of the Council is to advise and make recommendations to the national government on matters pertaining to traditional authorities, the indigenous law, traditions and customs of traditional communities throughout the Republic. The Council could further, at the request of the President, be called upon to advise him or her on any matters of national interest. Like in the case of the provincial Houses, national Government will similarly seek the comment of the Council before any parliamentary Bill impacting on their interests is enacted.

The 1993 law was aptly referred to as the Interim Constitution precisely because it was a transitory measure towards a final law for the country. As an interim measure, it was exactly that, an interim law. It is perhaps at this point that the traditional leaders could have failed to take proper cognizance of this ‘interim’ phenomenon and read too much into it. This interim Constitution was, in a way, a necessary measure needed to allay the fears of not only the traditional leaders, but also of many other stakeholders who after the entrapment of the Apartheid ideological doctrine over a period of more than four decades, were loath to believe in or trust a future clouded in uncertainty. This was a temporary measure intended to hold at bay the many ‘nations’ of Apartheid until the final law could be made to create one nation, a South African nation, and govern a united country. Thus began the road to a new, democratic, non-racial and non-sexist South Africa.
The Interim Constitution opened a gateway to a plethora of laws passed by Parliament of the Republic of South Africa. Among these new laws were the laws on the institution of traditional leadership. One of the first mandates to emerge out of the Kempton Park World Trade Centre negotiations was the establishment of a Constitutional Assembly charged with the responsibility of drafting a final constitution for the country.

“The Constitutional Assembly comprises the Senate (National Council of Provinces) and the National Assembly sitting jointly. The chairperson of the Constitutional Assembly was Cyril Ramaphosa. The target date for adoption of a new constitution was 09 May 1996. A panel of independent experts has been finalized and advised the Constitutional Assembly to write the final constitution” (Hazlehurs in Traditional leaders and the Constitution. 2011). Schedule 4 of the Interim Constitution contained constitutional principles which were meant to guide the drafting of the final constitution. Principle XIII of the schedule (substituted by Section 2 of Act 3 of 1994) states that: “The institution, status and role of traditional leadership, according to indigenous law, shall be recognized and protected in the Constitution. Indigenous law, like common law, shall be recognized and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith. Provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch shall be recognized and protected in the Constitution” (Constitution of the Republic of South Africa 1993).

But Ntsebeza (2004:206) argues that Principle XIII of the interim Constitution was not conclusive and failed to influence the final Constitution to usher in a better deal for traditional leaders.

4.3.2 Legislation leading to the Constitution of 1996

The road to the final Constitution was beset with many challenges. Many of the apartheid laws had to be repealed, amended or reprieved temporarily until the final Constitution was in place. Some of these laws affected the institution of traditional leadership and rural communities. Chief among these pieces of legislation was the

4.3.2.1 Local Government Transition Act of 1993 (Act 209 of 1993) (LGTA)

The LGTA constitutes the cross-over bridge from the 1993 interim Constitution to the 1996 final Constitution. While all efforts were made for widely inclusive transitional arrangements, the LGTA is conspicuously silent on the issue of traditional leadership barring a scanty reference in s. 8(1) (a) of Part V to “a transitional local council for a non-metropolitan area of local government, which may include the area of jurisdiction of a traditional authority….” Any other reference is made indirectly, prompting Ntsebeza (2004: 206) to comment that: “The LGTA provides an extremely limited role for traditional authorities in local government, defining them as an interest group with no more than 10 percent representation ... Even Schedule 1(3) (2) of the LGTA does not directly accord traditional leaders any membership to a forum which is supposedly bound by the principle of “inclusivity and representativity”, except to refer to “observers who or which shall be entitled to attend and participate fully in forum meetings, without the right to vote”.

Later on, with intense lobbying, the original 10 percent of the approved number of councillors catering for traditional leaders was “changed to 20 percent e.g. a local municipality having 30 councillors may now have up to six traditional leaders who are not able to vote or be elected to any office which is contrary to Section 182 of Interim Constitution for example, The Traditional Leadership and Governance Framework Act of 2003 (Act 41 of 2003) requires that 40% of members of traditional councils be elected and that a third of all members be women” (Venter and Landsberg 2006:137). Be that as it may, it is ironic that while traditional leaders are denied the right to vote or be elected to office in a council, they are, like councilors, “bound by the Code of Conduct for Councilors” (Craythorne 2003:111).
4.3.2.2 Aims and objectives of the LGTA

As indicated in the above, the LGTA served as a cross-over bridge from the old to the new order. The aims and objectives of the LGTA are:

- to provide for revised interim measures with a view to promoting the restructuring of local government, and for that purpose to provide for the establishment of Provincial Committees for Local Government in respect of the various provinces;

- to provide for the recognition and establishment of forums for negotiating such restructuring of local government; for the exemption of certain local government bodies from certain provisions of the Act;

- to provide for the establishment of appointed transitional councils in the pre-interim phase;

- to provide for the delimitation of areas of jurisdiction and the election of transitional councils in the interim phase;

- to provide for the issuing of proclamations by the Administrator of the various provinces;

- to provide for the establishment of the Local Government Demarcation Boards in respect of the various provinces; and

- to provide for the repeal of certain laws; and to provide for matters connected therewith” (Local Government Transition Act of 209 of 1993).

The said aims and objectives make no direct or indirect reference to the institution of traditional leaders. It can only be assumed that since “the local sphere of government consists of municipalities, which are established for the whole of the territory of the Republic”; the institution is herein *mutatis mutandis* included as any
one of the following: observers, interest groups, civic associations, residents’ associations, or local structures of political parties (Schedule 1: 3(4) (ii) of the Local Government Transition Act of 1996 (Act 12 of 1996).

The LGTA served as a blueprint for the transition process in local government. As a result, it was subjected to a myriad of amendments so as to cater for the needs of the malleable political situation of the time. It was more of a piece of legislation in a state of flux. Of the many changes which were effected, a few Acts stand out prominently as those that brought about fundamental amendments. These are the: Local Government Amendment Act of 1995 (Act 61 of 1995); Local Government Transition Act of 1995 (Act 89 of 1995); Local Government Transition Act of 1996 (Act 12 of 1996); and Local Government Transition Second Amendment Act of 1996 (Act 97 of 1996).

Of note here is that even these and other amendments to the principal Act do not make any direct reference to the institution of traditional leaders except for one of the objectives of the Local Government Amendment Act of 1995 which states: “To make provision for the re-delimitation of areas of jurisdiction, the re-determination of powers and duties…”, and the Local Government Transition Second Amendment Act of 1996 which says “To confirm the fact that a transitional council for a rural area of local government must consist of elected members.” Once again the reference does not speak to the institution of traditional leaders per se. It only speaks to them by innuendo and association.

4.3.2.3 Laws, rules and regulations affected by the LGTA

Several laws or parts thereof were affected by the LGTA by either being repealed, amended, substituted or even reprieved, and these include the following in Part VIII of the LGTA and in the Local Government Transition Second Amendment Act of 1996 (Act 97 of 1996), which will be referred to without any elaborative purposive
explanations, suffice to say they were subject to stipulated provisions in each instance;

- Black Local Authorities Act of 1982 (Act 102 of 1982)
- Local Authority Affairs Amendment Act of 1991 (Act 127 of 1991)
- Sections 28 and 29 of the Provincial and Local Authority Affairs Amendment Act, of 1992 (Act 134 of 1992)
- Proclamation No. 86 of 1982; Proclamation No. 67 of 1982; Proclamation No. 163 of 1974; and Government Notice No. 405 of 1988 (in Natal)
- Commissions Act of 1947 (Act 8 of 1947)
- Regional Services Councils Act of 1985 (Act 109 of 1985)
- KwaZulu and Natal Joint Services Act of 1990 (Act 84 of 1990) and
- Any transitional council or transitional metropolitan substructure established by proclamation contemplated in section 10(a), shall be deemed to be an institution or body contemplated in section 84(1) (f) of the Provincial Government Act of 1961 (Act 32 of 1961).

4.4 Constitution of the Republic of South Africa of 1996

One of the primary mandates of the Interim Constitution was to deliver the final Constitution for the Republic of South Africa within set time-frames. The Constituent Assembly (CA) was invoked by the interim Constitution to write the new constitution. It consisted of the Senate (The Interim Constitution contains the constitutional principles which provide stringent guidelines to be abided with by the CA.

"Following the 1994 elections, South Africa was governed under an interim constitution. This constitution required the Constituent Assembly (CA) to draft and approve a permanent constitution by May 9, 1996. After review by the Constitutional Court and intensive negotiations within the CA, a revised draft was certified by the Constitutional Court on December 2, 1996. President Nelson Mandela signed the new constitution into law on December 10, and it came into force on February 3, 1997. The Government of National Unity (GNU) established under the interim
constitution ostensibly remained in effect until the 1999 national elections. The parties originally comprising the GNU - the ANC, the NP, and the Inkatha Freedom Party (IFP) - shared executive power and on June 30, 1996, the NP withdrew from the GNU to become part of the opposition” (Traditional Leaders 2011).

Whereas the interim Constitution had paid more attention to the institution of traditional leadership, allocating more and clearer roles and functions and awarding more powers to traditional leaders, as well as retaining some of the older legislation from the past, the final Constitution fell far short of the expectations of traditional leaders. Chapter 12 of the final Constitution devotes only two sections (Section 211 and Section 212) to matters of traditional leadership, compared to Chapter 11 of the interim Constitution which contains four elaborate sections (Section 181; Section 182; Section 183; and Section 184). The two sections in Chapter 12 give very little insight into the future of the institution of traditional leaderships putting it clearly in the following words:

**Recognition**

212. (1) The institution, status and role of traditional leadership, according to customary laws are recognized, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which include amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

**Role of traditional leaders**

212. (1) National legislation may provide for a role for traditional leadership as an institution at local government level on matters affecting local communities.

(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities
observing a system of customary law –

(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and

(b) national legislation may establish a council of traditional leaders”.

The traditional leaders were not content with the final Constitution. It triggered protests the likes of which were last witnessed during the CODESA negotiations prior to the interim Constitution. Government and traditional authorities were at loggerheads over what the latter considered as usurpation of their powers. But not only traditional leaders are concerned; many other commentators believe that the new Constitution failed far short of the wishes and aspirations of traditional leaders. Holomisa of CONTRALESA, in a letter to the newly-elected president of the ANC, Mr Jacob Zuma, states that:

“The final Constitution, unlike the interim, was made without the full participation of traditional leaders. This was due to the fact that the government failed to establish the National House of Traditional Leaders before its finalization. A comprehensive submission made by CONTRALESA to the Constituent Assembly was never taken into account when the relevant provisions were considered for adoption” (Traditional leaders 2011).

“The result of such exclusion was the dilution of the provisions found in the interim Constitution. Government is now no longer constitutionally obliged to establish Houses of Traditional Leaders. Nor does the Constitution make it compulsory for the legislatures to refer relevant Bills to a House. However, the Framework Act of 2003 obliges legislatures to refer such Bills to a House” (Traditional leaders 2011).

A closer look at the provisions of Chapter 12 of the final Constitution reveals a plethora of non-committal assertions which do not really bind Government to any actions. “Recognition is subject to ...; traditional authority may function subject to ...; national legislation may provide for...; national or provincial legislation may provide for ...; and national legislation may establish...” Only Section 211(3) is resolute about what the courts must do albeit subject to ... “That all the provisions of the Chapter
are subject to the Constitution is neither here nor there since the Constitution is supreme and all laws are subject to it”. What is conspicuously absent are clear commitments which indicate that, in spite of all being subject to the Constitution, Government is ready and committed to do for traditional leaders what the laws permit and resources can afford.

As indicated earlier, many commentators also feel that the provisions of Chapter 12 do not go far enough in meeting the demands of traditional leaders, some of the comments are viewed hereunder. Chapter 7 of the Constitution, also known as the local government chapter, is the flagship of the Constitution on local government matters but does not mention the institution of traditional leadership despite the fact that municipalities are established for the whole of the territory of the Republic, which incidentally include the area of jurisdiction of traditional leaders. According to Craythorne (2003:110), the effect of the provisions of Chapter 12 is to prevent traditional leaders from inflicting traditional punishments and, in the context of land, greatly weaken their powers. He further argues that since Section 151(2) of the Constitution vests the executive and legislative authority of a municipality in its municipal council, and s. 160(2) prohibits the delegation of the legislative and fiscal functions, in effect this seems to leave traditional leaders with administrative powers only (Craythorne 2003:111).

4.5 Local Government: Demarcation Act, Structures Act and Systems Act

It is imperative that every law which is passed on issues of local government, unless passed for a specific reason or particular area of local government, should consider traditional leadership which is also an integral part of the ‘whole territory of the Republic’. The institution should not be left out like it used to be the case in many instances in the past. It is for this reason that the Local Government: Municipal Demarcation Act of 1998 (Act 27 of 1998), Local Government: Municipal Structures Act of 1998 (Act 117 of 1998) and the Local Government: Municipal Systems Act of 2000 (Act 32 of 2000) with their subsequent amendments, had to make reference to the institution of traditional leaders, however, minimal. This gives confidence that the institution is not relegated to the afterthoughts of policy making and development.
The Municipal Demarcation Act of 1998 provides for the Demarcation Board which demarcates municipal boundaries in the whole territory of the Republic which by implication includes all rural areas under the jurisdiction of traditional leaders. The Board performed and accomplished the demarcation process in 2000, allocating 283 municipalities to the Republic in urban as well as rural areas, which include traditional leadership areas.

The Municipal Structures Act of 1998 makes no reference whatsoever to traditional leadership in its objectives. However, Section 81 in Part 6 of the Act makes provision for participation of traditional leaders in the proceedings of the council of a municipality in their area and allows them to attend and participate in any meeting(s) of the council. At the same time Schedule 6 of the Structures Act prescribes the manner of and guidelines for identification of traditional leaders who should participate in municipal councils. The identification of such traditional leaders remains the prerogative of the MEC for local government in a province, which must be promulgated by notice in the Provincial Gazette. Item 15 of Schedule 5 of the Structures Act specifies items of the Code of Conduct for municipal councillors which apply to the traditional leaders in the same way they apply to councillors. Initially the Act prescribed that no more than 10% of the total number of councillors should represent traditional leaders, but after intense lobbying this was increased to 20% (Venter and Landsberg 2006:137 and Craythorne 2003:111).

On the other hand, the Municipal Systems Act of 2000 does make reference in its objectives to matters which may be construed to encompass issues of traditional leadership, for instance it speaks of:

- “moving towards the social and economic upliftment of local communities;
- ensuring universal access to essential services affordable to all; and
- providing for community participation defining the legal nature of a municipality as including the local community within the municipal area”.

The Municipal Systems Act 2000 clause 15 lays down the ground rules for a traditional leader who participates or has participated in the proceedings of a
municipal council in terms of Section 81 of the Municipal Structures Act. Selected clauses of the Code of Conduct affect traditional leaders the same way as they do councillors. Any breach of the provisions of the Code carries punitive measures which may be meted by the council or the MEC as the case may be. The greatest risk to a guilty traditional leader is cancellation or suspension of the right to participate in the proceedings of a municipal council. Furthermore the Systems Act amends subsection (5) of s. 81 of the Structures Act thus: (5) “when participating in the proceedings of a municipal council a traditional leader is subject to the provisions of the Code of Conduct set out in Schedule 5(1) of the Municipal Systems Act” (The Municipal Systems Act of 2000).

These two acts discussed in the above derive from a national government perspective, and do not take into account the unique circumstances prevailing in the different provinces of the country. In pursuit of an attempt to address provincial peculiarities, the Houses of Traditional Leaders are established in various provinces for this responsibility.

4.6 Final legislation on traditional leadership

The period since 1994 has seen government and traditional leaders lock horns over a number of issues pertaining to traditional leadership, and the battle has persistently been to find common ground between traditional leadership and democracy. It has indeed been a lengthy and laborious journey of wheeling and dealing since the inception of the interim Constitution of 1993. The process unfolding from the aftermath of the World Trade Centre constitutional negotiations culminating in the transitional process from the old to the new political dispensation saw an enactment of myriad pieces of legislation aimed at levelling the playing field and enabling democracy. Prior to 1994 there were many laws on traditional leadership based on ethnicity which were not congruent with anything for the betterment of the lot of traditional leaders. Seiler (2000:33) speaks of the possibility of national enabling legislation after “the rationalization of some 1500 current laws covering the entire gamut of traditional leaders and authorities.” Some of the critical laws introduced from the 1990s include: Constitution of the Republic of South Africa Act of 1993;

4.6.1 Policy process on drafting legislation for traditional leadership

The process of finalizing legislation on traditional leadership commenced with “a national audit on the institution of traditional leadership to identify statutes in terms of which traditional leadership institutions were established or carried out their responsibilities, their role and functions; the relationship between the institution and other structures of governance; and the relevant statistical information on traditional leadership. This phase culminated in the production of the Status Quo Report (SQR) in 1999, which became the founding document for the Draft White Paper on Traditional Leadership and Governance” (Department of Provincial and Local Government 2002:7). This report identified “a wide range of issues which are germane to traditional leadership, namely:

- structures of traditional leadership;
- the various levels of traditional leadership positions, the basis for a person to assume a position as a traditional leader and the replacement of existing structures, as well as the introduction of new ones;
- the apparent inconsistencies relating to the exclusion of women from traditional leadership positions and structures, and the provisions of the Bill of Rights and equality legislation prohibiting gender discrimination;
- salaries, allowances and benefits of traditional leaders;
- the manner in, and the extent to which traditional leaders and relevant structures should be held accountable;
- conditions relating to the termination of service of a traditional leader;
• the role, composition and accountability of National and Provincial Houses of Traditional Leadership, and their relationship to other levels and spheres of government;
• the establishment of District Houses of Traditional Leaders;
• the traditional leadership and governance issues pertaining to the Khoi-San communities; and
• the resolution of traditional leadership disputes” (Department of Provincial and Local Government 2002:7).

The Draft Discussion Document towards a White Paper on Traditional Leadership and Institutions was published on 11 April 2000 (Department of Provincial and Local Government 2000). This is an elaborate document which touches on many issues which impact on or relate to matters of traditional leadership. The then Minister for Provincial and Local Government, Minister Fholisani Sydney Mufamadi, put the matter this way in the Foreword of the Discussion Document: “This Discussion Document marks the beginning of a process aimed at engaging South Africans in a dialogue regarding the institution of traditional leadership, in terms of affirming and defining it, and clarifying its role in democratic governance” (Department of Provincial and Local Government 2000:3). Following on the Discussion Document, after a public participation process which solicited views, comments and input from interested stakeholders, a Draft White Paper on Traditional Leadership and Governance was published by the Department of Provincial and Local Government in October 2002. The Draft White Paper is a document consolidating the Draft Discussion Document by incorporating the views received from the stakeholders in preparation for a Bill on traditional leadership. “(It) outlines various policy positions that will pave the way for the drafting of national framework legislation relating to the institution of traditional leadership, followed by complementary provincial legislation” (Department of Provincial and Local Government 2002:7). Once again the then Minister remarked as follows in the Foreword of the Draft White Paper: “The key issues addressed in the Draft White Paper (Department of Provincial and Local Government 2002) relate primarily to the place and role of the institution of traditional leadership in the new system of governance. It sets out a broad policy framework that lays the basis for the drafting of national framework legislation … and the Draft
White Paper (Department of Provincial and Local Government 2002) will go a long way towards restoring the dignity of the institution of traditional leadership and ensure that it occupies its pride of place within the democratic system of governance.

The White Paper on Traditional Leadership and Governance (Department of Provincial and Local Government 2003) was published in July 2003. This is the penultimate policy document on traditional leadership. There shall be no further White Paper to do with the institution of traditional leadership henceforth. It paves the way for the final legislation on traditional leadership which can only be amended if and when a need arises or, in the extreme, be repealed. This is the watershed moment in the making of legislation on traditional leadership. Procedurally a Bill is followed by an Act of Parliament, which is a law enacted to govern and regulate society and its environment. Naturally the White Paper will normally not differ much, if ever, from the final law. Chairperson of the Task Team on the White Paper on Traditional Leadership and Governance (Department of Provincial and Local Government 2003) Advocate Nthai, remarks in the Foreword of the White Paper thus:

“This White Paper is a culmination of a long process wherein the country engaged in a dialogue regarding the role and place of the institution of traditional leadership in contemporary South Africa as a democratic state. South Africans have overwhelmingly expressed a view that the institution of traditional leadership has an important role to play in deepening and enriching democratic governance at a local level.”

The central objective of the White Paper is to set out a framework that will inform legislation intended to:

- “define the place and role of the institution within the new system of democratic governance;
- transform the institution in accordance with constitutional imperatives; and
• restore the integrity and legitimacy of the institution of traditional leadership in accordance with customary law and practices” (Department of Provincial and Local Government 2003:11).

The “significance of this White Paper is to pave the way for the drawing up of the national framework legislation relating to the institution of traditional leadership, which will subsequently be followed by complementary provincial legislation” (Department of Provincial and Local Government 2003:11).


The enactment of the Traditional Leadership and Governance Framework Act of 2003 (Act 41 of 2003) (Also known as the Framework or Principal Act) is a direct compliance with Section 212(1) of the Constitution which stipulates “that national legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities”. The principal Act is intended to do just that and this can be deciphered in the following purpose and objectives of the Act as well as its elaborate preamble. However, clause 2 of the Amendment Bill “provides for the amendment of the heading of Chapter 2 of the principal Act to include kingships and kingship councils” as discussed in 6.3.2 hereinafter.

4.6.2.1 Purpose of the Framework Act

To comply with the requirement of Section 211 of the Constitution on recognition of the institution of traditional leadership, the Act aims to:

• “provide for the recognition of traditional communities;
• provide for the establishment and recognition of traditional councils;
• provide for a statutory framework for leadership positions within the institution of traditional leadership, the recognition of traditional leaders and the removal from office of traditional leaders;
• provide for houses of traditional leaders;
• provide for the functions and roles of traditional leaders;
• provide for dispute resolution and the establishment of the Commission on Traditional Leadership Disputes and Claims;
• provide for a Code of Conduct;
• provide for the amendments to the Remuneration of Public Office Bearers Act of 1998; and
• provide for matters connected therewith”.

It is noticeable that one of the burning issues tabled by the traditional leaders is omitted in the objectives stated above. One of their biggest concerns is that the new law usurps their powers to rule and leaves them as ceremonial figureheads. However, it has to be borne in mind that the authority and power to govern reside with government and is derived from the Constitution which is the Supreme Law of the land. It is inconceivable that traditional leaders can be assigned authority and power to govern while they are not democratically elected and are in no way constitutionally constituted as government, not only in the ‘whole territory of the Republic of South Africa’, but also in the respective areas under their jurisdiction. As stated in the White Paper on Traditional Leadership and Governance of 2003 (Department of Provincial and Local Government 2003:27) the institution was never a government of a territory called South Africa and only operated within the defined limits of its prescribed jurisdiction. It is for this reason that any traditional leader who wishes to engage actively in party politics, is given the opportunity to vacate his/her traditional leadership position, albeit temporarily, to play politics. The law is even amenable to them in that it leaves the door open to such traditional leaders to reclaim their positions if and when they quit active party politics.

The law is very clear and resolute about the position of traditional leadership vis-à-vis that of the state. While traditional leadership is “a creature of custom and generally carries out customary functions” (White Paper 2003:27), local government has been and will always be “a creature of statute” (Zybrands 1995:6). The White Paper of 2003 states that traditional leadership “may complement the role of government in rural areas. Therefore, there cannot be contestation of authority between the institution of traditional leadership and the state”.
Section 15(1) of the Framework Act directs that “a king, queen, senior traditional leader, headman or headwoman, as the case may be, may, after consultation with the royal family, appoint a deputy to act in his or her behalf whenever that king, queen, senior traditional leader, headman or headwoman:

- becomes a full-time member of a municipal council;
- is elected as a member of a provincial legislature;
- is elected as a member of the National Assembly;
- is appointed as a permanent delegate in the National Council of Provinces; or
- is elected to, or appointed in, a full-time position in any house of traditional leaders”.

4.6.2.2 Preamble to the Framework Act

The preamble to the principal Act is very crucial because it sets the tone for the final law on traditional leadership. As indicated earlier on in this research report, once a Bill is passed by Parliament and bears the seal and signature of the President of the country, it de facto becomes the law, and is applicable and enforceable on the citizenry. All that can happen with it is to be amended or in extreme circumstances be repealed in part or totality. With this law, the Framework Act, the State attempts to:

- “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;
- transform the institution in line with constitutional imperatives; and
- restore the integrity and legitimacy of traditional leadership in line with customary law and practices”.

The preamble further states that the State recognizes that:

- “the South African indigenous people consist of a diversity of cultural communities;
• the Constitution recognizes the institution, status and role of traditional leadership according to customary law, and a traditional authority that observes a system of customary law;
• the State must respect, protect and promote the institution of traditional leadership in accordance with the dictates of democracy in South Africa;
• the State need to provide appropriate support and capacity building to the institution of traditional leadership;
• the institution of traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights to enhance democratic governance and advance gender equality; and
• the institution of traditional leadership must promote
  a. freedom, human dignity, achievement of equality and non-sexism;
  b. derive its mandate and primary authority from applicable customary law and practices;
  c. strive to enhance tradition and culture;
  d. promote nation building, harmony and peace amongst people;
  e. promote the principles of co-operative governance in its interaction with all spheres of government and organs of state; and
  f. promote an efficient, effective and fair dispute resolution system and a fair system of administration of justice, as envisaged in applicable legislation”.

The Framework Act is anchored on all these sound principles which drive the process of formulating national framework legislation on the institution of traditional leadership to finality. Of course, what should be alluded to by all stakeholders in this matter is that a good law is one that never satisfies everybody. A good law usually targets resonance well with the majority of members of society while at the same time accommodating the interests of minorities. In the same vein, it should be expected that not all members of the traditional leadership fraternity will be happy with this Act in its entirety. What is of essence here is that the law must have the capacity to regulate, direct and govern the affairs of the institution of traditional leadership lawfully and successfully.
4.6.2.3 Recognition of traditional communities and traditional leadership positions

While previous legislation did recognize communities, it is fair to conclude here that recognition by the Framework Act takes precedence. A recognized traditional community must, among others, be subject to a system of traditional leadership and observe customary law, and very importantly it must transform and adapt customary law and customs so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, especially those concerned with discrimination, equality and gender. Historically the colonial, apartheid and Bantustan systems had created many different titles for traditional leadership positions, which tended to confuse the situation rather than confine it. The principal Act recognizes “three leadership positions within the institution of traditional leadership, viz:

- Kingship;
- Senior Traditional Leadership; and
- Headmanship”.

Section 9 of the Framework Act duly recognizes kings and queens, laying down all necessary procedures and processes of how kings and queens are appointed in collaboration with government legislation, institution of traditional leadership and customary law and customs. A glaring omission here is that while kingship positions are recognized, a kingship as an entity or structure is not. The principal Act also does not provide “for the establishment and recognition of a structure or council for the kingship in performing its roles and functions”. Section 10 gives guidelines on how kings or queens are removed from office. Senior traditional leaders, headmen or headwomen are recognized in Section 11 of the Act with all the necessary procedures and processes to be followed. Their removal from office is clearly outlined in Section 12 of the Act. Sections 13, 14 and 15 respectively, deal with the “appointment and/or recognition of regents, persons acting as traditional leaders, and deputy traditional leaders”. To address these gaps, the Amendment Bill brings about changes which are clarified below in 6.3.2 and 6.3.3.
Kgosi Maubane, Chairperson of the National House of Traditional Leaders clarifies the structure of traditional leadership in South Africa as follows:

“Serving at the hierarchy of this institution in South Africa, we have our kings and queens who deals (sic) with strategic issues and are also in charge of a number of Senior Traditional Leadership. We then have Senior Traditional Leadership better known as Chiefs taking responsibility for both strategic and operational issues. There are also Headmen/Headwomen who are the ones directly involved with the day to day running of a village and the community” (Paper delivered in Durban on 30-31 July 2007).

A clearer definition of a kingship and a kingship council in clause 1 of the Amendment Bill and a reduction of the number of titles of leadership positions in the institution of traditional leadership will assist in facilitating communication and management of issues between government and traditional leaders. It will also cut down on an unnecessarily huge budget for salaries, benefits and allowances of traditional leaders, and in doing so release funds for much needed service delivery and development programs in rural areas.

4.6.2.4 Functions of traditional councils

The Framework Act prescribes functions for traditional councils which are established in every traditional community soon after the community has been recognized by the Premier of the province concerned. They also form the general functions for the Provincial Houses of traditional leadership as will be evidenced later on in the research report. But the principal Act once again fails to specify the functions of kingship councils, a matter which is taken care of by the Amendment Bill as elaborated on in 6.3.4 below. Traditional councils perform the following functions (Section 4(1):

- “administer the affairs of the traditional community in accordance with customs and tradition;
assist, support and guide traditional leaders in the performance of their functions;

support municipalities in the identification of community needs;

facilitate the involvement of the traditional community in the development or amendment of the integrated development plan of a municipality in whose area that community resides;

recommend, after consultation with the relevant local and provincial houses of traditional leaders, appropriate interventions to government that will contribute to development and service delivery within the area of jurisdiction of the traditional council;

participate in the development of policy and legislation at local level;

participate in the development programs of municipalities and of provincial and national spheres of government;

promote the ideals of co-operative governance, integrated development planning, sustainable development and service delivery;

promote indigenous knowledge systems for sustainable development and disaster management;

alert any relevant municipality to any hazard or calamity that threatens the area of jurisdiction of the traditional council in question, or the well-being of people living in such area of jurisdiction, and contribute to the disaster management in general;

share information and co-operate with other traditional councils; and

perform the functions conferred by customary law, customs and statutory law consistent with the Constitution”.

4.6.2.5 Roles and functions of traditional leaders

Section 19 of the principal Act states that a “traditional leader performs the functions provided for in terms of customary law and customs of the traditional community concerned”, and in applicable legislation. These roles and functions which include inter alia, arts and culture and agriculture (Section 20(1) of principal Act) can be assigned, delegated or performed on an agency basis (Department of Provincial and
Local Government 2002:27). However, in Section 17(3), the Act does prescribe the “functions of a local house of traditional leaders as being to:

- advise the district municipality or metropolitan municipality in question on matters pertaining to customary law, customs, traditional leaders and traditional communities within the district municipality or metropolitan municipality, the development of planning frameworks and by-laws that impact on traditional communities;
- participate in local programs that have the development of rural communities as an object; and
- participate in local initiatives that are aimed at monitoring, reviewing or evaluating government programs in rural communities”.

These general functions apply *mutatis mutandis* in all local houses of traditional leadership established in the District Municipalities of the various provinces. This will be evidenced later on in the discussion on Local Houses of Traditional Leaders.

### 4.6.2.6 Guiding principles for allocation of roles and functions

The principal Act is one law for all the six provinces which have established provincial and local houses of traditional leadership, and for any other provinces which may establish them in future. It sets the norms and standards which help to regulate and manage the peculiarities prevalent in the different provinces. The objective is to harness these peculiarities and bring about some kind of synergy in the governance of provincial and local houses of traditional leadership. Section 19 of the National Traditional Leadership and Governance Framework Act of 2003 (Act 41 of 2003) prescribes some guiding principles which should be adhered to when allocating roles and functions to traditional leaders. The guiding principles are discussed below:

- “National or provincial government may provide a role for traditional councils or traditional leaders in respect of among others: health, arts and culture, agriculture, etc.
Whenever an organ of state at national or provincial government level decides to allocate a role for traditional councils/leaders, it must concur with the Minister or MEC, consult relevant structures of traditional leadership and SALGA, comply with the Constitution and legislation, customary law and customs, acquire necessary resources, and promote co-operative governance, IDP, sustainable development and service delivery.

The organ of state must monitor the implementation of the allocated function to ensure that it complies with the Constitution and that it is actually being performed.

Where an allocated function is not being performed, given resources may be withdrawn.

4.6.2.7 Resolution of disputes and claims on traditional leadership

Section 22 of the National Traditional Leadership and Governance Framework Act (Act 41 of 2003) establishes the Commission on Traditional Leadership Disputes and Claims. The Commission's job is to resolve disputes and claims which arise between and among traditional communities, traditional councils and traditional leaders. In resolving any disputes, the Commission must do so in compliance with the Constitution, legislation, “customary law and customs of the stakeholders concerned, and it should consider and apply customary law and customs of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim” (Section 25(3) (a)).

It is incumbent to note here that the question of disputes and claims on traditional leadership is very thorny and holds potential for explosive repercussions if not properly dealt with. This is possibly the reason why the report of the Ralushai Commission of Inquiry established in 1997 by then Premier Ramatlhodi of the then Northern Province, now Limpopo Province, has never been published. The spokesperson for the Premier’s office had said in February 1999 that the Premier would not release the full report as it had “volatile contents that could spark outrage” (Sowetan 29-04-1999). An association of chiefs in Northern Province, Loc. cit. had given the Premier an ultimatum to release the report … if he wanted their full support
on Election Day. The above input shows how sensitive and serious the issue of ascendancy to positions of traditional leadership can be. Several other traditional leaders in other provinces have also previously tried to hold government to ransom by threatening to instruct their subjects not to vote in an election whenever they felt aggrieved with government.

4.6.2.8 Remuneration of Public Office Bearers

Section 219(1) provides for an Act of Parliament which must establish framework legislation to determine the salaries and allowances of persons holding public office including the “President …, traditional leaders, and members of any council of traditional leaders.” It is important to note here that “any council” does not by implication include Houses of traditional leaders at provincial or local level. A ‘house’ is not defined or classified as a ‘council’ in the definitions. This could imply that traditional leaders serving the provincial and local Houses may not be entitled to the salaries, allowances and benefits provided for by the law. The Remuneration of Public Office Bearers does not ameliorate the situation as it only includes traditional leaders in provincial Houses, but excludes members of the local Houses as recipients of salaries, benefits and allowances entitled to Public Office Bearers. The Framework Act has gone a step further “to provide for a framework determining the salaries and allowances of the President …, traditional leaders, members of local Houses of Traditional Leaders, members of provincial Houses of Traditional Leaders and members of the National House of Traditional Leaders. However, like its precursors, it omits non-traditional leader members of traditional councils and non-traditional leader members of kingship councils”.

This situation is corrected by the Amendment Bill which embraces all categories of stakeholders who qualify as Public Office Bearers. While the law on the one hand facilitates the remuneration of the said holders of public office, it is nonetheless, on the other hand, resolute that any of these public office bearers “who holds different public offices simultaneously, is only entitled to the salary, allowances and benefits of the public office for which he or she earns the highest income” (Clause 11(5) (2). The Amendment Bill also extends the heading of Act 20 of 1998 to include “non-
traditional leader members of traditional councils and non-traditional leader members of kingship councils”. This inclusion ensures that the needs which all members who hold public office are entitled to are duly taken care of.

4.6.2.9 Code of conduct

Schedule 1 of the Municipal Systems Act deals with a Code of Conduct for Councillors and specifies in Section 15 all the items from this Act which “apply to a traditional leader who participates or has participated in the proceedings of a municipal council in terms of s. 81 of the Municipal Structures Act, which deals with participation of traditional leaders in municipal councils”. Section 27(1) of the Framework Act states that “the code of conduct contained in the Schedule (to this Act) applies to every traditional leader and traditional council and must, in respect of a particular province, be read together with the relevant provincial code adopted by that province”. All six provinces which have the institution of traditional leadership have adopted codes of conduct in their respective provincial Acts. The Schedule prescribes the following general conduct for traditional leaders and traditional councils, but note that this does not include kingships and kingship councils which are provided for in the Amendment Bill discussed herein after.

“A traditional leader must:

- perform the functions allocated to him or her in good faith, diligently, honestly and in a transparent manner;
- fulfill his or her role in an efficient manner;
- not conduct himself or herself in a disgraceful, improper and unbecoming manner;
- comply with any applicable legislation;
- act in the best interest of the traditional community or communities he or she serves;
- promote unity amongst traditional communities;
- not embark on actions that would create divisions within or amongst traditional communities;
• promote nation building;
• not refuse to provide any service to a person on political or ideological grounds;
• foster good relations with the organs of state with whom he or she interacts;
• promote the principles of a democratic and open society; and
• disclose gifts received.

On the other hand a traditional council must:

• perform the functions allocated to it in good faith, diligently, honestly and in a transparent manner;
• execute its duties in an efficient manner;
• comply with any applicable legislation;
• act in the best interest of the traditional community it serves;
• give effect to the principles governing public administration set out in Section 195 of the Constitution; and
• foster good relations with the organs of state with whom it interacts”.

The Framework Act “was passed in December 2003, and came into operation on 24 September 2005. Since then, the Act has been implemented and through careful analysis of the Act and assessment of its implementation there emerged a need to effect certain amendments to address the current gaps and legal uncertainties and vacuums in respect of certain important areas” (Memorandum of the Amendment Bill 2008 in Nthai 1991).

And, while it is often said by many scholars, that society is forever in a state of flux, and that man-made laws are there to be unmade by man him/herself if and when need arises, it is not surprising then that shortly after the enactment of the Framework Act, there arose a need for an amendment. This came about through the tabling of the Traditional Leadership and Governance Framework Amendment Bill, 2008.
4.6.3 Traditional Leadership and Governance Framework Amendment Bill, 2008

Chapter 12 of the Constitution recognizes the institution, status and role of traditional leaders who operate in terms of customary law without offering any specifics about the types and categories of the traditional leaders so recognized. It further stipulates that “national or provincial legislation be provided for the establishment of houses of traditional leaders, and that national legislation may establish a council of traditional leaders”. However, in Section 143(1) (b) the Supreme Law dictates that “A provincial constitution, or constitutional amendment, must not be inconsistent with this Constitution, but may provide for the institution, role, authority and status of a traditional monarch, where applicable.”

Be that as it may, the final law on traditional leadership, the Framework Act, provides for the recognition of traditional leadership positions (s. 8) which are the kingship, senior traditional leadership, and headmanship. This being a great departure from an array of traditional leadership positions which existed prior to 1994. Section 9 of the principal Act recognizes kings and queens as one of, and not separate from, the structures of traditional leadership. While the Act clarifies the process to be followed when filling the position of a king or queen and their removal from office, it still, like the Constitution, lacks flesh to the bone. This omission and probably some other, has precipitated the amendments effected through the Traditional Leadership and Governance Framework Amendment Bill of 2008).

4.6.3.1 Purpose of Amendment Bill

The purpose of the Amendment Bill is to:

- “amend the National Traditional Leadership and Governance Framework Act of 2003 (Act 41 of 2003);
- provide for the recognition of kingships and the withdrawal thereof;
- provide for the establishment and recognition of the kingship councils;
- provide for the establishment of sub-traditional councils;
• further regulate the election of members of local houses of traditional leaders;
• provide for regulatory powers;
• further amend the transitional provisions relating to tribal authorities, community authorities and paramountcies;
• provide for the disestablishment of paramountcies;
• amend Act 20 of 1998 to make provision for the remuneration of non-traditional leader members of traditional councils and kingship councils; and
• provide for matters connected therewith”.

It is not surprising that the principal Act in its early stages of existence has to already undergo such extensive amendments. The reason for this could be attributed to the varied nature of the governance system of the traditional leadership system of the past. One traditional leader could not be found to govern similarly to the next. Even in homogenous communities or tribes like the Batswana one would seldom, if ever, find for instance, Bakwena and Bakgatla practicing a similar mode of governance in spite of their geographical proximity and familial dialects spoken by these communities. As a consequence of this diversity one can presume that the drafting of the legislation on traditional leadership has been a process in motion tinged with trial and error, in the absence of any veritable models to emulate, in order to arrive at this very crucial final stage. Some salient aspects of the Amendment Bill are dealt with below.

4.6.3.2 Definitions and recognition of kingships

The incumbency of a kingship comes at a very high premium to the taxpayers of South Africa. The upkeep of the Zulu monarch alone is reputed to be in excess of R20m per annum. With such a heavy financial burden it is very important that only genuine kings and/or queens are coroneted. The White Paper on Traditional Leadership and Governance (2003:49) carries a table showing levels and numbers of traditional leaders remunerated by government. A total of 2425 traditional leaders receive salaries, benefits and allowances from the state. This number overshadows the total number of politicians in all three spheres of government put together. Of these leaders 12 are classified kings and/or queens. Considering the budget of the
Zulu monarch indicated above one shudders at the possible cost to the treasury. It is for this reason that then President Mbeki appointed a Commission on Traditional Leadership Disputes and Claims to investigate and report on all leadership disputes dating back to 1927 (City Press 17-10-2004). The Commission’s report was submitted to President Zuma in July 2010 and reveals that there are only six legitimate kingships in South Africa.

Whereas Section 1 of the principal Act defines king or queen satisfactorily, it does not do similarly with the definition of kingships. A king or queen is defined as a “traditional leader under whose authority, or within whose area of jurisdiction, senior traditional leaders exercise authority in accordance with customary law. And are recognized as such in terms of this Act” (Section 1 of the principal Act). The Amendment Bill defines kingship as consisting of a number of traditional communities which are grouped together and are recognized in terms of applicable provincial legislation if:

- “each has a recognized traditional council in its area of jurisdiction with a legally recognized senior traditional leader;”
- they recognize a recognized senior traditional leader as their king or queen;
- they recognize themselves as a distinct group of traditional communities; and
- they have a system of traditional leadership at a kingship level recognized by other traditional communities”.

4.6.3.3 Establishment and recognition of kingship councils

An extensive elucidation of the establishment and recognition of kingship councils is outlined is Section 3A of the Amendment Bill. The Bill stipulates that a kingship council be established within one year of the recognition, consisting of no more than thirty members, a third of whom must be women. The number of members of a kingship council is determined by the Minister according to a given formula and published in the Gazette. The membership of a kingship council consists of 60% selected by the king or queen and 40% elected democratically from a list of nominees advanced by the traditional council where each traditional council
nominates two candidates for a term of five years. The Premier recognizes the kingship council, gazettes it and inform the President. The king as chairperson decides on a rendezvous for meetings, normally at the palace, requiring a quorum of 51% which will then elect a deputy chairperson who will act when the chairperson is unavailable for whatever reasons. The council meets bimonthly unless it is a special meeting called by the chairperson after consultation with the Premier. A notice of seven days is required prior to the meeting.

In the event of a vacation of office by any member of the kingship council, resulting from any circumstance, the vacancy must be filled as soon as possible for the remainder of the term of office in terms of the applicable law. The filling of a vacancy of a member selected by the king must occur within 14 calendar days and that of a member elected by an electoral college of senior traditional leaders within 45 calendar days. All appointments including the filling of vacancies, but excluding that of king or queen, must be aligned to the term of office of the local government. the Bill then lays down reasons and/or conditions for vacating office and/or being barred from appointment to a kingship council.

### 4.6.3.4 Functions of kingship councils

The principal Act makes no provision for the functions of kingship councils. The Amendment Bill stipulates these functions in detail as follows in Section 4A. Kingship councils perform the following functions:

- “administer the affairs of the kingship in accordance with customs and tradition;
- assist, support and guide senior traditional leaders and traditional councils in the performance of their functions;
- assist the king or queen in performing customary functions concerning the recognition of senior traditional leaders;
- mediate in disputes between senior traditionalleaderships falling within the jurisdiction of the kingship;
promote unity between traditional communities falling under the jurisdiction of the kingship;

assist the king or queen in performing his or her roles and functions conferred by the President in terms of the law;

must keep proper records, audited financial statements, disclose gifts, and adhere to the code of conduct as provided for in the law;

advise and support all traditional councils falling under the authority of the king or queen; and

may not use a kingship council or its resources to promote or prejudice the interests of any political party”.

4.6.3.5 Establishment and functions of sub-traditional councils

Sub-traditional councils are a new addition to the package of structures on traditional leadership. It smacks of the cross-border municipality phenomenon of local government where a portion of the community occupies more than one geographical area simultaneously. This is a reality which warrants guidance from the law. Sub-traditional councils assume roles and perform the following functions:

- “The Premier may, in cases where a traditional community occupies two or more geographical areas, establish a sub-traditional council for that section of the community which is resident outside the area in which the greater portion is located;
- The sub-traditional council must consist of not more than 15 members resident in the area concerned;
- The Premier must recognize the sub-traditional council as part of the main traditional council, and define the area of its jurisdiction, and gazette it;
- The chairperson of the sub-traditional council must be appointed by the senior traditional leader in consultation with the royal family;
- The appointed chairperson must be a member of the main traditional council selected by the senior traditional leader; and
- A sub-traditional council performs such functions listed in s. 4 as may be delegated to it by the main traditional council”.

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4.6.3.6 Remuneration of Public Office Bearers

The Remuneration of Public Office Bearers of 1998 (Act 20 of 1998) was first amended by Act 21 of 2000 and later by Section 29 of Act 41 of 2003. Initially the Act did not include the remuneration of members of the Houses of traditional leaders but this is clarified by the Framework Act which includes them on the payroll of Public Office Bearers. And now the Amendment Bill amends it further to include the remuneration of non-traditional leader members of traditional councils, and non-traditional leader members of kingship councils. The implication here is that these non-traditional leader members are classified office bearers who consequently qualify not only for a salary, but also for benefits and allowances like all other office bearers. The Amendment Bill states it succinctly that “Traditional leaders shall be entitled to such salaries and allowances as may from time to time be determined by the President after consultation with the Premier concerned by proclamation in the Gazette, and consideration of factors such as:

- “any recommendation of the Commission;
- the role, status, duties, functions and responsibilities of all categories of traditional leaders including non-traditional leader members;
- the affordability of different levels of remuneration of public office bearers;
- the current principles and levels of remuneration in society generally;
- the need for the promotion of equality and uniformity of salaries and allowances for equal work performed;
- the enhancement of co-operation, unity and understanding between traditional communities nationally;
- the extent of the role and functions of traditional leaders across provincial borders; and
- inflationary increases”.

All said and done, the entitlement to salaries, allowances and benefits is with a proviso that any leader who holds different public offices simultaneously, is only entitled to the salary, allowances and benefits of the public office for which he or she earns the highest income, taking into consideration conditions which apply.
Furthermore the President, after consulting relevant political office bearers (Minister and Premier) may set any benefits and gazette them in terms of the criteria set hereinabove. The salaries, allowances and benefits referred to in the Amendment Bill are payable from monies appropriated for that purpose by Parliament or provincial legislature, as the case may be. However, a member of the National House of Traditional Leaders is entitled to an allowance determined by the President for actual work performed, as of 10 April 1997.

These major amendments and several other minor ones have done much to bring government and traditional leadership closer towards finding a lasting solution to the contentious question of the role, functions and duties of traditional leaders in South Africa. That is if the Traditional Leadership and Governance Framework Amendment Bill of 2008 has not achieved the goal. With regard to the powers of traditional leaders, perhaps it will save parties involved in the skirmish all the headache if traditional leaders were to understand, acknowledge and accept that the locus of power to govern resides with the government of a country and state. Traditional leaders are not a government of the Republic of South Africa, but like many other societal institutions, are subsidiary to government which in turn derives its authority and power (mandate) to rule from the Constitution which is the Supreme Law of the land.

4.7 Structures of the institution of traditional leadership

Traditional leadership has always been known to exist but not as an organized institution per se. It existed as a governance structure peculiar to specific tribes, communities or groups of people living together to secure their interests and cater for their needs. The phenomenon of an ‘institution’ did not truly exist and where it was found to prevail, it did so on a very limited scale. The point being argued here is that traditional leaders in most cases operated apart from one another without a united voice which could make them audible through the corridors of power. The new regime of legislations seeks to rectify this anomaly by creating a formal institutional structure which all legitimate traditional leaders throughout ‘the whole of the territory of the Republic’ could affiliate and belong to. Such a structure will go a long way in
enabling government to work with and assist traditional leaders in fostering good governance and effective service delivery in areas under their jurisdiction and, to further engender *esprit de corps* between elected councillors and traditional leaders bound together by the prescripts of geography. In 2003 King Goodwill Zwelitini remarked in a speech that “… traditional leaders throughout South Africa are able to speak with one voice and are in a much stronger position than they were about two to three years ago” (Speech by His Majesty King Goodwill Zwelithini on 28 February 2003 in Mzimela 2003).

Chapter 12 of the Constitution mandates that “national or provincial legislation may provide for the establishment of houses of traditional leaders; and that national legislation may establish a council of traditional leaders. While it could be argued that the law here is non-committal, it nonetheless is a major step forward in advancing the interests of traditional leaders. This is a step towards consolidating the splintered entities of traditional leaders into what could be recognized as an ‘institution’ of traditional leadership”. Chapter 7 of the Constitution, while stipulating that local government be established for the whole of the territory of the Republic, is conspicuously silent on the issue of traditional leaders, many of whom have lived and governed in these very territories over centuries. Understandably, this has caused resentment in and among traditional leaders and their subjects. The LGTA, which is regarded as the ‘cross-over bridge’ from the old to the new local government dispensation says very little, if any, about traditional leadership. In here lies the danger of side-stepping traditional leadership in the whole transformation process. However, since the Constitution is supreme law, the prescriptions of chapter 12 on the establishment of a council and houses of traditional leaders had to be abided with by the respective legislative institutions of government. As a result, formal structures of traditional leaders have been instituted.

### 4.7.1 Council of traditional leaders

A Council of Traditional Leaders is established through the Council of Traditional Leaders Act of 1997 (Act 10 of 1997) to comply with the dictates of both the interim
and final Constitutions. Its mandate is:

- To provide for the establishment of a Council of Traditional Leaders.
- To provide for the objects and functions of the said Council; and for matters incidental thereto.

The Council’s mandate extends for a period of five years only, from the day of its first meeting after it has been constituted. The Council of Traditional Leaders Act of 1997 (Act 10 of 1997) was amended through the Council of Traditional Leaders Amendment Act of 1998 (Act 85 of 1998) and subsequently amended through the National House of Traditional Leaders Amendment Act of 2000 (Act 20 of 2000). The establishment of the Council and subsequently the House constitutes an important milestone in the history of traditional leadership in South Africa. For the first time traditional leaders in South Africa can belong to one formal institution which, despite a host of challenges, goes a long way in facilitating their activities and taking care of their needs and those of their subjects. Thus began the journey towards consolidating a shared common vision among traditional leaders throughout the country. A mechanism has been put in place for traditional leaders to sing from the same page and speak with one voice. Though not answering satisfactorily to the demands of the traditional leaders, the establishment of the House constitutes a step in the right direction. Chief among the challenges which confront the government remains the huge number of traditional leaders spread across six of the nine provinces of the Republic. The last count during the Nhlapo Commission on Traditional Leadership Disputes and Claims, which is by no means the final count, is about 2500 traditional leaders in the country (Mhlaba 2007).

4.7.2 Provincial Houses of Traditional Leaders

The Constitution clearly stipulates that national or provincial legislation may provide for the establishment of houses of traditional leadership (Section 212(2) (a)). It states further in Section 143(1) (b) that: “a provincial constitution, or constitutional amendment, must not be inconsistent with this Constitution, but may provide for the institution, role, authority and status of a traditional monarch, where applicable.” As a
consequence to this constitutional requirement various provinces have established Houses of Traditional Leaders, with six of the nine provinces of the Republic establishing these Houses. Only the Western Cape, Northern Cape and Gauteng provinces have not created Houses of Traditional Leaders. The Gauteng Province has been trying to establish one but to date, nothing has materialized. A Draft Bill to advance traditional leaders’ roles in Gauteng was published by the Gauteng Provincial legislature on 08 February 2009. Probably the problem could lie in the fact that Gauteng does not have a history of traditional leadership anywhere within its precincts, except for a few Indunas from the rural areas who exercise quasi authority on fellow villagers from the same rural areas as them, mainly those in the hostels across the province.

The following **Provincial Acts** have established the six Provincial Houses of Traditional Leadership in respective provinces:


A glance through the objectives of these provincial Acts reveals that they have more similarities than differences, and this strengthens the argument for the ideal of a common voice and vision for traditional leaders when entering into future political negotiations with government. All the Provincial Houses of Traditional Leadership
invariably desire:

- “To provide for the recognition and withdrawal or removal of traditional communities;
- To provide for the establishment and recognition of traditional councils;
- To provide for the recognition of traditional leaders; and
- To provide for a Code of Conduct for traditional leaders which is apparently a deviation from the standing position of traditional leaders being subject to the Code of Conduct of municipal councillors”.

Where there are variances, these are as a result of circumstances peculiar to individual provinces, such as the KwaZulu-Natal province which seems “to provide for Houses of Traditional Leaders within the provincial House of Traditional Leaders itself via district municipalities which have five or more traditional communities” (Section 36(1) of KwaZulu-Natal Traditional Leadership and Governance Act of 2005 (Act 2 of 2005) and for the recognition of Isilo as the monarch of the Province of KwaZulu-Natal. The Limpopo House includes provision for payment of allowances for travelling expenses of members of traditional councils and for meetings of royal family and traditional councils, as well as recognition of acting traditional leaders and regents.

4.7.3 General functions of traditional councils

All the six Provincial Houses of Traditional Leaders are unanimous on the general functions which must be performed by the traditional councils in the provinces. This is a very important step since the ideal would be to have traditional leaders working from a common legal and/or legislative context. Such a position will greatly enhance government’s efforts to develop communities and deliver services to the rural areas under the jurisdiction of traditional leaders. The general functions, as stated in all the six provincial Acts are listed below.
“A traditional council must:

- Administer the affairs of the traditional community in accordance with customs and tradition;
- Assist, support and guide traditional leaders in the performance of their functions;
- Support municipalities in the identification of community needs in the development or amendment of the IDP of the municipality in which area of jurisdiction that community resides;
- Recommend appropriate interventions to government that will contribute to development and service delivery within the area of jurisdiction of the traditional council, subject to consultation with the Provincial House or the relevant Local Houses of Traditional Leaders;
- Participate in the development of policy and legislation at local level;
- Participate in the development programs of municipalities, the Provincial and National spheres of government;
- Promote the principles of co-operative governance, IDP, sustainable development and service delivery;
- Promote indigenous knowledge systems for sustainable development and disaster management;
- Alert any municipality to any threatening hazard or calamity to the area and the people living there;
- Share information and co-operate with other traditional councils;
- Perform the functions conferred by customary law, customs and statutory law consistent with the Constitution; and
- Perform such other functions as may be prescribed”.

4.7.4 Roles, powers and functions of each Provincial House

The differences in the roles, powers and functions of the six Provincial Houses of Traditional Leaders are very negligible and minimal. In the main these roles, powers and functions are largely similar or closely related to warrant any serious concern. Where these differences come to the fore, it is as a result of circumstances unique to
individual provinces, and as indicated earlier in the above, should not detract from the bigger picture of an institution speaking with one voice and sharing a common vision of good governance in areas under the jurisdiction of traditional leadership, who are governed by one law like it became possible for a diverse South African nation to be united behind one law, the Constitution of the Republic of South Africa Act of 1996. Following hereunder are examples of each province’s ‘package’ of roles, powers and functions as they reflect in respective provincial Acts on traditional leaders.

4.7.4.1 Free State Traditional Leadership and Governance Act of 2005 (Act 2 of 2005)

The Free State Province does not seem to prescribe any specific roles, powers and functions for its traditional leaders other than the general functions of traditional councils stated above in 7.3. It only refers in Section 15 of the Act to key issues relating to communities and traditional councils, which are that the traditional councils must:

- uphold traditional African values;
- reject and proscribe such practices as the sowing of divisions based on tribalism;
- promote peace and stability amongst members of traditional communities;
- promote social cohesiveness of the traditional community; and
- ensure payment of subsistence and travelling allowances for members of traditional councils”.

4.7.4.2 North West Traditional Leadership and Governance Act of 2005 (Act 2 of 2005)

In the North West Province the traditional council:

- "administers the affairs of the traditional community;"
promotes the interest, advancement and well-being of the traditional community; and
administrates the finances of the traditional community as provided for by the Act”.

The Act further lays down the roles and functions of the kgosi/kgosigadi as:

• “administering the affairs of the traditional community;
• maintaining peace, conciliating and mediating disputes in the traditional community;
• reporting to the authorities all violent or natural deaths of any person in the community;
• reporting the outbreak of any contagious or infectious disease or epidemic;
• reporting any allegation of witchcraft or divination;
• reporting the commission of any offences beyond his/her powers to resolve;
• announcing the provisions of any new law or policy to the community and motsana;
• convening and attending traditional council meetings which are held once every calendar month;
• taking note of any problems, grievances or matters from the community at meetings and attempting to resolve them;
• convening and attending meetings of the traditional community convened and attended by community members and taking place at least once every six months; and
• seeking to promote the interests of the community; and taking the necessary steps to promote the well-being and advancement of the traditional community”.
4.7.4.3 Eastern Cape Traditional Leadership and Governance Act of 2005 (Act 4 of 2005)

The Eastern Cape Act stipulates the roles and functions of royal family and traditional leaders in Section 24, which are that the Royal Family and/or traditional leaders must/may:

- “act in accordance with the law, customs and customary law;

- keep a minute book of all proceedings of any meetings showing the date, place, specific meeting held, names of royal family attendees and their positions and designations and decisions taken for inspection by the Premier’s designee;

- perform additional functions as may be assigned by government and/or law to promote socio-economic development, service delivery, nation building, community peace and stability, social cohesiveness, preservation of the moral fibre and regeneration, culture and tradition, social well-being and community welfare; and

- report any matter of public interest to the authorities, disseminate official information, convene community imbizo, promote and advance the interests of the community, and facilitate access to government services by the community”.

4.7.4.4 Mpumalanga Traditional Leadership and Governance Act of 2005 (Act 3 of 2005)

According the above legislation a Local House of Traditional Leaders in each of the District Municipalities in the Province has the following powers and functions
(Section 9 of Act 3 of 2005):

- “advises and makes proposals to the Provincial House in writing on matters of custom and customary law;
- advises the District Municipality on customary law, customs, traditional leadership, traditional councils, development of planning frameworks, as well as development of by-laws;
- participates in local programs to monitor development in rural areas; keep the Provincial House informed on a continual basis; and
- exercises powers and perform functions conferred on it”.

Furthermore the Mpumalanga Provincial House is endowed with the following powers and functions (Section 24 of Mpumalanga Provincial House and Local Houses of Traditional Leaders Act of 2005 (Act 3 of 2005):

- “to advise and make proposals to the Provincial Legislature;
- to comment on any Bill of the Provincial Legislature affecting issues of traditional leadership;
- to ensure that any matter brought before the Provincial House is first discussed by the Local House(s) who will in turn make a written recommendation to the Provincial House for consideration;
- to have the matter first referred to the Provincial House by the Speaker of the Provincial Legislature before it can be passed and the House must respond to the Bill within 30 days;
- if the Provincial House fails to respond, the Provincial Legislature may pass the Bill;
- the Provincial House must nominate three members of the Provincial House to represent it in the National House;
- the Provincial House may withdraw a Member's membership of the National House of Traditional Leaders;
- of the three Members, at least one must be a woman;
- the Provincial House may exercise other powers and perform other functions conferred or imposed by law; and
if a Local House fails, the Provincial House may intervene to remedy the situation”.

4.7.4.5 KwaZulu-Natal Traditional Leadership and Governance Act of 2005 (Act 2 of 2005)

Like the Mpumalanga Province, the KwaZulu-Natal Province has several traditional leadership structures in the province, with multiple functions which run the risk of overlap, duplicity and cumbersomeness in administration and management. Nyandu (2003) cited in Lutabingwa, Sabela, and Mbatha (2003) identifies the KwaZulu-Natal traditional structures which are: Traditional Authorities, Community Authorities, Regional Authorities, Provincial House of Traditional Leaders, and National House of Traditional Leaders. However, one should note that the KwaZulu-Natal Traditional Leadership and Governance Act of 2003 (Act 41 of 2003) refers only to the following structures: Traditional Communities, Traditional Councils, Provincial House of Traditional Leaders, and Local Houses of Traditional Leaders which are duly discussed in this research essay. The functions of traditional councils in the province are, over and above those general functions stated in 6.3 in the above, to (Section 8 of Act 2 of 2005):

- “uphold the values of the traditional community;
- reject and proscribe the sowing of divisions based on tribalism; and
- promote peace, stability and social cohesion”.

4.7.4.5.1 Roles and duties of Isilo as Monarch

Section 18 of KwaZulu-Natal Traditional Governance Act of 2005 (Act 2 of 2005) prescribes the tasks of Isilo as being:

- “to uphold the Constitution and the law; to promote national and provincial unity;
- to carry out functions of Isilo in accordance with customary law;
- to meet once a year with other South African traditional leaders;
• to perform such ceremonial duties as required by the provincial government, including the opening of the Provincial Legislature;
• to support and develop communities that are recognized as traditional communities, and to officiate at the traditional installation of all Amakhosi in addition to other customary responsibilities;
• to cooperate with the Executive Council in: conferring honours and distinctions, meeting foreign dignitaries, representing the Province culturally and socially both within the Republic of South Africa and abroad, and addressing sessions or meetings of provincial intergovernmental bodies or structures; and
• Isilo may appoint any person or persons in accordance with custom and tradition, to perform specific functions and rituals arising from his/her duties under subsection” (1).

The role and functions of Amakhosi are to (s. 20 of KwaZulu-Natal Traditional Leadership and Governance Act of 2005 (Act 2 of 2005):

• “uphold the Constitution and the law and protect human rights;
• promote democracy, provincial unity and uphold national and provincial legislation;
• carry out customary functions consistent with the Constitution, law and democracy; and
• preserve and foster knowledge and understanding of Zulu culture, history and tradition”.

An Inkosi must:

• “convene and report to meetings of his/her traditional council every two months;
• convene and report to a meeting of his/her traditional community every three months;
• attend special consultative meetings of the Provincial House;
• participate in municipal council meetings if so selected according to s. 81 of the Structures Act;
• carry out any functions prescribed for Amakhosi by the responsible MEC;
• maintain law and order and report any matter to the MEC without delay;
• ensure protection of life, property and travellers and report to the relevant authorities the death of any person, outbreak of any contagious/infectious disease, any misuse of government property, any irregular receipt or use of public moneys, and the commission of any offence beyond his/her jurisdiction;
• ensure the exercise of constitutional rights by the community;
• announce to the community the requirements of any new law;
• ensure compliance with all the laws;
• prevent cruelty to animals; impound any stray animals or illegally de-pastured livestock; and
• generally seek to promote the interests of his/her traditional community”.

Section 34 of the Act stipulates the roles and functions of the Provincial House in KwaZulu-Natal, over and above the general roles and functions stated in 7.3 above, as follows:

• “it may advise and make proposals and other recommendations to the Provincial Government on legislation or matters affecting traditional leaders, traditional councils or communities; and legislation and matters pertaining to Zulu custom and tradition, or such other matters in respect of which the responsible MEC has invited a comment;
• the advice, proposals and recommendations are persuasive and do not preclude the Provincial Legislature from enacting legislation in conflict with such advice, proposals and recommendations;
• any pending legislation or draft Bill must be referred to the Provincial House which should take care of the matter within 30 days; and
• if the Provincial House fails to sit or to furnish representations in 30 days, the Bill may be put to vote for a decision of the Provincial Legislature”.
4.7.4.6 Limpopo Traditional Leadership and Institutions Act of 2005 (Act 6 of 2005)

Similar to the Mpumalanga and KwaZulu-Natal situations, the Limpopo Province has a number of traditional institutional structures in use. In terms of Act 6 of 2005 (Section 18), the roles and functions of traditional leaders are outlined as to:

- “promote the interests of the traditional community concerned;
- assist with the administration of the community in co-operation with the relevant municipalities and state departments;
- participate actively in the development of their areas; to inform their communities about the provisions of any new law; and
- perform any functions allocated by a competent authority”.

When allocating any functions to a traditional council, the organ of state concerned:

- “is obliged to inform the Premier of the allocated functions;
- a traditional council must account to the Premier and specifically account to the relevant organ of State; and
- the traditional councils must uphold traditional African values”.

Section 7 of the Limpopo Houses of Traditional Leaders Act of 2005 (Act 6 of 2005) provides for the powers, functions and duties of the Provincial House as to:

- “advise and make proposals to the Provincial Legislature on traditional councils, indigenous law, traditions or customs;
- comment on any relevant Provincial Bill referred to it by the Speaker of the Provincial Government;
- the Provincial House must indicate within 30 days whether it supports or opposes the Bill;
- if the Bill is opposed, the Legislature cannot pass it before 30 days have lapsed from the date the Speaker had given notification;
if the 30 days expire without any response from the Provincial House, the Legislature may pass the Bill; and
the Provincial House may exercise other powers and perform other duties conferred or imposed by any relevant law”.

The establishment of the traditional council and the six provincial houses of traditional leaders has helped to bring to the fore a somewhat clearer picture of the prevailing situation within the institution of traditional leadership in the country. The Acts passed to regulate the institution at provincial level have enabled government to coin legislation which, for the first time in South Africa, places the interests of all traditional leaders under one law on traditional leadership. While the law has not entirely addressed the pertinent issues of traditional leadership satisfactorily, one has to concede that it has gone a long way in creating what can confidently be referred to as an ‘institution’ of traditional leaders. This achievement helps to drive the vision of government which is “to transform and support the institution of traditional leadership in accordance with the constitutional principles of democracy and equality and that it may represent customary interests of communities, play a role in socio-economic development and contribute to nation-building, and be accountable” (Department of Provincial and Local Government 2003:25). Of course, viewed from the different sides of the divide, the progress made might seem substantive to government perspective, but minimal and negligible to the traditional leaders. Seiler (2000:32) identifies what he refers to as traditional leadership’s position and government’s position. On the one hand traditional leaders remain committed to their two fundamental principles, namely that:

“Traditional communities are entitled … to regulate their affairs in terms of their own laws and customs …”, and (that they) “wish to be directly involved in the development of their land in conjunction with the District Municipalities (Category C) having jurisdiction in their areas.”

On the other hand, Seiler (2000:33) states that: “In areas under the control of traditional leaders … until discussions … have been held … on the functions, roles and responsibilities of traditional leaders under the new constitutional order … the
status quo prevails.” Further, “where agreements necessitating the amendment of national legislation or the Constitution are reached, such legislation will be introduced by national government in line with the agreements reached” (Seiler 2000:33).

Of course, while the government has not made any amendments to legislation or the Constitution, and despite the fact that government has not had to amend the Constitution, and has stood firm on its “rejection of the traditional leaders’ argument for the central role of traditional authorities in rural local government …” (Seiler, 2000:32), the enactment of the afore-mentioned Provincial Acts bears testimony to the fact that substantive progress has been made to cater for the interests of the traditional leaders. The Traditional Leadership and Governance Framework Act of 2003 (Act 41 of 2003), as amended by the Traditional Leadership and Governance Framework Amendment Bill, 2008 constitutes a crunch legislation which may be viewed by some as the final legislation on traditional leadership, and by others as a pen-ultimate law on the matter, depending on whether one looks at it through the eye of government or of traditional leadership.

4.7.5 Local Houses of traditional leaders

The Framework Act makes provision for the local houses of traditional leaders at the District Municipality level, but not all of the six provinces with institutions of traditional leadership have established these local houses. It seems like the local houses are established in accordance with the unique circumstances that prevail in each individual province and not so much because the law insists on it. A closer look at the legislation of the six provinces which have the institutions of traditional leadership reveals that only KwaZulu-Natal, Limpopo and Mpumalanga have established Local Houses of traditional leadership.

4.7.5.1 KwaZulu-Natal Local Houses of traditional leaders

The KwaZulu-Natal Traditional Leadership and Governance Act of 2005 (Act 2 of 2005) provide for Houses of Traditional Leaders and Section 36(1) of the Act
establishes a Local House in “the areas of district municipalities where there are five or more traditional communities, and if a district municipality has less than five traditional communitie” (Section 36(2), the traditional leaders in that area “must choose one from amongst their number to represent traditional communities at the sitting of meetings of such district municipalities”.

4.7.5.2 General duties of the Provincial and Local Houses in KwaZulu-Natal

Section 41 of the Act prescribes some general provisions incorporating the following general duties to the effect that members of all traditional Houses (provincial and local), all traditional leaders and all traditional councils collectively and individually must:

- “give effect to the provisions of the Constitution;
- give priority to the basic needs of their communities;
- promote the development of their communities;
- ensure access to services by their communities;
- perform the roles and functions assigned to them fairly, without bias, favour or influence and in the best interest of their communities;
- ensure that they provide services equitably, accessibly, prudently, economically, efficiently and effectively; and
- the two Houses may make rules and orders to guide the conduct of their business and proceedings”.

4.7.5.3 Limpopo Local Houses of Traditional Leaders

The Limpopo Houses of Traditional Leaders Act of 2005 (Act 6 of 2005) provides for the establishment of a Provincial House of Traditional Leaders and Local Houses of Traditional Leaders; and determines their powers, functions and duties. Section 10 of the Act establishes a Local House of Traditional Leaders for each of the Districts established in terms of Chapter 3 of Proclamation 51 of 1995. The Local Houses of Traditional Leaders have the following powers, functions and duties (Section 17 of
The Limpopo Houses of Traditional Leaders Act of 2005 (Act 6 of 2005):

- “advise the relevant District Municipality on customary law, customs, traditional leadership, traditional communities, development of planning frameworks, development of by-laws;
- participate in local programs of development; and
- participate in initiatives to support government programs in rural communities; and may exercise powers and perform duties conferred or imposed by law”.

4.7.5.4 Mpumalanga Local Houses of traditional leaders

The Mpumalanga Provincial House and Local Houses of Traditional Leaders Act of 2006 (Act 3 of 2006) provides for:

- “the establishment and composition of a Mpumalanga Provincial House and Local Houses of Traditional Leaders;
- the determination of the procedure for the election of Members of the Provincial House and Local Houses;
- the powers and functions of the Mpumalanga Provincial House and Local Houses of traditional leaders; and
- matters incidental thereto”.

4.7.5.5 Powers and functions of Local Houses

Section 2 of the Act establishes a Local House for each of the District Municipalities in the Province, as contemplated in Section 17(1) of the Framework Act. The Act assigns the functions of a Local House as discussed in 7.4.4 above. The national, provincial and local Houses of traditional leaders cannot operate in isolation from the organs of state and other societal organizations or institutions. Traditional leaders govern and lead a citizenry said to number about 14 million people in areas under their jurisdiction throughout the expanse of the Republic of South Africa. By contrast, government, through municipalities of the local sphere, is established throughout the whole of the territory of the Republic. A situation of this nature warrants some form of
co-operation and shared governance between and among all stakeholders, governmental and non-governmental, and including the institution of traditional leaders. With it being a ‘creature of custom’ and local government a ‘creature of statute’ there is ample opportunity for the two institutions to use their respective positions to synergize and engender esprit de corps in order to facilitate development and service delivery in rural communities, especially those in areas under the jurisdiction of traditional leadership.

4.8 Conclusion

The role of the traditional leader has become more clear through recent legislation especially the National Traditional Leadership and Governance Framework Act (Act 41 of 2003). However, government still has a mammoth task to incorporate traditional leaders into government. At the heart of this conflict lies the fact that the provisions for traditional leaders overlap with those of elected local government officials (Sithole and Mbele 2008: 44). However, acknowledging traditional leaders as part of government has deep seated consequences and financial implications.

The question is no longer whether traditional leaders have a role to play but what that role will be and what impact it could have on co-operative (shared) local governance. These issues will be discussed in the next chapter.
CHAPTER FIVE

THE ROLE AND FUNCTIONS OF TRADITIONAL LEADERS IN SHARED RURAL GOVERNANCE

5.1 Introduction

The establishment of democracy in South Africa in 1994 “brought the issue of traditional leaders, their history and roles in the new South Africa, under the spotlight” (UJ Internal Handbook 2011:79). Traditional leaders, both chiefs and headmen, had and still have the powers and functions awarded to them under colonialism and apartheid in terms of various pieces of legislation. The most important in this regard are the Black Administration Act of 1927 (Act 38 of 1927) and the Black Authorities Act of 1951 (Act 68 of 1951). Under the Constitution of 1996, such powers and functions are the “responsibility of the national and provincial governments and may be assigned to municipalities under Section 156 of the Constitution. Apart from these functions there were specific traditional obligations that traditional leaders had. This is where the conflict arises: the powers and functions of traditional leaders correlates with the powers of the elected local government officials” (UJ Internal Handbook 2011:79).

The breakthrough for the rights of traditional leaders came in the form of the Traditional Leadership and Governance Framework Act 2003 (Act No. 41 of 2003), as amended by the Traditional Leadership and Governance Framework Amendment Bill 2008 and the subsequent establishment of the Department of Traditional Affairs. According to this Act and the Communal Land Rights Act of 2004 (Act 11 of 2004) traditional councils should be seen as new institutions that are aimed at replacing the old tribal authorities of the previous years. Mirroring the perspective of national government, traditional leadership has a central role to play in the new dispensation particularly in local governance, development and service delivery (Khunou 2009: 106). The National Traditional Leadership and Governance Framework Act of 2003 (Act 41 of 2003) clearly shows the intentions of the Government to phase in traditional leaders as part of local government by recognizing traditional leadership, traditional institutions and communities through the “establishment and recognition”
of traditional councils, providing guidelines for the operation of traditional institutions, clarifying the roles and functions of traditional leaders and other related matters, as well as to lay out the codes of conduct for officials of traditional leadership institutions. All decisions taken regarding the role of traditional leaders in government now have to comply with the provisions of this act" (Khunou 2009:87).

Giving traditional leaders “a role with regard to functions already allocated to elected local government would require amendment of the Constitution, which is what the traditional leaders are asking for” (Ruguge 2003:172). “This situation brings many challenges for the post-apartheid government with regards to the role of traditional leaders. As a result traditional leadership has been debated quite extensively” (Sithole and Mbele 2008:18).

5.2 Viewpoint of traditionalists versus that of modernists

At the heart of the controversy is the question whether traditional leadership could fit into a democracy built on human rights. The fundamental issue contradicting democracy is the fixed boundaries traditional leaders ruled over and the argument that people living in those boundaries lose their democratic rights since they have to adapt to the customs of these authorities. Traditional leadership is seen as opposing the human rights principle since it does not honor the needs of the individual for freedom and choice. Ntsebeza (2006:256-258) pointed out that “the recognition of a democracy and the rights of traditional leaders, born to the throne, in the South African Constitution is an ambiguity. Furthermore it was not clear how the African National Congress (ANC), which fought for a democracy, could embrace the institution of traditional leadership, which had a notorious record under Apartheid. The debate on the future role of traditional leaders in a democratic South Africa led to the emergence of two main schools of thought namely the modernists and traditionalists”.

According to Keulder (1998:3-10), “the modernists are primarily concerned with human rights, democracy and gender equality. They demand a major transformation of the institution of traditional leaders to meet the requirements of a modern, non-sexist and non-racial democracy”. To them traditional leadership is in direct contrast
to the resolutions of Agenda 21 which emphasises a participatory government system. “On the other hand, the traditionalists emphasise that the institution of traditional leaders was throughout history at the heart of rural governance, political stability and rural development. They further argue that traditional leaders acted as a symbol of unity to maintain peace, preserve customs and culture, resolve disputes and faction fights, allocate land. Some traditionalists put their argument in such a way that traditional leadership could be regarded as an alternative form of democracy. This form of democracy places less emphasis on the election process and how government comes into being and more on the rationalization of justice based on cultural-moral principles and a “shared democracy. Traditional leadership is therefore a facilitatory democracy more focused on issues than rigidified processes” (Sithole and Mbele 2008:11).

Contrary to expectations the arguments of the traditionalists are winning ground and the question is increasingly asked whether the governance systems of developing countries should mimic those of developed countries. (Although democracy is the desired form of government the question is asked whether the social and economic conditions of developing countries is conducive to that of democratic governance (Booth 2011:1). The argument is that the pragmatists who regard the “…theoretical legal security of ownership of land as the ultimate security that all people desire misses the complexity of the lives of the Black rural masses whose economic means are not stable…” (Sithole and Mbele 2008:15).

Keulder (1998:6) “observed both the modernists and traditionalists agreed that the institution of traditional leadership, its composition, functions and legal manifestations should change in order to adapt to the changes in the new constitutional, social and political environments of post-apartheid South Africa”. “Guidelines for co-existence and co-operation between traditional leaders and government were clearly informed by the notion of the co-existence of democratic and traditional authority structures. This means that a balance must be effected “between the need to retain the institution of traditional leaders on the one hand and entrench democracy on the other” (Sowetan 08-11-2000).
The integration of traditional leaders in a democratic government system

Despite the different approaches to traditional leadership, the newly elected democratic government had to somehow integrate traditional leaders into a democratic system of government. “A great deal of attention focused on issues and questions over a traditional leader’s roles and responsibilities, especially since the traditional leaders were regarded by many as agents of the Apartheid regime. It is evident that traditional leadership is receiving more and more attention from the government, the media, and academics. The present South African government has launched a transformation project for the institution of traditional leadership. This project is intended to cure the ills of the past and democratise the Traditional leader institution in accordance with the constitutional imperatives” (Khunou 2009: 88).

The Traditional Leadership and Governance Framework Act (Act 41 of 2003) and the Communal Lands Rights Act (Act 11 of 2004) are intended among many other regulations to change the powers and functions of traditional leaders enjoyed under the Apartheid regime, more specifically the Black Authorities Act (Act 68 of 1951) (Khunou 2009:114). However, despite becoming more lenient towards traditional leadership it is interesting to note that the Ten Year Review on Government Programmes of 2003 totally avoided the issue of traditional leadership (The Presidency 2003:114).

The birth of the Department of Cooperative Governance and Traditional Affairs (CGTA) ushered in a new era which represents an irreversible shift to an expanded and more deliberate mandate on matters of cooperative governance (The Presidency 2003:114).

Despite all the past differences between traditional leaders and government, Government now acknowledges that the institution of traditional leadership is central to the system of governance in rural areas and aims to place this institution at the centre of rural development. To achieve this it is essential to create the interactive government that President Zuma referred to in his State of the Nation Address (The Presidency 2003:114). The view of government is that rural voices have not been
sufficiently heard and that space and opportunities for the institution of traditional leadership and traditional communities need to be created to help these communities to become a vibrant and active part of this democracy (The Presidency 2003:114).

The big issue regarding the legitimacy of traditional authorities is to what extent it affects the delivery of services to the rural communities. It is even argued that these debates concerning democracy and traditional leadership are irrelevant in rural areas where traditional leaders accepted, out of respect and sometimes out of fear, to represent the people (Traditional leaders 2011). Traditional leaders therefore often see themselves as authorities on the issues of development and regard local government as closest to the people. Therefore they see themselves as most capable to negotiate development via elected government representatives who are accountable to the people. What complicates matters further is that traditional leaders do not only fulfil cultural and customary roles but before 1994 they had substantial local government power given to them by the Apartheid Government. This situation mostly prevails in rural areas.

5.4 The role of traditional leaders in creating sustainable livelihoods and reducing poverty in South Africa.

Rural poverty and underdevelopment are strongly linked to the policies of the colonial and apartheid governments, which alienated black people from their land, first by forcing them to work and live on the farms as tenants and then (under apartheid) relocating them forcefully to the Bantustans, subsequently referred to as homelands. Black commercial farming was systematically destroyed through legislation, dating as far back as the Natives Land Act of 1913 (Act 27 of 1913) (subsequently renamed Bantu Land Act of 1913 and Black Land Act of 1913 which restricted black peoples’ access to land, and the amount of land they could till. For the majority of homeland dwellers, profitable farming was impossible as forced removals of black people from urban areas zoned for Whites only (so-called black spot in a white area), and from white farms in the 1970s led to overcrowding, landlessness and environmental degradation. Discriminatory practices in the provision of government subsidies, taxation, extension services and rural infrastructure development restricted black peoples’ access to land, capital and
markets. The consequences of discriminatory rural development policies and the legislative construction of a dualistic agricultural system in South Africa were concentrated poverty in rural areas, particularly former homelands. These factors influenced the comparative advantage between the rural and urban areas, influencing individual decisions about whether or not to move from one location to another. To exacerbate the situation, the establishment of Border Industries from the mid-1960s to the 1970s, which served as labour buffer zones between the urban and rural areas, resulted in rural communities abandoning their lands in search of remunerative work at the adjacent factories and firms. Be that as it may, South Africa’s policy towards rural development and rural poverty alleviation has undergone significant transformation between the first and second terms of the ANC-led government. The first phase extends from the adoption of the White Paper on the Reconstruction and Development Programme (RDP) of 1994 as the election manifesto of the ANC during the 1994 general election, which is a sequel of the Freedom Charter adopted at the Congress of the People at Kliptown, Johannesburg, on June 26, 1955 to subsequently becoming the policy of the ANC-led government. This phase focused on land restitution, land redistribution and accentuated infrastructure provision as the central pillars of rural development policy. The second phase was triggered by the transition from the RDP policy to the Growth, Employment and Redistribution (GEAR) strategy in 1996, which reduced the amount of resources available for large-scale land redistribution and for national government departments to provide funding for major infrastructure programmes. The policy approach outlined by the Rural Development Framework (RDF) began to shift the burden of responsibility from the national focus to the local economy by advocating an enhanced role for rural local economic development, provision of local infrastructure and services, as well as for rural local government as the principal facilitator of rural development.

As previously noted, “unlike the urban areas, rural local government and its concomitant problems in rural areas has not enjoyed substantial consideration until recent times. Though the RDP made repeated reference to the need for a special focus on developing rural areas, very little has emerged. The 1995 National Rural Development Strategy (NRDS) integrated some institutional aspects of the emerging local government framework with the objectives of the RDP, but was criticized for its
failure to address adequately the potential of the rural economy and for ignoring issues of local governance, including traditional leadership. The government was to publish a White Paper on Rural Development on the basis of public comments on the NRDS, but this never happened. In 1997 the government attempted to address the criticism of the NRDS by producing the revised Rural Development Framework (RDF). The approach advocated by the RDF places an increased emphasis on the role of rural municipalities in creating sustainable livelihoods and reducing poverty in South Africa. The Ministry without Portfolio, which was responsible for driving the RDP process was phased out, and with its closure the RDF was shelved shortly after it was released" (Mbeki 1996: 56). In 1999, newly elected President Thabo Mbeki announced the government's intention to design a new rural development programme, saying: "The rural areas of our country represent the worst concentrations of poverty. No progress can be made towards a life of human dignity for our people as a whole unless we ensure the development of these areas" (Mbeki 1996: 56).

This was partly in response to the push by the rural communities via the Rural Development Initiative (RDI), a coalition of rural NGOs, community representatives and trade unions - to place rural issues on the negotiation agenda before the second democratic elections in 1999. "The launch of the new rural development strategy places rural development and poverty alleviation at the forefront of the government's agenda and is a further confirmation of a shift in South Africa's rural development policy. The government's Rural Development Strategy of the Government of National Unity of 1995 was criticized for its failure to adequately address the potential of the rural economy, and for ignoring issues of local governance, including traditional leadership. In 1997 the government began to address these deficiencies and published the revised Rural Development Framework of 1997 marking a shift in the focus of rural development strategy to incorporate issues of local governance (and in particular the role of rural municipalities in service delivery) and sustainable livelihood" (Ellis 1998). The sustainable livelihood (or livelihood diversification) approach to rural development, according to Ellis, “focuses on the ways in which individuals, families and communities “construct a diverse portfolio of activities and social support in their struggle for survival and in order to improve their standards of living” (Ellis 1998). The Sustainable Rural Livelihood (SRL) approach moves away
from a compartmentalized approach to rural development, attempting to develop a holistic assessment of how rural communities draw together resources from disparate sources to assemble their livelihoods. This is a significant shift, and has important ramifications for communities, institutions and organizations that occupy the rural domain. The approach advocated by the Rural Development Framework (RDF) places increased emphasis on the role of rural municipalities in creating sustainable livelihoods and reducing poverty in South Africa - a role they are currently ill-equipped to perform”.

The Integrated Sustainable Rural Development Strategy (ISRDS) of 2000 “emerged from this initiative. The ISRDS identifies local government structures, specifically district municipalities, as major role-players in managing and integrating rural development programmes at a local level, to ensure that they respond appropriately to local needs. Whilst acknowledging the capacity constraints of local government structures, the ISRDS sees this sphere as vital to the successful implementation of rural development programmes and clearly states that the reform of municipal government places organs of local government in a central role in integrating programmes to achieve synergistic rural development. Many will need assistance and guidance to develop capacity, but their role and responsibilities are clearly established. They are required to clearly identify local development needs and opportunities, and to plan to respond to these. They must align their budgets to achieve their planned objectives” (Lutabingwa, Sabela abd Mbatha 2003). The primary locus of integration is at the municipal level through the IDP process... “Technical and management assistance will be provided through the IDP and ISRDS structures. The objective will be to bolster and develop local capacity” (Ngubane 2003).

“The ISRDS can be considered to have the potential to be the most powerful single innovation to realize the vision of developmental local government by linking local development needs as expressed in the IDPs produced by municipalities with the active participation of communities and the resource allocation flows from the national and provincial spheres of government. Chapter 7 of the Constitution of the Republic of South Africa of 1996 spells out local government in a democratic South Africa in detail. The White Paper on Local Government of 1998 stipulates that Local
Government must be developmental, defining developmental Local Government as Local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives. In the past, local government served as an agent of the provincial administrations and was mainly concerned with providing services to the white communities. Now local government must ensure that all communities have access to basic services; that everyone can participate in decision making and planning; that the local economy grows; that job opportunities increase; and that local resources are utilized wisely to improve the quality of life of all the people” (Ngubane 2003).

The White Paper on Traditional Leadership and Governance of 2003 focused on the relationships between local government and traditional authorities. It proposed a co-operative relationship between municipalities and traditional leadership. According to the White Paper traditional leaders will have representation on local and district councils, to advise local government on the needs and aspirations of their constituencies. However these proposals meant that the role of the traditional leader is still different from that of councillors who can cast a vote while traditional leaders can only participate in the discussions and deliberations, serving as ex officio members of the council (Section 182 of interim Constitution).

5.5 Co-operative governance

In any social interaction of people where there is need for development and effective service delivery there is similarly need for good governance embracing a good spirit of co-operation, sharing and reliable partnerships. Organizations and institutions of the social system are obliged to adhere to the principles of good governance being promoted by the World Bank (WB), United Nations Development Program (UNDP) and International Monetary Fund (IMF) cited in Jarbandhan (2007: 181), some of which are: participation; accountability; transparency [the cornerstone of accountability]; effective management; fiscal discipline; and being efficient and responsive to public needs, if they wish to realize their good intentions. So does the institution of traditional leadership which carries the responsibility of taking care of the needs of its constituents.
Chapter 3 of the Constitution provides the basis for all organizations and institutions of society, both governmental and non-governmental, to co-operate in their endeavours towards development and delivery of services. Section 40(1) draws the bounds within which co-operative government is enshrined. It states clearly that: “In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.” A reference to the three spheres of government immediately brings to the fore the need for co-operation between and among these spheres. Distinctive: A sphere which is clearly separate and unique in its own right. Interdependent: An entity which cannot survive on its own away from the others. Interrelated: It shares a lot of common characteristics with other elements of the social system (cf. Venter and Landsberg (2006:123). Traditional leadership as a member organic structure of the bigger social system needs to retain its distinctiveness, rely on other elements of the social milieu, and share a meaningful relationship with them. The Preamble of the Traditional Leadership and Governance Framework Amendment Act of 2009 (Act 23 of 2009) adds a voice on the subject by emphasizing that the institution of traditional leaders must promote the principles of co-operative governance in its interaction with all spheres of government and organs of state. However, of the six provincial Houses, only Eastern Cape and Limpopo provincial constitutions contain a section on co-operative governance. The rest seem to rely on one of the general functions of traditional councils which stipulate that a traditional council must promote the principles of co-operative governance.

5.5.1 Principles of co-operative government and intergovernmental relations

Section 41(1) of the Constitution enumerates the principles which should guide the three spheres of government towards better co-operation and relationships. It states that “all spheres of government and all organs of state within each sphere must:

- preserve the peace, national unity and the indivisibility of the Republic;
- secure the well-being of the people of the Republic;
- provide effective, transparent, accountable and coherent government for the Republic as a whole;
be loyal to the Constitution, the Republic and its people;

- respect the constitutional status, institutions, powers and functions of government in the other spheres;

- not assume any power or function except those conferred on them in terms of the Constitution;

- exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and

- co-operate with one another in mutual trust and good faith by: assisting and supporting one another; informing one another of, and consulting one another on, matters of common interest; coordinating their actions and legislation with one another; adhering to agreed procedures; and avoiding legal proceedings against one another”.

Section 24(1) of the Local Government: Municipal Systems Act 2000 (Act 32 of 2000) provides that the “planning undertaken by a municipality must be aligned, and complement, the development plans and strategies of other affected municipalities and other organs of state so as to give effect to the principles of co-operative government contained in Section 41 of the Constitution”. It may be assumed here that while the institution of traditional leadership is not a direct organ of state, it is nonetheless an important participant in the affairs of government by virtue of the big constituent it represent in rural areas. So when municipalities do their planning, these plans should take cognizance of the traditional leaders and consult them where necessary, to avert any possible tensions and resistance from them against Local Government initiatives.

5.5.2 Traditional leadership and cooperative governance

Municipalities and traditional leadership in most rural areas share a common geographical space, communities, infrastructure, services and amenities. The two institutions are subject to the Constitution and laws of South Africa. It is precisely for this reason that they have to find common ground, rather than cling to differences, in order to better the lives of poverty stricken rural communities. They have to
cooperate and pull together scarce resources to achieve meaningful development and effective service delivery. They have to engender *esprit de corps* which incorporates some of the much acclaimed values and principles like consultation, mutual respect, transparency and accountability which are some of the essential recipes of good governance in any given society.

Municipalities and traditional leadership can work together in many ways to cause development and service delivery to take place. In terms of the law traditional leaders have a role to play and functions to perform, and while a municipality carries the same responsibilities; it has an added obligation of the power to govern as mandated by the Constitution and law. Section 156(1) accords a municipality “executive authority and the right to administer the local government matters and …any other matter assigned to it by national or provincial legislation”. And the Draft Discussion Document towards a White Paper on Traditional Leadership and Institutions (2000:24) state clearly that “Where the Constitution allocates a function to a sphere of government, that sphere has jurisdiction over that matter and cannot share the responsibility with traditional leadership; [but] on matters of common interest …cooperative relations can be established.” It may be hard for traditional leaders to accept this state of affairs but in terms of the law this is the *status quo* as it stands at present”. Section 19 of the Local Government: Municipal Structures Act of 1998 (Act 117 of 1998) provides that “a traditional leader performs the functions provided for in terms of customary law and customs of the traditional community concerned, and in applicable legislation”, while Section 4(1) (h) of the same Act describes one of the functions of traditional councils as “promoting the ideals of co-operative governance, integrated development planning, sustainable development and service delivery.” Some of the ways that municipalities and traditional leaders can cooperate include, as stated in the provincial Acts of other provinces:

- “submitting written proposals of by-laws to the municipality on issues they identify as important and the municipality is obliged to consider the proposal within three months, and if the municipal council decides to reject the proposal it must consult with the traditional council before effecting the rejection;
• entering into service level agreements with the relevant municipality in accordance with any applicable legislation” (Section 10 of the Limpopo Traditional Leadership and Institutions Act of 2005 in Holomisa 2009:78); and
• “entering into partnership agreements based on the principles of mutual respect and recognition of the status and role of respective parties to facilitate performance of their functions according to the principles of co-operative governance” (Section 15 of the Eastern Cape Traditional Leadership and Governance Act of 2005 in Holomisa 2009:89).

5.5.3 Co-operation between spheres of government and traditional leadership

In South Africa government is constituted in three spheres namely: National, Provincial and Local. In tandem to these spheres, the institution of traditional leadership consists of three houses namely: National House, Provincial Houses and Local Houses of traditional leadership.

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<th>Government Spheres</th>
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<td>National Sphere</td>
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<td>Provincial Sphere</td>
<td>Provincial Houses</td>
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<td>Local Sphere</td>
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This relationship does not necessarily imply that each sphere of government works exclusively with the corresponding House, but to a great extent, in practice, that is how the co-operative relationship manifests itself. The relationships and co-operation may be vertical signifying authority and power relations; horizontal to indicate peer relationships; and diagonal to signify synergistic relations. Just as the national sphere of government relates directly and indirectly with the other spheres, so is the relationship between and among the houses of traditional leadership. The Draft Discussion Document towards a White Paper on Traditional Leadership and Institutions (2000:40) gives very useful information on how the spheres of government co-operate with the institution of traditional leaders. In reference to co-operative government, Pravin Gordhan in 1998 (in Traditional leaders 2011) says “co-operation does not mean the absence of competition [or] disagreement, [it
means] generating a culture of co-operative competition, where we compete to do better than others but we do not compete in order to destroy each other."

5.5.3.1 Co-operative governance at national level

The Department of Provincial and Local Government (DPLG), now Department of Co-operative Governance and Traditional Affairs (CoGTA), administers the affairs of traditional leadership. The Minister and Members of the Executive Council (MECs) responsible for traditional affairs otherwise known as MINMEC cluster, organise meetings through the Department. The department takes the lead in formulating national policy and legislation and facilitates co-operation with the provincial directorates to implement policy and render advice on administrative matters. A MINMEC technical committee comprising national and provincial officials has been established. Other national departments like the Departments of Justice and of Land Affairs administer all legislation impacting on traditional institutions. Various structures have been established at national level to liaise traditional leaders with other government institutions. This co-operation resulted in high-level involvement of traditional leaders in the establishment of the National House of Traditional Leaders (NHTL). The NHTL has made many representations to Parliament, portfolio committees and statutory bodies like the Law Commission on matters of interest to traditional leadership. The National House has held regular meetings and briefings with government departments. The National House also gets invited to participate in conferences, to meet with the President, Deputy President and/or Cabinet. Organisations like CONTRALESA also meet with government to voice opinions and give advice.

5.5.3.2 Co-operative governance at provincial level

The establishment of the provincial houses of traditional leadership was done in close collaboration with traditional leaders. The co-operation with government differs from province to province due to prevailing peculiarities in individual provinces. In KwaZulu-Natal the provincial legislature tends to refer some bills to the Provincial House of Traditional Leaders for inputs while in the Eastern Cape the Provincial House of Traditional Leaders advises the provincial legislature and ensure that its
meetings coincide with those of the provincial parliament. The Premiers and relevant MECs meet regularly to discuss issues of mutual concern or use informal committees comprising members of the Provincial House and the Executive Council. The provinces administer the affairs of traditional leaders, appoint, remove them from office, and allocate funds using provincial directorates created for this purpose. The provincial houses interrelate with the provincial administrations on matters of common interest. The provincial administration is obliged to follow customary practices and seek the advice of the provincial House before the Premier or any other competent functionary can appoint any traditional leaders.

5.5.3.3 Co-operative governance at local level

The Constitution in Section 212(1) directs that national legislation be “provided for a role for traditional leadership as an institution at local level on matters affecting local communities”. The White Paper on Local Government (1998:97) also proposes a co-operative model for rural governance wherein traditional leaders have representation and a role to play while the Framework Act has “opened a window of opportunity for traditional councils and municipalities to work together in the spirit of co-operative governance”. The proposed model must ensure co-operation, communication, consultation between local government and traditional leaders and institutions, and most importantly, compliance with the Constitution. The model proposes elected local government in all the areas falling under traditional authorities. With this model, traditional leaders, being closest to rural communities, are obligated by law to work closely with Category B municipalities. They have to attend and take part in meetings of the Council and advise it on the needs and interests of their communities. In this way traditional leaders will enjoy representation on these Councils but it is not clear whether they will exercise any voting rights as well. They can also discuss issues concerning the development of their areas with other spheres of government. Provincial government and legislatures can also determine additional functions for them as provided for in the in this model, and determine the precise circumstances in which the model would apply. District and local municipal Councils must inform and consult traditional leaders about projects taking place in their areas of jurisdiction, and the Demarcation Board should consider boundaries of traditional authorities when demarcating new municipal jurisdictions.
5.5.4 Shared governance and partnerships

Shared governance is another way of pulling together the scarce human, material and economic resources to cause development to take place. Traditional leaders are part of a conglomerate of stakeholders with a keen interest in the general welfare of society. Of all the participants in rural development, local government and traditional leaders are key actors because they are responsible for creating an enabling environment which levels the playing field for all other actors to participate meaningfully in community development. According to the Department of Constitutional Development (1999:50):

“In some rural areas, citizens can participate in the proceedings of the council through traditional authorities. Those traditional leaders identified by the MEC can attend and participate in any meeting of the council. A good and constructive relationship or partnership between the municipality and traditional authorities will help to ensure that people’s needs are effectively conveyed.”

Shared governance between local government through municipalities and traditional institutions through traditional leaders, holds potential for a feasible partnership for development of rural communities. Lutabingwa et al. (2003:101) conclude their argument and deliberations on shared governance thus: “Shared governance is critical if local government and traditional leaders are going to deliver quality services to the rural communities where traditional leaders have a strong presence.” According to Mzimela (2003;1), there are more than 400 traditional communities in South Africa which are governed by traditional leaders. The population in these communities number about 14 million people (White Paper on Traditional Leadership and Governance 2003). With this size of the population there is no way that government can ignore, ostracise or marginalise their leadership. Governance has to, one way or the other, be shared to bring about ‘a better life for all’.

Shared governance implies partnership and, a good partnership is one in which participants or stakeholders enjoy equal status or equity. No partner should be at the mercy of the other. Mzimela (2003:2) describes it in this way: “Traditional leaders … are well positioned and closest to their communities. Therefore, it would be advisable
and imperative to involve them as equal partners and play a central role in both the formulation and implementation of ideas and programs aimed at developing and promoting better life for the communities.” On January 12, 2003 the Bafokeng signed the first formal agreement between a community with traditional leadership in the North West Province and the local municipal government to co-operate on development initiatives (Molotlegi 2003:32).

5.6 Challenges confronting co-operation, sharing and partnerships

The challenges of co-operation, sharing and partnerships are many and varied. Chief among them (challenges) are the peculiarities reigning supreme in the different provinces which serve as a prelude cascading to municipalities and areas under the jurisdiction of traditional leadership. Some of the challenges are:

- “endless turf-wars between elected representatives and hereditary rulers on issues like: who has the right to consult the community on development; who has the right to convene community meetings; who should manage the development funds; and who shoulders the responsibility to ensure that the desired development takes place?
- lack of capacity among many traditional leaders and councillors;
- poor or no management skills of people, finances and resources;
- inability to speak, read and/or write English which is the primary language of communication in most cases; and
- the changed mandate of traditional leaders due to developmental functions requiring new capabilities, attitudes and approaches from traditional leaders as well as councillors” (Lutabingwa et al. 2003:12).

To “give effect to the new local government system, a range of policies and new legislation has been formulated and promulgated beginning with the White Paper on Local Government issued in March 1998. The 1998 White Paper establishes the basis for a local government system geared towards development by putting forward a vision of the developmental local government, centred on working with local communities to find sustainable ways to meet their needs and improve the quality of
their lives. By implication, the demand for developmental local government also applies to the institution of traditional leaders, which Mike Mabuyakhulu – KwaZulu-Natal MEC for traditional affairs - refers to as “… a role as ambassadors of the people because at times they are responsible for inviting investors into their communities” (Sowetan 26-10-2007). The White Paper on Local Government of 1998 (1998:18) identifies the following “four inter-related characteristics of local government geared towards development:

- exercising municipal powers and functions in a manner which maximizes their impact on social development and economic growth;
- playing an integrating and co-coordinating role to ensure alignment between public and private investment within the municipal area;
- democratising development, empowering the poor, and redistributing income and opportunities in favour of the poor; and
- building social conditions favourable for development”.

Furthermore, local government is urged to focus on development outcomes, such as:

- “the provision of household and infrastructure services;
- the creation of liveable, integrated cities, towns, and rural areas;
- the promotion of local economic development; and

Following the “adoption of the White Paper, a series of bills and acts was formulated and passed to give effect to the provisions of the White Paper and provide a legislative framework for developmental local government. Some of these are: The Municipal Structures Act of 1998; the Municipal Demarcations Act of 1998; the Municipal Systems Act of 2000; and the Municipal Financial Management Bill of 2000 (PMFB). They form the foundation of the future local government system. Taken together, these pieces of legislation establish municipal types and their governance structure; pronounce the powers and functions of local government; provide for the rationalization of local government through the demarcation process;
and restructure local government systems, procedures and processes. The Structures Act gives weight to the categories of municipalities identified in the Constitution (Section 155 (1), namely a:

- **Category A**: metropolitan municipality.
- **Category B**: local municipality.
- **Category C**: district municipality.

The Structures Act also defines the different types of municipality that can be established within each category (Section 155 (2) and the functions and powers between the categories of municipalities. Part 6 of Chapter 4 on Internal Structures and Functionaries (section 81) provides for the participation of traditional leaders as well as the identification of traditional leaders for purposes of section 81 in Schedule 6 of the act. The act further regulates matters connected with local government and its internal systems and structures, including electoral systems”.

The Demarcation Act makes provision for the “re-demarcation of municipal boundaries and establishes a Municipal Demarcation Board (MDB) tasked with demarcating municipal boundaries in accordance with a set of factors listed in the act. The MDB also determines the ward boundaries within each of the municipalities. Following the demarcation process in terms of the Demarcation Act in 2000, South Africa's 843 municipalities were reduced to 284. The Systems Act focuses on the internal administration of a municipality. It uses a municipality's Integrated Development Plan (IDP) as a point of departure for managing and evaluating performance, allocating resources, and organizational change. At the same time, it aims at promoting synergy between the local, provincial, and national spheres of government and their inter-governmental functions and relationships. Essentially, an IDP sets out the vision, needs, goals and strategies of a Municipal Council to develop the municipality during its term of office, as part of a long-term vision and plan for development. Community participation in governance is a defining feature of the new system of local government. In terms of the Systems Act, community participation in both the content of the IDP and the process by which it is drafted is compulsory. Section (15) stipulates the application of the Code of Conduct to
traditional leaders which is similarly applicable to municipal councillors, while section (3) of Schedule 3 amends subsection (5) of section 81 on participation of traditional leaders”.

The above legislative and policy framework “strongly suggests that a rational and coherent system is being created on paper. The crucial question that stands out is what prospects do the above legislative and policy reforms offer for developmental local government to take root and flourish in rural municipalities” (Lutabingwa et al. 2003:102) and where do traditional leaders fit in.

5.7 Conclusion

This chapter attempted to provide an overview of the role and functions of traditional leaders in the different spheres of government. It became clear that traditional leaders had an important role to play and could together with traditional councils and municipalities work together to improve service delivery. Government recently began to acknowledge this, especially in the light of its failure to address the problem of poverty among the rural poor. However, given the troubled history of traditional leadership in South Africa, incorporating traditional leaders into government structures proves to be difficult.

In the next chapter a more holistic picture of traditional leadership and shared governance will be presented and recommendations will be made.
CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

This dissertation dealt with the variables influencing concepts of traditional leadership and local governance in the South African context. The motivation for this dissertation lies in the fact that traditional leaders have a role to play in governance. With the advent of colonialism, the leadership authority of traditional leaders changed, “traditional leaders became the agents of the colonial governments” (Rugege 2003:172). “Nationalist and liberation movements that fought for independence regarded traditional leaders (or chiefs, as they were renamed by colonialists) as collaborators in colonial oppression and at independence they were marginalised in most countries in Africa” (Rugege 2003:173).

The establishment of a democratic South African Government “brought the issue of traditional leaders, their history and roles in the new South Africa, under the spotlight. In 1994, South Africa entered a new constitutional dispensation based on democracy, equality, fundamental rights, the promotion of national unity and reconciliation that would considerably affect the rule of traditional leaders. According to the new constitutional dispensation traditional leaders are obliged to ensure full compliance with the core constitutional principles namely that of human dignity, equality, non-sexism, human rights and freedom. This means that the system of traditional rule is now influenced and qualified by the Constitution” (UJ Internal Handbook 2010; cf. Constitution of the Republic of South Africa 1996).

What made South Africa unique was that after 1994 traditional leaders, both chiefs and headmen still had the authority bestowed upon them under the former colonial and Apartheid periods in terms of existing legislation. The most Important in this regard are the Black Administration Act of 1927 (Act 38 of 1927) and the Black Authorities Act of 1951 (Act 68 of 1951). The problem was that under the Constitution, “such powers and functions are the responsibility of the national and provincial governments and may only be assigned to municipalities under section...
156 of the Constitution”. Traditional leaders regarded these functions as part of their traditional obligations and were therefore adamant to fulfil them. The Constitution did not make provision for shared governance. Although the “institution, status and role of traditional leadership according to indigenous law were recognised and protected by the Constitution the roles and functions of traditional leaders were not clearly defined. Traditional leaders were so to speak left in the dark about their power and future role. After more than a decade of democratic government neither the place nor the role of traditional leaders in South Africa’s democratic political system have been clearly defined” (UJ Internal Handbook 2010:89).

Although the role of the traditional leader has become more clear through recent legislation especially the National Traditional Leadership and Governance Framework Act (Act 41 of 2003) the last word on the participation of traditional leaders in local government has not been said. At the heart of this conflict lies the fact that the provisions made and the functions and duties of traditional leaders overlap with those of elected local government officials (cf. Sithole and Mbele 2008: 44). Giving traditional leaders a role with regard to functions already allocated to elected local government is just not possible unless the two parties start to work together in the search for a solution. This situation brings serious “challenges for the post-apartheid government with regards to the role of traditional leaders. As a result traditional leadership has been debated extensively” (Sithole and Mbele 2008:18).

The National Traditional Leadership and Governance Framework Act of 2003 (Act 41 of 2003), “shows that government is seriously considering an integration of traditional leadership within the South African system of governance”. This Act makes provision to phase in traditional leaders as part of local government by recognizing traditional “leadership, traditional institutions and communities, through the “establishment and recognition of traditional councils, providing guidelines for the operation of traditional institutions, clarifying the roles and functions of traditional leaders and other related matters, as well as laying out the codes of conduct for officials of traditional leadership institutions. All decisions taken regarding the role of traditional leaders in government now have to comply with the provisions of this act” (cf. Khunou 2009: 114).
Government is therefore finally agreeing that traditional leaders have a role to play and should be a partner in service delivery on a local government level. However the question is what role is needed to best serve the more than twenty eight million people in South Africa living as members of traditional communities. One thing is clear “(t)here should be an effective way for them to express their views and to uphold their traditions and customs and also to ensure that they are not left behind in the development of the country ” (Du Plessis and Scheepers 1999: 22).

6.2 Synthesis of the study

Chapter one provided a background and rationale for the study and contextualised the problem and significance of the study. The study aimed to answer specific research questions (see section 1.3).

To answer the above questions three key areas were addressed namely:

- The historical background of traditional leadership
- The African tribal government system
- The role and functions of traditional leaders

Chapter two presented a historical viewpoint of traditional leadership in South Africa. Like other African States traditional leadership is an institution that has developed over many decades in South Africa. Traditional Leadership is indigenous to South Africa and the rest of Africa. But unlike the rest of Africa through the enactment of Apartheid laws traditional leaders gained specific legal powers which they are not willing to surrender to a democratic government. The main reason for this being their belief that traditional leaders have an important role to play in helping the Government and more specifically local government to in general improve their services and more specifically to address the plight of the poor in rural areas. Traditional leaders therefore tend to see themselves as authorities on the issues of development and the distribution of land. However, because traditional leaders operated under the Apartheid laws the newly elected democratic government at its best tended to see traditional leaders as an outdated institution belonging to a
previous feudal era that needed to be replaced by democratic structures and at its worst as traitors who played in the hands of the Apartheid regime. What complicates matters further is that traditional leaders do not only fulfil cultural and customary roles but before 1994 they had substantial local government power given to them by the Apartheid government. Ironically it was the legal powers given to them by the Apartheid government that put the democratically elected Government in a ‘catch twenty two’ situation. After 1994 traditional leaders, both chiefs and headmen, still had the powers and functions awarded to them under colonialism and Apartheid in terms of the prevailing legislation. The most important in this regard are the Black Administration Act and the Black Authorities Act. The problem was that under the Constitution, such powers and functions are “the responsibility of the national and provincial governments and may only be assigned to municipalities under section 156 of the Constitution”.

Traditional leaders regarded these functions as part of their traditional obligations and were therefore adamant to fulfil them. The Constitution did not make provision for shared governance. Although the “institution, status and role of traditional leadership according to indigenous law were recognised and protected by the Constitution the roles and functions of traditional leaders were not clearly defined” (UJ Internal Handbook 2010:90).

A serious discrepancy resulted regarding the role of traditional leaders in government and for more than a decade their role was not clearly spelt out. In fact giving traditional leaders a role with regard to functions already allocated to elected local government would require amendment of the Constitution. This situation brings “many challenges for the post-apartheid government with regards to the role of traditional leaders. As a result traditional leadership has been debated quite extensively” (UJ Internal Handbook 2010:90).

However, despite all the discrepancies, the Government is finally agreeing that traditional leaders have an important role to fulfil and should be a partner in service delivery on a local government level provided that they are fully compliant with the core constitutional principles namely that of human dignity, equality, non-sexism, human rights and freedom. However the question is still what role is needed to best
serve the more than 28 million people in South Africa living as members of traditional communities.

**Chapter three** discussed the African tribal government system and related concepts. This discussion clearly shows that the term traditional leader is a multi-facetted concept. In an effort to improve the understanding of traditional leadership the philosophy of ‘ubuntu/botho’ (a way of life) and the general features and organisation of the symbiotic traditional tribal system were discussed.

**Chapter four** dealt with the statutory and regulating framework and mechanisms under which traditional leaders have to operate to meet the service needs of their people and to be part and parcel of rural development. To give effect to the new local government system, a range of policies and new legislation have been formulated and promulgated. Following the adoption of the White Paper on Local Government of 1998, a series of bills and acts were formulated and passed to give effect to the provisions of the White Paper and provide a legislative framework for developmental local government. Some of these are: The Local Government: Municipal Structures Act of 1998 (Act 117 of 1998); the Local Government: Municipal Demarcations Act of 1998 (Act 27 of 1998); the Local government: Municipal Systems Act of 2000 (Act 32 of 2000) and; the Municipal Financial Management Bill of 2000 which form the foundation of the future local government system.

**Chapter five** attempted to unravel the role and functions of traditional leaders in the different spheres of government. It was found that traditional leaders could help government to meet the standards set for service delivery, indigenous law and the distribution of land. By cooperating with traditional councils and municipalities they could play an important role especially on a local government level. Government recently began to acknowledge this, especially in the light of its failure to address the problem of poverty among rural people. However given the troubled history of traditional leadership in South Africa incorporating traditional leaders into government structures proves to be difficult. This situation has specific implications both for Government and the traditional leaders themselves.
6.3 Key implications and contributions

The concept ‘traditional leadership’ was extensively explored. In the study it was clear that this concept could be understood from many points of view. In order to gain a better understanding of the concept ‘traditional leadership’ it was necessary to gain a clear understanding of various concepts and to gain an in-depth understanding of the concept ‘African Tribal System’. Furthermore to come to an understanding of the issues surrounding traditional leaders and what the present perceptions of traditional leadership in South Africa entail the historical background and the changes brought about by the various governments throughout the years had to be investigated.

The many issues surrounding the roles of traditional leaders were further clarified by looking at the legal structure of traditional leadership and how it evolved throughout the years. It was clear that the understanding of ‘traditional leadership’ did not only depend on the clarity of meaning of the concept but also an in-depth understanding of the legal structure in South Africa and the impact it had on the roles of traditional leaders. It was argued that legislation and policy on traditional leadership and the House of Traditional Leaders impacted negatively on traditional leadership in South Africa. The unique situation of South Africa was pointed out where traditional leaders had certain powers given to them by the Apartheid Government. This meant that traditional leaders were in a position to bargain with the Government to keep and even extend their authority to act on the local government sphere. The difficulties involved in the integration of traditional leaders who were often seen as an obsolete institution in a democratic government setup, were discussed at length. Two viewpoints namely that of the traditionalists versus the modernists received specific attention.

It was clear that the way that traditional leadership is understood and interpreted by both the government and the traditional leaders themselves will have a definite impact on their role and their functions and how they fulfil this role. It is, therefore, of vital importance that both the government and the traditional leaders must have a clear understanding of what traditional leadership means and what the role of traditional leaders in a democratic society is. Furthermore, it was pointed out that
there should be a willingness to accommodate each other for the sake of improved service delivery to citizens when addressing the many complicated issues surrounding the integration of traditional leaders in a democratic government. This means that there should be a balance between preserving the need for traditional leaders on the one hand and entrenchment of democracy on the other (cf. Sowetan 08-11-2000).

Taking the concept of traditional leadership and related concepts as a point of departure an effort was made to develop a conceptual framework for a clear understanding of issues, concerns and challenges surrounding traditional leadership and the role of traditional leaders in a democratic government. In conceptualising traditional leadership the emphasis fell on the phenomenon as well as an exploration of the inputs that may impact positively as well as negatively on traditional leadership in South Africa. Specific research questions were asked to facilitate this (See Section 1.3).

To answer these questions regarding traditional leadership the study dealt with the problems of traditional leadership and the variables impacting on traditional leadership in an interactive government framework. Since South Africa has, because of our specific history and the power given to traditional leaders by the Apartheid regime, a somewhat unique situation the emphasis fell on the South African context. The general aim of the study was therefore to analyse the concept of traditional leadership as it is perceived in this country as well as to determine what role traditional leaders could play in our local, provincial and national government. More specifically:

- the question of how traditional leaders could help the government in their rural development efforts and the delivery of more effective services to rural people was highlighted;

- the essential aspects of traditional leadership was investigated and a description and explanation of the variables influencing the foundations,
meanings and understanding of the concepts related to traditional leadership were provided;

- the role of traditional leadership as a customary system in the new institutional system of democratic governance was looked at from various angles;

- the historical background and context of traditional leadership and how the role of traditional leaders in local governance evolved was investigated;

- the transformation of the traditional leadership system in-line with democratic principles was looked at;

- the development of legislation since the 1994 democratic dispensation and its impact on the institution of traditional leadership in South Africa was investigated;

- more specific rules, regulations, laws and legislation which govern and facilitate co-operation between government and traditional leaders were determined;

- an overview was presented of strategies to enhance cooperation between traditional leaders and government; and

- guidelines for cooperative governance were presented.

The justification of this partnership between government and traditional leaders lies in the realisation that today shared governance is of global importance. Today citizens increasingly demand participatory and democratic governance systems. They argue for improved management, better distribution of economic resources, stronger institutions and programmes to make governments more accountable to the public (cf. Policy framework for the Government-wide Monitoring and Evaluation Systems No date). Democratic governance demands the participation of citizens in government structures. The participatory theory of democracy assumes that people’s
participation fosters democracy. In line with resolutions taken by the World Summit
ordinary people are called upon to hold government accountable and to influence
governance and service delivery (Walker and Tompson 2008:3).

In recent years support for community development and participatory research has
been revived and people’s participation and empowerment has become a major
concern in development thinking. The importance of involving people in their own
development is driven by the Millennium Development Goals set for community and
societal development. The South African government and people pride themselves
in the belief that we are a participative democracy operating on the principles of

The White Paper of 1998 establishes the basis for a local government system
grounded towards development. It sets forward the idea of a developmental local
government cooperating with local communities to meet their needs and improve the
quality of their lives. One of the prerequisites for a developmental state depends on
the development of stronger and more effective linkages between the state and
civil society and thus between government and traditional leaders. The
rationale of this study is that a shared governance model is important if local
governments want to develop and deliver effective services to rural communities.
Rural development has been the primary focus area of government since 1994,
however to date not much has been achieved. The former legislation and policy on
traditional leadership and the House of Traditional Leaders was clearly not sufficient
to ensure development in the areas under traditional leadership. The capacity of
traditional leaders needs to be enhanced so that they can at least play an effective
role in Government’s Rural Development Strategy and the strengthening of
structures that deliver basic and essential services to grassroots communities.

By implication, the demand for developmental local government also applies to the
institution of traditional leaders. This is especially true on a local government level. It
stands to reason that traditional leaders should be part of local government, if
government wants to develop and deliver effective services to rural communities
where traditional leaders have a strong presence.
The champion negotiator in the process to clarify the role of traditional leaders is the Congress of Traditional Leaders of South Africa (CONTRALESA) “which claims to represent ninety per cent of the country’s traditional leaders. After more than a decade of democratic government neither the place nor the role of traditional leaders in South Africa’s democratic political system has been clearly defined” (Traditional leaders 2011).

The breakthrough “for the rights of traditional leaders came in the form of the Traditional Leadership and Governance Framework Act of 2003 (Act 41 of 2003) later amended as the Traditional Leadership and Governance Framework Amendment Act of 2009 (Act 23 of 2009) and the establishment of the Department of Traditional Affairs. It was noted that there were serious flaws identified with implementation of the Traditional Leadership and Governance Framework Act of 2003. It provided for the recognition of senior traditional leaders, headmen, and kings and queens, but did not officially recognize their jurisdiction over a community, which was a serious flaw needing to be corrected. It was proposed that the thirty-member limit on traditional councils must be relaxed, and the Minister would instead establish guidelines on appropriate membership” (Traditional leaders 2011).

This Act therefore recognises kingships or queenships and the withdrawal of such recognition only by the President and establishes and recognises principal traditional communities. The Act also further regulates “the establishment and recognition of traditional councils and principal traditional councils. It also establishes and recognises principal traditional councils and kingship and queenship councils; regulates the Traditional Leadership and Governance Framework Amendment Act of 2009 and regulates the election of members of local houses of traditional leaders; regulates the roles of traditional leaders and provides for the reconstitution and operation of the Commission on Traditional Leadership Disputes and Claims”.

The Traditional Leadership and Governance Framework Amendment Act of 2009 (Act 23 of 2009) more than ever shows that “government is seriously considering an integration of traditional leadership within the South African system of governance”. The main reason for this is its failure to adequately address the needs and the development potential of the rural communities. Government is therefore finally
agreeing that traditional leaders should be a partner in service delivery especially on a local government level. It is therefore essential that Traditional leaders and government find common ground and start working together for the betterment of rural communities. Recommendations will be made in this regard.

The literature reveal that the “notion of local developments as a model of democratic decentralization is intended to produce superior outcomes in promoting equity, improving the quality of citizenship and producing better outcomes of state action. At the core of this notion is the involvement of people not merely in making demands, but in playing an active part in decisions on how to improve their lives and their community. To produce the superior outcomes of reducing poverty, ensuring sustainable livelihoods and promoting social, economic, civic and political rights requires a number of changes in administrative structure, allocation of functions and powers and control over resources. In all these aspects the system of local government developing in rural areas is faced with a number of challenges. It is argued in this dissertation that the recognition of the 'institution of traditional leadership' was by and large influenced by political and reconciliation considerations, rather than by conditions on the ground. Organizationally thin on the rural ground, the ANC had hoped that progressive / comrade chiefs would embrace the ANC policies of democratising rural areas, and accept the non-political ceremonial role they were offering traditional authorities in the post-1994 democracy” (Mathibela 2004:87). “The traditional authorities, including those in CONTRALESA were united in rejecting this role. They want to constitute the primary structures of local government and land administration in rural areas. They argue that land be transferred to Tribal Authorities. Government's response to this opposition has been ambivalent, and this ambivalence about the role of traditional authorities in a democratic dispensation throws serious doubt on the prospects for development and democracy in rural areas” (Mathibela 2004:87).

One thing is clear, to be part of the South African government system, traditional leaders now have the difficult task to uphold their traditions and customs and at the same time ensure that their people are part of a democratic dispensation. Despite all the past differences between traditional leaders and government, Government now acknowledges that the institution of traditional leadership is central to the system of
governance in rural areas and aims to place this institution at the centre of rural development.

To achieve this it is essential to create an interactive government based on co-operative governance and a partnership between government and traditional leaders. This should be based on a clear and coherent, transparent and collaborative agenda that contributes to partnership building. This calls for a participatory action movement beyond the simple mapping of local knowledge and comparison of ideas, to ‘collegiate design’ or ‘dialogic research’, based on shared knowledge, and critical reflexive thinking between the two parties and all other stakeholders. Following from this the participatory action research design should allow space for the meaningful participation of traditional leaders and rural communities including marginalized groups, and it should take into account democratic principles, for example the right of participation of every citizen no matter his/her class, age, ethnicity or gender.

Government must deal with complicated social systems and the interaction of a wide variety of stakeholders with different value systems, cultures, and needs. This must be done in such a way that a partnership is built among traditional leaders and local government. Building a partnership between local government and civil society has become a key principle to achieve the goals set for a better life. These partnerships “therefore offers a vehicle for local authorities to ensure that communities have a genuine influence on decision making in a way that is constructive and in line with the local authorities goals, objectives and budgets” (Aimers 2000).

The South African government and people pride themselves in the belief that we are a participative democracy operating on the principles of government for the people by the people. If Hanberger’s (2006:17-22) democratic orientations can be taken as a point of departure then a participative democracy like South Africa mostly needs a participative evaluation methodology and participatory action research fostering empowerment and self-determination of citizens. In fact, in terms of sustainable public governance the importance of empowerment and self-determinism cannot be overstressed.
6.4 Findings of the study

Traditional leadership clearly means different things to different people and a clear understanding of this concept as well as related concepts is further complicated by the unique historical background of traditional leaders in South Africa. There is therefore a serious need to refocus the meaning of traditional leadership.

Currently it seems that the legal structure in which to operate as well as the willingness of Government to accommodate traditional leaders in a democratic dispensation is there. However, traditional leaders still need capacity to fulfil their roles. More specifically, this capacity refers to the institutional structure of the tribal authorities, training that would enable traditional leaders to fulfil their role more effectively and to participate in community development and financial support to be able to effectively accommodate the needs of their people. Without this support the institution of traditional leaders runs the risk to be seen as “toothless dogs” (cf. The Citizen 04/04/1995:8).

It was clear that in the light of participative, co-operative governance traditional leaders had an important role to fulfil. This was especially true for community development and the eradication of poverty in rural areas. Clearly the roles of traditional leaders of all spheres were not properly defined. The question was what this role will entail and how a more meaningful and dynamic relationship could be developed between the traditional leaders and municipal councillors. This is an issue that will be addressed further when recommendations are made.

Despite all the problems of the past, the Government had a clear intention to together with the traditional leaders unravel the role of traditional leaders on a national, provincial and local level. An example is the proposal from CONTRALESA to amalgamate the Traditional Leadership and Governance Framework Act of 2003 and the National House of Traditional Leaders Act of 2009 (Act 22 of 2009) in a bid to accommodate all outstanding matters including that of the Khoi-San.

It would be extremely difficult under present circumstances to develop a shared or co-operative governance system between traditional leaders and the South African
government. The fact remains that the practices of traditional leadership could in many ways be seen as contradictory to the practice of democracy. The fact remains that if this partnership could be effected Government would be able to provide more effective services and enhance the development especially of rural people. The conceptual framework for the understanding of ‘traditional leadership’ presented in this study needs to be developed further. It is necessary to develop a mutual understanding between government and traditional leaders regarding the concept ‘traditional leadership’ and related terms if the role of traditional leaders in Government is to be clarified. The Traditional Leadership and Governance Framework Amendment Act of 2009 (No 23 of 2009) goes a long way to achieve this.

Traditional leaders could play an important role to help address the current negative situation of public protests against poor services and bad public administration and to enhance public trust. This is especially true for the members of the presidential Imbizo, the forum aimed at enhancing dialogue and interaction between government and the people and promoting participation of the public in programmes to improve their lives.

6.5 Recommendations

- The meaning and substance of traditional leadership needs to be re-focused. There should be a single piece of legislation that will spell out who traditional leaders are, why their contribution is important at all levels of government but especially on the local government sphere and how such participation could be effected.

- The first step in incorporating traditional leaders in a democratic government is therefore to simplify law by combining the National House of Traditional Leaders Act of 2009 (Act 22 of 2009) and Traditional Leadership and Governance Framework of 2003 (Act 41 of 2003) into a single statute. To undertake a thorough audit of all other legislation relating to traditional legislation should ensure that there is an integrated approach
in dealing with all matters involving traditional affairs and that the Act actually empowered the NHTL. The consolidated Act would also address gaps and legal uncertainties identified in the two Acts. This consolidated Act should also include the recognition of the traditional Khoi-San communities.

- Collaboration between government and traditional leadership should be improved. Areas of collaboration include as noted before culture, customs, ethics, religion and values. Recommended interventions could include outreach programmes and a strategic Lekgotla involving traditional leaders and government on a local level.

- Collaboration between chiefs and their people and the gap between traditional authorities and local authorities and the community should be addressed.

- The traditional practice enabling communities to dispose of an unpopular unrepresentative traditional leader should be revived.

- There is also a need to build an administrative structure for tribal authorities as many provincial houses of traditional leaders do not have sufficient offices or financial assistance. Government has to make provision for elected members of traditional councils because in the current situation traditional councils mostly rely on their own resources to deliver services and to develop rural communities.

- It is important to match the duties of the tribal authorities with the available institutional structure and finances.

- The merit of the NHTL’s request for a chamber in Parliament should be investigated.
• The traditional leaders should be consulted at the local government sphere when municipalities draft their Integrated Development Plans (IDPs). Traditional leaders are occasionally invited to ceremonial functions only after IDPs are completed.

• The traditional functions of traditional leaders related to the allocation of land and indigenous law need to be clarified and if it is for the common good, re-instated.

• The issue of only thirty-members on traditional councils should be revised. The Minister should determine guidelines on how many members should be adequate for the traditional councils.

• The capabilities of traditional leaders to fulfil their roles should be enhanced. Training should be given within a community development approach and in collaboration with researchers. This training will enable them to assist local councils in implementing the new rural development strategy that places rural development and poverty alleviation at the forefront of the government's agenda.

• The partnerships among traditional leaders and local government should be strengthened on a sustained basis by promoting cooperative dialogue and joint operations in order to share the benefits. The partners should be committed to the joint decisions taken and the strategy to implement these decisions. The strategy for action/change should be clearly defined in terms of expected material results and increased social capital (empowerment). The participatory process should be well documented in a research journal or diary. The analysis of results and authorship of published materials must be shared between the different partners (cf. Pound, Snapp, Vernooy, McDougall and Braun 2002).

• The starting point of the partnership between government and traditional leaders should be the mobilisation of internal group resources such as
values, culture, skills, knowledge and experiences. This includes local knowledge and recognition of roles, rights, relationships and associations that shape people’s involvement in their environment (Pound, Snapp, Vernooy, McDougall and Braun 2002). The government should therefore not only recognize the power of folk wisdom in the empowerment of people but should also show an appreciation and respect for the knowledge, capabilities and core values, and the forms of expression of traditional communities such as music, drama, sports, storytelling etc.

- A shift should take place from the dependency model within which government (from their superior knowledge perspective) do everything for communities, to the community empowerment model, within which communities do things for themselves. To help achieve this, traditional leaders should have easy access to information and a range of skills and opportunities to stimulate participation, self-awareness, self-respect, ownership, a sense of purpose and the development of a new way of thinking and behaving that would enhance their self-reliance.

- The environment in which the empowerment process takes place should be supportive and encourage both the traditional leader and the community members to deal with important issues (e.g. lack of clean water) to participate actively and to become involved in decision making. It is of vital importance that traditional leaders and local government officials should be involved in the entire process. Their participation will ease the way for community members to participate in and sustain the projects.

- Projects should be inclusive, based on inter-sectoral and multidisciplinary principles, e.g. the projects should involve all the appropriate government sectors on a national, provincial and local level, institutions in civil society (e.g. churches and schools), non-governmental organisations delivering social services, the business sector together with community members, and the different professions such as social workers, nurses, educators, etc.
The development process should be based on **interactive learning** and **feedback loops** and there should be a two-way sharing of information between researchers involved in the process, facilitators, co-learners and team builders, and all should constantly interact with research participants to discuss, reflect on and verify findings, rather than acting as experts in charge of a project. More specifically the participatory action research model should have regular monitoring events, involving all key stakeholders and the outcomes of monitoring activities should be translated into revised actions.
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For the convenience of the reader certain legislation is repeatedly itemised under different headings eg the legislation per se, Republic of South Africa ...and South Africa...


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