

## TRADITIONAL LEADERSHIP AND GOVERNANCE: LEGISLATIVE ENVIRONMENT AND POLICY DEVELOPMENT IN A DEMOCRATIC SOUTH AFRICA

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### 1. INTRODUCTION

The primary objective of this article is to discuss a plethora of legislation and government policies which impact directly or indirectly on the institution of traditional leadership in the new South Africa. In the first ten years of democracy, the post-apartheid Parliament of South Africa enacted groundbreaking legislation. The democratic government also developed the relevant policies intended to transform and democratise the institution of traditional leadership. The bulk of these pieces of legislation took cue from the provisions of the 1996 Constitution.<sup>1</sup> This article also gives an exposition of the historical background of the pre-colonial, colonial and apartheid periods, which had an impact on the institution of traditional leadership. The relevant pieces of legislation affecting the institution during the colonial and apartheid South Africa are also highlighted to demonstrate how they influenced and affected the institution of traditional leadership. The democratic government took legislative steps to ensure that democratic processes of governance increased participation and involvement of traditional leaders, women and their communities on matters of administration, particularly those closely related to traditional communities, traditions and customs.

### 2. HISTORICAL BACKGROUND

#### 2.1 PRE-COLONIAL PERIOD

In the pre-colonial era, traditional leaders<sup>2</sup> and traditional authorities were important institutions, which gave effect to traditional life and played an essential role in the day-to-day administration of their areas and lives of traditional people. The relationship between a traditional leader and community was very important. The normal functioning of the traditional community was the responsibility of the traditional authority. Pre-colonial traditional leadership was based on governance of the people where a traditional leader was accountable to his people.<sup>3</sup> During the pre-colonial era, the institution of traditional leadership was a political and administrative centre of governance for traditional communities. The institution operated and functioned according to applicable customs, traditions and customary laws. Customary law was regarded by the members of the traditional community as binding on both a traditional leader and the people alike. According to Khunou, the traditional authority was an institution functioning according to the traditions and customary law of a particular traditional community. It is within this context that a traditional authority was vested with the powers to enforce obedience of the traditional values and customs of a traditional community.<sup>4</sup>

As Dlamini observed, a traditional leader was the one who passed laws, judged with the consent of his traditional council and took action through the members of the traditional community.<sup>5</sup> This philosophic approach is confirmed in Tswana adage, which says *Kgosi ke kgosi ka Morafe*.<sup>6</sup> Freedom of speech was guaranteed in the general assembly. Usually members of the community were offered an opportunity to debate public issues without fear or under any duress. It was that freedom of speech, which formed a strong foundation of the customary constitutional democracy of the pre-colonial traditional communities.<sup>7</sup> Of primary importance is the fact that during the pre-colonial era, a living customary law<sup>8</sup> solely regulated the institution of traditional leadership.

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<sup>1</sup> Constitution of the Republic of South Africa Act 108 of 1996. Herein referred to as the “final” Constitution.

<sup>2</sup> The words “traditional leader” were used differently to refer to a leader of a traditional community. During both the colonial and apartheid era, a traditional leader was known as Chief, Kaptein, headman and traditional authority. A traditional leader was also known as African ruler, Native leader or Bantu leader. Usually the most senior head of a community is a traditional leader called the Kgosi, Inkosi, Hosi, Morena, Khosi etc, depending on the language spoken in a given area.

<sup>3</sup> Khunou SF “A Legal History of Traditional Leaders in South Africa, Botswana and Lesotho” (LLD-Thesis North-West University Potchefstroom Campus 2007) 2.

<sup>4</sup> Khunou SF “Reasoning the Constitutional Powers of the Traditional Authority: *Shilubana and Others v Nwamitwa and Others* 2008 (9) BCLR 914 (CC)” 2010 De Rebus 24.

<sup>5</sup> Dlamini AM “African Legal Philosophy: A Southern African View” Unpublished Paper Delivered to LLB students at University of Free State (1993) 7.

<sup>6</sup> Literally translated to mean that a traditional leader is a leader by virtue of the people.

<sup>7</sup> Khunou SF “A Legal History of Traditional Leaders in South Africa, Botswana and Lesotho” (LLD-Thesis North-West University Potchefstroom Campus 2007) 2.

<sup>8</sup> Customary law is a characteristic of traditional societies. Therefore, customary can be described as law that is based on tradition and customs, a body of unwritten doctrines that is generally accepted by members of the traditional community. Living customary law is

The powers, roles and functions of traditional leaders were defined in terms of customary law. With the advent of colonialism, the idea of statutory control and regulation of traditional leadership was introduced. This colonial model was foreign to the institution of traditional leadership and traditional communities.

## 2.2 COLONIAL PERIOD

Colonialism in South Africa had a long history, which had a profound influence on the institution of traditional leadership. The arrival and subsequent settlement of the Europeans in South Africa brought about changes to the institution of traditional leadership. Various laws were enacted to legalise encroachment and to deprive traditional communities of their land. These changes had a great impact on the systems of pre-colonial customary law, communal land tenure system and the institution of traditional leadership itself.<sup>9</sup> During this period, South Africa was divided into four provinces namely, Cape Colony, Natal, Transvaal and Orange Free State. Each province enacted various legislation dealing with the institution of traditional leadership. The Union government adopted a uniform approach to regulate the institution of traditional leadership. Subsequently, various pieces of legislation were passed by the Union Parliament, which had a profound influence on the institution of traditional leadership.<sup>10</sup>

In 1913, the Union Parliament enacted the Native Land Act<sup>11</sup> (later known as the Black Land Act). This Act had a profound effect and influence on communal land administered by the traditional leaders. In 1920, the Union government introduced a system of self-government to regulate the affairs of the traditional communities. This was achieved through the promulgation of the Native Affairs Act<sup>12</sup> (later known as the Black Affairs Act). In terms of this Act, those who were elected into the local councils were mainly traditional leaders and other members of the traditional communities. These councillors became accountable to the Union government and no longer to their people. This means that traditional leaders who were the councillors became agents of the Union government.<sup>13</sup> In 1927, the Native Administration Act<sup>14</sup> (later known as the Black Administration Act) was enacted as the national legislative measure to control traditional authorities and traditional courts.<sup>15</sup> The Black Administration Act was intended *inter alia* to provide for the recognition and application of customary law and to make provision for the regulation of the institution of traditional leadership. According to Bennett, the individual colonies produced curiously diverse traditional court structures and a degree of recognition of customary law and the institution of traditional leadership.<sup>16</sup>

The principal concern of the Union government was to improve uniformity in the application of customary law and the regulation of the institution of traditional leadership.<sup>17</sup> The provision of the Black Administration Act, which regulated the institution of traditional leadership, was laid down as follows:<sup>18</sup>

“The Governor-General (later the State President) may recognise or appoint any person of a native tribe and may make regulations prescribing duties, powers and privileges of chiefs so recognised and appointed ... The Governor-General may depose any chief so recognised or appointed ....”

The power to recognise, appoint and depose traditional leaders was placed in the hands of the Governor-General who was also made a supreme chief of all traditional leaders in the Union of South Africa.<sup>19</sup>

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primarily unwritten customs and traditions, which are observed by the members of the community when they deal with their daily affairs. On the other hand, there is official customary law. Official customary law is mainly written. This type of customary law is entailed in textbooks, statutes, government policies etc. See in this regard White CMN “African Customary Law: The Problem of Concept and Definition” 1965 JAL 86.

<sup>9</sup> Draft Toolkit on “Legislation Impacting on the Institution of Traditional Leadership in South Africa” issued by the Department of Co-operative Governance and Traditional Affairs (Pretoria 2009) 8.

<sup>10</sup> Draft Toolkit on “Legislation Impacting on the Institution of Traditional Leadership in South Africa” issued by the Department of Co-operative Governance and Traditional Affairs (Pretoria 2009) 8-9.

<sup>11</sup> Act 27 of 1913.

<sup>12</sup> Act 11 of 1920.

<sup>13</sup> Khunou SF “A Legal History of Traditional Leaders in South Africa, Botswana and Lesotho” (LLD-Thesis North-West University Potchefstroom Campus 2007) 105.

<sup>14</sup> Act 38 of 1927.

<sup>15</sup> Vorster LP “The Institution of Traditional Leadership” in Bekker JC et al (eds) Introduction to Legal Pluralism in South Africa Part 1 Customary Law (Lexis Nexis Butterworths South Africa 2002) 128. See also Bekker JC and Boonzaaier CC “Traditional Leadership and Governance” in Bekker JC et al (eds) Introduction to Legal Pluralism in South Africa (Lexis Nexis Butterworths Durban 2006) 120.

<sup>16</sup> Bennett TW “The Equality Clause and Customary Law” 1994 SAJHR 62.

<sup>17</sup> Khunou SF “A Legal History of Traditional Leaders in South Africa, Botswana and Lesotho” (LLD Thesis: North-West University Potchefstroom Campus 2007) 108.

<sup>18</sup> Section 2 (7) of Act 38 of 1927. In 1961, the State President of the Republic of South Africa assumed the position of the Governor-General. In terms of the 1993 and 1996 Constitutions, these powers have now been assigned to the Premiers of the provinces.

<sup>19</sup> Section 1 of Act 38 of 1927.

These limitations militated against the customary rules and procedures for the appointment and deposition of a traditional leader. The Black Administration Act greatly undermined and interfered with the institution of traditional leadership. A traditional leader who could not conform was summarily deposed or dismissed by the Governor-General.<sup>20</sup> In 1936, the Union Government also enacted the Native Trust and Land Act<sup>21</sup> (later known as the Black Trust and Land Act). As a result of this Act, the total African indigenous communities occupied 13% of land in South Africa. This land was registered in the name of the Minister of Native Affairs who held it in trust for and on behalf of the traditional communities.<sup>22</sup> The Union government believed that traditional leaders together with their traditional communities should have their own areas in the reserves.

Therefore, members of traditional communities were denied an opportunity to live in places of their own choice and were confined to the reserves. They were also denied an opportunity to live side by side with other population groups. The communal land administered by the traditional leader was limited to the barren reserves.<sup>23</sup> With the establishment of a single government for the whole of South Africa in 1910, the institution was not given a role at national and provincial levels. Rather it was used as a platform to divide and rule the African people. The new structures did not have, as their primary objective, the delivery of services to the people, but was intended to make people subservient to the successive colonial and later apartheid administrations.<sup>24</sup>

### 2.3 APARTHEID AND HOMELAND SYSTEM

In 1948, the National Party (NP) led government introduced the apartheid policy. Through this policy of apartheid, the traditional communities were further separated into ethnic groups. The idea of separate development was achieved *inter alia* through the promulgation of the Promotion of Black Self-Government Act<sup>25</sup> and the Black Authorities Act.<sup>26</sup> The objective of the Black Authorities Act was to establish the three tiers of administrative hierarchies in traditional communities namely: tribal authority, regional authority and territorial authority.<sup>27</sup> The Bantu Authorities Act significantly redefined the indigenous political institutions. Under this Act, tribal authorities were established in the African reserves, in line with the government's stated intention of preventing "squatting" and eliminating black land ownership in "white areas". Traditional leaders suffered a lot of hardship under the mantle of this Act. Those who were against government directives were simply removed from office and replaced with those who were willing to adhere to the new institutions. Others were marginalized while the collaborators whose their traditional status was dubious were favoured.<sup>28</sup>

The Bantu Authorities Act finally rendered traditional leaders part of the state's bureaucratic machinery. The net effect of this Act was that traditional leaders became important agents in the government's strategy of extending control over Africans in the countryside, through the establishment of "reserves", "self governing states"<sup>29</sup>, "homelands", and later so-called "independent states".<sup>30</sup> When the homeland system was introduced, the apartheid government through the homeland governments continued to pursue its objectives of total control over the lives of African people, by resorting to further legislative enactments.<sup>31</sup>

<sup>20</sup> Section 2(8) of Act 38 of 1927.

<sup>21</sup> Act 18 of 1936.

<sup>22</sup> It is not recalling to state that in the new South Africa, traditional communities still do not have ownership over their land. The Minister of Land Affairs and Rural Development for and behalf of the traditional communities hold the land in trust. It is estimated that about 21 million people reside in the traditional authorities area.

<sup>23</sup> Government Gazette Vol. 459, No.: 25438 dated 10 September (2003) 22.

<sup>24</sup> White Paper on Traditional Leadership and Governance (2003) 22.

<sup>25</sup> Act 46 of 1949. This Act was enacted to ensure that blacks lived in the bantustans or homelands and ran their own affairs without any shares in the greater South Africa.

<sup>26</sup> Act 68 of 1951.

<sup>27</sup> Sections 4, 5 and 7 of Act 68 of 1951.

<sup>28</sup> Thobejane S "Traditional Leadership Participation Within Local Government" Unpublished Paper Presented at a Conference on Traditional Leadership and Local Government 6-7 October (2004) 1.

<sup>29</sup> The self-governing states of the apartheid South Africa were Gazankulu, KwaNdebele, KaNgwane, KwaZulu, Lebowa and QwaQwa. These states rejected the idea of independence from the apartheid South Africa. As a result of their stance, they formed part of greater South Africa. This was the case even though they were not represented in the national parliament of apartheid South Africa since they had their "own" national assemblies and cabinets.

<sup>30</sup> White Paper on Traditional Leadership and Governance (2003) 21. The independent states of apartheid South Africa were Transkei, Bophuthatswana, Venda and Ciskei. These states opted for independence from apartheid government of South Africa. As a result, the inhabitants of these states forfeited their citizenship of South Africa.

<sup>31</sup> For example the following pieces of legislation were enacted and provided for the powers and functions of traditional leaders in the homelands. Bophuthatswana: the Bophuthatswana Traditional Authorities Act 23 of 1978, the Bophuthatswana Traditional Courts Act 29 of 1979, the Bophuthatswana Registration of Customary Unions Act 8 of 1977, the Bophuthatswana Wheels Tax Act 23 of 1979. Transkei: the Transkei Authorities Act 4 of 1965, the Transkei Constitution Act 15 of 1976. Venda: the Venda District and Territorial Courts Act 15 of 1986. the Venda Traditional Leaders Administration Proclamation, 1991, Venda Land Affairs Proclamation, 1990. Ciskei: the Ciskei Administrative Authorities Act 37 of 1984. Lebowa: the Lebowa Royal Allowance Act 3

### **3. TRADITIONAL LEADERSHIP AND DEMOCRATIC CHANGES**

The post-apartheid era and the emergence of democracy in South Africa gave rise to the need for constitutional change. South Africa has undergone many constitutional and legislative changes and some of these changes are at variance with long-held values and notions sanctified by history and the distortions of the institution of traditional leadership introduced by the colonisers and apartheid masters.<sup>32</sup> It is in this context that a democratic government of South Africa introduced statutory changes in order to advance the ideals of universal values and fundamental rights without having to obliterate the institution of traditional leadership. The democratisation of institution of traditional leadership was both politically and constitutionally mandated. The post-apartheid epoch has subjected traditional authorities and institutions to a democratic process of transformation.<sup>33</sup>

The new South African government has committed itself to the establishment of a democratic, representative and accountable form of governance throughout the country including the traditional authorities' areas. According to Ntsebeza, this is by far a most challenging task. The post-apartheid state has inherited a system of administration that was based on the concentration of all powers in the hands of unaccountable and undemocratic traditional authorities in the rural areas.<sup>34</sup> The need for transformation of the institution of traditional leadership has been articulated in the 1993<sup>35</sup> and 1996<sup>36</sup> Constitutions of South Africa as well as the plethora of legislation and government policies. These legislative instruments and policies outline guidelines in terms of which the institution of traditional leadership must be governed. These pieces of legislation and policies are discussed hereafter.

### **4. TRADITIONAL LEADERSHIP AND GOVERNMENT POLICIES**

#### **4.1 OVERVIEW**

The democratic government has actively developed policies specifically aimed at regulating and promoting the institution of traditional leadership within the framework of the new constitutional dispensation. These policies require the institution to promote good governance in respect of local government matters and traditional administration. They should be seen as an important step on the part of the government to define the role of the institution of traditional leadership in a democratic South Africa and to clarify the nature of its relationship with other structures of government.

#### **4.1.1 White Paper on Local Government**

The White Paper on Local Government aims to establish a system of local governance in which the municipalities, which include the traditional authorities' areas play an increasingly important role in service delivery, eradicating poverty and improving the social and economic conditions of South African people in general and traditional communities in particular. The key objectives of the White Paper on Local Government are based on finding new ways to accelerate and sustain the delivery of services particularly to the poor. It is for this reason, among many others, that the White Paper on Local Government defines the role of the traditional leaders within the constitutional dispensation of local government.<sup>37</sup> The White Paper on Local Government explains in a most detailed way the role of a traditional leader at local government level namely, to:<sup>38</sup>

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of 1992. Kwazulu: the KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990, the KwaZulu Chief and Headman Act 8 of 1974, the KwaZulu Ingonyama Trust Act 3 of 1994, the KwaZulu Tribal Taxation Act 7 of 1974, the KwaZulu Act on the Code of Zulu Law No. 16 of 1985. KwaNdebele: the KwaNdebele Traditional Authorities Act 8 of 1994, the KwaNdebele Traditional Ingoma Act of 1984. Kangwane: the Kangwane Land Levies Act 8 of 1992. Qwaqwa: the QwaQwa Administration of Authorities Act 6 of 1983, the QwaQwa Levying of Tribal Taxes Act 5 of 1983. The most known pieces of legislation in these homelands were the Black Administration Act 38 of 1927 and the Black Authorities Act 68 of 1951. Most of the homelands' legislation took cue from both the Black Administration Act and the Black Authorities Act.

<sup>32</sup> Government Gazette Vol. 459, No.:25438 dated 10 September (2003) 17.

<sup>33</sup> Khunou SF "Traditional Leadership: Constitutionalism and Democracy in South Africa" 2008 Speculum Juris 96.

<sup>34</sup> Ntsebeza L Democracy Compromised: Chiefs and the Politics of Land in South Africa (HSRC Press South Africa 2005) 14.

<sup>35</sup> Constitution of the Republic of South Africa Act 200 of 1993. Herein referred to as the Interim Constitution. Section 181 of the Interim Constitution recognised the institution, status and role of traditional leadership according to customary law subject to the Constitution. The interim Constitution through section 182 further provided for the traditional leader to be an *ex-officio* member of local government.

<sup>36</sup> Constitution of the Republic of South Africa Act 108 of 1996. Section 211(1) of the 1996 Constitution recognises the institution, status and role of traditional leadership according to customary law subject to the Constitution. In other words, this Constitution recognises and guarantees the continued existence of the institution of traditional leadership.

<sup>37</sup> Burger D and Ferns L South Africa Year Book 2001/01(Pretoria 2000/1) 63.

<sup>38</sup> White Paper on Local Government issued by the then Ministry for Provincial Affairs and Constitutional Development, March 1998. Some of these roles of the traditional leaders were translated into local government legislation, for example the Local Government: Municipal Structures Act 117 of 1998, the Local Government: Municipal Systems Act 32 of 2000 and the Traditional Leadership and Governance Framework Act 41 of 2003.

- ❑ Act as head of the traditional authority and as such perform certain limited legislative, executive and administrative powers;
- ❑ Preside over customary law courts and maintain law and order;
- ❑ Consult with traditional communities through *Imbizo*<sup>39</sup>/*lekgotla*;<sup>40</sup>
- ❑ Assist member of the community in their dealings with the state;
- ❑ Advise government on traditional affairs through the Houses of traditional leaders;
- ❑ Convene meetings to consult with communities on needs, principles and provide information;
- ❑ Protect cultural values and provide a sense of community in their areas through a communal social frame of reference;
- ❑ Be the spokesperson generally of their communities;
- ❑ Be symbol of unity in the community; and
- ❑ Be custodian and protector of the community's customs and general welfare.

According to the White Paper on Local Government, traditional leaders also have added responsibilities and a role in the development of the local communities. These responsibilities include *inter alia* to:<sup>41</sup>

- ❑ Make recommendations on land allocation and settlement of land disputes;
- ❑ Lobby government and other agencies for the development of their areas;
- ❑ Ensure that the traditional community participate in decisions on development and contribute to development costs; and
- ❑ Consider and make recommendations to authorities on trading licenses in their areas in accordance with law.

#### 4.1.2 White Paper on Traditional Leadership and Governance

The White Paper on Traditional Leadership and Governance<sup>42</sup> was a product of approximately four phases of research, debates, extensive consultation and discussions. The first phase was mainly focussed on the national audit on the institution of traditional leaders, culminating in a Status Quo Report (SQR). The second phase culminated in the production of the Discussion Document titled Towards a White Paper on Traditional Leadership and Governance. Policy issues were identified in this phase through an extensive consultation process.<sup>43</sup> This co-ordinated consultation resulted in a two-day national conference on traditional leadership.<sup>44</sup> These discussions led to the production of a Draft White Paper on Traditional Leadership and Governance where preliminary policy positions were outlined. The fourth phase witnessed the launch of the White Paper on Traditional Leadership and Governance that paved the way for the drafting of the Traditional Leadership and Governance Framework Act<sup>45</sup> concerning the institution of traditional leadership.<sup>46</sup>

Nthai, Chairperson of the task team on the White Paper on Traditional Leadership and Governance pointed out that the White Paper was a culmination of a long process wherein the country engaged in a dialogue regarding the role and place of the institution of the traditional leadership in contemporary South Africa as a democratic state.<sup>47</sup> The key objectives of the White Paper on Traditional Leadership and Governance centre on the principles of creating an institution, which is democratic, representative, transparent and accountable to its clients. These objectives include *inter alia*:<sup>48</sup>

- ❑ To define the place and role of the institution within the new system of democratic governance;

<sup>39</sup> The word *Imbizo* is a Zulu term, which is literally translated to mean traditional community's meeting where serious issues are discussed.

<sup>40</sup> The word *Kgotla* is a Tswana term, which is literally translated to mean a traditional community's meeting. Like the *Imbizo*, serious issues of the community are discussed in the *Kgotla*.

<sup>41</sup> White Paper on Local Government (March 1998).

<sup>42</sup> White Paper on Traditional Leadership and Governance issued by the then Ministry for Provincial and Local Government, 2003. The White Paper Task Team was made up by Adv. S Nthai (Chairperson), Ms MF Mopeli (Deputy Chairperson), Mr D Masimola, Prof. R Mqoke, Prof. P Ntuli, Adv. T Mayimane-Hashatse, Chief BLMI Motsatsi, Chief SV Suping, Ms S Mkhize, Mr Z Titus and Mr S Selesho, supported by the White Paper Secretariat Mr J Meiring, Mr S Khandlela, Ms W Khuzwayo, Ms V Maleka and Ms D Pienaar, Ms L Msengane-Ndlela (Director-General) and the entire Department of Provincial and Local Government.

<sup>43</sup> White Paper on Traditional Leadership and Governance (2003) 12-13.

<sup>44</sup> The Conference was held at Eskom Conference Centre, Midrand from 17 to 18 August 2000. The author had an opportunity to attend the Eskom Conference on behalf of the defunct University of North-West and observed events as they unfolded. The first day of the Conference was fraught with difficulties and problems encountered by the organisers namely, the then Department of Provincial and Local Government. For example, the traditional leaders boycotted the Conference. They demanded that the Municipal Structures Act 17 of 1998 should be amended to give them 50% representation in the Municipal Council. However, in day two traditional leaders attended the Conference only as observers.

<sup>45</sup> Act 41 of 2003. Herein referred to as the Framework Act.

<sup>46</sup> White Paper on Traditional Leadership and Governance (2003) 12-13.

<sup>47</sup> White Paper on Traditional Leadership and Governance (2003) 4.

<sup>48</sup> White Paper on Traditional Leadership and Governance (2003) 12.

- ❑ To transform and support the institution of traditional leadership to play a role in socio-economic development and contribute to nation building; and
- ❑ To ensure the integrity and legitimacy of the institution of traditional leadership in accordance with customary law and practices.

Some of the critical issues addressed by the White Paper on Traditional Leadership and Governance included *inter alia*, the Bill of Rights (especially gender equality), democratisation and community participation, party-political affiliation of traditional leaders, appointment and recognition of traditional leaders, houses of traditional leaders, remuneration and co-operative governance.<sup>49</sup>

Traditional leaders appeared not to be satisfied with the White Paper on Traditional Leadership and Governance. The central point of their reservations was because the White Paper on Traditional Leadership and Governance proposed the removal of current decision-making powers and consigns to traditional leaders the role as mere custodians of culture.<sup>50</sup> Chief Mzimela, rejected the provisions of the White Paper on Traditional Leadership and Governance:<sup>51</sup>

The White Paper process is not an attempt to amend the Constitution. Our powers and functions have been obliterated. The government's aim was to abolish the institution of traditional leadership but they have failed because we have resisted. But we have not won the battle. Some of us are tired of waiting. When people are tired, they must come up with another strategy, they should not surrender, that is cowardice.

Nthai, the Head of the Task Team responsible for the drafting of White Paper on Traditional Leadership disagreed:<sup>52</sup>

Nobody is saying that the institution should not continue to exist. The White Paper enhances the role of traditional leaders. You can go through the White Paper. You will not find anything that say we want to erode it.

Khunou felt that the White Paper on Traditional Leadership and Governance is influenced by European and not African ideas. The core of White Paper on Traditional Leadership and Governance was an effort of the government to modernize and transform a tradition that dates back centuries. Khunou quoting Maimela correctly commented:<sup>53</sup>

How the country navigates the stormy water ahead and the extent to which African values and customs are protected will indicate the path chosen by government.

## **5. SELECTED LEGISLATION IMPACTING ON TRADITIONAL LEADERSHIP**

### **5.1 OVERVIEW**

The institution of traditional leadership in South Africa has undergone some profound changes since the advent of democracy. As highlighted above, various pieces of legislation which impact on the institution increased the tempo of these changes. The new vision of transformation of the institution of traditional leadership was developed and implemented through legislation such as the Framework Act, the Promotion of Administrative Justice Act<sup>54</sup>, the Promotion of Equality and Prevention of Unfair Discrimination Act<sup>55</sup>, the Promotion of Access to Information Act<sup>56</sup> and the Communal Land Rights Act<sup>57</sup>, which provide the building blocks for the efficient, transparent and democratic institution of traditional leadership.

#### **5.1.1 Traditional Leadership and Governance Framework Act of 2003**

The 1996 Constitution recognises traditional leaders and envisages a role for them in local government:<sup>58</sup>

A role for traditional leadership as an institution at local level on matters affecting local communities should be provided through national legislation.

<sup>49</sup>White Paper on Traditional Leadership and Governance (2003) 12.

<sup>50</sup>Williams JM "Leading from Behind: Democratic Consolidation and the Chieftaincy in South Africa" 2004 J of Modern African Studies 116.

<sup>51</sup>Khunou SF "A Legal History of Traditional Leaders in South Africa, Botswana and Lesotho" (LLD-Thesis North-West University Potchefstroom Campus 2007) 213.

<sup>52</sup>Khunou SF "A Legal History of Traditional Leaders in South Africa, Botswana and Lesotho" (LLD-Thesis North-West University Potchefstroom Campus 2007) 213.

<sup>53</sup>Khunou SF "A Legal History of Traditional Leaders in South Africa, Botswana and Lesotho" (LLD-Thesis North-West University Potchefstroom Campus 2007) 213.

<sup>54</sup>Act 3 of 2000. Herein referred to as the PAIA.

<sup>55</sup>Act 4 of 2000. Herein referred to as the PEPUDA.

<sup>56</sup>Act 2 of 2000. Herein referred to as the PAJA.

<sup>57</sup>Act 11 of 2004. Herein referred to as the CLARA.

<sup>58</sup>Section 212(1) of 1996 Constitution.

The Preamble of the Framework Act<sup>59</sup> is one of the major pieces of legislation in South Africa, which is framed to create an institution of traditional leadership that has to perform its traditional duties in a manner that embraces democracy. The 1996 Constitution recognises the institution of traditional leaders without assigning its roles and functions. Therefore, the promulgation of the Framework Act assists in filling this gap:<sup>60</sup>

The Act is framed *inter alia* 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, to transform the institution in line with constitutional imperatives and to restore integrity and legitimacy of the institution of traditional leadership in line with customary law and practices.

The Preamble of the Framework Act envisages an institution of traditional leadership that must *inter alia* strive to:<sup>61</sup>

- ❑ Promote freedom, human dignity and the achievement of equality and non-sexism;
- ❑ Derive its mandate and primary authority from applicable customary law and practices;
- ❑ Enhance tradition and culture;
- ❑ Promote nation building and harmony and peace amongst people;
- ❑ Promote the principles of co-operative governance in its interaction with all spheres of government and organs of state; and
- ❑ Promote an efficient, effective and fair dispute resolution system and a fair system of administration of justice.

#### **The Framework Act provides *inter alia*:**

- for the establishment of a traditional councils and directs that at least a third of the members of the traditional council must be women (section 3)
- functions of traditional councils (section 4)
- a framework for the recognition of traditional leadership positions within the institution of traditional leadership (section 8)
- recognition of kings and queens and outlines the procedure to fill the position of king or queen and sets out scenarios and procedure when a king or queen may be removed from office (sections 9 and 10)
- recognition of the position of senior traditional leaders, headmen or headwomen and outlines when they may be removed from office. It also sets out the functions and role of the traditional leaders (sections 11, 12, 19 and 20)
- recognition and guarantees the existence of the National and Provincial Houses of Traditional Leaders. It also provides for the establishment of a Local House of traditional leaders for the area of jurisdiction of a district municipality or metropolitan municipality (sections 16 and 17)
- for dispute resolution and establishment of the Commission on Traditional Leadership Disputes and Claims (sections 21 and 22)
- for conditions of service of traditional leaders in line with Remuneration of Public Office Bearers Act 20 of 1998
- for partnership between traditional leaders with municipalities (section 5)
- support and capacity building (section 6)
- a Code of Conduct for traditional leaders (section 27)

<sup>59</sup> Act 41 of 2003. See also the Traditional Leadership and Governance Framework Amendment Act, 2003 (Act 41 of 2003) This Amendment Act recognises traditional communities and makes provisions for the establishment and recognition of traditional Councils. It provides a framework for leadership position within the institutions of traditional leadership. It also provides for the recognition of traditional leadership and mechanisms for the removal of traditional leaders from office, the roles and functions of traditional leaders and for the establishment of the Commission on Traditional Leadership Disputes and Claims and a Code of Conduct. The significance of this Act is that it restores the dignity of the institution of traditional leadership by integrating this institution to governance.

<sup>60</sup> Act 41 of 2003. The Preamble of this Act articulates and sets the legal framework within which the institution of traditional leadership should undergo transformation.

<sup>61</sup> See the Preamble of Act 41 of 2003.

In terms of the Framework Act, once the Premier has recognised a traditional community, that traditional community must establish a traditional council. A traditional council may have no more than 30 members, depending on the needs of the traditional community concerned. At least a third of the members of a traditional council must be women. The role of the traditional council is to administer the affairs of the traditional community in accordance with customs, assist, and support and guide traditional leaders in the performance of their functions, support municipalities in the identification of community needs, development and implementation of Integrated Development Plans (IDPs) of a municipality in whose area of jurisdiction they reside<sup>62</sup>. The Framework Act also provides for establishment and recognition of Houses of Traditional Leaders.<sup>63</sup> It also provides for the recognition of Kings and Queens<sup>64</sup>, senior traditional leaders, headmen and headwomen.<sup>65</sup> The recognition of Kings and 'Queens' should be seen as an attempt on the part of government to restore the pre-colonial titles of traditional leaders.<sup>66</sup>

On a national level, an organ of state may consult with the Minister to allocate roles for traditional leaders in the sphere of national government.<sup>67</sup> At provincial level, an organ of state within the provincial government is required to consult the Member of Executive Council (MEC) responsible for the traditional affairs to allocate roles and duties for traditional councils or traditional leaders.<sup>68</sup> These roles of traditional councils or traditional leaders envisaged by the Act are in respect of:<sup>69</sup>

- ❑ Art and culture;
- ❑ Land administration;
- ❑ Agriculture;
- ❑ Health;
- ❑ Welfare;
- ❑ Administration of justice;
- ❑ Safety and security;
- ❑ Registration of birth, deaths and customary marriages;
- ❑ Economic development;
- ❑ Environment;
- ❑ Tourism;
- ❑ Disaster management;
- ❑ Management of natural resources; and
- ❑ Dissemination of information relating to government policies and programmes.

This piece of legislation also marks a new era that creates an opportunity for women to participate and serve as traditional leaders.

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<sup>62</sup> See sections 3 and 4 of Act 41 of 2003.

<sup>63</sup> See section 212 (2) of the 1996 Constitution and section 17 of the Framework Act. Both the 1996 Constitution and the Framework Act provide for the establishment and recognition of Houses of traditional leaders. As part of engendering the principle of co-operative government, provision is made for the various houses of traditional leaders to interact with each sphere of government and assist government to ensure service delivery and development of traditional community areas. The houses of traditional leaders in the Republic are: a national house of traditional leaders; provincial houses of traditional leaders and local houses of traditional leaders

<sup>64</sup> See also Traditional Leaders and Framework Bill, 2008 which seeks to amend some sections of the Framework Act by providing for: (a) the recognition of kingships (b) establishment of kingship councils (c) recognition, composition and functions of kingship councils etc.

<sup>65</sup> See sections 9 and 10 of Act 41 of 2003.

<sup>66</sup> Dlamini AM "African Legal Philosophy: A Southern African View" Unpublished Paper Presented to LLB Students at University of Free State 1993 18. Dlamini posited that the word "Chief" or "Paramount Chief" was introduced by the British colonial government in order to avoid the constitutional clumsiness of having multiple Kings. Those Kings of the colonies were to be reduced in status so that there was one King who was in England. The words *inkosi* in Zulu, *inkhosi* in Siswati and *kgosi* in Tswana indicate the recognition of traditional leaders as Kings before the arrival of the British in South Africa.

<sup>67</sup> Section 20(2) of Act 41 of 2003.

<sup>68</sup> Section 20(2) Act 41 of 2003. The traditional leaders receive salaries, allowances and benefits for the execution of their duties and services rendered. See in this regard the Remuneration of Public Office Bearers Act 20 of 1998, which *inter alia* provides for a framework for determining the salaries and allowances of the President, members of the National Assembly, permanent delegates of the National Council of Provinces (NCOP), Deputy President, Ministers, traditional leaders, members of Local Houses of Traditional Leaders, members of Provincial Houses of Traditional Leaders, members of the National House of Traditional Leaders. Section 5 of Act 20 of 1998 provides that salaries and allowances of traditional leaders may from time to time be determined by the President after consultation with the Premier concerned taking into consideration *inter alia* the role, status, functions and categories of traditional leaders, 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 leaders nationally.

<sup>69</sup> Sections 19 and 20 (a-n) of Act 41 of 2003.



It is the first statute in the history of South Africa, which recognises the possibility of women becoming traditional leaders.<sup>70</sup> Almost in all royal kraals, with the exception of the Modjadji in Bolebedu, Limpopo, the successor to the throne would be the eldest son of the traditional leader usually appointed by the royal council<sup>71</sup>. The Act is an attempt to reverse the legacy of the African customary rule of male primogeniture and the Black Administration Act, which denied women an opportunity to become traditional leaders in their own right.<sup>72</sup> One of the pillars of this piece of legislation is the principle of women emancipation. Traditional leaders contended that this Act is a ploy to destroy traditional leadership. They further asserted that the purity of royal blood might be unduly interfered with.<sup>73</sup> According to November and Wessels, the onslaught, which the Act makes on the institution of traditional leadership, is that it detaches them from their traditional constituencies. They further contended that the Framework Act places the traditional leaders at the centre of civil service. As the “employees” of the new constitutional and statutory institutions, they are now accountable and responsible to the Premier and President and no longer their subjects.<sup>74</sup> As November and Wessels correctly observed that the incorporation of traditional leaders into the civil service determines their effectiveness.<sup>75</sup>

Hence, they argued strongly that as “civil servants”, traditional leaders are required to work from an office and are thus restricted in the execution of their duties by conditions of service and line of command.<sup>76</sup> The Act constitutes traditional leaders as public office bearers. As public office bearers, they are bound by the Constitution and legislation issued to them. This was also the position during the colonial and apartheid periods.<sup>77</sup> No where does the Framework Act renders traditional leaders as employees of the state. A closer reading of the Framework Act reveals that the customary role of traditional leaders is fully restored. The Premier and the President do not appoint traditional leaders as November and Wessels suggest. They merely recognise the identification made by the relevant royal family.<sup>78</sup>

### 5.1.2 Promotion of Access to Information Act of 2000

In terms of the Constitution:<sup>79</sup>

(1) Everyone has the right of access to—(a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights. (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden of the state.

<sup>70</sup> The development of customary law to allow women to succeed to the position of traditional leadership was considered in the case of *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 1914 (CC). This case concerned a dispute between Ms Shilubana and Mr Nwamitwa over the right to succeed Mr Nwamitwa’s father, Richard Nwamitwa, as Hosi of Valoyi traditional community in Limpopo. In 1968 Ms Shilubana’s father, Hosi Fofzoa Mwamitwa died without a male heir. At that time, the custom of the Valoyi did not allow women to succeed. Ms Shilubana therefore did not succeed. Instead, her father was succeeded by his brother Richard Nwamitwa. During the 1996 and 1997, the royal council of Valoyi resolved that Ms Shilubana should succeed Hosi Richard since in the new constitutional era, women were equal to men. Her succession was approved by the provincial government of Limpopo. Following the death of Hosi Richard in 2001, Mr Sydwell Mwamitwa successfully objected the installation of Ms Shilubana as Hosi. He argued that the royal council had acted unlawfully and that he as Hosi Richard’s eldest son was entitled to succeed his father. The Constitutional Court held that the traditional authority of the Valoyi tribe has powers to amend the custom, which excludes women from succession to traditional leadership position and bring custom in line with the Constitution.

<sup>71</sup> Moleme S “Can a Woman be a Tribal Chief? If not, why not?” 8 August 2004 City Press 23.

<sup>72</sup> Sections 9 and 11 of Act 41 of 2003. For instance, section 23 of the Black Administration Act 38 of 1927 entrenched patriarchy and the rule of intestate succession, which excluded women from succession to family property and traditional leadership. The Framework Act was devised to reverse the legacy created and left by the African customary rule of intestate succession, the Black Administration Act and other apartheid laws intended to discriminate women in respect of succession to traditional leadership positions.

<sup>73</sup> Holomisa SP “Administration of Justice Under Traditional Leadership” Unpublished Paper Delivered at the Conference on Traditional Leadership and Local Government 6-7 October 2004 Durban 3-5.

<sup>74</sup> See the Remuneration of Public Office Bearers Act 20 of 1998. The Premier of the Province is a paymaster of the traditional leaders. In other words, he or she occupies the position of the employer while the traditional leaders may be regarded as the employees of the Office of the Premier.

<sup>75</sup> November ND and Wessels DP “The Political Status of Traditional Leadership in South Africa’s New Perspective” 2002 J of Contemporary History 149.

<sup>76</sup> November ND and Wessels DP “The Political Status of Traditional Leadership in South Africa’s New Perspective” 2002 J of Contemporary History 149. In terms of the Framework Act, a traditional leader may be removed from office under the following circumstances namely: conviction of an offence with a sentence of imprisonment for more than 12 months without an option of a fine (b) physical incapacity or mental infirmity which, based on acceptable medical evidence, makes it impossible for the traditional leader to function (c) wrongful appointment or recognition or a transgression of a customary rule or principle that warrants removal.

<sup>77</sup> For example, as highlighted above in 1927 the Black Administration Act 38 of 1927 was promulgated to *inter alia* regulate the institution of traditional leaders and deal with a question of customary law.

<sup>78</sup> See in this regard sections 8, 9 and 11 of the Framework Act.

<sup>79</sup> Section 32 of the 1996 Constitution

In compliance with the constitutional provision, the national parliament enacted the Promotion of Access to Information Act (the PAIA). The central objective of the Promotion of Access to Information Act<sup>80</sup> is to give effect to the constitutional right of access to any information held by the state as well as information held by another person that is required for the exercise of protection of any right. The main purpose of the Act is to foster the culture of transparency and accountability in public and private bodies and to promote a society in which the people of South Africa could have effective access to information that enables them to exercise and protect all their rights.<sup>81</sup> The Act has a profound effect on the institution of traditional leadership in South Africa. For instance, offices of traditional leaders are public offices and therefore they have to comply with the provisions of this Act and traditional communities should be given information held by the institution of traditional leadership. The Act also applies to all records of the offices of traditional leaders, which include any recorded information in any form or medium that was in their possession regardless of who created the record and regardless of when the record came into existence.<sup>82</sup> The Act requires *inter alia* offices of traditional leaders to display maximum accountability and responsiveness to ensure checks and balances against the abuse of power.

This position was different during the colonial and apartheid periods. As highlighted above, the traditional leaders were not accountable to their people during the colonial and apartheid periods. The system of checks and balances was generally flawed. Some of the traditional leaders were more accountable to the successive colonial and apartheid governments than to their subjects.<sup>83</sup> Therefore, the Promotion of Access to Information Act is designed among many others to create an accountable and transparent institution of traditional leadership.

### **5.1.3 Promotion of Administrative Justice Act of 2000**

The 1996 Constitution states that:<sup>84</sup>

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair, (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons (3) National legislation must be enacted to give effect to these rights and must (a) provide for the review of administrative action by a court or where appropriate an independent and impartial tribunal (b) impose a duty on the state to give effect to the rights in subsections (1) and (2) (c) promote an efficient administration.

The Promotion of Administrative Justice Act (the PAJA) is based on the 1996 Constitution, which expresses vision of safeguarding and protecting individuals against any abuse of power by organs of state. The Constitution through section 32 provides only a broad framework for the constitutionally correct way for organs of state and public bodies to act. It has been left to the PAJA to augment the principles and values of the Constitution by providing an elaborated and detailed expression of the rights to just administrative action and remedies to vindicate them.<sup>85</sup> The objects of the PAJA include *inter alia* to provide an efficient administration and good governance and to create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function.<sup>86</sup> Traditional leaders perform public functions. Therefore, the PAJA enjoins them to ensure that their administrative functions are discharged with due regard to representative and participatory democracy, accountability, transparency and public involvement.<sup>87</sup>

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<sup>80</sup> Act 2 of 2000.

<sup>81</sup> Section 3(a) and (b) of Act 2 of 2000. A public body for the purpose of the Act is defined as "any department of state in national, provincial, municipal or a local sphere of government or any functionary or institution when it is exercising a power or performing a duty in terms of the Constitution or a Provincial Constitution. Offices of traditional leaders are public bodies and are constitutionally required to be in compliance with the provisions of the PAJA and the Constitution.

<sup>82</sup> Section 3 of Act 2 of 2000.

<sup>83</sup> For example, the African leaders, mainly traditional leaders of independent states of South Africa namely: Bophuthatswana, Transkei, Ciskei and Venda accepted independence from the then apartheid government of South Africa. Most of these leaders reaped the fruits of independence in their personal capacities and some of them were generally accountable to the apartheid government. See Chidester B Religions of Southern Africa (London 1992) 204.

<sup>84</sup> Section 33 of 1996 Constitution.

<sup>85</sup> Govender K "An Assessment of Section 104 of the Promotion of Administrative Justice Act as a Means of Advancing Participatory Democracy in South Africa" 2003 SAPR/PL 405.

<sup>86</sup> See the Preamble of Act 3 of 2000. The South African administrative law now has a statutory basis, which means that all challenges to administrative action will be based on the provisions of PAJA. See also in this regard Mdumbe F "Administrative Action, the Constitution and the Promotion of Administrative Justice Act: Where do Commissions of Inquiry and Other Investigatory Bodies Fit in?" in Okpaluba C (ed) Law and Contemporary South African Society (Claremont 2004) 267.

<sup>87</sup> Govender K "An Assessment of Section 104 of the Promotion of Administrative Justice Act as a Means of Advancing Participatory Democracy in South Africa" 2003 SAPR/PL 405.

In terms of the PAJA, an administrative action, which materially and adversely affects the rights or legitimate expectation of any person, must be procedurally fair.<sup>88</sup> A fair administrative procedure depends on the circumstances of each case. In order to give effect to the right to procedurally fair administrative action, an administrator (who may be in a position of traditional leader) is required to give a person whose rights have been adversely affected an opportunity to:<sup>89</sup>

- obtain assistance and legal representation in serious cases;
- present and dispute information and arguments; and
- appear in person.

It is apparent from the PAJA that transparency is an important element of any administration, including the administration of the traditional leaders. Discussions, which are shrouded in secrecy lead to suspicion and distrust on the part of the public. It is apparent too, that sections of the PAJA, which provide that transparency, must be fostered in public administration by providing people or public with timely accessible and accurate information, will also assist in establishing a culture of openness in the institution of traditional leadership as an organ of public administration.<sup>90</sup> The provisions of the PAJA, which call for fair administrative processes and transparency, form a hallmark of the pre-colonial administrative system of traditional governance.<sup>91</sup> The pre-colonial society cherished the ideals of transparency, fairness and administrative justice. These ideals were changed through legislation by the regimes of both colonialism and apartheid. The legal culture, which the Act attempts to introduce, is not different from the pre-colonial position. However, it seems that some of the traditional leaders during the colonial and apartheid periods departed from the system of fair administration. There are instances where decisions were made during both the colonial and *apartheid* era without giving the affected party a hearing.<sup>92</sup>

#### 5.1.4 Promotion of Equality and Prevention of Unfair Discrimination Act of 2000

The Constitution provides that:<sup>93</sup>

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

<sup>88</sup> Section 3(1) of Act 3 of 2000. See also *Mkhatshwa v Mkhatshwa and Another* 2002 (3) SA 441 (TPD), where the court dealt with the matter concerning a deposition of a traditional leader by the Premier of Mpumalanga. The court accordingly stated that within the context of the new constitutional regime, when the Premier appoints or deposes a traditional leader, he or she performed an administrative function and thus administrative law governs his or her conduct. The party affected by the appointment made by the Premier has a right to administrative action that is lawful, reasonable and procedurally fair. The court went further to say that the Premier being an administrative functionary executing a statutory duty is not beyond the reach of or exempted from the peremptory provisions of section 33(1) and (2) of the Constitution. In *Republic of South Africa v SARFU and Others* 1999 (10) BCLR 1059 (CC), the Constitutional Court considered the question of procedural fairness in the context of Commission of inquiry. The court stated that when the President of South Africa appointed a Commission, he was exercising an original constitutional power and that neither the subject matter nor the exercise of that power constituted administrative action.

<sup>89</sup> Section 3 of Act 3 of 2000. See also Oosthuizen IJ “Aspects of Educational Law (Pretoria 1998) 45; Beukes M “Administrative Action Affecting the Public: Section 4 of the Promotion of Administrative Justice Act 3 of 2000 and the Regulations Made in Terms of Section 10 of the Act”. 2003 SAPR/PL 295. PAJA grants a right to procedural fairness in that everyone is entitled to administrative action, which is procedurally fair. At common law, the rules of natural justice encompassing the maxims of *audi alteram partem* (to hear the other side) and *nemo iudex sua causa* (the rule against bias) are used to grant affected person an opportunity to be heard and hearing free from bias. The PAJA also introduces legal representatives in traditional courts. These legal representatives may be attorneys and advocates summoned to traditional court to represent a person who has been affected by the administrative decision of the traditional leaders concerned.

<sup>90</sup> Sections 4, 5 and the Preamble of Act 3 of 2000.

<sup>91</sup> See Holomisa SP “Administration of Justice Under Traditional Leadership” Unpublished Paper Delivered at the Conference on Traditional Leadership and Local Government 6-7 October 2004 Durban 2. As Holomisa observed, during the pre-colonial era, both the court and the administrative proceedings of the traditional governance were held openly and fairly. The administrative and legal processes and procedures were all inclusive.

<sup>92</sup> In *S v Mukwevho S v Ramukhuba* 1983 (3) SA 498 (V), where the court stated that legal institution known as the trek pass in terms whereof a member of the tribe is ordered to quit his area was not contrary to public policy and the principles of natural justice and it was valid under customary law. The court further stated that the validity of a trek pass was however, subject to the following requirements: (a) it might only be applied for serious transgressions or taunting obstreperousness which might cause unrest in the tribe. (b) The tribesmen must be aware of the nature of the charge against him (c) It was desirable but not essential that the tribesmen be given opportunity to state his case (d) The Chief must exercise his discretion personally. The Mukwevho and Ramukhuba cases clearly confirm the fact that during the apartheid era, decisions were made in traditional courts where the affected party might not be given a hearing.

<sup>93</sup> Section 9 of the 1996 Constitution.

The 1996 Constitution places a duty on both the state and private persons not to discriminate unfairly. The 1996 Constitution guarantees equality but also requires government to adopt legislation to prohibit unfair discrimination. It is against this background that parliament promulgated the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).<sup>94</sup> This legislation influences the institution of traditional leadership that traditionally excluded women from its leadership. The Act intends to transform the social well being of the various structures within the community. The Act prohibits certain traditional aspects, which are seen to be in conflict with section 9 of the Constitution.<sup>95</sup>

The principle of equality is the core value of the PEPUDA.<sup>96</sup> The Act stresses that no person may unfairly discriminate against any person on grounds of gender including *inter alia*:<sup>97</sup>

- ❑ The system of preventing women from inheriting family property and traditional leadership;
- ❑ Any practice, including traditional, customary or religious practice which impairs dignity of women; and
- ❑ Systematic inequality of access to opportunities by women as a result of the sexual division of labour.

The PEPUDA implies that female persons may in terms of the law inherit family property<sup>98</sup> and may succeed to traditional leadership positions. Traditional authorities are required to comply with the provisions of the PEPUDA.<sup>99</sup> According to De Beer, the promulgation of the PEPUDA left nobody in any doubt about parliament's intention to immediately eradicate customs and practices perceived to be at variance with the gender principles in the Constitution. De Beer quoting Vorster put it correctly that:<sup>100</sup>

One of the primary objectives of of the (PEPUDA) is to rid customary law of all practices rooted in patriarchy, at least to the extent that they discriminate against women ... and section 8(c) of the Act will effectively abolish the entire customary law of succession and inheritance.

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<sup>94</sup> Act 4 of 2000.

<sup>95</sup> Traditional authorities were inherently patriarchal. They excluded the participation of women in the political game of traditional leadership. Section 9 of the 1996 Constitution prohibits all forms of discrimination. The prohibition is based *inter alia* on the grounds of sex and gender.

<sup>96</sup> The emphasis placed on the issue of equality, especially the eradication of practices, which in the past perpetuated the subordination of women and recognition of customary law, by the 1996 Constitution, the Recognition of Customary Marriages Act 120 of 1998 and other legislation create a conflict between African culture and equality. The debate concerning the apparent conflict between culture and equality was pre-empted by the Constitutional Court in *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC), where the court stated that sooner or later the question of the relationship between the Constitution and customary or indigenous law will have to be confronted. The court went further to predict a possible outcome of this conflict when it found that patriarchal principles which underlay much of indigenous law would be outlawed by the Bill of Rights and subsequent legislation on equality. In *Matukane and Others v Laerskool Potgietersrus* 1996 (3) SA 223 (TPD), the court in dealing with questions of equality and discrimination stated that the Constitution does not outlaw discrimination as such. The court went further to say the Constitution prohibits unfair discrimination. See also Vorster LP *The Introduction of Traditional leadership in Bekker* JC (eds) *Introduction to Legal Pluralism in South Africa: Part I Customary Law* (Durban 2002) 129. The conflict and inconsistencies that beset traditional leadership under colonialism and apartheid have been transferred to the new constitutional dispensation in South Africa.

<sup>97</sup> Section 8 of Act 4 of 2000.

<sup>98</sup> In *Bhe and Others v Magistrate Khayelitsha and Others* 2004 (1) BCLR 27, the Constitutional Court accordingly found that the rule of male primogeniture as it applies in customary law to the inheritance of property is declared to be inconsistent with the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property. See also *Shibi v Sithole and Others* 2005 (1) SA 580 CC. Here, the Constitutional Court dealt with the matter in which a woman was excluded from succession to property in terms of section 23 of Black Administration Act 38 of 1927. The court held that section 23 was a racist provision that was fundamentally unconstitutional being contrary to section 9 (the right to equality) and section 10 (the right to dignity) of the Constitution due to its blatant discrimination on grounds of race, colour and ethnic origin and its harmful effects on the dignity of person affected by it. See also *Daniels V Campbell NO and Others* 2003 (9) BCLR 969 (CC), where the Constitutional Court declared that there is no justification for the limitation of the equality rights of persons in the position of the surviving spouse. The Constitutional Court promoted gender justice in *Bhe*, *Shibi* and *Campbell* cases. See also in this regard Vorster LP *The Introduction of Traditional leadership in Bekker* JC (eds) *Introduction to Legal Pluralism in South Africa: Part I Customary Law* (Durban 2002) 131, where Vorster noted that the system of male succession is regarded as being in conflict with the constitutional requirement of non-discrimination on the ground of gender.

<sup>99</sup> TARG Overview Report: *The Administrative and Legal Position of Traditional Authorities in South Africa and their Contribution to the Implementation of the Reconstruction and Development Vol. X11* (Potchefstroom 1996) 59. According to TARG report, although the establishment of traditional authorities may be seen as being against the equality principle, it is not seen as discrimination in the communities themselves. TARG report further highlighted that a thorough analysis of developments regarding the content of the institution of the pre-colonial traditional leadership indicates the dynamic nature of the institution itself and does not describe it as institution that perpetuates discrimination. It is suggested that in the light of provisions of the PEPUDA and Constitution regarding democracy and equality, provision should be made for a process, which would empower rural communities to decide for themselves what the nature and content of the institution itself should be.

<sup>100</sup> De Beer FC "South African Constitution, Gender Equality and Succession to Traditional leadership: A Venda Case Study" in Hinz MO (ed) *The Shade of New Leaves: Governance in Traditional Authority-A South African Perspective* (Lit Verlag Berlin 2006) 215.

**6. CONCLUSION**

It is evident from the above that the government through its national parliament promulgated a host of democratic legislation intended to change the institution of traditional leadership and make it consistent with the spirit and philosophy of the Constitution. Although a democratic government has demonstrated its intention to retain and recognise the position and status of traditional authorities, it has changed their pre-colonial, colonial and apartheid roles as well as their standing. These changes resulted in the creation of a transformed institution of traditional leadership based on a number of core constitutional values, for example democracy, human dignity, equality, human rights and freedoms, non-racialism and non-sexism. The institution of traditional leadership is obliged to ensure full compliance with these constitutional values and the provisions of the above-mentioned pieces of legislation. The institution of traditional leadership in South Africa has undergone fundamental legislative changes throughout the different historical phases of pre-colonial, colonialism, apartheid and democratic dispensation. These legislative changes do not represent a complete story of the institution of traditional leadership. It remains to be seen whether the institution of traditional leadership would adapt to the new constitutional and legislative innovations and fit squarely in the scheme of constitutional democracy.