



Traditional leadership and its future role in local governance*

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1 INTRODUCTION

During the last few years a controversy has raged over the role of traditional leaders in governance, fuelled by the passing of legislation providing for a restructured local government system,¹ the demarcation of municipalities and the 2000 municipal elections that ushered in the new local government system. The controversy arose because the new municipalities cover the whole country, including the rural areas under the jurisdiction of traditional leaders. In rural areas municipalities have powers and functions that largely overlap with those that are supposed to be exercised by traditional authorities. Traditional leaders fear that once these municipal governments become fully operational, it will be the end of their influence and the end of traditional authorities. This paper looks at the problem of rural local government, the competing issues at stake and the implications of the different strategies that might be adopted by government in resolving the problem.

This paper also looks at the role of traditional leadership in the pre-colonial era, its distortion by colonialism and apartheid and the considerable powers and functions enjoyed by traditional leaders at the dawn of democracy. It then examines the constitutional provisions dealing with traditional leadership in comparison to the powers and functions accorded elected local government. The paper discusses the struggle of traditional leaders to retain the powers they had under apartheid, the draft *White Paper on Traditional Leadership and Governance*, as well as the draft Traditional Leadership and Governance Framework Bill 2003 (hereafter the Bill) which propose to give traditional leaders a greatly diminished role in rural governance. It also offers a comparative analysis of the position of traditional leaders in some neighbouring countries. The paper does not go into the question of whether traditional leadership, as an institution of governance, is still relevant in a democratic society or whether in fact we are perpetuating a moribund institution or whether the large number of traditional leaders in South Africa is sustainable. This debate does not

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1 Local Government: Municipal Structures Act 117 of 1998.

seem fruitful given that the Constitution recognises the institution and permits Parliament to pass legislation providing for a role for traditional leadership as an institution at local level.²

2 HISTORICAL OVERVIEW OF THE ROLE OF TRADITIONAL LEADERS

2.1 Pre-colonial period

Traditional leadership has been the basis of local government in most of Africa throughout history. In pre-colonial Africa, African societies were ruled by kings supported by a hierarchy of chiefs and councillors or advisors, who were either their close relatives or selected from their communities. These traditional leaders served as political, military, spiritual and cultural leaders and were regarded as custodians of the values of society. They looked after the welfare of their people by providing them with land for their subsistence needs through agriculture and for grazing. They also provided for the very poor and orphans.³ Traditional leaders were responsible for the defence of their people against external aggression and for keeping order in their communities.⁴ They resolved disputes, with the emphasis on reconciliation, and thus ensured harmony among neighbours. They inspired unity in their people. Pre-colonial African societies are reputed to have had a kind of participatory democracy. Through general assemblies of all adult men (known, among other terms, as *kgotla*, *pitso* or *imbizo*), the community participated in decision-making on important matters affecting the community.⁵ It is important to note that even in pre-colonial times not all traditional leaders were benevolent, generous and caring towards their people. Some were autocratic and oppressive.⁶ However, if people were dissatisfied with their leader they could desert him for another, arrange for his death or overthrow him through civil war.⁷ On the whole, though, it can be said that in much of pre-colonial Africa traditional leaders ruled largely with the consent of their people.

2 The Constitution of the Republic of South Africa Act 108 of 1996, s 212(1).

3 See, for instance, Schapera 1955: 68. Ashton (1967: 213) points out that although the pre-colonial generosity of Basotho chiefs was diminishing under colonial rule, there were chiefs who still looked after many orphans and widows.

4 Schapera 1955: 69.

5 Ashton (1967: 216) states: "Discussion, according to contemporary observers, was keen, great freedom of speech was allowed, and great weight attached to the opinion and attitude of the people. The people, as often as not, followed the line they judged the chief was taking, but if, for some reason they opposed him, and he expected their opposition to be firm, he would not risk forcing the issue." Schapera, however, qualifies the value of these assemblies: "In theory great freedom of speech is permitted at these meetings. In practice the fear of subsequent reprisals by the chief often acts as a deterrent" (Schapera 1955: 82).

6 See Ntsebeza 1999: 3.

7 Schapera 1955: 85. Ashton 1967: 217.

2.2 Colonialism and apartheid

With the advent of colonisation the most important powers were taken over by the colonial state and later, in South Africa, by the apartheid state, thus weakening the role of traditional leaders and institutions in governing African people. However, the day-to-day running of government activities was left to traditional leaders as agents of their colonial masters. Traditional leaders were no longer accountable to their people but to the colonial or apartheid government.⁸ Traditional institutions were transformed into agencies (tribal authorities) of the alien state and more powers were given to these tribal authorities to control the African population in order to better serve colonial/apartheid interests. The colonisers did not have enough personnel who could easily deal with social control of the 'natives' and mobilise them for the labour requirements of settler farmers, for the construction of roads and railways, for mining, etc. It was easier and more cost effective to use the existing administrative structures of the African people – the traditional leaders. Many traditional leaders became oppressive towards their people, who could do nothing about it as the coercive machinery of the colonial state protected the leaders.⁹ Thus many leaders lost their legitimacy with their people. 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.

The nature of traditional authority under colonialism and apartheid was distorted, in that the right to office of traditional leaders was no longer automatically based on hereditary rights based on the principle of male primogeniture. Although this principle was largely maintained, the state could appoint anyone to be a chief and could dismiss a chief who qualified as such according to custom if he did not conform to the requirements and did not serve the interests of the state.¹⁰ The state was empowered also to grant jurisdiction to chiefs to hold courts in their areas on civil and criminal matters and could also take this jurisdiction away.¹¹ This power has survived into the post-apartheid political dispensation assigned to provinces. Although there was resistance to the autocratic rule of chiefs, they survived. During the negotiations leading to democracy, traditional leaders were initially ignored but were later brought into the negotiating process that finally led to the interim Constitution. Although many in the African National Congress (ANC) were opposed to continued dominance of the countryside by un-elected leaders who had collaborated

8 Ntsebeza 1999: 16.

9 Schapera says: "Freed by the support of the administration from the fear of tribal sanctions formerly restraining him, [the chief] often tended to care more about asserting the rights that remained to him than about his corresponding duties and obligations. He became more autocratic and exacting and less willing to consider the welfare of the tribe . . . European government has deprived [the people] of such remedies as they formerly possessed against oppression and abuse." *Ibid*: 86.

10 S 2(7) and (8) of the Black Administration Act 38 of 1927.

11 *Ibid* s 12.

with the apartheid state, they were forced into the compromise that saw the constitutional recognition of traditional leaders in the hope of utilising the 'progressive' chiefs to win over the rural areas under their sway. The Congress of Traditional Leaders (Contralesa), which was allied to the ANC, was influential in getting it to compromise on this issue.

3 CURRENT STATUTORY POWERS AND FUNCTIONS OF TRADITIONAL LEADERS

Traditional leaders, both chiefs and headmen, still have the powers and functions accorded to them under colonialism and apartheid in terms of various pieces of legislation. It is said that there are at least 1 500 relevant pieces of legislation still operational.¹² The most important of these for our purposes are the Black Administration Act,¹³ the Black Authorities Act¹⁴ and the Regulations Prescribing the Duties, Powers, Privileges and Conditions of Service of Chiefs and Headmen¹⁵ (hereafter the Regulations of 1957).

The Black Authorities Act established a system of hierarchical local government in rural areas, based on traditional organisation but with statutory powers and functions. Whereas the functions of the lowest level (the tribal authority) are limited to carrying out general administrative tasks and advising government on the needs of the community,¹⁶ the powers and functions of a Regional Authority are quite extensive. Two or more areas for which tribal authorities have been established constitute a black regional authority. Its powers and functions under the Black Authorities Act include the power of:

- establishing, maintenance, management and conduct of education institutions;
- the construction and maintenance of roads, bridges, drains, dams, tunnels and any work ensuring satisfactory water supplies or for preventing or combating soil erosion;
- the suppression of diseases of stock by construction, maintenance and operation of dipping tanks . . .;
- establishment, maintenance, management and operation of hospitals, clinics;
- improvement of farming and agricultural methods generally;
- afforestation.¹⁷

Regional authorities also have the power to make bye-laws, "including bye-laws prescribing fees for services rendered by such authority or rates

12 Department of Provincial and Local Government 2002 *Draft White Paper on Traditional Leadership and Governance* Pretoria: Department of Provincial and Local Government 50 (hereafter the *Draft White Paper*).

13 *Supra* note 10.

14 68 of 1951.

15 110 of 1957.

16 *Supra* note 14, s 4.

17 *Ibid* s 5.

payable by any specified class of persons in respect of services made available by such authority".¹⁸ Since the regional authority is constituted by chiefs, headmen and councillors in the particular 'tribal region' this means that an un-elected body has powers of taxation. Section 3(3) states, "The chairman and the members of the regional authority shall be elected or selected in a manner prescribed by regulation from amongst the chiefs, headmen and councillors of the tribal authorities for the areas in respect of which such regional authority is established."

However, it is observed that traditional leaders and tribal authorities were never well equipped to perform many of the functions set out above.¹⁹ The powers granted them are extensive. Under the Constitution, 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. This is where the conflict arises: the powers and functions of traditional leaders overlap with those of elected local government.

Section 8 of Black Authorities Act empowered the Minister to cause to be established, in respect of every tribal, regional or territorial authority, a treasury into which monies are to be deposited and from which all expenditure of the authority concerned is to be met. Into this treasury payments are made derived from:

- (a) all fees and charges payable by the community in accordance with custom, regulation or bye-law;
- (b) all fines and fees collected by the chief or headman in the exercise of any civil or criminal jurisdiction;
- (c) levies;
- (d) amounts derived from any property owned by the tribe or community;
- (e) moneys assigned by the Minister from a fund held by him for such tribe or community;
- (f) moneys which Parliament may appropriate for the purpose;
- (g) any other moneys derived from any source for the benefit of any tribe or community.²⁰

With the establishment of wall-to-wall municipalities with wide-ranging powers and functions under the Constitution and with tribal authorities having no taxing powers and no government funds for development, they will be starved of funding and will not be able to show any justification for their continued existence.

The traditional leaders themselves have extensive statutory powers, duties and functions besides those they assert under customary law. The Regulations of 1957 list numerous and varied duties, powers and functions. These include:

18 *Ibid* s 5(2).

19 Vorster 2002: 135.

20 *Supra* note 14, s 9.

- to promote the interests of his tribe or community, support and actively encourage, and himself initiate, measures for the material, moral and social well-being of his people . . .
- maintain law and order in his tribe or community;
- report any condition of unrest or dissatisfaction or any other matter of serious import or concern to the government;
- carry out all such lawful orders as may from time to time be given him by officers of the government;
- ensure the enforcement within his area of all laws and all orders, instruction or requirements of the government relating to the administration and control of the people in his area in particular in relation to: public health; registration of persons and collection of taxes, rates and levies; registration of birth and deaths; taking of census and statistics; prevention or eradication of animal diseases; the occupation or cultivation of land, prevention, detention and punishment of crime; the efficient use of labour resources and control of work seekers; preservation of flora and fauna and water supplies; the rehabilitation of land and prevention of soil erosion, veld fires and overstocking;
- inform his people of new laws, orders, instructions;
- report to government authorities outbreaks of disease among people or stock, commission of crime, illegal possession of firearms, intoxicating liquor, . . . activities of persons who disturb and obstruct peace, order and good government by holding unauthorised meetings, distribution of publications and pamphlets;
- convene meetings of the people when requested by government and ensure attendance;
- hear and determine civil cases and try and punish criminal cases if he has been conferred with jurisdiction;
- exercise powers of arrest and custody of offenders conferred on a peace officer;
- powers of search without a warrant any person or homestead if there are reasonable grounds for suspecting that arms and ammunition or stolen stock or produce are hidden in a homestead or other place, seize and carry anything seized to the nearest police post;
- detain and impound stock brought into the area under unlawful or suspicious circumstances.

It is mainly these wide-ranging law enforcement powers of the traditional leaders, (such as the power of search without a warrant, the arrest and detention of suspects, reporting of persons disturbing the peace by holding unauthorised meetings and distributing pamphlets), that were used to oppress the people and get them into trouble with the apartheid state. However, there is no reason why some of the purely administrative functions cannot continue to be exercised by traditional leaders. Nevertheless, their powers are too many and varied. There is no traditional leader who could possibly fulfil all of them. A new law has thus to spell out what functions traditional leaders can exercise and whether tribal authorities should continue to exist.

4 THE CONSTITUTIONAL POSITION

4.1 Elected local government

In the post-1994 democratic dispensation it was intended that elected local government should extend to all areas of South Africa, including those under traditional leaders. The 1996 Constitution provides in section 151(1) that the "local sphere of government consists of municipalities which must be established for the whole of the territory of the Republic". It makes no mention of traditional authorities.

The objects of local government are stated to be:

- (a) to provide democratic and accountable government for local communities;²¹
- (b) to ensure the provision of services to the communities in a sustainable manner;²²
- (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.

All these are matters that are in the domain of traditional authorities and traditional leaders under various statutes, except of course "providing democratic and accountable government". Section 156 sets out the executive powers and functions of municipalities by referring to their rights to administer the matters listed in Part B of Schedule 4 and Part B of Schedule 5, and other powers that may be assigned by the national or provincial legislation.²³ These are powers that could easily fall under the powers of traditional authorities under the pre-1994 statutes, except that they do not have the material or human resources necessary to exercise them properly.

4.2 Traditional leadership

The Constitution recognises traditional leaders and envisages a role for them in local government. Thus section 211 states:

- (1) The institution, status and role of traditional leadership according to customary law, are recognised, subject to the Constitution.²⁴
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs which includes amendments to or repeal of, that legislation or those customs.

21 This appears to be intended to contrast with traditional leadership, which is not democratically elected and is not accountable to the community in a systematic way.

22 This is intended to extend public services such as water, electricity, sewage removal etc. to rural areas, where they are currently mostly absent.

23 These include, under Schedule 4, building regulations, electricity and gas, municipal health services, municipal public transport, municipal public works, water and sanitation; and under Schedule 5, cleansing, control of undertakings selling liquor, local sport, licensing and control of undertakings selling food to the public, municipal roads, refuse dumps and solid waste disposal etc.

24 This is in accordance with Constitutional Principle XIII in the interim Constitution of the Republic of South Africa Act 200 of 1993.

The role is not further defined and it is not clear what is meant by the "role of traditional leadership in accordance with customary law". Is it traditional customary law as it operated before its corruption by colonialism and apartheid, or is it customary law as modified by statute and as developed over the years? It has been argued that it is the latter version that is referred to.²⁵ On the other hand, it is recognised that traditional leaders under colonialism and apartheid were given powers they never had in pre-colonial times and that these powers properly belong elsewhere. Traditional leaders have also argued that the provision is too vague and that the role needs to be clearly spelled out, as has been done with elected local government.

Although the Constitution does not spell out a specific role for traditional leaders it gives power to the national legislature to pass legislation to "provide for a role for traditional leadership as an institution at local level on matters affecting local communities".²⁶ Such legislation is currently under discussion in Parliament and is discussed later in this paper.²⁷ It is submitted that by virtue of the constitutional provisions in Chapter 7 spelling out the powers and functions of 'wall-to-wall' municipalities, the scope of the powers and functions of traditional leadership and traditional authorities, whether under customary law or statute, is necessarily curtailed. In case of conflict, constitutional provisions prevail over ordinary legislation and customary law, by virtue of the supremacy clause in section 2 of the Constitution. Thus, the 1998 *White Paper on Local Government*²⁸ is correct in stating that "where Chapter 7 of the Constitution allocates a function to a municipality, the municipality has sole jurisdiction over the matter".²⁹ 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 but which was probably not intended by the drafters of section 212.

It has been argued that by recognising the institution of traditional leadership and envisaging a role for it at the local level, while at the same time providing for elected local government, including in the areas under traditional leaders, was "a conspicuous anomaly"³⁰ and is a fundamental contradiction.³¹ However, it is argued that the drafters of the Constitution

25 Vorster 2002: 130.

26 S 212(1).

27 The *Draft White Paper* was circulated for public comment in October 2002. The Draft Traditional Leadership and Governance Framework Bill 2003 was released in July 2003 and is presently (September 2003) before Parliament's Portfolio Committee on Local and Provincial Government.

28 Department of Constitutional Development 1998 *White Paper on Local Government* < www.local.gov.za/DCD/policydocs/whitepaper/white2pg.html

29 *Ibid* par 4.2. This is in accordance with the Constitutional Court decision in *African National Congress v Minister of Local Government and Housing (KwaZulu-Natal)* 1998 (3) SA 1, where it was said: "The traditional leaders who had previously been exercising the powers and performing the functions of local government will be represented on the newly established institutions which would now be responsible for those functions".

30 Vorster 2002: 129.

31 Ntsebeza 1999: 111.

were correct in recognising an ancient tradition and in envisaging a future role for it that would be deliberated and circumscribed by the elected Parliament in a way that would be consistent with democracy. As the Constitutional Court put it:

The New Text (of the Constitution) complies with CP XIII by giving express guarantees of the continued existence of traditional leadership and the survival of an evolving customary law . . . The Constitutional Assembly cannot be constitutionally faulted for leaving the complicated, varied and ever-developing specifics of how such leadership should function in the wider democratic society, and how such customary law should be interpreted, to future social evolution, legislative deliberation and judicial interpretation.³²

What is needed is a working relationship between traditional leaders and elected local representatives to maximise benefits for the community. There is therefore a quest for a model of cooperative governance in rural areas that is in conformity with the Constitution. Part of ensuring this cooperation is for traditional leaders to participate in the meetings of municipal councils so that they can put the concerns and needs of their people to them.

4.3 Participation of traditional leaders in local government

The interim Constitution of 1993³³ provided for the participation of traditional leaders in local government. Section 182 provided that:

The traditional leader of a community observing a system of indigenous law and residing on land within the area of jurisdiction of an elected local government . . . shall *ex officio* be entitled to be a member of that local government, and shall be eligible to be elected to any office of such local government.

Thus, not only could traditional leaders sit on the council of a municipality and participate in deliberations, but they were also full members entitled to vote on any decision of the council and eligible for election to office in a municipal government. The 1996 Constitution, on the other hand, makes membership of the councils a transitional measure that could be changed by statute. Item 26(1) of Schedule 6 states that “a traditional leader residing on land within the area of a transitional local council, transitional rural council or transitional representative council . . . is *ex officio* a member of that council until 30 April 1999 or until an Act of Parliament provides otherwise” (emphasis added). The Municipal Structures Act provides otherwise.³⁴

5 TRADITIONAL LEADERS UNDER THE MUNICIPAL STRUCTURES ACT OF 1998

The Municipal Structures Act changes the nature of participation of traditional leaders in the municipal government. It says nothing about ‘membership’ of traditional leaders in the councils but rather states:

32 *Ex parte the chairperson of the Constituent Assembly: In re Certification of the Constitution of South Africa 1996 (First Certification judgment)* 1996 (10) BCLR 1253 (CC) at 1323.

33 *Supra* note 24.

34 As Devenish predicted, “this appears to be a *capitis deminutio* [a decline in status] which undoubtedly will prove to be politically problematic” (1998: 298).

- (1) Traditional authorities that traditionally observe a system of customary law in the areas of a municipality, may participate through their leaders, identified in terms of sub-section (2), in the proceedings of the council of that municipality, and those traditional leaders must be allowed to attend and participate in any meeting of the council.

“Attend and participate” is understood not to include voting rights since these are the rights of the elected members of council,³⁵ which is a significant reduction in the status of traditional leaders in the councils.

Also significant is the number of traditional leaders who may attend and participate. Under the interim Constitution, any traditional leader in the area of the municipality was eligible to be an *ex officio* member. The number was thus not limited. This position was confirmed by the Constitutional Court in *African National Congress v Minister of Local Government and Housing*³⁶ in which the ANC argued that only one traditional leader in each municipality was entitled to be in the council but the Court held that all traditional leaders who qualified in terms of section 182 of the interim Constitution were eligible to be appointed as *ex officio* members.

It was probably as a result of this ruling that steps were taken in the Municipal Structures Act to limit the numbers of traditional leaders on municipal councils. In the original Act, section 81(2)(b) provided that the number of traditional leaders that could participate in the proceedings of a municipal council could not exceed 10% of the total number of councillors in that council. However, if the council had fewer than ten councillors, only one traditional leader could participate. After long negotiations, the Municipal Structures Act was amended to increase the participation of traditional leaders to up to 20% of a council.³⁷ The purpose of the limitation is to ensure that the non-elected element does not dominate the democratically elected councils. Given the fact that traditional leaders are only 20% of the council, there may be a case for allowing them full membership rights, in particular the right to vote on council decisions.

The MEC for local government in a province is empowered, after consultation with the Provincial House of Traditional Leaders, to regulate the participation of traditional leaders in the proceedings of a municipal council.³⁸ It is not clear what this regulation might entail, but it should include organising the selection of traditional leaders to participate in council proceedings, for instance by getting all the traditional leaders in the area of the council to elect their representative on the council. In addition to regular participation, the Act requires that where a matter under consideration directly concerns a traditional authority area, the traditional leader of that authority must be given an opportunity to express

35 It is submitted that in order to make this matter clear beyond doubt, the wording in s 54 of the Constitution regarding participation in the National Assembly of the President and members of the Cabinet who are not members of the Assembly should have been followed.

36 *African National Congress v Minister of Local Government and Housing* 1997 (3) BCLR 295 (CC); 1998 (3) SA 1 (CC).

37 Local Government: Municipal Structures Amendment Act 32 of 2000, s 5.

38 S 81(4).

a view on the matter before a decision is taken by the council. This means that even if the traditional leader concerned has not been nominated to the council, he has a right to be given an opportunity to express his view to the council on any matter before the council concerning the community under him.

6 DEMANDS OF TRADITIONAL LEADERS FOR A GREATER ROLE IN LOCAL GOVERNMENT

Traditional leaders of all political persuasions are dissatisfied with their constitutional and legal position with regard to governance. They argue that their status and powers and functions have been whittled away under the Constitution and post-1994 legislation. They further argue that the Constitution should have spelled out their powers and functions, as it did for municipalities. This having not been achieved, they argue that the national legislation referred to in section 212 of the 1996 Constitution, which is supposed to set out their role in local government, should have been processed at the same time that legislation on local government, such as the Municipal Structures Act and the Municipality Demarcation Act, was being processed.

Traditional leaders are demanding that traditional authorities be recognised at the primary level as local government and that they not be part of municipalities. As such, they demand that the Constitution is amended to reflect that position and to provide specific functions and powers for them. They also demand that necessary infrastructure is provided to enable them to deliver services in the communities. However, some traditional leaders also recognise that times have changed and that they live in a society where democracy is an important value. In a memorandum to the President, they offered a compromise that would retain the apartheid-created structures but would introduce a democratic element. They proposed that:

Members of the community falling within the area of jurisdiction of the traditional authority should democratically elect representatives to sit on the authority together with traditional leaders who will be automatic members . . . The elected members of the authority should be in majority.³⁹

In another document, the traditional leaders propose that 50% of councillors in a traditional authority should be selected in terms of customary law and the other 50% should be elected by the community, with the traditional leaders having a casting vote.⁴⁰

As far as district municipalities are concerned, traditional leaders argue that a district or regional council should be constituted by representatives from town councils (category B councils) and traditional authorities, with heads of traditional authorities being *ex officio* members of such district/regional

³⁹ Letter to President Mbeki from traditional leaders, dated 16 May 2000.

⁴⁰ Response to the *Discussion Document towards a White Paper on Traditional Leadership and Institutions* by the National House of Traditional Leaders, the Provincial House of Traditional Leaders, Contralesa and the Royal Bafokeng Nation, dated 29 June 2000.

councils "with the same powers and responsibilities as other councillors", including voting rights.⁴¹ In an interview, the president of the National House of Traditional Leaders, Inkosi Mzimela, stated that such partly elected regional councils would be in charge of planning and bulk delivery functions, while traditional authorities at local level would be in charge of actual delivery.⁴²

Thus, it would appear that traditional leaders are reconciled to the idea of some form of democracy but do not want to lose their influence and overall authority in rural areas. Being full members of councils and having appointed 50% of the council in terms of customary law, traditional leaders would still be dominant. This, however, would not only be contrary to Chapter 7 of the Constitution that prescribes elected municipalities over the whole territory of the Republic, but it would also not accord with section 1 of the Constitution.⁴³ As discussed below, the draft Bill envisages reconstituting traditional (tribal) authorities into partly elected bodies but without the kinds of power and functions demanded by the traditional leaders.

7 OPPOSITION TO TRADITIONAL LEADERS' DEMANDS

The demands for 'semi-autonomy' of traditional authorities in local government is opposed by a number of civil society organisations, which see the move of traditional leaders as retrogressive and subversive of democracy. Traditional leaders rule without accountability. Others argue that traditional leaders are desperately trying to hang on to privilege. As one commentator has said: "They used to instruct their subjects to pay levies and could sell sites. They see their powers slipping through their fingers and they are putting up a tough fight to preserve their hereditary right to rule without first testing the will of the ruled".⁴⁴ Some people have argued that if traditional leaders want to participate more effectively in local government, they should stand for election. If they are as popular with the people as they claim they are, they will be elected.⁴⁵ Traditional leaders have responded that that would not be in accordance with tradition.⁴⁶

8 GOVERNMENT RESPONSE TO DEMANDS OF TRADITIONAL LEADERS

The government, while willing to negotiate and reach an acceptable arrangement with traditional leaders, has been firm that the local government

41 Government's Response to the Submissions of Traditional Leaders on their Role, Powers and Functions. Memorandum from President Mbeki to Kgosi Kutama, dated 28 August 2000, par 3.3.

42 *Business Day* 2000.

43 S 1 states: "The Republic is one, sovereign, democratic state, founded on the following values: . . . (d) Universal suffrage, a national common voters roll, regular elections and a multi-party system of governance, to ensure accountability, responsiveness and openness". This section was meant to apply to the rural areas as well.

44 *The Star* 2000.

45 *Sunday Independent* 2000.

46 *Ibid*, based on an interview with the president of Contralesa, P. Holomisa.

model set out in the Constitution should not be changed. In a memorandum dated 28 August 2000, President Mbeki responded to the traditional leaders' memorandum of 29 May 2000 and their response to the *Discussion Document towards a White Paper on Traditional Leadership and Institutions*. The President assured the traditional leaders that:

- (1) In line with the Constitution and relevant law, traditional leaders would continue to discharge the authority currently vested in them.
- (2) The government would amend the Municipal Structures Act and increase representation of traditional leaders on councils from 10% to 20%.
- (3) The government would review the role of traditional leaders and ensure that they are accorded an appropriate role within the intergovernmental relations structures.
- (4) Demarcation of areas including traditional authority areas would be reviewed by the Board to address their objections although the final decision was that of the Board as an independent body.
- (5) Relevant national and provincial departments were tasked to identify areas in which additional responsibilities could be assigned to traditional leaders.
- (6) New legislation setting out their role would be finalised in July 2001.
- (7) MECs for local government would be advised to consider applying Section 81 (4) (b) of the Structures Act i.e. to prescribe a role for traditional leaders in the affairs of municipalities in their provinces.⁴⁷

However, regarding the model of local government, President Mbeki made it clear that government did not support the alteration of the existing local government model and emphasised that "the proposal to disenfranchise a section of our people negates the aspirations of millions, including some traditional leaders, who fought for democracy". He stated that the current model had been approved by the Constituent Assembly after an extensive and inclusive consultation process. Mbeki pointed out that apartheid had distorted the institution of traditional leaders, including allocating to them functions that traditionally did not belong to them. Most of these functions would now be performed by local government structures in terms of the Constitution. The President observed that many South Africans and organisations had responded to the *Discussion Document* indicating support for the rural local government model provided for in the Constitution.

Despite continued negotiations, not much has happened since 2000, apart from the amendment of the Municipal Structures Act to increase the participation of traditional leaders in municipalities from 10% to 20%. However, traditional leaders continue to agitate for more, with renewed support from the Minister of Home Affairs, Mangosuthu Buthelezi, and his nephew, King Zwelethini of the Zulus. The legislation providing for the role of traditional leaders did not materialise by July 2001 as promised. Continued consultation has, however, resulted in the *Draft White Paper on Traditional Leadership and Governance* and the Traditional Leaders and Governance Framework Bill 2003.⁴⁸

47 *Supra* note 41.

48 *Supra* note 12.

9 THE DRAFT WHITE PAPER ON TRADITIONAL LEADERSHIP AND GOVERNANCE

The *Draft White Paper* assumes a conciliatory tone, despite the often-combative stance taken by some traditional leaders over the issue of their powers and functions. The paper states that “traditional leadership and South Africa’s present democratic order are not mutually exclusive”.⁴⁹ The message is that traditional leadership and customary law have to be transformed to be in harmony with the Constitution and democracy. As part of its vision, government wants to see a strong relationship between the institution of traditional leadership and the different spheres of government – in particular, the local government sphere.⁵⁰ The *Draft White Paper* notes that traditional leadership was adversely affected by colonialism and warns that given the new order, it cannot be restored to its pristine pre-colonial form but has to adapt to change.⁵¹ It acknowledges that traditional leadership can still play an important role along with other institutions in achieving a better life for all, but makes clear the limits of its role:

Traditional leadership is a creature of custom and generally carries out customary functions. It may, however, complement the role of government in rural areas. Therefore there can be no contestation of authority between the institution of traditional leadership and the state.⁵²

The *Draft White Paper* further notes that in exercising their powers and functions prior to 1994, traditional leaders did not enjoy autonomy but acted under the supervision of magistrates, homeland departments or national departments. They cannot therefore legitimately claim autonomy in those areas now. Whereas local government powers and functions will not be shared with traditional leaders, cooperative relationships will be encouraged. Spheres of government may even delegate certain functions to traditional leaders where provided for by law.⁵³

Suggestions are made in the *Draft White Paper* as to the possible role of traditional leaders and the functions that they may perform in their own right or on behalf of government. There are uncontested functions according to custom, such as presiding over customary courts, convening meetings of communities through *imbizolekgotla* to consult with them on needs and priorities; protecting cultural values, and being protectors of customs and symbols of unity.⁵⁴ In addition, a traditional leader may be

49 *Ibid* 19.

50 *Ibid* 20.

51 The Minister of Justice and Constitutional Affairs, P. Maduna, recently repeated this warning: “It should however, be borne in mind that all this is taking place in a totally different constitutional context, where South Africa has since become a full-fledged republic – a state where supreme power is held by the people and exercised through their duly elected representatives. In other words the understanding of government is that this exercise reflects no intention to revert to the status that prevailed before the advent and intervention of colonialism and apartheid”. Minister of Justice and Constitutional Affairs, 2003.

52 *Supra* note 12, 21.

53 *Ibid* 24.

54 *Ibid* 29.

requested to perform ceremonial functions, such as inaugurating a development project or opening a new school or clinic in his or her area.

As far as non-customary matters are concerned, traditional leaders are expected to provide an advisory and supportive role to government in different spheres, but more particularly at the local government level. They should play an important role in mobilising the people in their areas to support social economic projects, such as the provision of water, roads etc. At a higher level, both the National and Provincial Houses of Traditional Leaders are expected to play a role in advising government in provincial and national spheres on developing policy and legislation affecting rural communities. The *Draft White Paper* spells out in some detail the possible involvement of traditional leaders and traditional authorities in various functional areas, such as justice, health, land affairs, environment and tourism etc., through assignment, delegation or agency from government. It is submitted that this is a substantial role and that the government is going out of its way to be accommodating. Traditional authorities no longer have taxing powers and therefore have no financial capacity (even if they had the human resource capacity) to carry out development projects and to provide services on their own. This should remain in the hands of elected municipalities, which have taxation powers and are allocated these functions by the Constitution. However, as they are salaried by the state traditional leaders should assist in the implementation of government programmes as well as advising on where the needs lie in their communities. These possible functions are more specifically dealt with in the Bill discussed below.

10 THE TRADITIONAL LEADERSHIP AND GOVERNANCE FRAMEWORK BILL 2003

The Bill was circulated in June 2003 for comment and is currently (September 2003) before the Portfolio Committee on Provincial and Local Government. The Bill makes few changes to the proposals in the *Draft White Paper* but is more specific on some of the issues. A major proposed change is the introduction of partly elected, partly nominated traditional councils to replace existing traditional authorities in traditional community areas. Clause 3 of the Bill provides that membership of a traditional council, at least a third of which must be women, comprises traditional leaders, members of the community selected by the principal traditional leader of the area in terms of custom, and other members who are democratically elected by the community. This is an important change that introduces a democratic element in traditional institutions and thus seeks to marry the traditional and the modern. The problem, however, is that the Bill provides that the elected element should be 25% of the council's membership, leaving 75% as nominated members. This hardly transforms or democratises traditional institutions. It has been argued that it will leave the *status quo* intact. The Commission on Gender Equality (CGE) has described this provision as a "mockery of democracy"⁵⁵ while the

55 Commission on Gender Equality (CGE), 2003.

National Land Committee describes it as merely symbolic with no real impact.⁵⁶ The Madikwe community from the North West argues that the composition of the council should be 75% elected and 25% appointed. To qualify as even partly democratic the councils should be at least 50% elected by the relevant community. This becomes even more important if the councils are to enter into service partnerships with municipalities, as proposed in the Bill.⁵⁷ The proposed 30% female membership is a significant step in the right direction, considering that even the fully democratised institutions such as the National Assembly, provincial legislatures and municipal councils have not yet achieved that level of gender equality. The Bill does not set out the process for and control over the election of councillors to ensure that the election is free. It is not even clear whether such elections would be by secret ballot. This leaves the process open to abuse or manipulation.

At a recent conference of traditional leaders, the idea of elected traditional councils was rejected as being in conflict with customary law.⁵⁸ It was argued that the existing traditional system is based on direct democracy and therefore was consistent with the requirements of the Constitution. It was submitted: "Those who claim that traditional African governance is undemocratic are either totally eurocentric in their thinking or have no understanding of the ways of African people".⁵⁹ This rejection was reiterated by Inkosi Mpiyezintombi Mzimela, chairman of the National House of Traditional Leaders, in his presentation to the portfolio committee.⁶⁰

In contrast, Contralesa, which is a member of the coalition, welcomed the Bill. It argued for the traditional authorities to be recognised as structures of local government in their own right in traditional community areas but added: "The transformation and democratisation of traditional authorities should be a prerequisite for such recognition".⁶¹ It therefore welcomed the provision in the Bill that traditional councils should be composed of traditional leaders and elected councillors, including women and youth. Most importantly, Contralesa is in principle not opposed to the establishment of elected municipal councils in areas under traditional leaders as long as, where possible, all heads of traditional authorities were full members of such councils.⁶²

The draft Bill lists a number of functions for traditional councils. These are similar to those proposed in the *Draft White Paper*. The councils are intended to provide a facilitative, supportive and consultative role to organs of state at the local, provincial and national levels. For instance, they are expected to facilitate the involvement of traditional communities

56 National Land Committee, 2003.

57 Republic of South Africa: Traditional Leadership and Governance Framework Bill 2003, [B58-2003] in *Government Gazette* No. 25437 of 4 September 2003, clause 5 (3).

58 Coalition of Traditional Leaders, 2003: 7. The coalition of traditional leaders comprises Contralesa, the Houses of Traditional Leaders and the Royal Bafokeng House.

59 *Ibid* p 2.

60 *Business Day* 2003b.

61 *Business Day* 2003c.

62 *Ibid*.

in the municipalities' development of integrated development plans, support municipalities in identifying community needs, recommend appropriate intervention to government in relation to development and service delivery, etc.⁶³ Importantly, the draft Bill provides as one of the functions of a traditional council "entering into service delivery agreements with municipalities regarding the provision of services to rural communities".⁶⁴ Thus, where the traditional council has the necessary capacity, a municipality may allow the council to deliver services. This may be in cooperation with local non-governmental organisations, as is currently the case in some communities. Further the draft Bill leaves the door open for a traditional council to exercise "powers and functions conferred by customary law, customs and statutory law consistent with the Constitution".

The proposals regarding service delivery have been met with skepticism in some quarters, which have argued that the traditional councils will not have the necessary capacity.⁶⁵ There is also the feeling that such a provision in the law will create the expectation that service delivery must be channeled through traditional councils or that the councils have priority in the award of tenders for service delivery.⁶⁶ As far as customary functions are concerned, it is not clear what powers and functions customary law confers. This could prove contentious. The Bill should have given an indication of the scope of these powers and functions.

A questionable provision of the Bill is that tribal authorities operating under previous (colonial, apartheid and homeland) legislation will be allowed to continue and are only expected to comply with the requirements of the new law within four years.⁶⁷ It is argued that there is no sound reason why the intended transformation should not take place with the passing of the new law. The legitimacy of these structures will remain in doubt as long as they do not adapt to democratic principles. In fact, it would be a good idea to repeal the colonial and apartheid laws relating to the creation, powers and functions of tribal authorities with the coming into force of the new legislation.

Another institutional change is the provision for the creation, in accordance with provincial legislation, of a district house of traditional leaders in the area of jurisdiction of a district municipality or metropolitan municipality where more than one chieftainship exists in that municipality.⁶⁸ Members of the house are to be elected by an electoral college comprising

63 *Supra* note 57, clause 5.

64 *Ibid* clause 5(3). The clause provides: "A traditional council may enter into a service delivery agreement with a municipality as provided for by law."

65 For instance the Sekhukhune Ad-hoc Committee (Limpopo Province), 2003; CGE 2003 and Legal Resource Centre 2003.

66 See for instance South African Local Government Association (SALGA) 2003 and CGE 2003.

67 *Supra* note 57, clause 25. The Legal Resources Centre (2003) is very critical of this provision as is the CGE (2003). They submit that these apartheid institutions must be made to democratise and do away with gender discrimination as soon as the law comes into force.

68 *Supra* note 57, clause 16.

all the kings, queens or their representatives and the principal traditional leaders residing in the district or metropolitan municipality in question. The functions of a district house would be advisory, as is the case with the provincial and national houses. It would advise the district or metropolitan municipality on matters relating to customary law, custom, traditional leadership, development of planning frameworks, development of by-laws impacting on traditional communities etc. This is a potentially important forum for traditional leaders, which, together with their participation in municipal councils and traditional councils, could make an important contribution to policy and delivery at the local level.

The role of traditional leaders themselves is not as clearly set out as they would want. The function of "administering the affairs of the traditional community in accordance with custom and tradition" is listed as a function of a traditional council, *not* of a traditional leader.⁶⁹ The Bill repeats the wording of section 212 of the Constitution that national or provincial government may, through legislation or other measures, provide a role for traditional leaders.

The Bill, however, goes further than the Constitution by providing a list of functional areas in which traditional leaders may play a role, namely arts and culture, land administration and agriculture, health and welfare, administration of justice, safety and security, registration of births, death and customary marriages, economic development, environment and tourism, management of natural resources and dissemination of information related to government policies and programmes.⁷⁰

These could be substantial powers and functions if they were specifically allocated to traditional leaders by legislation. However, it is probably necessary to leave the allocation to future legislation by the different spheres of government in terms of the shared functional areas in Schedules 4 and 5 of the Constitution. This is indeed framework legislation and the provinces should be able to put more flesh to it depending on the capacities, budgets and other considerations.

At the same time, this could cause great disparities in the powers and functions of traditional leaders. KwaZulu-Natal, for instance, where the traditional leaders' lobby is very strong, could allocate its traditional leaders wide powers and functions while the Free State gives them very few. This could then lead to demands by the others for uniformity based on the greater, not the fewer, powers and functions. There is also the danger of this law creating the expectation that traditional leaders would invariably administer the listed functional areas. Observers have warned that this law should not give the impression that traditional councils and leaders are a fourth tier of government on a par with elected local government.⁷¹

69 *Ibid* clause 5(1)(f).

70 *Ibid* clause 18(1).

71 Sekhukhune Ad-hoc Committee 2003, Legal Resource Centre 2003.

The Coalition has objected to the apparent vagueness of the provision relating to functions and powers of traditional leaders. In its commentary on the Bill, it reiterates its demand for exclusive authority in areas under traditional leaders. It argues:

The Coalition has repeatedly maintained that the traditional authorities must be accorded the right under the Constitution to take over full control of the local government functions of their communities. The wording of Chapter 7 [of the Constitution] has allowed elected local authorities to usurp the functions that should rightfully be performed by traditional authorities in their areas.⁷²

The Coalition repeats the charge that government had reneged on a promise to amend sections of Chapters 7 and 12 of the Constitution to provide for powers and functions of traditional authorities in local government. It proposes its own constitutional amendments, incorporating its demands. For instance, a proposed amended section 151(1) would read: "The local sphere of government consists of municipalities which must be established for the whole of the territory of the Republic, except for areas governed by traditional authorities". It is also proposed by the Coalition that a new section 212B be inserted in the Constitution to the effect that the local sphere of government in traditional communities consists of traditional authorities, one of whose functions is "to ensure the provision of services to traditional communities". It is further proposed that matters listed in part B of Schedule 4 and part B of Schedule 5 of the Constitution, (described in the Constitution as local government functions), be administered by the traditional authorities in traditional community areas.

These are extensive powers and responsibilities with considerable budgetary implications. It is most unlikely that the government would consider acceding to these demands.

It seems clear that although the Bill is a significant advance towards resolving the question of the role of traditional leadership in governance, the struggle of traditional leaders for the restoration of their pre-democracy powers and functions is far from over.

11 COMPARATIVE EXAMINATION OF ROLE OF TRADITIONAL LEADERS

11.1 Namibia

Although traditional leadership is recognised in the Namibian Constitution,⁷³ the role of traditional leaders diminished substantially after independence. As in many other African countries, colonial powers used traditional leaders in the then-South West Africa for their own purposes to assist in the implementation of colonial policy and enforcement of colonial

⁷² Coalition of Traditional Leaders 2003: 7.

⁷³ S 102(5) of the Constitution of Namibia states: "There shall be a Council of Traditional Leaders to be established in terms of an Act of Parliament in order to advise the President on the control and utilisation of communal land and on all such matters as may be referred to it by the President for advice".

laws. Traditional leaders lost much of their legitimacy with the people because of the oppressive nature of colonial law enforcement.

As a result of this collaboration with oppressive colonial rulers, the traditional rulers did not gain favour with the incoming liberators of the South West African Peoples' Organisation (SWAPO), which assumed power at independence in 1990. Traditional leaders were marginalised and stripped of most their powers and functions. For instance, they lost their criminal jurisdiction and could try only civil cases based on customary law. They lost powers of detention and the tribal police were disbanded.⁷⁴

The Traditional Authorities Act 17 of 1995 set up traditional authorities, consisting of traditional chiefs and their advisors, but it gave them no specific functions. Traditional leaders were left to function and exercise powers accorded to them by customary law. However, section 12(2) of the Act provided that "where the powers of the traditional leader conflict with the powers of the organs of the central government, regional councils or local authority council, the government, regional council or local authority council as the case may be, shall prevail". Although the traditional leaders' powers to allocate land were not taken away, they were diminished in that elected Regional Councils were given responsibility for administration of land outside urban areas.⁷⁵

More recent legislation – the Traditional Authorities Act 25 of 2000 – does not substantially improve the position of traditional authorities. It restricts them largely to cultural or traditional matters and to assisting government in maintaining law and order. It gives them no specific role in development or service delivery. Section 3 of this Act requires traditional authorities and their members to promote peace and welfare in the community and to supervise and ensure the observance of the customary law of the community by its members.⁷⁶ Traditional leaders are required to assist the police and other law enforcement agencies in the prevention and investigation of crime and the apprehension of offenders.⁷⁷ They are also required to assist and cooperate with government, regional councils and local authority councils in the execution of their policies and to keep members of their communities informed of development projects in their areas. Thus, traditional authorities are confined to assisting in the implementation of policies and governmental programmes rather than being in charge of such programmes themselves.

Traditional authorities may raise funds on behalf of their communities for purposes of performing the functions permissible under the Act.⁷⁸ Importantly, a traditional authority may set up a Community Trust Fund to which members of the community concerned may contribute for purposes of:

74 For a comprehensive study of the role of traditional leaders in Namibia, see Keulder 1998.

75 S 28(iii) Regional Councils Act 22 of 1992.

76 See s 3(1) of the Traditional Authorities Act 25 of 2000.

77 *Ibid* s 3(2).

78 *Ibid* s 3(3)(a).

- (a) financing projects in the community which promote and uplift the culture, preserve cultural sites, works of art and literary works of the community
- (b) meeting the administration costs of running the office of the traditional authority
- (c) meeting the costs of performing any of the functions and duties of the traditional authority under the Act.

It is clear that traditional authorities are not supposed to raise funds or manage funds provided by the state for service delivery in the same way as a local council would.

Provision of services in rural and urban areas is the province of elected local authorities. The Local Authorities Act 22 of 1992 provides for the setting up of municipalities, town councils and village councils headed by mayors, chairpersons and executive committees. Their functions include water supply, sewerage removal, rubbish removal, street construction and maintenance, electricity supply and public transport. No role is provided for traditional authorities in this respect, nor are traditional leaders members of these councils. Keulder states that there is tension between traditional leaders and elected councillors⁷⁹ who have clashed over, for instance, the traditional leaders' charging for use of communal land by members of the community. He further points out that there is mutual suspicion between traditional leaders and elected councillors, which is perhaps to be expected where power has been taken from one group and transferred to another. However, he acknowledges that in some areas there is cooperation between them on matters of development.⁸⁰ Keulder was writing in 1995–1996, and his work was based on the operation of the 1995 Traditional Authorities Act. Since the new Act of 2000 did not give the traditional leaders any greater involvement in local government, this probably implies the traditional leaders have come to accept their diminished role and are cooperating more with elected local councils. In any case, they are required by law to "give support to the policies of the Government, regional councils and local authority councils and refrain from any act which undermines the authority of those institutions".⁸¹

Another factor that restricts Namibian traditional leaders to matters of a traditional nature is denying them the right to hold elected political positions while holding the position of chief or head of a traditional community.⁸² Traditional leaders are not prohibited from taking up political office (defined as the office of the President of Namibia, membership of the National Assembly, National Council or Regional Council and including leadership of a political party), but once elected to office such a traditional leader is considered to have taken leave of absence from the office of chief or head of a traditional community. He or she may not be accorded the status of chief or head of a traditional community, nor receive allowances payable to a chief or head of a community.⁸³ The Act recognises

79 Keulder 1998: 61–2.

80 *Ibid* 62.

81 S16 of Act 25 of 2000.

82 *Ibid* s 15.

83 *Ibid* ss 15(1), (3) and (4). Taking leave to go into full-time politics is what the *Draft White Paper* is proposing for traditional leaders in South Africa.

that this may be a limitation of the constitutional right to hold political office or the office of chief or head of a traditional community and provides that "to the extent that this section authorises such a limitation, such limitation is authorised on grounds of public interest as contemplated in Article 17(3) of the Namibian Constitution".⁸⁴ Nevertheless, there is nothing prohibiting traditional leaders from being elected to local authority councils and participating in decisions on development etc.

On the whole it would appear that the position of traditional leaders in Namibia cannot be used as an example to argue for a greater role in local government for traditional leaders in South Africa.

11.2 Zimbabwe

The Zimbabwe Constitution provides for the recognition and appointment of traditional leaders by the President "giving due consideration to the customary principles of succession of the tribes people over whom the chief will preside. . ."⁸⁵ The Constitution also provides for a Council of Chiefs consisting of chiefs elected by chiefs in communal land areas (rural areas excluding commercial farming areas and rural towns). The Council of Chiefs has advisory powers only, similar to the National House of Traditional Leaders in South Africa.

Like in Namibia and other African countries, traditional leaders in Zimbabwe were marginalised at independence on the ground of their alleged or actual collaboration with colonial oppressors. In Zimbabwe before independence, the chiefs were largely tools of the Rhodesian government and used to identify and hand over suspected freedom fighters. In this way they lost much of their legitimacy and respect among the people whom they administered. As parts of the country were liberated, guerrillas set up village committees as local government structures, which took over functions previously performed by chiefs.⁸⁶ At independence elected village committees officially took over local government functions. These were later succeeded by village development committees, which fed ward development committees, which discussed and came up with programmes of action for approval by councils on matters of rural development. Urban, district and rural councils had the responsibility for provision of basic services such as water, electricity, sewerage, and roads. Tax collection in rural areas was the responsibility of district councils. However, it is recognised that these councils were not as successful in tax collection as the chiefs had been.

A new Act, the Traditional Leaders Act⁸⁷ of 1998, was passed introducing changes in the role of traditional leaders in Zimbabwe. It is argued that this was in recognition that the state would be more successful in its control of the population by having the chiefs on their side and using

84 *Ibid* s 15(8).

85 S 11 of the Constitution of Zimbabwe.

86 Keuker 1998: 181.

87 Traditional Leaders Act 1998, ch 29: 17 Laws of Zimbabwe.

them for matters such as tax collection and law enforcement. All indications are that tax collection in rural areas increased dramatically when this function was handed over to traditional leaders.

The most important part of the Traditional Leaders Act is the functions and duties of traditional leaders under section 5. The first duty is the performance of functions pertaining to the office of a chief as the traditional head of the community under his jurisdiction. This has to do with functions under customary law and culture. Another duty is the discharging of functions conferred on him in terms of the Customary Law and Local Courts Act⁸⁸ relating to resolution of disputes. A further important duty is overseeing the collection by village heads of taxes, levies, rates and other charges payable under the Rural District Councils Act.⁸⁹ They also have an important role in ensuring that communal land is properly allocated in accordance with the Communal Land Act⁹⁰ and ensuring that requirements for occupation and use of land are observed. In particular land must be used in accordance with the law relating to control of over-cultivation, overgrazing, destruction of flora and fauna and illegal settlement. A chief must report any outbreak of any epidemic disease, publish public orders, directions and notices of the state. Importantly, a chief is charged with "liaising with and assisting development committees . . . in all matters relating to the planning and implementation of local development programmes".⁹¹ He must also assist drought and famine relief agencies in coordinating relief.

Thus, it is evident that a chief and the headmen under him are agents of the central state with no autonomy in terms of service delivery or other local government functions. They take care of traditional/customary functions and general administration to ensure good governance and peace in communities, as well as assisting elected government structures and institutions to carry out their programmes related to service delivery and development and, significantly, in the collection of taxes, levies, rates and other charges for the state.

Unlike in Namibia, traditional leaders are not specifically restricted from taking up political office while retaining their positions as traditional leaders. This leaves them free to participate in local and national government.

Traditional democratic structures have been formalised and modernised in Zimbabwe. The Traditional Leaders Act provides for the existence of village assemblies, also known as *dare* or *inkundla*, consisting of all the inhabitants of the village concerned over the age of 18 years.⁹² The assemblies thus include women and youth, unlike traditional assemblies in many African countries in which women and unmarried young men have not been allowed to participate. Village assemblies are presided over by

88 Customary Law and Local Courts Act ch 7: 05 Laws of Zimbabwe.

89 Ch 29: 13 Laws of Zimbabwe.

90 *Ibid* ch 20: 04.

91 *Supra* note 87.

92 *Supra* note 87, s 14.

village heads nominated by headmen, approved by the chief and appointed by the Secretary of the Ministry of Local Government and Housing. The functions of a village assembly include:

- considering matters affecting the interests and well-being of all the inhabitants of the village, ensuring good government in the village;
- considering issues relating to land, water and other natural resources within the area and making appropriate recommendations;
- electing a development committee for the village;
- reviewing and approving any village development plan before it is submitted to the ward development committee for incorporation into the ward development plan;
- considering matters referred to it by various authorities and organs; and
- making representations on any matters affecting the village.⁹³

Village development committees, presided over by village heads, prepare development plans for incorporation into ward development plans.

A ward, consisting of a number of villages in the communal or resettlement areas of a rural district, has a ward assembly consisting of all headmen, village heads and the district councillor of the ward.⁹⁴ The ward assembly is presided over by a headman elected by the assembly. The functions of the ward assembly include supervising the activities of the village assemblies within its jurisdiction, reviewing and approving the development plans or proposals submitted by the village assembly, submitting such plans for incorporation into the rural district development plan, and generally overseeing the discharge of functions by village assemblies to ensure good government. In addition the ward assemblies consider and report on matters referred to them by the district administrator, the chief of the area, the rural district council or a member of the ward assembly.

Although the ward assembly is not a directly elected body it represents the general interests of the ward through the traditional leaders. This gives the traditional leaders an important say in the formulation of policy affecting their communities. However, it must be recognised that these bodies have no implementation powers, such powers resting with the elected rural district councils. Any development project must ultimately be approved by the district council before implementation.

At the highest level of traditional leadership there is a Council of Chiefs established by the Constitution "to advise the President on the control and utilization of communal land".⁹⁵ The Traditional Leaders Act expands the functions of the Council to:

- (a) . . . make representation to the Minister [of Local Government and Housing] concerning the needs and wishes of the inhabitants of communal and resettlement land; and

93 *Ibid* s 15.

94 *Ibid* s 18.

95 Constitution of Zimbabwe 1980, as amended, s 102.

- (b) to consider any representation made to it by the provincial assembly and, in its discretion, to report to the Minister; and
- (c) to consider and report on any matter referred to it by the Minister for consideration; and
- (d) to superintend the activities of ward assemblies and village assemblies and to give them such direction as it considers necessary.⁹⁶

This last function ensures that chiefs at the highest level have a say in the implementation of local government policy and programmes.

Each province has a provincial assembly consisting of all chiefs of the province. At each meeting, the chiefs elect one of their number to preside.⁹⁷ Each provincial assembly elects members of the Council of Chiefs from among its number. The main function of the assembly is to consider and report on matters referred to it by the Minister, the Council of Chiefs or a member of the provincial assembly and to bring to the notice of the Council or the Minister any matter which affects the inhabitants of the province concerned or any part of the province. It would appear that the provincial assembly is not as influential as the village or ward assemblies as it does not directly deal with specific development plans or programmes. A provincial assembly is thus similar to a provincial house of traditional leaders in South Africa.

As in the case of Namibia, the position and role of traditional leaders in Zimbabwe is not encouraging for those in the traditional leadership in South Africa who demand a greater role for traditional leaders in local government and especially for autonomy from elected municipalities. Zimbabwean traditional leaders have been reduced to administrators and tax collectors without much power in terms of decision-making, implementation of development programmes or service delivery. Nevertheless, their role in presiding over and participating in village and ward assemblies is important, in that through this they get to influence policy and service delivery in, and the development of, their areas.

11.3 Botswana

Unlike Namibia and Zimbabwe, Botswana's independence was not preceded by a liberation struggle. There was instead an 'orderly' transition to independence. The position of traditional leaders had been less undermined under colonialism than in the other two countries and the legitimacy of the leaders was largely intact at independence. This was also as a result of the fact that instead of using traditional leaders as instruments of oppression, the British had co-opted the leaders through their policy of indirect rule, leaving them to govern the African people as they had always done in accordance with customary law and practice, as long as they delivered taxes to the British and ensured law and order in their communities.

96 *Supra* note 87, s 37.

97 *Ibid* s 35.

Nevertheless, at independence political parties demanded democratic structures in governance and the powers and functions of traditional leaders in government were slowly eroded. The more senior leaders negotiated a House of Chiefs but even this had no powers. It is an advisory body that may consider draft legislation and pass resolutions on it, but Parliament is not bound to take its advice. Any Minister may consult the House of Chiefs on any matter and the House may discuss any matter regarded as in the interest of the tribes or tribal organisations. Although the House of Chiefs is largely toothless, it has been argued that it "... did contribute to the successful governing of Botswana. It facilitated better understanding of state policy by the ordinary rural population".⁹⁸ The House of Chiefs may be compared with the South African National House of Traditional Leaders in its limited role.

As far as local government is concerned, traditional authorities lost many of their powers to the new democratic structures: the district councils and the land boards. This naturally caused conflict. As in present day South Africa, "traditional leaders were reluctant to surrender their powers and influence to the new structures and relations between the two remained conflictual".⁹⁹

The responsibility for delivering services in rural areas rests with the district council. Its functions are spelled out in the Local Government (District Councils) Act.¹⁰⁰ The main function, as stated in section 7, is to "perform the functions it is required to perform and otherwise exercise its powers so as to secure and promote the health, order and good government of the area for which it has been established". The functions are further elaborated in the schedule to the Act and include:

- providing primary school education;
- providing sewage and refuse removal;
- taking steps to safeguard and promote health and prevent occurrence of or deal with outbreak of disease;
- constructing and maintain[ing] local roads; and
- providing water supplies, licensing of brewing and distribution of traditional beer.

For the above purposes, the district council is empowered to pass by-laws.

Traditional authorities could, of course, have performed some of the functions listed above. The option chosen by Botswana as a democratic modern state is that such services ought to be controlled and supplied by a democratically elected and accountable body with the assistance of traditional leaders where necessary. The traditional leaders, on the other hand, are left with very limited powers or functions. Even land allocation, which was a major source of power and patronage for them, was taken away in 1970 and given to land boards. According to the Chieftainship

⁹⁸ Keulder 1998: 112.

⁹⁹ *Ibid.*

¹⁰⁰ Laws of Botswana ch 40: 01.

Act,¹⁰¹ a traditional leader is left with minimal administrative functions, namely "to promote the welfare of his tribe, carry out any instruction by the Minister, inform the tribe of development projects in the area, convene *Kgotla* meetings to obtain advice as to the exercise of his functions".¹⁰² Traditional leaders are also charged with assisting in the prevention of crime. They may cause persons to be arrested if it may be done without a warrant or where a warrant has been issued. They may also seize property suspected to be stolen and report arrests and seizure of property to the nearest court.¹⁰³ In some respects these powers are similar to those of chiefs in South Africa under the Regulations of 1957 described above, especially with regard to the maintenance of law and order.

With respect to Botswana it may again be concluded that the role of traditional leaders has been considerably diminished and has given way to elected structures as far as local government functions are concerned. South African traditional leaders are better off, in that they are at least entitled to participate in local government decision-making under the Municipal Structures Act.

12 CONCLUSION

The idea that rural areas under traditional leaders should not have fully elected municipal councils and should remain under the overall control and direction of hereditary chiefs and their 'tribal authorities' is not likely to be accepted in the near future. If accepted, it would mean that, in some parts of the country people elect those they consider to be capable leaders, who have a programme for uplifting the community, while in other parts of the country people are stuck with leaders whose claim to leadership is not ability, efficiency or an implementable vision for the improvement of the life of the people but is rather based on being born to the royal line.

South Africa is not distinct from the rest of Africa or the world with respect to its traditional leaders. Traditional leadership is a dominant mode of governance at a particular stage in a people's history. Europe had hereditary rulers, powerful kings and queens with a hierarchy of subordinates such as dukes, marquis, earls and others, but this system ultimately gave way to democracy. Where traditional, hereditary leadership survived, only the very top leadership survived and they now only perform ceremonial functions, as is the case in England, the Netherlands and Sweden. In Africa traditional leadership was perpetuated by colonialism and apartheid because of the policy of indirect rule. Many of the colonial chiefs were turned against their people in the process of coercing them to render services and pay taxes to the colonial masters while neglecting their own well-being. It is for this reason that many African countries got

101 *Ibid* ch 41: 01.

102 *Ibid* s 15.

103 *Ibid* s 17.

rid of the institution of traditional leadership or relegated it to largely ceremonial and cultural matters after independence. Of course, there are quite a number of traditional leaders who resisted colonialism and who must be applauded and remembered. But times have changed. In order to improve people's conditions and fulfil their wishes, the people themselves have to periodically elect their leaders and get rid of those who do not live up to their expectations. It is true that the democratic experiment went wrong in a number of African countries but this is no reason to prefer hereditary rule to democracy. Africa is currently experiencing a renaissance of democratic rule.

The role of traditional leadership in a democratic South Africa has been the subject of debate and negotiation for ten years and still remains unresolved. Despite the many meetings that government has had with representatives of traditional leaders, it is clear from the *Draft White Paper* and the Traditional Leadership and Governance Framework Bill 2003, that the situation regarding elected local government, as outlined in the Constitution and legislation, is not about to change. A study of the position of traditional leaders in neighbouring countries does not advance the case of the traditional leaders in South Africa for the kind of powers and functions they demand. They need to accept this reality and settle for co-existence and cooperation with elected local government, which will assure them of greater participation in public affairs and a meaningful contribution to the upliftment of rural communities from the state of poverty and neglect they suffered under apartheid.

If traditional leaders are willing to cooperate with all spheres of government and to utilise the remodelled and the new traditional structures envisaged in the Bill, they can achieve much for their communities. They have been in charge on the ground and know or are able to assess the needs of their people, although they were previously unable to do much to meet these needs. They should use their representation on the councils to argue for better services and development projects in their areas. At the same time, given that traditional leaders comprise only 20% of the councils it would do no harm to allow them voting rights so that they feel that they are part of the councils and associate themselves with the decisions taken.

The Bill envisages the forging of partnerships between proposed traditional councils and municipal councils. Such partnerships should satisfy the traditional leaders' demand for a more substantive role in serving their people but the partnerships are subject to their demonstration of having the capacity to deliver. It is up to them to prove the sceptics wrong. Traditional leaders, assisted by structures at the local level, should continue to look after the cultural interest of their communities, resolve disputes in accordance with customary law and promote peace in the community. They should also remain points of communication between government agencies and the people and generally assist government in improving the conditions of life of the rural communities. The functions stated in Chapter 7 of the Constitution, such as the provision of water, electricity and other services, should remain primarily the responsibility of municipal councils. However, the two should cooperate closely to maximise their respective capacities to the benefit of the communities. The Bill sets the stage for such cooperation. It is still to be seen whether it will materialise.

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