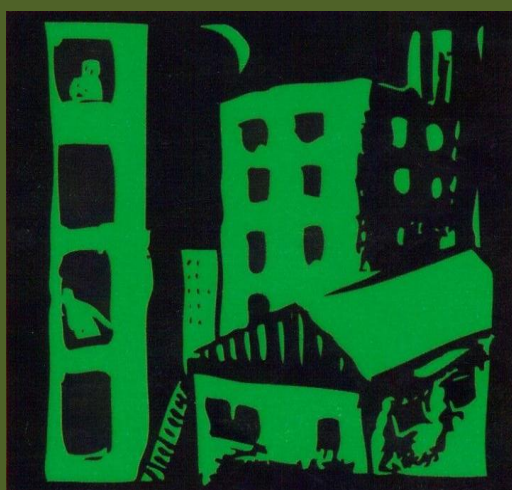


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## Revisiting the participation of traditional leaders in municipal councils in South Africa

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### 1 INTRODUCTION

During the pre-colonial era, societies in Africa were ruled by traditional leaders led by kings who were supported by chiefs, headmen and traditional councillors.<sup>1</sup> During the colonial conquest, the role of traditional leaders in the governing of people in Africa was weakened by the colonial masters and, later, by the apartheid government which reduced and/or took away most of the original, important powers of traditional leaders.<sup>2</sup> Although the powers of traditional leaders were eroded, these rulers continued to

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<sup>1</sup> Rugege S “Traditional leadership and its future role in local government” (2003) 7 *Law, Democracy & Development* 171 at 171.

<sup>2</sup> Rugege (2003) at 172.

govern their subjects.<sup>3</sup> Traditional leaders have always been part of local government in Africa and they looked after the welfare of local communities. Rugege, thus, points out that these traditional leaders have always been the basis of local government in most African countries, including South Africa.<sup>4</sup> In South Africa, local government is constituted by municipalities which are established throughout the Republic.<sup>5</sup> The executive and legislative authority of a municipality is vested in its municipal council.<sup>6</sup>

A municipal council is constituted by councillors who are elected at the general elections by voters.<sup>7</sup> In addition to the elected members, the Local Government: Municipal Structures Act 117 of 1998 allows traditional leaders, who should not constitute more than 10 per cent of the members of the municipal council and who are identified by the MEC for Local Government (the MEC), to attend and participate in the deliberations of a municipal council.<sup>8</sup> These members may participate in deliberations but may not vote because they are not full members of the municipal council.<sup>9</sup>

The participation of traditional leaders in a municipal council without the power to vote may reduce their influence with regard to the decisions of the municipal council. In addition, the power given to the MEC to identify traditional leaders who may participate in a municipal council might be incongruent with the status accorded to the institution of traditional leaders by the Constitution of the Republic of South Africa, 1996 (the Constitution).<sup>10</sup> The problem investigated in this article is, thus, the participation of traditional leaders in a municipal council without the power to vote, and the power bestowed on the MEC to identify and nominate those traditional leaders who may attend meetings of the municipal councils.

Accordingly, this article examines the procedure adopted for identifying representatives of traditional leaders to participate in municipal council activities, and it also critically discusses the participation in a municipal council of traditional leaders without the right to vote. In order to provide a background for the discussion, this article explains the role and powers of traditional leaders in government both before and after the colonisation of South Africa. This discussion is relevant in order to demonstrate the past and present roles of traditional leaders in local government. A comparative study of the membership and participation of unelected members in the Legislative Assembly is conducted with the aim of determining whether the possibility of full membership of traditional leaders -an unelected structure in a municipal council – in an elected structure might be at odds with the principles of democracy. This is done

<sup>3</sup> Bennet TW *Customary law in South Africa* (Cape Town: Juta 2004) at 107.

<sup>4</sup> Rugege (2003) at 171.

<sup>5</sup> Section 151 (1) of the Constitution.

<sup>6</sup> Section 151 (2) of the Constitution.

<sup>7</sup> Section 157 (2) of the Constitution provides that the election of members to a municipal council must be in accordance with national legislation, which must prescribe a system of proportional representation combined with a system of ward representation based on the national common voters roll. Accordingly, members of a municipal council are elected through general political elections.

<sup>8</sup> Section 81 (2) (b) of the Municipal Structures Act.

<sup>9</sup> See s157 (1)-(2) of the Constitution which provide for the composition and election of municipal councils.

<sup>10</sup> Section 211 of the Constitution recognises the institution, status and role of traditional leaders.

by briefly discussing the House of Lords in the United Kingdom, membership of the Parliaments of Zimbabwe and Lesotho, where both elected and unelected members constitute the Parliament, and the participation of traditional leaders in municipal councils in Zimbabwe, Lesotho and South Africa. Finally, a recommendation is made for the full membership of traditional leaders in municipal councils. This article does not discuss the broader status of traditional leaders under the Constitution, but only the status of traditional leaders in municipal councils.

## 2 HISTORICAL BACKGROUND OF TRADITIONAL AFRICAN GOVERNMENT

### 2.1 The pre-colonial period

Indigenous African traditional government dates back to before the occupation of South Africa by British and Dutch settlers.<sup>11</sup> The government was divided into three tiers of authority, namely, the chief, the ward head and the family head.<sup>12</sup> The chief was the head of traditional central government, the headman was the head of the ward, and the family head exercised leadership at family level.<sup>13</sup> Accordingly, the nature of traditional governance in South Africa was that of an unspecialised legal system where the king or chief was creator of laws, the executor of laws and the judge, all at the same time, although he worked with his council.<sup>14</sup> Keulder indicates that in Namibia in the pre-colonial era, kings and chiefs governed the communities with hereditary authority and were “vested with almost all political, economic and social power”.<sup>15</sup> In Zimbabwe, under the Ndebele political system, “the king had great power and full control of land and cattle, he was the commander of a powerful and well-trained army and supreme judge”.<sup>16</sup>

The most important and powerful person was the chief or king, depending on the title that described the head of that African traditional government. The chief or king was, thus, referred to as the father of his subjects and he wielded extensive powers over them.<sup>17</sup> According to Bennett, the chief or king had a range of powers, which included: the power to order his subjects to work on his lands or provide labour for public works, to maintain order, to judge disputes fairly, to provide for the needy, and to tend to the welfare of his people.<sup>18</sup> Myburgh and Prinsloo indicate that the powers of the chiefs included control over immigration and emigration, the allocation of land, initiation

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<sup>11</sup> Himonga C & Nhlapo T (eds) *African customary law in South Africa: post-apartheid living law perspectives* (Southern Africa: Oxford University Press 2014) at 228.

<sup>12</sup> See Himonga & Nhlapo (2014) at 102.

<sup>13</sup> See Himonga & Nhlapo (2014) at 103.

<sup>14</sup> Rugege (2003) at 172.

<sup>15</sup> Keulder C *Traditional leaders and local government in Africa: lessons for South Africa* (Pretoria: HSRC 1998) at 34 & 82.

<sup>16</sup> See Keulder (1998) at 145.

<sup>17</sup> See Keulder (1998) at 103.

<sup>18</sup> See Keulder (1998) at 103-104.

schools, law and order, and the army.<sup>19</sup> These powers were exercised by the chiefs through the traditional councils long before the colonial conquest.

## 2.2 The colonial and post-colonial periods

The year 1652 marked the beginning of colonisation with the settlement of Europeans in South Africa. When the Europeans colonised South Africa they introduced change in the way traditional governance operated in the country. Kings and chiefs could no longer be creators and executors of laws and judge all at the same time. Their traditional style of governance was diluted.<sup>20</sup>

After the colonial conquest, African leaders were subordinate to the settler governments, and the central government of the settlers became the primary source of their powers.<sup>21</sup> In this sense the original powers of traditional leaders were eroded, although they continued to rule their subjects. Attempts were made by the conquerors to eliminate traditional government.

In 1927, the Black Administration Act<sup>22</sup> was enacted to make provision for the control and management of the affairs of Black people. In terms of section 20 of this Act, the Minister of Justice had powers to determine the issues over which traditional leaders could or could not preside.<sup>23</sup> The government of the Union of South Africa and, subsequently, the government of the Republic of South Africa controlled and administered Black people by passing pieces of legislation that regulated the powers of traditional leaders. According to Bennett, the Black Administration Act gave authority to the Minister to create and divide tribes to depose or appoint any person as a traditional leader.<sup>24</sup> Since its inception, this Act has been amended several times but, with the Constitution being the supreme law of the Republic<sup>25</sup>, most parts of the Act were

<sup>19</sup> Myburgh AC & Prinsloo MW *Indigenous public law in KwaNdebele* (JL van Schaik 1985) at 24.

<sup>20</sup> See Rugege (2003) at 173.

<sup>21</sup> See Bennett (2004) at 107.

<sup>22</sup> Black Administration Act 38 of 1927.

<sup>23</sup> For example, in terms of sched 3 of the Black Administration Amendment Act 13 of 1955 traditional leaders could not try, among other things, high treason, murder, rape and many other crimes listed there.

<sup>24</sup> See Bennett (2004) at 109. The impact of these powers of the Minister on traditional government was that traditional leaders were no longer empowered solely on the basis of their hereditary right, but that any person could be appointed by the Minister as a traditional leader. This state of affairs regarding the appointment of and succession to the traditional leadership prompted Keulder (1998) at 24 to define a traditional leader as a person who, not only by virtue of his ancestry, occupies a clearly defined leadership position in an area or who has been appointed to such a position in accordance with the customs and tradition of the area, but also as a person who has been appointed by order of government or elected by the community to exercise traditional authority over an area or tribe, or to perform traditional functions for them.

<sup>25</sup> Sections 1 and 2 of the Constitution provide that the Republic of South Africa is one, sovereign, democratic State founded on the values of supremacy of the Constitution and the rule of law and that the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.

declared invalid by the courts because of their inconsistency with the provisions of the Constitution.<sup>26</sup>

### 3 TRADITIONAL GOVERNMENTS UNDER THE 1996 CONSTITUTION

South Africa embarked on negotiations for a democratic dispensation in the early 1990s.<sup>27</sup> This resulted in the interim Constitution<sup>28</sup> which paved the way for the first democratic elections in 1994 and the final Constitution in 1996. The drafters of the Constitution recognised the role of traditional leaders and traditional leadership and located their role within the sphere of local government.<sup>29</sup> The interim Constitution recognised the institutions of traditional leadership that had existed before the Constitution was adopted.<sup>30</sup> Traditional leaders were further allowed to be members of local government.<sup>31</sup> The Constitution provides the following:<sup>32</sup>

- (1) The institution, status and role of traditional leadership, according to customary law, are subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

This provision of the Constitution recognises the institution of traditional leadership subject to the Constitution. The systems of law practised by the traditional leaders are further recognised subject to the condition that they may be amended or repealed by legislation.

The Constitution does not provide for the role and powers of traditional leaders, but anticipates national legislation that will regulate this matter further where it provides the following in section 212:

<sup>26</sup> For instance s 23 was declared invalid in *Bhe and others v Khayelitsha Magistrate and others* 2005 (1) BCLR 1 (CC).

<sup>27</sup> Du Plessis W (Traditional Research Group) "The role and future of traditional leaders in South Africa" (1999) 64 *Koers* at 296.

<sup>28</sup> Constitution of the Republic of South Africa, 1993 (the Interim Constitution).

<sup>29</sup> Chapter 11 of the Interim Constitution made provision for traditional authorities and s 181 provided that a traditional authority which observes a system of indigenous law and is recognised by law immediately before the commencement of this Constitution shall continue as such an authority and continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority. Section 182 made provision 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 referred to in chap 10, 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.

<sup>30</sup> See s 181(1) of the Interim Constitution.

<sup>31</sup> See s 182 of the Interim Constitution.

<sup>32</sup> See s 211 of the Constitution.

- (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
- (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law –
  - (a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and
  - (b) national legislation may establish a council of traditional leaders.

Although the Constitution recognised traditional leaders, these leaders were not satisfied with the failure of the Constitution to specify their powers clearly. According to Rugege, the concerns of the traditional leaders arose from the fact that their status and powers were reduced by the Constitution and post-1994 legislation.<sup>33</sup>

### 3.1 The Traditional Leadership and Governance Framework Act

In 2003 the Traditional Leadership and Governance Framework Act<sup>34</sup> was enacted. Among other things, the object of the Act is to provide for the functions and roles of traditional leaders and thus define the place and role of traditional leadership within the new system of democratic governance and constitutional supremacy in South Africa.<sup>35</sup> The Traditional Leadership Act defines a traditional leader as “any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position, and is recognized in terms of the Act”.<sup>36</sup> It does not define “traditional governance” but, rather, “traditional leadership”. These terms, however, have the same meaning and are used interchangeably. The Traditional Leadership Act makes provision for recognition of a traditional community if that community is subject to a system of traditional leadership in terms of its customs and if it observes a system of customary law.<sup>37</sup> The Act specifies functions of the traditional leaders, which, among other things, include<sup>38</sup>: assisting municipalities in the identification of community needs; facilitating the involvement of the traditional community in the development or amendment of the integrated development plan of a municipality in whose area that community resides; recommending, after consultation with the relevant local and provincial houses of traditional leaders, appropriate intervention to government that will contribute to development and service delivery within the area of jurisdiction of the traditional council; participating in the development of policy and legislation at local level; and participating in development programmes of municipalities and of the provincial and national spheres of government.

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<sup>33</sup> See Rugege (2003) at 181.

<sup>34</sup> Act 41 of 2003.

<sup>35</sup> See the preamble of the Traditional Leadership Act.

<sup>36</sup> Section 1 of the Traditional Leadership Act.

<sup>37</sup> See s 2(1) of the Traditional Leadership Act.

<sup>38</sup> See s 4 of the Traditional Leadership Act which provides that the members of a traditional council must comprise traditional leaders and members of the traditional community selected by the senior traditional leader, and other members of the traditional community who are democratically elected must constitute 40 per cent of the members of the traditional council.

The functions of traditional leaders under the Traditional Leadership Act place such leaders primarily in the local sphere of government, where they are required to play a role in governance simply by participation and assisting municipalities. Furthermore, both the White Paper on Local Government<sup>39</sup> and the discussion document towards a White Paper on Traditional Leadership and Institutions<sup>40</sup> locate the role, powers and functions of traditional leaders and traditional governance in the local/municipal sphere of government.<sup>41</sup> The location of traditional leadership and governance affairs in the local sphere of government seems to be the route followed by most African countries after independence.

#### **4 THE ROLE OF TRADITIONAL LEADERS IN THE MUNICIPAL COUNCILS**

Apart from the powers and functions of traditional leaders under the Traditional Leadership Act, other pieces of legislation specify the roles of traditional leadership in local government. In this regard the Municipal Structures Act allows leaders of traditional authorities within the area of a municipality to attend and participate in the proceedings of a council.<sup>42</sup> The number of traditional leaders who may attend and participate in the council meeting may not exceed 10 per cent of the total number of councillors in that council.<sup>43</sup> The Municipal Structures Act provides that traditional authorities that traditionally observe a system of customary law in the area of a municipality may participate, through their leaders, in the proceedings of the council of that municipality.<sup>44</sup> These leaders are allowed to attend and participate in any meeting

<sup>39</sup> See the White Paper on Local Government (9 March 1998).

<sup>40</sup> See the discussion document towards a White Paper on Traditional Leadership and Institutions (11 April 2000).

<sup>41</sup> For example para 5.1 of the discussion document towards a White Paper on Traditional Leadership and Institutions (11 April 2000) mention the role of traditional leaders as follows: "Traditional leaders have responsibility for a number of functions and their functions include, among others: acting as head of the traditional authority, and as such exercising limited legislative powers and certain executive and administrative powers; presiding over customary law courts and maintaining law and order; consulting with traditional communities through imbizo/lekgotla; assisting members of the community in their dealings with the state; advising government on traditional affairs through the Houses and Council of Traditional Leaders; convening meetings to consult with communities on needs and priorities and providing information; protecting cultural values and providing a sense of community in their areas through a communal social frame of reference; being the spokespersons generally of their communities; being symbols of unity in the community; and being custodians and protectors of the community's customs and general welfare. The role of traditional leaders in the development of the local area and community includes: making recommendations on land allocation and the settling of land disputes; lobbying government and other agencies for the development of their areas; ensuring that the traditional community participates in decisions on development and contributes to development costs; and considering, and making recommendations to authorities on, trading licences in their areas in accordance with law."

<sup>42</sup> Section 81(1) of the Municipal Structures Act provides that traditional authorities that observe a system of customary law in the area of a municipality may participate through their leaders 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.

<sup>43</sup> See s 81(2) (b) of the Municipal Structures Act.

<sup>44</sup> Section 81 (1) of the Municipal Structures Act.

of the council.<sup>45</sup> The MEC is required to identify the traditional leaders who may participate in the proceedings of a municipal council.<sup>46</sup> The MEC has the power to regulate the participation, and prescribe the role, of the traditional leaders in the affairs of a municipality.<sup>47</sup> In a short survey conducted in five rural local municipalities in Kwa-Zulu Natal, it was confirmed that traditional leaders attend meetings of municipal councils. In one of the municipalities it was ascertained that traditional leaders do not only attend council meetings but also attend committees of the council. During an interaction with one traditional leader, however, it appeared that the role of the traditional leaders in municipal councils is not well articulated, and, therefore, some traditional leaders may not even appreciate the reason for their participation in municipal councils. On enquiries made with regard to three municipalities in Mpumalanga, it was found that traditional leaders are not invited to attend the meetings of the municipal council. Senior officials in the municipal council were not even aware that traditional leaders should attend council meetings.

As was pointed out above, the Constitution recognises traditional leaders; the idea of recognition needs, however, to be contextualised. Beyond the statement on recognition, the Constitution seems to be vague with regard to the purpose, and legal and political consequences, of the recognition of traditional leaders. It, thus, becomes relevant to consider the theories of recognition. The corrective theory of recognition frames the lack of recognition as a wrong in itself, one to be corrected by an act of recognition.<sup>48</sup> In this regard, recognition is used in political theory to explain the recognition of status, respect and esteem.<sup>49</sup> On the other hand, there is the instrumental theory, which regards recognition as a means to achieve other social policy goals.<sup>50</sup> This theory begins with an injustice of a political or structural kind and presents recognition as a method for achieving a more equitable allocation of power.<sup>51</sup>

It seems that the corrective theory is manifested in recognising and regulating the participation of traditional leaders in municipal councils. The problem with the recognition of traditional leaders in municipal councils relates to two main issues. The first of these relates to the status of traditional leaders in a municipal council. Traditional leaders are leaders in the rural communities of South Africa which comprise 40 per cent of the population of South Africa.<sup>52</sup> Furthermore, the discussion on the historical background of traditional leaders situates traditional authorities in local government. Traditional communities hold traditional leaders in high esteem and expect them to lead in their communities. This view is reinforced by Cele when,

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<sup>45</sup> Section 81 (1) of the Municipal Structures Act.

<sup>46</sup> Section 81 (2) of the Municipal Structures Act.

<sup>47</sup> Section 81 (4) of the Municipal Structures Act.

<sup>48</sup> Gover K *Tribal constitutionalism: states, tribes and the governance of membership* (Oxford Scholarship Online 2010) at 14.

<sup>49</sup> See Gover (2010) at 14.

<sup>50</sup> See Gover (2010) at 15.

<sup>51</sup> See Gover (2010) at 15.

<sup>52</sup> According to Bennett (2004) at 111, approximately 40 per cent of the South African population are subject to traditional rule.



explaining the role of traditional leaders in a democratic South Africa, he argues that there are large ethnic communities which still subscribe to the values and customs of traditional leaders and which are not adequately represented by the contemporary system of democracy.<sup>53</sup> The value of traditional leaders is not relevant only in South Africa, but also in other parts of Africa where traditional leaders still shoulder various government responsibilities.<sup>54</sup> In the context of South Africa, the institution of traditional leaders is recognised in the Constitution.<sup>55</sup> In this regard the authors of the Constitution considered traditional leaders to be an integral part of the system of democracy where this was applicable. Accordingly, participation of traditional leaders in municipal councils without the power to vote reduces them to the status of mere spectators who may discuss issues but who are not good enough to take decisions on the issues affecting their communities. Moreover the proximity of traditional leaders to the local communities gives them a better awareness of the needs of their communities. Allowing traditional leaders to vote in municipal councils will, therefore, strengthen democracy through their voice on behalf of their communities.

The second of these relates to the power afforded to the MEC to identify those traditional leaders who should participate in municipal councils and to regulate their participation in keeping with the constitutional status of traditional leaders. The legislation that provides for the participation of traditional leaders in municipal councils allows the traditional communities to be represented in municipal councils through their leaders.<sup>56</sup> The traditional communities themselves should, therefore, be best placed to identify their leaders, rather than the MEC identifying leaders on behalf of the traditional authorities. This power bestowed on the MEC is typical of the powers the colonial masters used to recognise traditional leaders. In the process, the MEC may overlook other traditional leaders. This could be seen in a refusal by the MEC – an outsider regarding the institution of traditional leadership – to recognise other traditional leaders who might have been recommended by the House of Traditional Leaders to participate in the municipal council. The MEC is not bound to accept recommendations from the traditional leaders, since the power to identify the leaders rests finally with the MEC. Consequently, the decision of the MEC might be contrary to the wishes of the traditional leaders and, therefore, harmful to them. Taylor explains the harm of “misrecognition” as a failure on the part of outsiders to concur with the self-description of the other.<sup>57</sup> Taylor explains further the pain inflicted by misrecognition where he argues that “by denying self-authorship, on recognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted and reduced mode of being”.<sup>58</sup> Considering that the institution of traditional leaders was

<sup>53</sup> Cele S “Discussion paper on the role of traditional leaders in a democratic South Africa” (delivered at the Conference on Traditional Leadership Role on 12-13 December 2011 in Durban).

<sup>54</sup> Chigwata (2016) at 170 points out that those traditional leaders still undertake important responsibilities where 67 per cent of the population resides in Zimbabwe.

<sup>55</sup> See s 211 (1) of the Constitution.

<sup>56</sup> See s 81 (2) (b) of the Municipal Structures Act.

<sup>57</sup> Taylor C “The politics of recognition”, in Taylor C & Gutmann A (eds) *Multiculturalism: examining the politics of recognition* (United States: Princeton University Press 1994) at 25.

<sup>58</sup> See Taylor (1994) at 25.

destabilised and weakened by the colonial conquest and, subsequently, by the apartheid system, apart from the simple recognition of the institution, the mind-set of the colonial conquest has not changed with regard to the legal status of traditional leaders. Kirsty correctly points out that “recognition must therefore have some end other than the conferral of esteem. It should be designed to address political and economic inequalities that have aligned, for various reasons, with cultural differences”.<sup>59</sup> In this regard the participation of traditional leaders in municipal councils without the power to vote, and the power of the MEC to appoint traditional leaders who are permitted to participate in municipal councils, do not seem to have any end other than the conferral of esteem. It does not address the denigration of the status of traditional leaders whose powers were eroded and put under the strict control of government ministers in the pre-democratic dispensation.

It should be noted that this article does not argue for the restoration of the original powers of traditional leaders as they were before the colonisation of South Africa, but rather for the recognition of traditional leaders as an institution which can take decisions by voting on matters affecting their communities and who can decide for themselves who should represent the institution in municipal councils. The effect of the membership of traditional leaders on democracy in municipal councils is considered next.

## **5 IS MEMBERSHIP OF TRADITIONAL LEADERS IN MUNICIPAL COUNCILS AN ANOMALY IN RELATION TO DEMOCRACY?**

The question arises whether the full participation of traditional leaders in the proceedings of a municipal council is an anomaly in relation to democracy. This question may arise from the fact that the municipal council is constituted by councillors who are elected through political elections. It is common knowledge that in some other democracies, such as, the United Kingdom, Zimbabwe and Lesotho, structures consisting of non-elected members participate fully in the legislative process of the Legislative Assembly.

The Parliament of the United Kingdom has two houses, namely, the House of Lords (the unelected chamber) and the House of Commons, which is elected through political elections.<sup>60</sup> The House of Lords is constituted by life peers, hereditary peers and certain religious leaders.<sup>61</sup> According to Walters, although the House of Lords began as an hereditary and aristocratic institution, it is becoming predominantly an elected assembly.<sup>62</sup> The Lords have the power to reject a Commons Bill, although, if the Lords reject such a Bill in two successive parliamentary sessions, the Bill may be passed by the Commons alone.<sup>63</sup> Walters reinforces the legislative power of the House of Lords when

<sup>59</sup> See Gover (2010) at 15.

<sup>60</sup> Michael J & Davies *A Reforming the Lords* (London: Institute for Public Policy Research 1993) at 1.

<sup>61</sup> Russel MEG *The contemporary House of Lords* (Oxford Scholarship Online 2013) at 72.

<sup>62</sup> Walters R “The House of Lords” in Bogdanor V (ed) *The British Constitution* (Oxford: Oxford University Press 2003) 197.

<sup>63</sup> See Russel (2013) at 82.

he points out that the House remained a chamber of the legislature and a forum of scrutiny of the executive despite the fact that it is not representative.<sup>64</sup> Unlike that which pertains in Parliament, however, the representation of the Lords is not extended to municipal councils. In Britain, local authorities in the form of councils are constituted by elected councillors only.<sup>65</sup>

Under the 2000 Constitution of Zimbabwe, Parliament was constituted by 150 members.<sup>66</sup> Eight were provincial governors appointed by the President of Zimbabwe, 10 were chiefs (traditional leaders) elected in accordance with electoral law, and 12 were appointed by the President. Under the 2013 (current) Constitution of Zimbabwe, Parliament consists of the Senate and the National Assembly.<sup>67</sup> Sixteen members of the senate are chiefs, two of whom are elected by the provincial assembly of chiefs from each of the provinces, excluding the metropolitan provinces.<sup>68</sup>

According to Chigwata, the law does not make provision for the representation of traditional leaders in local government in Zimbabwe.<sup>69</sup> There is, however, a long-standing practice of allowing traditional leaders to attend and participate in the deliberations of the municipal councils as *ex officio* members with no voting powers.<sup>70</sup> In accordance with this practice, three chiefs are nominated by the Minister of Local Government on a rotational basis for representation in a council. They are given an opportunity to address a council, more particularly on issues which concern their powers or the customs and traditions of the people living in their respective jurisdictions. It should be noted that, although the law does not make provision for the representation of traditional leaders in municipal councils, the Traditional Leadership Act<sup>71</sup> of Zimbabwe makes provision for membership and participation of traditional leaders in the wards of a rural municipality. A ward assembly is established in each ward of the rural municipal council. This is constituted by all headmen, village heads and the councillor of the ward.<sup>72</sup> The ward assembly is chaired by a headman who is elected by members of the ward assembly.<sup>73</sup> Amongst other things, the functions of the ward assembly include the review and approval of development plans or proposals, and the submission of such plans for incorporation into the rural district development plan. The active participation and leadership role played by traditional leaders within the

<sup>64</sup> See Walters (2003) at 189.

<sup>65</sup> The constitution of British councils is explained by Feldman D *English public law* (Oxford: Oxford University Press 2009) at 223 who states that the council comprises of the chairman and councillors where applicable the elected mayor. Furthermore, Griffiths A *Local government administration* (University of Virginia: Shaw & Sons Ltd 1997) at 30 reaffirms that members of a local authority must be councillors elected by local government electors for the area.

<sup>66</sup> Constitution of Zimbabwe Act 5 of 2000.

<sup>67</sup> Section 118 of the Constitution of Zimbabwe of 2013.

<sup>68</sup> See s 120 (1) (b) of the Constitution of Zimbabwe of 2013.

<sup>69</sup> Chigwata T "The role of traditional leaders in Zimbabwe: are they still relevant?" (2016) 20 *Law Democracy & Development* 69 at 85.

<sup>70</sup> See Chigwata (2016) at 85.

<sup>71</sup> Traditional Leadership Act 25 of 1988.

<sup>72</sup> See s 18 (1) of the Traditional Leadership Act.

<sup>73</sup> See s 18 (2) of the Traditional Leadership Act.

ward of a municipal council seems to be of little value considering that, at the meeting of the municipal council itself, these leaders do not have the power to vote. Chigwata correctly points out that the absence of voting powers significantly reduces the status and influence of chiefs in municipal councils.<sup>74</sup>

Accordingly, the Parliament of Zimbabwe presents another model of democracy, one which combines members of Parliament elected directly by voters and those appointed to Parliament, and this represents segments of the population of Zimbabwe. Although representation of traditional leaders in municipal councils in that country is not provided for in the legislation, the participation of traditional leaders in the wards of the municipal council is recognised in the legislation.<sup>75</sup> Although the practice in Zimbabwe with regard to the representation of traditional leaders in municipal council is similar to the South African situation, that practice is not contained in any legislation in that country. A conclusion can, thus, be drawn that the representation of traditional leaders in the municipal councils of Zimbabwe is weaker than that within the South African system. Given the fact, however, that, unlike the situation in South Africa, in Zimbabwe traditional leaders constitute an important component of Parliament, there should be no problem regulating the participation of traditional leaders in local government through legislation.

It is possible to conclude that the inclusion of traditional leaders as unelected members of the Zimbabwean Parliament demonstrates that the representation of traditional leadership in an elected system of government may not always be at odds with democracy.

In Lesotho, Parliament consists of the King, a Senate and the National Assembly.<sup>76</sup> The Senate consists of the 22 principal chiefs of Lesotho and 11 other senators nominated by the King, acting on the advice of the Council of State.<sup>77</sup> According to Pratchett, the local government of Lesotho is composed of urban councils and rural councils.<sup>78</sup> The rural councils are composed of two tiers, namely, the community councils and district councils. The Local Government Act<sup>79</sup> in Lesotho makes provision for the membership of traditional leaders in municipal councils. The community council is made up of between 9 and 15 elected councillors, not more than two chiefs nominated by chiefs within the community of the council area, and two chiefs who are nominated by councils in the district as further members of the district councils. Traditional leaders who are members of the councils are considered to be on a *par* with other councillors.<sup>80</sup> In this regard, the Lesotho position is different from the South

<sup>74</sup> See Chigwata (2016) at 85.

<sup>75</sup> See s 18 (2) of the Traditional Leadership Act.

<sup>76</sup> Section 54 of the Constitution of Lesotho of 1993.

<sup>77</sup> See s 55 of the Constitution of Lesotho.

<sup>78</sup> Pratchett, Lankina *et al* "Local democracy in Lesotho: current strengths and challenges" (*Local Government Research Unit, De Montfort University, UK and Institute for Southern Africa Studies, National University of Lesotho* 2008) at 8.

<sup>79</sup> Local Government Act 6 of 1997.

<sup>80</sup> Pratchett, Lankina *et al* (2008) at 10 emphasise the point that although the chiefs are not elected and are nominated by other chiefs, they are on a *par* with other members of the council.

African and Zimbabwean situations: first, in Lesotho traditional leaders are not merely invited to participate but are permanent members of the municipal councils, and, secondly, traditional leaders are not appointed by the Minister for Local Government but nominated by other traditional leaders to represent the institution of traditional leaders in the municipal council. Letlatsa argues that the inclusion of traditional leaders in the Lesotho councils demonstrates a genuine attempt to ensure that traditional leaders are not marginalised in the modern system of local government.<sup>81</sup>

Lesotho has taken a step further than South Africa and Zimbabwe in that its rural municipal councils are constituted by representatives of traditional leaders who are full members of the councils. Lesotho is, thus, another example of an African State where chiefs become members of Parliament and municipal councils by virtue of being traditional leaders. South Africa can learn from the Lesotho experience with regard to the status of traditional leaders in municipal councils. The UK, Zimbabwe and Lesotho thus show that unelected leaders can be members of a democratic parliament and of municipal councils without offending the principles of democracy. It should be noted that democracy is a relative concept. There is no universally accepted definition of democracy; hence different writers have their own understanding of the concept "democracy".<sup>82</sup> One of the vital components of democracy is, however, self-government which entails government of the people by the people.<sup>83</sup> As the people of South Africa, in their Constitution, recognise traditional leadership as being a segment of democratic government and recognise the participation of traditional leaders in local government, allowing such traditional leaders to elect their representatives and granting them the power to vote in municipal councils will be fully consistent with the notion of self-government.

It should be noted that an unhealthy relationship between elected councillors and traditional leaders has become a continental rather than a specifically South African problem. Chigwata has attributed the unhealthy relationship between traditional leaders and councillors in Zimbabwe to the fact that the existence of traditional leadership parallel with elected rural governments has created conflicting claims to legitimacy, and mistrust between traditional leaders and councillors.<sup>84</sup> Furthermore, traditional leaders are dissatisfied with the reduction of their powers which are now exercised by municipal councils.<sup>85</sup> It is also argued that traditional leaders have historically considered local government as their exclusive domain, and they continue to call for a re-definition of their role in local government.<sup>86</sup> Despite the existing state of the relationship between councillors and traditional leaders, traditional leaders are

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<sup>81</sup> Letlatsa M *Local government in post 1993 Lesotho: an analysis of the role of traditional leaders* (unpublished Master in Public Management dissertation, Central University of Technology, Free State, 2013) at 46.

<sup>82</sup> See De Vos P & Freedman W (eds) *South African constitutional law in context* (Southern Africa: Oxford University Press 2014) at 85.

<sup>83</sup> See Catt H *Democracy in practice* (London: Routledge 1999) at 7.

<sup>84</sup> Chigwata (2016) at 86

<sup>85</sup> Rugege (2003) at 180.

<sup>86</sup> Mashele P "Traditional leadership in South Africa: new democracy" (2004) 31 *Review of African Political Economy* 349 at 353.

placed by legislation in local government, and the current status of traditional leaders in municipal councils may worsen the relationship rather than mending it. This is likely to be the case because councillors who have voting powers could be considered to be superior to traditional leaders whose contributions in councils can easily be ignored at the will of councillors.

### 6 CONCLUSION

The recognition of traditional leaders should not be merely symbolic in South Africa. The bestowing of esteem on traditional leaders, without enabling the institution of traditional leadership to take its lawful space in local government, does not help to improve the unhealthy relationship between traditional leaders and councillors nor to strengthen democracy in local government. Democracy could be further strengthened by allowing different voices from different segments of the community in local government. Furthermore, the participation of traditional leaders in municipal councils without the power to vote might create further division between councillors and traditional leaders in that councillors may be perceived to be big brothers who have the final authority while traditional leaders as seen as being subservient to councillors capable only of influencing councillors to take decisions while they themselves cannot participate in the decision making. If the value of traditional leaders were not crucial in local government they could easily have been excluded completely from participating in municipal councils. It is their inclusion, while holding from them the power to vote in the deliberations of municipal councils, that impacts negatively on the status of traditional leaders.

Furthermore, the power bestowed on the MEC to identify and appoint the traditional leaders who should participate in municipal councils may be contrary to the spirit of the Constitution, which recognises the institution of traditional leaders. It would be consistent with the constitutional integrity of the traditional leaders for the House of Traditional Leaders to identify and elect its representatives in the municipal councils. The institution of traditional leaders should be allowed to decide who should best represent the institution in municipal councils without the interference of the MEC. Once the traditional leaders are appointed (if they are appointed by the House of Traditional Leaders) to the municipal council they should become full members and vote in the same way as the other members of the council.

This article shows that full membership of traditional leaders in municipal councils is not contrary to the concept of democracy. The composition and nature of constituencies that constitute legislative assemblies are based on the choices of the people of a particular country. This is evident from the composition of the House of Lords in the UK and the composition of the Parliaments of Zimbabwe and Lesotho on the African continent, where unelected members become members of the Legislative Assembly with the right to vote. Furthermore, South Africa can learn from Lesotho where traditional leaders are members of, and on a *par* with, councillors in the community councils. Since the people of South Africa, through their representatives in Parliament, decided that traditional leaders should form part of municipal government,

it is at odds with the spirit of the Constitution and the instrumental theory of recognition not to grant full membership of the municipal council to traditional leaders. Full membership of traditional leaders in municipal councils would enhance democracy in that such leaders would be not only participants but would also make decisions with respect to the government of the local community.