

**A DRAFT DISCUSSION DOCUMENT
TOWARDS A WHITE PAPER ON TRADITIONAL LEADERSHIP AND INSTITUTIONS**

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TABLE OF CONTENTS

SECTION A

1. PREFACE.....	ERROR! BOOKMARK NOT DEFINED.
2. INTRODUCTION	6
2.1. <i>The White Paper Process on Traditional Leadership</i>	7
2.2. <i>Promotion and Protection of the Constitutional Rights of the Khoisan Community</i>	8
3. VISION FOR THE INSTITUTION OF TRADITIONAL LEADERSHIP	10
4. COMPARATIVE PERSPECTIVES	12
4.1. <i>The African Experience</i>	12
4.2. <i>International Human Rights and Traditional Leadership</i>	16

SECTION B

5. TRADITIONAL LEADERSHIP – A HISTORICAL OVERVIEW OF FUNCTIONS.....	18
5.1. <i>White Paper on Local Government – The Role of and Relationship Between Traditional Leaders and Elected Local Government</i>	20
5.2. <i>Overlap of Functions of Local Authorities and Traditional Leadership</i>	22
6. STRUCTURE OF TRADITIONAL LEADERSHIP.....	25
7. APPOINTMENT/RECOGNITION OF TRADITIONAL LEADERS	39
7.1. DISQUALIFICATION.....	46
7.2. RETIREMENT OF TRADITIONAL LEADERS	46
8. REMOVAL OF TRADITIONAL LEADERS FROM OFFICE	48
8.1. SUCCESSION DISPUTES.....	48
9. THE ROLE OF WOMEN IN TRADITIONAL LEADERSHIP.....	51
10. THE STATUS OF THE YOUTH/MINORS IN TRADITIONAL COMMUNITIES	53
11. PARTY POLITICAL AFFILIATION	55
12. REMUNERATION OF TRADITIONAL LEADERS	58
13. CO-OPERATIVE GOVERNANCE	61
13.1. CO-OPERATIVE GOVERNANCE AT NATIONAL LEVEL	61
13.2. CO-OPERATIVE GOVERNANCE AT PROVINCIAL LEVEL.....	62
13.3. CO-OPERATIVE GOVERNANCE AT LOCAL LEVEL	63
14. ROLE AND FUNCTIONS OF STATUTORY BODIES REPRESENTING TRADITIONAL LEADERS.....	65
14.1. NATIONAL HOUSE OF TRADITIONAL LEADERS	65

14.2. PROVINCIAL HOUSES OF TRADITIONAL LEADERS	66
15. TRADITIONAL COMMUNITIES AND ISSUES HAVING TRANS-PROVINCIAL IMPLICATIONS	69
16. TRADITIONAL COMMUNITIES, NATIONAL BORDERS AND TRANS-NATIONAL IMPLICATIONS	71
17. CONCLUSION.....	74
18. ACKNOWLEDGEMENTS.....	75

SECTION C: ANNEXURES

ANNEXURE A

TERMS REQUIRING DEFINITION	77
---	-----------

ANNEXURE B

REVIEW OF THE CURRENT LEGAL FRAMEWORK	93
--	-----------

ANNEXURE C

CONSTITUTIONAL FRAMEWORK: CORE VALUES	102
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ANNEXURE D

WHITE PAPER PROGRAMME ON TRADITIONAL LEADERSHIP AND INSTITUTIONS	107
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SECTION A

1. FOREWORD

This Discussion Document marks the beginning of a process aimed at engaging South Africans in a dialogue regarding the institution of traditional leadership, in terms of affirming and defining it, and clarifying its role in democratic governance. Traditional leadership embodies a system of discourses, which describe Africa's earlier forms of societal organisation. In this sense it is a monument to our past and is a true icon of our identity as Africans. Its resilience is borne out by the fact that it has survived manipulation and persecution by successive colonial and apartheid regimes. The call for an African Renaissance, therefore, is a call for the coming of age of Africa's institutions, and not for a perfect mimicry of the world's powerful societies. After all, it is hard to conceptualise African culture without any reference to the institution of traditional leadership and to customs.

To this day, the majority of South Africans, especially (but not exclusively) in the rural areas, continue to owe allegiance to the institution of traditional leadership, in addition to their support and commitment to democratic governance as articulated in the Constitution. The recognition afforded traditional leadership in Chapter 12 of the Constitution is an acknowledgement of the presence and the continued support that this institution enjoys among most South Africans.

The challenge therefore, which this Discussion Document seeks to engage with, is not whether or not to recognise the institution of traditional leadership. Rather it is to determine the precise way in which the institution will promote constitutional. In seeking to fill this policy vacuum we need to be guided by the sentiments expressed by President Mandela, when, on the occasion of the opening of the National House of Traditional Leaders, he stated that:

I feel truly humbled to officially open the National Council of Traditional Leaders, to stand before my leaders, at last to acknowledge their status and role as full participants in national affairs, as part of the corps of leaders in the reconstruction and development of our country.

Stakeholders, civil society and all interested South Africans are therefore invited to contribute ideas that will lead to the formulation of a comprehensive policy on all matters affecting the institution of traditional leadership. Such contributions as will be received from a broad range of South Africans, should be guided by the need and commitment to the strengthening of our constitutional democracy, and the promotion of effective governance and nation building.

2. INTRODUCTION

Traditional leadership is one of the oldest institutions of government, both in Africa and the rest of the world. It predates colonialism and apartheid, and it represents early forms of societal organization. The rest of the world has gone through eras of monarchical rule of one form or another. In other countries, e.g. France, Russia, Uganda, etc the institution of traditional leadership was abolished. That the institution still exists today, even in those countries where it was abolished, such as Uganda, testifies to its resilience.

All absolute monarchies in the world have now given way to new forms of societal organization, which in the main are democratic forms of government. South Africa has been similarly affected by the worldwide trends towards democracy. With the advent of colonialism, the institution of traditional leadership was subjected to repression and was used as an instrument in the implementation of such colonial policies as indirect rule.

However, not withstanding oppression by successive colonial and apartheid regimes, the institution of traditional leadership pioneered resistance and led numerous struggles against colonialism. The advent of democracy in South Africa is also due to that pioneering role, which traditional leadership played. The former Deputy President (and now President) of South Africa Thabo Mbeki, on the occasion of the adoption of the Constitution in Parliament on 8 May 1996, acknowledged as much when he declared that:

“I am the grandchild of the warrior men and women that Hintsá and Sekhukhune led, the patriots that Cetshwayo and Mphephu took to battle, the soldiers Moshoeshe and Ngungunyane taught never to dishonour the cause of freedom.”

The Constitution, which came into operation on 4 February 1997, provides, in Chapter 12 for the recognition of the status and role of the institution of traditional leadership in South Africa, subject to all the other provisions in the Constitution. Traditional authorities that observe a system of customary law are empowered to

function, subject to any legislation and customs (including amendments to or repeal of such legislation and/or customs). In addition, customary law is recognised, once again subject to the Constitution.

Provision is also made for the introduction of national legislation that may determine a role for traditional leadership at local government level, as well as for national and provincial legislation that may establish a National House or provincial Houses of Traditional Leaders in order 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.

2.1. The White Paper Process on Traditional Leadership

Notwithstanding the recognition afforded to traditional leadership in terms of Chapter 12 of the Constitution, the exact role that this institution should play in the current democratic context remains unclear. This is partly because so far government does not have a consistent policy on traditional leadership. Government has therefore decided to launch **the White Paper Process on Traditional Leadership**, through which all questions regarding the role, status and future of traditional leadership will be dealt with in a comprehensive manner. This White Paper process is divided into three phases.

Phase One

The first phase saw the production of a status quo report (SQR) on traditional leadership, wherein a national audit on traditional leadership was conducted. This audit focussed on such issues as the collection of all pieces of legislation, especially from the former homelands, by which traditional leadership institutions are established; the collection of all statistical data relating to the total number of traditional leaders in South Africa, including those that were deposed by successive apartheid and homeland regimes in the past; the collection of data concerning the relationship between traditional leadership and various levels of government; the National House and the provincial Houses; remuneration; cross-border matters;

relationship with communities; the role of women and the youth as well as dispute resolution and development.

Phase Two

In this phase we launch the Discussion Document, which will culminate with the production of a White Paper as soon as all the necessary consultations have been finalised. The discussion document stage of this phase will mainly be concerned with outlining the issues that must be considered in policy (a problem statement), a number of which have been identified in the SQR, as well as posing a few strategic questions. These are issues such as:

- (a) Whether it is possible to hold an institution which has no elective base, accountable to the people?
- (b) Whether the institution should be transformed such that it can be gender representative and in line with the principles of equality as enshrined in the Constitution and the Bill of Rights. How do we deal with the fact that the discrimination of women with regard to the issue of succession is inconsistent with the principle of equality, which is enshrined in the Constitution and the Bill of Rights?

Phase Three

This will focus on the implementation of the policy framework as approved by government. In preparation for this phase, the rationalisation of current legislation has been finalised.

2.2. Promotion and Protection of the Constitutional Rights of the Khoisan Community

Parallel to the White Paper Process on traditional leadership is the investigation on the promotion and protection of the constitutional rights of the Khoisan Community. Like other communities in South Africa the Khoisan Community's rights and dignity were

never recognized by the past governments. A process has therefore been put in place to conduct research on their protection and proper accommodation. In this regard a number of professionals, including the Human Rights Commission (HRC) have been commissioned to undertake a study on these issues.

The process will culminate in the production of a consolidated Status Quo Report for the Khoisan, from which policy on their accommodation will be finalized.

This SQR will mainly be concerned with the national, regional and international legal accommodation of indigenous communities, a historical overview of the Khoisan community in South Africa pertaining to origin and subdivisions that developed, leadership, structures of governance, residence and movement, relationship with colonial/republican authorities pre and post 1994.

3. VISION FOR THE INSTITUTION OF TRADITIONAL LEADERSHIP

The policies of successive colonial, apartheid and homeland governments completely distorted the institution of traditional leadership, co-opted it and assigned to it roles which were alien to it. Through a complex web of pieces of legislation, the institution was transformed into a tool through which the 'cultural differences' of the black people were emphasised and used as a basis to balkanise the country.

Traditional rural areas were under-resourced, under-developed and relegated to the periphery of relatively affluent white South Africa. These areas came to be regarded as reservoirs of cheap labour for urban centres and mining conglomerates. Despite these coercive and persuasive methods of co-opting the institution of traditional leadership, there were some traditional leaders who not only rejected co-optation but also took active steps to oppose it.

The institution of traditional leadership was therefore never accorded a pride of place in the systems of governance, which were after-all imposed on the majority of the people of South Africa. We now have the opportunity to map out a vision which will harmonise the indigenous institutions of traditional leadership with our evolving system of democratic governance. Once we have mapped out our vision, we must proceed to ensure that it is supported by policies and programmes. The mapping out of this vision, as well as the articulation of policies and programmes is not a sole province of government. The rest of society must contribute to this process.

The vision statement

Our vision on the institution of traditional leadership must:

- ⇒ Provide for an institution which responds and adapt to change
- ⇒ Provide for an institution, which is in harmony with the Constitution and the Bill of Rights.

- ⇒ Provide for an institution, which strives to enhance tradition, culture and cultural values.
- ⇒ Provide for an institution, which respects the spirit of communality.
- ⇒ Provide for an institution, which strives to achieve unity and peace amongst people.
- ⇒ Provide for an institution, which promotes and facilitates a strong relationship between the institution and the different spheres of government - in particular - local government sphere.
- ⇒ Provide for an institution which can mobilise rural people to participate in rural local governance so as to achieve RDP goals and Local Economic Development initiatives
- ⇒ Provide for an institution, which can ensure efficient, effective, and fair dispute resolution system through customary law courts for traditional local communities.
- ⇒ Provide for an institution which acts in partnership with municipalities to contribute to and create co-operative and supportive relationships in service delivery, secure and safe rural areas.

Challenges

We face the challenge of restoring the traditional nature and respectability of the institution of traditional leadership.

We have to redefine its focus, role and functions, and to relate it to the different spheres of government such that it is not seen as either as a surrogate or as an adversary of government.

We also have to ensure that the institution plays a supportive role to municipalities so as to enhance rural governance and development, nation building and unity, and that it exists in harmony with constitutional democracy.

4. COMPARATIVE PERSPECTIVES

The history of other African states offers experiences worthy of note in our attempt to understand how, subsequent to independence, the institution of traditional leadership could be dealt with. Therefore in attempting to define a suitable role for traditional leadership in the context of our own constitutional democracy it is important that we draw lessons from the African experience.

4.1. The African Experience

Following the attainment of independence and the decolonisation process, most African States have undergone profound changes. The introduction of democracy created the need for changes in the structure of African society. Given the needs of modernisation, most of the change that Africa has been grappling with ever since the advent of democracy have been inescapable. The institution of traditional leadership has not been entirely impervious to this process of change. Like in other parts of Africa, the institution of traditional leadership in South Africa will necessarily undergo changes in order to make it more relevant to developing circumstances. Some of these changes may clash with long held values and notions 'sanctified' by history or other factors.

It must be pointed out that some of the main obstacles towards change in Africa have come from the customary society and, in particular, from the institution of traditional leadership. The tension between tradition and modernity is bound to become more apparent as the process of change slowly gravitates. Colonialism did a lot of damage to so-called customary African society and ancient institutions that it would be difficult to successfully carry out corrections to the damage of many centuries in a short time.

For example, in some African countries like those under French and Portuguese colonial rule, Africans were discouraged and sometimes prohibited from living their ways of life. The French and Portuguese colonialists understood themselves as being entrusted with the task of "civilising" the native African in Western ways. In the

so called Anglophone Africa, the idea was that apart from “civilising” the native, some of the institutions like traditional leaders would be used or abused to advance the colonial interests. This was achieved, for example, through the discredited policy of “indirect rule” imposed on Africa and other British colonies. Under this policy, Africans would be given limited leverage to “govern” themselves in accordance with their customs and traditions provided these did not offend the principles on which the system of colonialism was grounded.

In English-speaking Africa, institutions such as the institution of traditional leadership were retained, but only after they were violently suppressed to remove the possibility of them being competitors to political power. However not all African societies were centralised at the time of colonialism. Some societies like the Tonga in Zambia and the Masai in Kenya did not know the institution of traditional rulers. These societies were already democratic in a modern sense. In spite of this, colonialism was not convinced and did not want to retain this apparently democratic character of some of these African societies. Rather, colonial governments established chieftaincies and appointed chiefs, and also compelled communities to obey them even if that was contrary to their customs and traditions. The structure of those societies that did not have chiefs would have frustrated the application of the policy of indirect rule, which needed chiefs and equivalent authorities to operate. Therefore, chiefs and other traditional rulers like village headmen had to be forced upon all societies irrespective of the fact that some communities did not recognise the institution of traditional leadership.

During the period of colonialism and apartheid the institution was grossly abused. It was assigned entirely new and in many cases, uncustomary functions. This was done with a view to advance colonial and apartheid interests. Sometimes this was done by twisting certain customary principles (e.g. the African principle of respect for the elderly and title) to fit the needs of colonialism. For example, colonialism used to its own advantage traditional leaders, who were assigned the duty to ensure law and order within their areas by empowering them to disallow assemblies and demonstrations and to effect arrests as peace officers.

After independence, many African countries retained and maintained with the institution of traditional leadership. The only exception in this respect is Tanzania, which abolished the institution of traditional leadership altogether. Many modern states in post-independent Africa did not really know what to do with the institution of traditional leadership. Some aspects of traditional rule are not only incompatible with democratic rule but are violative of some of the basic rights and freedoms which form the basis of modern society. Specific examples of these range from the constitutional principles of succession to the throne (where according to customary law only males are generally favoured) to the vexing question of the role of these leaders in public administration at local and national governmental levels. In addition, the institution is often seen to be male and age biased and therefore in disregard of the equality principle.

Selected Examples of the African Experience

The following is a brief summary of some select African States on an African perspective on the institution of traditional leadership after independence.

The Constitution of Ghana recognizes the institution of traditional leadership. It provides for the national and regional Houses of traditional leadership. Traditional leaders have a role to play in issues of development although they are forbidden from active participation in party politics.

In Namibia, the Namibian Constitution provides that traditional leaders must pay allegiance to and accept the authority of the modern state. It also provides for a Council of Traditional Leaders whose responsibility it is, to advise the president on the control and utilization of communal land and on all other such matters as may be referred to it by the president for advice.

The Constitution also provides that traditional institutions should give support to the policies of the (central) government, regional and local authority councils in the performance of their duties and functions. Where their powers conflict with the

powers of either central government regional or local authority councils then the powers of the central government should prevail.

In Zimbabwe, soon after independence the government tried to dismantle the inherited legal dualism to create what was described as a single, politically united non “tribal” nation. Traditional leaders were stripped of their judicial functions and made to remain explicitly as symbolic cultural figureheads. This was reversed in 1993 and today the constitution provides for National and Provincial Houses of Chiefs. The National Council of Chiefs is also entitled to have 10 of its members form part of the 150 member National Assembly. Traditional leaders are also represented in Rural District Councils. Traditional leaders also qualify to stand elections on party political tickets.

In Botswana, the constitution provides for a House of Chiefs which is an advisory body to the National Assembly and the Executive. The House does not have legislative powers but must be consulted on certain specific Bills.

In Uganda, the constitution in 1966 abolished the kings and the kingdoms. Upon coming to power in 1986, Yoweri Musereni restored title to traditional leaders but denied them political power or role. Article 246 of the constitution of Uganda states that:

“the institution of traditional leaders or cultural leader may exist in any area of Uganda in accordance with culture, customs and traditions or wishes and aspirations of the people to whom it applies”

“the allegiance and privileges according to a traditional leader or cultural leader by virtue of that office shall not be regarded as a discriminatory practice prohibited under article 21 of this Constitution, but any custom, practice, usage or tradition relating to a traditional leader or cultural leader which detracts from the rights of any person as guaranteed by this Constitution, shall be taken to be prohibited under that article”

4.2. International Human Rights and Traditional Leadership

International agreements as well as regional agreements dealing with issues affecting traditional leadership and institutions form part of the legal framework regulating traditional leadership. Section 231(4) of the 1996 Constitution provides that any international agreement becomes law in the Republic when it is ratified by Parliament. The exception is a self-executing provision of an agreement that has been approved by Parliament, which automatically becomes law.

The following are relevant agreements to which South Africa has either acceded or which it has ratified.

International Covenant On Economic, Social and Cultural Rights of 16 December 1966.

South Africa signed this Covenant on 3 October 1994. It provides amongst others and in terms of Article 15 that states should recognise the rights of everyone to take part in cultural life.

The African Charter of Human and Peoples Rights of 21 October 1986

Article 17 of the charter provides that every individual may freely take part in the cultural life of his community and that the promotion and protection of morals and traditional values recognised by the community shall be the duty of the state.

The charter also obliges individual to preserve and strengthen positive African cultural values in his relations with other members of the society. This is to be done in the spirit of tolerance, dialogue and consultation, and, in general, to contribute to the production of the moral wellbeing of society. It obliges him to contribute to the best of his abilities, at all times and at all levels to the promotion and achievement of African unity.

Articles 22 of the charter also provides that all peoples shall have the right to their cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of humanity.

The Universal Declaration of Human Rights of 10 December 1948

This declaration binds all members of the United Nations of which South Africa is a member. Article 27 of this Declaration gives everyone the right to participate freely in the cultural life of the community.

SECTION B

5. TRADITIONAL LEADERSHIP – A HISTORICAL OVERVIEW OF FUNCTIONS

This chapter explores the functions of traditional leaders in the past and how, over time, these functions in some ways became similar to those normally carried out by elected local councils. It also looks at the model of co-operative governance proposed by the White Paper on Local Government and the challenges imposed by the Constitution and the democratic dispensation on traditional leadership.

Traditional leadership is an institution that has developed over many hundreds of years in Africa. It has served the people of Africa through wars, periods of slavery, famine, freedom struggles, economic and political restructuring, and during colonial and apartheid periods.

Prior to the introduction of colonialism, social organisation in South Africa was characterised by a number of tribal regimes based on patriarchy and ascriptive norms. Each tribe, as is still the case today, had a traditional leader who was the central figure. He was the highest authority in the territory. He had various functions, which he did not exercise as an autonomous individual but in collaboration with a tribal council that represented the people. His people saw him not only as a link between them and their ancestors but also as a spiritual, cultural and judicial leader, and the custodian of the values of his community. He was the co-ordinator of the various aspects of everyday life, the realisation of community dreams and aspirations, and the creator of harmony between people and their natural, spiritual, social, physical and economic environment.

He ruled the tribe and the tribe considered him as both father and son. His leadership role was a bonding factor as he was responsible for the common good. Traditional leaders ruled over the members of their tribes as kings-in-council and according to the principles of African democracy and accountability.

With the advent of colonialism, the African traditional government was systematically weakened, and the bond between traditional leaders and their subjects was gradually eroded. Colonialism deprived people not only of their land and property but also of their dignity and culture. The ancient African societal system, which was the basis of its humanity and mutual co-operation and protection, was destroyed.

When the National Party came to power in 1948, it fine-tuned the destruction of the African traditional government. They applied the doctrine of apartheid and thus reinforced the doctrine of segregation that was applied under British colonial rule. Legislation increasingly strengthened tribal divisions and gave traditional leaders powers and roles that they did not possess before. Of particular significance in this regard was the Black Administration Act (No. 38 of 1927) and the Black Authorities Act (No. 68 of 1951) and later, as the apartheid policy was gaining momentum, legislation issued by various former “independent states” and “self-governing territories”.

In terms of the Black Authorities Act and other laws relating to traditional leadership still applicable in South Africa’s provinces today, provision is made for the institution of tribal, community and regional authorities or councils. Tribal authorities have the general function of administering the affairs of the tribe and assisting the chief in carrying out his responsibilities. Regional authorities have the general function of advising and making representation to the government on all matters affecting the general interests of Blacks within their specific jurisdictions. They also have the power to make by-laws and to acquire and hold land or any interest in land.

Essentially, these laws established a system of local government that placed the traditional leaders at the centre of the bureaucratic system of traditional authorities. Chieftainship came to be reduced to a very different institution. As one commentator noted:

“It was a public office created by statute. That is the reversal of the position of the chief in traditional society, in which the role of the chief was to represent his people according to the dictates of customary practise. This reversal,

effected by the Act, has plainly made the appointment, suspension and deposition of chiefs subject to political manipulation.”²

The current South African Constitution recognises the institution, role and status of traditional leadership according to customary law, but subjects it to the Constitution. For example Chapter 12 of the Constitution specifically provides for the recognition of the institution of traditional leadership. However the Constitution falls short of providing for their specific role. It merely states that the status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution (section 211), and that national legislation may provide for the role of traditional leadership at local government level (section 212).

At the same time the Constitution provides for the establishment of municipalities in all areas of South Africa, including those occupied by traditional communities. It further provides that local government is to be democratic and accountable to local communities, to ensure the sustainable provision of services to communities, to promote social and economic development, and to encourage the involvement of communities and community organisations in matters of local government.

5.1. White Paper on Local Government – The Role of and Relationship Between Traditional Leaders and Elected Local Government

According to the White Paper on Local Government, the functions of traditional leaders presently include amongst others the following:

- ⇒ Acting as head of the traditional authority, and as such exercising limited legislative power 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

² See Freddy Khunou, *Critical Overview of the Role and the Effectiveness of the Traditional Leaders in the Rural Local Government: Road of Despair or Hope?* Article delivered at the conference entitled “Law in Africa: New Perspectives on Origins, Foundations and Traditions”, Roode Vallei (Pretoria), 13-15 January 1999.

- ⇒ Advising government on traditional affairs through the houses of traditional leaders
- ⇒ Convening meetings to consult with communities on needs and priorities and providing information
- ⇒ Protecting cultural values and instilling a sense of community in their areas
- ⇒ Being the spokespersons of their communities
- ⇒ Being symbols of unity in the community
- ⇒ Being custodians and protectors of the community's customs and general welfare

Their role 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
- ⇒ Considering and making recommendations to authorities on trading licences in their areas in accordance with the law

The White Paper also proposes a co-operative model of rural local government in accordance with the Constitution. It proposes that elected local government in areas falling under traditional leadership be constituted in such a manner that traditional leaders will be represented and have a role to play. Their role will include attending and participating in the meetings of the municipal councils and advising them on the needs and interests of their communities.

One of the important principles of democratic governance, in addition to representation and participation, is the right to vote. However, this right may have both an advantage and a disadvantage for traditional leaders. The advantage lies in the opportunity that the right to vote offers them to influence processes of development and administration. The disadvantage relates to the possibility of their being seen as part and parcel of an inefficient and ineffective council, by virtue of which they may face removal even though they may not be responsible for the council's inefficiency and ineffectiveness.

The role of traditional leaders is not limited to local level government because provision is made for them to approach and lobby other agencies and spheres of government. They also have a role to play at both provincial and national levels through the houses of traditional leadership.

The role of traditional leaders is defined as belonging to the category B municipality, i.e. a municipality responsible for reticulation services directly to residents and not for bulk service provision, as district councils are. The White Paper concedes that there may be exceptions to this model. It also provides that both the district and local municipal councils must inform and consult traditional leaders regarding municipal projects or programmes within the traditional leaders' area.

The White Paper on Local Government is given effect to in terms of the Municipal Structures Act (1999). Section 81 provides for the participation of traditional leaders in municipal councils. It also empowers, amongst others, the MEC to identify traditional leaders who may participate in the councils.

5.2. Overlap of Functions of Local Authorities and Traditional Leadership

In terms of existing legislation (the Local Government Transition Act, No. 209 of 1993) provision is made for the membership of and participation by traditional leaders in transitional regional councils and transitional representative councils.

It is clear that the Constitution provides for two institutions at local and community level that operate within the same functional and jurisdictional areas. Laws stemming from the past assigned powers and functions to traditional leadership institutions that are similar to those exercised by municipalities in terms of the Constitution, the Local Government Transition Act (No. 209 of 1993) and the Local Government Municipal Structures Act (No. 117 of 1998), e.g. environmental conservation, recommendations for issuing of trading licences and the passing of by-laws. Thus relationships between and the functional areas of elected local government

councillors on the one hand, and traditional leaders and traditional institutions on the other hand, still have to be clarified.

Challenges

Successive colonial and apartheid governments subjected traditional leaders and the institution of traditional leadership to systems of governance foreign to it and assigned powers and functions which in many instances were “untraditional”. This compromised and undermined traditional loyalty to the institution.

Unlike municipal councillors and other politicians who derive their power from party politics, election mandates and legislative instruments, traditional leaders derive their mandate, power and authority from customary law (as amended by statute law), which has been distorted by the colonial and apartheid governments. These distortions and the misdirections and abuse they have effected must be addressed.

⇒ As much as we cannot go back completely to pre-colonial times, we cannot rush into modernity by undermining and discarding our past. A proper role for traditional leaders at local level has to be determined. The White Paper on Local Government foresees a co-operative model for rural local governance. The Constitution provides for a role for traditional leadership at local level. How and what this role should be require further clarification, taking into consideration the impartiality and unifying role that traditional leaders must be seen to be promoting.

⇒ The exclusive and specific functions given to municipalities in terms of section 156 of the Constitution must also be attended to.

Strategic Questions

It is clear that the institution of traditional leadership operates at best at the lowest level of governance – i.e. local government level - and that some powers and functions of traditional leaders overlap with those of municipalities. The following questions therefore arise:

1. Should the role of traditional leaders at local level be re-defined?
2. How can this role be defined without emasculating the institution and without hampering service delivery and development by municipalities?
3. The Municipal Structures Act provides for a limited role and representation of traditional leaders in local councils. Should this role and representation be maintained or expanded?
4. Should traditional leaders have a right to vote within the local councils?
5. What should be the relationship between municipalities and tribal councils?

(Refer also to Chapter 12.)

6. STRUCTURE OF TRADITIONAL LEADERSHIP

Traditional leadership used to be rooted in the notion of “king”. With the advent of colonialism there came a tendency to refer to all African rulers as “chief”. This obscured the hierarchy of leadership that existed within the African community. The partition of Southern Africa and the tampering with borders also contributed to the obfuscation of leadership in the African society. In some instances the colonial authorities called principal rulers “paramount chief” and indiscriminately used the term “chief” to describe other layers. The use of the term “king” was never used by the British colonial rulers to refer to African rulers as it was reserved for the British king.

The king in the African administrative structure was in principle not an autocrat. By popular mandate he was supposed to take decisions with his councillors – the headmen and elders who were normally kinsmen and notable leaders in the community. Headmen were normally members of the extended royal family (inner circle) and were each assigned a section of the tribe to rule on behalf of and with the assistance of the king. The royal family thus extended its power vertically and horizontally through people who could be called “kin”. The concept of “election” was foreign to traditional leadership.

With the introduction of the Black Administration Act (No. 38 of 1927) the African system of governance and administration was changed and the white government took control of the African population. The customary structures of governance of traditional leadership were put aside or transformed. New structures were established in their place in terms of the Black Authorities Act of 1951. These were termed “tribal authorities” (in former Qwaqwa termed a “tribal council”), “community authorities” (where there was no hereditary leader) and “regional authorities” (in former KwaNdebele and Qwaqwa termed “chief's councils”). The Governor-General became a “supreme chief”, a position that gave him the power to create and divide tribes and to appoint any person he chose as a chief or headman. He also had the power to depose chiefs and headmen. In 1961 the position of the Governor-General was assumed by the President of the Republic of South Africa. In terms of the 1993

and 1996 constitutions these powers were assigned to the premiers of the various provinces.

In terms of current legislation, traditional leadership is divided into three categories, i.e. kings/paramount chiefs, chiefs, and headmen. These titles may not necessarily be understood in the same manner in various provinces and may have completely different meanings when translated into the vernacular.

The following overview explains the structures/categories of traditional leaders in various provinces in South Africa. (See also the organogram of structures of traditional leadership in the various provinces of South Africa at the end of this section.)

Eastern Cape

The Eastern Cape constitutes the two former “independent states” of Transkei and Ciskei and parts of the former RSA.

In the former Transkei there are 5 officially appointed paramount chiefs (*iikumkani*), 5 deputy paramount chiefs, 140 chiefs (*iinkosi*) and 863 headmen (*izibonda*). There are also 146 traditional authorities, 140 of which are headed by chiefs and 6 by headmen. There are 8 regional authorities, 5 of which are headed by paramount chiefs and 3 by elected chairpersons.

In the former Ciskei there is 1 king (*ikumkani*), 40 chiefs (*iinkosi*) and no officially appointed/recognised headmen. There are also 40 traditional authorities, each of which is headed by a chief who is also its chairperson.

Free State

The Free State constitutes the former “self-governing territory” of Qwaqwa, a portion of the former Bophuthatswana (Thaba Nchu) and portions of the former RSA.

In the former Qwaqwa there are 10 traditional communities (*merafe*), resorting under the authority of two kings (*marena a maholo*). Each traditional authority has its own chief (*morena*) who rules over a defined territory. This territory is divided into a number of villages/wards (*metse*), each under the authority of a hereditary headman (*morenana*) or non-hereditary elected headman (*boramotse*), both of which are subordinate to the chief concerned. There are 61 headmen in Qwaqwa, and both categories of headmen are appointed by government and receive remuneration.

A Council of Chiefs has been established for each paramountcy, consisting of the king, all his subordinate chiefs and two headmen from each traditional community. A traditional council has been established for each traditional community, consisting of the chief, all his subordinate headmen and ordinary members.

The traditional community in Thaba Nchu is under the authority of a chief (*kgosi*). There are 29 officially appointed/elected headmen (*dikgosana*) under his authority. They rule over outlying villages in the chief's area of jurisdiction.

A traditional authority, vested with the power and functions of a regional authority, has been established for the traditional community in Thaba Nchu, consisting of the chief, headmen and a number of elected councillors.

The districts of Vrede and Harrismith each has an officially recognised chief (*morena*). Although landless and without traditional authorities and prescribed areas of jurisdiction, they do have influence by virtue of their recognition as *marena* by their subjects.

Kwazulu-Natal

KwaZulu-Natal constitutes the former KwaZulu self-governing territory and parts of the former RSA.

KwaZulu-Natal has one king (*Ingonyama/Isilo samabandla*), 277 chieftaincies, 195 officially appointed chiefs (*amakhosi*), 44 officially appointed acting chiefs

(*amabamba bukhosi*) and 38 vacancies. The 4 elected chiefs (*iziphakanyiswa*) who are heads of their community authorities have all been officially appointed. In addition to the 8 deputy chiefs (*amasekela enkosi*) who have been officially appointed by government, there are also other deputy chiefs who have been “unofficially” appointed by the traditional leader concerned. None of the about 10 000 headmen (*izinduna*) in KwaZulu-Natal have been officially appointed or recognised.

Each of the 277 traditional authorities in KwaZulu-Natal is made up of the chief (who is the chairman) and elected councillors. All the traditional authorities in a given magisterial district constitute a regional authority. However, the traditional authorities outside the former KwaZulu are not represented in these regional authorities. There are 23 regional authorities in the province. In addition, there are 4 community authorities, each of which is headed by an elected chief.

Mpumalanga

Mpumalanga constitutes the former self-governing territories of KaNgwane and KwaNdebele, a portion of the former independent Bophuthatswana as well as portions of the former RSA.

In the former KaNgwane there are 28 chiefs (*amakhosi*), 28 traditional authorities (each of which is headed by a chief) and 4 regional authorities.

In the former KwaNdebele there are 2 kings (*iingwenyama*) and 7 chiefs (*amakhosi*). The 7 traditional authorities make up the area under the jurisdiction of the Council of Chiefs (*Ibandla lamakhosi*).

In the magisterial district of Moretele (former Bophuthatswana) there are 5 chiefs (*dikgosi*) and 1 community authority.

In the former RSA there are eleven 11 *makgoshi/marena/amakhosi* who are the heads of 11 traditional authorities. Headmen in Mpumalanga are not officially appointed/recognised.

Northern Province

The Northern Province constitutes the two former “self-governing territories” of Lebowa and Gazankulu, the “independent state” of Venda and portions of the former RSA.

In the former Lebowa there are 128 officially appointed chiefs (*magoshi*) and over 900 headmen (*mantona*), but they are not officially appointed and do not receive remuneration. There are also clan headmen (*borakgoro*) who act under the authority of chiefs and headmen. They are responsible for the administration of their respective wards. The 128 traditional authorities, 12 community authorities and 12 regional authorities are headed by either chiefs or elected chairmen.

In the former Gazankulu, there are 33 officially appointed chiefs (*tihosi*). The headmen (*tindhuna*) are divided into three categories: (a) officially appointed independent headmen, (b) officially recognised headmen appointed by chiefs, and (c) non-officially recognised headmen appointed by chiefs and independent headmen. There are 47 independent headmen in the former Gazankulu. They are officially appointed (and remunerated) by the government and therefore not under the authority of chiefs, although their subjects ascribe to them the status of chief and use the title *hosi* to address them. There are 106 officially appointed (and remunerated) headmen in the former Gazankulu and all of these are appointed by chiefs. There are also about 385 headmen who are not officially appointed and not remunerated. Below headmen there are petty headmen (*xamuganga*) who are responsible for the administration of their respective villages.

The former Gazankulu has 33 traditional authorities, 6 community authorities and 6 regional authorities. The community authorities comprise two categories:

- a) Independent headmen and their communities for which a Community Authority Council has been established, consisting of independent headmen and

councillors elected by the communities. The Community Authority Council is chaired by an independent headman elected by the members of that council.

- b) Communities without a headman and for whom a Community Authority Council has been established, consisting of councillors elected by the community. The chairperson is one of the elected councillors.

Chairpersonship of the Community Authority Council is supposed to rotate among the headmen after every 5 years. Some independent headmen who chaired community authority councils were eventually promoted to the position of chief. Other independent headmen who were not promoted to chief and thus remained chairpersons of community authority councils refused to vacate their chairmanship after the expiry of their term of office.

In the former Venda there are 28 officially appointed chiefs (*mahosi*), 374 officially appointed headmen (*vhamusanda*), an estimated 248 officially unappointed headmen (*vhamusanda*) as well as petty headmen (*vhakoma*). There are also 28 territorial councils (equivalent to the Traditional Authority) and 5 regional councils (equivalent to the Regional Authority).

Northwest

Northwest constitutes the former independent state of Bophuthatswana and portions of the former RSA.

There are 62 formally appointed chiefs (*dikgosi*) and two categories of headmen, namely:

- (a) Independent headmen. There are three officially appointed independent headmen (*dikgosana*). They do not fall under the authority of chiefs and receive remuneration from government.

(b) Headmen appointed by chiefs. Some of them are officially recognised by government, and receive remuneration. Others are not officially recognised, and do not receive any remuneration. (The exact number of the non-officially appointed headmen is not known.)

In addition, there are also clan headmen. They are responsible for the administration of their family units.

The former Bophuthatswana has 62 traditional authorities and 10 regional authorities. These structures are constituted in the same way as in other provinces.

In the former RSA there are two officially appointed chiefs (*dikgosi*) and these are chairmen of their respective traditional authorities.

The following table summarises the different categories and structures of traditional leadership in the different provinces:

PROVINCE	KINGS/ PARAMOUNT CHIEFS	CHIEFS	HEADMEN			CHAIRPERSONS (COMMUNITY AUTHORITIES)	RECOGNISED LANDLESS CHIEFS	DEPUTY TO KINGS
			LINEAGE	INDEPENDENT	VILLAGE/ WARD			
KWAZULU-NATAL								
Former KZN	X	X	X	-	-	X	-	-
Former RSA	X	X	X	-	-	-	-	-
FREE STATE								
Former Qwaqwa	X	X	-	-	X	-	X	-
Former Thaba Nchu	-	X	-	-	X	-	-	-
Former RSA	-	-	-	-	-	-	X	-

PROVINCE	KINGS/ PARAMOUNT CHIEFS	CHIEFS	HEADMEN			CHAIRPERSONS (COMMUNITY AUTHORITIES)	RECOGNISED LANDLESS CHIEFS	DEPUTY TO KINGS
			LINEAGE	INDEPENDENT	VILLAGE/ WARD			
MPUMALANGA								
Former Bophuthatswana	-	X	X	-	X	X	-	-
Former KaNgwane	-	X	X	-	X	-	X	-
Former RSA	-	X	X	-	-	-	-	-
Former KwaNdebele	X	X	X	-	X	X	-	-
Former Lebowa	-	X	X	-	X	-	-	-
EASTERN CAPE								
Former Transkei	X	X	-	X	-	X	X	
Former Ciskei	X	X	-	X	-	X	-	
Former RSA	-	X	-	-	-	-	-	

PROVINCE	KINGS/ PARAMOUNT CHIEFS	CHIEFS	HEADMEN			CHAIRPERSONS (COMMUNITY AUTHORITIES)	RECOGNISED LANDLESS CHIEFS	DEPUTY TO KINGS
			LINEAGE	INDEPENDENT	VILLAGE/ WARD			
NORTHERN PROVINCE								
Former Lebowa	-	X	X	-	X	X	-	-
Former Gazankulu	-	X	-	X	X	X	-	-
Former Venda	-	X	-	X	--	-	--	
NORTHWEST								
Former Bophuthatswana	-	X	X	X	X	X	-	-
Former RSA	-	X	X	X	X	-	-	-

PROVINCE	REGIONAL AUTHORITY	TRIBAL AUTHORITY	COUNCIL OF CHIEFS	TRIBAL COUNCILS	COMMUNITY AUTHORITY	
KWAZULU-NATAL						
Former KwaZulu	X	X	-	-	-	
Former RSA		X	-	-	-	
MPUMALANGA						WARD AUTHORITY
Former Bophuthatswana	X	X	-	-	X	
Former KaNgwane	X	X	-	-	-	
Former RSA	-	X	-	-	X	
Former KwaNdebele	-	X	X	-	X	X
Former Lebowa	X	X	-	-	-	
EASTERN CAPE						
Former Transkei	X	X	-	-	X	
Former Ciskei	X	X	-	-	X	
Former RSA	-	X	-	-	-	

PROVINCE	REGIONAL AUTHORITY	TRIBAL AUTHORITY	COUNCIL OF CHIEFS	TRIBAL COUNCILS	COMMUNITY AUTHORITY
NORTHERN PROVINCE					
Former Lebowa	X	X	-	-	X
Former Gazankulu	X	X	-	-	X
Former Venda	X	X	-	-	
NORTHWEST					
Former Bophuthatswana	X	X	-	-	X
Former RSA	-	X	-	-	-

NB: The nomenclature used in the various vernaculars to refer to traditional leaders who occupy different levels in the hierarchy of leadership still has to be properly studied and understood.

Challenges

- ⇒ In some provinces there are kings (e.g. KwaZulu-Natal and Mpumalanga), while in other provinces there are paramount chiefs (e.g. Free State and Eastern Cape). There are no officially appointed kings and paramount chiefs in the Northern Province and Northwest. In KwaZulu-Natal the king rules over all the Zulu-speaking people, while in Mpumalanga, the Free State and Eastern Province the kings/paramount chiefs only rule a specific section of a larger language community.
- ⇒ Landless chiefs are officially appointed and remunerated by government. Unlike other officially appointed chiefs, though, they do not have a defined jurisdictional area and a traditional authority. In addition, landless chiefs have only civil jurisdiction within a defined magisterial district or districts over community members who freely subject themselves to his civil jurisdiction. Hence these chiefs are unable to exercise some of the powers and functions accorded to “appointed” chiefs who have prescribed areas of jurisdiction and administrative infrastructures.
- ⇒ There is lack of uniformity concerning the categories of headmen. In the Northern Province, for example, there are three categories of headmen: independent (remunerated), officially appointed (remunerated) and non-officially appointed (non-remunerated). The majority of headmen in the Northern Province are not officially appointed and thus not remunerated. This lack of uniformity as regards the recognition, categories and remuneration of headmen in all provinces should be addressed.
- ⇒ Community authorities are headed by chairpersons, who may be either appointed or elected independent headmen. Some of the independent headmen who head community authorities became chiefs and now head their own traditional authorities. In cases where chairpersonship rotates among the independent headmen after every 5 years, some refused to vacate their seats after the expiry of their five-year term of office. This created tension among some headmen and their followers. This is a problem that needs attention. Another problem is that community authorities without traditional leaders became part of the elected government structures, whereas this did not happen in the case of community authorities headed by independent headmen.

⇒ In addition, regional authorities became inactive in some provinces, whilst in other provinces they continued to exercise their advisory and executive powers. Moreover, although the funding of traditional authorities decreased and opposition by local government structures affected their effectiveness, they generally continued to function all over South Africa.

Strategic Questions

1. Given that there are kings and paramount chiefs in some provinces, what should be done to address the problem of lack of uniformity in the highest layer of traditional leadership?
2. What should be the role, function and composition of regional authorities, councils of chiefs, traditional authorities and community authorities, and what should be their relationship with local government structures?
3. How should the problem of landless chiefs be addressed?
4. What should be done with the disparate status, recognition and remuneration of headmen?
5. What should happen to those independent headmen who eventually became chiefs, given that the status of other independent headmen remained unchanged?
6. What policy should be adopted as regards those independent headmen who were not promoted to become chiefs, and who are involved in community authorities at present?

7. APPOINTMENT/RECOGNITION OF TRADITIONAL LEADERS

Different laws of succession, sets of legislation and procedures are being used by different provinces in the appointment of traditional leaders into different positions of power. This has resulted in a number of problems for policy formulation in this area.

The power to appoint traditional leaders, which power was vested in the supreme chieftaincy, was assigned to the Governor-General by the Black Administration Act of 1927. This power was later re-assigned to the President of South Africa in 1961 and then to the homeland governments upon the attainment of self-government status, and to the TBVC states upon gaining independence. Outside the former self-governing territories and “independent” TBVC states traditional leaders were still being appointed by the South African President.

Traditional leaders generally begin their term of office upon official appointment by government, followed by a customary inauguration.

Eastern Cape

In both the former Transkei and former Ciskei there are officially appointed kings/paramount chiefs (*iikumkani*), deputy paramount chiefs and chiefs (*iinkosi*).

Succession to the position of king/chief is hereditary along the male line and is further determined by the law of succession of each traditional community. Females can only act as regents on behalf of their minor sons.

In the former Transkei the government formally appoints the headmen (*izibonda*) after consultation with the king/paramount chief concerned. In the former Ciskei no headmen were appointed after 1984 except with prior approval of the then Minister of Native Affairs and the concurrency of the then treasury.

In 1994 the power to appoint traditional leaders was assigned to the Premier of the Eastern Cape or the delegated MEC.

The following legislative measures determine the appointment of traditional leaders: the Transkei Constitution Act of 1976, the Transkei Authorities Act of 1965, the Ciskei Constitution Act of 1981, the Ciskei Administrative Authorities Act of 1984 and subordinate legislation.

Free State

In the former Qwaqwa there are kings (*marena a maholo*) and chiefs (*marena*) who rule over a defined territory. There are also hereditary headmen *marenana* or non-hereditary elected headmen (*borametse*) who are subordinate to the chiefs.

The position of traditional leader (paramountcy (*borena bo boholo*), chieftaincy (*borena*) and headmanship (*borenana*)) is hereditary along the male line. Females are appointed as regents for their male sons who have not yet reached the age of maturity. In the category of non-hereditary headmanship (*borametse*) the headmen (*rametse*) are elected by the villages/wards (*metse*) over which they exercise jurisdiction.

In Thaba Nchu there is a chief (*kgosi*) and non-hereditary headmen (*dikgosana*). Chieftaincy (*bogosi*) is hereditary along the male line while non-hereditary headmen are elected by the inhabitants of the villages.

In the districts of Vrede and Harrismith there are recognised chiefs (*marena*) who are landless and do not have traditional authorities and prescribed areas of jurisdiction. They do, however, exert influence by virtue of their recognition as *marena* by their subjects. Their positions are hereditary in the male line.

In 1994 the power to appoint traditional leaders was assigned to the Free State Premier or the delegated MEC.

The following legislative instruments determine the appointment of traditional leaders in the Free State: the Bophuthatswana Constitution Act of 1976, the Bophuthatswana Traditional Authorities Act of 1978, the Black Administration Act of 1927 and the Qwaqwa Administration of Authorities Act of 1983, as well as subordinate legislation.

KwaZulu-Natal

Traditionally, the king (*Ingonyama/Isilo samabandla*) and the chief (*inkosi*) acquire their positions through hereditary succession along the male line. The law of succession of each traditional community also informs succession.

There exists also a category of elected chiefs (*iziphakanyiswa*). Deputy chiefs (*amasekela enkosi*) are appointed by the chiefs or elected chiefs, and acting chiefs (*amabamba bukhos*) are appointed by the clan (*umndeni*) to act as chiefs when the rightful persons cannot be appointed for various reasons.

Succession to the position of headman (*izinduna*) is hereditary, elected or appointed.

In 1994 the power to appoint traditional leaders was assigned to the Premier of KwaZulu-Natal or the delegated MEC.

The following legislation dealing with the appointment of traditional leaders applies to KwaZulu-Natal: the Black Administration Act of 1927 and the KwaZulu AmaKhos and Iziphakanyiswa Act of 1990 (and subordinate legislation).

Mpumalanga

Succession to the positions of kings (*iingwenyama*) and chiefs (*makgoshi/marena/amakhos/magosii*) in Mpumalanga as a whole is hereditary along the male line and is further determined by the law of succession of each traditional authority.

The headmen (*tindhuna*) are not officially appointed. They are appointed by either the king or chief in consultation with the traditional authority and the royal council of the community concerned. This position is also hereditary.

In 1994 the power to appoint traditional leaders in Mpumalanga was assigned to the Premier or the delegated MEC.

The following legislation dealing with the appointment of traditional leaders applies to Mpumalanga: the Black Administration Act of 1927, the KwaNdebele Traditional Authorities Act of 1984, and the Bophuthatswana Traditional Authorities Act of 1978.

Northern Province

In the former Lebowa there are officially appointed chiefs (*magoshi*) as well as headmen (*mantona*) who are not officially appointed. There are also clan headmen (*borakgoro*) who are under the authority of chiefs and headmen.

Succession to the position of chief and headman is hereditary along the male line and is further determined by the law of succession of each traditional community. The general law of succession among the BaPedi is that a chief is succeeded by his eldest son born from the *masechaba* wife (the so-called “candle wife”). The exception to this general law is the Modjadjis, where succession follows the female line.

In the former Gazankulu, there are officially appointed chiefs (*tihosi*). The headmen (*tindhuna*) are divided into three categories: independent headmen, headmen formally appointed by chiefs, and headmen non-formally appointed by chiefs and independent headmen. Independent headmen are formally appointed by the government. These headmen are not under the authority of chiefs, but among their subjects they enjoy the same status as chiefs and the title *hosi* is used to address them. In addition, there are formally recognised headmen who are appointed by chiefs as well as headmen who are not officially recognised by government. Below headmen there are petty headmen (*xamuganga*) who are responsible for the administration of their respective villages.

In the former Venda there are officially appointed chiefs (*mahosi*), officially appointed headmen (*vhamusanda*), non-formally appointed headmen (*vhamusanda*) as well as petty headmen (*vhakoma*). Succession to the positions of chief and headman among the VhaVenda is hereditary along the male line. A chief's successor is identified by the royal council and is usually the eldest son of the *dzekiso* wife (i.e. the one married by the sister's *lobola* cattle).

In 1994 the power to appoint traditional leaders was assigned to the Premier of the Northern Province or the delegated MEC.

The following legislation applies to the appointment of traditional leaders in the Northern Province: the Black Administration Act of 1927, Proclamation R110 of 1957, the Lebowa Local Authorities Act of 1984, the Lebowa Royal Allowances Act of 1984, the Venda Traditional Leadership Proclamation 21 of 1991 and the Venda Districts and Territorial Councils Act of 1986.

North West

In the former Bophuthatswana there are formally appointed chiefs (*dikgosi*). Succession to the position of chief is hereditary along the male line. The law determines that a chief be succeeded by the first-born son of his principal wife.

There are two categories of headmen (*dikgosana*). The first category is the independent headmen who do not fall under the authority of chiefs and receive remuneration from government. The second category is that of headmen appointed by chiefs. They are not officially recognised and do not receive remuneration from the government. Succession to the position of headman is either hereditary along the male line or elected.

In the former RSA part of Northwest there are appointed chiefs (*dikgosi*). The law of succession to the position of these chiefs is the same as the one followed in the former Bophuthatswana. In addition, each traditional community influences succession.

Headmen under appointed chiefs are appointed to their position by the chief (*kgosi*) concerned, which appointment is then confirmed by the government.

In 1994 the power to appoint traditional leaders was assigned to the Premier of Northwest who may delegate this power to the relevant MEC.

The following legislative instruments determine the appointment of traditional leaders: the Black Administration Act of 1927, the Bophuthatswana Traditional Authorities Act of 1978, and the Bophuthatswana Constitution Act of 1977 as well as subordinate legislation.

Appointment Procedures

The following appointment procedures (subject to regional variations) apply in respect of the different categories of traditional leaders:

In the official appointment of *the different categories of appointed traditional leaders (kings/paramount chiefs, chiefs and appointed headmen)*, the following considerations apply:

a) Three layers of institutions play a role:

- ⇒ Customary institutions (e.g. the royal family)
- ⇒ Administrative institutions (the provincial department concerned)
- ⇒ Statutory institutions responsible for the official appointment. In this context the applicable pre-1994 legislation (see below) has been assigned to the provincial premier concerned. However, from one province to another, from one category of traditional leader to another, and in some instances even from one area in a particular province to another, the actual appointing functionary differs: either the Premier or the Executive Council or the Premier in consultation with the Executive Council or the MEC concerned.

b) In general the provincial department concerned seeks the advice of the Provincial House of Traditional Leaders.

c) In some instances other statutory institutions are also consulted (e.g. the Regional Authority, Chief's Council, Traditional Authority or the king/paramount chief/chief concerned).

In identifying and appointing *headmen who are not officially appointed* in terms of legislation, the following considerations apply:

- ⇒ Involvement of customary institutions
- ⇒ "Unofficial" appointment by a chief in terms of customary law

As regards the appointment of *independent headmen* (for those traditional communities that do not have their own chiefs), the following considerations apply:

- ⇒ Involvement of customary institutions
- ⇒ Involvement of administrative institutions (the provincial department concerned)
- ⇒ Appointment in terms of applicable legislation by the statutory institution referred to above.

In appointing/confirming *elected (non-hereditary) headmen*, the following considerations apply:

- ⇒ Election by the community concerned
- ⇒ In some provinces: appointment by the chief concerned
- ⇒ Involvement of administrative institutions (the provincial department concerned)
- ⇒ Confirmation/appointment in terms of applicable legislation by the statutory institution referred to above.

In appointing *elected chairpersons of those community authorities that do not have independent headmen as leaders*, the following considerations apply:

- ⇒ Election by the communities concerned
- ⇒ Involvement of administrative institutions (the provincial department concerned)
- ⇒ Appointment in terms of applicable legislation by the statutory institution referred to above.

7.1. Disqualification

Succession to traditional leadership is gender specific. Succession is hereditary in the male line, with the exception of the Modjadjis, where succession is hereditary in the female line.

The identification of the successor is determined by the customary law of the community concerned. If the identified successor is still a minor, an acting chief – who can be a female or a male – is appointed to rule until such time as the minor concerned has reached maturity.

7.2. Retirement of Traditional Leaders

Customary law does not make provision for the voluntary retirement of traditional leaders. However, legislation in the Eastern Cape and Northwest makes provision for the retirement of traditional leaders.

Challenges

- ⇒ There are no uniform procedures in the appointment/recognition of kings, paramount chiefs, chiefs and headmen. This can be attributed to different norms, values, genealogy and various acts governing the different provinces. The diversity of the sources of influence and their various but concurrent effects have resulted in a number of problems that call for a clear policy on the appointment of traditional leaders.
- ⇒ The relationship between government (as supreme chief) on the one hand, and customary institutions and practices on the other hand, as regards the appointment of traditional leaders has been the subject of conflicting court decisions (e.g. Sigcau v Sigcau). Putting a policy in place will remove uncertainties in this regard.
- ⇒ Occasionally the legitimate successor declines appointment. To which extent such a declination can be reversed or whether the decliner's children are entitled to succeed into his/her position need to be determined by policy in cases where custom does not provide a clear answer.

⇒ Communities have expressed a strong wish to retain the customary practice. They contend that the formal/official way in which appointment and recognition are handled is not only detached from the people, but also excludes a significant section of the community from participation.

Strategic Questions

1. Should there be a uniform system of appointing traditional leaders in all provinces?
2. What role should government play in the appointment/confirmation of traditional leaders?
3. Should government be involved in the appointment of headmen?
4. Should the position of supreme chief be retained?
5. What should be the roles of government on the one hand, and customary institutions on the other hand, as regards the identification and appointment of traditional leaders?
6. What role, if any, should the national and provincial houses of traditional leaders in the appointment of traditional leaders?
7. To what extent can a legitimate successor who has declined to be appointed as a traditional leader remain a legitimate successor?
8. Are the children of a traditional leader who has declined to succeed to the position of traditional leader be entitled to succeed to this position?
9. What should be the role of government in the ceremonial installation of traditional leaders?

8. REMOVAL OF TRADITIONAL LEADERS FROM OFFICE

According to custom, traditional leaders may be removed from their positions if they commit acts that are deemed by the Royal Council to be acts of misconduct.

Legislation also provides for the removal of a traditional leader from office, where the traditional leader is deemed to have committed acts of misconduct. Acts of misconduct amongst others include conduct that is disgraceful, improper or unbecoming, using intoxicating liquor or dependence-producing drugs excessively, abusing of powers, and being convicted by a competent court of acts stipulated in Schedule 1 of the Criminal Procedure Act of 1977, i.e. murder, treason and other conduct.

A number of traditional leaders were deposed in terms of various laws for not being amenable to colonial and apartheid government directives. Notwithstanding the traditional legitimacy they enjoyed, they were ousted from office or passed over in matters of succession. Legislation was also used to establish new chieftaincies as well as to merge and dissolve existing communities. New traditional leaders were also imposed on the new chieftaincies.

8.1. Succession Disputes

Cases are known where chieftainship has been usurped or acquired by trickery or force. This has resulted in succession disputes that involve mostly genealogical controversies, i.e. questioning the legitimacy of the person/s claiming to be the successor/s to traditional leadership.

Recently women in traditional communities came to challenge succession laws and customs on the basis that these laws and customs discriminate against them. The Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act were used as a basis for such challenges.

Customarily, succession disputes are resolved by the Royal Council, using the prevailing law of succession and provincial legislation as guidance.

Challenges

- ⇒ There is a need for uniform policy on the removal from office of traditional leaders by the traditional institutions concerned and by government.
- ⇒ The issue of traditional leaders who were deposed for political reasons has presented practical problems where such traditional leaders claimed their original positions. This has potential for destabilising communities, particularly where the current incumbent who was imposed/installed at the expense of the legitimate one, is seen to have looked after the interests of the community well and has gained legitimacy in it.
- ⇒ The creation of new chieftaincies and the installation of chiefs during the colonial and apartheid eras have raised serious concerns regarding the legitimacy of the traditional leadership institution.
- ⇒ Succession disputes present a problem where the law of succession is challenged on the basis of the equality provision of the Bill of Rights.
- ⇒ Different provinces handle succession disputes differently; as a result, there is lack of uniformity.

Strategic Questions

1. Should government be involved in the removal of traditional leaders? If so, what should be the reasons for removing traditional leaders?
2. What role should the Royal Council concerned play in the removal of a traditional leader?
3. What should be the role of the national and the provincial houses of traditional leaders in the removal of traditional leaders from office?

4. Should leaders who were “imposed” be removed and be replaced with the “legitimate” traditional leaders?
5. How should a succession dispute be resolved, especially in cases where elements of the right to equality as entrenched in the Bill of Rights contraventions are involved?
6. Should a dispute resolution mechanism be established?
7. What form should this dispute resolution mechanism take, e.g. should it be a commission of inquiry?

9. THE ROLE OF WOMEN IN TRADITIONAL LEADERSHIP

With the exception of the matrilineal society of the Modjadjis in the Northern Province, traditional South African societies have always been defined along patriarchal lines, i.e. the head of the household was a man, and his wife/wives were subordinate to his authority. Wives were responsible for the general welfare of the family and the upbringing of children. The women in the households of traditional leaders also gave advice in matters of succession (for example, sisters of the king/chiefs and headmen were part of the group of advisors to these leaders). These women also assisted in and co-ordinated the family's ritual functions (for example weddings and inaugurations), mediated during family disputes, and also acted as regents in cases where the successors to the leaders were under-aged.

The successive colonial and apartheid regimes significantly altered the role played by women in traditional communities. For example, the migrant labour policies and the creation of African reserves left them on their own to act as heads of households responsible for a range of functions formerly executed by men.

KwaZulu-Natal was the first province where women were officially acknowledged as leaders in predominantly patriarchal traditional communities. The AmaKhosi and Iziphakanyiswa Act 9 of 1990 provided for any person (including a woman) to be appointed as an *inkosi* or *isiphakanyiswa*.

Challenges

- ⇒ The Promotion of Equality and Prevention of Unfair Discrimination Act prohibits discrimination against men and women. This includes any distinction, exclusion or restriction made on the basis of gender that impairs or nullifies the recognition, enjoyment and exercise by women and men of their human rights and fundamental rights.
- ⇒ The Act further provides for the outlawing of gender-based violence (including witchcraft or ritual-related violence), the barring of women from inheriting family property, female genital mutilation, any practice (including traditional, customary or religious) that violates the dignity of women and undermines equality between women and men, as well as any policy that unfairly or unreasonably limits women's access to land.

- ⇒ The Act also outlaws any acts or conduct that create or sustain systematic forms of domination and disadvantage that perpetuate and reinforce unequal gender relations and prevent women from developing their full human potential and participating fully in society. Stakeholders are therefore called upon to consider whether the patriarchal nature of traditional communities discriminates against women and contradicts the equality clause in the Bill of Rights and the Promotion of Equality and Prevention of Unfair Discrimination Act.

- ⇒ The extent to which the institution of traditional leadership can be transformed in line with the equality clause and equality legislation, without undermining the cultural values on which it is based, must also be considered.

- ⇒ Traditional leaders have often argued that discrimination against women with regards to succession is not aimed at excluding them from meaningful participation, but rather at preserving the lines of succession. When a woman from a royal family gets married, her children are not considered to be part of the royal family, but as part of her husband's family. Her children are therefore excluded from any rights accruing to members of their mother's family. Although in terms of the Bill of Rights this boils down to discrimination against women, there are calls for preserving the hereditary nature of family succession, which is an integral part of the institution of traditional leadership.

Strategic Questions

1. How can the prevailing law of succession and customary law be reconciled with the equality clause entrenched in the Bill of Rights and the Promotion of Equality and Prevention of Unfair Discrimination Act?

2. Taking into account the prevailing democratic dispensation, what role should women play in institutions of traditional leadership, such as customary courts and *izimbizo*?

10. THE STATUS OF THE YOUTH/MINORS IN TRADITIONAL COMMUNITIES

In African traditional culture, age and seniority played an important part. The youth were raised knowing that their seniors should be respected and honoured. They were also taught from early in life the responsibilities of adulthood, such as providing for their children's sustenance. The children were otherwise left to fend for themselves and make decisions on their own. This independence later on inspired them to demand to play a more important role in the affairs of communities. The more they were prevented from exercising this role, the more rebellious they became.

In traditional communities minors were not seen as belonging to their families only, but also to their communities as a whole. Thus, if parents died, the relatives and, where they were not available, the community would care for the children and afford them the benefits that they would have enjoyed in their original family. That is why there were no homeless children in traditional communities.

According to customary law, minors could not succeed into positions of traditional leadership. Where a minor was the next in line to succeed, a regent was appointed on the minor's behalf. In some cases, only men who had reached a certain stage of development and maturity (depending on the customs of that community) were allowed to play a role in traditional institutions.

The royal youth were represented in customary traditional institutions such as the Royal Council. Although they did not participate in the discussions, they were brought in as observers in order to obtain the necessary experience of how these institutions functioned, and how the deliberations were conducted. The commoner youths, on the other hand, were not allowed to attend such meetings.

Challenges

⇒ There are instances where regents appointed on behalf of a youth refuse to vacate the position when the youth becomes eligible for the position of traditional leader. This creates instability and prolonged claims.

⇒ The Constitution prohibits discrimination on the basis of age. The impact of this on the law of succession in different traditional communities and on the participation of youth in traditional institutions needs to be determined.

Strategic Questions

1. Should there be a policy on the age of succession?
2. What role should youth play in traditional leadership institutions?
3. Where the leadership position of a minor is temporarily handed over to a regent, what mechanisms should be implemented to ensure that the rightful holder assumes this position upon maturity?
4. Where the leadership position of a minor is temporarily handed over to a regent, what rights do the minor and his/her mother have as regards general care (including remuneration)?
5. How should customary law and the law of succession be reconciled with the equality clause in the Bill of Rights?
6. Should government have a responsibility towards the family/families of a deceased traditional leader as regards general care, etc.?

11. PARTY POLITICAL AFFILIATION

Prior to the Union of 1910, various colonial governments had made several attempts to reconstruct the chieftainship and make it pliable to colonial rule. For example in the Eastern Cape this was achieved mainly through military conquest, (and the frontier wars are a good example of this), while in other areas by way of contrast, treaties between the 'chief' of a 'tribe' and a colonial or republican political power might provide the basis for maintaining a limited tribal autonomy. With the creation of centralised administration in 1910 and with the evisceration of the reserve economy it became possible to finally reorganise traditional political institutions. In terms of the South Africa Act of 1909, the Governor General was conferred as a 'supreme chief' over all African tribes, and in 1927 the Native Administration Act consolidated these powers, and vested them in the Minister of Native Affairs, with the Bantu Authorities Act of 1951 finally reducing traditional leaders to the position of an element in the bureaucratic hierarchy.

However as a response to the establishment of the Union in 1910, Africans began to express their political demands in more concrete terms. For example the formation of the African National Congress in 1912 represented the first political instrument by which such demands were to be articulated. Though organized across ethnic and tribal lines, the ANC nonetheless maintained a respect for traditional leaders, which was due both to the recognition of the role that they had played in resisting colonialism, as well as the fact that Africans in urban areas, despite increasing industrialization, and the concomitant proletarianization, still maintained their loyalty to the institution of traditional leadership. Because of the respect accorded to traditional leaders after that formation of the ANC, some traditional leaders were made honorary vice presidents within the ANC. When the ANC adopted its first constitution in 1919, despite the fact that leading personalities in the African community had emerged from outside the institution of chieftaincy, it provided for a forum within Congress known as the Upper House of Chiefs. All kings, princes, paramount chiefs and chiefs by heritage, as well as other persons of royal blood in the direct line of succession among all the Africans in Southern

Africa, had the right to attend the meetings of Congress either in person or by representation. This form of representation for traditional leaders, besides showing respect for, and honoring the status of traditional leaders, was also intended to get the political consent of all the ethnic groupings assembled within the ANC.

The South African government, fearing that traditional leaders would become radicalised by their involvement with the ANC, moved swiftly to counter this by enacting the Native Administration Act of 1927, in terms of which a separate administration for Africans was created. From this moment onwards, no 'chief' who held views contrary to those of government was confirmed in his position as 'chief' by the Governor - General, irrespective of his hereditary right by African custom.

Subsequent to the enactment of the Native Administration Act, traditional leaders became important tools in the government's strategy of extending its control over Africans in the countryside, through the establishment of 'reserves', 'self-governing states', 'homelands' and later 'independent states'.

Challenges

The participation by traditional leaders in party politics is rooted both in the history of the establishment and consolidation of colonial and apartheid regimes, as well as in struggles against such regimes. However the question of their participation in party politics in this Discussion Document, arises out of recent experiences, where in the past traditional leaders played a leading role in homeland party politics and recently in various parties which are participating in the new political dispensation.

The Constitution provides that every citizen is entitled to belong, stand for elections and vote for a political party of their choice. For example section 19 of the Constitution provides for the political rights of all citizens.

There is a need to consider, in view of the need to promote governance and impartiality, whether or not it is counter productive for traditional leaders to overtly espouse their party political views.

Strategic Question

1. Given then that every citizen is constitutionally entitled to belong, stand for elections and vote for a political party of their choice, how should the participation of traditional leaders in party politics be limited if at all?
2. Can any restrictions be placed on the political party activities of traditional leaders?
3. How should traditional leaders be capacitated to play a more impartial role?

12. REMUNERATION OF TRADITIONAL LEADERS

In the past traditional leaders, with regard to their remuneration, occupied a position of unique privilege and authority. In addition to all other entitlements they enjoyed, a traditional leader was a repository of wealth and a dispenser of gifts. His exalted status was reflected in the ceremonial surrounding him and in the obligations of his “tribesmen” towards him.

He and his family normally took precedence in the “tribe” in matters of rituals, such as the first fruits and initiation ceremonies. He had the first choice of a site for building his home, of “tribal” lands and of grazing for his cattle. He was invariably the richest man in the “tribe”. All offences against him are generally punished far more severely than similar offences against ordinary “tribesmen”. He could send people where he liked and on any errand that he liked and could also use their wagons and oxen, provided that the work involved was on behalf of the “tribe”. He was also entitled to free labour from the age-regiments for both public and private purposes. A traditional leader’s most important source of wealth was cattle. As a rule he possessed by far the largest lands in the “tribe”.

With the advent of colonialism and apartheid laws were introduced which drew distinctions between a traditional leader and his community, defined his role, powers and functions and regulated his benefits. These laws gradually alienated the traditional leader from his community and took away some of his powers. He became an instrument in the hands of the administration through which instructions and conformity could be demanded. He was made to be responsible for the implementation of laws passed by the administration e.g. hut-tax, labour recruitment, etc.

In the era of democracy, the remuneration of traditional leaders has now completely assumed new completely dimensions. Unlike in the past, where traditional leaders enjoyed benefits from their “tribes” and earned respect and emoluments by close association and devotion to their communities, they are paid in terms of laws passed by the central government on a uniform basis and without any distinction of the size

of the “tribe”. With the introduction of both the 1993 and 1996 Constitutions provision was made for the establishment of Houses of Traditional Leaders. This also necessitated the design of payment processes for traditional leaders serving in these Houses.

The Constitution and Remuneration of Public Office Bearers Act of 1998 provide for the remuneration of traditional leaders. As regards benefits, the President may in his discretion determine whether benefits, if at all should be paid. It is important to note that only kings and “chiefs” are paid. Headmen are not paid. There are however instances where, in some provinces, headmen are paid as well.

The remuneration is regulated in terms of the Remuneration of Public Office Bearers Act of 1998, and takes place at four levels:

- a) King/Paramount chief level
- b) Chief level
- c) Provincial Houses level
- d) National Houses level.

At both National and Provincial House levels only allowances are paid. Members of Houses have proposed that these Houses be make permanent and that they be paid salaries as full time members.

Challenges

The remuneration of traditional leaders by government imposes a number of consequential duties and obligations on both government and traditional leaders. Not only does it create fiscus obligations on the government but also creates, accountability to government by traditional leaders.

Once government remunerates traditional leaders then the following issues come to the fore:

1. The nature of the relationship between traditional leadership and government becomes one of the employer and employee.
2. The principle of accountability which would dictate that traditional leaders account for the work they do in, inter alia, advising government to address the developmental needs of communities.
3. The conclusion of performance agreements/contracts with traditional leaders.
4. The implications of traditional tributes like inxaxheba/sehuba/ ukuvasizandla/tlhatywa letsogo.

Strategic Questions

1. Who should pay traditional leaders, and why?
2. Should headmen be paid, and if so, by whom?

13.CO-OPERATIVE GOVERNANCE

Chapter 3 of the Constitution provides for a co-operative model of government and co-operative intergovernmental relationships. The institution of traditional leadership can play a meaningful role within this model. Amongst others, section 41(1) provides that all spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and good faith by fostering friendly relations, assisting and supporting one another, building on common interest, co-ordinating their actions (and legislation) with one another, adhering to agreed procedures and avoiding legal proceedings against one another.

13.1. Co-Operative Governance At National Level

At national level the Department of Provincial and Local Government is responsible for the administration of traditional affairs. The department therefore organises regular MINMEC meetings on traditional affairs, attended by the Minister of Provincial and Local Government and the MECs responsible for traditional affairs in the provinces concerned. In addition, the department is responsible for the formulation of national policy and legislation on traditional affairs, and co-operation with the provincial directorates for traditional affairs (see 13.2) as regards policy implementation, the rendering of advice on the administration of traditional institutions and related matters. A MINMEC technical committee on traditional affairs has also been established. It comprises national and provincial officials, and they meet regularly to discuss matters relating to traditional affairs. Other national departments (especially the Department of Justice and the Department of Land Affairs) administer legislation that impact on traditional institutions.

At national level various structures were established to provide for liaison between traditional leaders and other government institutions. Traditional leaders were closely involved in discussions and the drafting of legislation on the establishment of the National House of Traditional Leaders, its composition, and administrative and secretarial support provided by the Department of Provincial and Local Government. (See Chapter 14 for a discussion of the National House of Traditional Leaders.)

In addition, through the National House of Traditional Leaders, traditional leaders have made representations on issues affecting traditional leadership, traditional communities and customary law. These representations were made to Parliament, portfolio committees and statutory bodies (e.g. the SA Law Commission and the SA Human Rights Commission). Meetings with national departments such as the Department of Provincial and Local Government take place on a regular basis. Briefings by national departments such as the Department of Land Affairs also happen from time to time when the need arises. The National House of Traditional Leaders is also invited to participate in national and other conferences. Meetings with the President and the Deputy President (attended by a number of cabinet ministers) are also held. The voluntary organisations of traditional leaders, CONTRALESA and OTLSA, are also involved in meetings and discussions with government and the statutory bodies, and their opinions are often sought. They have also been involved in the Status Quo Report phase of the White Paper Programme on Traditional Leadership and Institutions, as well as in discussions that informed the drafting of this discussion document. The National House of Traditional Leaders also meets on a regular basis with the provincial houses of traditional leaders.

It is foreseen that traditional leaders will play a strong supportive role as regards the transformation of our society and the further implementation of good and effective governance, e.g. by participating in and making inputs to bodies such as the Aids Council, the Demarcation Board and the Tourism Board.

13.2. Co-Operative Governance at Provincial Level

The six provincial houses of traditional leaders have been established in close co-operation and consultation with traditional leaders. (See Chapter 13 for a discussion of the provincial houses of traditional leaders.)

Relationships with government and the functions of the provincial houses differ from province to province. For instance, in KwaZulu-Natal the provincial legislature has referred several bills to the Provincial House of Traditional Leaders for its inputs and in the Eastern Cape the Provincial House of Traditional Leaders has advised the

provincial legislature, and its meetings coincide with those of the provincial legislature. In the other provinces there have not yet been any direct and formal meetings with provincial legislatures.

The premiers and MECs concerned with traditional affairs meet regularly to discuss issues of mutual concern. Some provinces have informal committees consisting of key members of the Provincial House and the Executive Council.

Provinces are responsible for the administration of traditional affairs and for the appointment, removal and remuneration of traditional leaders. Provincial directorates were established for this purpose in 1994. They also allocate funds to regional and traditional authorities.

The provincial houses of traditional leaders also interrelate with the provincial administrations responsible for the administration of traditional affairs. As regards the appointment of traditional leaders, the customary practices within individual communities are taken into account and the advice of the Provincial House of Traditional Leaders is sought by the provincial government before the Premier or other functionary makes an appointment. In addition, the existing regional authorities (and the chiefs' councils in the Free State) also advise the provincial governments, especially in respect of succession and appointments, but also as regards other issues pertinent to traditional communities. (Also see chapters 5, 6 and 7.)

The relationship between communities resorting under the same traditional leader but resident in different provinces as well as the position of their traditional leaders (and the challenges arising from this situation) are discussed in Chapter 14.

13.3. Co-Operative Governance At Local Level

According to the Constitution, national legislation must provide for the role of traditional leaders at local level on matters affecting local communities. The White Paper on Local Government also proposes a co-operative model of rural local government in which traditional leaders have representation and a role to play.

For a detailed discussion of the role of traditional leaders at local level, see Chapter 5.

Challenges

- ⇒ The institution of traditional leadership is as old as Africa itself. It has served the African people over many years in various forms. It has retained a role for itself in modern-day South Africa. This role, however, needs to be properly defined and focussed.
- ⇒ Some form of partnership must be established between local councillors and traditional leaders. The relevance of the institution of traditional leadership depends to a large extent on how the institution serves its communities – customarily, culturally and developmentally. While traditional communities support democracy and are increasingly conducting their lives in accordance with democratic principles, such as equality of treatment, right of participation and choice, they simultaneously support traditional leadership. Hence the two systems, in so far as they relate to governance, need to be synergised within the framework of co-operative governance.

Strategic Questions

1. At which of the three levels of government should traditional leadership be located?
2. How can a more meaningful and dynamic relationship between traditional leaders and government be effected?

(See also the strategic questions in Chapter 5.)

14.ROLE AND FUNCTIONS OF STATUTORY BODIES REPRESENTING TRADITIONAL LEADERS

The 1996 Constitution provides for national legislation on the establishment of a National House of Traditional Leaders on the basis of relevant national legislation, and for national and provincial legislation on provincial houses of traditional leaders. The functions of these houses of traditional leaders are to advise government on matters affecting traditional leadership, traditional communities and customary law. All these bodies are in place. The six provincial houses were established in terms of provincial legislation passed by the provincial legislatures within the framework of the 1993 Constitution.

14.1. National House Of Traditional Leaders

The National House of Traditional Leaders (previously the National Council of Traditional Leaders) was established in terms of the National Council of Traditional Leaders Act of 1998. It consists of 18 members (3 nominees from each of the six provincial houses). The National House has established six committees, namely the management committee, the rules committee, the constitutional development committee, the internal arrangements committee, the social development committee and the committee on traditions, customs and culture. Each of these committees consists of six members. Each provincial house is represented in the National House by one of its three delegates in each committee, and each delegate represents their respective Provincial House in two committees. One of the three members of each provincial delegation is a chairperson of one of the six committees.

The National House is empowered to advise national government on issues regarding traditional leadership and institutions, traditional communities, customary law and customs, as well as matters referred to it by government. It is not obligatory or mandatory for government to seek the House's advice before or during the submission of legislation and policy documents to Parliament.

The National House has established various forums for interaction between it and the provincial houses. These include a chairpersons' forum, inter-house executive

committee meetings and a secretaries' forum. It has made presentations to Parliament and has participated in or attended public hearings organised by various portfolio committees. The South African Law Commission has also discussed issues relating to customary marriages, the Child Care Act and the law of succession with the National House.

Its members (including the chairperson) are part-time members, although legislation is being drafted to provide for the chairperson to be appointed on a full-time basis. The National House has indicated that it wants to become a full-time body and to play a more significant role in policy formulation and the finalisation of legislation.

14.2. Provincial Houses Of Traditional Leaders

The six provincial houses of traditional leaders were established in terms of the respective provincial acts within the framework of the 1993 Constitution. The number of members of the six provincial houses is as follows: Eastern Cape 20; Free State 15; KwaZulu-Natal 76; Mpumalanga 21; Northern Province 36; and Northwest 24. They act in an advisory capacity and make proposals to the provincial government on any matter relating to traditional authorities, indigenous law and the traditions and customs of traditional communities within the province. They, too, are part-time institutions. The provincial governments are not obliged to refer any matters to them before submitting them to the provincial legislature. The provincial houses have made it clear that they want to play a more substantial role.

The following problems have been identified:

- ⇒ No uniform criterion in terms of which these houses are constituted. Their composition differs from province to province.
- ⇒ Lack of training and infrastructure.
- ⇒ Lack of clarity as regards functions.
- ⇒ Lack of sufficient links to the provincial governments and provincial legislatures.
- ⇒ Undefined relationships with the National House of Traditional Leaders.

Challenges

Taking into consideration the fact that the 1996 Constitution provides for a National House of Traditional Leaders as well as for provincial Houses of Traditional Leaders, the following challenges as to their composition, role and functions as well as their relationship with government, traditional communities and traditional leadership need to be addressed:

- ⇒ The determination of the status and role of the National House and the Provincial Houses.
- ⇒ The need to determine the operational status of these Houses or whether they should be permanent, sessional, periodic and whether some members should serve on a part-time basis..
- ⇒ The composition of the provincial Houses with respect to representativity of the communities resident in the province concerned
- ⇒ The size of the National House with respect to the proportionate representation of South Africa's traditional communities.

STRATEGIC QUESTIONS

1. Should the size, composition, role and functions of the National and Provincial Houses of Traditional Leaders, be reviewed, taking into account the 1996 constitutional provisions?
2. What mechanisms should be developed to ensure accountability by the National House to the provincial Houses, traditional leadership and traditional communities,

3. What mechanisms should be developed to ensure accountability by the provincial Houses to traditional leadership and traditional communities in the province concerned?
4. To which structure(s) of government should the National House and the Provincial Houses account?
5. Should their relationship with other government structures, and their administrative and financial accountability to those government departments to whom they are administratively linked, be reviewed?
6. Should national government and the provincial governments be obliged to seek the National House's or the provincial Houses' advice on traditional issues before policy proposals and legislation are submitted to Parliament or the provincial Legislatures respectively?
7. Should a formal link between the National House and Parliament be established, possibly by providing for the National House to advise the National Council of Provinces as regards traditional issues?

15. TRADITIONAL COMMUNITIES AND ISSUES HAVING TRANS-PROVINCIAL IMPLICATIONS

Cross-boundary issues are a reality following the displacement and separation of traditional communities resulting from the historical determination and adjustment of what are now provincial boundaries. Other factors which compound the problem are the merger and splitting of communities, the deposition of legitimate traditional leaders and the imposition of illegitimate leaders by the colonial and apartheid governments, as well as the impact of migration.

Some traditional communities in the provinces concerned (Free State, KwaZulu-Natal, Mpumalanga, the Northern Province and North West) are affected in a number, (sometimes varying), ways by their (sometimes) close links with senior traditional leaders and traditional communities in other provinces. In some instances the areas of jurisdiction of the formally appointed traditional leaders straddle more than one province. There is also the cross-boundary distribution of sections of what used to be a specific traditional community (sharing in pre-colonial times a unified traditional community territory) – sometimes as separate communities, sometimes still as a specific community. This gives rise to a number of issues:

- ⇒ the question of which provincial authority has jurisdiction over traditional communities based in more than one province as a result of the splitting of traditional communities across provincial boundaries;
- ⇒ the question of whether the status of a traditional leader should be determined within the narrow context of his/her newly acquired jurisdiction in another province or rather within the broader context of the community as a whole, irrespective of provincial boundaries, and
- ⇒ the question of finding an acceptable solution to the restitution of land to (parts of) communities who lost their land (either in full or in part) in terms of the racially based land discriminatory legislation – especially where the land parcels which are allocated, are now situated in different provinces. This also impacts on the

question of whether a new chieftaincy should be established for such a group to whom restitution of land is made available.

Challenges

Taking into consideration the fact that the 1996 Constitution provides that the boundaries of the provinces are those that existed when the Constitution took effect and that there are communities who are divided by such boundaries (and are consequently administered by different provincial governments, the following challenges should be addressed:

- ⇒ There is clearly a need for a uniform policy and administrative practice on relationships between traditional communities and traditional leaders resident in different provinces.
- ⇒ A uniform approach as to the administration of communities located in more than one province should be identified.

Strategic Questions

1. What co-operative relationships should be forged among the provinces affected?
2. What challenges do these cross-provincial relationships pose for both local governance and provincial governance?
3. As a consequence of removals of communities (or parts thereof) in terms of racially based measures in the past, some communities have now in accordance with the land restitution programme been allocated land. What should be the approach to a request for the establishment of a chieftaincy by such a community (or part thereof)?
4. To what extent can these relationships contribute positively to the resolution of succession and other community disputes?

16. TRADITIONAL COMMUNITIES, NATIONAL BORDERS AND TRANS-NATIONAL IMPLICATIONS

The historical arbitrary determination of national borders by colonial governments (resulting in the displacement, separation and splitting of traditional communities), the deposition of legitimate traditional leaders and the imposition of illegitimate leaders by the respective colonial governments, as well as the fact of migration in the Southern African continent, have had implications for South Africa and the communities concerned.

There are traditional leaders whose traditional areas of jurisdiction extend to an adjacent country, e.g. Swaziland and Mozambique in the case of traditional leaders in Mpumalanga and KwaZulu-Natal, Botswana in the case of North West, and Lesotho in the case of Free State. There are also instances where a traditional leader in terms of custom owes allegiance to a senior traditional leader in a neighbouring country, and where such a senior traditional leader plays a role in customary issues such as succession to chieftaincy. In addition, some communities are closely linked to sections of the very same communities in an adjacent country. This phenomenon is not unique to South Africa. The national borders of the 53 African states, determined by the colonial powers following the 1884 Berlin Conference, are recognised by the Organisation of African Unity. Problems that emanate from this state of affairs are amongst others:

- ⇒ the possibility of a conflict of interest in cases where a traditional leader owes allegiance to a senior traditional leader in a neighbouring country whose wishes are not necessarily in consonance with those of the South African government
- ⇒ the problems of communication, contact and cultural cohesion between members of the same traditional community based in separate countries.

Challenges

Taking into consideration the fact that the African Charter and the Organisation for African Unity provide that the colonial boundaries of national states are fixed, and that

there are (a) communities straddling South Africa's national borders and those of adjacent countries (e.g. Botswana, Lesotho, Swaziland and Mozambique), (b) communities who are strongly linked to other communities in adjacent countries, and (c) instances where a more senior traditional leader in an adjacent country plays a role in customary processes in South Africa (e.g. chieftaincy succession), a number of challenges should be addressed:

- ⇒ There is clearly a need for a uniform interregional policy on the handling of the relationship of the ties that exist between South Africa and its neighbours in the case where traditional communities and/or more senior traditional leaders are resident in adjacent countries.
- ⇒ It is constitutionally imperative that all traditional leaders in South Africa should owe allegiance to the Republic of South Africa. Within this context the issues of affinity to traditional leadership institutions in adjacent countries should be examined.

Strategic Questions

1. What forms of relationships exist between communities (parts of which reside in different countries) and their traditional leadership structures?
2. What co-operative relationships should be forged between the countries affected?
3. What interregional structure(s) should deal with matters of this nature?
4. What challenges do these trans-national relationships pose for effective local governance and development planning?
5. What commonalities in policy and administrative practice are there among the affected countries and to what extent can such commonalities promote the African Renaissance?

6. How should the issues of trans-national common identities and nation building be dealt with?

17. CONCLUSION

This discussion document is by no means conclusive. In fact, it merely states a number of challenges and posits a number of questions so as to elicit comments and debate from stakeholders. These responses will be used to inform the Green Paper, which will contain a number of policy options.

All traditional leaders, traditional organisations and formations, government departments, statutory bodies, local government officials, NGOs, women, the youth, academics, and interested persons are therefore requested to comment on this discussion document. They are requested to read closely the issues requiring policy formulation and to respond to the strategic questions raised in Section B, as well as to pay particular attention to all the issues requiring definition (Annexure A).

All comments must reach the Department of Provincial and Local Government by **end April 2000**.

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Staff of the Department of Provincial and Local Government, other government departments, provincial task teams, MINMEC members focussing on traditional affairs, statutory bodies (e.g. the SA Human Rights Commission (SAHRC), the national and provincial houses of traditional leaders, the Gender Commission, the Youth Commission), the South African Local Government Association (SALGA), academics, the National Democratic Institute (NDI), the Human Sciences Research Council (HSRC), the Institute for Democracy in South Africa (IDASA), the Institute for Multiparty Democracy (IMPD), traditional leaders, as well as NGOs (e.g. the Congress of Traditional Leaders of South Africa (CONTRALESA), the Organisation of Traditional Leaders of South Africa (OTLSA) and the South African National Civics Association (SANCO)).

SECTION C: ANNEXURES

ANNEXURE A

TERMS REQUIRING DEFINITION

The issues of definitions and terminology regarding all aspects pertaining to traditional leadership, traditional communities, other traditional institutions and concepts such as democracy and governance are problematic. The finalisation of the policy process as well as the eventual drafting of legislation requires clarity. Stakeholders are therefore requested to assist the policy formulation process by defining the following and any other relevant conceptual terms. The Department does not necessarily subscribe to the definitions given below, but makes them available to stimulate discussion and debate.

CO-OPERATIVE GOVERNANCE

Chapter 3 of the Constitution describes how national, provincial and local government must work together. Each level of government has a specific jurisdiction in which it can exercise its powers. **(About Our Constitution, Community Law Centre)**

All spheres of government (national, provincial and local) as well as all organs of state (including traditional leaders and other traditional institutions established in terms of legislation (e.g. regional, traditional and community authorities)) must act in accordance with the principles of co-operative government as contained in Chapter 3:

- ⇒ preserve the peace, national unity and the indivisibility of the Republic;
- ⇒ secure the well-being of the people of the Republic;
- ⇒ provide effective, transparent, accountable and coherent government for the Republic as a whole;
- ⇒ be loyal to the Constitution, the Republic and its people;
- ⇒ respect the constitutional status, institutions, powers and functions of government in the other spheres;
- ⇒ not assume any power or function except those conferred on them in terms of the Constitution;

- ⇒ exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
- ⇒ co-operate with one another in mutual trust and good faith by -
 - fostering friendly relations;
 - assisting and supporting one another;
 - informing one another of, and consulting one another on, matters of common interest;
 - co-ordinating their actions and legislation with one another;
 - adhering to agreed procedures; and
 - avoiding legal proceedings against one another.

In addition, organs of state are obliged to make every reasonable effort to settle disputes with other organs of state and spheres of government.

All spheres of government are obliged to observe the principles of co-operative government put forward in the Constitution. Co-operative government assumes the integrity of each sphere of government. But it also recognises the complex nature of government in modern society. **(White Paper on Local Government)**

Co-operative governance is “a type of government where different spheres or institutions in the same sphere of government work together, co-operatively, according to a set of basic policies to realise objectives. It involves a relationship of trust between people involved and a willingness to come to agreement even when there are clashes of interest.” **(Local Government: A Discussion Document, Department of Constitutional Development)**

The cardinal values of Government for the Republic contained in the Principles of Chapter 3 and other provisions of the Constitution, and encompassing the institutional enablement of these values through appropriate intergovernmental structures and institutions to be established by Act envisaged in S 41(2) of the Constitution **(Discussion Document: Strategic Issues and Options for Policy on Co-operative Government and Intergovernmental Relations, Department of Constitutional Development)**

Government by partnership among the three spheres of government in the national interest. This includes the alignment and integration of legislation, government activities and policies, and a duty to avoid conflict. **(Constitutional Handbook for members of the Executive, Department of Constitutional Development)**

CULTURE

Culture is a sum total of knowledge, experience, beliefs, values, attitudes, meaning and objects.

Culture comprises

- ⇒ the total way of life of a people
- ⇒ the social legacy the individual acquires from his group
- ⇒ a way of thinking, feeling, and believing
- ⇒ an abstraction from behaviour
- ⇒ a storehouse of pooled learning
- ⇒ a set of standardised orientations to recurrent problems
- ⇒ learned behaviour
- ⇒ a mechanism for the normative regulation of behaviour
- ⇒ a set of techniques for adjusting both to the external environment and to other men
- ⇒ a precipitate of history
- ⇒ a behavioural map, sieve, or matrix

“...I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law, but an interpretative one in search of meaning. It is explication I am after.” **(Mirror for Man, Clyde Kluckholm pp. 4-5)**

The totality of socially transmitted behaviour patterns, arts, beliefs, institutions, and all other products of human work and thought. **(The American Heritage English Dictionary)**

The non-biological aspects of human beings. Culture is the way a people uses earth's resources for survival, organises to carry on its activities, and explains life. Thus culture includes the technological base of human survival that has been learned, and the ideas, beliefs, and values people hold, also learned. Culture is therefore learned behaviour. A particular culture is one that has its own combination of technological, sociological and ideological characteristics" **(The African Political Dictionary)**

5a : the integrated pattern of human knowledge, belief, and behaviour that depends upon man's capacity for learning and transmitting knowledge to succeeding generations

b : the customary beliefs, social forms, and material traits of a racial, religious, or social group

(Webster Dictionary)

Behaviour peculiar to Homo sapiens, together with material objects used as an integral part of this behaviour. Thus, culture includes language, ideas, beliefs, customs, codes, institutions, tools, techniques, works of art, rituals, and ceremonies, among other elements. **(Encyclopedia Britannica).**

CUSTOM

The norms implicit in routinely performed actions, or the actions embodying elements of the culture or tradition of an institution. **(New Dictionary of Political Analysis, Geoffrey and Alistair Edwards. pp 33-34)**

The usual way of behaving/acting or a particular established way of behaving. **(The Ninth Edition of the Concise Oxford Dictionary)**

Rules of behaviour based on long established and widespread ways in which people actually behave. " That different groups have different customs should not blind us to the fact that customs in general are powerful determinants of human behaviour. **(Third Edition of "Governing", An Introduction to Political Science, Austin Ranney; pp. 523)**

CUSTOMARY LAW

This is the unwritten body of law that has emerged through state practice **(About Our Constitution, Community Law Centre)**.

Customary law is, however, not static. As the living law of the people, customary law is adapted, changed and repealed according to the social, cultural, political and economic circumstances of those who live with these rules. **(Traditional Authority and Democracy in Southern Africa, J Sindane)**

Customary law is divided into written and unwritten law, the latter consisting of customs which have been established by long usage. **(Dictionary of Legal words and phrases, Claassen)**

Customary law is "...law which is (psychologically or sociologically) internalised by the people who consider the rules, usually emerging from customs, as binding and authoritative." **(The People as Law-makers, FM d'Engelbronner-Kolff)**

"Customary law "means the customs and usage's traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples. **(Recognition of Customary Marriages Act, 1998, South Africa)**

Customary law consists of rules and customs of a particular group or community. Ordinary people understand and relate to it much more than the largely imported common law or the statutory law applied in the regular courts". **(South African Law Commission - Discussion Paper 82: 1, Harmonisation of the Common Law and Indigenous Law)**

Customary law varies from community to community, it is flexible and liable to constant and imperceptible change. Not only is customary law diverse and volatile, but it also exists in at least two versions. The version usually relied upon by courts and other state organs are so-called 'official' law. This collection of rules has been called into question by modern scholarship on the grounds that it is tainted by apartheid, out of date and a

distortion of genuine community practices. A distinction is now generally drawn between 'official' and 'living' law, the latter denoting law actually observed by African communities. **(South African Law Commission - Discussion Paper 74: 28)**

Customary Laws are beliefs and practices that are recognised in a traditional community. Customary Laws carry with them an obligation as well as enforcement, i.e. public outcry and shunning." **(National Issues Related to the Institution of Traditional Leadership, Jabu Sindane)**

Customary Law is a system of law existing and operating as a distinct legal system regulating the life of the community, with its own sources of production and interpretation. The various expressions of this legal system are so integrated that they can only be artificially divided into community law, inheritance, family and marriage law, property law, community taxation, community organisation and administration." **(A KwaZulu Natal Perspective on Traditional Leadership, a report by the provincial government)**

Customary law and customs is broadly defined as being made up of (a) written (including statutes) and (b) unwritten law (beliefs and practices) passed from generation to generation. It includes written and unwritten sources, e.g.

- Beliefs and practises which are recognised in community
- Carries with it an obligation as well as enforcement, i.e. public outcry/ shunning
- Some customs have attained status of law and some not (only practise). Test is its widespread recognition/ acceptance.

DEMOCRACY

Democracy is understood and applied differently world-wide. This is because there is no country that is identical to any other. The different definitions of democracy therefore reflect the diversity of countries. Political scientists generally agree that the word 'democracy' derives from Greek, it means 'people's rule'. **Demos** means 'the people' and **kratos** means 'to rule', hence the rule of, by and for the people. In its broadest sense, democracy is applied directly and indirectly. Indirectly applied democracy is often referred to as representative democracy. This is as far as consensus on the interpretation of

democracy goes. Beyond this point, the interpretation of democracy varies, and these different interpretations are considered normal, given the differences between countries. It is therefore generally accepted that there is no one definition of democracy. ...Democracy should be understood to represent a process of decision making that involves people, especially those people who will be affected by those decisions. Some of the common elements that could be identified in any democracy will include legitimacy, consent and accountability, etc (Sindane 1994:2).

Democracy is a form of regime whose legitimacy derives from the principle of popular sovereignty: Namely, that ordinary citizens are equally endowed with the right and ability to govern themselves **(Democratic Experiments in Africa, M Bratton & N van de Walle)**

Democracy is “a form of rule in which the people exercise political power, either by acting as the policy-making authority (direct democracy), or through their choice of those making policy on their behalf (representative democracy).” **(A New Dictionary of Political Analysis, G Roberts & A Edwards)**

As a political idea democracy is premised on the assumption that the people are both the subject and object of democratic governance. This means that the masses of people should enjoy basic freedoms including those of association, speech, shelter and food. **(National Summit of Africa, Achola Pala-Okeyo)**

LOCAL COMMUNITIES

In reality, every ‘community’ is made up of a number of different communities who will compete with each other for scarce resources. The diversity of communities therefore needs to be recognised, and conflictual relationships must be mediated. **(Integrated Development Planning: Handbook for Community Leaders, PLANACT 1997)**

“...we consider local communities as organisational units with their own rights, their own tasks, their own organisation and their own autonomy

(Tradition and Contemporary Forms of Local Participation and Self-Government in Africa, (Wilhelm Hofmeister)

The process of local government is consequently the interaction between the informal structures (the local community) and the formal structures (the local authority) or, in other words, the bridging of the gap between service and accessibility within the particular local environment.” **(South African Constitutional Law, DA Basson)**

Section 212 of the Constitution: “National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.”

CIVIL SOCIETY

A matrix of organisations usually existing outside of state structures which embody different interests.

Civil: Relating to the citizens of a country. **(Oxford Dictionary)**

Society: system whereby people live together in organised community, social way of living. **(Oxford Dictionary)**

Civil Society: Civil society, however, is a catch-all phrase that is used to describe a number of different groupings, whose agendas and perspectives differ markedly from each other. Civil Society is made-up of various community-based organisations, organised business, organised labour, NGOs, religious groupings, stokvels and so forth. Some of these groupings (like sports clubs) may not even be interested in the general affairs of local government. Most civil society organs, however, are interested in governance because they believe they have an important role to play as watchdogs of government and development partners. **(Integrated Development Planning: Handbook for Community leaders, Plan Act 1997)**

The term ‘civil society’ describes ‘a realm between the family and the state where voluntary organisation and private individuals predominate because they are

distinguishable from both the power structures of the state and from the mediating institutions in political society, even though all of them are still somehow interconnected; the delineation of this area permits the members of civil society to articulate and defend interests which touch them as individuals and as members of organised groups, but the sum of which is germane to the overall civic culture of their state.” **(Tradition and Contemporary Forms of Local Participation and Self-Government in Africa, Prof. Emeka Nwokedi of Nigeria, quoted by Wilhelm Hofmeister)**

Civil society refers to the organisations that communities establish outside of government. It includes such things as Civic Organisations, Burial Societies, Women’s Associations, Ratepayers Associations, Disabled People’s Associations, Environmental Groups, Stokvels and other bodies where members of the public organise themselves around common interests. **(South Africa’s Local Government. A Discussion Document)**

ORGAN OF STATE

As defined in section 239 of the Constitution, means, any department of state or administration in the national, provincial or local sphere of government; or any other functionary or institution-

- exercising a power or performing a public function in terms of the Constitution, such as the Human Rights Commission; or
- a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer, such as any parastatal established by government. **(Constitutional Handbook for Members of the Executive, Department of Constitutional Development)**

PUBLIC OFFICE BEARER

“Office bearer” means a Deputy President, a Minister, a Deputy Minister, a member of the National Assembly, a permanent delegate, a Premier, a member of an Executive Council, a member of a provincial legislature, a traditional leader, a member of a

provincial House of Traditional Leaders, a member of the Council of Traditional Leaders and a member of a Municipal Council.” **(Remuneration of Public Office Bearer’s Act, South Africa, 1998)**

STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY

Chapter 9 of the Constitution provides for the establishment of a number of independent State institutions, the primary aim of which is to support and monitor the implementation of different aspects of constitutional democracy: They are the

- The Public Protector.
- The Human Rights Commission.
- The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (still to be established).
- The Commission for Gender Equality.
- The Auditor-General.
- The Electoral Commission.

Organs of state (including traditional leaders and other traditional institutions established in terms of legislation (e.g. regional, traditional and community authorities)) must co-operate with these institutions, and provide them with all information required. These institutions are empowered to monitor and evaluate, as well as to bring out reports on the extent of compliance with constitutional values by all other organs of state.

TRADITIONAL COMMUNITY

... an indigenous homogenous, endogamous social grouping of persons comprising ancestry, language, cultural heritage, customs and traditions, recognise a common traditional authority; inhabit a common communal area; ... [this] includes the members of that community residing outside the communal area. **(Traditional Authorities Act of 1995, Republic of Namibia)**

A customary society which observes a customary way of living and abides by its laws. "Traditional Leaders play a vital role in 'traditional communities' just as elected representatives do within modern structures of governance." **(National Issues Related to the Issues of Traditional Leadership, J Sindane)**

Traditional communities as a specific model of societal organisation and as an organ of civil society through which the constitutionally protected right of self-determination at community level is expressed and realised. **(A KwaZulu-Natal Perspective on Traditional Leadership, a report by the provincial government)**

Traditional communities are societies that observe and live under traditional customs, beliefs and uphold social values. **(Democratic Experiments in Africa, Regime Transitions in Comparative Perspective, Michael Bratton and Nicolas van de Walle)**

A customary society which observes a customary way of living and abide by its customary law

TRADITIONAL AUTHORITY

A system of rule which was in existence before the intrusion of colonialism into Africa. "When the British came to Africa, they termed the type of rule or rulers they found as 'native' administration or authorities (Hailey, 1963:101). It is from this notion that the term "traditional rule" used nowadays emerged. The traditional rulers were meant to have jurisdiction over matters relating to the indigenous people only, because they, so the colonialists believed, would not easily accept or assimilate the legal technicalities

introduced by the new colonial system. (**“The Rights of Indigenous People”, B De Villiers pp. 126**)

Traditional Authority is authority which is based on the everyday belief in the sacred traditions in force since time immemorial, and the legitimacy of those who are called to govern by the said traditions. (**Traditional Authority and Democracy in Southern Africa, M.O Hinz**)

This term refers to traditional power structures in rural communities such as traditional chiefs and headmen. (**About Our Constitution, Community Law Centre**)

The concept “Traditional authority” has as its features (amongst other things) leadership structures and positions of authority and support, and are recognised in terms of customary law and (sometimes) by statute, and part of the societal organisation of customary society which observes a customary way of living and its laws.

TRADITIONAL LEADER

The group referred to as traditional leaders/rulers or “tribal” leaders/rulers are individuals occupying communal political leadership positions sanctified by cultural mores and values, and enjoying the legitimacy of particular communities to direct their affairs. Their basis of legitimacy is therefore tradition, which includes a whole range of inherited culture and way of life; a people’s history; moral and social values and the traditional institutions which survive to serve those values. (Adeuwmi & Egwrube, 1985:20) The area of influence and instruments of administration of Traditional leaders, such as traditional or “tribal” courts, are confined to one “tribal” group. Generally, the institution of traditional authority is divided into three categories, namely Kings/Paramount Chiefs, Chiefs and Headmen.

Traditional rulers or leaders are individuals occupying communal political leadership positions sanctified by cultural mores and values, and enjoying the legitimacy of particular communities to direct their affairs. Their basis of legitimacy is therefore tradition, which includes a whole range of customs and way of life; a people’s history;

which includes a whole range of inherited culture and way of life; moral and social values and the traditional institutions, which survive to serve those values.

The concept “Traditional leader” has as its features (amongst other things) its being a living and adaptable institution, an institution of governance, more than a political system, recognised by both the state and communities concerned, with an area of influence, and having control over instruments of administration such as customary law courts

Traditional leaders are social leaders and systems rather than actual government institutions. Their primary function is to regulate and control relationships and social behaviour within a traditional community. They are in essence people-oriented and not service-oriented as government structures are. “The authority of traditional leaders is derived from tradition and is exercised in consultation with senior advisers without being regulated by provisions. A traditional leader is a leader by birth” **(The Rights of Indigenous People: A quest for coexistence, B De Villiers, pp.40)**

A traditional leader is an individual holding a leadership position in a traditional hierarchy. “Traditional leaders are more of the custodians of land and the protectors of custom than rulers of nations. In some instances traditional leaders are asked to advise government on issues that relate directly to their traditional institutions, but discouraged to be involved in active politics, whereas in other countries such as Zimbabwe and Malaysia, traditional leaders are allocated permanent seats in the National Assembly and allowed to run for political office.” **(The Role of Traditional Leaders in a Democratic Dispensation, National Democratic Institute, 1998)**

“Traditional leader” means any person who in terms of customary law or any other law holds a position in a traditional ruling hierarchy. **(Recognition of Customary Marriages Act, 1998, South Africa)**

TRIBE

Group of people sharing customs, language, and territory, such as the Apache Indians of North America. Anthropologists stress the importance of kinship in “tribes”. Usually a “tribe” has a leader, a religion teaching that all its people are descended from a common ancestor, and a common language and culture. A “tribe” is often small in size, is fairly limited in its contacts with other societies, and is correspondingly ethnocentric in its view of the world. Experts disagree about the relative importance of linguistic, political, and geographical boundaries. Whatever definition of “tribe” is chosen, however, exceptions to it abound. The most important criteria for a “tribe” continue to be linguistic and cultural resemblance's.

The word “*tribe*” has long been used by both anthropologists and laypersons, but recently it has come under attack as a derogatory term implying an inferior way of life. Moreover, its use is inconsistent; it is not, for instance, applied to modern European groups that meet the criteria of the definition. The designations *people* or *ethnic group* are generally preferred today. **(Encyclopedia Britannica).**

“tribe”, in cultural anthropology, is a theoretical type of human social organisation based on small groups defined by traditions of common descent and having temporary or permanent political integration above the family level and a shared language, culture, and ideology. In the ideal model of a “tribe”, members typically share a “tribal” name and a contiguous territory; they work together in such joint endeavours as trade, agriculture, house construction, warfare, and ceremonial activities. Tribes are usually composed of a number of smaller local communities (e.g., bands, villages, or neighbourhoods) and may be aggregated into higher-order clusters, called nations.

As an ideal type, the “tribe” is regarded by cultural evolutionists as the form of social organisation that developed into a stratified society and, eventually, into the type of social organisation known as the primitive state. As an ideal type, the “tribe” derives its unity not from a territorial identity but from a sense of extended kinship.

Few ethnographically known “tribes” possess all the characteristics of the ideal, or model, “tribe”. The Amba of Uganda are considered to be one “tribe” although they speak two

mutually unintelligible languages; the Zuni “tribe” consists of only one community; the Dorobo of Kenya live scattered among the Nandi and Masai, for whom they hunt and perform ritual services.

As an anthropological term, the word “tribe” fell out of favour in the latter part of the 20th century. Some anthropologists rejected the term itself, on the grounds that it could not be precisely defined. Others objected to the negative connotations the word acquired in the colonial context. African scholars, in particular, felt that the term was pejorative as well as inaccurate. Thus, many modern anthropologists replaced it with the designation ethnic group, usually defined as a group of people with a common ancestry and language, a shared cultural and historical tradition, and an identifiable territory. The use of the term ethnic group is particularly appropriate in the discussion of modernising countries, where a person's extended kinship ties may be less important than his village or region of origin in establishing his identity and claim to land ownership. (**Encyclopedia Britannica**).

The invention of “tribalism”. In the areas reserved for sole African occupation, governments made use of African political structures, creating “tribes” where none had existed and governing through compliant indigenous chiefs and headmen. Imperial authorities at first sought to curb and undermine the powers of chiefs, whom they saw as the embodiment of their people and as potential leaders of resistance; this was as true in the 19th-century Cape as it was in the Rhodesia and South West Africa in the early 20th century. Once the powers of the chiefs had been limited, however, fears of “detrribalization” and the potential radicalisation of African workers confronted administrations. In response, colonial governments throughout the region moved to bolster chiefs, granting them increased authority over their subjects while seeking to maintain their subordination to the colonial state and establishing local advisory councils as a substitute for popular enfranchisement and representation in central government. This creation of “tribal” institutions frequently created new identities and political interests.

Industrial development and increasing westernisation often made indirect rule through chiefs inappropriate to changing African needs, however. The extension of the market economy intensified divisions, especially as chiefs became identified with unpopular colonial policies and no longer had sufficient land for their commoner followers. The state

recognition of chiefs, the imposition of "tribal" boundaries," and land shortages meant that dissatisfied commoners could no longer check arbitrary rule by attaching themselves to alternative polities, as they had in precolonial times. Although urban migration provided some outlet, restrictions on African movement into the colonial towns, together with the often squalid living conditions and low wages, meant that moving to the towns was not an easy option (**Funk and Wagnalls Encyclopedia**).

ANNEXURE B

REVIEW OF THE CURRENT LEGAL FRAMEWORK

The 1996 Constitution provides for the continuation of all old order legislation (pre 27 April 1994 legislation which originated in either the old South Africa or the homelands), as well as all transitional legislation (made during the period from the interim Constitution up to the commencement of the 1996 Constitution (04 February 1997)). This means that all the old order legislation pertaining to traditional leaders and traditional institutions remain in place today. This legislation differs from region to region, and was passed during a now discarded ideological framework. To be replaced by new relevant legislation, all old legislation needs to be rationalised.

In terms of the 1996 Constitution the following legislation remains in place to the extent that it is not incompatible with the Constitution or until repealed or amended:

- All old order legislation (legislation passed before 27 April 1994 by the previous South African, TBVC and homeland governments), as well as:
- All interim period (during the time since the commencement of the 1993 Constitution (27 April 1994) up to 4 February 1997 (commencement of the 1996 Constitution)). This also applies to all the assignment proclamations made by the President in terms of the 1993 Constitution in respect of the old pre-27 April 1994 homeland and SA legislation pertaining to traditional leaders and institutions (as being matters within the functional domain of the provinces).

Legislation retained at the national level: old order, interim and new legislation

In terms of the interim Constitution of 1993, the President assigned a number of legislative instruments to relevant provinces. The Black Administration Act 38 of 1927 remains at national level (only sections 1 and 27), (7)bis and (7)ter have been assigned to the relevant provinces. This Act provided for the control and management of Black Affairs. Since 1994, the following sections of the Act were assigned to the relevant provinces:

- Section 1 (dealing with the supreme chieftaincy (and the power to appoint traditional leaders)); and
- Sections 2(7), (7)bis, (7)ter and (8).

Other sections remain at national level, and are the responsibility of the Department of Land Affairs (sections dealing with land), the Department of Justice (sections dealing with customary courts and inheritance), the Department of Home Affairs (the section dealing with marriages) and the Department of Constitutional Affairs (responsible for a number of other sections). The proclamations under this Act continue in force until such time that the President repeals them by further proclamation.

As regards national legislation passed during the **interim period**, the national Local Government Transition Act 209 of 1993 and the local government arrangements referred to in the 1993 Constitution remain in force until the next local government election (end 2000).

The following **national Acts** were passed **after the commencement of the 1996 Constitution** (4 February 1997) and remain at national level:

- Remuneration of Public Office Bearers Act of 1998 (see discussion below);
- National House of Traditional Leaders Act 10 of 1998 (see discussion below); and
- Local Government: Municipal Structures Act 117 of 1998 (see discussion below).

Legislation assigned by the President to the provinces

The 1993 Constitution compelled the President to assign to the provinces all old order legislation that fell within the ambit of the functional areas contained in Schedule 6 to the 1993 Constitution. As mentioned above, traditional leadership was one such functional area. As a result the President assigned nearly all the relevant old South Africa legislation and the old (pre-1994) homeland (TBVC and self-governing territories') legislation to the relevant provinces.

The following are examples of the most important legislation assigned to the provincial Premiers (this list is not exhaustive):

- The Transkei, Bophuthatswana, Venda and Ciskei Constitutions
- Pre-1994 RSA and homeland legislation:
 - **Eastern Cape:**
 - Black Administration Act, 1927 (Act no 38 of 1927, only sections 1 and 2(7)bis; (7)ter and (8))
 - Regulations Prescribing the Duties, Powers, Privileges and Conditions of Service of Chiefs and Headmen, 1957 (Proclamation no 110 of 1957)
 - Land Regulations, 1969 (Proclamation No. R 188 of 1969)
 - Land Regulations, 1936 (former Transkei)
 - Pounds ordinance 1938, (Ordinance 18 of 1938)
 - Transkei Authorities Act, 1965 (Act no 4 of 1965)
 - Chiefs Courts Act, 1983 (Act No. 6 of 1983)
 - Administrative Authorities Act, 1984 (Act No 37 of 1984)
 - Pounds Act, 1984 (Act no 43 of 1984)
 - Land Use Regulations Act, 1987 (Act No 15 of 1987)
 - Black Authorities Act, 1954 (Act No 68 of 1951)
 - Regulations for the Control of Residents on and the Occupation of Privately Owned or Tribally Owned Land in Black Areas, 1967 (Proclamation number R129 of 1967)
 - Betterment areas proclamation, 1967 (Proclamation R196 of 1967)

- Nature Conservation Act, 1987 (Act. No 10 of 1987). The whole except part 1 of Chapter 4, Chapter 6 and 7 and section 70
 - Proclamation Concerning Payment by Blacks of Rentals for Arable and Residential Allotments and of Fees for Grazing on Certain Land Owned by the South African Development Trust, 1968 (Proclamation no. R.300 of 1968).
- **Free State:**
 - Bophuthatswana Traditional Authorities Act, 1978 (Act no 23 of 1978) including Government Act no 137 of 08/12/1978
 - Bophuthatswana Traditional Courts Act, 1979 (Act no 23 of 1979)
 - Bophuthatswana Registration of Customary Unions Act, 1977 (Act no 8 of 1977)
 - Qwaqwa Administration of Authorities Act, 1983 (Act no 6 of 1983) including the Regulations prescribing the Duties, Powers, Privileges and Conditions of Service of Chiefs and Headmen (Government Notice no 11 of 25/02/1985.)
 - Qwaqwa Levying of Tribal Taxes Act, 1983 (Act no 5 of 1983)
 - Qwaqwa Pounds Act, 1974 (Act no 4 of 1974)
 - Qwaqwa Nature Conservation Act, 1976 (Act No 5 of 1976)
 - Black Administration Act, 1927 (Act no 38 of 1927, only sections 1 and 2(7)bis; (7)ter and (8)
 - Regulations prescribing the Duties, Powers, Privileges and Conditions of Service of Chiefs and Headmen, 1957 (Proclamation no 110 of 1957)
 - Land Regulations, 1969 (Proclamation No. R 188 of 1969).
 - **KwaZulu-Natal:**
 - KwaZulu Pounds Act, 1980 (Act No. 8 of 1980)
 - KwaZulu Amakhosi and Iziphakanyiswa Act, 1990 (Act No. 9 Of 1990)
 - KwaZulu Act on the Payment of Salaries, Allowances and other privileges to the Ingonyama, 1993 (Act No. 6 of 1993)
 - KwaZulu Act on the Code of Zulu Law 1985 (Act no 16 of 1985)
 - KwaZulu Act on the Licensing and Control of Dogs, 1988 (Act no 19 of 1988)
 - KwaZulu Nature Conservation Act, 1992 (Act No 29 of 1992)

- **Mpumalanga:**

- Black Administration Act, 1927 (Act no 38 of 1927, only sections 1 and 2(7)bis; (7)ter and (8))
- Regulations prescribing the Duties, Powers, Privileges and Conditions of Service of Chiefs and Headmen, 1957 (Proclamation no 110 of 1957)
- Land Regulations, 1969 (Proclamation No. R 188 of 1969)
- Licensing and Control of Dogs Act 1980 (Act no. 5 of 1980)
- Payment of Allowances to Members of the Regional authority 1988 (Act no 3 of 1988)
- Kangwane Land Levies Act, 1992 (Act no 8 of 1992)
- Kwandebele Pounds Act, 1981 (Act no 8 of 1981)
- Kwandebele Levying of Taxes by Traditional Authorities Act, 1993 (Act no 5 of 1983)
- KwaNdebele Traditional Authorities Act, 1994 (Act no 2 of 1994)
- KwaNdebele lingoma Act, 1984 (Act No. 4 of 1994)
- Black Authorities Act, 1951 (Act no 68 of 1951)
- Regulations for the Control of Residents on and the Occupation of Privately Owned or Tribally Owned Land in Black Areas, 1967 (Proclamation number R129 of 1967)
- Betterment Areas Proclamation, 1967 (Proclamation R196 of 1967)
- Proclamation Concerning Payment by Blacks of Rentals for Arable and Residential Allotments and of Fees for Grazing on Certain Land Owned by the South African Development Trust, 1968 (Proclamation no. R.300 of 1968)
- Nature Conservation Act, 1981 (Act No 3 of 1981)
- Nature Conservation Act, 1973 (Act No 3 of 1973)
- Registration and Control of Dogs Act, 1976 (Act No 4 of 1976)
- Registration of Customary Unions Act, 1977 (Act No 8 of 1977)
- Bophuthatswana Traditional Authorities Act, 1978 (Act No. 23 of 1978)
- Bophuthatswana Wheel Tax Act, 1979 (Act No 23 of 1979)
- Bophuthatswana Traditional Courts Act, 1979 (Act no. 29 of 1979)
- Lebowa Tribal Rates Act, 1975 (Act No 2 of 1975)

- Lebowa Royal Allowance Act, 1984 (Act No 3 of 1984)
- Lebowa Pounds Act, 1990 (Act No. 8 of 1990)
- Lebowa Dipping Tax Act, 1976 (Act No. 9 of 1976).

- **Northern Province**

- Black Administration Act, 1927 (Act no 38 of 1927, only sections 1 and 2(7)bis; (7)ter and (8))
- Regulations prescribing the Duties, Powers, Privileges and Conditions of Service of Chiefs and Headmen, 1957 (Proclamation no 110 of 1957)
- Land Regulations, 1969 (Proclamation No. R 188 of 1969)
- District and Territorial Council's Act, 1986 (Act No 15 of 1986)
- Venda Traditional Leaders Proclamation, 1991 (Proclamation 29 of 1991)
- Gazankulu Pounds Act, 1976 (Act no 8 of 1976)
- Lebowa Tribal Rates Act, 1975 (Act no. 2 of 1975)
- Lebowa Royal Allowance Act, 1984 (Act no 3 of 1984)
- Lebowa Pounds Act, 1990 (Act no 8 of 1990)
- Black Authorities Act, 1954 (Act no 68 of 1951)
- Regulations for the Control of Residents on and the Occupation of Privately Owned or Tribally Owned Land in Black Areas, 1967 (Proclamation number R129 of 1967)
- Betterment areas proclamation, 1967 (Proclamation R196 of 1967)
- Proclamation Concerning Payment by Blacks of Rentals for Arable and Residential Allotments and of Fees for Grazing on Certain Land Owned by the South African Development Trust, 1968 (Proclamation no. R.300 of 1968)
- Gazankulu Nature Conservation Act, 1975 (Act No 5 of 1975)
- Lebowa Nature Conservation Act, 1973 (Act No 10 of 1973)
- Lebowa Dipping Tax Act, 1976 (Act No 9 of 1976)
- Venda Pounds Act, 1976 (Act No 6 of 1976)
- Venda Registration and Control of Dogs Act 1977 (Act No 9 of 1977)
- Nature Conservation and National Parks Act, 1986 (Act No 20 of 1986)
- Venda Land Affairs Proclamation, 1990 (Proclamation 45 of 1990) Section 6 and 7 and 14-19

- **Northwest**

- Black Administration Act, 1927 (Act No 38 of 1927, only sections 1 and 2(7)bis; (7)ter and (8))
- Regulations Prescribing the Duties, Powers, Privileges and Conditions of service of Chiefs and Headmen, 1957 (Proclamation No 110 of 1957)
- Land Regulations, 1969 (Proclamation No. R 188 of 1969)
- Pounds Act, 1974 (Act no. 7 of 1974)
- Registration and Control of Dogs Act, 1976 (Act No 4 of 1976)
- Registration of Customary Unions Act, 1977 (Act No 7 of 1977)
- Bophuthatswana Traditional Authorities Act, 1978 (Act No 23 of 1978)
- Bophuthatswana Wheels Tax Act 1979 (Act No 23 of 1979)
- Bophuthatswana Traditional Courts Act, 1979 (Act No 29 of 1979)
- Mmabana Cultural Foundations Act 1987 (Act No 15 of 1987)
- Black Authorities Act, 1954 (Act No 68 of 1951)
- Regulations for the Control of Residents on and the Occupation of Privately Owned or Tribally Owned Land in Black Areas, 1967 (Proclamation number R129 of 1967)
- Betterment Areas Proclamation, 1967 (Proclamation R196 of 1967)
- Proclamation Concerning Payment by Blacks of Rentals for Arable and Residential Allotments and of Fees for Grazing on Certain Land Owned by the South African Development Trust, 1968 (Proclamation no. R.300 of 1968)
- Bophuthatswana Nature Conservation Act, 1973 (Act No 3 of 1973)
- Livestock and Grazing Control Act, 1983 (Act No 16 of 1983)

Areas of applicability of assigned legislation

This assigned old order legislation applies in principle only to the original jurisdictional area to which it had applied before 27 April 1994 (e.g. the assigned ex-Venda legislation applies today only to that part of the Northern Province previously known as Venda). The result is that different sets of legislation applies in one and the same province: for example, in the Northern Province, the old Gazankulu, Lebowa, Venda and South African

Development Trust legislation and in Mpumalanga the old Bophuthatswana, KwaNdebele, KaNgwane, Lebowa, Gazankulu and South African Development Trust legislation still apply.

Administration of assigned legislation

All this old legislation has been assigned to the Premier of the province concerned, who in turn was empowered to formally assign the administration thereof further to a member of the Provincial Executive Committee – but which in many instances did not take place. In actual fact, in all six provinces where traditional leaders are found, an MEC has been instructed by the Premier to administer traditional affairs. However, since the 02 June 1999 elections, the administration of traditional affairs has in a number of provinces been transferred to the Premier's office.

Need for rationalisation of assigned legislation

The continuation of the old order legislation which was based on the now rejected ideologies of colonialism and apartheid, runs not only counter to the Preambles of the 1993 and 1996 Constitutions, but also contradicts various explicit 1996 constitutional provisions. In addition, the legal chaos perpetuated by this continuation of old order legislation (e.g. different and contradictory legislative approaches and a Premier having to administer five bodies of law dealing with the same subject matter) needs to be resolved within a context where a national policy framework has been determined.

ANNEXURE C

CONSTITUTIONAL FRAMEWORK: CORE VALUES

The 1996 Constitution is based on a number of core values e.g. democracy, human dignity, equality, human rights and freedoms, non-racialism and non-sexism, supremacy of the Constitution, the rule of law as well as universal adult suffrage and a multi-party system of democratic government to ensure accountability, responsiveness and openness. This means that the government is obliged to ensure compliance with the Constitution by all institutions and individuals in order to achieve these constitutional goals.

Bill of Rights

Chapter 2 of the Constitution enshrines the Bill of Rights, which provides for the recognition, advancement, protection and the compulsory enforcement by the state of the rights and freedoms referred to in it. The following rights and freedoms are especially important as regards the institution of traditional leadership and rural communities: Equality (including the prohibition of discrimination on the basis of gender), human dignity, freedom of the person, freedom of religion, belief, opinion and of expression, the right to assemble, the freedom of association (and of disassociation), political rights (including the right to choose one's own political affiliation), access to information, just administrative action, and access to courts (including customary law and other courts). In addition, language and cultural rights are also protected to the extent that they may not be exercised in a manner inconsistent with any other provision of the Bill of Rights. All the rights referred to in the Bill of Rights are binding on all law (including statutory and customary law), the government (the legislature, the executive and the judiciary), as well as on all organs of state (including traditional leaders). In the interpretation of legislation or the development of customary law, a court (including a customary law court), tribunal and forum must promote the spirit, aim and objects of the Bill of Rights.

Co-operative Government

All spheres of government (national, provincial and local) as well as all organs of state (including traditional leaders and other traditional institutions established in terms of legislation (e.g. regional, traditional and community authorities)) must act in accordance with the principles of co-operative government as contained in Chapter 3. These are:

- To preserve the peace, national unity and the indivisibility of the Republic;
- To secure the well-being of the people of the Republic;
- To provide effective, transparent, accountable and coherent government for the Republic as a whole;
- To be loyal to the Constitution, the Republic and its people;
- To respect the constitutional status, institutions, powers and functions of government in the other spheres;
- To not assume any power or function except those conferred on them in terms of the Constitution;
- To exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
- To co-operate with one another in mutual trust and good faith by fostering friendly relations, assisting and supporting one another, informing one another of, and consulting one another on, matters of common interest, co-ordinating their actions and legislation with one another, adhering to agreed procedures, and avoiding legal proceedings against one another.

In addition, organs of state are obliged to make every reasonable effort to settle disputes with other organs of state and spheres of government before or without resorting to judicial institutions/courts.

Public administration

Public administration in all spheres of government (local, provincial and national government) and all organs of state (including traditional leaders and other traditional institutions established in terms of legislation (e.g. regional, traditional and community authorities)) must be governed by the democratic values and principles enshrined in the Constitution, including the following:

- A high standard of professional ethics must be promoted and maintained.
- Efficient, economic and effective use of resources must be promoted.
- Public administration must be development-oriented.
- Services must be provided impartially, fairly, equitably and without bias.
- People's needs must be responded to, and the public must be encouraged to participate in policy-making.
- Public administration must be accountable.
- Transparency must be fostered by providing the public with timely, accessible and accurate information.
- Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
- Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

Government is obliged to pass legislation promoting the values and principles referred to above, taking into account the nature and functions of the institutions concerned (including traditional leaders and other traditional institutions established in terms of legislation (e.g. regional, traditional and community authorities)).

Concurrent functions

In terms of schedule 4 of the Constitution, Traditional Leadership is a functional area of concurrent national and provincial competence subject to chapter 12 of the Constitution. Section 76 read with section 44 of the Constitution, entitles parliament to pass legislation in respect of traditional leadership with the co-operation of both the National Assembly and the National Council of Provinces. In terms of Sections 44 and 238, provincial legislatures are entitled to pass provincial legislation where legislative powers have been so assigned or delegated. A provincial executive is responsible for implementing all national legislation, which falls in an area listed in schedule 4, unless the Constitution or an Act of Parliament provides otherwise. Section 125 (3) limits the responsibility to the extent that the Province has the administrative capacity to assume effective responsibility, and place an obligation on national government to develop the administrative capacity of the Provinces. In certain instances, the Constitution provides expressly for national legislation to be passed, e.g. for the remuneration of public office bearers, the role of traditional leadership in local government and the establishment of the national house of traditional leaders

State Institutions supporting Constitutional Democracy

Chapter 9 of the Constitution provides for the establishment of a number of independent State institutions, the primary aim of which is to support and monitor the implementation of different aspects of constitutional democracy: They are:

- The Public Protector.
- The Human Rights Commission.
- The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (still to be established).
- The Commission for Gender Equality.
- The Auditor-General.
- The Electoral Commission.

Organs of state (including traditional leaders and other traditional institutions established in terms of legislation (e.g. regional, traditional and community authorities) must co-operate with these institutions, and provide them with all information required. These institutions are empowered to monitor and evaluate, as well as to bring out reports on the extent of compliance with constitutional values by all other organs of state.

ANNEXURE D

WHITE PAPER PROGRAMME ON TRADITIONAL LEADERSHIP AND INSTITUTIONS

The White Paper Programme on traditional Leadership and Institutions consists of three phases:

- The Status Quo Report phase
- **The Discussion Document, Green and White Paper phase, and**
- The rationalisation of legislation and implementation phase.

The following terms of reference were identified and used for purposes of the **Status Quo Report on Traditional Leadership and Institutions phase:**

Issues defining Traditional Leadership

The definition of the institution of traditional leadership, traditional institutions and traditional communities, including:

- Categories of traditional leaders, including statutory (formal) and customary categories,
- Various processes in terms of which traditional leaders are identified,
- Various processes which must be complied with for traditional leaders to assume and to be removed from office, with due attention to regional and community variations,
- The role of the supreme chieftaincy (vesting in the South African President)
- The role of trusteeship (vesting in the South African government)
- Powers, privileges, entitlements, functions, and duties of the institution of traditional leadership and formally established structures
- The existing formal structures in which the institution of traditional leadership function (e.g. Traditional authorities, regional authorities, etc)

Policy issues

- The relationship between traditional leadership and communities (having reference to notions such as representation and accountability),
- Status of the institution of traditional leadership in society, e.g. whether or not traditional leaders are public office holders / civil servants / organs of civil society / etc.
- The role of traditional leaders in politics,
- The identification of all pre 27 April 1994 legislation and the determination of its conformity with the 1996 Constitution
- Due recognition of South Africa's signatory status to, and ratification of, international and regional conventions (if any) relating to and/or impacting on the institution of traditional leadership,
- Cross-provincial and national border issues affecting aspects of the institution of traditional leadership,
- A national audit of traditional leaders referring to, amongst others, the determination of the categories and individuals receiving remuneration, taking also into account the respective jurisdictional areas and regional variations.
- The role of various existing dispute resolution mechanisms (e.g. customary law and other courts) and the identification of other structures and mechanisms
- The status and role of women,
- The status and role of the youth,
- Traditional leadership and remuneration having regard to:
 - the rationale for remuneration
 - legislation pertaining to the categories of recipients (referring also to the position of functionaries in this regard),
 - levels of remuneration, and
 - level(s) of government responsible for effecting payments
- The relationship between, on the one hand, the institution of traditional leadership and existing formally (statutory) established structures (e.g. regional and community authorities), and, on the other hand, local authorities as referred to in the White Paper on Local Government, including:
 - The interplay between these constituencies on effective and accountable system of service delivery in rural areas,

- The extent to which the relationship between local and traditional authorities should be formally regulated,
- The role of traditional authorities as agents of development within communities,
- The formal structures established in terms of legislation,
- The context of their interrelationship with other development agencies,
- The identification of the status quo regarding policies, policy processes, legislation, administrative practices, and the provisioning of technical and administrative support to traditional leaders and institutions by other government departments at national and provincial level (e.g. the Departments of Justice, Land Affairs, Home Affairs and Welfare)
- the relationship between the Department of Constitutional Affairs and the provincial governments within the context of traditional leadership and institutions
- The role of the institution of traditional leadership at all levels of government in representing the interests of the communities concerned

Institutional requirements

- Training and capacity building needs of traditional leaders and authorities, as well as the remuneration of staff to these institutions,
- Infra-structural requirements to meet obligations, and
- The implementation of legislation pertaining to statutory bodies

Interrelationships between the National House of Traditional Leaders, the Provincial Houses of Traditional Leaders, Parliament and Provincial Legislatures

- Review of the statutory instruments establishing the National House and provincial Houses of Traditional Leaders and their interrelationship.
- The inter-relationship between, on the one hand, the National House of Traditional Leaders and the various Provincial Houses of Traditional Leaders, and on the other hand, elected legislative bodies (national and provincial), and
- A review of the role, powers and functions of the Houses

The research methodology consisted of:

- A survey of customary law norms pertaining to the institution, status and role of traditional leadership
- An audit of legislation pertaining to the institution, status and role of traditional leadership
- A review of court decisions pertaining to the institution, status and role of traditional leadership
- An empirical survey of the *de facto* position and practices pertaining to the institution, status and role of traditional leadership
- A review of South African and international literature
- Consultations with stakeholder in all three spheres of government (national, provincial and local)
- A compilation of information contained in government files, as well as
- Consultations with a number of communities and other stakeholders e.g. traditional leaders, relevant NGOs, CBOs, etc.
- Commissioned Papers.

The other two phases of the White Paper Programme on Traditional Leadership and Institutions are:

Phase Two

This Discussion Document launches the second phase, which will culminate with the production of a Green and a White Paper as soon as all the necessary consultations have been finalised. The discussion document stage of this phase will mainly be concerned with outlining the issues that must be considered in policy (a problem statement), a number of which have been identified in the Status Quo Report , as well as posing a few strategic questions as examples, e.g.

- Accountability within the institution of traditional leadership in view of its hereditary nature, and
- Whether the institution should be transformed such that it can be gender representative and in line with the principles of equality as enshrined in the Constitution and the Bill of Rights.

Phase Three

This will focus on the rationalisation of legislation and the implementation of the policy framework as approved by government.