

CONSTITUTIONAL FRAMEWORK FOR TRADITIONAL LEADERS IN SOUTH AFRICA

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1. DECLARATION

I, Teboho Jeffry September, student number 2020879652, hereby declare that this mini-dissertation for the programme in Governance and Political Transformation at the University of the Free State (Bloemfontein) is my own original work and has not submitted by me or any other individual at this or any other university. I also declare that all reference materials, used for this study, have been properly acknowledged.

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Abstract

This conceptual Mini dissertation explores the Constitutional framework for traditional leaders in South Africa, focusing on the delicate balance between cultural heritages and integrating traditional leadership into the modern governance. Traditional leadership plays a significant role in social, cultural and economic fabric of South African Communities, often serving vital link between the government and local Communities. However, the Constitutional recognition and regulation of traditional leaders have been subject of an ongoing debate. Drawing on comprehensive review of existing literature, legal framework and relevant case studies, this mini dissertation examines the historical context of traditional leadership in South Africa and analyse the complexities surrounding their positions within the Constitutional framework. It explores the tension between customary law, democratic principles and human rights, shedding light on the Constitutional challenges faced in reconciling traditional governance structures with the demand of the modern Constitutional democracy. This main dissertation delve into the key issues such as recognition of traditional leaders authority, their leadership with elected government structure, and extend to which Customary laws should be accommodated within the broader legal system. It also explored the need for accountability, transparency, and inclusivity within traditional leadership institutions, ensuring that they align with democratic values while upholding the cultural heritage and practices cherished by local government communities. The findings of this mini dissertation contributes on the ongoing discourse of the Constitutional recognition and regulations of traditional leadership in South Africa. By critically analysing the intricate dynamics between traditional, modern governance and Constitutional principles. The study will inform policy makers, legal practitioners, scholars and communities on the challenges and potential solutions for establishing a Constitutional framework that respects Cultural heritage while promoting the principles of democracy, human rights and inclusivity.

Keywords: Cultural heritage, Constitutional democracy, modern governance, traditional leaders, traditional governance, historical background

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List of Abbreviations

| Abbreviations | Definitions |
|----------------------|---|
| ANC | African National Congress |
| ACL | African Customary Law |
| CDWs | Community Development Workers |
| CLARA | Communal Land Rights Act |
| CONTRALESA | Congress of Traditional Leaders of South Africa |
| COGHSTA | Cooperative Governance and Traditional Affairs |
| GCIS | Government Communication and Information services |
| HIV/Aids | Human Immunodeficiency Virus |
| IDP | Integrated Development Plan |
| KZN | KwaZulu-Natal |
| MEC | Member of Executive Council |
| NADERTRAC | National Development and Restoration of Traditional Affairs |
| RSA | Republic of South Africa |
| SALGA | South African Local Government Association |
| SADC | Southern African Development Community |
| TBVC | Transkei, Bophuthatswana, Venda and Ciskei |
| TLGFA | Traditional Leadership and Governance Framework |
| TCB | Traditional Courts Bill |
| TKLB | Traditional and Khoi-san Leadership Bill |
| UDF | United Democratic Front |
| ZAR | Zuid-Afrikaansche Republic |

CHAPTER ONE: INTRODUCTION

1.1 Motivation and background

Since the advent of democracy in 1994, traditional authorities have transformed; some have opposed this idea as they believe that this transformation reduces their powers and authority (Khunou, 2009:84). Chapter 12 of Constitution of the Republic of South Africa of 1996 recognises the institution of traditional authorities, their roles and status. The provision in the Constitution was that traditional authorities and their roles should be based on customary law (Constitution, 1996).

A principal issue after South Africa became independent was the discussion tabled on the role and status of traditional leaders and traditional leadership institutions in governance (Chapter 11 of the 1993 Interim Constitution). The White Paper placed the important role of the institution of traditional leadership in the governance system and ensured that it restored the dignity and pride of the institution of traditional leadership within the governance system (Section 4 of the White Paper).

Traditional authority is described as a collective institution that consists of the position of the traditional leader or King, the deputy, the royal family, the secret advisory body, the headmen of small villages, and the traditional council (Mmusinyane, 2008:151). Moreover, traditional leadership has played and continues to play an important developmental, administrative, and political role in rural areas. The underlying premise for these roles is that they represent the ethnic units and are the closest authorities to the people (Dlungwana, 2002:11).

The Traditional Leadership and Governance Framework Act of 2003 defines traditional leadership as “the customary institutions or structures, or customary systems or procedures of governance, recognized, utilized, or practiced by traditional communities”. The term refers to customary systems or procedures of governance, recognised, utilised, or practised by traditional leadership and a governance framework (Khanyisa, 2010:47). Traditional leadership is an organisation that rules a specific ethnic group in accordance with customary law and has evolved over many years in Africa (Khunou, 2009:125). South Africa is a democratic country ruled by a legal framework and strategies. This means each organisation must act in accordance with the authorisation of the Constitution in its functioning.

Some progress has been made in traditional leadership since the arrival of democracy. However, much still needs to be done to ensure that it complies with the supreme law of the country (Khanyisa, 2010:47).

However, scholars fail to agree with this argument. Their views vary on this key topic, which justifies this research. According to Ubink and Duda (2021:1), in the past 15 years, South Africa has experienced a strong legislative agenda whereby the intention was to centralise the power of traditional leaders. The legislative instruments, such as the Communal Land Rights Act of 2004 (CLARA), the Traditional Courts Bill (TCB), the Traditional and Khoi-San Leadership Act, the Traditional Leadership and Governance Framework Act, the Amendment Act, and the Communal Land Tenure Bill have been severely criticised for strengthening the power of traditional authorities while ignoring participatory features and multi-level customary decision-making processes, and for compromising democracy and rural people's citizenship rights (Ubink & Duda, 2021:1).

The White Paper on Traditional Leadership and Governance was launched in 2003 with the intention of setting out a national framework, and the norms and standards that clearly define the role of the institutions of Traditional Affairs in South Africa. Its purpose was to transform and support the institutions in accordance with constitutional importance and restore their dignity.

Furthermore, the National House of Traditional Leaders was established in terms of the then National House of Traditional Leaders Act, 1997 (Act 10 of 1997) with the objectives and functions of promoting the role of traditional leadership within an elected constitutional system, intensifying integration and comprehension amongst traditional communities, and advising national government accordingly (Act 10 of 1997).

The South African government recognised that transformation could not be complete in the absence of the organisation of traditional leadership. As part of the government objective it is accepted that any form of changes has its own challenges, and it can be contended that any authority demanding to independently change the institution is condemned to fail. The other challenge that the government is confronted with is to try

to convince traditional leadership to persist in applicable processes and systems in compliance with the Constitution (Koenane, 2007:6).

According to research, the organisation of traditional leadership has been in existence for years, as opposed to democratically selected organisations (Holomisa, 2004:1). Ever since the existence of traditional leadership, the organisation has undergone many stages of change. Moreover, Holomisa (2004:1) stipulates that there have been attempts to abolish the institution; but the researcher ascribes the endurance of the organisation to its flexibility, and the decisiveness of traditional leadership.

The Constitution (1996) laid the foundation for the relationship between traditional leadership and democracy in South Africa. It also provided the framework for the broad principles of democracy.

According to the Draft Discussion Document (2000:2), countries such as France, Russia, and Uganda are no longer under the authority of, or follow, a monarchy and traditional leadership. However, traditional authorities were restored in Uganda, where it had previously been eradicated. In the rest of the world, democratic governments have replaced all absolute monarchies.

South Africa is not unique in this regard as some of its neighbouring countries, such as Zimbabwe, Ghana, Namibia, Botswana, Lesotho, Swaziland and Uganda, still recognise and respect the important role that traditional authorities play, especially in communal areas (Sithole & Mbele, 2008:18).

This study focuses on unpacking a Constitutional Framework of Traditional Authorities in South Africa. This study was inspired by the invisible roles played by traditional authorities in tribal community areas. Koenane (2017:2) emphasised that people living in the rural areas still regard an indigenous system of governance through traditional leaders as a more effective and transparent system than the current local government system with its corruption and ineffectiveness in transforming lives and delivering services in tribal areas. Ultimately, this study will determine the effectiveness of the institution, and the status and roles of the traditional authorities as recognised in Chapter 12 of the Constitution (1996).

1.2 Problem statement

The institution of traditional leadership has pre-existed in Africa in both the colonial and apartheid systems, and rural or indigenous people recognised only this governance system (Koenane, 2017:1) Even though the current political trend questions traditional leadership, Africans have their own understanding of democracy, which differs sharply from the liberal democracy of the West (Koenane, 2017:1).

Over 16.5 million people residing in rural areas in South Africa are subject to the command of traditional leadership (Tshehla, 2005:2). The rural communities qualify to benefit from the fruits of democracy, of which are the right to a healthy life and the right to live.

Regardless of modernisation, traditional leaders still play an imperative role in the lives of rural communities (Tlhoaele, 2012:1). People in rural areas believe that traditional leadership is essential to warrant the development of their areas. This belief dates back to the pre-1994 era when traditional leadership was at the centre of the development of rural communities (Ntsebeza, 2003:30).

Democracy brought much change in the institution of traditional authority; which includes the transformation forecast of the alignment with democratic principles and the Constitution (1996). However, there is a need to transform some characteristics of governance in the institution of traditional leadership.

According to Khunou (2009:85), it was expected that after the post-1994 democratic dispensation the elected local government would extent to all areas of South Africa, including the areas under traditional rule. Section 151(I) of the Constitution (1996) determines that the local spheres of government consist of municipalities, which must be established for the whole of the territory of the country (Khunou, 2009:85).

This study will determine whether the institution of traditional leadership still plays a key role in South Africa and whether it can contribute positively to the development of South African society at large and rural communities in particular (Koenane, 2017:1). One of the problems however is that in the new democracy, ward councillors regard themselves as the dominant custodians of all developmental projects of the government and the local government sphere in their jurisdiction; while, on the other hand, traditional leaders claim legitimacy based on history and religion. Historically,

traditional leaders claim political authority derived from the pre-colonial period (Sekgala, 2016:3). The traditional leaders represent indigenous, African values and authority, whereas the ward councillors perceive traditional leaders as resistant to change. In other words, traditional leaders feel that ward councillors are sabotaging their custodial authority over their communities (Sekgala, 2016:3).

In the new dispensation, traditional leaders are recognised in terms of the provision in Chapter 12 of the Constitution, also in the Traditional Leadership and Governance Framework Act No. 41 of 2003. Section 20 of the Act provides that national government may provide a role for traditional leaders and traditional councils in respect of a range of issues including land administration, agriculture, health, welfare, safety and security, and the administration of justice (Mhlanga, 2012:9).

However, the roles or functions of traditional leaders in the legislation are vague. And, where they are not ambiguous, their roles are merely for advisory purposes. This has resulted in traditional leaders not being “sure of their roles and what is expected from them” (Buthelezi & Yeni, 2016:2).

Chapter 12 of the Constitution (1996), in Section 211-212, gives recognition to the traditional authority, its status, and the role of traditional leadership (Mhlanga, 2012:14). The Constitution (1996) further states that traditional leaders are obliged to ensure full compliance with the core constitutional values, namely, equality, human dignity non-sexism, freedom, and human rights. The Constitution does not mention the traditional authorities; instead, in accordance with Principle VIII, the institution, status and roles of traditional leaders, in agreement with indigenous law, were recognised and protected (Tlhoale, 2012:2).

According to Koenane (2017:2), the Constitution and other related policy documents, such as the White Paper of 2003 on Traditional Leadership, recognised the key roles that were played by traditional leaders then and the roles that they could play now to service their communities. However, the above-mentioned documents are silent on certain roles traditional rulers ought to play in their capacity as an integral part of local and provincial government structures (Koenane, 2017:2).

Traditional leaders are seen to represent indigenous, truly African values and authority; hence, traditional leaders are of the view that ward councillors sabotage their custodial authority over their communities (Mhlanga, 2012:3). According to Ntshabele (2006:76), previously traditional authorities were viewed as holding old-fashioned opinions about the customs and traditions of their communities. Traditional authorities are also perceived to be at the forefront of hindering the development of customary laws in accordance with the applicable constitutional principles (Ntshabele, 2006:77).

The role of traditional authorities is a burning issue to the government of South Africa and the role and status of traditional leaders have been debated, regardless of the provision of several laws providing for their roles (Sekgala, 2016:4). In response to the outcry by traditional leaders, the government introduced legislation, namely the Traditional and Khoi-San Leadership Bill (TKLB) of 2015. Its aim to clarify the role of traditional leaders in democratic South Africa. However, it remains to be seen whether the TKLB will answer the cry of traditional leaders and clarify their role in local governance (Sekgala, 2016:4).

Ward councillors regard themselves as the dominant custodians of all developmental projects of the government and local government in their areas of operation; on the other hand, traditional leaders claim legitimacy based on history and religion. Historically, traditional leaders claim political authority derived from the pre-colonial period (Mhlanga, 2012:3).

During the South African constitutional dispensation, compelling arguments were forwarded to include and protect the institution of traditional leadership and traditional law. In both the Interim Constitution of 1993 and the final Constitution of 1996, provisions were made for the recognition and role of traditional leaders. However, traditional leaders have a bigger role to play as the custodians of culture and the protectors of custom in their communities.

The development and the provision of services became local government competencies, as envisaged in the Constitution in Chapter 4, Sections 151 and 152. In Section 153 of the final Constitution, the developmental duties of municipalities are

emphasised. Ward councillors are mandated by the Municipal Structures Act, No. 117 of 1998.

Chapter 2 of the Constitution (1996) recognises equal human rights for all. Furthermore, the Constitution makes provision for the recognition of the role of traditional leaders. Since 1994, there have also been many developments towards the recognition of equal rights for South African women (Chauke, 2015:37). Bently (2005:49) states that these changes are cosmetic in nature, in that they only exist on paper. The mandate of the Commission on Gender Equality Act 39 of 1996 is to evaluate any system of indigenous laws, customs, or practices. Their mission and vision have identified poor, black, rural women as their target. Chauke (2015:38) states that customs and traditions are often used and understood differently. There is a belief that if practices are customary and traditional, they cannot be amended, and even a chief or council cannot be forced to change them (Chauke, 2015:1).

The Constitution in Chapter 12 is clear about recognising the institution, the status and the role of the traditional authorities in the country. However, there are many unresolved theoretical and practical problems arising from the application of customary law within the Constitutional framework (Mmusinyane, 2008:136).

1.3 Research questions

The main research problem of this study relates to unpacking a constitutional framework for traditional authorities in South Africa. The research aims to provide a clear legislative framework gained from the literature to simplify Chapter 12 of the Constitution by clearly defining the roles of traditional leaders and their participation at the local level of government.

The research questions are as follows:

- What does the current legislation say about traditional leaders' powers, roles and functions?
- How effective and relevant are the current legislative tools that administer traditional authorities and what are the legislative requirements to appoint a traditional leader?
- What is the influential role of traditional leaders in the development of rural communities in democratic South Africa?

- What is the working relationship between traditional leaders and South African democratic government at the local level?
- What lessons can South Africa learn from constitutional frameworks on the role of traditional leadership of three countries, namely Ghana, Botswana, Zimbabwe and Namibia?

1.4 Aims and Objectives

The general aim of the study is to analyse a constitutional framework for traditional authorities in South Africa. This study will also assist in determining how local authorities can be utilised effectively without undermining their role in the community.

The objectives of this study are as follows:

- To analyse the current legislation regarding traditional leaders' powers, roles and functions;
- To determine the effectiveness and relevance of the current legislative tools that administer the traditional authorities;
- To determine the influential role of traditional leaders in the development of rural communities in democratic South Africa;
- To assess the legislative requirements for the appointment of traditional leaders based on heredity rights;
- To analyse the working relationship between traditional leaders and South African democratic government at the local level; and
- To study and compare the constitutional frameworks on the role of traditional leadership of three countries, namely Ghana, Uganda, and Namibia.

1.5 Research methodology

Research methodology refer to the structured way in which, and the plan of action by which, researchers go about their work of describing, explaining, and predicting circumstances (Moore, 1993:6). According to De Vos et al. (2011), there are three research methods that are been used to collect data – qualitative, quantitative, and mixed method. For this study, the researcher chose the qualitative research approach that relies on secondary sources. Secondary sources of information include books,

journals, published dissertations and theses. According to Mhlanga (2012:4), a qualitative research method focuses on the processes and not the outcome.

Maree (2017:365) and others argued that qualitative research formulates rich descriptions and explanations. This qualitative research method will require of the researcher to consult various sources and to collect data on the Constitutional Framework for Traditional Authorities in South Africa.

Qualitative research methods are an ongoing process of collecting data for a research study. It is an interpretation of the expert's experience and it is descriptive because it describes the daily lives of respondents.

This desktop study will gather data from secondary sources, and examine the existing legislation and other related documents. The study will refer to the Interim Constitution, the final Constitution, case law, policy documents, the Northern Cape Traditional Leadership, Governance and Houses of Traditional Leaders Act, 2007, the Rules and Orders of the Northern Cape House of Traditional Leaders, the White Papers, the Bills, the legislation, and the regulations. Books, academic journals and newspaper articles will be used as secondary sources of data, and theses and dissertations, which will constitute the bulk of the sources used. Internet sites will also be used to collect relevant data and information.

Ghana, Namibia, Botswana and Zimbabwe have been selected as a case study to determine whether South Africa can be considered as a country worth learning from in terms of the role of traditional leaders in municipalities.

The researcher will be using content analysis to compare and analyse the representation of relationships. The literature review will focus on relevant work conducted by other researchers.

The qualitative data will be analysed by using content analysis; the researcher will code and arrange the data obtained from numerous sources (journals, diaries, books, articles, dissertations, and PhD theses) into major classifications during the content analysis and the classifications will be constructed on the objectives of the study (Hopkins & King, 2010:229).

The study will analyse the current legislation regarding traditional leaders and the powers, roles and functions of traditional leadership, and highlight the Constitutional framework, which furnishes an appropriate version for scrutinising the problem and finding solutions for researchers and scientists (Mertens, 2012:255-257).

1.6 Literature Review

Traditional authorities are indigenous to South Africa and the rest of Africa; the institution has existed in South Africa for a very long time. According to Tlhoale (2012:106), traditional leadership and traditional authorities were critical institutions managing the day-to-day administration of their areas and the lives of traditional people. Tlhoale (2012:74) described their roles during the apartheid regime as the leaders of Bantustans or homelands. The title roles of traditional leaders, which were implemented during the apartheid reign, were the granting of the land, the continuity of law and order, the supplying of management assistance at the local level, the supplying of social welfare, and the encouragement of education (Sekgala, 2016:1).

The current government has three levels of government, national, provincial and local government, and in 2000, delimited extensive municipalities further brought to an end the acknowledgement of traditional authorities as a municipal framework (Sekgala, 2016:1). This was the directive of the Constitution, which stated that the local level of government was to be made up of municipalities, which had to be entrenched for the entire area of the Republic of South Africa (Constitution, 1996).

South Africa entered a new constitutional dispensation based on democracy, equality, fundamental rights, and the promotion of national unity and reconciliation that would affect the rule of traditional leaders (Tlhoale, 2012). Tlhoale (2012) further indicates that South Africa is not unique, since other countries also recognised the important role that traditional authorities played in the liberation from colonialism. These included Botswana, Ghana, Uganda, Namibia, and Zimbabwe (Sithole & Mbele, 2008:18).

1.7 Legislation that governs the Traditional Authorities in South Africa

The Interim Constitution was implemented on 27 April 1994. Its purpose was, among others, to introduce a new Constitution for the Republic of South Africa; to provide recognition of traditional authorities and customary law; to provide ex officio

membership to traditional leaders in the local government; and the establishment of both the Provincial Houses of Traditional Leaders and the Council of Traditional Leaders. Sekgala (2016:14) emphasised that traditional leaders were supposed to enjoy membership in local councils and the rights attached to such membership by virtue of their status. The Constitution (1996) in Chapter 11 states, “The institution, status and roles of traditional leadership, according to customary law, are recognised”. Chapter 12, according to custom law, recognises the institution, status and role of traditional leadership. The Constitution (1996) provides that “an Act of Parliament may provide for a role for traditional leadership as an institution at local level on matters affecting local communities”.

According to the National House of Traditional Leaders Act, 1997, “National or provincial legislation may provide for the establishment of the houses of traditional leaders to deal with the matters of traditional leadership, the role of traditional leaders, customary law and customs of communities observing a system of customary law”.

The White Paper on Traditional Leadership and Governance, 1998, lists the roles of traditional authorities on the development of their local area and community, including making recommendations on land allocation and the settling of land disputes, lobbying government and other agencies for the development of their areas, ensuring that the traditional community participates in decisions on development and contributes to development costs, and considering and making recommendations to authorities on trading licenses in their areas, in accordance with law (The White Paper on Local Government, 1998:76).

The Traditional Leadership and Governance Framework Act, 2003, is tasked with restoring the dignity of traditional leaders and their communities by investigating and ensuring that the institution of traditional leadership is restored to where it belongs. It also investigates all claims to any position of traditional leadership (king/queen/principal/senior traditional leader and headmen and women), including disputes over the boundaries of traditional councils.

The National House of Traditional Leaders Amendment Bill, 2008, enhances the cooperative relationships within national and provincial government. Local houses of

traditional leaders deepen and cement the relationship between municipalities and traditional leaders on customary law and development initiatives.

The National Khoisan Council aims to unite the Khoisan communities and create a platform through which they can raise issues affecting them as a group of communities. The most critical issue is the statutory recognition and inclusion of the Khoisan people in formal government structures.

The National House of Traditional Leaders Act, 2009, states that the Constitution mandates the establishment of houses of traditional leaders by means of either provincial or national legislation. The National House of Traditional Leaders was established in terms of the then National House of Traditional Leaders Act, 1997 (Act 10 of 1997). Its objectives and functions are to promote the role of traditional leadership within a democratic constitutional dispensation, enhance unity and understanding among traditional communities, and advise national government.

1.8 The role of traditional authorities in the local government sphere in South Africa

The efforts to describe or explain the status of the institution of traditional leadership within a democratic dispensation in South Africa was not easy and it led to many debates from various sectors of South African society (Kompi, 2018:2). In further efforts to clarify the roles, functions, and powers of traditional leaders in post-apartheid South Africa, legislation was passed and fully debated (Kompi, 2018:1). Sekgala (2016:19) stated that the roles or duties that traditional leaders played previously were given to municipalities by the final Constitution (1996).

Traditional leaders must advise the government on traditional affairs through the Houses and Council of Traditional Leaders, convening meetings to consult with communities on their needs and priorities and providing information. They also have a responsibility of protecting cultural values and providing a sense of community in their areas through a communal social frame of reference, being the spokespersons of their communities and being the symbols of unity in their community (The White Paper on Local Government, 1998).

The Northern Cape Traditional Leadership, Governance and Houses of Traditional Act of 2007, which was derived from the developed legislation, stipulated the roles and functions for the Traditional Authority as such: to provide for the recognition of traditional communities, traditional leadership and institutions. Therefore, to define the roles and functions of traditional leaders; to provide for the establishment and recognition of traditional councils; to define the functions of traditional councils; to provide for the appointment, recognition and removal of traditional leaders; and to provide for the establishment of a Provincial House of Traditional Leaders and Local Houses of Traditional Leaders. Moreover, to promote cooperate governance and the transformation of traditional leadership and to provide mechanisms for dispute resolution; to provide for a code of conduct; to regulate the administration of traditional institutions; and to provide for matters connected therewith.

1.9 Brief views of the Constitutional frameworks of Traditional Authorities of other countries

Ghana: According to Sekgala (2016:59), Ghanaian traditional leadership has been in existence before and during colonial ruling and continued to exist after self-governing; hence, traditional leaders continued to be in power in the discussion of the executive and communities. The 1992 Constitution of the Republic of Ghana represents the Fourth Republic Constitution. It recognises only the institution of chieftaincy; however, it does not explicitly provide for traditional leaders' membership in district assemblies (Sekgala, 2016:60).

Namibia: Chlouba (2019:3) states that traditional chiefs continue to play a significant role in modern-day Namibia. They provide cultural leadership to their communities, settle disputes, perform traditional rites, cooperate with local police forces to ensure security, and most importantly, allocate land (Hinz & Namwoonde, 2010:138). Particularly in northern Namibia, communal land is administered by the Traditional Authorities, which traditional chiefs head.

Uganda: Ngubane (2000) states that in Uganda, before 1967, traditional leaders had administrative and political powers. Between 1967 and 1993 they had no political or executive powers. However, their powers have been restored. Chiefs are appointed in terms of their cultures and the Constitution recognises them as cultural entities. There

is no legal relationship between the local government and chiefs; however, co-operative governance is encouraged (Ngubane, 2000:2).

1.10 Study outline

Chapter 1: Introduction

Several authors describe a research design as a plan on how to conduct your research; it also provides the overall framework for collecting data, outlining the details step by step; and lastly, provides guidelines to systematic data collection (Strauss & Corbin, 1998). This study comprises of six chapters, which will unpack the research topic: A Constitutional Framework for Traditional Authorities in South Africa.

Chapter 2: Legislative theoretical framework/role of law

This chapter will look at the frameworks that have been developed in South Africa to ensure that the roles that traditional authorities played pre-democracy continue.

Chapter 3: The Constitution regarding traditional authorities

The Constitution of South Africa (1996) will be unpacked in detail to examine if it addresses the roles of the traditional authorities and recognises gender equality. The focus will be on Chapters 2, 11 and 12 of the Constitution (1996).

Chapter 4: South Africa's local government situation

The Chapter will focus on the implementation of the legislation, which was developed to support Chapter 12 of the Constitution. It will look at the implementation at local government level, where communities are affected. The legislation tools of local government will be used to justify the research.

Chapter 5: Constitutions of Ghana, Namibia, and Uganda

The Chapter will provide an analysis of the constitutional framework on the role of the traditional leadership of three countries, namely Ghana, Uganda, and Namibia. The aim of this comparative study is to search for the lessons to be learnt from these countries.

Chapter 6: Summary, findings, and recommendations

This chapter will provide the findings of the research and the recommendations arising from the study.

CHAPTER TWO: LEGISLATIVE THEORETICAL FRAMEWORK/ROLE OF LAW

2.1 Introduction

Constitutionalism and its relationship with traditionalism has never been properly addressed and this has left a vacuum, which is causing unnecessary confusion. Hence, there are many cases before the courts in South Africa because there appears to be no clear guidelines, through the legislation, which truly address many of the matters that pertain to traditional leadership; therefore, this has created much confusion. This all arose from the fact that when the current Constitution (1996) was drafted traditional leaders were mostly observers and not participants in its drafting and designing, which is why matters are the way they are. Thus, this chapter will look at the frameworks that were developed in South Africa to ensure that the roles that the traditional authorities played pre-democracy, which still exist now. Furthermore, the chapter will examine why there was a lack of proper engagement with traditional leaders, which is why there is no proper legislation that governs the role and authority of traditional leaders.

This chapter will further engage on the aspects of the history on why and when customary law was applied in South Africa and how this is one of the reasons why traditional leaders are still not pleased about how, in the creation of the Constitution (1996), there was no proper mention of what their role would be and that it diminished the authority they previously had. Moreover, there is the fact that in the negotiations for the restructuring of the government of South Africa the leaders of Bantustans were not recognised as governments, for example, Venda and Zululand. These were fully functioning separate states but when it was time to negotiate for a new structure of government, they were not invited. This is what has led the state to this point where there is not a proper link between the traditional authorities and the country's legislation.

There also needs to be an analysis of the link of the actions of the first South African government and its adoption of traditional leadership and why, in the new

dispensation, it is frowned upon. The only reason traditional leaders found themselves at the negotiation table was because they had too much influence to be ignored. Therefore, in this chapter the history of traditional leadership and its relationship with the South African legal system will be analysed. In addition, there will be an analysis of all spheres of traditional leadership and how the fact that there is no proper legislation affects how traditional authorities fulfil their roles.

2.2 Constitutionalism and its relationship to Traditional Leadership

2.2.1 History of the recognition of traditional leadership in South African legislation

Traditional leadership is one of the cornerstones of customary history. It is considered by indigenous communities as one of the main factors that kept their communities together during the apartheid era. The Constitution (1996) does not state the role of traditional authorities, but it follows the Principle VIII institution. The position of traditional administrators and leaders, according to customary law, was recognised and protected.

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

To thoroughly understand the nature of customary law that is practised in South Africa today, it is important that we are familiar with the history of customary law in the country, particularly in its initial stages of recognition. In its context of recognition in developing customary law, it can be seen with the arrival of the colonial settlers and

their administrations in 1652, through the era of apartheid, and up to the point of the creation of the Constitution (1996). However, it should be noted that customary law existed in South Africa long before the earliest colonisation. It was the law of the day; it spearheaded the existence of native communities and how they co-existed, and it constituted an authoritative form of justice (Ebrahim, 1998:168). The legitimacy and legality of Indigenous Law as a legal system arises from the fact that it has existed from time immemorial and became the day-to-day cultural traditions of all native people. It did however differ and was dependent mainly on which tribal group of natives was being dealt with. However, most of their customary laws were similar and arose from a place of social, economic, and religious beliefs.

The colonial era, however, had the most influence on the development of the law in South Africa. In the colonial era, Indigenous Law was not recognised initially, but it was tolerated eventually and provisionally accepted by the colonial settlers even though it was never their intention to do so. In 1652, the Dutch East India Company established a refreshment outpost at the Cape Harbour. By the 1670s, the VOC decided to set up a permanent settlement, which they ended up calling Cape Town, and eventually declared their rights over the Cape Territory in 1672. Because of the results of colonisation, the Dutch settlers brought with them Roman-Dutch law (International Law). At that time, it was the law practised in the Netherlands. There was no evidence that the Dutch administration acknowledged the customs of the indigenous people they first encountered on their arrival. This has raised debates amongst legal and historical scholars as some argue it was a method to subdue any resistance from the natives, or it was the colonisers trying to avoid having the responsibility to govern the natives who did not have any understanding of their laws, which was Roman-Dutch law (Kerr, 1979:15).

The British Colony of Natal established what we refer to as the Natal Code of 1878. It was the first codification that held some form of recognition for traditional leaders. In addition to implementing English law, the British maintained Roman-Dutch law as the main source of common law and as the law of the land (Cape Articles of Capitulation, 1806). The Natal Code of 1878 was partly disorganised and not properly structured and it was the initial attempt at codifying customary law. Nonetheless, it introduced fundamental concepts that have stayed inherent to the Code through subsequent legal changes, reviews, and amendments. The 1878 Code stated that 'native law' was

based on a few leading principles, from which all other aspects of the law were derived. The main elements of Indigenous law had many elements relating to the subjugation of women to men, the subjugation of children to their father or to the head of the family, and the authority of primogeniture (Rugege, 2003:7-8).

The Native Administration Act of 1927, whose name was later amended to the Black Administration Act, in Section 11 provided for the beginning of the universal recognition of customary law. What it meant was that Indigenous Law was granted full recognition in both Chiefly and Commissioner Courts. However, Indigenous law would be applied at the discretion of the commissioner.

The Black Administration Act also created a dual system of law. The Act appointed the National President as the Supreme Chief of all natives in the Union; this gave the office of the President authority in matters including the selection or demotion of traditional leaders, land tenure, and the constitution of tribes (The Black Administration Act, 1927). There were also sections of the Act that regulated marriage, distinguishing between civil marriages and unions, with the latter term used to refer to informal African nuptials that did not constitute a legal marriage (Rugege, 2003:8).

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

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

There was a major crisis by the time the nation held the 1994 general elections because it had not been concluded what the role of traditional authorities and traditional leaders was going to be in the new nation's future. According to Section 156 of the Constitution (1996), it "sets out the executive powers and functions of municipalities by referring to their rights to administer the powers assigned to them by national or provincial legislation". To confuse matters further, these powers could easily fall (and in 1994 it in fact did fall) under that of "traditional authorities who still

operated under the pre-1994 statutes” (Rugege, 2003:7). The truth of the dilemma of Indigenous Law and the Constitution (1996) is that it has not been resolved yet. Hence, leadership succession squabbles have been on the increase; for example, *Shilubana v Nwamitwa Case CCT 03/07 [2008] ACC* (unreported). They have become a strain on the courts of the country who have ruled that the legislation is too vague and has not provided any legal solution or assistance when it comes to traditional leadership succession. Furthermore, the courts have no authority to rule on matters of Indigenous Law. The only thing they can do at present is to apply Chapter 2 (the Bill of Rights) of the Constitution if there is any form of discrimination (Rugege, 2003:9).

2.3 The Constitution and Customary Law

The Constitution (1996) was heralded as providing “a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful coexistence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex” (Ebrahim, 1998:113). Indeed, the Constitution (1996) states that South Africa is founded on values, including human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism, and non-sexism.

The legal standing of any person is related to his/her powers, rights, and duties. indigenous law believes that people belong to different classes or categories because of factors such as sex, age, rank within the family, legitimacy or illegitimacy of birth, adoption, disinheritance, mental capacity, order of birth within the family, marital status, and kinship. In customary law a person and their status is influenced by several aspects, with the result that no two people have the same social standing. This means that all persons are not of the same status in African Indigenous communities and this is how it was before the arrival of the first white settlers (Khunou, 2009:89).

In modern indigenous law the social status of a person or an individual is based on his/her powers to act and to appear in court and the power to have property and to be able to dispose of it. A minor (a person below the age of 15 in customary law) cannot, enter into a contractually binding arrangement without the permission of his/her guardian. Status in all facets under indigenous law has an influence on a person’s capacity to act, as well as on his/her capacity to appear in court and to acquire

property. It can be stated that indigenous law has now been accepted and recognised as part of the general South African legal system (Khunou, 2009:82). The parts of this system can be described as acts of law, case law, indigenous law, and common law. Customary law, similarly, like common law, is subject to Chapter 2, which is the Bill of Rights of the Constitution, and must be interpreted with consideration of the equality clause in Section 9. Section 9(3) of the Constitution states that the state may not unfairly discriminate, directly or indirectly, against any person on, among others, the grounds of age or gender. By recognising customary law on the one hand and banishing unfair discrimination of any persons, the Constitution gave rise to a dispute between two opposing ideologies, namely the right of the individual to equal treatment and the right of a group to adhere to the culture of its choice. Section 30 of the Constitution states this, which is something that customary law does not represent.

The Constitution, granting the right to culture, seems to be limited somewhat by the provisions that are provided for in the Discrimination Act 4 of 2000, whose aim was to eradicate economic and social inequalities, especially those that are systemic in nature and are generated by patriarchy, which has been part and parcel of our history and has proven to be one of the things the Constitution has tried to eradicate. "In 1994, South Africa entered a new constitutional dispensation based on democracy, equality, fundamental rights, and the promotion of national unity and reconciliation that would considerably affect the rule of traditional leaders. South Africa is not unique in this regard, as several other African countries have also recognised the significant role of traditional leaders after liberation from colonialism. These include Botswana, Zimbabwe, Ghana, Namibia and Uganda" (Sithole & Mbele, 2008:18).

2.3.1 Indigenous Law and its application since the adoption of the Constitution

In Indigenous Law the legal capacity, as well as the authority of a person to act or to appear in court, was determined according to the rules of either

- statute law, common law and case law, or
- Indigenous law.

The organisation of traditional leadership has been in existence for years, as opposed to democratically selected organisations (Holomisa, 2004:1). Ever since the existence of the organisation of traditional leadership, the organisation has gone through numerous stages of changes. Moreover, (Holomisa, 2004:1) stipulates that on some

occasions, there have been attempts to abolish the institution. The researcher ascribes the endurance of the organisation to its flexibility, and the decisiveness of traditional leadership. In South Africa we have only one legal system, namely the law of the land. It has been submitted, that there is, in fact, only one system of law in operation in the Republic of South Africa, and that it is very important to guard against depriving a party to a suit of a right, which is inherently or patently his under the law of the land, or against instilling on him/her rights which he/she clearly does not have. This statement came before the recognition of indigenous law in terms of the Constitution (1996), at a time when indigenous law was not recognised as a concurrent legal system of the Republic of South Africa. One example of that is in the case *Ex parte Minister of Native Affairs: In re Yako v Beyi* (1948) (1) SA 388 (A) it was decided that no basic or primary legal system was applicable.

Furthermore, the responsibility and authority passed to traditional administrators and leaders in the democratic political system of South Africa has not been properly defined. Research organisations have felt that not enough effort has been made to try and incorporate traditional leaders in the country's Constitution and that efforts in this regard have never been enough and it seems to have not been put forward since the conception of the new legal system. "When the process of negotiations for a new democratic dispensation began at the Conference for a Democratic South Africa (CODESA) in December 1991, traditional leaders tabled their concern that the new Constitution needs to recognise their powers and functions" (Khunou, 2009:107). It is therefore important to look at what position and responsibility of traditional administration is not properly defined in Principle VIII. Indigenous leadership at the beginning of the CODESA negotiations and submissions for post-apartheid South Africa did not receive any form of recognition or invitation, but after stating their displeasure with the situation they were finally invited to the negotiation table. This is because their role was determined and established by the colonial government and therefore it was not felt that they had anything to offer to the negotiations (Khunou, 2009:107). This will be discussed further later in this dissertation.

According to the Draft Discussion Document (2000:2), countries such as France, Russia, and Uganda are no longer under or following monarchies and traditional leadership. However, traditional authorities were restored in Uganda, where it had

previously been eradicated. In the rest of the world, democratic governments have replaced all absolute monarchies.

South Africa is not unique in this regard as some of its neighbouring countries, such as Zimbabwe, Ghana, Namibia, Botswana, Lesotho, Swaziland and Uganda, still recognise and respect the important role that traditional authorities play, especially in communal areas (Sithole & Mbele, 2008:18). Regarding the existing status, traditional leaders and administrators are of the view that the Constitution (1996) and the current legislation do not give clarity on the role and responsibility that is bestowed on them. The champion negotiator in the process to clarify the role of traditional leaders is the Congress of Traditional Leaders of South Africa, which claims to represent the country's traditional leaders (Sithole & Mbele, 2008:19).

Indigenous law may be enforced by the courts. Section 1 of the Law of Evidence Amendment Act 45 of 1988 has given authority to all courts of law to take judicial note of customary law in as far as such law can be proven readily and with sufficient certainty. In addition, customary law may not be opposed to the principles of public policy or natural justice, subject only to the proviso that lobola, bogadi and other customs may not be regarded as opposed to such principles (Seiler, 2000:11).

However, recently this position has been greatly amended by the Constitution (1996). One can observe that Section 211(3) provides for the fact that the judiciary should use Indigenous law if the statute is applicable, but it should be in line with the Constitution, and this applies to any customary law statute. This provision amends Section 1 of Act 45 of 1988 in that courts MUST now apply customary law and cannot merely take judicial notice of it. The court must determine whether customary law is applicable and if it is found to be applicable the court must apply it. Otherwise, the court is not compelled to apply customary law.

It is not clear whether the principles of public policy and natural justice still apply. The fact that Indigenous Law is subject to the Constitution makes these principles redundant. Moreover, the question arises whether these principles are not in conflict with the right to culture, which is recognised in terms of Sections 30 and 31 of the Constitution.

By recognising Indigenous Law, on the one hand, and prohibiting unfair discrimination, on the other, the Constitution gives rise to conflict between two opposing principles,

namely the right of the individual to equal treatment and the right of a group to adhere to the culture of its choice in Section 30 of the Constitution. This right to culture appears to be limited somewhat by the provisions of Act 4 of 2000, which aim to eliminate social and economic inequalities, especially those that are systemic in nature and are generated, amongst others, by patriarchy (Kerr, 1979:11).

There is no generally accepted definition of patriarchy. This concept refers to a type of social system that is dominated by the principle of a paternal authority and a father's right. This authority applies to the private (domestic) and public domains. Father's right may be viewed as the absolute authority of males in the domestic domain, extending to power over women and children, property, and the right to take decisions on behalf of the household (domestic group). Patriarchy may also be viewed as the monopoly of males in the public sectors, in political and economic decision-making. A patriarchal cultural system is characterised by the emphasis on the social and juridical status of fathers, as well as succession and inheritance in the male line of descent (Kerr, 1979:11).

2.4 How does the current legislation align with Traditional Authority?

2.4.1 Traditional leaders' authority over their people

According to the Bantu Authorities Act of 1951 (Act 68 of 1951) Section 6, tribal authority refers to the authority that is bestowed on a tribal leader within a tribal area in a hereditary succession system (Bekker, 1998:300).

Independence chiefs and traditional leaders, inserted as the main agents of the apartheid government policy, were given authority to carry and fulfil the roles accorded to them by the state. The Native people of South Africa were overcome and subdued by the Europeans, in a technique of using brutality, and exploitation commenced. The Traditional leaders (chiefs) were demoted of all forms of power and authority and turned into servants/employees of the state. "With the arrival of colonialism, the African traditional government was systematically weakened, and the bond between traditional leaders and their subjects was gradually eroded" (Maubane, 2007:4). According to Maubane (2007:7), this was partly because "the Zulus in Natal were very resistant to the colonial administration. Sir Theophilus Shepstone decided to use tribal leaders to govern, and did so by recognising customary law". According to Roodt et

al. (1993:19), it was found that the governor of the Natal Colony operated a Court of Appeal, which meant that all traditional authority which had been vested in Traditional leaders, paramount chiefs or monarchs now rested with the governor of the colony. He therefore had the power to appoint and dismiss chiefs.

However, it is significant in this instance to observe that the state sponsored erosion of the system of hereditary leadership was not committed to the Natal region where mainly British settlers had established themselves. This was a national crisis created and caused by the descendants of the Dutch who had also established their own colony and had set up roots in the country. "In 1885, the President of the ZAR (Zuid-Afrikaansche Republiek) was declared Supreme Chief with powers to appoint and vest chiefs with the limited criminal jurisdiction and unlimited civil jurisdiction in matters between their tribes" (Mamdani, 1996:89). In the years that followed, the Black Administrations Act of 1927 (Act 38 of 1927) stated specifically in Section 5(1) (a) that the Head of State in South Africa was given all the authority to create new tribes; divide existing tribes; and to divide up the areas that were currently occupied by the members of the tribe. Most traditional administrative councils and a union of traditional councils had been set up to assist with consultations. During the second reading of the Hertzog Land Bill of 1926, he explained that the "first duty of the White man is to himself. Whatever the rights of a native may be, they have no right to call upon us to do anything which might jeopardise our supremacy." According to Holomisa (2004:15), "This abovementioned Land Bill caused an outcry and Mr Sol Plaatje had described the Bill as a jackal trap". Shepstone was busy destroying the power of hereditary chiefs; he nevertheless managed to assist in how the institution of chiefs was created. Through the control of chiefs, they could therefore control the natives.

Welsh (1973:776) quotes Theophilus Shepstone as saying in 1864: "It is by the gradual and judicious extension of this system, in combination with, and under the control of white magistrates, that I think will be the shortest and safest means of breaking down the power of the hereditary chiefs, without losing the machinery, as yet indispensable to us, of tribal organisation; I would without anxiety let the hereditary houses crumble and their chiefs lose power so long as the material does not become confused rubbish, but can be built into other, although smaller edifices, which passes none of the dangerous associations of ancient tradition; the Government will then

become practically, what to a great extent is now only theoretically, the source of all rank and power in the colony”.

“The ancient African societal system, which was the basis of its humanity and mutual co-operation and protection, was destroyed” (Seiler, 2000:10). Under this policy, Africans were given administrative and judicial powers to govern themselves in line with their customs and traditions provided these customs did not contradict the policies of colonialism. In terms of the Bantu Authorities Act of 1951 (Act 68 of 1951) and other laws relating to traditional leadership still applicable in South Africa’s provinces today, provision is made for the institution of tribal, community and regional authorities or councils.

Tribal authorities had the responsibility of administering the affairs of the tribe and assisting the chiefs in fulfilling all their responsibilities. Regional authorities have the general function of advising and making presentations to the government on all matters affecting the general interests of Blacks within their specific areas and communities. “The Act also granted them the power to make by-laws and to acquire and hold land or any interest in land” (Seiler, 2000:10). Their powers were reinforced by various acts, for example the Bantu Authorities Act of 1951 and the Black Administration Act of 1927 (Act 38 of 1927). According to these Acts, the Governor-General was made the supreme chief of all traditional leaders in the Union of South Africa. Through the year’s successive colonial governments of South Africa enacted a considerable number of legislative measures to change the pre-colonial structures, and the roles and powers of traditional leaders (Roodt et al., 1993:19).

What occurred in the Bantulands during the colonial period is a way to showcase how native leadership was used to help grow and promote the goals and missions of the apartheid regime. This resulted in the erosion of the leadership roles of traditional leaders. Traditional leaders could no longer be accountable to their communities. Colonialists justified indirect rule on the basis that traditions and customs were indigenous forms of social organisation. But they reinforced and used these identities to divide and manage rural Africans (Ntsebeza, 2003:69). In view of the preceding discussion, it is evident that both the apartheid and homelands’ legislative frameworks altered the roles, powers and functions of traditional leaders. Moreover, the various

pieces of legislation further eroded the foundation upon which the institution of traditional leadership was founded and established (Ntsebeza, 2003:69).

The formation of the Congress of Traditional Leaders of South Africa (CONTRALESA) was critical for the recognition of traditional authorities in both the Interim Constitution and the final Constitution (Oomen, 1996:65). CONTRALESA was launched on 20 September 1987 by traditional authorities who opposed the declaration of the state of emergency during the civil unrest that was occurring in parts of the country. This group of traditional leaders saw the United Democratic Front (UDF) as an organisation that could give them protection and help them organise other traditional authorities (Oomen, 1996:65). CONTRALESA was formed by some traditional leaders, under the belief that the UDF, with the material and political support of the ANC, would help them keep the authority they had in the homelands. It was due largely to the resistance of these traditional leaders, as part of the mass democratic movement, that the apartheid programme of homeland-style independence was derailed (Holomisa, 2004:19).

2.5 Conflict between the Constitution and Indigenous law

Conflict between Indigenous Law and the Bill of Rights is unavoidable. The principle of patriarchy, implying cultural discrimination against women, is prevalent in most African cultures and Indigenous Law. However, in the Bill of Rights the main aspect is on the rights of an individual, whereas in Indigenous Law the emphasis is on the group, the community, and the individual in the context of the community. The Bill of Rights emphasises rights, whereas Indigenous Law emphasises duties.

The question is how this potential conflict should be dealt with. The Constitution does not give a clear answer to this question. However, it is clear that the Constitution is the supreme law (s 2) and that Indigenous Law is subject to this law (s 211(3)). There are also other indications that the Bill of Rights has priority over Indigenous Law.

For instance, there are many examples of this conflict:

Firstly, the place of a wife in an Indigenous marriage: discrimination against married women in terms of Section 11(3) of the Black Administration Act 38 of 1927 has been cancelled by the Recognition of Customary Marriages Act 120 of 1998. The Act came into use on 15 November 2000. Although Act 120 of 1998 provides in Section 7 for the status of equality between husband and wife, the position of wives in a polygynous

marriage towards one another is not clear. The main question is whether the unequal rank of wives in a polygynous marriage would constitute unfair discrimination. The ranking position of a wife in a polygynous marriage does have an apparent effect on the wife's children's right to succession to the estate of the father but does not necessarily entail unequal treatment of wives by their husband.

Secondly, the form of marriage and the status of family members: the legal system which governs the marriage also determines the status of the family members, and this status is also determined by traditional leaders who play the role of distributing land to communities, with regard to their mutual rights and duties. In *Ngcamu v Majozi* (1959 NAC 74 (N-E)) it was noted that a child cannot have two guardians, one according to Indigenous law and one according to South African common law. It was found that traditional administrators could also preside on this matter and determine who the parent of the child was or is. It was further stated that a child's guardian is determined by the legal system, which would usually be applicable to the child. Consequently, it was decided that the guardian of a daughter from an indigenous marriage was her father despite common law being applied in the court action. The South African High Court has, however, in cases where common law was applied, consistently refused to recognise the father of a child from a formerly non-recognised customary union as the guardian of the child. See *Samente v Minister of Police* 1978 (4) SA 632 (E).

Thirdly, the legal system which governs the right or duty and status: should one of the abovementioned guidelines not be applicable to a situation, the status of the parties is determined by the legal system governing the right or duty. Section 1(3) of the Law of Evidence Amendment Act 45 of 1988 governs the position in cases where more than one indigenous legal system applies in an area. The Section agrees with the old Section 54A (2) of the Magistrates Courts' Act and therefore has the same effect. Also compare *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948(1) SA 388 (A). Should one of the parties be a non-Black, the status of all the parties is determined according to the general South African law and not in terms of Indigenous law.

These decisions will probably no longer apply in the light of the recognition of customary marriages in terms of Act 120 of 1998.

2.6 Recognition of traditional leaders by traditional communities

When one observes that the only reason the occupiers recognised and created a place for native leaders was because this was the only way to prevent the Natives from continuing to revolt is another example of why till this day we cannot create a legally frameworked legislation that gives guidelines to the role and expatiations of traditional leaders and administrators. But there were always Native communities hundreds of years before the colonisers landed on the shores of South Africa, which also means that there where traditional leaders and administrators and that they had a major role that they played as the government of the day. The most significant aspect is that this is where the legal framing of traditional leadership began and this is where it all started during the colonial and apartheid era. The history of Native communities and their relationship to traditional administrators was established many years before the colonizers even arrived on the shores of South Africa. Historically the colonial, apartheid and Bantustan systems invented many different titles for traditional leadership positions, which tended to confuse the situation rather than confine it.

The principal Act recognises three leadership positions within the institution of traditional leadership (Kerr, 1979:15).

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

Thus, Section 9 of the Traditional Leadership and Governance Framework Act 41 of 2003 recognises kings and queens, laying down all necessary procedures and processes of how kings and queens are appointed in collaboration with government legislation, the institution of traditional leadership, and customary law and customs. But even though this has been provided for in the Framework Act, the law is still vague when it comes to contestations on succession. A glaring misconception is that while kingship positions are recognised, a kingship as an entity or structure is not. The Act also does not in any instance provide for the establishment and recognition of a structure or council for the kingship in performing its roles and functions (Kerr, 1979:15).

Section 10 gives guidelines on how kings or queens are removed from office. Senior traditional leaders, headmen or headwomen are recognised in Section 11 of the Act

with all the necessary procedures and processes to be followed. Their removal from office is clearly outlined in Section 12 of the Traditional Leadership and Governance Framework Act 41 of 2003. Sections 13, 14 and 15, respectively, deal with the “appointment and/or recognition of regents, persons acting as traditional leaders, and deputy traditional leaders”. Kgosi Maubane, the Chairperson of the National House of Traditional Leaders, clarifies the structure of traditional leadership in South Africa as follows:

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

The kingship and the kingship council in this instance is properly defined in Clause 1, but it grows from how the coloniser wanted the traditional leader’s role to be. Therefore, this definition is not from the Native community but was created by the oppressor for their own benefit. Thus, remains conflict in aligning traditional leadership with legislation.

2.7 The role of traditional leaders

2.7.1 Traditional councils and their functions

The Traditional Leadership and Governance Framework Act 41 of 2003 states all the functions for traditional councils, which are set up in every traditional community soon after the community has been recognised by the Premier of the province concerned. They also form the general functions for the Provincial Houses of Traditional Leadership as will be evidenced later in this research report. But the principal Act once again fails to specify the functions of kingship councils, a matter which is taken care of by the Amendment Bill. Traditional councils perform the following functions (Section 4(1):

- ❖ Administer the affairs of the traditional community in accordance with customs and tradition;

- ❖ Assist, support, and guide traditional leaders in the performance of their functions;
- ❖ Support municipalities in the identification of community needs;
- ❖ Facilitate the involvement of the traditional community in the development or amendment of the integrated development plan of a municipality in whose area that community resides;
- ❖ Recommend, after consultation with the relevant local and provincial houses of traditional leaders, appropriate interventions to government that will contribute to development and service delivery within the area of jurisdiction of the traditional council;
- ❖ Participate in the development of policy and legislation at local level;
- ❖ Participate in the development programs of municipalities and of provincial and national spheres of government;
- ❖ Promote the ideals of co-operative governance, integrated development planning, sustainable development, and service delivery;
- ❖ Promote indigenous knowledge systems for sustainable development and disaster management;
- ❖ Alert any relevant municipality to any hazard or calamity that threatens the area of jurisdiction of the traditional council in question, or the well-being of people living in such area of jurisdiction and contribute to the disaster management in general;
- ❖ Share information and co-operate with other traditional councils; and
- ❖ Perform the functions conferred by customary law, customs, and statutory law consistent with the Constitution.

2.8 Legislation and the responsibilities of Traditional Chiefs and Administrators

Section 19 of the Traditional Leadership and Governance Framework Act 41 of 2003 states, a “traditional leader performs the functions provided for in terms of customary law and customs of the traditional community concerned”, and in applicable legislation. These roles and functions, which include inter alia arts and culture and agriculture (Section 20(1) of the principal Act), can be assigned, delegated, or performed on an agency basis (Department of Provincial and Local Government, 2002:27). However,

in Section 17(3), the Act does prescribe the “functions of a local house of traditional leaders as being to:

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

All the above-mentioned general responsibilities and roles apply *mutatis mutandis* in all established traditional leadership communities set up in the District Municipalities of the various provinces. This will be discussed later when we focus on the Local Houses of Traditional Leaders.

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

- ❖ National or provincial government may provide a role for traditional councils or traditional leaders in respect of among others: health, arts and culture, agriculture, etc.;
- ❖ Whenever an organ of state at national or provincial government level decides to allocate a role for traditional councils/leaders, it must concur with the Minister or MEC, consult relevant structures of traditional leadership and SALGA, comply with the Constitution and legislation, customary law and customs,

acquire the necessary resources, and promote co-operative governance, IDP, sustainable development and service delivery;

- ❖ The organ of state must monitor the implementation of the allocated function to ensure that it complies with the Constitution and that it is actually being performed; and
- ❖ Where an allocated function is not being performed, given resources may be withdrawn.

2.9 Resolving of succession contestations of traditional leadership

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

It is important to take note here that the question of contestations and claims on traditional leadership is a thorny issue and holds the potential for explosive repercussions if not properly dealt with. This is one of the main reasons why the report of the Ralushai Commission of Inquiry established in 1997 by then Premier Ramatlhodi of the then Northern Province, now Limpopo Province, has never been published. The spokesperson for the Premier's office had said in February 1999 that the Premier would not release the full report as it had "volatile contents that could spark outrage" (*Sowetan* 29/4/1999). An association of chiefs in Northern Province, Loc. Cit. had given the Premier an ultimatum to release the report if he wanted their full support on election day.

Section 219(1) states that an Act of Parliament must establish framework legislation to determine the salaries and allowances of persons holding public office including the "President ..., traditional leaders, and members of any council of traditional leaders." With regards to the Remuneration of Public Office Bearers, the Traditional Leadership

and Governance Framework Act 41 of 2003 does not elaborate, as it only mentions those leaders who hold Provincial offices but does not include those who fall in the category of the local Houses as recipients of salaries, benefits and allowances entitled to Public Office Bearers.

Traditional leaders and administrators were established to be government institutions that have a connection to the native people; therefore, they should be viewed as such. With this observation it means that they play a leading role in the 1996 Constitution, but this is different from the one they played in the colonial government with the structures that it had set up. This however may need serious consultation as there would be a need for the co-existence of democratically elected rural local government structures and the institution of traditional leadership. The place of women in our communities must also be significantly changed as a requirement and in consultation with the rural women concerned (Department of Provincial and Local Government, 2002:28).

While the law, on the one hand, facilitates the remuneration of the said holders of public office, it is nonetheless, on the other hand, resolute that any of these public office bearers “who holds different public offices simultaneously, is only entitled to the salary, allowances and benefits of the public office for which he or she earns the highest income” (Clause 11(5) (2)). The Amendment Bill also extends the heading of Act 20 of 1998 to include “non-traditional leader members of traditional councils and non-traditional leader members of kingship councils”. This inclusion ensures that the needs, which all members who hold public office are entitled to, are duly taken care of (Koenane, 2017:7).

The institution of traditional leadership should be transformed to move with the times. Many traditional leaders accept the role they must play as part of the new order, as well as the resulting challenges associated with the process of transformation. There can never be true rural development in South Africa, during an interim period, without the participation, involvement, and consultation of traditional authorities as part of local government. It is understood that each traditional community should be sufficiently empowered to determine whether they favour the retention of the institution of traditional leadership. It is also accepted that accountability and transparency should characterise all actions undertaken by traditional authorities, and that express

provision for the actual implementation thereof be made at the level of each traditional community (Koenane, 2017:7).

Schedule 1 of the Municipal Systems Act deals with a Code of Conduct for Councillors and specifies in Section 15 all the items from this Act which “apply to a traditional leader who participates or has participated in the proceedings of a municipal council in terms of s. 81 of the Municipal Structures Act, which deals with participation of traditional leaders in municipal councils”. Section 27(1) of the Traditional Leadership and Governance Framework Act 41 of 2003 states that “the code of conduct contained in the Schedule (to this Act) applies to every traditional leader and traditional council and must, in respect of a particular province, be read together with the relevant provincial code adopted by that province”.

A traditional leader must:

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

On the other hand, a traditional council must:

- ❖ perform the functions allocated to it in good faith, diligently, honestly and in a transparent manner;
- ❖ execute its duties in an efficient manner;

- ❖ comply with any applicable legislation;
- ❖ act in the best interest of the traditional community it serves;
- ❖ give effect to the principles governing public administration set out in Section 195 of the Constitution; and
- ❖ foster good relations with the organs of state with whom it interacts (ibid.).

The Traditional Leadership and Governance Framework Act 41 of 2003 was passed in December 2003, and came into operation on 24 September 2005. Since then, the Act has been implemented and through careful analysis of the Act and assessment of its implementation there emerged a need to effect certain amendments to address the current gaps and legal uncertainties and vacuums in respect of certain important areas (Memorandum of the Amendment Bill, 2008; Nthai 1991:23).

Traditional leaders should have civil jurisdiction. Customary land law rules are more or less the same in all the communities. The dispute resolution capacity of traditional authorities should be maintained and strengthened. This statement does not, however, disregard differences that may exist in different communities. Development functions should be provided for and be discussed with the various communities. According to the traditional communities interviewed, traditional authorities are confident that they can participate in the planning and monitoring of development projects but that they should be given an opportunity to do so with the support and trust of government.

Legislation dealing with traditional authorities needs to be rationalised in all the provinces. In each province there are various sections of legislation dealing with the appointment, structure, and functions of traditional leaders. The diverse system of legislation is a legacy of the former homeland system. The appointment and installation of traditional leaders should be in accordance with the wishes of the communities concerned as well as with prevailing custom. Traditional authorities should be apolitical in the execution of their functions (Memorandum of the Amendment Bill, 2008; Nthai 1991:23).

2.10 Traditional Leadership and Governance Framework Amendment Bill, 2008

Chapter 12 in the Constitution recognises the status and responsibilities of traditional leaders and administrators whose authority arises from indigenous law even though there are no forms and categories of traditional leaders so recognised. It further

stipulates that “national or provincial legislation be provided for the establishment of houses of traditional leaders, and that national legislation may establish a council of traditional leaders”. However, in Section 143(1) (b) the Supreme Law dictates, “A provincial constitution, or constitutional amendment, must not be inconsistent with this Constitution, but may provide for the institution, role, authority and status of a traditional monarch, where applicable” (Memorandum of the Amendment Bill, 2008; (Nthai, 1991:26).

The traditional leaders always played and still have an important role to play in family disputes. If a matter cannot be resolved at family or kgotsana level, it is referred to the traditional leaders. As the traditional leader is seen as the most important and powerful member of the community, as well as the embodiment of all attributes, emotions, and values of the community, his or her position in this regard should be respected and recognised. It is stated in the White Paper on Local Government (RSA, 1998:4.2) that the Department of Justice should, in the process of establishing community law courts, take “cognisance of the advantages of customary law courts such as the fact that they are cheap, speedy, informal, conciliatory and accessible”. It is also stated that traditional leadership should receive special recognition in the rural community law courts.

The adoption of African Customary Law (ACL) protected within the Bill of Rights, most notably under the right to freedom, belief and opinion (s 15) of the Constitution (1996), initially during the colonial era was purposely set up as a way to subdue African communities and now it needs to be readdressed. Since the adoption of Constitutional law not enough has been done to address those matters that have been left hanging by the fact that the law remains vague on many matters of customary law. Constitutional scholars have argued that the customary and state courts do not offer the same protections and services, so people should not be forced to use one kind rather than the other simply because they live in rural areas. This particularly affects women in that they are not well represented or protected in customary forums or in the new Bills. The historical record, rather than the colonial depiction of it, shows that communities have typically determined how they are led. Customary law is lived and agreed on by community members (Memorandum of the Amendment Bill, 2008: Nthai, 1991:25).

Historical and archaeological records also show that communities did not have to have a senior traditional leader. The idea of a chief, beloved by colonialists, does not reflect the fact that societies in Southern Africa were mostly governed by decisions made by groups of people.

This is why South Africa needs to balance the demands of traditional leaders with these collective decision-making processes and modern constitutional terms for governance. This is why the current process is not sufficient to address the dilemma that currently exists with regards to aligning the current legislation to the customs of majority of the population. South Africa's Constitutional Court has noted that living customary law requires respect and that it must accord with the 1996 Constitution. But laws that keep using the idea of colonial and apartheid chiefdoms go against this precept.

Post-apartheid legislation insists on the existence of a traditional leader for a traditional community to be recognised by the government. With recognition comes salaries for traditional leaders and land, among other government benefits. This is why traditional leaders support the laws. The new Traditional and Khoi-San Leadership Act 3 of 2019 is based on the same hierarchy of leaders and authority as the Traditional Leadership and Governance Framework Act 41 of 2003, which it replaces. And that, in turn, is based on colonial and apartheid-era definitions.

2.11 Conclusion

Defining spheres in which traditional and democratic forms of government operate is of importance to clear up the uncertainty which currently prevails. Traditional authorities are more in touch with community sentiments than the national government. This has been found to be prevalent nationwide; it can be ascribed to the fact that they have direct access to these communities. They are therefore important links between communities and the state. The state should therefore not attempt to abolish their authority or ignore their existence. Moreover, existing interests and assets should not be interfered with without proper consultation. These assets, if taken away, should only be used for the betterment of a particular community. Provision should also be made for mediation or a dispute council or arbitration in the case of disputes.

As traditional authorities are regarded as the government nearest to the people, local government should not interfere with traditional authority land without prior

consultation with the relevant authority concerned. Development, if initiated by local government, should only be implemented after proper consultation with the communities concerned. It is proposed that the number and the representation of traditional authorities in an area where there are more than one such authority should be properly negotiated with the communities concerned.

Therefore, in considering the history of Constitutionalism and the authority of traditional leadership it can be observed that in South Africa's new dispensation, no conclusive method was created that would allow for the traditional authority to have a clear role under the new system. Hence, there are many matters before the courts of law, which have all transpired, because there is no legal remedy that allows the traditional leadership to handle its own matters; for example, the matters pertaining to succession disputes like in the case of *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC). These are some of the issues that have become a burden to the judiciary because they are involved in matters that do not have proper legislation.

CHAPTER THREE: THE CONSTITUTION OF SOUTH AFRICA REGARDING TRADITIONAL AUTHORITIES

3.1 Introduction

South Africa's Constitutional dispensation is based on the premise that all existing laws are subject to the Constitution (1996), including African customary law, and that all laws are limited only by the Constitution. South African customary law is a body of law by which millions of South Africans regulate their lives in a multicultural society. It existed long before the adoption of the Constitution which, among other things, aims at harmonising the different cultural practices that exist in the country. It is apparent that some traditional cultural practices that still exist conflict with the Constitution but, until they are challenged before a court of law, they will remain enforceable in communities. Traditional leaders occupied a position almost like that of a governor, whose authority stretched from judicial functions to social welfare (Tshehla, 2005:1). The Bantu Administration Act of 1951 consolidated the powers and position of chiefs and traditional councils and prepared them to administer the independent homelands. Chiefs were thus given full authority of their people.

This research examines two contradictory conceptions of customary law, as either fundamentally democratic or as autocratic, and their impact on the constant reconstruction of and resistance to chiefly authority in modern-day South Africa. In the last 15 years or so South Africa has witnessed a strong legislative agenda to centralise the power of senior traditional leaders. The new traditional authority laws' ahistorical, authoritarian understanding of customary law, as something to be defined and imposed on rural communities by senior traditional leaders, is directly opposed to the Constitutional Court's interpretation of customary law as something to be determined with reference to practice from and acceptance by the people whose customary law is under consideration. This study examines the net result of these contradictory processes on local contestations over chiefly power in the Eastern Cape. It displays the state's concerted efforts to impose a model of traditional authority that empowers senior traditional leaders, even in contexts where local communities strongly contest this model, arguing that it contravenes their custom and history, as well as their democratic rights.

In this chapter, there will be an extensive analysis of the relationship of the Constitution of South Africa (1996) and reference to the Interim Constitution of South Africa regarding the authority and recognition of Traditional Councils and Traditional Leaders. There will also be an analysis of how the shortcomings of the current dispensation are impacting on the relationship between traditional leaders and their councils, and local and national government authorities. Reference will also be made to the relationship between traditional leaders, their authority and the government, and what the law stated during the colonial era. Moreover, the Interim Constitution will be examined and also how, when it was ratified, it formed part of the root of the conflict that currently exists.

3.2 The Constitution regarding traditional authority

Though the Constitution is in force, there are many unresolved theoretical and practical problems arising from the application of customary law within the constitutional framework. For example, many customary systems of succession are guided by the principle of male primogeniture: a deceased's heir is his eldest son, failing which, the eldest son's oldest male descendant is his heir. In most cultural traditions women are ineligible to be traditional leaders of their tribes. When the traditional leader has only daughters, the throne automatically passes to his brother or oldest living male heir. Traditional authorities can be seen as communal structures that are capable of either perpetuating the primogeniture principle or developing community customs to bring them in line with the aspirations of the Constitution. It may be asked to what extent traditional authorities can do the latter. This study aims to analyse the traditional authority's role in the development of customary practices in line with the Constitution, particularly regarding the advancement of the right of women to inherit traditional chieftaincy thrones (Khan & Lootvoet, 2001:2).

To date, the emphasis is mainly on the advancement of women's and children's rights in general, a process that seems to be advancing too slowly, despite being rooted in constitutionally protected rights. This research will highlight the enduring legacy of apartheid constructions, and the powerful role of contemporary governments in their recreation. New laws are a crucial tool in this process. They entrench an apartheid model of traditional leaders and minimise rural democracy. It is only with serious efforts of community mobilisation and legal education and support that local communities can

successfully access the courts to challenge the actions taken by an alliance of chiefs and the state. Ultimately, this analysis highlights an understudied link between the functioning and legitimacy of chiefs in democratic states and the autocratic or democratic conception of the customary law underlying the powers of such chiefs (Khan & Lootvoet, 2001:4).

3.3 Recognition of Traditional Authority

The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution. A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs. The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law (Williams, 2010:4).

3.4 Role of traditional leaders

National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities. 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:

- national or provincial legislation may provide for the establishment of houses of traditional leaders; and
- national legislation may establish a council of traditional leaders.

The Department of Traditional Affairs is mandated to oversee issues related to traditional affairs and to support the development of stable and cohesive interfaith communities. The 2003 White Paper on Traditional Leadership and Governance sets out a national framework, and the norms and standards that define the role of the institutions of traditional leadership in South Africa. It seeks to support and transform the institutions in accordance with constitutional imperatives and to restore the integrity and legitimacy of traditional leadership in line with African indigenous law and customs subject to the Constitution.

South Africa also has provincial houses of traditional leaders in the Eastern Cape, Free State, KwaZulu-Natal, Limpopo, Mpumalanga and North West. National and

provincial houses of traditional leaders enhance the cooperative relationships within the national and provincial government. Local houses of traditional leaders deepen and cement the relationship between municipalities and traditional leaders on customary law and development initiatives (Williams, 2010:6).

The Department's mandate is informed by the following legislation:

- the Traditional and Khoi-San Leadership Act of 2019; and
- the Commission for the Protection and Promotion of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002.

The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities: the Commission supports communities in developing and fostering social cohesion, peace, and tolerance. The Commission also plans to produce four research reports per year to restore the diminished heritage of communities and conduct investigations into cases and resolve disputes emanating from cultural, religious or linguistic differences (Beall et al., 2004:3).

3.5 The powers of traditional leaders and their role in governing

The Constitution states that the institution, status and roles of traditional leadership, according to customary law, are recognised. The government acknowledges the critical role of traditional leadership institutions in South Africa's constitutional democracy and in communities, particularly in relation to the Rural Development Strategy. It, therefore, remains committed to strengthening the institution of traditional leadership. To this end, numerous pieces of legislation have been passed and various programmes implemented to ensure that traditional leadership makes an important contribution to the development of society. The government through this portfolio is also working on a range of issues, including policies on unity and diversity, initiation, traditional healing, traditional leaders' protocol, family trees, the remuneration and benefits of traditional leaders based on uniform norms and standards, and involving the Khoisan people in the system of governance in South Africa (Beall et al., 2004:5).

Traditional leadership has always been part and parcel of the South African legal system since the inception of the Black Land Administrative Act. The judiciary's role is to partake in assisting to modernise traditional leadership. Significant traditional

leadership is not modernised enough for us to say that the judiciary or the legislation cannot be part of modernising the system.

3.6 What does the Constitution state and other legislation and cases

Currently legislation and cases have gone before the judiciary, and we have already given examples of the Bhe case and the Shilubana case. In both instances the judiciary took over the role of modernising traditional leadership. This is because the judiciary is trying to assist the traditional leadership to come to grips with the fact that the legislation of the country has modernised since the inception of the Constitution (1996), which in effect is the Bill of Rights, which states that every person has a right to be well represented and to not be oppressed. This has not been effected when it comes to the handling of women and children within the South African community. Thus, it is the role that the judiciary has been given (Ntsebenza, 2004:71).

Moreover, legislation has not done its job in creating acts and statutes that stipulate and regulate the responsibility that traditional leaders must play in their communities. For example, redistribution of local land is still a matter of conflict between local government and the traditional leadership. Traditional leadership in most cases feel like the land that they preside over is (Williams, 2010:5).

Traditional leaders were given authority through legislation, which was also created since the inception of the Constitution (1996). What it means is that there is a need for the traditional leadership, in line with government officials and the judiciary, to come together so that the traditional leadership can modernise how they handle matters within the traditions of the natives or Africans who live in communities. Local government is one of the pillars of government that works directly with traditional leadership and there has been conflict, which has arisen because of this. This is because local government authorities have authority over their local communities (Ntsebenza, 2004:71).

Local government's (i.e. the municipalities) authority over their communities is being taken away by traditional leaders and their councils because the leaders feel that it is their community and they should have authority over them. In certain instances when traditional leaders hand out portions of land or carry out their duties, they are not in line with legislation, which then forces the local government to step in to assure citizens

that they cannot do it because it is not in line with the local government's authority (Beall et al., 2004:5).

Moreover, legislation has transformed the composition of traditional councils to provide for elements of democracy. It states that 40% of members must be elected and that one third of members must be women. Legislation has also opened the opportunity for municipalities and traditional councils to achieve cooperative governance. Traditional councils have been given a strong voice in development matters and may now enter into partnerships and service-delivery agreements with government in all spheres (Beall et al., 2004:5).

Turning to the National Khoisan Council, it aims to unite the Khoisan communities and create a platform through which they can raise issues affecting them as a group of communities. The most important issue is the statutory recognition and inclusion of the Khoisan people in formal government structures (Beall et al., 2004:5).

3.7 The Council of Traditional Leadership

A Council of Traditional Leaders was established in terms of Section 184 of the 1993 Constitution. It was to consist of 19 representatives elected by the different Houses of Traditional Leaders. The Council of Traditional Leaders had to advise and make recommendations to national government on any matter pertaining to Traditional Authorities, indigenous law, and the customs and traditions of traditional communities. It had to advise the President at his request on any matter of national interest and to comment on any parliamentary Bill pertaining to the matters referred to above. Notification of the approval or rejection of the Bill had to take place within 30 days. Parliament could not pass the Bill before a period of 30 days had lapsed. If no notification was given, Parliament could proceed with the Bill (Beall et al., 2004:7).

The Constitution was amended providing that this section would only apply once the Council of Traditional Leaders was established. Section 183 provided for the establishment of Houses of Traditional Leaders in the various provinces. Their powers, duties and functions were to advise the provincial legislatures on matters dealing with Traditional Authorities, indigenous law, and the customs and traditions of traditional communities. Bills also had to be referred to the Houses and they had to notify the provincial legislature of their approval or rejection of the Bill within 30 days. The

legislature could, in any event, accept the Bill after 30 days without taking any proposals of the Houses into account.

The National Council (now the National House) was only established in April 1997 after the 1996 Constitution was adopted. Houses of Traditional Leaders were instituted in North West, KwaZulu-Natal, Mpumalanga and the Free State by 1997 but problems were experienced in the Northern Province and Eastern Cape due to the various tribal groupings who could at that time not come to an agreement on representation in the Houses (Williams, 2010:2).

3.8 The role of the judiciary and its effects on the authority of the traditional leaders

The colonial and apartheid governments, in their efforts to oppress African people after conquering and undermining the traditional African legal system and imposing the Roman-Dutch legal system, destroyed the traditional courts. The reason for this was that these courts did not keep any records. This meant that all the matters that these traditional courts heard would have to be retried in Magistrates Courts that applied the foreign Roman-Dutch legal system in South Africa. Section 11 of the Black Administration Act of 1927 was recognised subject to the so-called public policy and principles of natural justice based on the foreign Roman-Dutch legal system. Moreover, the Constitution (1996) acknowledges that African traditional law is equal to the so-called common law of South Africa (Roman-Dutch law). However, it is subjected to the Bill of Rights that has entrenched Western norms and values at the expense of African norms and values.

Traditional leaders were issued with certificates by the Ministry of Justice to try civil and criminal cases (Williams, 2010:2). Traditional chief's courts and traditional councils are a pivotal part of the fulfilment of justice in many disadvantaged former Bantustan South African communities and this is a role that cannot be taken for granted. Many become critics of how the government restored powers to Traditional leaders, without taking proper analysis of how important this is and the political climate, while this is because they still want to apply the maxim *rex non potest peccare*. In many instances it has been acknowledged that these traditional courts have become a form of dispute resolution. It has to be acknowledged that for the sake of a proper

legislative balance it is of importance that traditional courts and traditional councils are part of the modern democracy of a country like South Africa (Williams, 2010:2).

In most instances legislation is used as a tool that will emancipate traditional councils and traditional leaders from the old canonical methods that they previously used, which did not acknowledge the rights of women and children. In many instances we find that a dispute that arose between the local government and the traditional leadership and councils was because the local government had to implement their legislative authority, which in most instances some traditional leaders were not willing to accept. For instance, the case of the Amathembu Chief Dalindyebo (S v Dalindyebo 2016 (1) SACR 329 (SCA)) who was charged for overstepping his authority and applying canonical laws that were created before constitutional South Africa. This is one of the reasons why disputes arise between the state and traditional leaders (Williams, 2010:2).

In this instance, the government has told itself that it would not stop at anything in trying to migrate traditional leaders into the constitutional dispensation. Traditional leaders may dispute some of the legislative changes, but it is important for them to know that the state has changed and that they are now led by the Constitution and the Bill of Rights, which states that all men are equal before the law. Therefore, there should be a drastic change in how they handle cases that appear before the traditional councils.

However, the state needs traditional councils because they help alleviate the heavy workload of local government in rural communities. Thus, it is important that they come together and find ways to resolve their disputes (Williams, 2010:4).

It is important to acknowledge that in many instances traditional courts are the most accessible courts in the country. They also have a mechanism, which allows for the rapid resolving of disputes of a nature that are understandable to African communities. This shows that rural African communities want a simple system of justice. Finally, it can however be stated that there are shortcomings in the South African justice system (Williams, 2010:4).

Tying up with what was said about traditional courts in the paragraph above, it can also be stated that they play a key role in alleviating the pressures the judiciary must deal with in rural communities. We also need to remember that South Africa has not

reached a point of development that allows all communities of this nation to have access to courts, as would have been expected. Therefore, it is important that in acknowledging that the realigning and modernising of traditional courts is of importance, it is essential for South Africa to have a functioning legal system.

Schedule 6 of the Constitution (1996) provides, in Section 16(1) that, “Every court of traditional leaders existing when the new Constitution took effect (Black Administration Act of 1927), in homelands and courts in the former TBVC (Transkei, Bophuthatswana, Venda and Ciskei) states, continues to function and to exercise its jurisdiction in terms of the legislation applicable to that office subject to –

- A. Amendment or repeal of the that legislation; and
- B. Consistency with the new Constitution, 1996.”

However, the Constitution (1996) in Section 106, provides for the administration of justice in South Africa and for the following courts, namely: the Constitutional Court, the Supreme Court of Appeal, the High Court of South Africa, Magistrates’ Courts and “any other court established or recognised in terms of an Act of Parliament ...”. When the CONTRALESA objected to the certification of the Constitution on the basis that the text did not recognise Traditional Courts, the Constitutional Court held that Traditional Courts are contemplated in the “other court” provision quoted above (Williams, 2010:4).

3.9 South African Law Commission Project

In January 2002, the South African government decided to establish a law commission whose responsibility was to visit rural communities and thoroughly analyse how traditional courts function in South Africa. The report was released in 2002 and it led to the passing of legislation that gave recognition to traditional courts in South Africa.

What followed that was the creation of legislation, which was called the Traditional Courts Bill, which came into use in 2008. It is a version of the parliamentary bill, which was set up through the Government Gazette number 40487 590, which was released on 9 December 2016 (Williams, 2010:8).

The Bill contains a section that stipulates the role traditional councils and chiefs must play in the justice system of South Africa. It further stipulates the authority that has

been dispensed to these traditional councils when they preside over matters that the government feels they can preside over within their traditional communities (Williams, 2010:8).

After an analysis of the report from the Commission, these were the observations:

- I. The Traditional Courts Bill currently in Parliament be processed and penned into law without any further ado;
- II. The Bill must be amended to make it clear that Traditional Courts are courts of law with powers to dispense justice in accordance with the African legal system;
- III. Traditional Courts like magistrates be granted immunity from prosecution when dispensing justice;
- IV. The government must commission codification of African customary law, both in the form of the Code and Procedure; and
- V. There must be a hierarchy of Traditional Courts as follows:

3.9.1 Family Court

The primary structure of a rural community is the family. The family is the first and main structure of any community; therefore they come before traditional courts in family matters. In this instance, we are looking at the primary structure, which is the primary structure of a family. Therefore, if there are any disputes that affect a certain family within the community these matters will be brought before the traditional chief for the Traditional Council. In these proceedings the head of the family come before the Council to present the matter, If it is a matter within a single family, it is quickly resolved. In some instances, if it is a case that involves two different families, the Council must step in and act as a mediator who must resolve the dispute between the two families. In such an instance, if the one family feels that they have been wronged by the other family, the Council steps in to resolve the matter and to create a peaceful environment for the community (Ntsebeza, 2004:78).

3.9.2 Village/Locality Court (Induna)

Sub-headmen and councillors composed by heads of families within the village determine the disputes and dispense justice in accordance with African legal system. Some of the disputes end at this level and others are referred directly to the

headman/kgotsana for consideration. Headmen/kgotsana courts also hear appeals from such courts. It is recommended that such courts must be courts of record and be provided with the necessary tools to perform their functions.

3.9.3 Headman's (Kgosana, etc.) Court

The Headman's Court, like that of the sub-headmen, is composed of a headman and sub-headmen of all localities within the area and wise persons appointed by the headman/Kgosana of the area of jurisdiction of the headman. There are cases that are directly referred to the headmen of the area and others, by way of appeal, from the sub-headman's court. This must be a court of record and be provided with the necessary infrastructure to dispense justice. Appeals from a headmen's court must be referred to the Traditional Authority/Council that has jurisdiction over the areas administered by headmen (Ntsebeza, 2004:78).

3.9.4 Traditional Authority/Council Court

The Traditional Authority/Council Courts are courts composed by a senior traditional leader and all headmen belonging to a clan and councillors appointed within the area of jurisdiction of the Traditional Authority/Council concerned. The court has jurisdiction to try all cases reported to it or referred to it directly from the headman's court directly or by way of appeal. In some traditional authorities, for example, the Barolong in North-West, the court is presided over by a person appointed from amongst the members of the Authority/Council who will lead the proceedings, and all concerned participate and watch the proceedings, and are those who must pass judgment. In other Traditional Councils a procedure like that of a magistrate with assessors is followed with senior traditional leader active in directing the proceedings. We prefer the Barolong practice as it retains the status (Ntsebeza, 2004:78).

3.10 The conflict between the judiciary and how matters are handled by the traditional authority

King's/Queen's Council

The King's/Queen's Court is composed of the King/Queen (as the case may be), senior Traditional Leaders and Councillors appointed within the area of jurisdiction of such kingdom. The court, like the Court of Traditional Council, must dispense justice in accordance with the African legal system. The proceedings will be chaired by one

of the traditional leaders and the King/Queen will oversee the proceedings and pronounce judgment (Ntsebeza, 2004:78).

High Courts of Traditional House

The Local House of Traditional Leaders should have the power to dispense justice within their area of jurisdiction and must be composed of selected members of the Local House, who must have the necessary qualifications and skills to deal with disputes. The status of the House should be similar to that of the Local Division of the High Court in the Province. The Court must be provided with the necessary infrastructure and personnel to dispense justice in accordance with the African legal system (Ntsebeza, 2004:79).

Provincial Division of High Court of Traditional Leaders

The Provincial Houses of Traditional Leaders in South Africa must be empowered to dispense justice within their areas of jurisdiction. The members of the Court will be selected from members of the House and must have the necessary qualifications and skills to deal with disputes. The Court must deal with matters from King's/Queen's and Local Houses and all matters conferred to it by law. The Courts would be accorded similar status and be provided with similar infrastructure, including personnel, like all Provincial Divisions of the High Court in South Africa (Ntsebeza, 2004:79).

Appeals Court of Traditional House Leaders Court

The National House of Traditional Leaders must be empowered to dispense justice in South Africa and must have powers and functions similar to that of the Supreme Court of Appeal. The Court must deal with matters referred to it by way of an appeal from Provincial Houses. The Court must be provided with the necessary infrastructure, including personnel befitting its status. Members of the Court must be selected from members having the necessary qualifications and skills (Williams, 2010:8).

Constitutional Court

The Constitutional Court established in terms of the Constitution (1996) must continue to have jurisdiction on constitutional matters. However, we are of the view that the Constitutional Court needs to be transformed to be able to deal with and be the final

arbiter on traditional issues. It is understood that justices must have the necessary in-depth knowledge of customary/indigenous law (Williams, 2010:8).

Advantages and disadvantages of traditional courts

Advantages:

Accessibility: The greatest strengths of traditional courts and councils are that they are easily accessible and are readily and visually found within the communities they exist. The people who stay in those communities do not have to travel long distances to have someone preside over matters that they have and would want to be quickly resolved. In these rural communities it does not matter who you are or how much wealth you have, you all appear before the council at the same level and the matter is resolved in a fair manner for both parties (Williams, 2010:11).

Cost: Aside from their ease of access, traditional courts are cheap to transport, and the courts charge minimal fees (payable in kind) that are easily affordable. These courts are also affordable because legal practitioners are not permitted inside (Williams, 2010:11).

Simplicity and informality:

Traditional courts are user-friendly for the people who inhabit communities because they are flexible, they are simple, and there is no need for extravagance as found in procedural courts. The majority of African traditional communities, or as we call them rural communities, do not understand the technicalities of the complications that are involved in the justice system that all courts provide; therefore, they feel more comfortable and more welcome when they appear before traditional councils or before the chief or the admin. This allows the application of justice to be welcomed by them because it is something that they understand and it is user-friendly because it is something that they have observed within the community and that they have used for many years (Williams, 2010:12).

Language:

Language is another element why rural communities prefer appearing before traditional councils or a chief. In traditional courts they use the language that is best

understood by all members of the community. There is a hearing and the whole community is welcome to come and listen to the hearing (Williams, 2010:12).

Disadvantages

Exclusion of legal practitioners:

Legal representation is prohibited in most countries where there are traditional or customary courts or non-traditional community courts. It is sometimes argued that the exclusion of lawyers from traditional courts is unjustified in that litigants should have the choice, if they so wish, to engage legal practitioners to represent them in these courts. In South Africa, Rule 5 of the rules of courts of chiefs and headmen prohibits legal representation in these courts. It has been argued that this is contrary to Section 35 of the Constitution, which provides:

(3) Every accused person has a right to a fair trial, which includes the right -

(f) To choose and be represented by a legal practitioner, and to be informed of this right promptly.

The appropriateness of this exclusion is discussed later in this dissertation (Williams, 2010:8).

No presumption of innocence:

It has been stated that the inquisitorial procedure whereby the chief and his councillors question a party to proceedings in traditional courts amounts to a presumption of guilt against a person accused of an offence before a traditional court and that such accused has to convince the court of his or her innocence. Thus, it is said that the right to silence, enshrined in Section 35 (3) (h) of the Constitution, is unknown in customary law and that a person unable to clearly articulate his or her position may prejudice his or her case (Ntsebeza, 2004:80).

Composition of the traditional court:

There are two possible constitutionally controversial issues relating to the composition of traditional courts: firstly, whether they are not discriminatory against women contrary to Section 9 of the Constitution, and secondly, whether chiefs and headmen are appropriately qualified to preside over courts in terms of Section 174 of the Constitution.

(a) Court composition is sexist: Women are not allowed to preside over or participate in traditional courts except as litigants assisted by men. Although women may hold a position in an acting capacity, chiefs and headmen are presided over by virtue of their position. There is a strong patriarchal influence on dispute resolution in traditional African society.

Our traditions and culture are constitutionally protected by the two most pivotal and important sections, Section 30 and Section 31. Section 30 states: “Everyone has the right to use the language and to participate in the cultural life of their choice, but no one may exercise these rights in a manner inconsistent with any provision of the Bill of Rights.” Section 31(1) stipulates, “Persons belonging to a cultural, religious, or linguistic community may not be denied the right, with other members of the community-

(a) to enjoy their culture...” However, Sub-section 2 of the same section qualifies the right in that it “may not be exercised in a manner inconsistent with any provision of the Bill of Rights”. The provisos to Sections 30 and 31 make the right to culture subject to the equality clause, which suggests that the exclusion of women from membership of traditional courts is unconstitutional.

(b) Lack of training in law – this is one of the major conflicts that has arisen between the traditional councils and scholars of the law. They believe that for justice to be truly served the person or persons presiding over the matter must have some form of legal training for them to fulfil the merits of true justice, which is fair and just. But this contradicts what Section 174 (1) of the Constitution states, namely that “Any appropriately qualified woman or man who is a fit and proper person, may be appointed a judicial officer”. It is arguable that traditional leaders are prima facie proficient in customary law, which they administer in their courts, and are therefore “appropriately qualified to adjudicate in matters of customary law”. However, the same cannot be said of their knowledge of common law or statutory law. There is thus merit in the argument that they are not qualified to adjudicate in matters relating to common law and statutory criminal law and that they should not have jurisdiction over such matters (Ntsebeza, 2004:78).

Should traditional courts continue to exist?

Given the above advantages and disadvantages of typical traditional courts, the question is whether in a modern democratic South Africa, these courts should continue to exist or should be abolished. There are several reasons why traditional courts should continue to exist. These include their constitutional position, the strong lobby of traditional leaders, and the continued usefulness in the practice of traditional courts.

The Constitution recognises and protects them

i. In the Certification case, the Constitutional Court confirmed that Section 166 (e) which refers to "any other court established or recognised by an Act of Parliament" accords recognition to traditional courts via the Black Administration Act No. 38 of 1927. The Court further held that Section 16(1) of Schedule 6 of the Constitution is more direct in its recognition of traditional courts when it states that "every court, including courts of traditional leaders ... continues to function".

ii. Thus, it may be said that the framers of the Constitution intended the continued existence of traditional courts. This, however, does not mean that they must remain unchanged in the same form as provided for under the Black Administration Act of 1927. Section 2 of Schedule 6 says that all law that was in force when the new Constitution took effect continues to be in force, subject to any amendment or repeal. Thus, traditional courts may be safely reorganised under this section by amending or repealing and replacing the Black Administration Act and statutes of the former homelands that regulate traditional courts.

iii. As administration of justice is neither within the concurrent functional areas of national and provincial legislative competence nor exclusive areas of competence of the provincial legislatures, it must be that the national legislature has the residual competence to amend or repeal and/or pass new laws regulating traditional courts.

iv. Strong lobby of traditional leaders

v. Traditional leaders in general support the continuation and even strengthening of traditional courts presided over by chiefs or headmen and their councils. They have lobbied for the improvement of their status and role in the new South African order at various fora, including in the Parliament, at conferences, in public addresses and in the media.

vi. For example, in several statements, CONTRALESA has expressed its position on the matter saying traditional courts must not only be recognised but must be specifically entrenched in the Constitution. Thus, in its objection to the certification of the 1996 Constitution, CONTRALESA stated: “The chapter dealing with courts does not make provision for customary courts that have been in existence from time immemorial. We are of the view that these courts like other courts of the land should be recognized in the Constitution”.

vii. In its submission to the Constituent Assembly Ad hoc Committee on Traditional Leaders, CONTRALESA (KwaZulu/Natal branch) urged that chiefs should be accorded civil and criminal jurisdiction in respect of civil claims arising out of indigenous law and customs and in respect of certain criminal offences determined by the Minister. This position was reaffirmed by the then President of CONTRALESA, Chief Patekile Holomisa.

viii. The former Northern Transvaal leaders made a case for the retention of traditional courts as follows: “Traditional courts are closer to the people and enjoy respect in their areas of jurisdiction; as a result, they should continue to exist. Their existence will to an extent assist in the reduction of workload faced by our magistrates' courts.” The leaders also stressed the value of traditional courts in performing a mediation function and in promoting the reconciliation of parties.

ix. In a strongly worded statement called the "Manifesto of Constitutional Proposals and Political Commitments for all traditional leaders of South Africa" a delegation of Amakhosi of KwaZulu-Natal called for constitutional recognition of "tribal courts and the system of jurisdiction, enforcement and/or sanctions of traditional and indigenous law".

x. At a meeting of a committee of traditional leaders nominated by a conference of traditional leaders from the Eastern Cape, North West, the Free State, KwaZulu-Natal and Mpumalanga in September 1996, it was resolved “to make representation to the Ministry of Justice to recognise customary courts as courts of law”. This was ascribed to the view that since the traditional courts were not integrated in the national judicial system, they were not sufficiently protected. They called for greater recognition because they argued, this was “a judicial service which remains accessible and available to tribal communities for free”.

xi. At another meeting of traditional leaders of the former Northern Transvaal organised by the Commission on Constitutional Affairs to solicit views on traditional authorities, the leaders expressed their view that traditional courts should continue to exist as before because “formal courts are in most cases inaccessible, expensive and incomprehensible”. They further stated that chiefs’ powers in respect of the courts should not be limited.

xii. The National Development and Restoration of Traditional Customs Forum (NADERTRAC), another organisation associated with traditional leaders, called for the continuance of traditional courts. Its main arguments were the following:

- a) traditional courts provided justice to poor communities whose members could not afford attorneys’ fees,
- b) no legal representation was necessary as the procedure was so uncomplicated that anyone could prosecute and defend a case, and
- c) the language and procedures of ordinary courts were not understandable to illiterate people. NADERTRAC recommended that, in order to strengthen the courts, workshops to provide legal training for chiefs and headmen should be organised and that the decisions of the traditional courts should be recognised and regarded as valid by the High Courts.

xiii. The KwaZulu-Natal government states: “The uncertainty on the status of traditional jurisdiction is likely to undermine the administration of justice and create havoc and confusion in place of the present order and social stability”. It is such withholding of cooperation by the traditional leaders in Zimbabwe which led the state to capitulate to demands of chiefs to return their adjudicatory powers, which were abolished in 1981 and were re-established in 1990 (Callinicos, 1999:13-14).

Traditional courts still serve a useful purpose

The simplicity and flexibility of traditional courts is the reason traditional communities want to utilise them. They are free, they are accessible, they are not intimidating and they are very quick – this is good for our communities in rural South Africa. This is not what happens when they go before magistrate courts within their communities. Firstly, they travel long distances, they must pay, and these courts are not as flexible and accommodating as the community would like them to be. What traditional courts do is to reduce the workload of magistrates courts because if all the people in the community

approached the magistrates courts, these courts would be overwhelmed by all the cases (Callinicos, 1999:13-14).

3.11 The role legislation plays in the local government and traditional authority relationship

Little opposition to traditional authority and traditional councils

Traditional courts seem to be well received in the literature, with the exception of the Regional Authority Courts (discussed later in the study), which will probably grind to a halt. The Rural Women's Movement opposes the continuation of traditional courts and has stated explicitly that traditional leaders cannot have judicial authority. Rather, it argues, traditional leaders' courts should be regarded as arbitration forums. According to the Movement, traditional courts use their judicial powers "without following the rules and without being accountable." It also accuses these courts of being biased towards women (Callinicos, 1999:17).

Always a controversial subject, the question of traditional leadership under a Bill of Fundamental Rights was the focus of a wide variety of views. Agreement was only over the principle that traditional leadership, like indigenous law, should be under the superintendence of the Constitution and the Bill of Rights, in accordance with Constitutional Principles XIII (Callinicos, 1999:13-14).

It has always and will always be a debate as to the application and the movement of traditional leadership and the principles of the Bill of Rights and the application of the Constitution. This is because in many instances the law is applied first and the authority of traditional chiefs and tier councils will always remain a point of contention. It is also in this regard that there should be the involvement of scholars and the judiciary, and traditional councils so that we can have a proper migration of traditional courts within the framework of the judicial system (Ntsebeza, 2004:78).

The parties did not address the meaning of "subject to the Bill of Rights" directly: there appeared to be a general assumption that there was enough language in the Interim Constitution to establish the subjection of the institution to the Bill of Rights. Problem areas might well lie in the view expressed, for instance, by the Zulu King's Council (and heard frequently at the Public Hearing on Traditional Leaders) that the Bill of Rights in its pure Western form may not be suitable for the South African reality and

that it may have to 'absorb' certain positive aspects of the traditional way of life. Comments on the negative aspects of traditional leadership in a human rights context revolved around women, equality, and hereditary succession (Callinicos, 1999:13-14).

Traditional authorities should continue to carry out the responsibilities entrusted to them by current legislation and as outlined on page 11 of the Draft Document. To enable them to do their work with due regard to accountability and efficiency, the traditional authorities must be constituted of democratically elected councillors in addition to traditional leaders and councillors. In other words, traditional authorities must be recognised as the primary tier of rural local government (Callinicos, 1999:14).

The limited role and representation accorded traditional leaders by the Municipal Structures Act is rejected. Heads of traditional authorities must be full and automatic members of local councils, which have jurisdiction over their areas of rule. It is thus proposed that District or Regional Municipal Councils must be established and be constituted of representatives from the town councils and the democratically constituted traditional authorities. The relationship between municipalities and traditional authorities must be one of co-operative governance, as outlined in the Constitution (Callinicos, 1999:14).

Furthermore, the government should expedite the process of the recognition of courts of traditional leaders in order to remove constitutionality or otherwise of their status. Criticisms levelled at these courts are based on ignorance and the inability of people to interpret their manner of operation as being consistent with fundamental human rights.

The courts are conducted democratically, in an open and transparent manner. The peers of the litigants conduct the trial because everyone is free to examine and cross-examine the witnesses. Even lawyers are free to participate if they do so as members of the public and in accordance with the procedures of the court (Ntsebeza, 2004:81).

Records of the proceedings and evidence should be kept in these courts using modern technologies. To increase their awareness of and adherence to constitutional and other laws, the presiding officers and council members must be trained. This could be accomplished by reviving the original Schools for the Sons of Chiefs and Headmen and making them available for in-service training for traditional leaders and councillors.

In order to work with traditional leaders, the councillors should be elected democratically (Ntsebeza, 2004:83).

People should be able to distinguish between politicians and traditional leaders when dealing with public office bearers. This is because each of these careers pertains to different protocols and/or customs. In order to value their opponents as less valuable, political parties perpetuate division by seeking to diminish their esteem in the public's eyes. A traditional leader is however seen as a tool for peace, unity, and progress. They represent the people so that they are able to develop them (Ntsebeza, 2004:83).

A traditional leader is not only an advocate of all the things he represents, but also a politician since he governs his people. In order to be effective leaders, traditional leaders should avoid active involvement in party politics while in office. Since the office of traditional leadership is one of governorship, structures such as the Houses of Traditional Leadership and Traditional Authorities must be properly equipped in both material and other respects so that traditional leaders can participate in governance matters in a manner that does not compromise their status (Ntsebeza, 2004:83).

For now, however, it would be in the public interest for traditional leaders not to take part in party politics because politicians have yet to determine their role, status, and functions. History shows that politicians have never valued traditional leadership for its own sake, so they cannot be trusted to determine the fate of traditional leaders (Ntsebeza, 2004:83).

The Houses and traditional authorities must be appropriately empowered so that traditional leaders can discharge their duties impartially. After they have accomplished this, it will be time to consider whether party political affiliation is appropriate or not. Their affiliation with political organisations is not required since they are representatives of their communities. Despite the fact that this issue is easy to discuss, it is difficult to maintain (Ntsebeza, 2004:84).

3.12 The purpose of legislative organisations representing Traditional Leaders

There is a need to revisit and to realign Chapter 12 of the Constitution (1996) with the provisions of Chapter 11 of the Interim Constitution. Regarding the number of officials and representatives of the Provincial Houses, there is meant to be a new way of how

the selection of the representative of all the traditional regions of a province will be done (Callinicos, 1999:17).

Decisions made by the Provincial representatives of the National House are supposed to seek responsibilities from their Provincial Houses on all relevant issues before committing themselves to them. They should in turn report regularly to the Provincial Houses on the decisions taken. The National House should establish links between itself and the regional authorities by conducting regional visits, together with the Provincial Houses. The Traditional Councils should also send their representatives with what is needed to finalise the aspects of what their communities need and bring it to the council (Callinicos, 1999:17).

The vast majority of traditional communities have yet to enjoy the benefits of freedom. It is also evident that no comprehensive rural development strategy exists. There should be a ministry dedicated to traditional affairs and rural development to streamline their affairs and ensure their smooth running. Moreover, a rural development strategy would need a structure that involves the development and implementation of such a strategy (Callinicos, 1999:17).

There must be consistent communication between the Portfolio, Select and Standing Committees of Parliament and Legislatures and the Standing Committees of the Houses of Traditional Leaders. By doing so, the issues at hand could be understood by everybody. In matters affecting the leadership of traditional communities and traditional leadership, the Parliament or the government should not adopt any laws or policies before consulting the Houses (Callinicos, 1999:18).

In addition, with the advent of the new constitutional order, it was realised that it would only be possible to transform the legislation existing on 27 April 1994 over a period of time. Despite its continued existence under the democratic era the traditional court dispensation continues to experience constitutional and operational challenges (Callinicos, 1999:18).

Allegations of abuse of the conferred judicial authority by some traditional leaders, patriarchal stereotypes, and the prevalent exclusion of women in the traditional court structures and bias against women litigants or parties to the proceedings continue to gloom the picture over these courts. Challenges arising from the conflicts of the system with some constitutional values overlap with the formal judicial system, fragmentation

and inconsistencies, and the lack of enforceability of traditional courts' decisions (Callinicos, 1999:18).

As it currently stands, we can agree that the current framework of the relationship between the state and traditional leaders and their councils is currently not feasible. It is important that the framework of the current legislation needs to be changed because, as seen above, it is too vague and leaves much to be desired as the official aspect to be followed (Callinicos, 1999:19).

3.13 Conclusion

This chapter has argued that traditional authorities are able to adapt to any environment; hence, this has led to their survival. When they realised that their existence is being threatened, they adapted, and allowed themselves to serve the colonial and apartheid governments. They also served as paid agents and implemented the policies of the new arrivals, although they were putting themselves at risk of being rejected by their communities in future. They did not hesitate to form alliances with the colonial and apartheid governments when it was a matter of their survival (Callinicos, 1999:17).

However, the colonial and apartheid governments were able to manipulate the traditional authorities to gain access and control the black masses through them. The colonial and apartheid governments were able to implement their policies because they had the co-operation of traditional authorities. Traditional authorities, instead of representing their subjects, assisted these governments to suppress the masses. Yet, traditional authorities also benefitted from this co-operation because the colonial and apartheid governments granted them the sole rights for the allocation of land.

The co-operation with the apartheid government provided an opportunity for the implementation of homelands in South Africa. A total of ten homelands, of which four were independent homelands, were created in South Africa from 1976 to 1981. These homelands were the product of negotiation with traditional authorities, while the communities were opposed to them. There is no doubt that in running homeland governments, traditional authorities gained administrative capacity. This expertise could assist the new democratic government, which did not have administrative capacity to run the country (Callinicos, 1999:18).

Turning to traditional courts, various aspects of these courts were examined to identify areas that required reform, such as their structure, jurisdiction, and procedure. A traditional leader's court should be a court of law with the ability to enforce its own judgements, as far as structure is concerned. Even though traditional leaders would continue to preside over the courts, a radical suggestion was to have councillors elected by the citizens of the area of jurisdiction to sit with the leaders and infuse a sense of popular justice into these courts (Callinicos, 1999:18).

There is some controversy about the criminal jurisdiction of traditional leaders' courts, but the conclusion is that these courts should only handle very minor criminal offences and that they should not expand their jurisdiction. Legal practitioners should also be excluded from these courts due to the possibility of creating more problems than they solve. These courts should also be a court of record, as another departure proposal. It must always be remembered that since the commencement of the new Constitutional dispensation, the principle of parliamentary sovereignty/supremacy was abolished. This watershed event also heralded a dispensation that recognised South Africa as a sovereign, democratic state.

CHAPTER 4: TRADITIONAL AUTHORITY AND SOUTH AFRICAN GOVERNANCE AND HOW THEY FUNCTION IN LINE WITH SECTION 12 OF THE CONSTITUTION

4.1 Introduction

The Constitution (1996) established a National Council of Traditional Leaders and Provincial Councils of Traditional Leaders. These councils allowed traditional leaders to play an advisory role in matters relating to traditional leaders and customary law in national and provincial governments.

This chapter will serve as recognition of African customary law as part of the law of South Africa. The administration of justice is a national competence, implying that there are no functional areas relating to the administration of justice that are devolved by the Constitution to the provincial or local spheres of government. Provinces have legislative competence on matters relating to indigenous and customary law, subject to Chapter 12 of the Constitution, and have no legislative competence on matters relating to the administration of justice as provided for in Chapter 8 of the Constitution.

This chapter further deals with traditional leaders and their role in South Africa's democracy. The role and status of traditional leadership, according to customary law, are recognised. It allows for traditional authorities to function within the framework of the country's legal system. The courts can apply customary law in appropriate cases if that customary law is consistent with the Constitution. Traditional leaders and traditional councils are given official recognition by different national and provincial laws in South Africa. By recognising these institutions, these laws give traditional leaders and councils certain legal powers, which include the powers to manage the resources and financial affairs of specific traditional communities for the benefit of community members.

The adoption of the Interim and subsequently the final Constitution is often lauded as the major milestone in the attainment of freedom in South Africa. As important a milestone as the adoption of these two Constitutions was, however, it is arguably the governmental structures that these Constitutions established that have been most vital in ensuring that South Africa continues to develop as a constitutional state; for example, a state in which political power is restricted in various ways and in which the Constitution serves as the standard for the legitimate exercise of public power.

The separation of powers is the basis for an institutional, procedural and structural division of public power to create conditions that place human rights at the centre of society. Both from an institutional and structural point of view, such a constitutional principle is an essential aspect of promoting and securing the entrenchment of South Africa's nascent constitutional democracy. The separation of powers, as well as democracy and the rule of law are therefore linked to the constitutional project of creating a society founded on the recognition of human rights, peaceful co-existence, and development opportunities for all South Africans.

Chapter 11 of the Constitution states that the institution, status and roles of traditional leadership, according to customary law, are recognised. The government acknowledges the critical role of traditional leadership institutions in South Africa's constitutional democracy and in communities, particularly in relation to the rural development strategy. It therefore remains committed to strengthening the institution of traditional leadership.

In the more than two decades of South African democracy, the institution of traditional leaders has been surrounded by controversy. Democracies have repeatedly been cast as inimical or undemocratic because of their nature and practices. Traditional leaders are recognised by South Africa's liberal Constitution, bringing about differing views. It has drawn the attention of civil societies and human rights commissions, but the undefined nature of traditional leaders' roles in the South African Constitution has also continued to displease the institution of traditional leaders and the Congress of Traditional Leaders.

This chapter will focus on the implementation of the legislation that was developed to support Chapter 12 of the Constitution. It will look at the implementation at the local government level, where communities are affected. The legislative tools of a few local governments will be utilised to justify the research.

This chapter will also engage in a detailed analysis of the import and impact of the doctrine of separation of powers in the development of South Africa's constitutional law. Before moving to consider exactly how the doctrine has manifested itself in the South African context, the first part of the chapter will briefly consider the doctrine's origins and its profound influence on the development of the modern democratic state premised on the idea of limited government. This analysis will seek to show that the

doctrine's success as a means of establishing a predictable set of structured constitutional arrangements has resulted in a growing tendency to emphasise the doctrine's form over its substance.

Moreover, traditional leaders insist on clarifying their role as recognised institutions of authority and, in some cases, on revising their constitutions. Through the Traditional Courts Bill, traditional leaders have pushed to exert absolute control over legal matters at the local level. A major concern of South Africa's democracy during its initial phases was whether it maintained existing institutions of power or established new ones, which were similar to any other form of regime at an initial stage. In democratic South Africa, the institution of traditional leadership however remains relevant and important for the development of rural communities (Wamala, 2006:435).

In addition, it defends the premise that traditional leadership is a sine qua non for development in rural areas. Wamala (2006) pertinently asks whether it is possible to talk about democracy in a traditional African setting. He further questions, as do many South Africans, whether it is possible to even begin discussing traditional leadership in the context of democracy in the sense in which democracy is understood by many today (ibid.). For many people, more so in the newly attained political democracy of South Africa, democracy is defined as holding regular elections in which leadership is elected on the basis of one person one vote. Clearly, this is not the case in the way traditional leaders assume authority or leadership positions (Wamala, 2006:435).

4.2 The question of why there are shortcomings in regulating traditional leaders and their councils

In democratic South Africa, traditional leaders have been and continue to be a contentious issue in both the political and socio-economic spheres. It is because of the ambiguity in their previous local administrative roles under colonialism and the apartheid era that their credibility has been adversely affected in promoting democracy and development in rural areas. The apartheid government wanted them for political reasons "... prior to 1994 traditional leaders strengthened as political leaders and were drawn into the homeland party system and legislatures in a co-option process that undermined their traditional authority" (Picard & Mogale, 2015:228). Although they are recognised by Chapter 12 of the Constitution, the legacies of both pro-traditional leaders and those who aimed to reduce them into paid servants of oppressive regimes

continue to shape dialogue about their role in democratic governance (Picard & Mogale, 2015:228).

Firstly, during the epoch of colonialism, this legacy of undermining African traditional leadership structures through rural chiefs prevented this institution from regaining its role as the absolute power of rural areas. African societies under traditional leadership have historically been governed by indigenous institutions and authorities, just as ancient traditional societies arranged and managed their political, economic, and social lives in their own way with distinct forms of authority. Compared to Western societies, these societies possessed a structurally different system of state formation and governance based on African traditions and culture (Walker & Cousins, 2015:17).

Africa's traditional societies interpreted the world and human interactions based on a concept of African socialism that emphasised plurality and interdependence. Therefore, African social, economic, and political affairs have traditionally been governed by traditional leadership through chiefs. As a result of this epoch, the Chief's role in South African society began to be negatively impacted, which explains why contemporary rural administrative dynamics concerning their power over land-related matters in traditional communities remain highly controversial (Nyerere, 1966:9).

Africa's indigenous governance system changed with the arrival of white settlers. White settlers first aimed to dominate their own people by using traditional leaders. Traditionally, leaders were revered among their people, according to some scholars, as they controlled the government. Precolonial, colonial, apartheid, and post-apartheid leadership periods can all be classified historically. This is one of the main reasons why the integration of the constitutional dispensation and traditional leadership has not truly lived up to its potential (Koenane, 2007:6).

The fact that during the apartheid and colonial era the government dealt with the Traditional Leadership Councils or Indigenous leaders by giving power to preside over their communities without involving themselves is what some of these councils are searching for and it seem this is not possible because of Constitutionalism. Due to the assignment of the laws of former homelands to various provinces in 1994, different statutes have, to date, been applicable in various parts of South Africa, which has made many Indigenous leaders feel uninvolved in the running of the state, which they previously used to do in the former homelands (Picard & Mogale, 2015:12).

Traditionally, traditional leadership was seen as important in precolonial times; however, I believe it continues to be so today. It was also the institution's responsibility to deal with socio-political and economic matters affecting their people in the past, aside from preserving customs and culture. As we consider this in today's context, traditional leaders may have an important role to play in addressing a variety of socio-political, economic, and cultural issues (Koenane, 2017:6).

4.3 Customary Law in Africa and its role

Customary law, the traditional law indigenous to a region, continues to regulate many areas of people's lives in Africa. For example, some African constitutions now enshrine the right to culture and oblige courts to apply customary law where applicable. Elsewhere, constitutional and statutory law has superseded most or all customary law. Yet, even in situations where constitutional law, statutory law and common law have superseded it, customary law may nevertheless govern in certain areas, such as family relations (Nyerere, 1966:15).

For example, in many places, the requirements for marriage, the rights and duties of husbands and wives, the obligations toward and custody of children, the ownership of property acquired during marriage, and many other aspects of family life are governed by customary law. Moreover, even where conflicting constitutional or statutory law exists, lack of access to legal resources may mean that, as a practical matter, customary law still governs. Additionally, the persistence of longstanding expectations and social practices informed by customary law has given rise to many problems in enforcing contradictory statutory law (Koenane, 2007:19).

The arrival of the Europeans led to state laws being abolished and modified, and they rigidly regulated the application of indigenous laws. Consequently, customary law was born as a result of coercive changes in normative behaviours among Africans. There was, however, a dissonance between indigenous law and state law that led to the creation of customary law. African constitutions are the ultimate expression of this dissonance, which, as imposed products, are among the most notable (Koenane, 2007:19).

Moreover, state laws were transformed into European laws. During colonial rule, people adapted normatively to the resulting socioeconomic changes, resulting in the creation of customary law. State laws had the greatest influence on these changes.

We will show how the laws, courts, and law enforcement enforced these socioeconomic changes. We should therefore explain the importance of legal transplant for Sub-Saharan Africa's interaction of laws in order to illustrate the proposal for rethinking the interface of customary laws and African constitutions (Koenane, 2007:19).

In countries like Ghana, they have made acknowledgements in the ways the Constitution defines customary law. Traditionally, customary law is mandated by the government, which affirms social changes that influence traditional society and contribute to the dynamism of customary law. The right to culture, communal life, equality between women and men, and matrimonial property provisions show what colonialism has done to indigenous African laws (Koenane, 2007:20).

4.4 The effects of culture, traditional institutions, and rural life

It was shown previously that precolonial African society differed dramatically from contemporary African society. In order to cope with radical social changes, the protection of culture and traditional institutions depends on the respect of people's rights, as well as the guarantee of dignity and non-discrimination. Agrarian tradition and modernity should be incorporated into constitutional frameworks. Therefore, indigenous laws will be adapted to socioeconomic change as a result of the highest law of the land (Koenane, 2017:13).

To promote traditional dispute resolution mechanisms in land conflicts, Kenya's Constitution of 2010 established the National Land Commission. As noted in Article 11(1), Kenyans are recognised by the Constitution as a people and nation whose culture was shaped by centuries of history. In addition, Article 56 mandates the state to develop programmes that ensure the cultural development of minorities and marginalised groups. It provides unparalleled provisions for courts and tribunals, including arbitration, mediation, reconciliation, and traditional dispute resolution mechanisms, to be guided by the principles of alternative dispute resolution.

Following the industrialisation and land appropriation policies of British colonialism, Ghana stands out from the other countries in its concern for women's economic power loss. According to Ghana's Constitution, Section 36(6) (7) requires the state to "take all necessary steps" to "ensure the full integration of women into the mainstream of economic development in Ghana" and to "ensure" their ownership and inheritance

rights. As per Section 39, the state has an obligation to adapt customary and cultural values to meet the growing needs of society, while Section 270 entrusts traditional institutions with the responsibility of guiding the development of customary law itself (Koenane, 2017:13).

4.5 Criticism as to why Indigenous leaders cannot be part of democracy

Traditional leaders were vehemently criticised for their inclusion in South Africa's democratic structures by many scholars who argued that, as long as there was no clarification regarding the role, functions and powers of traditional leadership, both the Interim and final Constitutions simply incorporated a clause recognising the institution. Changes that took place after colonialism, after apartheid, and particularly during democratic South Africa required administrative institutions to demonstrate their relevance and legitimacy. It is therefore conceivable that a democratic institution could be abandoned if it cannot demonstrate its relevance to democratic dominion. Among the changes in African societies, it has been shown that traditional ideas and institutions were abandoned and modified (Ntsebeza, 2002:4).

Despite severe hardships under colonial forces, traditional leadership has shown a remarkable level of resilience that colonial powers were not able to break. The apartheid system also used the same strategies of usurpation in order to usurp power from the institution. Colonialism, however, was not the last attempt to usurp power from an institution.

The next section will discuss the apartheid regime's efforts to regain full control over the institution, rendering it completely useless in the eyes of the people under its jurisdiction, as well as the world as a whole. It is ethically important to recognise that the traditional leader does not only hold a position but possesses a moral status: in the case of a male, his role is that of a father, and in that of a female, her role is that of a mother (Koenane, 2017:5).

4.6 Chapter 12 of the Constitution of South Africa and how it affects traditional leadership

It has always been stated that power arrests power, which means there must be a balance on all levels of government. Contrary to the ideological view that traditional leaders are a one-man show, the institution of traditional leadership is an accountable

structure. Consensus, as we have come to understand it, works better as a system than the modern liberal democracy. Consensus constitutes collective opinion and has nothing to do with the ideology of majority rule. The articulation of an explicit doctrine of separation of powers as a distinct explicatory theory of governance is thought to have its origin in the political philosophy of the age of Enlightenment in 17th century Europe, when political thinkers started to challenge the unlimited might and arbitrariness of an absolute monarch. However, its basic aim is much older; for example to find a structure of government that prevents the accumulation of too much power in one institution. Mitigating power by way of diffusion has been a feature common to many societies for ages, even when they have followed a strictly hierarchical system of government (Bennett & Murray, 2005:26).

4.7 Constitutionalism and Traditional Authority – how are they to co-exist through the application of separation of powers

The traditional African democracy cherished the ideal of freedom of speech more obviously than professed democracies. “This is clearly expressed in the Sesotho adage, which states: *moa kgotla ha a tsekisoe*. A direct translation of this adage is: He that falls in the court environment or setting cannot be faulted. This maxim could be more clearly expressed as follows: The one who advances an unpopular viewpoint should not be faulted for his opinion” (Koenane, 2017:3). The context within which this expression is meaningful is a traditional court (*kgotla*), where every participant was allowed to express his/her view (without fear), even if those views were not favourable to all, and the person who expressed those views could not be held blameworthy (Koenane, 2017:3).

The modern notion of separation of powers as a foundational concept in constitutional law is often said to be premised in organisational theory and therefore primarily concerned with the design of ideal structural and institutional arrangements. Fuelled further by the adoption of formal written constitutions encapsulating constitutional rules and arrangements as a *modus vivendi*, separation of powers is often depicted as a depoliticised, and purely formal, justificatory, or descriptive theory of governance. It is in line with such formalist notions that a 'pure form' of separation of powers has evolved. The doctrine in its 'pure form' has been described as requiring the strictest adherence to the following three principles:

- the division of governmental power into the three branches: legislative, executive and judicial, with no control or interference by one on the other;
- the separation of functions; and
- the separation of personnel (Bennett & Murray, 2005:26).

This pure form of separation of powers emphasises negative limits on the powers of political actors in a society. The existence of several autonomous decision-making bodies with distinctive functions is considered a sufficient safeguard against the concentration and abuse of power. Simply by allocating different functions to different people, each of the branches will be a check on the others and no single group of people will be able to control the machinery of the state. To a certain level this has also been used against the traditional leadership and their councils since there has never been a proper structured legislation to hold them accountable (Bennett & Murray, 2005:26).

4.8 The traditionalists and modernists and their view on Chapter 12 and its application

A polarised argument is raging between traditionalists and modernists regarding the role of traditional leadership in democratic systems. Evidently, they represent two extreme divergences in a sense. There is a disagreement between the two schools on the institution of traditional leadership. Therefore, it is argued by traditionalists that the institution is a legitimate institution based on more democratic principles compared to the modern system of government. It is traditionalists' belief that the institution could still play an important role that underpins their argument. Traditionalists further argue that traditional leadership possesses democratic characteristics, which makes it compatible with modern democracy. This group of scholars thus believe that traditional leadership can be integrated with the modern democratic system of governance (Bennett & Murray, 2005:26).

A continuing conversation about institutions that should be responsible for local governance continues to focus on the abandonment or transformation of traditional leadership institutions. Since traditional communities and the former Bantustans had suffered mass land displacements and still cling to their traditional ways and traditional leaders, a larger population is usually regarded as a threat. In South Africa, traditional leaders are being challenged to maintain their influence at different levels of

government in response to an outcry for democratic institutions. Consequently, the government and local institutions have continually conflicted over roles and responsibilities (Bennett & Murray, 2005:26).

The South African government has adopted the concept of decentralisation as a major strategy for enhancing efficiency, ensuring equitable access to services, and ensuring greater participation and responsiveness to citizens as most democratisation programmes faced controversy in newly independent states on the African continent. There is a historical tangled relationship between modern and indigenous modes of life, which is revealed by contradictory views between traditional authorities and democratic governmental authorities at grassroots levels. It is the effectiveness of an institution's role in policy-making that defines its power, and the government should recognise that role for any institution, democratic or undemocratic. For democratic South Africa to achieve desirable outcomes by decentralising government powers, the struggle for power and recognition must not compromise the opportunity for local institutions to participate in decision-making processes (Koenane, 2008:12).

There is a strong belief among many scholars that traditional leadership should be incorporated into modern governance systems. Traditional leaders are completely sceptical about integrating into contemporary governance structures, while modernists are entirely indifferent. Women and young people are viewed negatively by modernists because they perceive tradition as outdated, patriarchal, and oppressive (Ntsebeza, 2004:12). Furthermore, they consider the institution irrelevant in an era of democracy. Traditions of African authority are considered obsolete by modernists or scholars of the modern era. The main argument of modernists is that the institution of traditional leadership was distorted and corrupted by colonial powers. Accordingly, they object to the institution's integration into modern democracy (Ntsebeza, 2004:12).

In pre-colonial Southern African societies, no separation of powers technically existed, because traditional leaders performed all functions of government, including dispute resolution. However, traditional leaders were always expected to consult with an advisory body that aligned them with the principles of the colonial government (Bennett & Murray, 2005:27).

As a result of the new constitutional recognition of this institution and the decentralisation initiatives of the democratic government of South Africa, democratic

institutions are not only complex to operate, but also present the possibility of conflict between traditional institutions and democratic institutions. Government agendas frequently reach crossroads at which traditional leadership is abandoned, together with communities in rural areas and civil society organisations. The institution of traditional leaders is constantly confronted with the challenge of observing the Constitution and ensuring democratic procedures (Ntsebeza, 2004:14).

4.9 The demography of traditional leaders, their authority and the authority of government

There is an argument to be made that democracy is compromised due to the recognition of traditional leaders who inherit their position through birth and are not elected like any public servants in a democratic system. In the absence of aforementioned practices, challenges like gender equality (inclusion of women) and the democratic election of leaders and/or public representatives in traditional councils still confront this institution.

The devolution of power to the local level of government that has been employed by the South African government to ensure effective local governance after 1994 has its challenges regarding the management of natural resources and institutional participation in the country. This has been further confronted by pitfalls, especially in traditional communities, as different existing forms of authorities commonly aim to assume absolute power in managing and administering rural development. This has contributed to various root causes of local municipal problems that have been acknowledged and stipulated by the Department of Cooperative Governance and Traditional Affairs. These difficulties range from political conflicts, limited revenue and lack of municipal capacity to grant dependency and the lack of accountability systems (COGHSTA Turning Around Local Government, 2010).

4.10 The Constitution and the National Council of Traditional Leaders and Provincial Councils of Traditional Leaders

The Final Constitution does not provide a description or definition of what legislative authority is, but from Constitution in Section 44(1) it can be gleaned that the exercise of legislative authority entails the power to make laws, to amend the Constitution, and to assign or delegate legislative powers to other legislative bodies in another sphere of government. This is not something that the government has fulfilled for rural

communities who are attached to their community leaders, and traditional leaders and Traditional Councils exist in rural communities as the form of leadership that they understand and are aligned with. Plenary legislative competence is conferred by the Final Constitution on Parliament, although there is an important substantive constraint on the exercise of legislative authority in that Parliament must act in accordance with, and within the limits of the Constitution in Section 44(4) marking a clear departure from the pre-1994 Westminster system of government (Bennett & Murray, 2005:29).

The Constitution states that the institution, status and roles of traditional leadership, according to customary law, are recognised. The government acknowledges the critical role of traditional leadership institutions in South Africa's constitutional democracy and in communities, particularly in relation to the Rural Development Strategy. It, therefore, remains committed to strengthening the institution of traditional leadership. To this end, numerous pieces of legislation have been passed and various programmes implemented to ensure that traditional leadership makes an important contribution to the development of society. The Department of Cooperative Governance and Traditional Affairs is also working on a range of issues, including policies on unity and diversity, initiation, traditional healing, traditional leaders' protocol, family trees, the remuneration and benefits of traditional leaders based on uniform norms and standards, and involving the Khoisan people in the system of governance in South Africa (Koenane, 2008:12).

Parliament extended the term of the Commission of Traditional Leadership Disputes and Claims from 2016 to 2020 to allow the commission time to finalise outstanding disputes and claims, and deal with the 320 traditional leadership disputes and claims per year that were envisaged. This is because it was found by the Commission that since the inception of the new Constitution the Traditional Councils, their leaders and their communities are not impressed by the limitation of their authority by sections like Section 12 of the Constitution (1996). This is because when the separation of powers was established in the Constitution the rural communities received the hard end of the stick and lost all the authority that they previously held (Bennett & Murray, 2005:29).

4.11 The locus standi of traditional leaders and their councils

It is unfortunate that some traditional leaders and councils have interpreted their official recognition in terms of these laws to mean that only they have the right to call meetings

of the traditional community, access information about community revenue or assets, and have the sole authority to represent the traditional community. These traditional leaders and councils seem to believe that their official recognition in terms of the law protects them from community scrutiny and oversight. This interpretation is at odds with the participatory nature of customary law and can be criticised for undermining indigenous accountability mechanisms and for closing down the democratic space for community members to participate in decisions about their land, resources and finances. The Constitution specifies in Section 211 that the recognition of traditional institutions and leaders is according to customary law, and subject to the rights enshrined in the Constitution (Koenane, 2017:10).

For instance, traditional councils have used their official status or recognition to prevent members of traditional communities from organising meetings to hold traditional leaders accountable. In court, traditional councils do this by arguing that because they are the official traditional council, other people in the community do not have the legal standing or *locus standi* to demand accountability or convene meetings for members of the traditional community. For example, in the North West High Court there have been court cases that have upheld this interpretation of the legislation and prevented communities from taking traditional leaders or councils to court. There have also been a number of conflicting court decisions in relation to the official recognition of traditional councils and the *locus standi* of members of traditional communities, making this issue complex (Koenane, 2017:10).

Despite this debate, one thing can be agreed upon: traditional leadership in Africa has enjoyed legitimacy as a result of people's consent, who viewed them as the custodians of land and the head of societal governance. In traditional communities, customs and socioeconomics play a significant role in development. Traditional leaders governed all these sectors in a communal and social manner, maintaining social cohesion by deciding what decisions to take, while recognising land and other natural resources as belonging to the community collectively (Nyerere, 1996:15).

There have been controversies in relation to the relevance of traditional leadership in today's democratic structures and their involvement in apartheid policies, which was highlighted by scholars. *Pilane v Pilane* was a court case, which was decided on in the Constitutional Court. In this case, a clan which was part of the Bakgatla ba Kgafela

unsuccessfully tried to protect their local assets and hold an officially recognised traditional leader, Nyalala Pilane, to account. After their attempts failed to secure accountability through traditional structures and by approaching the government, the leaders of the Bakgatla ba Kautlwale decided that they had no option but to secede from the Bakgatla ba Kgafela tribe (Koenane, 2017:17). The traditional leader applied for a court order to block a meeting called to discuss the secession from going ahead, saying that only he and the officially recognised traditional council had the power to call meetings of this nature. The North West High Court awarded various interdicts to stop the Kautlwane clan from calling this and other similar meetings in future (Bennett & Murray, 2005:29).

Furthermore, the inclusion of traditional leadership has been subjected to condemnations since their recognition by the Interim Constitution, which stipulated, “the recognition of existent legally constituted traditional authorities and for their continued supervision of indigenous laws and customs, subject to the latter's regulation by constitutional law and entrenched rights. It furthermore accords them the right to become ex officio members of local governments within whose jurisdiction they fall, and to be elected to local office” (Interim Constitution, 1993).

Two other important cases, however, found differently. In *Traditional Authority of the Bapo ba Mogale Community v Kenoshi and Another*, a case that was decided in the North Gauteng High Court, Judge Legodi said that the issue of locus standi was a technical argument that was nothing else than a smokescreen. By focusing on the technical issue of locus standi, the administrator was trying to avoid the serious claims of corruption that were made against him by community members. The judge found that the members of the community had a direct and important interest in protecting their assets, which is enough for them to have locus standi. The judge also said that the North West provincial government and the Premier should comply with their oversight obligations in terms of the North West Act to ensure accountability (Koenane, 2017:17).

According to Picard and Mogale (2015:15), “For any democratic or undemocratic institution, its effective role in advancement of a given population seem to be key in acquiring recognition from the state under constitutional parameters”. The decentralisation of the government's powers should be carried out in South Africa with

no compromise to the desirable outcomes that are expected. To ensure inclusion of relevant institutions in local decision-making processes, traditional leaders should also be permitted to participate in local development initiatives under constitutional parameters. It has become increasingly apparent that traditional leadership institutions need to be completely reformed; while on the other hand, the abandoning of such institutions is becoming conceivable for democratic societies (Picard & Mogale, 2015:25).

4.12 What part does African customary law play in governance in South Africa?

The institution of traditional leadership in Africa pre-existed both the colonial and apartheid systems and was the only known system of governance among indigenous people. However, contrary to the current political trend of discrediting traditional leadership, Africans have their own understanding of democracy, which sharply differs from the liberal democracy of the West. The institution of traditional leadership was democratic in its own unique way in what we nowadays refer to as consensus. This study argues that the institution of traditional/indigenous leadership is still relevant as a trusted institution for governance by the majority of people living in rural South Africa (Murray & Murray, 2005:29).

4.13 History of customary law in South Africa

Most African states follow a pluralistic form of law that includes customary law, religious laws, received law such as common law or civil law, and state legislation. The South African Constitution recognises traditional authority and customary law under Section 211. A ruling under *Bhe v. Magistrate, Khayelitsha* specified that customary law was protected by and subject to the Constitution in its own right. Customary law, prior to colonialism, had its source in the practices, traditions and customs of the people. Customary law is fluid, and changes over time and among different groups of people. In addition, ethnicity is often tied up into customary law. Moreover, it has been suggested that to have a more realistic idea of the way people live according to the law and social mores it is necessary to study the law in the context of society, rather than attempting to separate the law from society (Bennett & Murray, 2005:29).

South Africa has seen endless political and legal disagreements because of the co-existence of liberal Western perspectives and African customary law. Culture

influences laws and moral values, which include the interpretations of laws and moral values. The Bill of Rights and the recognition of customary law in the Constitution are at the root of these opposing views. As a result of customary law and its constitutional recognition, traditional leaders maintain an "ambiguous" position in the South African democratic state (Bennett & Murray, 2005:29).

Research results have demonstrated that the constitutional recognition of customary law in this democratic dispensation was not accompanied by sufficient explanation or continuous consultation with rural traditional communities who were most affected. This is because it is essential that customary law still plays a role in the Constitutional era. Therefore, it is all in part ascribed to the fact that the rural communities (as stated in earlier chapters) are attached to their customs and beliefs (Bennett & Murray, 2005:29).

The recognition of customary law is seen in the South African Constitution under Section 211, although there is not a textual connection in the definition of customary law to the communities recognised in Section 31(1). The application of customary law is subject to the Constitution, as well as to any legislation that specifically deals with it. African customary law is further protected within the Bill of Rights, most notably under the right to freedom, belief and opinion in Section 15, the individual right to language and culture in Section 30, as well as the collective right pertaining to cultural, religious and linguistic communities in Section 31. The protection of customary law within the Bill of Rights is not subject to the same conditions as in Section 211(3), namely that it must be used where applicable and subject to the relevant legislation. Accordingly, the rights in the Bill of Rights protecting customary law are subject only to the Constitution and specifically, other rights in the Bill of Rights, and can only be limited in terms of Section 36, being the general limitations clause (Bennett & Murray, 2005:30).

Pursuant to the Constitutional principles, the Constitution protects and recognises customary law in various ways. Chapter 12 in Section 211 and Section 212 affords official recognition to customary law, as well as to the institution, status and role of traditional leadership. Specifically, Section 211(3) mandates the application of customary law by the courts, where applicable.

4.14 Rights and restitution awarded to customary law

There have been a number of cases that have come before the Constitutional Court requiring it to interpret and apply the rights and principles in the Constitution pertaining to customary law. In doing so, the Constitutional Court has not only been faced with the challenge of elucidating the extent to which customary law is now recognised, but it has also had to address the issue of how to go about ascertaining what the law in fact is.

The first such substantive case is *Alexkor Ltd and Another v the Richtersveld Community and Others*, which involved the appeal of a claim for restitution of land by the Richtersveld Community, an indigenous South African community, in terms of the Restitution of Land Rights Act. The Constitutional Court therefore had to examine whether or not the Community had rights in land in 1913 and, if so, whether or not it was subsequently dispossessed “as a result of past racially discriminatory laws or practices”. It was in answering the first of these questions that the Court made various authoritative comments regarding the extent to which customary law is now recognised (Bennett & Murray, 2005:29).

The Court stated two broad principles. Firstly, customary law is an independent source of law, not to be interpreted through the common-law lens. Instead, it is to be seen as parallel to the common law. Secondly, the recognition of customary law is circumscribed by its consistency with the Constitution and any legislation concerning customary Law. The Constitutional Court drew specifically on Section 211(3) of the Constitution.

Applying these principles, the Court found that the Community did indeed have indigenous rights in land in 1913, which were left unaltered by British annexation. It then added an important third principle that customary law in the Constitution really referred to the living form of that law. It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life. In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practiced and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing

needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution (Bennett & Murray, 2005:26).

4.15 The decentralisation of traditional leadership authority

Considering decentralisation and separation in rural governance, delegation and devolution of power are often used interchangeably when attempting to understand rural governance from various perspectives. However, for the purposes of this study, decentralisation primarily refers to the devolution of administrative powers to local governments. In short, it refers to the process of taking over authority over local affairs, including the management of local resources and local development programmes. A meaningful discussion of existing local structures of authority is at the heart of this interpretation of decentralisation, as they can better comprehend local needs for development. A local government based on institutions, pluralism, and participatory democracy is an approach to rural development that this study seeks to examine (Picard & Mogale, 2015:25).

Considering its historical background, traditional leadership as a traditional institution has a vital role to play in many rural communities in South Africa. With the complete restructuring of South Africa's constitutional system, traditional leaders insisted on the inclusion and protection of not only customary law but also traditional leadership itself. Accordingly, the final Constitution specifically accords constitutional recognition to the institution, status, and role of traditional leadership. Although the institution, status and role of traditional leadership are recognised, such aspects are subject to the Constitution in general. However, the Constitution is not clear on exactly what role traditional leaders should play within the overall governmental structure. In debating the role of traditional leaders, two viewpoints have emerged. According to the so-called modernistic view, traditional leaders should play only a ceremonial and advisory role in governmental structures (Picard & Mogale, 2015:25).

In recent discussions, it has been pointed out that centralised governments have a challenging time mediating between contradicting beliefs between modern and traditional practices, while also providing adequate rural development. The view of some scholars is that traditional leaders are vehemently opposed to elected government councillors usurping their responsibilities. To regain the status they had previously enjoyed, countervailing laws were needed. Furthermore, decentralisation

has appealed to some scholars as a promising future for settling democratic institutions in harmony (Claassens, 2015:74).

It has been widely reported that traditional leadership is a contentious institution that has plagued both South Africa and other countries. In addition, many scholars strongly advocate for the end of traditional leadership after carefully examining this institution's history and analysing the results of studies. In order to change traditional leadership, one must first acknowledge that it must be democratised. South Africa and other African countries should, however, be true to themselves and restore a sense of African authenticity and self-identity. To do this, Africans must rediscover certain values and practices that make them authentic, including governing traditionally (Koenane, 2017:7).

Therefore, this then brings forward the argument by De Vos and Freedman (2011) that the right to equality can best be described in two ways. Firstly, the right to equality does not entail a guarantee that all people should be treated identically all the time, regardless of their personal attributes or characteristics, social or economic status. The right should therefore be viewed as entailing more than a formal prohibition against discrimination. Secondly, the right to equality must guarantee more than equality before the law and must focus on the effects or impact of legal rules or other differentiating treatment on people (Picard & Mogale, 2015:25).

The right to equality cannot therefore focus merely on whether two or more people have been treated in an identical manner by the legal rule or by another individual concerned. One can assert that this two stage inquiry in relation to the meaning of equality is balanced and in line with the principle of substantive equality. This is the only reason that many scholars state that if the state or government pushes to have customary law (not indigenous law but African customary law), it must be constitutionalised or democratised because it is the best form of government. It has been argued to bring African customary law into the 21st century so that it benefits the state, just like fellow African countries have done (Koenane, 2017:8).

Furthermore, in addition to the notion that traditional leadership is undemocratic, one of the arguments for abolishing it is that it is not democratically elected, but rather is inherited. The term democracy must, however, be interrogated. Traditional systems of government are democratic within their own limited contexts, but it is necessary to re-

examine the term democracy. Democracy can be applied in a variety of contexts. The question is, what exactly does it mean? In many academic circles, this question is not even asked, since it is assumed that when democracy is mentioned everyone is in agreement. Since there are as many political parties and scholars as definitions and understandings of the concept, that is not necessarily true. Again, George Orwell cautions, "There are no agreed definitions of the word democracy, and any attempt to do so is met with opposition on all sides". The critics of any regime claim it to be democratic (Teffo, 2006:443).

4.16 The current regeneration of the structure of South African governance

An individual society is defined by its moral landscape. South African society is in serious decline when it comes to morality among its African citizens. We are experiencing immoral situations today due to incest, teachers engaging in sexual relationships with students and teachers, teenagers getting pregnant, drug and alcohol abuse, and backyard abortions. Moreover, there are brutal rapes and killings of elderly people, children and women in general; correctional rape; intolerance of gay and lesbian people; xenophobic attacks; intolerance of political, cultural and racial differences; muthi killings; lack of regulation of circumcision schools which causes many young men to die every year; the killing of old people suspected of witchcraft; and livestock theft and corruption (Teffo, 2006:442).

Democratisation entails the dismantling of power and bringing government decision-making processes closer to the people, enabling the government to guarantee the transfer of authority from the powerful to the most affected. Traditional leadership in former Bantustans was directly and indirectly affected by reforms of local government and land administration in post-apartheid South Africa (Teffo, 2006:442).

With newly independent states struggling to deal with economic, political, and social challenges, devolution of power has become more crucial. In the context of decentralisation, in which financial resources and decision-making powers are transferred from the federal government, local institutions play an integral role in facilitating the transfer of resources and decision-making powers. Researchers have emphasised the importance of understanding the various sectors of power and the domains where they exercise them. There should be a variety of actors involved in the decentralisation process at the local level, including appointed or elected officials,

NGOs, chiefs, corporations, cooperatives, and committees, who need to be responsible for certain types of authority (Teffo, 2006:443).

A comparative assessment of urban and rural development levels based on basic service delivery might provide insight into the effectiveness of decentralisation in rural infrastructure development. In every stage of policy formulation, public policy theorists advocate incorporating people directly affected by the policy. As a result, policy failure is minimised while providing local populations with the opportunity to participate in the agenda development process. It is important to note, however, that implementing these policies may be hindered by a lack of resources and political will. Furthermore, decentralisation also has pitfalls, whether it be politically, administratively, or fiscally (Ngcobo, 2016: 30).

It is evident that South Africa and most democratic states have conducted extensive research on the position of traditional leadership. Although opposing views remain concerning the preservation of traditional leadership under democratic parameters, it remains a controversial issue. Traditional leadership, as an existing and constitutionally recognised structure in democratic South Africa, still enjoys the majority support of the rural populace, especially of traditional communities. The current democratic government has evidently done its best to integrate them in rural development initiatives, but their participation level and position on the democratic transformation scale remain crucial factors. Traditional leaders were also disadvantaged by the ambiguity of their roles under the apartheid government, which rendered them ineffective at tackling rural development in their respective jurisdictions (Ngcobo, 2016:31).

Given the undemocratic nature of local democratic government and the deliberate reduction in the administrative power of traditional leaders, decentralising power and organising local democracy has left traditional leadership in a very ambiguous position. Theoretical arguments and conclusions about democratic decentralisation have been made by different democratic decentralisation theorists in comparable ways. Efficient, equitable, and inclusive are these concepts. Based on these principles, decentralisation processes should focus on empowering local communities, establishing accountability and public participation, as well as responsibly managing natural resources (Ngcobo, 2016:31).

4.17 The interests of the natives or the rural communities

Africans and European colonialists crafted customary laws in accordance with their kinship, tribal, economic, and political interests. In general, laws evolve from human needs and aspirations in a dynamic social environment that responds to changing situations and needs. Rather than being absolute and hierarchical, rights in these communities were mostly complementary and relational. Precolonial women, for example, functioned as cooks, sold/bartered farm products, and mediated disputes in a typical social setting. Democracy decentralisation became effective when the public was included and involved in the management and decision-making processes around local resources. In rural local communities, decentralisation also facilitates democratisation by increasing citizen participation (Ngcobo, 2016:39).

African elites converged with postcolonial capitalism, whose capitalist hegemony they inherited from the colonial state, and there was an increased sense of obligation to indigenous practices. In terms of the second component, indigenous laws possess a dual-edged nature due to their process-oriented nature. The indigenous laws became more adaptable to change because of it. In particular, the Nigerian Evidence Act and customary court laws are examples of artificial antiquity in indigenous law, which define customary law as a set of customary rules enhanced by established usage. In particular, the Nigerian Evidence Act and customary court laws are examples of artificial antiquity in indigenous law, which define customary law as a set of customary rules enhanced by established usage. To practice this form of justice, South African natives demand that it be regulated in accordance with the constitutional dispensation (Ngcobo, 2016:39).

The modernists were primarily concerned with gender equality and reviewed the institution of traditional leaders as the basis of rural patriarchy. On the other hand, the traditionalists believed that the institution of traditional leaders was at the heart of rural governance, political stability, and rural development. They further argued that a traditional leader functioned as a symbol of unity to maintain peace, preserve customs and culture, resolve disputes and faction fights, and allocate land. This is why many of the rural communities, which are the former Bantustans, for example Bophuthatswana and Venda, had a leading role they played in these communities and the natives had a connection to them. The institution of traditional leadership, despite

past policies and practices, enjoyed substantial support and legitimacy. However, it can be observed that both the modernists and traditionalists agreed that the institution of traditional leadership, its composition, functions, and legal manifestations should change in order to adapt to the changes in the new constitutional, social and political environments of post-apartheid South Africa (Koenane, 2007:15).

However, there can be an agreement that the constitutional provisions, which aim to champion the realisation of cultural practices, can be seen as a way of remedying the past injustices, while at the same time ensuring that the new democratic order upholds the fundamental rights of the people of South Africa. It is also important to consider that dignity is not only defined in diverse ways, but also operates in different respects. Dignity can function as a specific right as entrenched in terms of Section 10 of the Constitution (Koenane, 2007:18).

Additionally, dignity may determine how the entrenched right, like the right to choose cultural practices without any form of discrimination can be used in order to achieve equality among different religious and cultural practices. This means that dignity can serve as a basis to the realisation of a fundamental right that is upheld and protected by the Constitution, which in this case is the right to choose cultural practices of one's choice. In South Africa, dignity is classified as a value because different provisions in the Bill of Rights must be interpreted to promote the values that underlie a democratic society (Picard & Mogale, 2015:27).

Dignity therefore stands in relation to the application of all other rights and these rights shape our understanding of dignity. For this reason, dignity has relevance to our understanding of the right to freedom of culture or religion. Similarly, the right to equality is of particular importance to our appreciation of the right to freedom of culture. The interrelationship between dignity and equality in many ways can be comparable to the interrelation that exists between religion and culture. For diversity to prosper it is essential that the value of dignity and equality as well as the interrelation between religion and culture are held when addressing issues regarding the manifestation of indigenous culture and religion. This is because in the African context religion or culture it is one and the same thing because it entails the process of worship; in this context, it will be ancestors (Picard & Mogale, 2015:27).

It would take political will for the institution of traditional leadership to function in this country and to make meaningful contributions to policy development and implementation. A government structure should support the institution in cultural and customary practices. To ensure that traditional leaders are not marginalised, it is imperative that political leaders change their attitude. This will allow the country to remain true to its principles and values. Although political dispensations with their ideologies have come and gone throughout history, traditional leadership has shown resilience, and I am of the view that the institution of traditional leadership, which has been the foundation of traditional governance, will endure (Koenane, 2017:18).

4.18 Conclusion

In democratic states, including South Africa, traditional leadership occupies a prominent position. While opposing views regarding the preservation of traditional leadership under democratic parameters continue to exist, the institution of traditional leadership is still regarded as extremely important. Despite the democratic transition and the continued reliance on traditional leadership, rural populations, specifically traditional communities, still support this structure as an existing and constitutionally recognised structure. The current democratic government has done its best to integrate them in rural development initiatives, but their participation level and position on the democratic transformation scale remain crucial factors.

Traditional leaders played an ambiguous role under apartheid, putting them in a unique position to deal with rural development in areas within their jurisdiction. Traditional leaders continue to fight for more power and the redefinition of their role in democracy, but the institution remains an important resource for rural populations as the sole keepers of African indigenous culture and tradition. With its undemocratic nature and deliberate reduction of local administrative power, the decentralisation of administrative power and the establishment of local democratic governments have placed traditional leadership in an ambiguous position.

With the adoption of the Constitution as the supreme law of the land, the democratic government had a duty to remedy the injustices of the past, which included ensuring that African customary law was developed and applied, to such an extent that it was placed at the same level with common law. This meant that African customary law should be applied parallel with common law and it did not need common law to validate

it, which was the position during the colonial and apartheid era period; now only the Constitution could validate and confirm this legal system. The aim has consequently been to ensure that cultural communities are in a position where they are protected and are independent through the application of a recognised legal system, which in this case is African customary law.

Despite socioeconomic changes, the Constitutional Court of South Africa has determined that indigenous laws' founding values motivate people to adjust their behaviour in response to them. Modern African customary laws are becoming similar to those of the 1960s. People adapted their indigenous laws to socioeconomic changes because of the colonial experience, resulting in present-day customary law.

Papua New Guinea, the Solomon Islands, Vanuatu and Western Samoa, for example, successfully implemented legal integration based on customary law. As soon as these nations became independent, they made customary law their primary source of law, taking it from the imposed colonial law and giving it an equal standing with it. By establishing their own legal systems on customs, values and traditions, they sought to break free from the imposed common law traditions. In the opinion of one commentator, the ultimate objective was to develop "a new, culturally sensitive jurisprudence that integrates customary law and institutions with modern Western law and institutions".

In conclusion, the law is meant to apply equally to everyone. The provisions of the law are also meant to be applied equally. Yet, the government appears more intent on enforcing the provisions of the law that provide official recognition to traditional leaders, than on enforcing the checks and balances on their power contained in the same legislation. Community members have no option but to step forward and go to court themselves to try to enforce the checks and balances that the government ignores. But when they do this, they are told that they have no legal standing to do so, and they are awarded heavy costs orders that force them to pay not only their own legal costs but also the legal costs of the traditional leaders who seek to silence them. This situation cries out for intervention at a higher level.

CHAPTER FIVE: THE ROLE OF TRADITIONAL LEADERSHIP IN OTHER AFRICAN COUNTRIES

5.1 Introduction

Traditional leaders have received little attention from rural local governments, although they frequently maintain legitimacy in the eyes of their people because their authority dates to pre-colonial times. Opportunities for local governance are wasted when their relevance is not acknowledged. There has also been a resurgence of interest in traditional leaders among African and Western governments as well as the development community since the early 1990s. The necessity of including these leaders in local governance is becoming increasingly apparent.

People in post-colonial states frequently believe that traditional authority and the state hold different levels of political legitimacy and that democratic practice should incorporate both. But how well-suited is conventional leadership to local and state democracy? This is a complex question. However, in many African countries, traditional leaders continue to enjoy popular support. Thus, they remain important political actors who can and do play a significant role in rural local governance (Baldwin, 2015:6).

It is believed that the consensus principle-based traditional African legal system is the closest thing we have to actual democracy. This forgiving mentality is undoubtedly not present in South Africa's contemporary democratic system. The democracy that is ingrained in the African way of life is ensured by consensus. The principle of *moa khotla ha a tsekisoe*, which guarantees freedom of speech in traditional court settings and assemblies where significant issues were discussed, also served as a sign of the importance of participatory democracy, in which all citizens were permitted to express their opinions without fear (Holzinger, Kern & Kromrey, 2016:465).

According to Teffo (1994), conversation served as a means of demonstrating democracy in traditional African civilizations. In supporting Teffo it was said that democracy did not thrive in the traditional African context, simply meaning majority rule, as many seem to believe: he argues that consensus was a democratic practice which took into account every participant's views about the issue at stake, and people would not be ostracised for expressing a different viewpoint from the one upheld by

the majority. This was the case even when a viewpoint was controversial (Teffo, 1994:4).

Further Teffo (1995) sees democracy as being characterised by the following principles: representative, accountable and participation. As argued previously, the right to differ is not respected in our democracy today. Teffo (1995) stresses the fact that long before the advent of European colonialists in Africa, democracy existed. Furthermore, Teffo (1995) articulates: before the arrival of the Europeans, Africa had participatory and direct democracy, free village markets, and free trade. Freedom of expression also existed in traditional societies. At village meetings, the natives of Africa freely expressed their ideas and exchanged viewpoints (Teffo, 1995:140).

In this chapter the aim is to discuss the link that exists between the South African traditional authority and the traditional authority bestowed in other African states. In this chapter there is an intention to show that there is relevance to the value of the link between traditional authority and the democratic government. Thus, there is a need to show how other states created legislation that is helping them integrate traditional authority into the government activities. In this chapter the emphasis is on looking how legislation integrated traditional councils and traditional laws into government legislation and how this does not contradict the constitution (Holzinger et al., 2016:465).

In this chapter, reference will be made to Ghana, Botswana, Zimbabwe and Namibia as the four African democracies that practice or apply traditional authority in their legislation. These nations seemed to have found the balance between culture and democratic governance. Teffo (1995) states that South Africa missed this when the Constitution was written. The lack of consultation between traditional leaders and the state in the negotiations is the reason that some issues have arisen (Teffo, 1994:4).

5.2 Historical background

No African nations, including Namibia, Botswana, Zimbabwe and Nigeria, were able to destroy the institution of traditional leadership and its legitimacy because of colonial practices. It continued to be crucial from a political and administrative standpoint. Furthermore, it became impossible to ignore after the democratically elected authorities took over. South Africa gained some knowledge on the use of traditional leadership to complement democratic institutions charged with fostering sustainable

livelihoods for rural communities (Baldwin, 2015:12). The Traditional Leadership and Governance Framework Act, 2003 (Act 41 of 2003) and the White Paper on Traditional Leadership and Governance, traditional leadership institutions and their roles in the new model of democratic governance are clarified and informed by the 2003 framework (Baldwin, 2015:12).

All over the continent of Africa, traditional leadership has had a similar history. In addition, Namibia, Botswana, Zimbabwe and the rest of the SADC member countries post-independence, and the South African government, have addressed the issue of traditional leadership. Traditional leadership was the foundation of authority in all these countries before colonisation, and even under colonisation (Baldwin, 2015:12).

5.3 Colonial legacy In Africa

Oomen (2005) argues that traditional authority, like all other (legitimate) authority, derives from God and that without it, Africans would not have a community. Traditional chiefs are given the power to protect their people from orthodox and unconventional sieges meant to topple African states. In this sense, traditional leaders are those in charge of the security of the country, as well as the lives of the populace. Based on the customs and ideals ingrained in their various communities, they are the leaders who rule and govern those nations (Oomen, 2005:28-29).

The significant socioeconomic changes brought about by the colonial legal transplant in Africa are known as the colonialism of power and are characterised by their pervasive patterns of power, philosophy, and behaviour. The astounding degree to which colonialism affects the normative behaviours of Africans demands a reassessment of the status of indigenous African laws (Baldwin, 2015:14).

This research argues that most indigenous laws have transformed into customary laws through people's adaptations to legal, economic, religious, and globalisation-fuelled changes in intersecting social fields. It uses content analysis of 26 African constitutions to assess the extent to which customary laws are accommodated, suggesting that these constitutions are future common laws and offer the foundational values of indigenous laws as building blocks of constitutionalism and legal integration in the continent (Oomen 2005:28-29).

5.4 Democracy in Africa and how African customary law was incepted

An investigation of how other African governments are implementing African customary law in their own democratic countries was found to be necessary after conducting a survey on some African states. Case studies from Ghana, South Africa, Botswana, Lesotho, and other Sub-Saharan nations looked at the benefits that traditional leadership contributed to the culture of governance and how it could be incorporated within local government systems. An analysis of its role in land management and the effects of including traditional leaders in rural governance were both done (Holzinger et al., 2016:469). The following were the key trends:

- In Ghana, the state acknowledges traditional leaders' significance to rural local government because they can influence public opinion and morality and galvanise people for development.
- Although traditional leaders in South Africa come from different socioeconomic backgrounds, there is strong public support for their involvement in local governance. They have a number of duties that the formal government is unable to conduct.
- Even though they are not expected to participate in party politics, some people think they ought to be put up for election if they want to serve in local government.
- Traditional leaders and their followers have lost land, but some of them have created their own government structures, thwarting efforts to change land tenure. There must be an end to this argument.
- In Botswana, traditional leaders' history and democratic ideals can co-exist. Although the state restricts their authority, they participate in a national House of Chiefs and hold important local governmental positions (Holzinger et al., 2016:469).

i. Ghana

Ghana stands out among all the African nations because it appears to be particularly aware of how women have lost their position as economic powerhouses because of British colonialism's industrialisation and land grabbing practices. The Ghanaian Constitution, for instance, requires the government to "take all necessary efforts... to

facilitate the full integration of women into the mainstream of Ghana's economic development" and "secure" their ownership of property and right to inherit. In Section 39, it is said that the state is required to adjust "customary and cultural values" to "the evolving requirements of the society," and in Section 270 of the Constitution of Ghana, traditional institutions are given a say in the formation of customary law (Constitution of the Republic of Ghana, 1993).

The 1992 Ghanaian Constitution guarantees women's property rights and it is the only country in the world, which was surveyed, that has a constitution that unequivocally affirms joint matrimonial property. Notably, the Constitution of Ghana (1993) in Section 22(3) (a) and (b) provides that "spouses shall have equal access to property jointly acquired during marriage", and "assets, which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage". This remarkable recognition may be due to the matrilineal nature of some Ghanaian societies (Holzinger et al., 2016:471).

ii. Botswana

The monarchy was the most significant political institution in pre-colonial Botswana (Bogosi meaning Chieftaincy). The Paramount Chief (or King) was in charge in terms of politics, economy, law, religion, and symbolism. Ward headmen and senior advisors (Bagakolodi) helped him perform his duties. Through the Kgotla (a meeting near the Chief's home where official announcements were delivered), the tribe's social authority was exercised. Despite having only consultative authority, the Kgotla was crucial in building support for suggested actions (Keulder, 1998:96).

Families of the tribe were typically led by a headman, who divided the tribe into small groups. Through marriage or birth, the families typically had direct connections. The clusters were organised into wards with their own Kgotla, which consisted of administrative units. With other headmen, the headman formed the Chief's advisory council, which was responsible for the activities in his ward (Schapera, 1982:91).

Botswana, for example, strengthened community participation by establishing village development committees and Kgotlas (open gatherings close to the Chief's house where formal announcements are made). In the aftermath of independence, local,

district and traditional authorities were integrated into these structures (Du Pisani, 1986:40).

The fact that the Botswanan parliamentarians frequently chose to take the advice of their House of Chiefs on less important problems rather than more important ones suggests that the houses may have more symbolic significance than practical utility. On the other hand, South Africa's traditional leaders frequently succeed in swaying judgments in their favour on issues that directly impact them. This is accomplished by engaging in lobbying in institutions like CONTRALESA and by joining a number of political parties with representatives in the legislatures (Du Pisani, 1986:50).

Following independence in Botswana, the traditional courts continued to preside over civil proceedings but lost their old criminal jurisdiction. Traditional courts were not a component of Botswana's legal system, which is termed Lekgotla. Traditional authorities lost their authority to detain people, and the tribal police was dismantled. Traditional authorities could only be established as a type of local authority in order to be included in the political structure outlined in the Constitution. Traditional leaders were no longer allowed to hold political office due to the Traditional Authorities Act of 1995 (Act 17 of 1995), which changed their colonial and traditional status from that of political leaders to that of cultural agents (Mahlangeni, 2005:65).

iii. Namibia

In Namibia, most communities were ruled by Kings with the help of Chiefs prior to the colonial takeover. Most of the political, economic, and social power was delegated to Kings, whose authority was inherited. In most parts of Namibia, prominent headmen who oversaw districts and worked closely with the Chiefs to construct the government, aided the Kings, who in turn received assistance from the Chiefs. Most often, headmen were chosen to represent the interests of their subjects by them or were appointed by the Chief. Sub-headmen, a new level of power, were established, particularly in Ovambo, and they were in control of the wards. They mostly served as advisors to the senior headmen. In some ethnic groups, like the Herero, the Paramount Chief appointed the Chiefs, who in turn appointed some headmen (Keulder, 1998:34).

The period leading up to Namibia's independence was short. In a matter of weeks, the Namibian Constitution Act, 1998 (Act 34 of 1998) was drafted with little input from organisations other than political parties. Traditional elders and other indigenous

interest groups were not consulted. Their interests were therefore not taken into consideration when the Constitution was being written, with the exception of Article 102(5) of the Constitution of Namibia, 1998, which stated, "There shall be a Council of Traditional Leaders to be established in terms of an Act of Parliament in order to advise the President on the control and utilization of communal land and on all such matters as may be referred to it by the President for advice" (The Constitution of the Republic of Namibia, 1998 Act 34 of 1998) (Keulder, 1998:53).

Criminal cases were no longer dealt with by traditional courts following independence; however, civil cases were still dealt with by them. Unlike Botswana, Namibia did not have traditional courts to the same degree as the Lekgotla (Du Pisani, 1986:50).

Traditional authorities lost their authority to detain people, and the tribal police was dismantled. Traditional authorities could only be established as a type of local authority in order to be included in the political structure outlined in the Constitution. Traditional leaders were no longer allowed to hold political office due to the Traditional Authorities Act of 1995 (Act 17 of 1995), which changed their colonial and traditional status from that of political leaders to that of cultural agents (Mahlangeni, 2005:65).

iv. Zimbabwe

The Matebele (Ndebele) and Shona Kingdoms were Zimbabwe's main political entities before the Europeans arrived. There were five main tribes in the Shona nation: the Hera, Rozwi, Njanja, Dzete, and Nobvu. Politics, administration, religion, and social systems were all based on patrilineal ancestry. The Chief's hereditary title descended from the name of a common ancestor who united the clans. Politically, the Shona people were organised into a number of chiefdoms with a reasonable degree of autonomy (Garbett, 1976:142).

Following independence, traditional chiefs lost practically all of the authority that the colonial powers had granted them. As the new democratic state began an effort to monopolise social control, traditional leaders were either replaced by publicly elected officials or appointed by the government. This was consistent with the declared socialist principles of the government (Holomisa, 2004:13).

The modern state overthrew the legal and administrative frameworks to defeat the old-style systems of government. The state, however, struggled to continue being the only

source of survival advice for the peasants because of its weakness at the local level. It had to rely on established figures to make up for this and improve its capacity to deliver effective legal services (Keulder, 1998:202).

Even though traditional authority was quite weak in the early years of independence, it still had some influence. In addition, the fact that the people elected traditional leaders to serve on village tribunals implies that, at least in some locales, the rural populace supported them. Since then, the Zimbabwean government has fully restored the authority of traditional chiefs in local governance, land allocation, and redistribution (Holomisa, 2004:13).

It makes sense that these individuals were President Robert Mugabe's land redistribution programme's biggest supporters. They received free restoration of the land that was historically theirs and their people before colonisation. The land allotment panels were also heavily influenced by traditional authorities, who also designated deserving families land (Holomisa, 2004:13).

5.5 Constitutionalism and democracy in Africa

According to Keulder (1998:12), in the SADC region, traditional leadership has a similar history. Traditional leadership was a topic that SADC nations like Namibia, Botswana, South Africa, and Zimbabwe had to address in their post-independence governments. Colonial policies in these nations improved the structure of traditional leadership on a political and administrative level while harming its standing with the arriving modern elite and some segments of the indigenous population (ibid).

History reveals that the institution of traditional leadership, which is one of the highest levels of authority, endured difficult circumstances at the hands of colonial forces and displayed fortitude that the colonial powers were unable to shatter. However, the apartheid system also used the same techniques; therefore, colonisation was not the final attempt to seize the authority of the institution. Moreover, the role of traditional leadership in a democratic South Africa has not been without controversy (Koenane 2007:24).

From a legal standpoint, Wamala (2006) contends that the Basotho political constitutional model or paradigm was known as chieftaincy during the precolonial era (borena or ubukhosi). Unanimity was the norm for reaching decisions in conventional courts, and these courts were typically organised according to the chief-in-council

system. A council of clan chiefs (izinduna) governed the monarch, according to Wamala (2006), who wrote about the Baganda's history. There were heads, subheads, and chiefs at various levels of society. Referring to consensus among the Baganda, the goal of every argument was to come to an agreement. The operation of democracy in Buganda society, as well as in many other African societies, depended heavily on consensus. If after due deliberations the council reached a consensus, it was taboo for the monarch to oppose or reject it (Wamala, 2006:439).

The king's powers were constrained, which is one of the guiding principles of modern democracy, and the aforementioned statement illustrates how deeply ingrained democracy was in traditional African culture. This arrangement had significant ramifications since it symbolised the political environment in which the traditional ruler and the people were both involved in governing. Hence, the institution of ubukhosi (chieftaincy) is complicated. The council was made up of Izinduna/Matona and Amakhosi/Marena. In this regard, the 96orena/96orena was incapable of acting independently. The system also had its own checks and balances to prevent ambitious, power-hungry indigenous leaders from abusing their positions of authority (Wamala, 2006:439).

Moving on to cooperative governance between the three sectors of government in South Africa, it is provided for in Chapter 3 of the Constitution (1996). In the same chapter, the fundamentals of cooperative governance and intergovernmental interactions are laid out. The chapter also serves as background information for the 2005 Intergovernmental Relations Framework Act (Act 13 of 2005). But in practice, it is true that ambiguous role assignments between levels make operating government in the context of multiple tiers and, consequently many distinct interactions. difficult (DPLG, 2007:31).

The Traditional Leadership and Governance Framework, 2003 (Act 41 of 2003) deals with the distribution of tasks and responsibilities for traditional leadership in Sections 19 and 20(1). This distribution of tasks and responsibilities was in an effort to remedy the situation. Traditional affairs and traditional leadership structures have been assigned to provincial and national administrations without formal assignment instruments. Traditionally, constituted leadership structures already carried out some of these functions. All relevant state departments were informed of the Act in

November 2006 by the then-minister for provincial and local government and encouraged to consider traditional leadership issues when planning and implementing their various programmes, where and when necessary (Koenane, 2017:11).

5.6 Why should traditional leaders play a bigger part in governance in South Africa?

The White Paper 2003 in Section 26 gives traditional leaders the authority to promote indigenous music, oral history, commemoration events, and knowledge systems, as well as the preservation of cultural resources. The institution of traditional leadership should, in collaboration with the Department of Arts and Culture, perform a number of tasks, including:

- a. Help the traditional communities protect, promote, and preserve their knowledge system of the indigenous people;
- b. Announce new heritage institutions to address unresolved histories;
- c. Promote, support, and coordinate programmes in traditional communities' sectors; and
- d. Transform place names to reflect the linguistic, historical, cultural, and socioeconomic factors that contributed to the name in order to restore human dignity (Koenane, 2017:15).

On the topic of initiation schools, every year, young people who attend unlicensed initiation schools around the country die and end up as statistics. The government has intervened and suggested offering surgical supplies and assistance (by providing licensed doctors to do the surgery) to these initiation schools, but this has failed. Koenane (2017) believes that the reaction would change if traditional leaders addressed these activities.

The South African government is unwilling to foster an environment that would allow the institution of traditional leadership to co-exist with the frameworks of locally elected government (Koenane, 2017:13). Moreover, within the framework of the nation's economic and social development agenda, eco-friendly behaviours are promoted and the importance of environmental living is emphasised. Traditional leaders can genuinely contribute to the battle against climate change and environmental degradation (Holzinger et al., 2016:473).

Due to their people's respect, traditional leaders are crucial motivators in rural areas. Everyone who is familiar with the institution of conventional leadership is aware of this. There have been reports of elderly individuals being tortured in rural Limpopo and in KwaZulu-Natal districts, and other people have had their houses raided on the pretence of witchcraft. Some people accuse other people of witchcraft without being able to demonstrate how they reached that judgement. The last few of years have seen an increase in this phenomenon. Once more, it was traditional authorities who saw to the cessation of these allegations and the execution of alleged witches. In this regard, it is argued that traditional leaders must ensure the enforcement of all laws, order, institutions or requirements of government relating to the administration within their area (Dlungwana, 2002:6).

The White Paper 2003 Section 26 also calls for the participation of traditional leaders in the communication of information about government policies and programmes. This is consistent with the government's plan to keep the rural populace, especially the rural poor, informed about the policies that affect them. Traditional leaders are meant to collaborate closely with other government officials in charge of disseminating information, such as Community Development Workers and Information Officers of the Government Communication and Information Service (GCIS) (CDWs).

In addition, traditional leaders are required to offer guidance and play an active part in rituals and activities related to traditional health, such as initiation schools. They are also expected to provide guidance and take part in national health initiatives like those against tuberculosis, cholera, and HIV/Aids. The institution should aid in, through collaboration with the Department of Health (Du Plessis & Scheepers, 2009:22), the following:

- a. A Telemedicine System that delivers distance healthcare to rural South Africans, thereby enabling better utilisation of scarce medical personnel and resources and enabling rural communities to access physicians and specialists;
- b. Aiding in the formation, registration and conduct of traditional health practitioners in order to improve efficiency, safety, and quality of traditional health services; and
- c. The promotion of awareness of HIV/Aids among the public (Du Plessis & Scheepers, 2009:22).

Traditional councils participate in the Department of Home Affairs' activities by helping to register births, identity documents, customary weddings, deaths, and other relevant events. In the past, some of these responsibilities were given to conventional authorities but were subsequently removed (Du Plessis & Scheepers, 2009:30):

- a. Providing sustainable homes for the homeless and restoring dignity to traditional communities, as well as ensuring their homes are long-term assets for future generations;
- b. Rural communities in South Africa should benefit from a collaborative effort and a commitment to constructive dialogue;
- c. As one of the primary methods for reducing poverty in rural regions, accelerate the delivery of homes; and
- d. Work to remove barriers that slow down distribution in rural areas (Du Plessis & Scheepers, 2009:30).

The White Paper 2003 in Section 20 establishes the judicial roles for traditional leadership, grants them the authority to hear certain cases in customary courts, and also designates them as Commissioners of Oaths. Traditional Councils are also outlined in the White Paper as playing the following roles:

- a. Land administration;
- b. Development of agricultural methods and advising the government on agricultural development;
- c. Enhancing the use of land in a sustainable manner; and
- d. Contributing to the development of animal welfare programmes and advising the government (Du Plessis & Scheepers, 2009:34).

Children, the elderly, and the disabled are traditionally protected by traditional leadership. Traditional leadership should make it easier for the community to access pensions and social grants. Traditionally, the institution of traditional leadership should collaborate with the Department to accomplish the following:

- a. The restoration of family, community, and social relations;
- b. The availability and accessibility of social welfare services for those living in rural areas;
- c. The promotion of equity in service delivery; and

- d. The provision of HIV/Aids treatment and care within the community in rural communities with a variety of services, with special focus on orphans and children who are infected with and impacted by HIV/Aids (Du Plessis & Scheepers, 2009:22).

5.7 Conclusion

Over the years, there have been many alterations to the institution of conventional leadership, both beneficial and negative. These modifications date back to the colonial era, continued during the apartheid era, and are currently being implemented by the government or state of post-independence, which is democratic and representative of South Africa. The institution witnessed the dethronement of traditional chiefs who were seen to be obstructive by the colonial authority. The colonial rulers continued to manage the institution while making sure it performed some official duties. The democratic government of South Africa is currently making every effort to change the institution of traditional leadership to conform to democratic norms, as well as passing legislative pieces. However, support programmes for the institution should also be implemented.

Problematic is the lack of consideration given to the function of traditional leadership in contemporary democratic South Africa in all policy instruments, including the Constitution. This is demonstrated in Chapter 12 of the Constitution, which demotes traditional leadership to a minor role in the democratic South Africa of the post-apartheid era. There is no doubt that this situation has to be reviewed and remedied. It was further asserted in this chapter that traditionalists and modernists (two schools of thought) dominate the discussion on whether to combine the separate systems of government. The former view the institution of conventional leadership as unfriendly, while the latter are of the opinion that it could still play a crucial role in the new democracy.

CHAPTER SIX: SUMMARY, FINDINGS AND RECOMMENDATIONS

6.1 Introduction

The main objectives of this chapter are to convey the study's key findings, a list of suggested recommendations, and the key conclusions reached. It should be emphasised that the preceding chapters warned that generalisations about the study's key findings and conclusions could not be made. This is partially attributable to the study's approach, which was intended to offer insightful data and a deeper understanding of the traditional leadership structure. It should be emphasised once more that there is a vast body of research on the topic of traditional leadership in South Africa and that findings from several studies have been made. The conclusions of this study are similar to a number of previous studies, and the results also appear to be similar to some existing studies.

There is a saying in old English that goes, "Where there is a will, there is a way". The institution of traditional leadership might function and make a significant contribution to the formulation and execution of policies in this country – with adequate political will. Governmental frameworks must support the institution and allow it to take the lead in cultural and traditional activities. Some political leaders need to adopt a different mindset, as doing this would make it easier to implement measures that would support traditional leaders rather than marginalise them.

In Chapter 1 and Chapter 2 we began by establishing that South Africa should uphold the beliefs and customs that have kept it genuine and distinctive. We then further state why this is an essential element to the argument that will be made in this research. While political regimes and their ideologies have come and gone and will continue to come and go, the traditional leadership institution, which has been the cornerstone of traditional administration, has proven resilient throughout the years. In my judgement, it will persist and survive. Problematic is the lack of consideration given to the function of traditional leadership in the contemporary democratic South Africa in all policy instruments, including the Constitution. This is demonstrated in Chapter 12 of the Constitution, which demotes traditional leadership to a minor role in the democratic South Africa of the post-apartheid era.

In Chapter 2, the construction of the Constitution and how Constitutionalism and its relationship to Traditionalism have never been adequately addressed is discussed. This has left a void, which has given rise to needless misunderstandings. The history of Constitutionalism in South Africa and its antagonistic relationship with traditional leadership were then observed, which is what prompted an in-depth investigation of some of the legal cases that came before the Constitutional Court. All of this resulted from the current scenario, which arose from traditional leaders' largely passive participation in the development and creation of the current Constitution.

To verify that the function played by traditional authorities prior to democracy is still being played today, an effort was made in Chapter 2 to examine the frameworks developed in South Africa. This prompted a discussion of the historical reasons for and occasions of the use of customary law in South Africa, and the reasons why traditional leaders are still not satisfied that their position was lessened from the authority they previously passed after the current Constitution of South Africa Act 108 of 1996 was created and that it was not properly mentioned.

Hence, it was established that the state should deal with the confusion that now exists; it is crucial to define the domains in which traditional and democratic forms of government function. Moreover, because traditional authorities have direct access to their communities, they have been shown to be more in touch with the community than the national government. As a result, they serve as the crucial connection between communities and the government.

This then took us to Chapter 3 where we investigated two opposing views of customary law, either democratic or autocratic; how it has been affected; and how primary authority is always being reconstructed and being resisted in contemporary South Africa.

South Africa has experienced a strong legislative agenda to consolidate the power of senior traditional leaders over the past 15 years or so. The Constitutional Court interprets customary law as something that should be determined with reference to practice from and acceptance by the people whose customary law is under consideration, which is directly opposed to the new traditional authority laws, a historical, authoritarian understanding of customary law as something to be defined and imposed on rural communities by senior traditional leaders.

The relationship between the South African Constitution of 1996 and the Interim Constitution of South Africa, as well as the authority and recognition of Traditional Councils and Traditional Leaders, were also thoroughly examined in Chapter 3 of this study. The impact that the current administration's shortcomings are having on the alliance between traditional leaders, their councils, and local and federal authorities was also examined. Furthermore, the link between traditional leaders and their power and the government throughout the colonial era, as well as what the law said, were discussed.

The research on traditional leaders and their function in South Africa's democracy was provided in Chapter 4. According to customary law, traditional leadership has a recognised position and standing. It enables conventional authority to operate within the confines of the nation's legal structure. A National Councils of Traditional Leaders and Provincial Councils of Traditional Leaders were established by the Constitution. These councils give traditional leaders the opportunity to advise national and provincial government on issues pertaining to traditional leaders and customary law. This chapter also acknowledged African customary law as a component of South Africa law. According to Chapter 4, as long as customary law complies with the Constitution and is applicable in the circumstances, judges may use customary law in certain situations.

Chapter 5 examined how individuals in post-colonial states typically hold the opinion that the state and traditional authority have varying degrees of political legitimacy and that democratic practice should take both into account. But, how well suited is traditional leadership to regional national democracy? This is a challenging question as people still respect traditional leaders in many African nations. As a result, they continue to be strong political players who can and do contribute significantly to rural local governance. This then led to a look at other African states and how they have applied traditional customary law, and what forms of legislation they have. This led to the finding that the current democratic system in South Africa does not reflect the attitude of forgiveness, which existed from the ancient African legal system. Moreover, it was found that consensus ensures that democracy is engrained in the African way of life.

6.2 Findings

Traditional authority was present both in pre-colonial and colonial times, according to the study. This is consistent with assertions that conventional leadership has existed for eons. The assertion may have some aspects of reality, but it should be noted that several Chieftaincies were formed during the apartheid era and have acquired strength over time. Moreover, the two-tier system that distinguishes municipal administration outside of urban areas must be emphasised. Rural municipalities collaborate with district municipalities to share executive and legislative power, unlike their counterparts in metropolitan areas. The district municipalities oversee all district administration areas on an executive and legislative level. They also control the management of all local municipalities within their districts, as well as the assets and liabilities of those municipalities. Hence, in South Africa, district municipalities serve as the primary implementers of rural development. In Chapter 4 mention was made of Ghana whose Constitution was established with reference to the traditional leadership councils who have a role to play in the governance system. This is something that the South African government should consider.

The challenging issue of how traditional leaders could continue to serve as judges and play a role in government in a constitutional democracy was also addressed in this research. It examined the alleged benefits and drawbacks of conventional leaders' courts and concluded that the benefits outweighed the drawbacks, but that these courts' systems could be improved to be more in line with the principles underpinning the Constitution. In general, the courts continued to be beneficial to the communities that they found themselves in. The research also established, in reference to other states and their constitutions that if the relationship between traditional leaders and the legal system was well established, this allowed for proper alignment that eliminated the conflict between the two structures. All that is needed is for the state to engage with these leaders.

The absence of respect for the role of traditional leadership in the modern democratic South Africa, including the Constitution, is problematic. Chapter 12 of the Constitution, which reduces conventional leadership in the democratic South Africa of the post-apartheid era to a small role, serves as an example of this. Without a doubt, this situation needs to be relooked and should be corrected. It was further stated that the

debate over whether to unite the various system of administration was dominated by traditionalists and modernists. The former saw conventional leadership as hostile, while the latter believed it might still be a key component of the new democracy. Furthermore, it was agreed that the Constitution safeguarded the institution of traditional courts.

The structure, jurisdiction and procedures of these traditional councils were examined with a view to identifying those areas in need of reform. As far as structure was concerned it was argued that traditional leaders' councils should be considered as places with the power to enforce their own judgements and preside over the lives of their communities. As further established, African communities still believed that they must be governed by their traditions and customs. This was elaborated on when the Botswana system of governance was scrutinised. It was observed that the processes in these rural communities worked well because they were still led by African traditional customs.

The controversial issue of how to deal with criminal jurisdiction in traditional leaders' courts was also discussed, with the conclusion that only very minor criminal offences should be handled by these courts/councils and that there should be no question of increasing their jurisdiction in this regard.

Additionally, it was established that the weaker constitutional standing of customary law has an adverse effect on the administration of justice, particularly regarding the rights of marginalised groups including women, female children, and young men. Matrimonial property rights under customary law was used to illustrate this point. As previously mentioned, the close-knit character of precolonial social life, during which time family revenue was derived jointly from farming, hunting, and fishing led to women's marital property rights. This situation has changed. To begin with, family property has evolved from huts, sleeping bags, farming equipment, and fishing nets to high-tech vehicles, appliances, and structures.

Furthermore, women's rights should be one of the first reforms that should be examined because the Constitution forbids any type of prejudice or discrimination, as was determined in the case of *Mphephu v. Mphephu-Ramabulana and Others* (948/17) [2019] ZASCA 58. In order to preserve South Africa's Constitution, the state should fight for the protection of women's and children's rights.

In Chapter 2 it was briefly observed that traditional leadership presents a problem for local governments because it is still unclear what function the institution should serve. The TLGFA describes the functions of traditional leadership; however, it remains difficult to put the Act into practice and integrate into local governments. Hopefully, the National Programme for Support of Traditional Leadership will address this issue. Traditional leadership was considered a threat to democracy by the ANC, so it was phased out in the beginning. Traditional leadership was also considered a threat to local municipalities. After realising that traditional leadership enjoyed substantial support from its constituency, the ANC's perspective shifted, although political manipulation could take place when this support is claimed (Ntsebeza, 2003:75-76).

Chapter 3 and Chapter 4 provided the framework and the structure of this study. Due to the nature of the study, which investigated the roles and functions of Chiefs and their Councils who are more active at local level, Chapter 3 indicated that it became necessary to consider a theoretical approach that would channel more deliberations at local level. Decentralisation became more relevant as it sought to promote the devolvement of power, accountability, public participation, and the local management of natural resources. Post-apartheid South Africa, like most developing countries, engaged decentralisation as state reformation endeavours. Decentralisation in a democratic South African government was employed to decentralise hierarchical structures in an attempt to make public service delivery more efficient and extend service coverage by giving local administrative units more responsibility.

After observing the Constitutions of Zimbabwe, Namibia, Ghana and Botswana it was concluded that the state is not an entity that must exist outside of the communities who still practice and live according to the norms and beliefs of their origin, which is why one scholar stated that people are their history and beliefs. Hence, the government must not discard this philosophy, but launch an initiative that will allow for growth in the relationship between the Traditional Councils and the state whereby decisions are made when the Councils are consulted, as they have the authority to go back to their communities to explain the action or decision.

6.3 Achievement of objectives

Objectives for how traditional leadership and the state can move forward

The objectives of the study were clearly defined as follows:

- To explore the role that is presently played by the institution of traditional leadership in the governance and development of respective communities. This was stated at the beginning of Chapter 5, as there was an exploration into whether the state clearly involved traditional leaders in its decision making, especially in matters that directly affected them and if when there was no voice from those communities. For example, traditional leaders insist on clarifying their role as recognised institutions of authority and, in some cases, on revising their constitutions. Through the Traditional Courts Bill, traditional leaders have pushed to exert absolute control over legal matters at the local level. This was discussed in Chapter 5, as traditional leaders were aghast at the way the state acted without consultation and the communities involved reacted in uproar.
- To examine the extent to which the South African government has managed to integrate the institution of traditional leadership into the existing structures of governance, especially rural local governance. This was addressed in Chapter 5 and the main issue was that the government was not doing enough to integrate traditional leadership and their communities in governance. It was established in this research that the work being done was seemingly inadequate. Furthermore, in democratic South Africa, traditional leaders have been and continue to be a contentious issue in both the political and socio-economic spheres. It is ascribed to the ambiguity in their previous local administrative roles under colonialism and in the apartheid era that their credibility has been adversely affected in promoting democracy and development in rural areas.
- To examine the extent to which the institution of traditional leadership, with specific reference to South Africa (and Ghana, Botswana, Namibia and Zimbabwe, and parts of Sub-Saharan Africa), fulfils its legislative obligations as outlined in the Traditional Leadership and Governance Framework Act, 2003 (Act 41 of 2003). The Constitution of South Africa (1996) seems to have omitted or ignored the role that traditional leaders had been accustomed to, and this has created a conflict in the country. Furthermore,

the integral role that traditional leaders fill within rural communities was highlighted. Moreover, the Chapter referred to other African Constitutions to offer South African governance alternatives that can be followed to allow traditional leadership to play its rightful role in the country's governance systems. For example, in Ghana there is the belief that there is no nation without its tradition and there is no tradition without its leadership, which is why their legislation and Constitution have a properly defined role that Traditional Councils play within the governance systems. This is something that South Africa can heed.

- To analyse the current legislation regarding traditional leaders' powers, roles and functions. In Chapter 3, it was discussed as one of the goals of this research, the need to analyse the workings of the Constitution and how this affects rural communities. The fact that rural communities view the current governance system as a total disregard of their customs was a major aspect analysed in this study.
- To determine the effectiveness and relevance of the current legislative tools that administer the Traditional Authorities. Chapter 2 discussed Section 19 of the Traditional Leadership and Governance Framework Act 41 of 2003. It was important to thoroughly analyse how the legislation functioned and how its functions were helpful to traditional leaders. Another question that had to be answered was whether the legislation was sufficient and if it functioned properly.
- To determine the influential role of traditional leaders in the development of rural communities in democratic South Africa. How traditional authorities functioned during the apartheid era and how it differed from the current democratic dispensation were examined. Moreover, an analysis was done of whether traditional authorities' current role is sufficient for them to really impact on how matters are overseen by the state in all spheres of society or if they are only for the purpose of being shown as 'a prize' of South Africa's past history.
- To assess the legislative requirements for the appointment of the traditional leaders based on hereditary rights. Chapter 2 outlined Section 9 of the Traditional Leadership and Governance Framework Act 41 of 2003 on how traditional leaders are appointed. The legislation that was instituted since 1996, as a form of acknowledgment of traditional leaders, was analysed. The main aspects considered was how it could be improved for betterment of the state and for the growth of communities.

- To analyse the working relationship between traditional leaders and South Africa's democratic government at the local level. In Chapter 3, this was discussed, including the different positions and responsibilities bestowed on traditional leaders by the state; whether the traditional leaders who act in these roles feel if it is sufficient or not; and why this was gazetted in legislation.
- To study the constitutional framework on the role of the traditional leadership of other African countries, namely, Ghana, Uganda, and Namibia. In Chapter 5, the aforementioned countries were discussed. There is a need for us to look at how these four states decided to integrate traditional leaders into the governance of the state; how this is in line with a modern constitutional dispensation; and how this can assist South African governance.

6.4 CONCLUSIONS

In conclusion, the influence of colonialism on indigenous African laws is incalculable. According to Fitzpatrick (1985), pre-existing social interactions were appropriated, reconfigured in accordance with its requirements, and then, in a sense, returned to the people as their own. This rejected history and replaced it with tradition. Since Africans are powerless to turn back the hands of their legal clock, they might as well embrace change by ensuring that marginalised populations receive justice. It is obvious that conventional leadership still contributes to the development and governance of the domains for which it is accountable. To better include traditional leadership in the development programmes South Africa plans and implements, the government must step up its efforts in this area (Modern Law Review, 1985:479).

By highlighting some of the difficulties and barriers to successful rural development, this study has been able to add to the field of development studies. The government and traditional leadership institutions will hopefully act and heed the aforementioned advice and recommendations in an effort to enhance the procedures and methods now used for rural development. A review of the degree, achieving its developmental objectives through traditional leadership and obligations as set forth in the Traditional Leadership and Governance Framework Act, Act 41 of 2003, has highlighted this as a gap in this topic and future studies might address this.

This study effectively demonstrated that in South Africa, traditional leadership is emerging, as well as rural citizens' conceptions of traditional leadership. Such a system contradicts the democratic ideals of post-apartheid South Africa. Legislators and the administration sustain it with their autocratic concepts of customary law, including those who still reside in their ancestral territories, to choose their own leaders and be able to hold them accountable for their deeds. Did this pledge not also involve the reversal of the apartheid regime's distortions of conventional law and authority? Resistance by the former Ciskei people to the current attempts to reconstruct traditional authority structures from the top down speaks volumes about this issue.

By tying debates about the various conceptions of customary law held by legislators to a study of traditional leadership, it is argued that studies on traditional leadership need to give closer attention to their democratic or autocratic conceptions of customary law. The reintroduction of traditional authority is engaged in a tussle among administrators, judges, and rural communities.

This study further found that there has been ongoing discussion on the appropriate function of unelected "traditional leaders" or "chiefs" in contemporary African societies. Chiefs were often dismissed as antiquated, outdated, and anti-democratic, especially after the democratic changes that swept the continent in the 1990s, but they have recently come back to life, becoming an essential component of local governance in several nations. Alongside the practice of democracy, elections, and multiparty competition, the unelected chieftaincy has not only co-existed but flourished. In many locations, chiefs collaborate with local council members to distribute land, settle disputes, and run communities.

Citizens in most of the countries that featured in this study have a generally good opinion of traditional leaders, particularly in light of their contributions to government, development, and conflict resolution. They typically view their chiefs as cooperating with elected officials rather than competing with them and as being more concerned with advancing the interests of their communities than their own personal goals. The considerable need for chiefs to assume a larger role in managing communities across the continent may be the most telling conclusion.

Additionally, it was found that the majority of Africans disagree with detractors who claim that an unelected chieftaincy is anti-democratic. People are more inclined to

think of chiefs as strengthening democracy than as weakening it, presumably because of their success in collaborating with local authorities and communities to accomplish goals. There are, however, clear boundaries as to what the populace expects from their traditional leaders: they value the chiefs' participation in local government but disapprove of their involvement in electoral politics.

In closing it can be said that a system of customary law that emerges from community acceptance, including both the institution of traditional authority and particular traditional leaders, is more compatible with democratic state structures if the institution is viewed as a system that emerges from community acceptance. Alternatively, traditional leaders with wide discretion are free to disregard their own communities and act according to their own desires if customary law is conceived as a form of government derived from sovereign command. This will affect the community negatively in terms of democratic norms and practices.

6.5 Recommendations

- I. In Chapter 2, some discrepancies were found and it is suggested that African Constitutions take the lead in integrating customary and state law by incorporating the core concepts of indigenous laws in their own legal systems. Humanity, family continuity, preservation of the ancestral house, the responsibility of care owed to family members by the family head, and the non-individual nature of marriage are some of these clearly definable values. The Constitutional Court of South Africa has stated that, in terms of change, the fundamental principles of indigenous laws are more stable than indigenous legislation since they inspire the ways in which people modify their behaviour in response to socio-economic changes. These fundamental principles are recommended as the basis for the development of common law in African nations. In 1960, it was noted that customary rules in contemporary Africa are expanding. The colonial experience created contemporary customary law by forcing people to adapt indigenous laws to socio-economic changes.
- II. In order to provide the Commission enough time to finish its work, it was advised that the term of office for the Commission on Traditional Leadership Disputes and Claims be extended. This issue was mentioned in Chapter 2 and Chapter 3.

- III. Thirdly, Cooperative Governance and Traditional Affairs must collaborate with the Department of Rural Development and Land Reform to address the needs of the rural poor so that they can live better lives and, hence, lives will be saved. The South African government should also seriously consider implementing a two-tier system of local governance in rural areas. This has been well established by scholars, as referred to in Chapter 2 and 4, as they considered why the government had not involved traditional leadership as part of its governance policy. This was further established in Chapter 4 where reference was made to other African Constitutions.
- IV. In Chapter 5 it was established that there should be a link between the government and traditional leaders and that the traditional courts must have some authority. At the same time, it is recommended that legal practitioners should be kept out of these courts as they might cause more problems than they solve. Another departure proposed is that these courts should be courts of record. For this purpose, para-legals should be trained and appointed to compile reasonable records, including summaries of evidence and judgements. These para-legals must be swiftly deployed into rural communities so that they can begin to educate these communities on what is the purpose of the Constitution, which is something that has been proven to be misunderstood.
- V. Another crucial suggestion is to establish a secretariat for traditional courts within the Ministry of Justice, staffed by a commissioner and assistant commissioners, to keep an eye on how these courts are run and to guarantee that they adhere to the law and constitutional principles.
- VI. Additionally, the administration being restructured ought to result in the delegation of authority to local spheres of government, as well as the allocation of tasks and responsibilities.
- VII. Laws and other measures should be taken to enhance collaborations between local municipalities and traditional councils, as the government's ambition for a single public service has the potential to empower rural communities. A co-operative governance approach should be employed to guide the partnerships.
- VIII. Finally, a radical recommendation is that whereas the traditional councils should continue to be presided over by traditional leaders, an element of popularity should be infused into these councils by having the advisors, who sit with the leaders, elected by the people of the area of jurisdiction of the traditional community.

1. Traditional courts should continue to be recognised where they are already established, that is, in rural areas, within the areas of jurisdiction of chiefs and headmen.
2. In urban or peri-urban areas where there are no chiefs or headmen, community courts should be established and should consist of members popularly elected by all the residents of a particular urban locality. These community courts should apply the general sense of justice and common sense and should aim at reconciling the disputants and establishing harmony in the community. Decisions should be by consensus or by majority vote. Appeals should go to Magistrates courts.
 - a. Traditional courts should continue to be presided over by chiefs and headmen as part of their role under Section 211 of the Constitution.
 - b. Alternatively, existing chief's courts could become informal arbitration tribunals while special customary courts or community courts take their place as formal courts, similar to the situation in Lesotho.
3. (a) Councillors could be popularly elected by the people of the village or ward to sit with the chief or headman in his/her adjudication of disputes. Decisions should be taken collectively, treating the councillors as full members of the court.
4. (b) Alternatively, councillors could be appointed by the presiding chief or headman from a panel elected by the relevant community. The traditional element of popular participation whereby every adult was allowed to question litigants and give his opinion on the case should be maintained.
5. To comply with Section 9 of the Constitution, the full participation of women members of the community as councillors or presiding adjudicators must be allowed.
6. Para-legal should be trained and appointed by the Ministry of Justice to assist traditional courts. These clerks should be trained in customary law and have a basic understanding of the Bill of Rights.
7. (a) The Regional Authority Courts of the former Transkei should be abolished.
 - (b) Alternatively, the Regional Authority Courts could be retained as appeal courts in customary law matters, but in that event similar courts should be established all over the country to maintain uniformity in the administration of justice.

8. Traditional courts should be regarded as courts of law and given the status and respect of courts of law.

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