

Chapter 26

Traditional Leaders

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211. (1) The institutional status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

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Role of traditional leaders

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

(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law —

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

26.1 Introduction*

The Final Constitution deals with traditional leaders in two short sections, a terseness which reflects the dominant view in the Constitutional Assembly that democracy, not traditional leadership, was to take precedence in South Africa. However, the intense political negotiations between the government and traditional leaders over the eight years since the Final Constitution came into effect demonstrate that the role of traditional leaders in South Africa is more complicated, and more deeply entrenched, than constitution-makers were prepared to concede. The role of traditional leaders in local government is the area of greatest dispute, as it is at the local level that traditional leaders formerly exercised most of their powers. Three key pieces of legislation, two relating to local government (Local Government: Municipal Demarcation Act¹ and Local Government: Municipal Structures Act²) and one concerned directly with the role of traditional leaders (Traditional Leadership and Governance Framework Act³), have done little to resolve matters. Instead, the context in which traditional leaders now operate is often unclear. Their relationship with the municipal councils that govern the areas within which they fall, for example, remains fuzzy. The impact of the Final Constitution's commitment to equality on succession to leadership positions is contested. The constitutionality of traditional courts is disputed. The power of the provincial and national houses of traditional leaders is the subject of deep unhappiness amongst traditional leaders. The extent to which practices of

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1 Act 27 of 1998.

2 Act 117 of 1998.

3 Act 41 of 2003.

traditional leaders must be revised in the light of the Bill of Rights (in particular, the provisions relating to just administrative action) is the subject of an increasing number of constitutional challenges.

Underlying all these difficulties are profoundly different understandings of government: on the one hand, those held by traditional leaders, and, on the other, those held by elected representatives in the new South African democracy. In modern states, governmental powers are regulated by various rules which are designed to guarantee what is probably the most important principle in a democracy: accountability to the citizen body.⁴ Customary law had no specific rules catering for this principle, but the type of controls associated with a bureaucratic state were irrelevant to the personal style of government typical of traditional African society. A ruler's power was general and all-inclusive.⁵ It followed that the business of government was neither differentiated according to the western notions of executive, judicial and legislative functions nor allocated to separate institutions.⁶ Instead, all the functions of government were located in one body: the chief-in-council.

When the Interim Constitution was promulgated, traditional leaders still held, more or less unchanged, their all-encompassing powers of government under customary law.⁷ Although these powers were, in principle, subject to statutory controls, very few had, in fact, been passed during the years of colonial and apartheid rule. The principal legislation was (and remains) the Black Authorities Act,⁸ which provides tribal authorities with all the customary powers of government.⁹ FC s 211(1) accepts this position in broad principle by providing that '[t]he institution, status and role of traditional leadership, according to customary law, are recognised.' But then follows a significant proviso: 'subject to the Constitution'.

Because traditional rulers are organs of state,¹⁰ and must comply with the Final Constitution,¹¹ certain customs will have to change and certain specific customary powers are now superseded or limited. The Final Constitution's commitment to

4 See Constitution of the Republic of South Africa, 1996 ('FC' or 'Final Constitution'), s 1(d).

5 The most diverse and far-reaching powers relate to land, including the powers to dedicate new land to commonage, farming or residence, to declare the beginning and end of the agricultural cycle and to impose conservation measures.

6 See AC Myburgh *Die Inheemse Staat in Suider-Afrika* (1986) 7; WD Hammond-Tooke *Imperfect Interpreters: South Africa's Anthropologists 1920-1990* (1997) 64-5; HO Mönning *The Pedi* (1967) 253-4; H Ashton *The Basuto* (1952) 209-10.

7 Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution').

8 Act 68 of 1951, as amended by the Regional and Land Affairs General Amendment Act 89 of 1993.

9 Under Black Authorities Act s 4(2) traditional leaders also have the powers given to them by subordinate legislation. The regulations in question are contained in Proc R110 of 1957, as amended by Proc R110 of 1991.

gender equality, for example, has major implications for many customary practices, including succession and the composition of traditional councils. We discuss these matters later in the Chapter. The Final Constitution also explicitly vests the power to raise taxes in national, provincial and local governments.¹² A traditional leader's customary power in this regard is therefore lost.¹³ FC s 13, which prohibits servitude or forced labour, would also suggest that rulers must forfeit their power to demand labour from their subjects for public projects.¹⁴

More general qualifications on the exercise of customary powers flow from the two constitutional frameworks that were designed to differentiate the functions and institutions of government and to ensure limited government in South Africa: separation of powers (accompanied by checks and balances) and multi-sphere government (national, provincial and local). The former is not expressly mentioned in the Final Constitution, but it has been built into the new system of government. Hence, the Constitutional Court has said that there 'can be no doubt that our Constitution provides for such a separation, and that laws inconsistent with what the

- 10 FC s 239 defines an organ of state broadly to include any functionary or institution exercising a power or performing a function in terms of the Final Constitution or exercising a public power in terms of legislation. For the definition of 'organ of State', see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds), *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.
- 11 See FC s 8(1)(Explicitly binds all organs of state.)
- 12 See FC ss 228 and 229. See also *White Paper on Traditional Leadership and Governance* (2003) 43, available at <http://www.info.gov.za/gazette/bills/2003/b58-03.pdf> (accessed on 20 July 2005) ('*White Paper on Traditional Leadership*').
- 13 A distinction may, however, be drawn between tax and tribute. But see Mönnig (supra) at 287 (Customary law makes no such distinction). Tax is a compulsory contribution to the fiscus for use in promoting the public welfare; tribute is a payment made as a mark of deference or respect for a ruler. The power to issue compulsory levies (which implies an ad hoc tax) is encoded in regulation 22 of the Regulations for Tribal and Community Authorities. R2779 of 22 November 1991. Government approval must first be obtained. This regulation is now presumably unconstitutional. See also H Kuckertz *Creating Order: The Image of the Homestead in Mpondo Social Life* (1990) 71-2 (On the general decline of traditional fiscal powers.)
- 14 See, generally, S Woolman & M Bishop 'Slavery, Servitude and Forced Labour' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 64. In light of FC s 13, the decision in *Sibasa v Ratsialingwa & Hartman NO*, that traditional rulers have a right to require their subjects to work their own lands for the production of official income may no longer be valid. 1947 (4) SA 369 (T). However, if the section is read in light of the Forced Labour Convention No 29 of 1930 there may be grounds on which to defend this customary power under FC s 36. Under FC s 36 a right may be limited by 'law of general application' only, and customary law is law of general application. See *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC) at para 136; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 96; S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 34 (On meaning, purpose and criteria for 'law of general application' as used in FC s 36). Moreover, while the Convention obliges states party to suppress forced labour practices, it allows various exceptions, notably, 'minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations.' Article 2(2)(e). In addition, Articles 7 and 10 allow traditional rulers to exact forced labour, provided the work is in the interests of the community, is necessary and not too burdensome, and is in accord with the exigencies of social life and agriculture. The work may include ploughing and harvesting the rulers' own fields.

Constitution requires in that regard are invalid.¹⁵ The framework of multi-sphere government, on the other hand, is explicit.¹⁶

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Traditional leaders are an awkward element in these structures, because, according to customary law, in its pre-colonial form at least, traditional rulers were full sovereigns, with powers limited only by the people and territory under their jurisdiction. This Chapter discusses the constitutional framework within which traditional leaders now operate in South Africa, as well as some of the most difficult issues arising from attempts to accommodate traditional leadership in a democracy. To better understand the uncertainty and controversy that surround their role, the discussion is set against a description of the traditional form of government.

26.2 The structure of traditional government

According to the typical legend, traditional polities were founded when a charismatic individual, the head of a clan, together with various other families attached to the group, guided his people to the land on which they were to settle. Whatever the reasons for migration over the vast spaces of Africa, once favourable conditions were found, the group could settle permanently. The process might involve the conquest and absorption (or even expulsion) of the original inhabitants, or it might involve the negotiation of a right to settle within a more powerful nation. In any event, settlement established a territorial framework within which to structure further political and economic relations. Hence, the leader could mark out land for his own homestead and fields, those for other sections of the clan and accompanying families, and then an area for communal grazing.

In the early days, government of this unit would have been a simple matter, given the small number of people involved. As the unit grew, however, a certain stratification and structure would inevitably develop. Decisions would be made by the leader in consultation with an inner clique, usually composed of senior kin of the founding clan. When occasion demanded, the advisory council could be expanded to include leaders of the associated families.

In the parlance of colonial rule, these units were generally described as 'tribes' and their leaders as 'chiefs'.¹⁷ The former denoted a partially stratified political structure, normally containing no more than a few thousand individuals.¹⁸ Members were assumed to be related by ties of kinship, and, because of their common ancestry, they were believed to be homogeneous groups, bound together by

15 See *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at para 22. See also I Currie & J de Waal *New Constitutional and Administrative Law: Vol 1* (2001) 96.

16 FC s 40(1). See S Woolman, T Roux & B Bekink 'Cooperative Government' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 14.

17 See M Mamdani *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996) 79–82.

18 See T Earle (ed) *Chiefdoms: Power, Economy and Ideology* (1991) 1ff. For a useful typology, see B Sansom 'Traditional Economic Systems' in WD Hammond-Tooke (ed) *The Bantu-speaking Peoples of Southern Africa* (2nd Edition, 1974) ('Hammond-Tooke *Bantu Speaking Peoples*') 249.

common interests, beliefs and goals.¹⁹ Leadership of tribes fell to their most senior members, the chiefs. This word was the English translation for *inkosi* (Xhosa and Zulu), *morena* (Sotho) and *kgosi* (Tswana). In most of southern Africa, the office was hereditary, generally devolving according to the principle of primogeniture in the male line.

Blanket use of the terms tribe and chief obscured not only the true nature of these institutions but also the considerable diversity of political structures in pre-colonial southern Africa.²⁰ The term tribe is a particularly egregious offender in this regard.²¹ Kinship was never the sole basis for membership.²² Political units might, historically, have been based on ties of blood, but outsiders were always being incorporated, whether by way of conquest, invitation or submission. What is more, from the very earliest days of colonization, traditional polities were divided, merged or reconstituted in order to suit central government policies.²³ Modern tribes therefore bear little resemblance to their pre-colonial forebears.

Chiefs stood at the head of the hierarchy of offices in traditional government. In cases where a particular individual had gained primacy over his neighbours, the colonial powers were sometimes prepared to use the term 'king'.²⁴ Hence, Sobhuza I, Mswati II, Shaka, Dingane and Moshoeshoe were all referred to as kings of their peoples. Otherwise, where a chief had not yet acquired complete authority over his coevals (as with the Xhosa), or where the polity was simply not considered large enough (as with the Pedi), the principal ruler was described as a 'paramount chief'.²⁵

Below the office of chief or king, the polities of southern Africa could, broadly speaking, be divided into two tiers of authority: wardhead and familyhead. Headmen

19 See Sansom (supra) at 262–3. It is significant that the courts accepted these criteria for purposes of apartheid legislation. See *S v Bhoolia* 1970 (4) SA 692 (A) (Relied exclusively on kinship or genetic links to determine the concept of tribe.) See also *Mathebe v Regeering van die RSA & Andere* 1988 (3) SA 667 (A), 692–3; *Staatspresident & 'n Ander v Lefuo* 1990 (2) SA 679 (A), 685 (Criteria of ethnic and cultural homogeneity.)

20 See EAB Van Nieuwaal 'Chiefs and African States: Some Introductory Notes and an Extensive Bibliography on African Chieftaincy' (1987) 25 & 26 *J Legal Pluralism* 1, 5ff. See also M Hall *The Changing Past: Farmers, Kings and Traders in Southern Africa 200–1860* (1987) 74ff (Historical and archaeological evidence.)

21 As an analytical concept, 'tribe' is of little value. See Hammond-Tooke *Bantu-speaking Peoples* (supra) at xv; A Mafeje 'The Ideology of Tribalism' (1971) 9 *J Mod Afr Studies* 253; and P H Gulliver (ed) *Tradition and Transition in East Africa* (1969) 7–35. See also P Skalnik in E Boonzaier & J Sharp *South African Keywords: the Uses and Abuses of Political Concepts* (1988) 68ff. Tribe is additionally objectionable because it carries the connotation of 'tribalism'. See L Vail (ed) *The Creation of Tribalism in Southern Africa* (1989) 3–4.

22 See I Schapera *Tribal Innovators: Tswana Chiefs and Social Change* (1970) ('Schapera *Tribal Innovators*') 5 and 205.

23 The creation of a Tsonga tribe out of a collection of disparate peoples provides a telling, albeit extreme, example of these processes. See P Harries 'The Emergence of Ethnicity among the Tsonga Speakers of South Africa' in Vail (supra) at 83ff.

24 King may be translated as *ingonyama* (Zulu), *ikumkani* (Xhosa) and *marena a maholo* (Sotho). See M Gluckman 'The Kingdom of the Zulu in South Africa' in M Fortes & E E Evans-Pritchard (eds) *African Political Systems* (1940) 24ff.

(or wardheads)²⁶ were normally senior members of leading families within the nation. They controlled clearly defined geographic units, termed 'wards' in the

anthropological literature.²⁷ Wardheads reported directly to the chief, and, in concert with him, they formed a ruling council. Below the wardheads came the patriarchal heads of households, known as '*kraalheads*' in colonial parlance, or, more commonly today, 'familyheads'. Each incumbent of the three (or sometimes four) ranks of office — chief, wardhead and familyhead — exercised similar types of power, but obviously at different levels of authority.²⁸

In the eyes of his people, the chief was the most important and powerful member of his nation.²⁹ Even so, people talked about their chiefs in the idiom of kinship. Thus, subjects called their ruler a 'father', and his great wife a 'mother'. Like the patriarchal head of a household, chiefly powers were generalized and diffuse. He was expected to judge disputes fairly, to govern wisely, to provide for the needy and to tend to the welfare of his people.³⁰

25 See WD Hammond-Tooke 'Chieftainship in Transkeian Political Development' (1965) 35 *Africa* 149, 157-9 (Describes the Xhosa-speaking polities as a 'tribal cluster'). But see J B Peires *The House of Phalo: a History of the Xhosa People* (1981) 27-31 (Regards them as a more unified structure and argues that Hammond-Tooke's view was formulated at a particular time in Xhosa history, namely, when they were trying to extend their control.) See also RB Mqoke *Basic Approaches to Problem Solving in Customary Law: A Study of Conciliation and Consensus Among the Cape Nguni* (1997) 69-70. For the Tswana, see I Schapera 'The Political Organisation of the Ngwato of Bechuanaland Protectorate' in Fortes & Evans-Pritchard (supra) at 56ff.

26 Headman is a term associated with government usage and wardhead with the anthropological literature. They are used to translate *induna* (Zulu), *ibonda* (Xhosa), *morenana* (Sotho) and *kgosana* (Tswana).

27 On the concept of the ward, see AJB Hughes *Land Tenure, Land Rights and Land Communities on Swazi National Land in Swaziland: A Discussion of Some Inter-relationships Between the Traditional Tenurial System and Problems of Agrarian Development* (1972) 102; J F Holleman 'Some Shona Tribes in Southern Africa' in E Colson & M Gluckman *Seven Tribes of British Central Africa* (1961) 367-9; I Schapera *Native Land Tenure in the Bechuanaland Protectorate* (1943) ('Schapera *Native Land Tenure*') 27-32; MFC Bourdillon *The Shona Peoples: An Ethnography of the Contemporary Shona with Special Reference to their Religion* (1976) 123-4; WJO Jeppe *Die Ontwikkeling van Bestuursinstellings in die Westelike Bantoegebiede (Tswana-Tuisland)* (1970) 113; VGJ Sheddick *Land Tenure in Basutoland* (1954) 8-9.

28 See Sansom (supra) at 145-6; Holleman (supra) at 371-2, 376; Ashton (supra) at 209; M Gluckman *Politics, Law and Ritual in Tribal Society* (1971) ('Gluckman *Politics Law and Ritual*') 39.

29 He embodied all the emotions and values that ensured the integrity of the realm. See Hammond-Tooke *Bantu-speaking Peoples* (supra) at 174. See also Mönnig (supra) at 253; I Schapera *A Handbook of Tswana Law and Custom* (2nd Edition, 1955) ('Schapera *Handbook*') 62. Note that the chief represented his people in dealings with outsiders. See Schapera *Handbook* (supra) at 69; Sansom (supra) at 266. Thus, according to *Mathiba v Du Toit*, the chief had *locus standi* to sue for restoration of national land. 1926 TPD 126.

30 See M Hunter *Reaction to Conquest* (1964) 392; Schapera *Handbook* (supra) at 68; WD Hammond-Tooke *Command or Consensus: The Development of Transkeian Local Government* (1975) ('Hammond-Tooke *Command or Consensus*') 30; Mönnig (supra) at 254. In keeping with this paternal image is the principle that a ruler's reputation was enhanced by giving rather than receiving. See Gluckman *Politics, Law and Ritual* (supra) at 50; WD Hammond-Tooke *Bhaca Society* (1962) 199; Ashton (supra) at 212; Mönnig (supra) at 274.

Many of these powers derived from the belief that the present ruler was a direct descendant of the founder of the nation. Through a notionally unbroken tie of blood, he provided a channel of communication with the ancestors of his people,³¹ and, because of this special relationship, he had the spiritual powers necessary to maintain the natural order.³² In particular, he was able to ensure good rains and fertile crops. By reason of his control over the processes of nature, the ruler presided at the major national rituals. In farming communities, for example, he decided when the agricultural cycle was to begin and end, and, accordingly, when his people could start to plough or harvest.³³

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The ruler also had a range of powers and privileges of a more secular nature. He could order his subjects to work on his lands and provide labour for public works;³⁴ he could levy taxes³⁵ and demand tribute from the harvest³⁶ or the hunt;³⁷ he was entitled to choose the best land for his homesteads;³⁸ and he could order his subjects to plough and harvest his fields.³⁹

This form of government obviously differed markedly from a modern democracy. Traditional rulers needed no special training; they were qualified for office by their ancestry alone. (Hence the well-known saying, *kgosi ke kgosi ka a tswetswe* [a king

31 See EM Letsoalo *Land Reforms in South Africa* (1987) 18; WJO Jeppe *Bophuthatswana: Land Tenure and Development* (1980) ('Jeppe Bophuthatswana') 36; Schapera *Handbook* (supra) at 61-2; Bourdillon (supra) at 87.

32 See Earle (supra) at 6-7.

33 See AC Myburgh & MW Prinsloo *Indigenous Public Law in KwaNdebele* (1985) 41; MW Prinsloo *Inheemse Publiekreg in Lebowa* (1983) ('Prinsloo Publiekreg') 131; W D Hammond-Tooke *Bhaca Society* (supra) at 176; Mönnig (supra) at 159-60. The harvest festival was generally the highlight of the seasonal calendar. It was an occasion to celebrate the first fruits, affirm national unity and honour the ruler for his wisdom and benevolence. See BA Marwick *The Swazi* (1966) 182ff; Hammond-Tooke *Bhaca Society* (supra) at 179ff; Schapera *Native Land Tenure* (supra) at 187-8; EJ Krige *The Social System of the Zulus* (1936) 249; Hunter (supra) at 394.

34 See Myburgh & Prinsloo (supra) at 8; Ashton (supra) at 207-8; Hughes (supra) at 144.

35 The taxes often paid for public works. See Ashton (supra) at 208; Krige (supra) at 221-2; Hughes (supra) at 109.

36 Schapera *Native Land Tenure* (supra) at 196; Letsoalo (supra) at 19 and 23; H Kuper *An African Aristocracy* (1947) 150. Cf Marwick (supra) at 164; NJ Van Warmelo & WMD Phophi *Venda Law: Parts 1-3* (1948), *Part 4* (1949), *Part 5* (1967) 1089.

37 See Holleman (supra) at 378; Bourdillon (supra) at 86; Hammond-Tooke *Bhaca Society* (supra) at 199; Ashton (supra) at 208; Prinsloo *Publiekreg* (supra) at 141; Krige (supra) at 222; HA Junod *The Life of a South African Tribe* (1912) 404-7.

38 See Schapera *Native Land Tenure* (supra) at 44; Sheddick (supra) at 147; Kuper (supra) at 45 and 149.

39 The produce was supposed to be used to feed the needy. See Letsoalo (supra) at 18-19; Holleman (supra) at 378, Hughes (supra) at 108; Sheddick (supra) at 33, 148 and 150.

is a king because he is born to it].) As we have already noted, the functions of government were not differentiated into judicial, administrative and legislative categories, nor were rulers subject to the scrutiny of an independent judiciary. What seems an alarming concentration of power in one person was circumscribed, normatively, only by a duty to consult councillors and always to act for the benefit of the people.

The most important limitation on the power of traditional rulers came from the reality of day-to-day politics. As the notion of tribe suggests, most pre-colonial African polities were poised halfway between being state and stateless societies.⁴⁰ As a result, few rulers had an uncontested hold on their offices. If an office holder is constantly under threat of usurpation, he has to take great care to cultivate goodwill and to appease hostile factions.⁴¹ Thus, a certain degree of political insecurity explains why an African ruler's power could not, in the past at least, have been absolute. Anyone who attempted tyrannical rule would soon face revolt or secession.⁴² The wise leader, therefore, did not dictate to his subjects. A common saying has it that *kgosi ke kgosi ka batho* [a chief is a chief through his people].⁴³

Rulers kept in touch with their people through councillors. As might be expected, the status and function of these officials varied, as did the composition and tasks of the councils they formed.⁴⁴ All rulers tended to rely on their senior

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kinsmen for regular advice. These individuals constituted a close-knit council, which generally met in private. A similar, more representative unit, which also met in private, consisted of members of the family council together with leaders of the community, notably, the wardheads.

Meetings of the ruling aristocracy should be distinguished from popular assemblies (*imbizo* in Xhosa/Zulu or *pitso* in Sotho/Tswana). At the latter, all (male) adults in the realm were called together for the discussion of nationally important matters, such as the imposition of new legislation or levies, the organization of collective labour parties or, occasionally, the resolution of national disputes.

Because no important decision could be taken without discussion in council, kinsmen, wardheads or even the people generally were given opportunities to check

40 See Fortes & Evans-Pritchard (supra) at 5ff.

41 See Hall (supra) at 63-4; Hammond-Tooke *Command or Consensus* (supra) at 31ff.

42 See I Schapera *Government and Politics in Tribal Societies* (1956) 211 Hammond-Tooke *Command or Consensus* (supra) at 35-6; Ashton (supra) at 217; Hunter (supra) at 393-4.

43 See Prinsloo *Publiekreg* (supra) at 161; Schapera *Handbook* (supra) at 84.

44 See Schapera *Handbook* (supra) at 75 (Noted that the councils were not formally constituted and had no fixed membership.) The various types of council and national gathering are described in Jeppe *Bophuthatswana* (supra) at 126-7; Ashton (supra) at 216; Hughes (supra) at 103-4; Myburgh & Prinsloo (supra) at 11-13 and 51-3; Prinsloo *Publiekreg* (supra) at 92-7; Schapera *Tribal Innovators* (supra) at 22-5. After the enactment of the Black Authorities Act, the government naturally looked to these councils to provide the future 'tribal authorities'. Act 68 of 1951. See Jeppe *Bophuthatswana* (supra) at 120; Myburgh & Prinsloo (supra) at 53-7.

self-interested action and to voice public opinion.⁴⁵ Hence, a ruler's authority was never continuing and unquestioned; it always had to be recreated for specific issues and in specific contexts.⁴⁶

Because of the constant flux in power and authority in the traditional structures of government, historical and anthropological sources were uncertain about the nature of traditional rule. Was it a primordial form democracy or naked despotism?⁴⁷ Perhaps predictably, the colonial authorities tended to regard all indigenous rulers as autocrats.⁴⁸

26.3 Conquest, indirect rule and apartheid

The various forces unleashed by colonial conquest inevitably worked to undermine the checks and balances of traditional government.

Initially, dating from their earliest exchanges with the people living on the eastern frontiers of the Cape Colony, the British aimed at eliminating traditional government. When areas of Ciskei were annexed, a conscious attempt was made to reduce the power of the chiefs, who were believed to be the main obstacle to Britain's civilizing mission in Africa.⁴⁹ Thereafter, as colonial rule was extended

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beyond the Kei River, a similar, although modified form of government was introduced to the Transkeian territories.

A completely different policy developed in Natal.⁵⁰ There, Shepstone persuaded the colonial administration to give chiefs governmental and judicial powers,⁵¹ under the leadership of the Lieutenant-Governor, who was deemed Supreme Chief of the

45 See Kuckertz (supra) at 80ff; Jeppe *Bophuthatswana* (supra) at 119ff n12; Hammond-Tooke *Bhaca Society* (supra) at 205-6; Prinsloo *Publiekreg* (supra) at 153ff, 165; Myburgh & Prinsloo (supra) at 66ff; Ashton (supra) at 215.

46 See Hammond-Tooke *Command or Consensus* (supra) at 65. See also JL Comaroff 'Chieftainship in a South African Homeland' (1974) 1 *Journal for Southern African Studies* 36, 41 (Describes traditional authority as follows: '[t]he rights and duties of [a chief] are not immutably fixed: the chief and his subjects are thought to be involved in a perpetual transactional process in which the former discharges obligations and, in return, receives the accepted right to influence policy and command people. The degree to which his performance is evaluated as being satisfactory is held to determine the extent of his legitimacy, as expressed in the willingness of his people to execute his decisions.')

47 See M Chanock *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (2000) 282ff n5.

48 See *Rathibe v Reid & Another* 1927 AD 74, 81. But see AC Myburgh *Die Inheemse Staat in Suider-Afrika* (1986) 63ff (Notes considerable variation and contradiction in the sources.)

49 See EH Brookes *The History of Native Policy in South Africa from 1830 to the Present Day* (1924) 90 and 93-4. More formally, British policy was justified by Ordinance 50 of 1828, which required equal treatment for all people in the Colony. See Mqoke (supra) at 75-8 (Brief history of the imposition of British rule in Ciskei and Transkei.)

50 See Brookes (supra) at 25.

African people.⁵² In the Transvaal, during the short period of British rule from 1877 to 1881, the same regime was imposed, and, after the retrocession, it was retained.⁵³ As in Natal, traditional rulers were given both judicial and local government powers, subject to native commissioners and the overriding authority of the State President, who held the office of Paramount Chief.

The policy towards traditional rulers on the northern borders of the Cape colony was similar. In 1885, when Britain declared southern Bechuanaland a Crown colony and northern Bechuanaland a protectorate, traditional rulers were allowed to continue administering customary law more or less undisturbed.⁵⁴ Colonial courts had the power to try Africans only 'in the interests of peace, or for the prevention or punishment of acts of violence to persons or property.'⁵⁵ In 1895, southern Bechuanaland was incorporated into the Cape, but no attempt was made to impose Cape policy.

The Orange Free State could not be considered to have any fixed policy on traditional rulers. The rulers of the Rolong were allowed to continue governing their people in the Thaba'Nchu Reserve, and those of the small Witzieshoek Reserve were also given minor civil jurisdiction according to customary law, with appeal to the Commandant.⁵⁶

With the exception of the Cape and the Free State, colonial rule in most parts of southern Africa left the customary powers of traditional rulers more or less intact. Although legally subordinate to settler governments, chiefs continued to be the main providers of law and order for their subjects. Nevertheless, in spite of this structure of indirect rule — a policy that Britain was later to implement throughout Africa — the subtle give-and-take of traditional government was gradually supplanted by a more authoritarian rule.⁵⁷

Once African leaders became functionaries of colonial government, the central administration became the primary source of their power and authority, which in turn eroded any sense of accountability to those being governed.⁵⁸ In addition,

51 Ordinance 3 of 1849.

52 Through this means the colonial government could rule African subjects by executive decree, rather than the normal legislative process. See D Welsh 'The State President's Powers under the Bantu Administration Act' 1968 *Acta Juridica* 81, 89-90.

53 Law 4 of 1885. See Brookes (*supra*) at 130.

54 Sections 31 and 32 of Proc 2 of 1885.

55 Section 8 of an Order in Council of 10 June 1891.

56 Law 9 of 1889. See H Rogers *Native Administration in the Union of South Africa* (2nd Edition, 1949) 102-3.

57 See Mamdani (*supra*) at 52ff (Describes indirect rule as a system of 'decentralised despotism'.)

58 See, eg, Ashton (*supra*) at 217; Jeppe *Bophuthatswana* (*supra*) at 149; Hammond-Tooke *Command or Consensus* (*supra*) at Chapter 8.

when the colonial powers imposed new provincial and international boundaries, the most effective method for protesting against unpopular rulers — secession — was lost, because those disaffected with a chief's rule were prevented from leaving the chiefdom to settle elsewhere.⁵⁹

The most determined campaign to undermine traditional government was a scheme launched by the Cape administration in the district of Glen Grey in 1894.⁶⁰ For complex reasons to do mainly with excluding Africans from Parliament, people living in the area were subjected to new organs of partially elected location councils and more comprehensive district councils. What came to be known as 'the council system' was then extended to the Transkei,⁶¹ where a general council (or *Bhunga*)⁶² provided a model for future local government in rural areas.

In 1909, the South Africa Act vested control of 'native' affairs in the Governor-General in Council, who henceforth assumed all the special powers previously held by the governors of the colonies.⁶³ A national Department of Native Affairs was fashioned out of earlier colonial departments, and this body became the Governor-General's main executive authority.⁶⁴ One of the new Department's first tasks was to devise a uniform policy of local government for rural Africans.

The Native Affairs Act was passed in 1920.⁶⁵ This law, which represented a high-water mark in the policy of Cape paternalism, extended the Glen Grey council system nationwide. The councils set up under the Act were expected to attend to all the duties that elsewhere were performed by municipalities, such as the building of schools and hospitals and the improvement of agriculture. Councils had authority to make by-laws, prescribe fees for the services they rendered, and levy rates on adult males ordinarily resident within their areas of jurisdiction.

Those who drafted the Native Affairs Act envisaged a close cooperation between the councils and the Native Affairs Department, whereby Africans would be trained to achieve a western style of government under the tutelage of native commissioners. Great emphasis was placed on consultation, with mediation by the Native Affairs Commission.⁶⁶ As it turned out, however, very few councils were

59 See Prinsloo *Publiekreg* (supra) at 29.

60 Act 25 of 1894 (Cape). See Hammond-Tooke *Command or Consensus* (supra) at 84ff.

61 Proclamation 352 of 1894. See Rogers (supra) at 40ff.

62 This Council was formed by an amalgamation of the general councils for Transkei and Pondoland by Proclamation 279 of 1930.

63 Section 147 of the South Africa Act of 1909.

64 See Lord Hailey *An African Survey: A Study of Problems Arising in Africa South of the Sahara* (2nd Edition, 1945) 363ff.

65 Act 23 of 1920.

capable of managing the extensive duties prescribed in the Act,⁶⁷ and, within a decade, the entire system began to falter.⁶⁸

In any event, a new policy appeared during the course of the 1920s, one designed to 'retribalise' the African population and resurrect traditional rule.⁶⁹ In 1927, the government laid the statutory foundation for this policy: the Native Administration Act.⁷⁰ Although judicial powers over civil disputes were returned to the chiefs,⁷¹ the state assumed wide powers of control over traditional institutions of government. These powers could be summed up in a single provision: s 1 of the Act made the Governor-General the Supreme Chief of all Africans. Acting in this capacity, he had full authority, with the advice of the Department of Native Affairs, to create and to divide tribes,⁷² and to appoint any person he chose as a chief or headman.⁷³

The Native Administration Act, although often amended, and now named the Black Administration Act, is still in force.⁷⁴ Traditional rulers who opposed the exercise of executive powers, no matter what popular legitimacy they might have enjoyed, could be ousted from office or passed over in matters of succession. Hence, although the Department of Native Affairs was generally prepared to make appointments from the ruling families, it was free to depart from the established order of succession by choosing uncles or younger brothers,⁷⁵ or by promoting subordinate headmen.⁷⁶ The outcome was a compliant cadre of 'traditional' leaders who provided the personnel needed to realize an increasingly unpopular state

66 The Commission was an advisory body of independent experts (presided over by the Minister) which was established under the Native Affairs Act. Act 23 of 1920.

67 See Rogers (*supra*) at 66.

68 See S Dubow *Racial Segregation and the Origins of Apartheid in South Africa, 1919-36* (1989) 107ff.

69 The ultimate aim was to eliminate any vestiges of African participation in central government. This goal was achieved, formally, when the Representation of Natives Act removed Africans from the common voters' roll. Act 12 of 1936.

70 Act 38 of 1927 ('NAA').

71 NAA s 12. Later, under NAA s 20, chiefs were given minor criminal jurisdiction.

72 NAA s 5(1)(a).

73 NAA s 2(7).

74 A bill to repeal the Black Administration Act is currently before Parliament: Repeal of the Black Administration Act and Amendment of Certain Laws Bill (2005). The Constitutional Court has commented on the need to repeal the Act on a number of occasions: *Western Cape Provincial Government & Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government & Another* 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC) at paras 1, 2, 41 and 93; *Moseneke & Others v The Master & Another* 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC) at para 21; *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of the RSA & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at paras 62-64.

policy.⁷⁷ Especially after 1948, when the Nationalist Party came to power, chiefs became instrumental in enforcing (or at least facilitating) many of the hated apartheid controls.⁷⁸

For another twenty years, the council system persisted alongside this supposedly traditional form of government, but, in areas where no councils had been

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established, chiefs were allowed to continue exercising their customary powers. Eventually, the Bantu Authorities Act signalled the formal demise of the council system and a full return to traditional rule.⁷⁹ Under the new Act, the Governor-General could, with due regard to customary law, and after consultation with the tribe concerned, establish three tiers of authority in the reserves (which later became the *bantustans*): tribal, regional and territorial.⁸⁰ A tribal authority, which consisted of a chief (or headman) and his councillors, operated at the lowest level. It was responsible for administering the general affairs of a tribe and for advising and assisting the government.⁸¹ Strictly speaking, the councils set up under the 1920 Native Affairs Act ceased to exist when new authorities were established in their areas of jurisdiction,⁸² but, whenever possible, the Bantu authorities were simply grafted onto existing council structures.

The Bantu Authorities Act paved the way for the next stage in the apartheid programme: the creation of independent homelands. In 1959, the Promotion of Bantu Self-Government Act created eight (later nine) national units, and it provided a framework for their transition to self-government and ultimately full independence.⁸³ Africans now fell under the jurisdiction of one of the 'territorial

75 See W Beinart & C Bundy *Hidden Struggles in Rural South Africa: Politics and Popular Movements in the Transkei and Eastern Cape, 1890-1930* (1987) 7.

76 See I van Kessel & B Oomen "'One Chief, One Vote": The Revival of Traditional Authorities in Post-apartheid South Africa' (1997) 96 *African Affairs* 561, 563-4.

77 See T Quinlan 'The Perpetuation of Myths: A Case Study in "Tribe" and "Chief" in South Africa' (1988) 27 *J Legal Pluralism* 79 (Study of the former homeland of Qwa Qwa.)

78 Of course, not all traditional rulers were prepared to cooperate. Notable instances of resistance were Albert Luthuli, who was elected ANC president in 1952, and Sabata Dalindyebo and Morwamoche Sekhukune, in Transkei and Lebowa, respectively.

79 Act 68 of 1951 ('BAA').

80 BAA s 2(1). BAA s 3 allowed the Governor-General (later the State President) to recognize tribal authorities that were already functioning according to the laws and customs of the tribes. Under BAA s 3(3), members of regional authority structures were drawn from the traditional rulers who constituted the tribal authorities.

81 BAA s 4(1). Powers and duties were further specified under Proclamation R110 of 1957.

82 BAA s 12.

83 Act 46 of 1959.

authorities', and each of these authorities was allotted one or more of the *bantustans* as a 'national homeland'. Thus, the North-Sotho authority was allotted Lebowa, the South-Sotho Qwaqwa, the Swazi Kangwane, the Tsonga Gazankulu, the Tswana Bophuthatswana, the Venda Venda, the Ndebele KwaNdebele, the Xhosa Transkei and Ciskei, and the Zulu KwaZulu.

The Bantu Homelands Constitution Act of 1971 gave the State President power to create a legislative assembly for an area in which a territorial authority had been established under the Bantu Authorities Act.⁸⁴ This assembly could, in turn, be transformed into a fully self-governing territory. By this means, Transkei was granted independence in 1976, soon to be followed by Bophuthatswana, Venda and Ciskei.⁸⁵ Chiefs *ex officio* occupied half the seats in the homeland legislative assemblies, thereby ensuring leading parties a solid basis of support.⁸⁶

The intensified manipulation of traditional leadership under apartheid inevitably led to protest in the 1950s and early 1960s. Thereafter, however, open opposition to the enlisting of chiefs to conduct the business of apartheid government

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declined until the late 1980s, when, ironically, the relaxation of the pass laws in 1986 led chiefs to become more, not less, authoritarian. Once the rural population could work in cities without passes, chiefs lost a substantial source of revenue that had accrued to them under the registration system. They replaced this income with 'tribal levies'. Sometimes these levies were for public services such as building a school or clinic, but often they were used for the direct benefit of the chief.⁸⁷

Not unexpectedly, following growing anger and resistance to apartheid in the townships, political protests grew massively in rural areas. As Maloka & Gordon write:

Unlike the 1950s-60s revolts, those of the period 1985-1990 were led by the youth and civic/resident associations against chiefs. These organs of civil society challenged the legitimacy and authority of these chiefs, demanding their resignation from Bantustan structures. Many villages consequently fell under the control of the youth and civic organisations, in line with the countrywide strategy of the ANC-aligned political organisations to render apartheid structures unworkable and create organs of "peoples' power" as an alternative. Thus many chiefs fled from their villages, governing from "exile".⁸⁸

84 Act 21 of 1971, s 1.

85 Independence was granted in 1976, 1979 and 1981, respectively.

86 See C Tapscott 'The Institutionalisation of Rural Local Government in Post-Apartheid South Africa' in W Hofmeister & I Scholz (eds) *Traditional and Contemporary Forms of Local Participation and Self-government in Africa* (1997) 294.

87 See Van Kessel & Oomen (supra) at 567 (Document a case in which a levy paid for nappies for the chief's children.)

88 See T Maloka & D Gordon 'Chieftainship, Civil Society, and the Political Transition in South Africa' (1996) 22 *Critical Sociology* 37, 42.

The attitude of South Africa's internal resistance movement, the United Democratic Front, was clear: 'Chiefs must go and the people must run the villages.'⁸⁹ The brief (and influential) set of Constitutional Guidelines for a Democratic South Africa, which the exiled ANC circulated in 1988, was also alert to the problems that traditional leadership posed for its vision of a future democratic South Africa. The ANC, however, was less adamant in its wording: 'The institution of hereditary rulers and chiefs shall be transformed to serve the interests of the people as a whole in conformity with the democratic principles embodied in the constitution.'⁹⁰

Traditional leaders were also adjusting to the times, and, in September 1987, 38 'progressive' chiefs met to form the Congress of Traditional Leaders of South Africa ('CONTRALESA'),⁹¹ a body aligned to the ANC. CONTRALESA's Constitution stated that the organization:

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aim[ed] to unite all traditional leaders in the country, to fight for the eradication of the Bantustan system, to 'school the traditional leaders about the aims of the South African liberation struggle and their role in it', to win back 'the land of our forefathers and share it among those who work it in order to banish famine and land hunger' and to fight for a unitary, non-racial and democratic South Africa.⁹²

Van Kessel & Oomen note that 'CONTRALESA emerged on the political scene couched in the discourse of liberation politics'.⁹³

By June 1989, more than 80 per cent of the chiefs in the Transkei and 50 KwaZulu chiefs were members of CONTRALESA. The participation of KwaZulu chiefs was especially significant, since Mangosuthu Buthelezi was Chief Minister of the Bantustan, and, after being condemned by the ANC in the early 1980s as 'an enemy of the people', he had become heavily dependent on the apartheid regime. He viewed CONTRALESA as an obvious threat to his power and ambitions, and he warned KwaZulu chiefs against joining.⁹⁴

89 See Van Kessel & Oomen (supra) at 568. (Van Kessel & Oomen provide a fuller description of this period.) The United Democratic Front ('UDF') was, in effect, the internal arm of the exiled African National Congress ('ANC').

90 ANC Constitutional Drafting Committee *Constitutional Guidelines* (1988) para C.

91 See Maloka & Gordon (supra) at 42. CONTRALESA was created in 1987 in response to the division among traditional leaders in KwaNdebele on the question of independence. Chiefs who were opposed to independence, allied themselves to the UDF and formed the organization. In 1988 and 1989, CONTRALESA delegations were received by the ANC in Lusaka, and the party's media praised the contribution of the organization to the cause of liberation in the rural areas. See B Oomen 'Talking Tradition: The Position and Portrayal of Traditional Leaders in Present-day South Africa' (Unpublished MA thesis, University of Leiden, 1996)(manuscript on file with authors)(Oomen 'Talking Tradition').

92 See Van Kessel & Oomen (supra) at 569 quoting from *Race Relations Survey 1987-1988* (1988) 922.

93 See Van Kessel & Oomen (supra) at 569. See also Maloka & Gordon (supra) at 42.

94 See Maloka & Gordon (supra) at 43.

When, in 1990, the first tangible moves towards liberation were made in South Africa, the inevitable end of the *bantustans* became evident. Perhaps seeing the writing on the wall, increasing numbers of chiefs joined CONTRALESA.⁹⁵

When the Interim Constitution was being drafted in 1993, views on traditional leadership were, to say the least, ambivalent. As an institution, the chieftaincy was said to encourage tribalism and ethnic division,⁹⁶ and, inevitably, it represented the interests of traditionalist males, rather than women, youths or the landless. A similar ambivalence marked views on the personal abilities of the existing chiefs. Obviously, the degree of efficiency and honesty varied from individual to individual, and so, too, did the degree of control exercised by the state, but many rulers were said to be incompetent and corrupt.⁹⁷ Even those who were considered competent rulers were usually too conservative and hardly any had the financial and managerial skills needed to perform the tasks of modern public officials.⁹⁸

All of these views could have been anticipated. Chiefly rulers had long been expected to play the difficult, and often quite contradictory, roles of patriarchal

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leaders and state bureaucrats.⁹⁹ The result was a serious discrepancy between the demands of central government and local communities.¹⁰⁰ What is more, few chiefs had the resources needed to develop the rural economy or deliver the basic services expected of modern local authorities. Not only was the homeland infrastructure hopelessly inadequate — and, because of apartheid, bizarrely fragmented — but it was also incapable of generating a proper revenue base. For many years, the homelands had relied heavily on handouts from the central government and, of course, remittances from urban workers.

Dissatisfaction with traditional rule was not peculiar to South Africa. At the time of decolonisation, similar views could be found in most parts of Africa.¹⁰¹ Even so, few of the newly independent states could afford to dispense with traditional authorities,

95 See Van Kessel & Oomen (*supra*) at 571.

96 *Ibid* at 572.

97 See Tapscott (*supra*) at 294-6; CR Cross 'Landholding Systems in African Rural Areas' in M De Klerk (ed) *A Harvest of Discontent* (1991) 73; CR Cross 'The Land Question in Kwa-Zulu: Is Land Reform Necessary?' (1987) 4 *Development SA* 428, 437-8; Hammond-Tooke *Command or Consensus* (*supra*) at 211; WD Hammond Tooke 'Chieftainship in Transkeian Political Development' (1964) 2 *J Mod Afr Studies* 313, 320-1.

98 See '1986 Report on Workshop on Land Tenure and Rural Development' (1987) 4 *Development SA* 375-7.

99 See AKH Weinrich *Chiefs and Councils in Rhodesia* (1971)(For a detailed study); N Miller 'The Political Survival of Traditional Leadership' (1986) 6 *J Mod Afr Studies* 183 (General analysis of role conflicts). See also H Kuckertz *Creating Order: The Image of the Homestead in Mpondo Social Life* (1990) 74; Hammond-Tooke *Command or Consensus* (*supra*) at 212; EAB Van Rouveroy van Nieuwaal 'Chiefs and African States: Some Introductory Notes and an Extensive Bibliography on African Chieftaincy' (1987) 25 & 26 *J Legal Pluralism* 1 (Van Rouveroy van Nieuwaal 'Chiefs and African States') 28.

100 See EAB Van Rouveroy van Nieuwaal 'State and Chiefs: Are Chiefs Mere Puppets?' (1996) 37 & 38 *Journal of Legal Pluralism* 39, 64.

and attempts made to depose or sideline them nearly always resulted in failure.¹⁰² The main reason for the resilience of traditional authority was clearly popular support for the institution, if not the individual office-holder.¹⁰³

What is more, chiefs were well positioned to run an adaptable form of community government.¹⁰⁴ In spite of all its faults, and in the absence of viable alternatives, the chieftaincy is more in touch with local sentiment than a central state bureaucracy. For many ordinary people, their rulers are a 'legal and constitutional horizon', a 'personification of the moral and political order, protection against injustice, unseemly behaviour, evil and calamity'.¹⁰⁵

26.4 Constitutional negotiations and the final constitution

In 1991, when the Convention for a Democratic South Africa met to negotiate a new constitution, traditional leaders had no formal status, and their demands to

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be included in the proceedings were rejected. They were not without a voice, however, for their interests were represented by the Inkatha Freedom Party, delegations from homeland governments and individual members of political parties. For the ANC, too — despite opposition of organizations aligned to the liberation struggle — chiefs represented an important rural support base. Hence, the ANC was quick to take advantage of the prospect of their support, and the early stages of the transition in government were 'characterised by enthusiasm and co-operation between the ANC and chiefs'.¹⁰⁶

In 1993, the Multi-Party Negotiating Forum admitted constituencies of traditional leaders, largely as a result of efforts by CONTRALESA and bargains struck with the ANC. Traditional rulers won significant, although temporary, constitutional victories.¹⁰⁷ Under the Interim Constitution, and notwithstanding the constitutional revolution underway, they were allowed to continue exercising all the powers and

101 See Van Rouveroy van Nieuwaal 'Chiefs and African States' (supra) at 6–7.

102 See KO Adinkrah 'Legitimacy and Tradition in Swaziland' (1991) 24 *CILSA* 226.

103 See Comaroff (supra) at 38; Haines & Tapscott (supra) at 167–8. Chiefs have also been active in protecting their own interests. In this regard, they have been able to draw on the powerful legitimating force of tradition. See B Oomen 'We Must Now Go Back to Our History: Retraditionalisation in a Northern Province Chieftaincy' (2000) 59 *Afr Studies* 71ff.

104 A brief opinion survey conducted in South African in 1994, for instance, showed that two-thirds of the population were willing to support traditional rulers. See N Pillay & C Prinsloo 'The Changing Face of 'Traditional Courts' (1995) 28 *De Jure* 386 ff. See also RB Mqoke *Basic Approaches to Problem Solving in Customary Law: A Study of Conciliation and Consensus Among the Cape Nguni* (1997) 166. More recently, evidence is emerging that the failure of local government in rural areas is causing people to turn back to their traditional leaders for basic needs.

105 See Van Rouveroy van Nieuwaal 'Chiefs and African States' (supra) at 23.

106 Maloka & Gordon (supra) at 44.

functions they held under customary law and 'applicable laws', including the Black Authorities Act (although now specifically subject to amendment or repeal).¹⁰⁸

In addition, they were given new positions in the local, provincial and national spheres of government. At the lowest level, traditional rulers had *ex officio* membership of the municipal structures being created in their areas.¹⁰⁹ At provincial level, all provinces containing traditional authorities were obliged to establish houses of traditional leaders,¹¹⁰ and, at national level, a similar provision obliged Parliament to create a council (now called a house) of traditional leaders.¹¹¹ Although these new bodies lacked law-making powers, they could advise and make proposals on matters concerning traditional authority and customary law, and any bills on these topics had to be referred to them.¹¹²

Potentially much more significant than the temporary powers granted to traditional leaders under the Interim Constitution was a guarantee that the status of traditional leaders would be specially protected in the Final Constitution. Constitutional Principle XIII.1 of the Interim Constitution stipulated that the institution

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of traditional leadership, as determined by indigenous law, was to be recognized and protected. Moreover, in an implicit acknowledgement of how anomalous traditional leadership appeared in the new constitutional order, Constitutional Principle XVII provided that, although democratic representation was to prevail in all spheres of government, this principle did not derogate from the provisions of Principle XIII.¹¹³

107 The chiefs' proposals were set out in a document submitted to the Negotiating Council 'Joint Position Paper concerning Role of Traditional Leaders' (13 August 1993). See C Albertyn 'Women and the Transition to Democracy in South Africa' in C Murray (ed) *Gender and the New South African Legal Order* (1994) 39.

108 IC s 181(1). The 'applicable laws' in this section referred, *inter alia*, to the various enactments by the homeland governments specifying the powers and duties of traditional rulers: Transkei Authorities Act 4 of 1965; Bophuthatswana Traditional Authorities Act 23 of 1978; Venda Traditional Leaders Administration Proc 29 of 1991; Ciskei Administrative Authorities Act 37 of 1984; Qwa Qwa Administration of Authorities Act 6 of 1983; KwaNdebele Traditional Authorities Act 2 of 1984; and KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990.

109 IC s 182.

110 IC s 183(1)(a). IC ss 183(1)(b) and (c) stipulated that the Houses had to be established in consultation with the traditional authorities resident within the province.

111 IC s 184.

112 The new organs could delay the passing of a Bill. See IC s 183(2)(d)(Regarding the provincial Houses); IC s 184(5)(c)(Regarding the national Council). A veto on legislation delayed passage of a bill for 30 days.

113 See A Donkers & R Murray in South Africa' in B De Villiers (ed) *The Rights of Indigenous People: A Quest for Coexistence* (1997) 39, 47.

Traditional leaders had no formal representatives at the Constitutional Assembly, which drafted the Final Constitution. As a result, the gains of 1993 were largely lost.¹¹⁴ FC s 211(1) appears to capture Principle XIII.1, almost to the letter: '[t]he institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.'¹¹⁵ However, FC s 211(2) significantly qualifies what appears to be a blanket confirmation of the status quo by providing that '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.'

FC s 212(2) rounds off the series of provisions on traditional leaders by allowing, but not requiring, a national council of traditional leaders and provincial houses of traditional leaders to be established in order '[t]o 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.' As for the political role of traditional leadership, under FC s 212(1), 'national legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.' FC s 143(1) provides a footnote. In accordance with Constitutional Principle XIII.2, it states that a provincial constitution

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'may provide for . . . the institution, role, authority and status of a traditional monarch, where applicable.'¹¹⁶

When the Final Constitution was being drafted, traditional leaders did not revive, with any conviction, claims they had made in 1993 that customary law should be shielded from application of the Bill of Rights and, in particular, the equality clause. The Bill of Rights expressly states that that both the rights 'to use the language and participate in the cultural life of [one's] choice' (in FC s 30) and rights concerning

114 For a description, see TRH Davenport *The Transfer of Power in South Africa* (1998) 70; C Murray 'South Africa's Troubled Royalty: Traditional Leaders after Democracy' Law and Policy Paper 23, Centre for International and Public Law, Australian National University (2004)(manuscript on file with authors). The weakness of the provisions relating to traditional leadership reflect the fact that the champion of chiefly power, the IFP, had boycotted most of the Constitutional Assembly proceedings because the government refused to enter into international mediation over the position of the Zulu monarch in accordance with a Memorandum of Agreement between the erstwhile South African government, the ANC and the IFP (signed on 19 April 1994). An additional factor explaining the absence of any solid entrenchment of chiefly powers in the Final Constitution was the waning influence of CONTRALESA within the ANC and the activities of the organization's controversial president Phatekile Holomisa. CONTRALESA became estranged from the ANC after Holomisa called for a boycott of the local government elections in areas under traditional authority and began associating with senior officials of the IFP. Like the IFP, CONTRALESA opposed certification of the 1996 Constitution on the ground that it made inadequate provision for traditional leadership and customary law. See 'Tension in ANC over Traditional Leaders' *Weekly Mail & Guardian* (8 December 1995). See, on the relationship between the ANC and CONTRALESA, Oomen 'Talking Tradition' (supra).

115 FC s 212(1) reads: 'National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.' The indeterminate language in this section, however, gives Parliament authority to reduce chiefly powers in local government.

116 Clause 2 was added to Constitutional Principle XIII by the Constitution of the Republic of South Africa Second Amendment Act 3 of 1994, following the Memorandum of Agreement between the South African government, the ANC and the IFP (signed on 19 April 1994). The Act also amended s 160 of the Interim Constitution to require that the provincial constitution of KwaZulu-Natal make provision for the institution, status and role of the Zulu monarch.

membership of cultural, religious and linguistic communities (in FC s 31) were to be subject to the other provisions of the Bill of Rights.¹¹⁷

When it came to certifying the Final Constitution, the IFP argued that FC s 211, and especially FC s 212, failed to realize the Constitutional Principles, because the powers of traditional leaders had been subjected to national legislation and not customary law. In the *First Certification Judgment*, the Court rejected this argument. The judgment nonetheless contains a clear statement of the tension between the claims of traditional leadership and the values of the Final Constitution:

In a purely republican democracy, in which no differentiation of status on grounds of birth is recognised, no constitutional space exists for the official recognition of any traditional leaders, let alone a monarch. Similarly, absent an express authorisation for the recognition of indigenous law, the principle of equality before the law . . . could be read as presupposing a single and undifferentiated legal regime for all South Africans with no scope for the application of customary law — hence the need for expressly articulated CPs [Constitutional Principles] recognising a degree of cultural pluralism with legal and cultural, but not necessarily governmental, consequences.¹¹⁸

Because traditional leadership is at odds with republican democracy, the explicit protection of its role in the Constitutional Principles was necessary if it was to survive. The *First Certification Judgment* Court reminds us that, although the Kempton Park agreement required the Final Constitution to recognize a degree of cultural pluralism, it contained no mandatory requirement that traditional leaders be given a role in government. The Court added:

The CA [Constitutional Assembly] cannot be constitutionally faulted for leaving the complicated, varied and ever-developing specifics of how such leadership should function in the wider democratic society, and how customary law should develop and be interpreted, to future social evolution, legislative deliberation and judicial interpretation.¹¹⁹

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The Constitutional Court therefore treated FC ss 211 and 212 as constitutionally entrenching the existence of traditional leadership, leaving the legislature to deal with traditional leaders' future political role. It followed that whatever legislation was to be enacted could provide for a diminished, even a nominal or purely symbolic, function for chiefs, thereby drastically restricting powers under customary law. But the legislature could not abolish the institution of traditional leadership or customary law altogether.

The Court maintained this approach in the *Second Certification Judgment*, when it addressed an objection that the revised draft of the Constitution did not comply with Constitutional Principle XIII.2 (requiring recognition and protection of provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch). It was argued that FC ss 143 and 147(1), dealing with

117 See I Currie 'Community Rights: Culture, Religion and Language' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 58.

118 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of SA, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) ('*First Certification Judgment*') at para 195.

119 *Ibid* at para 197.

provincial constitutions and with conflicts between national legislation and the provision of a provincial constitution, recognized the power to provide for a traditional monarchy as required by Constitutional Principle XIII.2, but did not give effect to the requirement of protection. The sections meant that provisions in a provincial constitution dealing with traditional monarchs were liable to be overridden by national legislation.¹²⁰

The Court disagreed. It found that Constitutional Principle XIII.2 did not require the provisions about traditional monarchy in a provincial constitution to be given a position of supremacy in the national Constitution, thereby allowing them to prevail over all other protected interests. Instead, the only requirement was that the monarchy be given the recognition and protection needed to carry out its traditional role and to maintain its status and authority, consistent with the constraints inherent in a republican and wholly democratic constitutional order.¹²¹

Three other constitutional provisions relate to traditional leaders. These are FC s 166, which describes the courts of South Africa and implicitly includes traditional courts, s 219, on remuneration, and Schedule 4. We deal with each of these issues below. Here we should note that only one of these provisions has a direct impact on the powers of traditional leaders. Constitutional questions concerning the powers of national and provincial governments over traditional leaders and traditional communities (of which the remuneration of traditional leaders forms part) are not disputes that concern their powers.

As we have seen, the Constitution is clear on the powers of traditional leaders. It does not grant them powers beyond those contained in their status as guardians of traditional culture. In every sphere of government, their constitutional role has been reduced from that granted under the Interim Constitution. Hence, as noted above, the Final Constitution allows provincial constitutions to make provision for traditional monarchs, and it allows the establishment of houses of traditional

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leaders at both national and provincial level (although these organs may no longer delay the passing of legislation). Similarly, although traditional leadership may be given a role 'at local level', traditional leaders are constitutionally excluded from voting membership of local councils,¹²² and, as the reference in FC s 212(1) to 'local level', rather than 'the local sphere of government' or 'local government', reminds us, they have no constitutionally guaranteed role in local government. The fact that Chapter 12 — Traditional Leaders — is located towards the end of the Final Constitution, and is separated from chapters dealing with the main institutions of government, reflects the view expressed by the Constitutional Court that the role of traditional leadership may not be governmental.

While the Constitutional Assembly might have been resolute in limiting real grants of power to traditional leaders in the Final Constitution, in practice it has proved much more difficult to reach a workable arrangement between traditional

120 See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of SA*, 1996 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) at paras 96-98.

121 Sufficient protection for purposes of Constitutional Principle XIII.2 was provided by FC s 143(1), as read with FC ss 74(3) and 41. See *First Certification Judgment* (supra) at paras 99-105.

122 See FC s 57(1).

leaders and the government. That the former are still a force to be reckoned with is evident from their ongoing protests, which intensify each time elections approach.

According to unverified figures, there are 12 kings or queens and 773 chiefs, supported by 1 640 headmen.¹²³ Approximately 18 million people, about 40 per cent of the South African population, are said to be subject to traditional rule.¹²⁴ Although this figure may be inflated — a recent poll indicates that in the year under review only eight per cent of black South Africans consulted a traditional leader for an important problem or to express their views¹²⁵ — the volatile political situation in KwaZulu-Natal and the perceived ability of traditional leaders to influence elections has ensured that they still have influence.

Section 26.5 considers the institution of traditional leadership in the context of South Africa's system of multi-sphere government. Section 26.6 focuses on government by traditional leaders, paying particular attention to the role traditional leaders play in relation to land.

26.5 Traditional government in the multi-sphere system

Although the Constitutional Court has made it very clear that the Final Constitution does not demand a role in government for traditional leaders, the emerging framework of national and provincial laws establishes them as organs of state with governmental responsibilities. As a result, the principles of co-operative government set out in Chapter 3 of the Final Constitution apply to traditional

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leaders and to their relationships with the national, provincial and local spheres of government. The system of houses of traditional leaders, which is to be expanded under the new Traditional Leadership and Governance Framework Act,¹²⁶ and the repeated assertions in that Act of the responsibility of both provincial and national government to support traditional institutions, confirms the national government's intention to relate to traditional leaders and councils in accordance with the Chapter 3 principles.

The imperative to transform traditional systems of government remains. The preamble to the Traditional Leadership Act obliges the state to 'respect, protect and promote' traditional leaders 'in accordance with the dictates of democracy in South Africa' and requires transformation of the institution of traditional leadership 'in harmony with the Constitution'. The first move towards this change came about with new legislation regulating the composition of traditional houses and councils.

123 These are the numbers of traditional leaders remunerated by the government. See *White Paper on Traditional Leadership and Governance* (2003), available at <http://www.info.gov.za/view/DownloadFileAction?id=68774> (accessed on 9 March 2009) 49.

124 See C Botha *The Role of Traditional Leaders in Local Government in South Africa* (Konrad Adenauer Foundation, 1994) 29.

125 See R Mattes, AB Chikwana & A Magezi *South Africa: After a Decade of Democracy* (2005), available at <http://www.afrobarometer.org> (accessed on 27 September 2005). The survey was conducted in 2004.

126 Act 41 of 2003 ('TLGFA' or 'Traditional Leadership Act').

(a) Traditional communities and councils

During the colonial and apartheid eras, indigenous polities and their political structures changed remarkably little. Of course, the territorial expanse of these domains was drastically reduced, and, especially in the Cape and Transkei, attempts were made to remodel chieftaincies on the British idea of a local authority. By and large, however, central government simply grafted new institutions onto what was already there.

The Traditional Leadership Act, together with provincial legislation, has now swept away this entire regime. The Traditional Leadership Act states that 'tribes' which were previously recognized by the state are now deemed to be traditional communities.¹²⁷ In addition, under s 2, a community may be recognized as a traditional community provided that it '(a) is subject to a system of traditional leadership in terms of that community's functions; and (b) observes a system of customary law'. Draft provincial legislation in each of the six provinces with traditional leaders gives premiers the authority to recognize (and withdraw recognition from) traditional communities. Following instructions in the Traditional Leadership Act, the draft provincial laws require consultation with the provincial house of traditional leaders, any king or queen under whose authority the community would fall and consultation with the community itself.¹²⁸

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Once a traditional community is recognized, the Act provides that it must establish a traditional council 'in line with principles set out in provincial legislation', and, presumably, in line with the requirements relating to their composition set out in the national Act itself.¹²⁹ These latter provisions have been a bitter pill for traditional leaders to swallow, as they require one third of the members of the council to be women and 40 per cent to be democratically elected for terms of five years.¹³⁰

The Act allows the premier to set a lower number for the participation of women 'where it has been proved that an insufficient number of women are available to participate in a traditional council.' It is hard to imagine, however, when this would be the case, since women make up at least half the population of every community in South Africa. Under one possible interpretation, this provision could be used if not enough women make themselves available to serve on councils. The danger with this approach, however, is that it may thwart the goal of involving women. In many rural areas there is strong resistance to women participating in government, and, unless there is real pressure on communities to ensure that women do become involved in the councils, change may never occur.

127 TLGFA s 28(3).

128 See Limpopo Traditional Leadership and Institutions Bill (2005) clause 3; North West Traditional Leadership and Institutions Bill (2004) clause 3; Mpumalanga Traditional Leadership and Governance Bill (2004) clause 3; KwaZulu-Natal Traditional Leadership and Governance Bill (2004) clause 2; Free State Traditional Leadership and Governance Bill (2004) clause 3; Eastern Cape Traditional Leadership and Governance Bill (2004) clause 5.

129 TLGFA s 3(1).

130 TLGFA ss 3(b) and (c).

Some feminists think differently. They argue that, by including women in traditional councils (and the houses of traditional leaders), government can give the appearance of promoting women at no cost and without meaningful change. On this view, the women who serve on these bodies, in a context in which their views are not respected and in which they do not contribute in meaningful ways, will simply serve the purposes of men, thereby legitimating deeply unequal practices. From this perspective, meaningful change will occur only if women are properly empowered — educated and employed — and they should not participate in the new structures until these goals have been achieved. This approach fails to take seriously the reciprocal effect that political power and individual agency have on one another. Because the legislature has few tools with which to change culture in traditional communities, the right to participate in councils is an important way of creating space for women. Although there is disturbing evidence that women are not active participants in many of the bodies on which they serve at the moment, the new legal requirements ensure that, when they wish to engage more actively, they will not have to fight for their place.

Under the Act, tribal authorities already in existence when the Act came into effect were deemed to be traditional councils, but they were given a year within which to comply with the requirements regarding the composition of councils.¹³¹ The implications of failure to observe these provisions are unclear, since the Traditional Leadership Act does not allow recognition of community status to be withdrawn in these circumstances. It may be that councils that do not comply will not be entitled to enter service delivery agreements with the municipalities

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under which they fall, but this consequence is not stated expressly.¹³² Another possibility is that non-compliant traditional communities will not receive the governmental support contemplated in the Act. But even this is not necessarily the case.

In fact, it is the Communal Land Rights Act that provides the main incentive for transforming the composition of councils.¹³³ Under this Act, communally-owned land must be administered by a Land Administration Committee, and a traditional council may act as such a Committee only if it is recognized. Indeed, the Communal Land Rights Act supplements the requirements of the Traditional Leadership Act, obliging councils to ensure membership of a person who can represent 'the interests of vulnerable community members, including women, children and the youth, the elderly and the disabled', together with various non-voting members designated by other interested parties in the area.¹³⁴

The newly constituted councils are intended to take over the role of the chiefs' councils of the past. The Act requires them to 'administer the affairs of the traditional community in accordance with customs and tradition' and to advise local

131 That date passed on 24 September 2005.

132 The Local Government: Municipal Systems Act allows municipalities to enter service delivery agreements with 'traditional authorities'. Act 32 of 2000. See also TLGFA s 5(3).

133 Act 11 of 2004.

134 See TLGFA s 21(3), as read with ss 22 (4) and (5).

government on various matters.¹³⁵ The Act does not clarify the relationship between councils and traditional leaders, however, because it appears to assume that this issue will be settled under customary law.

At present, the power to determine the boundaries of traditional areas is still vested in the President,¹³⁶ but the imminent repeal of the Black Administration Act will change this situation. The new arrangements have two components. First, the Traditional Leadership Act requires a Commission on Traditional Leadership Disputes and Claims to deal with existing disputes about boundaries.¹³⁷ Secondly, it appears that provinces are expected to replace the provisions of the Black Administration Act with their own legislation. The various draft provincial bills on traditional leadership do not have a uniform method for dealing with the boundaries of traditional communities. Some give the Premier the power to determine boundaries,¹³⁸ some give the Premier this power only when the Commission on Traditional Leadership Disputes agrees to a boundary change,¹³⁹ and one is simply silent on the matter.¹⁴⁰

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(b) The Houses of Traditional Leaders

Although the Final Constitution no longer requires houses to be established for traditional leaders, leaving this possibility entirely within the discretion of the national and provincial governments, the number of houses is set to expand. This is because, in addition to the national and provincial houses of traditional leaders established under the Interim Constitution, the Traditional Leadership Act requires provinces to establish local houses of traditional leaders for each district municipality or metropolitan municipality in which there is more than one senior traditional leader.¹⁴¹ If one takes into account traditional councils operating at local municipal level, this means that there will be a house or council of traditional leaders at every level of government in South Africa: local, district, provincial and national. Nevertheless, an important distinction is to be drawn between traditional councils and the local, provincial and national houses: the latter have advisory powers only,

135 See TLGFA s 4(1).

136 See TLGFA s 1, as read with s 5 of the Black Administration Act 38 of 1927.

137 See TLGFA s 25(2)(a)(v).

138 See Limpopo Traditional Leadership and Institutions Bill (2005) clause 20; North West Traditional Leadership and Institutions Bill (2004) clause 5; and Mpumalanga Traditional Leadership and Governance Bill (2004) clause 16.

139 See KwaZulu-Natal Traditional Leadership and Governance Bill (2004) clause 16; Free State Traditional Leadership and Governance Bill (2004) clause 17. This approach is problematic, because, under the national Traditional Leadership Act, the life of the Commission is limited to five years.

140 See Eastern Cape Traditional Leadership and Governance Bill (2004). Presumably the power is implied in the Premier's power to recognize and to withdraw recognition from traditional communities.

141 See TLGFA s 17.

whereas the traditional councils are intended to be central to traditional community decision-making.

In 1994 and 1995, as required by the Interim Constitution, six of South Africa's new provinces established houses of traditional leaders.¹⁴² None were established in Gauteng or the Western Cape, and, as yet, none have been established in the Northern Cape, where Khoi and San authorities are only now beginning to emerge.¹⁴³ In 1997, Parliament constituted a Council of Traditional Leaders for the entire country,¹⁴⁴ which changed its name to the National House of Traditional Leaders in 1998.¹⁴⁵

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As yet, no local house of traditional leaders has been established in district municipalities, as the necessary enabling legislation has not been passed in the provinces. Nevertheless, the Traditional Leadership Act is detailed in its requirements, and, unless a province takes the unusual step of designing local houses to suit its own particular ideas, the houses will have up to 20 members chosen by an electoral college consisting of the traditional leaders in the district concerned.¹⁴⁶ Their relationship to the district municipality within which they fall will be very similar to that of traditional councils to local municipalities.

(i) Composition

142 See Free State House of Traditional Leaders Act 6 of 1994 ('Free State TLA'); KwaZulu- Natal House of Traditional Leaders Act 7 of 1994 ('KwaZulu-Natal TLA'); North West House of Traditional Leaders Act 12 of 1994 ('North West TLA'); Limpopo House of Traditional Leaders Act 6 of 1994 ('Limpopo TLA'); Eastern Cape House of Traditional Leaders Act 1 of 1995 ('Eastern Cape TLA'), as amended by Traditional Affairs Notice 13 ECP 1326 of 8 April 2005; and Mpumalanga House of Traditional Leaders Act 4 of 1994 ('Mpumalanga TLA'). As of 3 May 2005, several bills were awaiting consideration: House of Traditional Leaders Amendment Bill 2004 (Eastern Cape) 18 ECP 1274 of 7 February 2005; House of Traditional Leaders Amendment Bill 2003 (Free State) 5 FSP of 5 September 2003; and House of Traditional Leaders Amendment Bill 2004 (North West) 531 NWP 6086 of 19 November 2004. The remaining three provinces did not establish Houses, as only provinces 'in which there are traditional authorities' were required to do so.

143 Initially, there was lobbying for the establishment of a seventh House in Gauteng. See B Oomen 'Talking Tradition: The Position and Portrayal of Traditional Leaders in Present Day South Africa' (Unpublished MA thesis, University of Leiden, 1996) 83. See also International Labour Office Project for the Rights of Indigenous and Tribal Peoples *Indigenous Peoples of South Africa: Current Trends* (1999) 20.

144 Council of Traditional Leaders Act 10 of 1997 ('CTLA'). This statute repealed Act 31 of 1994 of the same name, which never came into force.

145 Council of Traditional Leaders Amendment Act 85 of 1998. There are differing views on why the name was changed. The Deputy Chairperson, Kgosi Kutama, has given two reasons: a desire for uniformity with provincial institutions, and the fact that there are many councils and that the name was therefore confusing. (Telephone interview with K Kutama, 3 August 2005.) A more likely reason is that the word 'house' suggests a legislative body (which is what many traditional leaders believe that the Houses should be) while a council is more obviously an advisory body. The Amendment Act refers to the house as 'a council to be known as the National House of Traditional Leaders.' s 2(1). In addition, the Amendment Act changed the name of the CTLA to National House of Traditional Leaders Act ('NHTLA').

146 As traditional leadership is a Schedule 4 matter, provincial legislation need not follow the national Act to the letter. Variation is possible, and, if conflicts arise, they would be resolved under FC s 146.

The National House of Traditional Leaders has 18 members, each of whom serves five-year terms of office.¹⁴⁷ The number of members in the provincial houses is also usually fixed — the limits range from 18 to 36¹⁴⁸ — and these members also serve five-year terms of office.¹⁴⁹ KwaZulu-Natal is the exception: the enabling legislation sets no limit on the number of members or on the length of the term of office.¹⁵⁰ Under the Traditional Leadership Act, local houses must have between five and ten members.

Membership of the houses is determined by nomination, election or a combination of the two. In the case of the National House, each of the six provincial houses nominates three members.¹⁵¹ In the case of the provincial houses, however, membership is determined in different ways. In KwaZulu-Natal, some members are nominated by groups specified in the Act and others are elected by regional authorities.¹⁵² In the Eastern Cape, the Premier, assisted by committees of the provincial legislature, is authorized to establish rules for the nomination of members by traditional authorities.¹⁵³ Members of the Limpopo House are elected from and by members of districts in the province.¹⁵⁴ In the Free State, members are nominated by the traditional authorities in the province,¹⁵⁵ and in the North West members are elected from defined groups.¹⁵⁶ In Mpumalanga, all the traditional

147 See NHTLA s 3(1).

148 North West TLA s 3(1) stipulates 24 members; Mpumalanga TLA s 3(1) 21 members; Eastern Cape TLA s 3(1) 20 members; Free State TLA s 3(1) 18 members; and Limpopo TLA s 3(1) 36 members.

149 See North West TLA s 3(2)(a); Eastern Cape TLA s 3(4); Free State TLA s 3(2); Limpopo TLA s 3(3). Mpumalanga TLA s 3(3), in addition, makes special provision for members to be re-elected.

150 See KwaZulu-Natal TLA s 5.

151 See NHTLA s 4.

152 See KwaZulu-Natal TLA s 5.

153 See Eastern Cape TLA s 3(2), as amended by Notice 13 ECP 1726 (8 April 2005).

154 See Limpopo TLA s 3(1). The Act does not specify whether members of the districts should be traditional authorities.

155 See Limpopo TLA s 3. Cf the House of Traditional Leaders Amendment Bill 2003 5 FSP 74 (5 September 2003).

156 See North West TLA s 3.

leaders in the province constitute an electoral college, which then elects members to the House.¹⁵⁷ Members of the local houses will be elected by an electoral college composed of all the senior traditional leaders in the district.¹⁵⁸

No concession is made to the principles of gender equality or popular democracy in the existing statutes establishing the houses. The Traditional Leadership Act, however, intends to correct this. Section 16(3) cautiously requires provincial legislation to provide for 'mechanisms or procedures that would allow a sufficient number of women (a) to be represented in the provincial houses of traditional leaders concerned; and (b) to be elected as representatives . . . to the National House'. Currently, members of the houses are chosen by their peers, and, in all but one case, the only eligible candidates are traditional rulers.¹⁵⁹ By implication, therefore, members will generally be male and belong to a ruling dynasty.¹⁶⁰

The North West province permits a minor exception to this rule: the Executive Council may appoint four persons to the House on the basis of their expertise in and experience with customary law. The Traditional Leadership Act also states, rather vaguely, that the electoral college constituted to elect members to local houses must 'seek to elect a sufficient number of women to make the local house of traditional leaders representative of the traditional leaders within the area of jurisdiction in question'.¹⁶¹ Clearly, no affirmative action is envisaged, but each of the houses apparently has women among its members.

Members of Parliament or a provincial legislature may not be members of the National House.¹⁶² On introducing this provision, the government argued that the disqualification was designed to prevent the Council, whose principal function was to advise the legislature, from being made up of members from the very institutions it would be advising. The National Party (as it then was) and the Inkatha Freedom Party were unimpressed with this explanation. There was no disqualification of members of provincial or national legislatures from serving as members of provincial houses. Indeed, the chairman of the KwaZulu-Natal House of Traditional Leaders — Mangosuthu Buthelezi — was a member of Parliament and a Cabinet Minister. The opponents of the Act treated the disqualification as an 'anti-Buthelezi clause', specifically aimed at keeping Buthelezi out of the Council. Whatever the reason for introducing the disqualification, however, it is based on a sound principle: active membership of a political party, which

157 See North West TLA s 1 of Schedule 1, as read with s 3(2).

158 TLGFA s 17(2)(b).

159 Any challenge to the validity of this legislation could presumably be met by the argument that the Constitution makes special provision for the continued recognition of traditional authorities, and, if the agnatic system of succession were abolished, these authorities would no longer be 'traditional'. See AJ Kerr 'Customary Law, Fundamental Rights, and the Constitution' (1994) 111 *SALJ* 720, 727 (On IC s 211).

160 See North West TLA s 3(b). Otherwise, under ss 3(1)(a) and 3(4)(a), members of the House must be *dikgosi*, *dikgosigadi*, *dikgosana* or regents.

161 See North West TLA s 17(1)(c).

162 See NHTLA s 4.

membership of a legislature must mean, is incompatible with the role of traditional leaders (which is to be guided by the general good of the community in all matters, and to fulfil their functions without regard to party affiliation). The same principle should be extended to the provincial and local houses.

(ii) Powers

The powers of the provincial and national houses were initially laid down in the Interim Constitution and their constitutive acts, and were then modified in the Final Constitution. The principal functions of the National House are to advise government or the President,¹⁶³ and to make recommendations on questions of traditional leadership, customary law and the customs of communities observing systems of customary law.¹⁶⁴ The House may also investigate these matters and disseminate information.¹⁶⁵ Every year, it must submit a report to Parliament on its activities.¹⁶⁶

With one significant exception, Parliament and the executive are not obliged to seek advice, although, presumably, the National House is entitled to volunteer its opinion whenever it wishes. Even if advice has been sought and given, neither Parliament nor the President is obliged to take account of it (and the Final Constitution omits any mention of the House's limited power under the Interim Constitution to delay the passage of bills). The House therefore plays a strictly advisory role, even in matters concerning traditional leadership or customary law.

The exception was introduced in 2003 by the Traditional Leadership Act which, in s 18(1), obliges Parliament to refer bills concerning 'customary law or customs of traditional communities' to the National House before they are passed. The House must comment, if it so wishes, within 30 days.

This section was the subject of some controversy in Parliament because certain legal advisers argued that it attempted to add a requirement to the constitutional rules for the passage of legislation. Such changes are not permitted by an ordinary Act, but only by an amendment to the Final Constitution. The opposing view was that the provision did not change the decision-making rules, because it dealt only with Parliament's internal processes. According to this view, the provision (like timetabling, agenda setting and other decisions concerning who should be

163 See NHTLA s 7(2)(c). The advisory role of the National House (and its provincial counterparts) may be more significant than traditional leaders currently are prepared to admit. For instance, when *Bhe*, which dealt with the customary law of succession and the principle of male primogeniture was entered on the roll, the Constitutional Court notified the House, hoping that it would make submissions. None, however, were received. See *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of the RSA & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at para 4.

164 See NHTLA s 7(2)(a). The objects of the House are described, in NHTLA s 7(1), as promoting the role of traditional leadership within a democratic constitutional dispensation, enhancing unity and understanding among traditional communities and enhancing co-operation between the National House and the Provincial Houses.

165 See NHTLA s 7(2)(b).

166 See NHTLA s 7(2)(d).

consulted in the law-making process) did not need to be incorporated in the Final Constitution. Evidently — and correctly — the latter view carried the day. It also gave government the best of both worlds: a constitutional amendment to secure chiefly powers for an indefinite period was unpalatable, while traditional leaders would not have been content with a provision in the internal rules of Parliament, because these are too easily changed.

The provincial houses also enjoy a right to insist that provincial legislatures refer to them any bills on customary law or traditional leadership.¹⁶⁷ The houses then have 30 days within which to comment.¹⁶⁸ If they fail to do so, the bill may be passed. If they raise an objection, the bill is, at most, delayed for another 30 days. The legislatures are not obliged, however, to take account of comments or objections.¹⁶⁹

The provincial houses have no power to generate their own legislation nor do they have any specific power to initiate bills in provincial legislatures. In KwaZulu-Natal, however, the House may make proposals to Cabinet,¹⁷⁰ and, in the North West, the House may propose legislation to the legislature.¹⁷¹

The local houses will also have no law-making powers. Moreover, unless provincial legislation or a municipal by-law stipulates otherwise, the legislatures and councils will not be obliged to refer bills to them for consideration.¹⁷² The fact that these houses will be much closer to traditional communities, however, is reflected in a number of functions that differ from those of the provincial and national houses. They are to advise not only on matters relating to traditional leadership and customary law, and on by-laws, but also on 'the development of planning frameworks' that affect their communities. In addition, they are to participate in local community development programmes and in the oversight of government programmes in rural communities.¹⁷³

(iii) Procedures, privileges and immunities

167 See North West TLA s 6(2); Limpopo TLA s 8(2); Mpumalanga TLA s 8(2); Eastern Cape TLA s 8(2); Free State TLA s 12B(1); and KwaZulu-Natal TLA s 4(2). Section 4(1) of the latter Act gives the House power to comment on a bill or executive action that may have a bearing on customary law and traditional authorities, even if the bill is not referred to the House. The TLGFA now also 'allows' a provincial legislature or municipal council to adopt the s 18(1) procedure. TLGFA s 18(2).

168 This procedure is in line with IC s 183.

169 It is an open question as to whether the provincial Houses may insist on the right to comment on national legislation passed on a functional area of concurrent competence under Schedule 4 of the Final Constitution.

170 See KwaZulu-Natal TLA s 4 (1).

171 See North West TLA s 6(1)(a).

172 See TLGFA s 18(2).

173 See NHTLA s 17(3).

The National House is expressly empowered to make its own rules for the orderly conduct of business.¹⁷⁴ Otherwise, the constitutive Act provides that the House must meet at least once a year, during the sitting of Parliament,¹⁷⁵ that the presence

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of a majority of members is necessary to constitute a quorum,¹⁷⁶ and that decisions are made by a majority of the members, present and voting.¹⁷⁷

Like the National House, the provincial houses are also given the power to establish whatever rules, procedures and orders are necessary for the conduct of their business.¹⁷⁸ The North West legislation differs somewhat. It provides that any rules regulating the procedure and the conduct of house business are subject to the Final Constitution and the approval of the Executive Council.¹⁷⁹ In this province, nothing is said about a quorum. Elsewhere, the quorum is at least one third of the members for ordinary house meetings and half when voting on a bill.¹⁸⁰ In all the provinces, decisions are to be taken by a simple majority.¹⁸¹

The provincial houses must meet at least once a year,¹⁸² and some are required to do so during the sittings of provincial legislatures.¹⁸³ In the North West, the house must meet at least twice annually.¹⁸⁴ Apart from these requirements, the houses are free to determine the dates and times of their sessions.¹⁸⁵

174 See NHTLA s 10.

175 See NHTLA s 9(3).

176 See NHTLA s 11.

177 See NHTLA s 12.

178 See Mpumalanga TLA s 10; Eastern Cape TLA s 10; Free State TLA s 8; Limpopo TLA s 10; and KwaZulu-Natal TLA s 12.

179 See North West TLA s 7.

180 See Mpumalanga TLA s 11; Eastern Cape TLA s 11; Free State TLA s 9; Limpopo TLA s 11; and KwaZulu-Natal TLA s 13.

181 See Mpumalanga TLA s 12; Eastern Cape TLA s 12; Free State TLA s 10; Limpopo TLA s 11; and KwaZulu-Natal TLA s 13.

182 See Mpumalanga TLA s 4(2); Eastern Cape TLA s 4; and Free State TLA s 4.

183 See Limpopo TLA s 4(2) and KwaZulu-Natal TLA s 6(2).

184 See North West TLA s 7(a).

185 See Mpumalanga TLA s 3; Eastern Cape TLA s 4; Free State TLA s 4; Limpopo TLA s 3; KwaZulu-Natal TLA s 6(3); and North West TLA s 7.

The houses are clearly not legislatures. Despite demands by traditional leaders that they should have more power, they remain advisory bodies. Nevertheless, the Acts establishing the provincial houses seek to equip them with some of the trappings of legislatures. The most obvious example is an attempt to confer the traditional parliamentary privileges on house members. The Act creating the National House makes no mention of this subject,¹⁸⁶ but three of the provincial enactments contain detailed provisions.¹⁸⁷ The Limpopo Act, for instance, lists a number of privileges and immunities (notably, freedom of speech and debate).¹⁸⁸ The North West Act provides for immunity from legal proceedings,¹⁸⁹ immunity from arrest¹⁹⁰ and control of entry to the house.¹⁹¹

It is unlikely that these provisions are constitutional. Immunities were traditionally given to parliamentarians to protect them from the interference of the

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executive. Now, in stable democracies at least, this protection is often seen to be unnecessary, and many privileges have been limited. For those that remain another reason is often given: they allow members to speak freely and to act on matters that might otherwise attract the operation of the law of defamation. Because freedom of expression is a necessary condition for robust debate, parliaments can fulfil their function only if their speech is largely unfettered.

The cost of such privilege is that the rights of individuals to dignity and to privacy may be infringed, and the question is whether such infringements are justified. The role of the houses of traditional leaders does not suggest either that the executive would interfere with them or that members need to be allowed greater freedom of speech than is already guaranteed by the Bill of Rights. This view is supported by the fact that, although the Final Constitution deals with privilege for the national Parliament, the provincial legislatures and local councils, it does not mention privilege in the context of the houses. Moreover, under the Final Constitution, provincial legislatures do not have the right to determine what privileges apply to their members. This must be done by national legislation.¹⁹² It seems inappropriate, then, that they should be able to confer such immunities on the houses.¹⁹³

Nevertheless, the Acts constituting the houses of traditional leaders secure at least one of the traditional protections associated with legislatures in parliamentary systems. On the issue of remuneration they are all agreed. The Act establishing the National House provides that members must be paid directly from the national

186 See NHTLA.

187 See North West TLA; Limpopo TLA; and Mpumalanga TLA s 15.

188 See Limpopo TLA s 15.

189 See North West TLA s 10.

190 See North West TLA s 12.

191 See North West TLA ss 13 and 14.

192 See FC s 117(2).

revenue fund,¹⁹⁴ and a similar stipulation can be found in each of the provincial Acts.¹⁹⁵

(c) Traditional government and the national and provincial spheres

On the basis of long-established usage, it is clear that a chief's customary powers may be exercised only within the local sphere of government. Whatever may have been the situation in pre-colonial times, the functions of traditional leaders now concern the everyday needs of their people. Under the system of multi-sphere government embraced by the Final Constitution, however, traditional leadership is included in Schedule 4 and is thus a function over which the national and

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provincial governments have concurrent legislative (and thus executive) competence.¹⁹⁶ If they enact conflicting laws, provincial law will prevail, suggesting a presumption in favour of provincial authority. There is a major qualification, however. National law prevails if it meets the test set out in FC s 146. The Final Constitution lists a wide variety of circumstances that justify national supremacy, including the need for 'efficient government', which may be secured by nationally established norms and standards.¹⁹⁷

The implications of including traditional leadership as a concurrent function under Schedule 4 have not been tested, and there is little case law on concurrency from which to extrapolate. In particular, because the provinces have passed few laws, FC s 146 has hardly been used. A key, and as yet undecided, issue is the meaning of FC s 146(2)(b). This section allows national law to trump provincial law, if the former 'deals with a matter that, to be dealt with effectively, requires uniformity across the nation' and 'provides that uniformity by establishing (i) norms and standards; (ii) frameworks; or (iii) national policies'. Does this mean, for instance, that procedures for managing succession in traditional communities must be uniform, as the Traditional Leadership and Governance Framework Act suggests, or is provincial variation permissible? Would provincial legislation on the recognition of traditional communities, which departs from the model set out in the national Act, prevail over the provisions of that Act?

193 It might be argued that there is a difference between a provincial legislature determining its own privileges and those of another body. In the latter case, there is no concern about self-interested behaviour. However, the most likely reason for the constitutional rule that privileges must be conferred by national legislation is that the needs of the country in this regard are uniform and that privilege cannot be conferred lightly. There can, therefore, be no reason for different regimes for different provinces (and, as argued in the text, no reason at all for privilege outside the parliamentary context).

194 See NHTLA s 13.

195 See Mpumalanga TLA s 13; Eastern Cape TLA s 13; Free State TLA s 11; Limpopo TLA s 13; and KwaZulu-Natal TLA s 114. The Eastern Cape TLA s 13 is an exception. It refers to 'moneys appropriated by the Provincial Legislature as determined by the Premier.'

196 See FC Schedule 4. Indigenous and customary law are also listed in Schedule 4. See also FC s 125 (Provincial executive power.)

197 See V Bronstein 'Conflicts' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 16.

Moreover, what limits are placed on prescriptions in national laws by the requirement that they may prevail over provincial law only insofar as they establish norms and standards, frameworks and national policies? In a robust system of multi-sphere government, it would be difficult to argue that anything more is required from the national government than a stipulation that succession be properly managed and that the recognition of communities be effective. If such is the case, then there is nothing to prevent provinces from developing their own procedures, even if these diverge from those laid down in the Traditional Leadership Act. The question is academic at present, however, as there is no indication that those provinces with traditional leaders intend to devise procedures for managing succession or any other aspect of traditional leadership at variance with the national law.¹⁹⁸

But uniformity has not always been the norm. Although the Interim Constitution delegated legislative and executive powers over traditional authorities and indigenous law to the provinces, in 1995, central government sought to establish

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a degree of political control over traditional leaders by controlling their remuneration.¹⁹⁹ The Remuneration of Traditional Leaders Act provided that the remuneration and allowances of traditional leaders were to be determined by the President, after consultation with the (then) Council of Traditional Leaders and the Commission on Remuneration of Representatives.²⁰⁰ Payment was to be made out of the National Revenue Fund. A preamble to the Act justified the passage of national legislation on a matter of provincial competence on the ground that 'the subjects and followers of particular tribal hierarchies do not necessarily reside in a single province and the constituencies of traditional hierarchies transcend provincial boundaries.' Remuneration paid by the central government was to be additional to any salaries traditional leaders received from provincial government.

In response to the Act and the loss of control over traditional leaders that it entailed, the government of KwaZulu-Natal introduced legislation prohibiting traditional leaders and the Zulu monarch from accepting any remuneration other than that provided for in KwaZulu-Natal legislation. Other payments to the King or traditional leaders were to be deposited by the recipients into the provincial revenue fund, to be distributed by the provincial government for the benefit of traditional leaders. The two bills introduced to effect these policies, the Payment of Salaries, Allowances and Other Privileges to the Ingonyama Amendment Bill and the KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill, sought to amend legislation which had been enacted by the KwaZulu legislature before the Interim Constitution came into force.²⁰¹ Objections by members of the new KwaZulu-Natal legislature to

198 Some provinces have taken the initiative and dealt with problems that particularly concern them. See, eg, Northern Province Circumcision Schools Act 6 of 1996; Free State Initiation School Health Act 1 of 2004; and Eastern Cape Application of Health Standards in Traditional Circumcision Act 6 of 2001.

199 See IC s 126, as read with Schedule 6.

200 See Act 29 of 1995 s 2(1).

201 After the 1994 elections, control over legislation of the disestablished KwaZulu legislature vested in the KwaZulu-Natal legislature. IC s 235(6)(b).

the constitutionality of the Bills were referred to the Constitutional Court for abstract review in terms of IC s 98(9).

The Court in *Amakhosi and Iziphakanyiswa Amendment Bill* held that the Bills were within the legislative competence of the province, that they did not infringe fundamental rights, and that they were therefore constitutionally valid.²⁰² Legislation dealing with the appointment and powers of traditional leaders was contemplated by IC s 181 as being within the competence of provincial legislatures. If laws dealing with the appointment and powers of traditional leaders were within the competence of the provinces, then laws providing for payment of salaries and allowances must also be within their competence, since these were matters incidental to the appointment and were attached to the office.²⁰³

FC s 219 reduces provincial control over remuneration of traditional leaders. It requires an act of Parliament to establish a framework for determining the

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remuneration of persons holding public office, including traditional leaders,²⁰⁴ and the establishment of an independent commission to make recommendations concerning such remuneration.²⁰⁵ In terms of FC s 219(1), provincial legislation (and the provisions unsuccessfully challenged in the Constitutional Court in 1996) would be ineffective if contrary to the remuneration framework established by national legislation.

The framework prompted by the Final Constitution, however, raises new questions. For instance, although FC s 219(1) requires an act of Parliament to establish a 'framework' for remuneration of listed public office bearers, the Act concerned simply allows the President to gazette salaries and allowances from time to time.²⁰⁶ Whether or not this is what the Final Constitution envisages depends on what 'framework' means. The Act may be said to provide a framework, if the fact that it allows the President to distinguish among the office bearers that it covers and envisages a remuneration package consisting of basic remuneration, pensions and medical aid benefits is thought to be a framework. If, however, the Final Constitution

202 See *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995*; *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995* 1996 (4) SA 653 (CC), 1996 (7) BCLR 903 (CC) ('*Amakhosi and Iziphakanyiswa Amendment Bill*').

203 Ibid at paras 20–22.

204 'Traditional leaders' includes traditional monarchs. See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) at para 102.

205 See FC s 219(2). The commission referred to by FC s 219 is the Independent Commission for the Remuneration of Public Office Bearers established by Independent Commission for the Remuneration of Public Office-Bearers Act, Act 92 of 1997. The Commission has the power to make recommendations regarding the remuneration of traditional leaders, members of provincial houses and the national House of Traditional Leaders. In terms of s 5 of the Remuneration of Public Office Bearers Act, the President must consult the Commission before determining the remuneration of traditional leaders. Act 20 of 1998.

206 Remuneration of Public Office Bearers Act s 5.

means that the national Act must provide parameters within which salaries are to be determined, then the Remuneration of Public Office Bearers Act does not comply. This question may become significant if an individual province decided that it wished to have some leeway in its payment of traditional leaders.

In regulations issued under the Remuneration Act, the President sets out annually the exact salaries of kings and traditional leaders.²⁰⁷ The allocation of the function of determining salaries to the President might also provide the basis for provincial objections. Although the Final Constitution does not state who is to implement the framework in respect of traditional leaders, the inclusion of traditional leadership in Schedule 4 suggests that provinces may claim this power. Final Constitution s 219(4), which requires provincial executives to consider recommendations from the Commission before implementing the remuneration framework legislation, strengthens the argument that provincial legislation concerning remuneration of traditional leaders may prevail over the regulations published by the President under the Act.

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The 2003 White Paper suggested that these concerns may be temporary, as it noted that the current position (which gives all traditional leaders remuneration based on uniform scales determined by the President) is not 'based on clearly defined roles and functions of traditional leaders'.²⁰⁸ By implication, once more information is available on these roles, a proper framework will be developed.²⁰⁹

In addition to opening the way to both provincial and national legislation on traditional leaders, the inclusion of traditional leaders in Schedule 4 means that national bills relating to traditional leaders should follow the procedure set out in FC s 76.²¹⁰ This section captures the notion of cooperative government by ensuring that provinces can participate in the passage of national laws relating to areas over which they share competence with the central government. The implementation of this section, however, has been hugely controversial.

In 1998, Parliament decided that the Recognition of Customary Marriages Act²¹¹ should not follow the FC s 76 route through Parliament. Although it dealt with customary law and traditional leaders (both Schedule 4 matters), its main focus was equality in marriage, and therefore not a matter of concern to provinces. A similar decision was taken in 2004 in relation to the Communal Land Rights Act.²¹² Despite the fact that it dealt with communal land, most of which falls within the jurisdiction

207 'Salaries and Allowances Payable to Traditional Leaders, Members of the National House of Traditional Leaders and Members of the Provincial Houses of Traditional Leaders for the 2004/2005 Financial Year' Proclamation R8, Government Gazette 27279 (11 February 2005).

208 See *White Paper on Traditional Leadership and Governance* (2003), available at <http://www.info.gov.za/view/DownloadFileAction?id=68774> (accessed on 9 March 2009) 53.

209 However, the White Paper does not suggest that provinces will be given any role in determining remuneration beyond the requirement in s 5(1) of the Remuneration of Public Office Bearers Act that the President consult premiers when determining remuneration.

210 See S Budlender 'National Legislative Authority' in in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 17.

211 Act 120 of 1998.

of traditional leaders, it followed the FC s 75 route through Parliament. FC s 75 affords the provinces very limited influence.

The importance of deciding whether a bill should be dealt with under the FC ss 75 or 76 process concerns mainly the balance of powers between the provinces and the central government. Removing matters affecting traditional leaders and their communities from the FC s 76 process, however, also means that there is less chance that the communities affected by such laws will be able to participate in the legislative process. This was borne out by the passage of the Communal Land Rights Act. Traditional leaders had various opportunities to present their views on the bills to Parliament, but few community members had such access. Had the bills been considered by provincial legislatures, as FC s 76 demands, many more of the affected people would have had the opportunity to participate.

(d) Traditional government and local government

Because traditional rulers have always operated as a species of local authority, the challenge to their rule, since the Interim Constitution, has emerged mainly in this sphere of government. In 1994, when the Interim Constitution came into force, a primary aim of the Government of National Unity was to secure democratic

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elections. This principle was immediately put into effect in the national and provincial spheres of government. Reforms in the sphere of local government had to be deferred, however, because of the racially divided nature of apartheid local government, the division of existing authorities among former provinces and homelands and the enormity of the task of establishing new non-racial municipalities.

The Interim Constitution nevertheless stipulated that organs of local government were henceforth to be democratically elected.²¹³ For the first time, chiefs faced the prospect of having to compete with elected officials.²¹⁴ Practical politics and the fact that the traditional leaders provided the only viable authorities in rural areas, however, suggested the wisdom of maintaining the status quo, at least for the time being.²¹⁵ As a temporary measure, therefore, IC s 182 allowed traditional rulers both *ex officio* membership of local government bodies in their areas and eligibility for election to such bodies.²¹⁶

212 Act 11 of 2004.

213 See IC s 179(1).

214 Prior to 1994, local government elections were held only in urban areas and towns. See TE Scheepers, W du Plessis, C Rautenbach, J William & B de Wet 'Constitutional Provisions on the Role of Traditional Leaders and Elected Local Councillors at Rural Level' (1998) 19 *Obiter* 70. Traditional leaders were especially concerned about the possibility of losing their judicial powers and control over land affairs. Salaries were another controversial matter, for traditional leaders were paid more than municipal councillors and had more perquisites of office. See Oomen *Tradition on the Move: Chiefs, Democracy and Change in Rural South Africa* (2000) 13-14 and 40-3.

215 See, eg, *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of SA, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 189.

In 1993, in anticipation of imminent conversion to democratic government, but to ease the process, the Local Government Transition Act was passed.²¹⁷ This Act established a framework of temporary authorities that were to operate until 2000. Existing local authorities in the non-metropolitan areas of each province were replaced with transitional local councils ('TLCs') for smaller towns, transitional representative councils ('TRCs') and transitional rural councils for rural areas.²¹⁸ Provincial MECs were given the power, if they deemed it to be in the interests of people residing within a traditional ruler's area of jurisdiction, to appoint the traditional ruler as a local government body (a traditional council) for purposes of the Act.²¹⁹

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In 1996, the Final Constitution reiterated the principle of democratic and accountable local government,²²⁰ and, at the same time, declared that elected local authorities were to be created for all parts of South Africa: the principle of 'wall-to-wall' municipalities.²²¹ In practice this means that, for all but five metropolitan areas and a number of sparsely populated areas, there are two levels of local government throughout the country. These are local municipalities located within larger district municipalities.²²²

The Final Constitution changed the position of traditional leaders dramatically. Although it confirmed their *ex officio* membership in TRCs and rural councils until 30 April 1999, their role in local government became dependent on national legislation.²²³ FC s 212(1) states that '[n]ational legislation may provide for a role for

216 The ANC claimed that this arrangement undermined democratic government. In particular, it objected to KwaZulu-Natal exploiting FC s 182 by making traditional rulers *ex officio* members of the new regional councils. The ANC claims were dismissed, however, in *African National Congress & Another v Minister of Local Government and Housing, KwaZulu-Natal & Others* 1998 (3) SA 1 (CC), 1998 (4) BCLR 399 (CC) at para 19. The Constitutional Court held that FC s 182 validly sought to defuse the tension arising from the imposition of democratic structures in areas formerly governed by hereditary rulers.

217 Act 209 of 1993 ('LGTA').

218 The TRCs contained mainly elected members, although, under LGTA s 9C(1), others could be nominated by an 'interest group', if an MEC considered it desirable. Under LGTA s 9A, traditional leaders represented one of four specified interest groups. The others were farm owners, farm labourers and women.

219 LGTA s 1(2).

220 See FC s 152(1)(a).

221 See FC s 151(1). Section 174(1) of the Interim Constitution had simply required the establishment of local authorities in demarcated areas.

222 In constitutional terms, under FC s 155(1), the 'metros' are category A municipalities, the local municipalities are category B municipalities and district municipalities are category C municipalities. See Barry Bekink 'Local Government' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 22.

223 Item 26(1)(b) of Schedule 6 to the Final Constitution. See Scheepers *et al* (supra) at 71-7.

traditional leadership as an institution at local level on matters affecting local government'.

In 1997, a Green Paper on Local Government investigated, *inter alia*, the ambiguous position of traditional leaders under both the Final Constitution and the Local Government Transition Act.²²⁴ It noted with dismay the uncertainty about responsibility for service delivery, the lack of rural infrastructure, funding and capacity, and the continuing tension over control of land affairs. The Paper observed that traditional authorities and elected municipalities shared powers, functions, jurisdictions and constituencies. Without specifying how the inevitable conflicts were to be solved, it called for cooperation between the two authorities in order to advance rural development.²²⁵

A White Paper on Local Government followed in 1998.²²⁶ This confirmed the principle that elected local governments should be established for all areas, including those ruled by traditional authorities. Although the White Paper declared that municipalities should have sole competence over the functions of local government, it was prepared to make some concessions to traditional rulers. It therefore recommended that they should be represented in local government structures²²⁷ and that the functions of local government should depend on the circumstances of each area.

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In 1998, the Local Government: Municipal Demarcation Act started to put into effect the principle of 'wall-to-wall' municipalities.²²⁸ The Demarcation Board created by the Act confronted a number of problems caused by the fragmentation of existing chiefdoms amongst two or more municipalities. Although it was supposed to take account of areas of traditional authority,²²⁹ the Board frequently neglected this requirement or found it impossible to implement. Confusion currently reigns. Traditional authorities may fall into more than one district or local municipality (or, more frequently, more than one ward). The standard of services offered to the subjects of traditional rulers often differs considerably among such municipalities.²³⁰

224 Government Gazette 18370 (17 October 1997).

225 The Paper's position is consonant with the principles of cooperative government and intergovernmental relations laid down in s 41 of the Final Constitution.

226 Government Gazette 18739 (13 March 1998) ('*White Paper on Local Government*'). Traditional authorities in fact received little attention in the White Paper. See K Shubane 'Chiefs and the White Paper' (1998) 15 *Development SA* 313.

227 *White Paper on Local Government* (supra) at 77.

228 Act 27 of 1998. ('LG:MDA').

229 See LG:MDA s 25.

230 See *White Paper on Traditional Leadership and Governance* (supra) at para 3.5. For a discussion of the process from the perspective of the Demarcation Board, see C Goodenough *Shaping South Africa: Reflections on the First Term of the Municipal Demarcation Board, South Africa 1999–2004* (2004) 25ff.

In 1998, the process of replacing transitional local authorities also began. Traditional leaders won far less than they had been hoping for. The Local Government: Municipal Structures Act provided that the MEC for local government in a province containing traditional authorities had to request the local House of Traditional Leaders to identify leaders who would participate in local authorities.²³¹ The leaders so identified could then attend and participate in the meetings of municipal councils.²³² But, significantly, no provision was made for them to vote. The number of traditional leaders entitled to participate in a municipal council was not to exceed 20 per cent of the total number of councillors.²³³ After consulting the relevant house of traditional leaders, MECs for local government could regulate the participation of traditional leaders in council proceedings and prescribe their role in municipal affairs.²³⁴

The White Paper of 1998 had recommended an investigation into traditional affairs, and, to this end, the Department of Provincial and Local Government produced a White Paper on Traditional Leadership in July 2003.²³⁵ The central question posed by this Paper was the extent to which traditional leaders could continue to exercise their pre-constitutional powers. It was assumed that such powers were excluded in the areas for which local government was competent. The White Paper therefore recommended that, in local government, traditional leaders should play, in essence, a support and advisory role.²³⁶

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This approach was implemented in the Traditional Leadership and Governance Framework Act.²³⁷ The Act lists both the functions of traditional councils and those of traditional leaders. The former have one clear function that authorizes them to act independently: 'administering the affairs of the traditional community in accordance with customs and tradition.'²³⁸ All other items on the list of council functions give them only an advisory role to municipal councils or allow them to 'participate in' municipal activities.²³⁹ The local houses to be established by provinces under the Act

231 Act 117 of 1998 ('Municipal Structures Act') s 81. The guidelines for identification are provided in s 81(2)(a), as read with Schedule 6 of the Act: a traditional leader must hold 'supreme office of authority among all the leaders of the traditional authority' and be ordinarily resident within the municipal area concerned. Moreover, Houses of Traditional Leaders have the task of identifying the traditional leaders who will be *ex officio* members of elected local government. Proc R109 of 1995.

232 See Municipal Structures Act s 81(1).

233 The Municipal Structures Amendment Act 33 of 2000 (Amended the original figure set in s 81 from 10 to 20 per cent.)

234 See Municipal Structures Act s 81(4).

235 See *White Paper on Local Government* (supra) at 76.

236 See *White Paper on Traditional Leadership and Governance* (supra) at paras 3.2 and 3.3.

237 Act 41 of 2003 ('TLGFA').

238 See TLGFA s 4(1)(a).

will also have only advisory functions and the right to 'participate in' local programmes related to rural communities.²⁴⁰

In relation to traditional leaders, the Act vaguely asserts that '[a] traditional leader performs the functions provided for in terms of customary law and customs of the traditional community concerned, and in applicable legislation'. This ambiguity leaves a critical question unanswered: how is local government action and government by traditional leaders to be distinguished? Perhaps the answer to this question will be provided gradually in the future. In a long list of areas, s 20 of the Traditional Leadership Act stipulates that both the national and provincial governments may 'provide a role for traditional councils or traditional leaders', provided that the allocation of the role is consistent with the Constitution. Here, of course, the most difficult issue will be a possible intrusion on local government powers.²⁴¹

The powers of local authorities are specified, in the first instance, by the Final Constitution,²⁴² and, in the second, by the Local Government: Municipal Structures Act²⁴³ and the Municipal Systems Act.²⁴⁴ These enactments list matters typically associated with municipalities, such as building regulations, electricity services, cemeteries, trading regulations, control of liquor, fencing, refuse removal, street trading, roads, traffic, parking and pounds. It can be argued that, because the Final Constitution and the two Acts were intended to define the competence of local authorities, they override only those powers enjoyed by traditional leaders under customary law with which the Final Constitution and the Acts deal explicitly.

On this reading, the powers considered critical to the maintenance of traditional authority — judging disputes, allocating land, convening initiation schools

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239 Councils may also enter partnership agreements with municipalities (TLGFA s 5), but these would clearly depend on the willingness of the municipality concerned.

240 These houses will consist of no more than ten representatives of traditional communities in the area of the district council for which they are constituted. It is entirely unclear how they would participate in municipal initiatives save, once again, in an advisory capacity.

241 Note that FC s 151 protects the right of municipalities to govern and says that neither the national nor provincial governments may 'compromise or impede' this right.

242 See FC s 156, as read with Part B of Schedules 4 and 5. Under FC s 151(3), municipalities have jurisdiction over local government affairs, but subject to national and provincial legislation.

243 See Municipal Structures Act s 83(1).

244 Act 32 of 2000 s 8(1).

and presiding over national festivals — remain intact.²⁴⁵ The persistent concerns among traditional leaders about their loss of powers may largely be the result of a misunderstanding of the functions that are to be assumed by local government under the new dispensation. Nevertheless, it is clear that local government will formally bear responsibility for many of the functions traditional leaders previously exercised through the system of indirect rule. This means that, whereas in the past, members of traditional communities were dependent on traditional leaders for almost all of the (minimal) services that they received, they will now have another place to which to turn — their municipality. This threatens to reduce considerably the hold that traditional leaders have over their communities.

In practice, however, the new local governments have battled to establish themselves, and, in rural areas, few have the capacity to provide services. (They are often reduced to a single bare office and just one member of staff.) In addition, the newly demarcated municipalities are enormous, usually covering large areas and many communities. Some traditional authorities, on the other hand, have what Oomen has described as 'the material legacy of fifty years of governance-through-chiefs: large tribal offices, tribal cars, tribal secretaries and (as they are called) tribal cleaners'.²⁴⁶ Stories abound of people appealing to the new local government officials to solve problems, and, then, in the absence of a response, resorting to a traditional authority instead. In these circumstances, it may be that the proposed cooperative relationship between traditional councils and local government will in fact leave much power in the hands of chiefs.²⁴⁷

Customary powers may, of course, be superseded by specific national or provincial legislation, but, in the context of local government, the critical issue is whether municipalities have the same authority. The starting point for this inquiry is FC s 211(2). This section provides that traditional leaders 'may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs'. Does the term 'legislation' in this section include by-laws?²⁴⁸ Under the Final Constitution, municipalities may make by-laws for the effective administration of matters they are empowered to

245 In the *White Paper on Local Government*, the authority of traditional leaders was taken to include limited legislative and executive powers, presiding over customary courts, maintaining law and order, consulting with communities, advising government through the provincial Houses and the national Council of Traditional Leaders and making recommendations on land allocation and the settlement of land disputes. See *White Paper on Traditional Leadership and Governance* (supra) at para 3.3.

246 B Oomen *Tradition on the Move: Chiefs, Democracy and Change in Rural South Africa* (2000) 14.

247 See L Ntsebeza 'Rural Governance and Citizenship in Post-1994 South Africa: Democracy Compromised?' in J Daniel, R Southall & J Lutchman (eds) *The State of the Nation South Africa 2004 — 2005* (2005) 58.

248 As a general rule, by-laws are considered legislation. See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31 (On what counts as legislation, by municipalities, for purposes of Bill of Rights analysis); Barry Bekink 'Local Government' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 22.

administer,²⁴⁹ but a by-law conflicting with national or provincial legislation is invalid.²⁵⁰ Thus, whenever customary law is codified in national or provincial legislation — and the two key examples are the Black Authorities Act²⁵¹ and the Natal and KwaZulu Codes²⁵² — it would appear to be immunized from any municipal amendments.

Final Constitution s 156(4) may nullify this effect. It obliges national and provincial governments to assign to municipalities Schedule 4 and Schedule 5 matters (including, therefore, customary law and traditional leadership), if these matters would be most effectively administered in the local government sphere and a municipality has the capacity to do so.

An unanswered question is whether FC s 156(4) requires the transfer of all aspects of a listed function or whether the national or provincial government can retain some aspects and assign others. A literal reading of the text suggests the former interpretation, but this view seems unduly rigid, and would undermine the principle of subsidiarity, which the section clearly intends to capture. However, even on this literal and expansive reading, it is unlikely that the regulation of traditional leadership or customary law would be assigned to municipalities, as these matters include functions related to the administration of justice — a national matter — and the protection of cultural rights, a matter with which local communities should be involved, but of which the national government should have oversight.²⁵³

If, on the other hand, FC s 156(4) allows the assignment of aspects of the matters listed in Schedules 4 and 5, it is likely that, in due course, municipalities will be able to demand responsibility over some matters relating to traditional leadership and customary law. The danger here is that municipalities will not be persuaded that they should accept a distinction between the incidents of modern and traditional government,²⁵⁴ and will begin to override the powers of traditional rulers. In these circumstances, traditional leaders will have to rely, like any other group of citizens, on the vagaries and hurly-burly of the democratic political process.

249 FC s 156(2).

250 FC s 156(3).

251 Act 68 of 1951, as amended by Act 89 of 1993. The regulations issued under the Act must also be included. See ss 9, 10 and 11 of Proc R110 of 1957, as amended by Proc R110 of 1991.

252 Proclamation R151 of 1987 and KwaZulu Act 16 of 1985, respectively.

253 The concern here would be that local minorities would not be adequately protected if the matter was taken out of the control of the central government.

254 See A Sachs *Advancing Human Rights in South Africa* (1992) 77-8. Sachs argued that there was no inherent conflict between traditional and democratic forms of government, provided that each operated within its own sphere. Drawing this distinction is not, however, easy, because the powers of traditional rulers are already ill-defined. Some of them are derived from pre-colonial institutions, while others are of more recent origin and have been arrogated by rulers who assumed the multifarious responsibilities of modern government. It could be argued that all of the latter powers are now customary law, which is constantly adapting to changes in society.

(e) Traditional Monarchs

The clause in Constitutional Principle XIII requiring the new constitution to allow a provincial constitution to 'provide for . . . the institution, role, authority and status of a traditional monarch, where applicable' was added at the eleventh hour as part of a deal to draw the Inkatha Freedom Party back into the transition process, and, even more important, to secure its participation in the 1994 elections. Twelve years later, despite the urgency attached to this principle in 1994, nothing has come of it.

In 1996, in KwaZulu-Natal's first venture at constitution-making, an attempt was made to constitutionalize the Zulu monarch. However, that constitution failed to secure the approval of the Constitutional Court, as required by IC s 160(4).²⁵⁵ A second attempt is under way now. In 2004, after the ANC won control of the provincial legislature, it initiated a provincial constitution-making process with the specific goal of resolving persistent disputes about the king. From the ANC's point of view, the status of the monarch was the only matter needing attention in the provincial constitution. The requirement of a two-thirds majority for the passage of a constitution, however, meant that any provincial constitution-making process would involve deals with minority parties, and, as a result, many other issues would be brought into the debate.

In 2004, the ANC, IFP and the Democratic Alliance each produced a draft constitution, and a number of smaller parties submitted memoranda dealing with specific issues. Each draft constitution contains provisions concerning the recognition of the monarch, his role, matters of succession and a 'civil list', that is, a secured annual allowance for the royal household. The most significant differences in the three drafts relate to the extent of the monarch's 'kingdom', whether the monarch should be inviolable, and removal.²⁵⁶

On the question of the monarch's kingdom, the DA draft limits the king's jurisdiction to 'the Zulu people',²⁵⁷ while the ANC and IFP propose that the king should be recognized as monarch of the province.²⁵⁸ Both approaches seem constitutional. In *Certification of the Constitution of the Province of KwaZulu-Natal*, the Constitutional Court considered the constitutionality of establishing the Zulu king as monarch of the province, and found that, in terms of IC s 160(3), this was permissible.²⁵⁹ Because the requirements of the Final Constitution do not differ in any material way from those of the Interim Constitution, the same decision should be expected now.

255 See S Woolman 'Provincial Constitutions' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 21 (Argues that provincial constitutions confer no new additional powers and are largely window dressing.)

256 See K Govender, W Freedman & A Annandale *Analysis of Constitutional Proposals for the Province of KwaZulu-Natal* (2005) at paras 287–307.

257 See *Draft Constitutions of KwaZulu-Natal* (9 February 2005) Democratic Alliance Proposal Clause 3.3.1.

258 See *Draft Constitutions of KwaZulu-Natal* (supra) Inkatha Freedom Party Proposal ('IFP Draft') Clause 60(1).

259 See *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal* 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC) at para 3.

However, a DA provision declaring the Zulu king 'traditional monarch of the Zulu people' has raised one concern: it may be read as an attempt to extend the authority of the KwaZulu-Natal legislature beyond the borders of the province, thereby infringing FC s 104, which limits the legislative power of the provincial legislature to the territory of the province. This view seems to depend on an overly zealous reading of the Final Constitution, because it is clear that the province does not have legislative power beyond its borders, and this provision could not achieve that power. Instead, the provision is better read as an attempt to limit the reign of the monarch to Zulus (however they may be defined) in the province, leaving other citizens untouched.²⁶⁰

Only the IFP draft constitution stipulates that the monarch is 'inviolable', a term which is then defined to mean 'not subject to civil, administrative or political responsibility or authority'.²⁶¹ This provision resembles an equivalent in the draft constitution considered by the Constitutional Court in 1996. Although the Court found that the monarch's inviolability was constitutional, if the matter were to be heard again under the Final Constitution, the same conclusion might not be reached. Section 143(2) now provides that provisions in provincial constitutions regarding traditional monarchs must comply with s 1. This section sets out basic values on which South Africa's new constitutional order is founded, notably, accountability and the rule of law. On both counts, a provision that a monarch is to be inviolable would probably fail, since it contradicts the principle that the monarch, like everyone else, is subject to the Constitution and the law.

The question of removal is perhaps the most interesting of the three areas of disagreement. Only the IFP draft makes provision in this regard. The power is granted to the provincial house of Traditional Leaders 'for just and good cause'.²⁶² Although this provision gives wide powers to the House, exercise of those powers must nevertheless be constitutional, since FC s 143 gives provinces a free hand in determining the status of kings, provided that its requirements are met. The provision also ensures some level of accountability to the traditional elite, if not the people that traditional rulers are intended to serve.

The main constitutional question raised by the IFP's removal provision, however, is a conflict with the provisions for the removal of kings and queens in the Traditional Leadership and Governance Framework Act. Section 10 of that Act allows royal families to request the President to remove kings or queens in certain specified circumstances. The President must comply. The IFP draft, however, leaves the matter entirely in the hands of the provincial house of Traditional Leaders and gives the house a broader discretion than royal families are given under the national Act. Would the provincial Constitution prevail under FC s 147

or would it be overridden by the national Act? For the national Act to prevail, it would have to meet the requirements of FC s 146(2). The national Act claims to fall under FC s 146(2)(b), as it states in its Preamble that it 'set[s] out a national framework

260 In essence this is a conflict between principles of territorial and personal rule. See TW Bennett *Customary Law in South Africa* (2004) 70ff.

261 See IFP Draft (supra) at Clause 63(7).

262 Ibid at Clause 66(5).

and norms and standards'. However, whether the Act meets the other part of the FC s 146(2)(b) test, which states that it must '[deal] with a matter that, to be dealt with effectively, requires uniformity across the nation', is doubtful.

It is perhaps arguable that uniformity is required in matters concerning recognition of traditional leaders. In an apparent bid to stop the proliferation of traditional leaders, for instance, the Traditional Leadership Act states that, when recognizing kings and queens, the President must take into account 'the need to establish uniformity in the Republic in respect of the status afforded to a king or queen'.²⁶³ It seems unlikely, however, that this argument could be made with any conviction in the context of removal procedures. On the contrary, the very nature of customary law suggests that different practices will have developed in different areas, and, if tradition is to be preserved, this diversity should be maintained.

At the moment, these constitutional disputes are hypothetical, and the chances of the KwaZulu-Natal politicians reaching consensus on a provincial constitution are slight. Until they do, the status of the Zulu king will be subject to national and provincial law.

26.6 Government in traditional areas

(a) Appointment and Succession to Office

The legends and traditions of most South African chieftaincies regard the first person to settle the land as the founding father of the nation. Thereafter, according to the principle of patrilineal succession, his office was inherited by his eldest son. If a deceased ruler had contracted a series of polygamous marriages, his heir would be the eldest son of the principal wife,²⁶⁴ whose rank was usually denoted by the fact that subjects had contributed towards payment of her *lobolo*.²⁶⁵

Although patrilineal succession is considered a cardinal rule of customary law,²⁶⁶ the transmission of political offices has always been subject to many variations and exceptions. If the eldest son were physically or mentally incapable, for example, he could be barred from taking office.²⁶⁷ More important, however, was the

263 TLGFA s 9(1)(b)(i).

264 She need not be the first wife. Certain systems of customary law allow rulers to nominate their principal wives. See *Vikilahle v Zuluaiteti* (1904) 1 NAC 77; *Tyelinzima v Sangqu* 4 NAC 375 (1920); *Holi v Tyantyaza* (1923) 5 NAC 206; and *Ngwenya v Gungubele* 1950 NAC 198 (S). This power is encoded in s 75 of the Natal and KwaZulu Codes. See Proclamation R151 of 1987 and Act 16 of 1985.

265 This practice is specifically recognized in s 75(2) of the Natal and KwaZulu Codes.

266 See B Sansom 'Traditional Rulers and their Realms' in WD Hammond-Tooke (ed) *The Bantu-speaking Peoples of Southern Africa* (2nd Edition, 1974) 257; I Schapera *Government and Politics in Tribal Societies* (1956) ('Schapera *Government and Politics*') 50ff; AC Myburgh & MW Prinsloo *Indigenous Public Law in KwaNdebele* (1985) 5–8; MW Prinsloo *Inheemse Publiekreg in Lebowa* (1983) ('Prinsloo *Publiekreg*') 113–14.

267 See S Zungu 'Traditional Leaders Capability and Disposition for Democracy: The Example of South Africa' in W Hofmeister & I Scholz (eds) *Traditional and Contemporary Forms of Local Participation and Self-Government in Africa* (1997) 162.

reality of power politics. Succession to the chieftaincy seldom went uncontested, and the death of a ruler often occasioned fierce disputes. As a result, the rules of succession were frequently manipulated or even ignored.²⁶⁸

The strict rule of customary law has been further undermined by many years of state intervention. Since the promulgation of the Native Administration Act in 1927, and even before, successors to chiefly office needed the support of the Department of Native Affairs. Hence, not only are many of the existing incumbents of office of doubtful ancestry, but so too were their predecessors.²⁶⁹ Some provincial governments responded to the substantial number of succession disputes in their regions by instituting commissions of inquiry.²⁷⁰ The best known is the Ralushai Commission, which was established in 1996 by the Premier of Limpopo. The report of this Commission was not made public, but, in a successful court challenge under the Promotion of Access to Information Act,²⁷¹ 46 traditional leaders from Sekhukhuneland won access to those portions of the report dealing with them.²⁷²

The 2003 Traditional Leadership and Governance Framework Act reflects the national government's intention to settle the backlog of disputes.²⁷³ It establishes a Commission on Traditional Leadership Disputes and Claims to deal not only with questions of legitimate succession to title but also cases in which there is doubt whether a leadership position was established under customary law and cases relating to the establishment of 'tribes' and tribal boundaries.²⁷⁴ When dealing with disputes about succession, the Commission must 'be guided by customary norms' and, in addition, when considering succession to a kingship, the Commission must consider provisions in the Act concerning the recognition of kings and queens.²⁷⁵ (These require a nationally uniform approach to the status of kings and queens.)

268 See M Gluckman *Politics, Law and Ritual in Tribal Society* (1971) 138ff.

269 In the event of a dispute about an incumbent of office, s 16(2) of the Amakhosi and Iziphakanyiswa Act 9 of 1990 (KwaZulu) requires the MEC in KwaZulu-Natal to institute an inquiry. Similarly, under s 10(2) of the Natal Code, the State President is obliged to institute an inquiry into any case of a disputed succession. See *Government of the Province of KwaZulu-Natal v Ngwane* 1996 (4) SA 943 (A). Disputes have been complicated by failure to decide which department of government should have jurisdiction. See I van Kessel & B Oomen "'One Chief, One Vote": The Revival of Traditional Authorities in Post-apartheid South Africa' (1997) 96 *African Affairs* 561, 577-8.

270 Eastern Cape, Free State, North West and Limpopo are reported to have established commissions. Ministry for Provincial and Local Government 'Press Statement on the Ralushai Commission's Report' (11 November 2004), available at <http://www.dplg.gov.za> (accessed on 2 August 2005).

271 Act 2 of 2000.

272 See *Minister for Local and Provincial Government v Unrecognised Traditional Leaders, Limpopo Province* 2005 (2) SA 110 (SCA), [2005] 1 All SA 559 (SCA).

273 Act 41 of 2003 ('TLGFA').

274 See TLGFA s 25(2).

275 See TLGFA s 26(3)(b).

The task, which the Act anticipates will be completed in five years,²⁷⁶ is immense. The Ralushai Commission apparently estimated that there were over

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300 disputes in Limpopo, and reports from the Eastern Cape and KwaZulu-Natal suggest a similar number of disputes in those provinces.²⁷⁷ Although by establishing a Commission and by binding itself to accept its decisions,²⁷⁸ the national government presumably hoped to move the process out of the political arena, customary law is uncertain enough for any decisions to be perceived as politically motivated.²⁷⁹

Another less pressing concern is the issue of retirement and deposition. Customary law has no specific rules or procedures to govern these eventualities. Office holders simply ruled until they died. Those who were incapable or unpopular might be persuaded to abdicate through the pressure of relatives or their councils.²⁸⁰ Ultimately, however, revolt and secession were the only methods for forcing corrupt or incompetent leaders to relinquish office.²⁸¹

Under the Black Administration Act,²⁸² executive sanction was needed for the appointment of traditional leaders and for their deposition. In 1994, these powers were assigned by the President to the six provinces with traditional rulers. They now lie with provincial premiers.²⁸³

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The Traditional Leadership and Governance Framework Act also deals with matters of succession, retirement and deposition. Following s 2(7) of the Black

276 See TLGFA s 25(5).

277 Conversation with Professor Thandabantu Nhlapo, Chairperson of the National Commission (15 July 2005).

278 See TLGFA s 26.

279 This impression may be bolstered by the fact that the staff of the Commission (which will presumably do most of the work) is drawn from government (the Departments of Justice and Provincial and Local Government and from the National Prosecuting Authority). It is noteworthy that the Act does not require the Commission to consult the provincial or national houses of traditional leaders. This was a wise move, as the involvement of the houses would increase the likelihood of the Commission's work being politicized. But see C Keulder *Traditional Leaders and Local Government in Africa: Lessons for South Africa* (1998) 308–10 (Keulder argues that it would be unwise to remove illegitimate chiefs, partly because it is impossible to unravel historical claims and partly because some chiefs, regardless of their origins, now have legitimacy in the eyes of their people.)

280 Cf I Schapera *A Handbook of Tswana Law and Custom* (2nd Edition, 1955) 84. While Schapera gives examples of rulers being tried in their own courts for abuse of powers, the traditional form of government does not contemplate an independent judiciary holding rulers to account.

281 See Schapera *Government and Politics* (supra) at 209–11; WD Hammond-Tooke *Command or Consensus: The Development of Transkeian Local Government* (1975) 35–6; H Ashton *The Basuto* (1952) 217; M Hunter *Reaction to Conquest* (1979) 393–4.

282 Act 38 of 1927.

Administration Act, the new Act requires executive sanction for the appointment and deposition of traditional leaders. When leadership positions are to be filled, the royal family concerned must identify a successor 'with due regard to applicable customary law'.²⁸⁴ The President must formally recognize the new kings and queens identified by the family while provincial legislation must provide for a process under which premiers recognize other traditional leaders. If there are allegations that customary law was not followed properly when a person was identified to fill a leadership position, the President or premier may refuse the certificate of recognition, in which case the matter must be referred back to the royal family concerned for reconsideration.

The President may also refer disputes about succession to the position of king or queen to the National House of Traditional Leaders, while premiers may refer such disputes to the provincial house. Once a house has considered a matter and has identified a suitable candidate, the President (or premier) is obliged to recognize that person, unless there are grounds for thinking that the house did not consider the issue in accordance with customary law. Although the Act is conspicuously silent in this regard, if a dispute cannot be resolved by this process, the matter could presumably be taken to court.

Sections 10 and 12 of the Act deal, respectively, with the removal of kings and queens and other traditional leaders. There are just four circumstances in which removal is possible:

- (a) conviction of an offence with a sentence of imprisonment for more than 12 months without an option of a fine;
- (b) physical incapacity or mental infirmity which, based on acceptable medical evidence, makes it impossible for that senior traditional leader, headman or headwoman to function as such;

283 Under IC s 235(8), the President was given the power to assign by proclamation the administration of certain pieces of legislation to provinces (and was required to do so if the Premier requested it). On 9 September 1994, he assigned ss 2(7), (7)bis, (7)ter and (8) of the Black Administration Act, together with the whole Black Authorities Act 68 of 1951 to the six provinces with traditional leaders. Notice 139 of 1994 Government Gazette 15951. However, the assignment excluded any provisions which fell outside the functional areas listed in IC Schedule 6 'or which relate to matters referred to in paragraphs (a) to (e) of section 126(3) of the [Interim] Constitution'. On the same basis, the Bophuthatswana Traditional Authorities Act 23 of 1978 was assigned to North West province, the KwaNdebele Traditional Authorities Act 2 of 1984 to Mpumalanga, the Transkei Authorities Act 4 of 1965 and Ciskei Act on Administrative Authorities 37 of 1984 to Eastern Cape and the KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990 to KwaZulu-Natal. The assignment left matters uncertain, as it did not specify which provisions, if any, fell outside Schedule 6 or within IC s 126(3) and thus remained the responsibility of the national government. That the national government believes that some of these powers at least fell outside the Schedule, and thus were not assigned, is suggested by the fact that the new legislation (the 2003 Traditional Leadership and Governance Framework Act) seems to assume that matters covered in those laws are matters for which the national government may lay down a framework and provide norms and standards which, under FC s 146, would prevail over provincial laws on the same matter.

284 See TLGFA s 9(1)(for kings and queens) and s 11(1)(for senior traditional leaders and headmen or headwomen). In the past, although the state intervened in the appointment of traditional leaders whenever it was politically expedient to do so, customary law was never completely disregarded. Indeed, ethnographers in the Department of Native Affairs kept a semi-official register of the genealogies of the 800 ruling families to assist in the appointment procedure. Section 10(1) of the Natal Code provides that the deceased's heir shall be the person whom the Cabinet appoints as successor. Proc R151 of 1987. Section 16(1), as read with s 12, of the Amakhosi and Iziphakanyiswa Act 9 of 1990 (KwaZulu), has a similar provision, although the Minister is obliged to take s 81 of the KwaZulu Code Act 16 of 1985 into account. But see *Minister of Native Affairs & Another v Buthelezi* 1961 (1) SA 766 (D), 769-70 (Held that nothing limited the President's discretion other than the interests of the public and the people concerned.)

- (c) wrongful appointment or recognition; or
- (d) a transgression of a customary rule or principle that warrants removal.²⁸⁵

In both the case of a king or queen and of a traditional leader, the royal family makes the decision to remove an incumbent of office, and the President (or premier, as the case may be) must then withdraw the certificate of recognition.

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By dividing responsibility for the appointment and removal of traditional leaders between provinces and the national government, the Traditional Leadership and Governance Framework Act has, temporarily at least, created a complicated situation. Under FC s 239, laws administered by provincial governments, when the Final Constitution took effect in February 1997, are defined as provincial laws. This provision covers laws assigned to provinces, as happened to certain provisions of the Black Administration Act. The national Parliament cannot now amend or repeal such laws. As a result, whenever the new Traditional Leadership Act conflicts with sections of the Black Administration Act which were assigned to provinces, the provincial laws prevail, unless the provisions of the Traditional Leadership Act meet the test in FC s 146. It is clearly the intention of the six provinces having traditional leaders that any such conflict should be remedied, since each of these provinces has tabled legislation which will repeal laws conflicting with the national Traditional Leadership Act. Nevertheless, until these laws are passed, uncertainty will exist.

The Final Constitution introduced a new issue to the question of succession, that of gender discrimination.²⁸⁶ According to customary law, women may not hold political office. There are certain exceptions to this rule, the most famous being the Lovedu since the reign of Modjadji I,²⁸⁷ and there is evidence to show that practices are changing in response to new ideas of gender equality.²⁸⁸ Nevertheless, the general rule still holds true: women may, at most, act as regents during an interregnum or if an heir is under age.²⁸⁹

Under the Bill of Rights, however, one might argue that if a traditional leader were to die leaving both male and female descendants, the rule preferring male descendants should be ignored, because it constitutes unfair discrimination.²⁹⁰ The oldest child would have to succeed, whether male or female.²⁹¹ The White Paper is quite clear on this issue. It states that the existing rules are in conflict with the

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285 See TLGFA s 10(1). Section 12(1) is similarly worded but substitutes 'senior traditional leader, headman or headwoman' for 'king or queen'.

286 See K Motshabi & SG Volks 'Towards Democratic Chieftaincy: Principles and Procedures' 1991 *Acta Juridica* 104; L Bank & R Southall 'Traditional Leaders in South Africa' (1996) 37 & 38 *J of Legal Pluralism* 407.

287 See EJ Krige & DJ Krige *Realm of a Rain-Queen: a Study of the Pattern of Lovedu Society* (1943) 177 and 180.

288 See Keulder (supra) at 319. On the former Transkei, see DS Koyana & JC Bekker *Judicial Process in the Customary Courts of Southern Africa* (1943) 258ff.

289 A famous example was MmaNthatisi of the Tlokwa. See Ashton (supra) at 197-8.

Bill of Rights, notes that women often act as regents for many years (implying that there can be no question of their ability to fulfil the role) and cites South Africa's international obligations to prohibit gender discrimination. It concludes that 'custom and customary law should, generally, be the basis for regulating succession' but that custom must be transformed to allow women (and men) who were discriminated against in the past to succeed as traditional leaders.²⁹²

Despite this bold statement the Traditional Leadership and Governance Framework Act is silent on the issue of female succession. Although a number of court cases have been brought by women claiming the right to succeed to a leadership position, we know of none that has been upheld.²⁹³ Moreover, although the White Paper states that the right of women to succeed will take effect from 27 April 1994, the day the Interim Constitution came into effect, there is no indication in the Traditional Leadership Act that the Commission on Traditional Leadership could recognize women rather than men when it resolves disputes. It has been left to the Commission and the courts to assert this important principle. There are indications that the courts will. In dealing with the customary law of succession, in *Bhe* the Constitutional Court could not be more emphatic: '[t]he primogeniture rule as applied to the customary law of succession cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights.'²⁹⁴ While some different issues are raised by succession to leadership positions, the basic principles remain the same. It is difficult, therefore, to justify a rule reserving positions of leadership to men under the Final Constitution.

(b) Territorial and personal jurisdiction

By using the language of public international law, the traditional concept of sovereignty may be analysed in terms of a ruler's personal and territorial reach of power. Hence, we can say that, although a chief had jurisdiction over all those owing

290 The rule of primogeniture might constitute unfair discrimination because it differentiates on the basis of age. However, the customary rule may be justified, on the ground that a system of inherited offices, although arbitrary as to age, is necessary if certainty and stability are to be achieved in the political order.

291 See AJ Kerr 'Customary Law, Fundamental Rights, and the Constitution' (1994) 111 *SALJ* 720, 728-9 (Notes, however, that, if the law governing succession to political office were changed other areas of customary law would also be affected.) See also the South African Law Reform Commission *Discussion Paper on the Customary Law of Succession* Project 90 Discussion Paper (2000) at paras 4.7.1-2 (Recommends that any legislation aimed at improving the position of widows and children should not be extended to traditional leaders.) But see Kerr (*supra*) at 727-8 (Further arguments against changing the rule of agnatic succession to the chieftaincy.)

292 *White Paper on Traditional Leadership and Governance* (*supra*) at 52.

293 There are women in the houses of traditional leaders. See, for example, 'Cheftainess Nosiseko Gayika elected in 2000 to Eastern Cape House of Traditional Leaders' (2000), available at <http://www.info.gov.za/speeches/2000/0009181218p1005.htm> (accessed on 20 July 2005). We do not know whether these women are regents or traditional leaders.

294 See *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of the RSA & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at paras 88-97, 187-190 and 210.

him personal allegiance,²⁹⁵ the exercise of this power was restricted to the borders of his domain.

Bonds of allegiance were established through the time-honoured processes of birth, marriage, immigration and, in the past, conquest or capture in war.²⁹⁶ A child born to parents who were already subjects of a particular chief was automatically

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affiliated to that chiefdom. The significant link was the blood connection, for it was irrelevant whether the child was actually born inside the realm. In the case of marriage, the operative rule was not as clear. The custom of virilocal residence would suggest that a wife should become subject to her husband's chief, because she would be permanently attached to the husband's family.

Immigrants could be accepted as subjects if they were prepared to submit to the authority of a traditional ruler.²⁹⁷ Submission normally entailed paying some token of submission, which, in earlier times, would have been a beast, but today it is more likely to be cash. Similar, although less stringent, terms applied to the readmission of former subjects.²⁹⁸ If they lost their original status, because they had rejected the authority of a ruler or had committed a crime, they would be required to settle the issue before being accepted back into the realm.²⁹⁹

According to customary law, all subjects resident within a ruler's domain were obliged to submit to local laws (at least those of a public nature).³⁰⁰ Such laws included a duty to pay taxes, liability to perform public works and, of course, an overall duty to obey the ruler's orders and acknowledge his position.³⁰¹ The Regulations Prescribing the Powers and Privileges of Chiefs give traditional rulers additional powers to enforce a range of statutory laws concerning health, the

295 See, eg, Prinsloo *Publiekreg* (supra) at 25.

296 For what follows, see AC Myburgh *Die Inheemse Staat in Suider-Afrika* (1986) 11-15; MW Prinsloo *Die Inheemse Administratiefreg van 'n Noord-Sothostam* (1981) ('Prinsloo *Administratiefreg*') 66-9; Myburgh & Prinsloo (supra) at 2-4.

297 See Prinsloo *Administratiefreg* (supra) at 67 (Lists the criteria for admission: evidence from an existing subject that the applicant is suitable, reasons why the applicant left his previous chiefdom, availability of land and payment of an admission fee.)

298 Ibid at 68.

299 A subject wanting to leave a traditional ruler's territory must first obtain permission; permission will be given, provided that taxes are paid up to date and outstanding judgments have been settled. Ibid at 69. When the emigrant wants to enter another ruler's territory, he or she will be required to prove an orderly departure from the previous realm.

300 So far as the central state is concerned, chiefly powers derive from territorial rather than personal jurisdiction. See, for example, *Zulu v Mbata* 1937 NAC (N&T) 6; *Monete v Setshuba* 1948 NAC (C&O) 22; and s 3(2) of the Natal Code Proc R151 of 1987. Moreover, regulation 6 of the Regulations Prescribing the Powers and Privileges of Chiefs refers only to persons resident within a traditional ruler's area of jurisdiction. Proc R110 of 1957.

301 The relationship between the ruler and subject is signified by the use of certain honorific titles, specific to the particular ruler.

registration of births and deaths, stock dipping, eradication of weeds, and so on.³⁰² A person failing to comply with the customary or statutory regulations was liable to pay a fine for contempt of authority.³⁰³ Subjects who were persistently disobedient, or those who rejected the authority of the ruler and his council,

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might be banished, which resulted in the loss of all rights of membership of the polity, especially of access to land.³⁰⁴

Since colonization, the rule of territorial jurisdiction has been subject to certain obvious changes. As we explained above, borders are now more precisely described,³⁰⁵ chiefly domains have been reduced in size³⁰⁶ and many traditional polities have been divided by local, provincial and even international boundaries.

(c) Separation of powers with checks and balances

In a constitutional democracy, effective and legitimate government is deemed to depend upon different institutions performing different functions and on a system of checks and balances that control the exercise of power. In particular, the courts must remain independent and impartial so that they can check the activities of the other two branches of government, and dispense justice in a way that is not influenced by the interests of the executive or the legislature.³⁰⁷ However, as we have already noted, under customary law, traditional leaders, together with their councils, perform all functions of government, which includes running courts for any disputes arising within their areas of jurisdiction.

(i) Judicial powers

302 Regulation 9 of Proc R110 of 1957, as amended. This Proclamation was assigned to the six provinces with traditional leaders under IC s 235. Notice 139, Government Gazette 15951 (1994). When the provincial bills designed to implement the national Traditional Leadership Act are passed, the Proclamation will be repealed.

303 Hence, regulation 6 of Proc R110 allows a traditional ruler to 'take such steps as may be necessary to secure from [all Blacks resident within his area] loyalty, respect and obedience.' Proc R110 of 1957. See, too, s 7 of the Natal Code and s 7 of the Amakhosi and Iziphakanyiswa Act 9 of 1990 (KwaZulu).

304 See Myburgh (supra) at 14ff; Prinsloo *Administratiefreg* (supra) at 71 and 194-5; Prinsloo *Publiekreg* (supra) at 136-8. Examples of banishment happening today, however, are rare. In fact, Prinsloo could find no available examples. Prinsloo *Publiekreg* (supra) at 32-3. See Myburgh & Prinsloo (supra) at 29 (Report that banishment is so serious that only immigrants can be punished in this way, and then only for persistent disobedience to the law or contempt for the chief.)

305 Before the advent of modern techniques of mapping and surveying, boundaries were demarcated with reference to such topographical features as hills, rivers and outcrops of rock: See Myburgh (supra) at 8; Prinsloo *Administratiefreg* (supra) at 185-6; HO Mönnig *The Pedi* (1967) 245-6.

306 The indigenous polities that survived conquest were segregated from white cities and farms as 'reserves'. These areas became the so-called 'scheduled' and 'released' areas under the Natives Land Act 27 of 1913 and the Native Trust and Land Act 18 of 1936, respectively. Later, under apartheid, they became the bantustans, and eventually the 'homelands'.

307 See S Sibanda & A Stein 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds), *Constitutional Law of South Africa* (2nd Edition, OS, June 2006) Chapter 12.

Predictably, the first reason for objecting to the way in which traditional courts operate was separation of powers. The judicial function of traditional rulers is prescribed by the Black Administration Act, under which the Minister may allow a traditional ruler to constitute the court of a 'chief or headman'.³⁰⁸ The Act also prescribes the courts' powers of jurisdiction: to hear civil claims 'arising out of Black law and custom brought before [them] by Blacks against Blacks resident

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within [their] area of jurisdiction' and criminal claims where the accused is a black person.³⁰⁹

The Final Constitution permits the continued operation of these courts, provided that they are consistent with the Constitution.³¹⁰ However, because traditional rulers also exercise legislative and, especially, executive powers, it has been argued that, as judges, they are neither independent nor impartial, as is required by FC s 165(2).³¹¹ In *Bangindawo & Others v Head of the Nyanda Regional Authority & Another*, the applicants used this argument to object to the Transkeian Regional Courts (which are statutory tribunals, but constituted by traditional rulers).³¹² The High Court dismissed the objection on the ground that the usual common-law tests for independence and impartiality were not applicable.³¹³ It held that, in Africa, although no clear distinction is drawn between the executive, judicial and legislative functions of government, no reasonable African would perceive bias on the part of traditional leaders merely because they exercise executive powers.

308 Section 12(1) of Act 38 of 1927 ('BAA'). The Repeal of the Black Administration Act and Amendment of Certain Laws Bill (2005) anticipates the provisions of the BAA relating to traditional courts being replaced by a new Act. However, there is no draft legislation on this matter yet. Presumably, traditional courts will continue to be governed by the BAA until such a law is passed. Transkei (Acts 13 of 1982 and 6 of 1983), Ciskei (Act 37 of 1984), Bophuthatswana (Act 29 of 1979), and KwaNdebele (Act 3 of 1984) constituted traditional courts along the same lines as South Africa, but with occasional modifications in jurisdiction and procedure.

309 BAA s 20.

310 FC s 16(1) of Schedule 6. During the certification proceedings, a contention that the Final Constitution failed to establish traditional or customary courts (as required by Constitutional Principle XIII) was dismissed. See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of SA*, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 199. Under FC s 166(e), the customary courts qualify as 'any other court established or recognised in terms of an Act of Parliament'.

311 IC s 96(2) was FC s 165(2)'s immediate predecessor.

312 1998 (3) SA 262 (Tk), 1998 (3) BCLR 314 (Tk) ('*Bangindawo*').

313 Despite ostensibly dismissing the common-law tests, the *Bangindawo* Court held that the idea of judicial independence denoted no 'reasonable apprehension of bias'. In other words, a reasonable person would consider the judiciary independent if it were free from interference by either the executive or the litigants. In this regard, the Court followed the Canadian decision in *R v Valente*. (1986) 24 DLR (4th) 161 at 169-70 and 172-3. However, while *Valente* and at least one Constitutional Court judgment require both a perception of independence and impartiality and independence from an objective point of view, *Bangindawo* was committed to the view that, under an African interpretation of independence, all that was required was a perception of independence in the minds of the public. Cf *De Lange v Smuts* NO 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC).

The High Court in *Mhleka & Feni v Head of the Western Tembuland Regional Authority & Another* was not prepared to accept this ruling on traditional government.³¹⁴ The High Court noted that the Final Constitution does not explicitly mention the doctrine of separation of powers and that FC s 165(2) does not prohibit traditional leaders from being judges simply because they perform other governmental functions. It went on to hold, however, that some of these functions involve controversial public issues and may therefore lead to the perception of an unduly close relationship to the executive.³¹⁵

Mhleka's most telling departure from *Bangindawo*, however, is its insistence that all courts must comply with FC s 165. This means that not only must the courts

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be perceived to be unbiased but, objectively assessed, they must be independent of the executive. Relying on the Constitutional Court's decision in *De Lange v Smuts*,³¹⁶ Van Zyl J found that presiding officers in the Transkei Regional Authority Courts did not have sufficient *individual* independence of the executive. In other words, although the courts themselves were *institutionally* independent of both the executive and the legislature, the relationship of their presiding officers to the executive was too close. This finding was based on an examination of the many tasks of the traditional leaders who presided over these courts, including powers of search and seizure, general responsibility to maintain law and order, and other policing functions.

Mhleka's finding that the Regional Authority Courts were unconstitutional was not sent to the Constitutional Court for confirmation under FC s 172, although there is a strong body of opinion that traditional courts presided over by traditional leaders are incompatible with the Final Constitution.³¹⁷ *Mhleka*, however, did not decide that traditional leaders could never preside over a court nor did it attempt to draw the line between the legitimate non-judicial functions that a presiding officer might carry out and those that would undermine the independence of their courts. This decision provides a starting point for considering modifications of the traditional court system to ensure that traditional courts conform to the Final Constitution, but still retain their strengths - accessibility, understanding of customary practices, sensitivity to the needs of the communities they serve and, in many cases, legitimacy.

The Law Reform Commission's *Report on Traditional Courts and the Judicial Function of Traditional Leaders* suggests some ways in which reforms could be achieved. One option is to allow councillors to be elected to the courts; another is to allow traditional leaders to appoint councillors from panels elected by their communities.³¹⁸ There are many possibilities, and it may be best to allow traditional communities to develop their own systems within parameters which require the

314 2001 (1) SA 574 (Tk), 619, 2000 (9) BCLR 979, 1018 (Tk) ('*Mhleka*').

315 *Ibid* at 616-17. Moreover, traditional leaders do not enjoy the security of tenure guaranteed other judicial officers by FC s 177.

316 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC).

317 See, for example, I Currie & J de Waal *The New Constitutional and Administrative Law Vol 1* (2001) 311; RB Mqoke 'The Rule of Law and African Traditional Courts in the New Dispensation' (2001) 22 *Obiter* 416, 423.

inclusion of women in the court structure and maintenance of a sufficient distance between court officials and the day-to-day administration of community affairs. One thing seems clear, a current practice whereby traditional leaders delegate authority to preside over customary matters to 'a trusted councillor', but retain a veto over the court's decisions,³¹⁹ cannot continue. It may be constitutional to permit a traditional leader to participate in proceedings as one of a

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group, but, a traditional leader cannot, on his or her own, have final decision-making power, nor can someone who has not participated in the proceedings retain a veto.

(ii) Legislative powers

Legislation is not a great feature of customary law, which derives its legitimacy from tradition. It follows that those responsible for maintaining and applying the law are more inclined to preserve existing rules than to generate new ones. Even so, customary law obviously permits the making of new laws, and all rulers, depending on their status in the hierarchy of offices, have some degree of legislative power.³²⁰

This power is now superseded, however, by the Final Constitution. Final Constitution s 43 provides that legislative authority vests in Parliament (in the national sphere), in provincial legislatures (in the provincial sphere) and in municipal councils (in the local sphere).³²¹ Nevertheless, traditional leaders retain an involvement in law-making both through their participation in the provincial and national houses of traditional leaders and through the Traditional Leadership and Governance Framework Act, which lists as a function of traditional councils 'participating in the development of . . . legislation at local level'.³²² In these cases, the role of traditional leadership can be advisory only, although in many municipalities traditional leaders will doubtless be very influential.

(iii) Executive and administrative powers

Executive or administrative action in customary law was based on the principles of consultation and rationality. Before making a decision, rulers had to consult their councils, and, for serious matters affecting the commonweal, they had to consult a

318 South African Law Reform Commission *Report on Traditional Courts and the Judicial Function of Traditional Leaders* Project 90, Report (21 January 2003) 7. Note that elections may bring new problems, as the system of elected judges in many states in the United States has shown. In particular, if the job is paid, councillors will have strong incentives to retain their jobs, which may involve appeasing powerful members of the community.

319 Ibid at 7-8.

320 See I Schapera *Tribal Legislation among the Tswana* (1943); I Schapera *Tribal Innovators: Tswana Chiefs and Social Change* (1970) Chapter 2 (Gives detailed evidence of the legislative activities of Tswana chiefs.) See also FM D'Engelbronner-Kolff in FM D'Engelbronner-Kolff, MO Hinz & JL Sindano (eds) *Traditional Authority and Democracy in Southern Africa* (1998) 71ff.

321 In the national and provincial spheres of government, however, special bodies were created to allow traditional leaders to participate in the legislative process by expressing their views on matters of customary law and traditional leadership.

322 Act 41 of 2003 ('TLGFA' or 'Traditional Leadership Act') s 4(1)(f).

gathering of all adult males, who represented the interests of the entire nation.³²³ Any proposal to be made had to be supported by good reasons, the merits of which would be debated in council.³²⁴ Decisions were supposed to be

unanimous, and unanimity through persuasion was the ideal.³²⁵ In the final analysis, however, the most important check on abuse of power was the need to maintain political support: a ruler who persisted in acting against a council's opinion was courting disaster.³²⁶

The Final Constitution now sets out a framework within which all government power must be exercised. Most importantly, it requires accountable and accessible government, and it is here that adjustments to the style of traditional government will be required. The Traditional Leadership and Governance Framework Act makes a start in this regard by requiring councils to report to their communities at least once a year 'to give account of the activities and finances of the traditional council'.³²⁷ In addition, the Act requires provincial legislation to:

regulate the performance of functions by a traditional council by at least requiring it to — (a) keep proper records; (b) have its financial statements audited; (c) disclose the receipt of gifts; and (d) adhere to the code of conduct.³²⁸

These provisions on their own, however, cannot establish a relationship of accountability between leaders and the community, as they give the community no method of holding leaders to account for unsatisfactory performance. This lacuna is most striking in the provisions in the Act dealing with the removal of traditional leaders: no mention is made of a failure to govern in an accountable and responsive way as a ground for removal.³²⁹ In short, a key component of accountability is

323 See Myburgh & Prinsloo (supra) at 41–2, 63–4; Prinsloo *Administratiefreg* (supra) at 134–5; MW Prinsloo *Inheemse Publiekreg in Lebowa* (1983) ('Prinsloo *Publiekreg*') 154; Hunter *Reaction to Conquest* (supra) at 394; Mönnig (supra) at 284–5; Krige *The Social System of the Zulus* (supra) 219; H Kuper *An African Aristocracy* (1947) 36–8. What constitutes a 'serious matter' is naturally difficult to define. An early case, *Hermansberg Mission Society v Commissioner for Native Affairs & Another*, held that alienation of tribal land required consent of only the chief's council (not the greater tribal council). 1906 TS 135. In *Mogale v Engelbrecht & Others*, the rule in *Hermansberg* was approved as a matter of principle. 1907 TS 836. In *Mathibe v Tsoke* the court noted obiter that only a majority of councillors needed to consent. 1925 AD 105, 114–16. See also *Rathibe v Reid & Another* 1927 AD 74.

324 See, eg, *Kekane v Mokgoko* 1953 NAC 93 (NE).

325 See WJO Jeppe *Bophuthatswana: Land Tenure and Development* (1980) 128; AJB Hughes *Land Tenure, Land Rights and Land Communities on Swazi National Land in Swaziland: A Discussion of Some Inter-relationships between the Traditional Tenurial System and Problems of Agrarian Development* (1972) 105.

326 See Myburgh & Prinsloo (supra) at 53 (A traditional ruler may not act contrary to the advice of the national council.)

327 See TLGFA s 4(3)(b).

328 See TLGFA s 4(2).

missing: the power of the person or body to whom account is given to act in case of improper government.³³⁰

Other elements of accountable government to affect traditional rule concern administrative law. Even before the new Constitution came into force, it was argued that a traditional ruler's administrative powers were subject to the common-law standards. Hence, to the extent that customary law permitted departure from the principles of natural justice, for example, by denying *audi alteram partem*, it was invalid.³³¹ The common law was, in its turn, superseded by FC s 33(1),

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which provides that administrative action must be 'lawful, reasonable and procedurally fair', and FC s 33(2), which provides that anyone 'whose rights have been adversely affected by administrative action has the right to be given written reasons'.

These provisions were then refined and amplified by the Promotion of Administrative Justice Act.³³² Under s 3 of this Act, any administrative action that 'materially and adversely affects the rights or legitimate expectations of any person' must be 'procedurally fair'.³³³ Although procedural fairness depends upon the circumstances of each case,³³⁴ which allows traditional rulers a certain degree of latitude, it is defined to include adequate notice of an action, opportunity to make representations, a clear statement of the action, notice of a right of review (or appeal),³³⁵ and notice of the right to request written reasons (within 90 days).³³⁶ Apart from the last requirement, which may present some difficulties,³³⁷ the customary procedures can easily be adjusted to comply with these provisions (if

329 A community that wants to remove a leader who fails to provide accountable government might be able to argue that the offender had transgressed customary law in a way which is serious enough to warrant removal. The removal of leaders was always controversial, however, and a non-accountable government will not be an easy ground to argue given the control exercised by royal houses and the increased formalization of leadership positions under the Traditional Leadership Act.

330 See *White Paper on Traditional Leadership* (supra) at 54. The document gives a hint of the reason for this omission. The drafters appear to have been concerned only with accountability to the government, not with accountability (as it is usually understood in the context of the exercise of public power) to the governed.

331 See TW Bennett 'Administrative-Law Controls over Chiefs' Customary Powers of Removal' (1993) 110 *SALJ* 276, 288-91.

332 Act 3 of 2000 ('PAJA').

333 See PAJA s 3(1). Section 4 lays down even more stringent requirements for action affecting the public.

334 See PAJA s 3(2).

335 See PAJA s 3(2)(b).

336 See PAJA s 5.

they do not already comply). Where administrative action is not procedurally fair, a court may review the action.

Section 3 deals only with the *audi alteram partem* rule. Under the common law, however, procedural fairness also required an absence of bias, which is expressly recognized in the Act, as well as a provision allowing the courts to review administrative action if administrators were reasonably suspected of bias.³³⁸ Here traditional leaders may be confronted with the same challenges as they face in their judicial role. As decision-makers and administrators, leaders may struggle to show sufficient distance from issues, and may thus fall foul of the requirement of impartiality.

The requirement that administrative action be both reasonable and rational is perhaps more easily met. The Constitutional Court has found that what is reasonable will depend on the circumstances of each case. Factors that assist in the determination of the reasonableness of a decision include the nature of the decision, the identity and expertise of the decision-maker, the complexity and breadth of underlying factors, what reasons are given, the nature of competing interests involved, as well as the impact of the decision.³³⁹ For decisions taken in traditional communities, the participation of a traditional council and the ensuing transparency and openness of the decision-making would be relevant.

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Application of both the Bill of Rights and the Promotion of Administrative Justice Act depends on the classification of an act as 'administrative action'³⁴⁰ and the judicial functions of traditional leaders are expressly excluded from the definition of administrative action in the Administrative Justice Act.³⁴¹ The Constitutional Court has affirmed that it is the nature of the function rather than the functionary that must be taken into account in determining whether the requirements of administrative justice apply.³⁴² Even in this regard, customary law does not clearly

337 In a predominantly oral culture, governmental acts are not necessarily recorded in writing. Section 5(4) of PAJA, however, allows an administrator to depart from the requirement to give adequate reasons 'if it is reasonable and justifiable in the circumstances'.

338 See PAJA s 6(2)(a)(iii).

339 See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at para 45.

340 Section 1(1)(a) of PAJA defines 'administrative action' to mean any decision (or failure to take a decision) by an organ of state. A distinction must, however, be drawn between administrative and executive acts, the former denoting implementation of a law or judicial decision and the latter formulation of policy. Although executive acts do not fall within the purview of the Act, they must comply with the broad principle of 'legality' that was developed in *Fedsure Life Assurance Ltd v Greater Transitional Metropolitan Council*. 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC). See also *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC). While the content of this principle is still uncertain, it means, at the very least, that a functionary must act rationally within powers granted by the Final Constitution. *Ibid* at para 85.

341 See PAJA s 1(b)(ee).

342 See *President of the RSA v South African Rugby Football Union* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at para 141. See C Hoexter *New Constitutional and Administrative Law* (2001) 93-4.

differentiate the functions of government, and so it may well happen that statutory requirements are inadvertently breached.

(d) Land

In 2004, the Communal Land Rights Act³⁴³ was passed, primarily with a view to giving landholders under customary law greater security of tenure as required by FC s 25. It is designed to override customary interests over communal land and generate an entirely new system of land tenure, similar to that provided by the Communal Property Associations Act.³⁴⁴ Because the former Act is not yet in force, we first describe the existing customary powers of traditional leaders and their councils, and then consider the impact of the Final Constitution on this regime. Thereafter we discuss the Communal Land Rights Act.

As leaders of their nations, chiefs enjoyed a range of rights and privileges over land, including a right to demand tribute from the harvest or the hunt and a right to choose the best land for their own purposes. They also represented their people in any dealings with the land. As a result of this conglomeration of powers, certain rulers have, perhaps inevitably, described themselves as 'owners' of their domains, and, therefore, entitled to sell mineral rights and charge rents for businesses.³⁴⁵ This type of claim, however, is a calculated misinterpretation of the general principles of customary law, because the exercise of customary powers must always be for the benefit of the nation, and all major decisions must be endorsed, at least by the ruling council, if not the national council.

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(i) Traditional power to allot land

All the chiefdoms in South Africa have been settled for many decades, and all of them are hopelessly overcrowded. Rulers are therefore seldom, if ever, called upon to exercise such traditional powers as establishing new realms, marking out royal homesteads or zoning land into sections dedicated to grazing or farming.³⁴⁶ Of greater day-to-day importance is the power to allot plots of land to subjects who need places to live and farm.

In practice, however, because most land has already been allotted, the ruler is more often required to do no more than approve a transfer between existing landholders.³⁴⁷ Although he is under no obligation to accede to a request, the ruler is supposed to behave as a benevolent father with a general responsibility for his subjects' welfare. His power is therefore construed as a duty.³⁴⁸ What can be done to meet all the demands, however, obviously depends upon the amount of land

343 Act 11 of 2004.

344 Act 28 of 1996.

345 See, for example, I Schapera *Native Land Tenure in the Bechuanaland Protectorate* (1943) ('Schapera *Native Land Tenure*') 258-60; JF Holleman 'Some Shona Tribes of Southern Africa' in E Colson & M Gluckman *Seven Tribes of British Central Africa* (1961) 379.

346 See AJ Kerr *Customary Law of Immovable Property and of Succession* (3rd Edition, 1990) 30 (Botswana is probably the only exception to this rule.) See Schapera *Native Land Tenure* (supra) at 59ff; NJ Van Warmelo & WMD Phophi *Venda Law: Parts 1-3* (1948), *Part 4* (1949), *Part 5* (1967) 1065-6. Cf Jeppe *Bophuthatswana* (supra) at 22.

available, and many rulers must now fall short of the ideal notion that they are providers for their people.

As it happens, everyday allotments are seldom the responsibility of high authority. A subject's entitlement to land within a chiefdom arises not from affiliation to the nation, but, rather, from attachment to one of its wards.³⁴⁹ The applicant for land on which to build a house, church, store or school, or on which to grow crops must, in the first instance, approach the local wardhead.³⁵⁰ Unfortunately, the likelihood is that all available land has already been taken. Hence, someone looking for a site will generally be obliged to arrange for a transfer from an existing resident.³⁵¹

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Although the allotment of land is not governed by set rules or procedures, it is not a matter of pure discretion. Wardheads must achieve at least a fair distribution of the land in their areas so that all householders have enough according to their needs. To this end, decisions to allot land are taken on the advice of elders and the applicant's future neighbours.³⁵² In common-law terms, this is an administrative act, and is therefore subject to the principles of administrative law.³⁵³

347 The extent to which a ruler intervenes depends largely on his personal power. Weak rulers do little more than rubber stamp decisions that have already been reached by a neighbourhood. See C R Cross 'The Land Question in Kwa-Zulu: Is Land Reform Necessary?' (1987) 4 *Development SA* 428 (Cross 'The Land Question') 436.

348 See Hughes (supra) at 110-11; Jeppe *Bophuthatswana* (supra) at 24.

349 This entitlement is termed a 'right of avail'. See VGJ Sheddick *Land Tenure in Basutoland* (1954) 32; Hughes (supra) at 62; Jeppe *Bophuthatswana* (supra) at 13-14; P Duncan *Sotho Laws and Customs* (1960) 86-7; EM Letsoalo *Land Reforms in South Africa* (1987) 19; I Hamnett *Chieftainship and Legitimacy: An Anthropological Study of Executive Law in Lesotho* (1975) 65. Wards are clearly defined geographic units that are usually ruled by heads of aristocratic families. On the concept of the ward, see Hughes (supra) at 101-2; Holleman (supra) at 367-9; Schapera *Native Land Tenure* (supra) at 27-32; MFC Bourdillon *The Shona Peoples: An Ethnography of the Contemporary Shona with Special Reference to their Religion* (1976) 123-4, WJO Jeppe *Die Ontwikkeling van Bestuursinstellings in die Westelike Bantoegebiede (Tswana-Tuisland)* (1970) 113; Sheddick (supra) at 8-9.

350 If no wardhead exists, then the person must approach the authority directly in charge of the area. See C De Wet & M Whisson (eds) *From Reserve to Region: Apartheid and Social Change in the Keiskammahoek District of (former) Ciskei 1950-1990* (1997) 17.

351 See CR Cross *Informal Tenure in South Africa: Systems of Transfer and Succession* (1993) 16 (Notes that the wardhead then does little more than act as an intermediary to facilitate the claim.)

352 See BA Marwick *The Swazi* (1966) 162; Hughes (supra) at 129; Kuper (supra) at 48-9; Cross 'The Land Question' (supra) at 436. So far as the applicant for land is concerned, the temptation is obviously to shorten this process by simply buying or leasing rights. See CR Cross 'Informal Tenures against the State Landholding Systems in African Rural Areas' in M De Klerk (ed) *A Harvest of Discontent* (1991) 74.

353 See FC s 33 and PAJA. Because an applicant has no definite rights before an allotment is made, the decision is administrative, not judicial. See Duncan (supra) at 88 and *Nzama v Nzama* 1942 NAC (N&T) 8. Regarding allotment by the state, see *Gaboetloeloe v Tsikwe* 1945 NAC (C&O) 2 and *Dlomo v Dlomo* 4 NAC 181 (1922). Cf Hamnett (supra) at 63-5.

Strictly speaking, all allotments are gratuitous,³⁵⁴ but nowadays it is usual to pay some form of consideration. These payments could, of course, be treated as bribes, but they can also be construed as a form of naturalization fee (or thank offering), that traditionally betokened submission to political authority.³⁵⁵ Proof of corruption is therefore difficult to sustain.³⁵⁶ Nevertheless, the receipt of gifts in return for services sits uncomfortably with a traditional leader's position as a paid state official. The Code of Conduct in the Schedule to the Traditional Leadership and Governance Framework Act³⁵⁷ now requires traditional leaders to disclose any gifts received, and this provision may provide an incentive to bring the system to an end.

To provide evidence of a landholder's rights, the act of allotment and a description of the land concerned must, in some way, be publicized.³⁵⁸ In certain areas, registers of allotments are kept,³⁵⁹ but, if neither an official document nor a witness to the initial act is available, customary law gives no indication of how landholders are to prove their titles.

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(ii) Traditional power to regulate common resources

Although all subjects have free access to common resources, in customary practice, rulers may determine when and how these resources are to be used. This power, which may be exercised only for the public good, requires a careful balancing of the people's welfare and a need to protect the environment.³⁶⁰ Thus, in times of scarcity,

354 According to Kuper, the Swazi use the verb *kuphakela* to describe allotment. Kuper (supra) at 45. This is the same word that is used to denote serving food - and every individual has a right to be fed.

355 See Hamnett (supra) at 72; RJ Haines & CPG Tapscott 'The Silence of Poverty: Tribal Administration and Development in Rural Transkei' in CR Cross & RJ Haines (eds) *Towards Freehold: Options for Land and Development in South Africa's Black Rural Areas* (1988) at 169-70; N Bromberger 'Introduction to the land tenure debate from reality' in Cross & Haines (supra) at 208; and Jeppe *Bophuthatswana* (supra) at 24-5.

356 Nevertheless, control of land provides good opportunities for bribery, which has been the cause of widespread complaint throughout southern Africa. See WD Hammond-Tooke *Command or Consensus: The Development of Transkeian Local Government* (1975) 211; WD Hammond Tooke 'Chieftainship in Transkeian Political Development' (1964) 2 *J Mod Afr Studies* 313, 320-1; Hunter *Reaction to Conquest* (supra) at 114; H Ashton *The Basuto* (1952) 147-8; Hamnett (supra) at 76.

357 Item 1(l) of Act 41 of 2003.

358 See Hughes (supra) at 132-3; Ashton (supra) at 147. Without a public record, officials in control of land are given even better opportunities for corruption. According to Hamnett, they may declare that land had never, in fact, been allotted, or that it had been lent on a temporary basis. See Hamnett (supra) at 69.

359 See Duncan (supra) at 89. In Lesotho, traditional rulers appoint special officials whose job is to supervise allotments. See Hamnett (supra) at 69.

360 See, eg, B Sansom 'Traditional Economic Systems' in WD Hammond-Tooke (ed) *The Bantu-speaking Peoples of Southern Africa* (2nd Edition, 1974) 137-8 (On the problem of deciding when grass may be cut.) Although pre-colonial peoples are often depicted as 'children of nature', living in harmony with their environment, scholars today portray them as regulators. See W Beinart & P Coates *Environment and History, The Taming of Nature in the USA and South Africa* (1995) 3-4.

rulers may be obliged to impose restrictions on use, and there is ample evidence to show that they have reacted swiftly when the need arose. Over fifty years ago, for instance, Tswana leaders banned the killing of certain species of game,³⁶¹ and prohibited the practice of annually burning pasturage to encourage new spring growth.³⁶²

Formally, customary law gives traditional leaders all the powers necessary to safeguard the environment.³⁶³ However, three factors militate against effective action. First, a coherent policy requires central planning and an administrative infrastructure for implementation. Where political authority is diffuse and decentralized, prompt, co-ordinated action is much more difficult to achieve.³⁶⁴ Secondly, the very ethic of customary law is to give priority to human needs. Hence, traditional rulers tend to be more concerned with social support networks than the environment.³⁶⁵ Thirdly, the painful fact remains that very little can be done to conserve natural resources when chiefdoms are suffering all the problems of poverty and overpopulation.³⁶⁶

(iii) Traditional powers of expropriation and confiscation

Under customary law, traditional authorities have a general power to order landholders or, occasionally, even whole communities to relinquish the lands they were allotted. The reasons for issuing such orders are various, but they may be loosely grouped into two, or possibly, three categories.

In the first, land may be expropriated for a general public purpose. The tract in question may be needed for constructing public works, such as roads or dams,³⁶⁷ or the soil may be exhausted and in need of conservation measures.³⁶⁸ In these

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361 See Schapera *Native Land Tenure* (supra) at 257.

362 See I Schapera *A Handbook of Tswana Law and Custom* (2nd Edition, 1955) ('Schapera Handbook') 209.

363 Of course, insofar as traditional rulers exercise administrative powers, they must comply with the requirements of FC s 33 and PAJA.

364 It is noticeable, for instance, that the main examples of environmental control come from relatively centralized polities in Lesotho and Botswana. See Schapera *Handbook* (supra) at 212; Schapera *Native Land Tenure* (supra) at 42-4 and 263; Sheddick (supra) at 124; Duncan (supra) at Chapters 37, 46 and 49.

365 Cross 'The Land Question' (supra) at 438.

366 See, eg, EM Preston-Whyte 'Land and Development at Indaleni' (1987) 4 *Development SA* 401, 415.

367 See AC Myburgh & MW Prinsloo *Indigenous Public Law in KwaNdebele* (1985) 41-2.

368 See Sheddick (supra) at 170. See also M Wilson & MEE Mills *Keiskammahoek Rural Survey Vol 4* (1952) 26; Schapera *Native Land Tenure* (supra) at 183.

cases, the dispossessed landholder is compensated with land elsewhere in the realm.

In the second category, a removal order is issued to penalize a landholder for committing an offence,³⁶⁹ typically a violation of one of the rules governing land use, such as starting to plough before permission was given. In addition, however, this type of order may be made in order to rid the community of the disruptive influence of criminal delinquents. Unfortunately, a more self-serving motive — to put down political dissent — may well underlie the ostensible reason.³⁷⁰

In cases of criminal confiscation, no form of compensation is paid, and the offending landholder may even lose whatever improvements were made to the land. At most, he or she will be allowed to dismantle buildings and harvest the crops that happen to be standing in the fields.³⁷¹ If the wrongdoing was serious and persistent, the dispossessed holder may lose all entitlement to land in the realm (which is tantamount to banishment or expulsion).³⁷²

There is, perhaps, a third reason for issuing removal orders. Land may be taken away from holders who are not occupying it beneficially or who have more than is necessary for their subsistence needs.³⁷³

The power of removal, which is comparable with the common-law doctrine of eminent domain, has both good and bad features. On the one hand, removal orders can be used to achieve an equitable distribution of land, and, for this purpose, they may be issued to penalize absentee landholders and to encourage productive farming.³⁷⁴ On the other hand, removal orders are a convenient weapon for silencing political opposition, and, in the hands of corrupt and unpopular rulers, they are open to abuse.³⁷⁵

369 See Myburgh & Prinsloo (supra) at 42; Prinsloo *Publiekreg* (supra) at 137 (Landholder may be dispossessed only for commission of several serious offences.)

370 See Ashton (supra) at 149–50; Sheddick (supra) at 62 and 155.

371 See Prinsloo *Publiekreg* (supra) at 137; Hughes (supra) at 228–9. See also Sheddick (supra) at 72.

372 In customary law, banishment is the appropriate sanction for rejecting the authority of a ruler and his council. See Prinsloo *Die Inheemse Administratiefreg van 'n Noord-Sothostam* (1981) ('Prinsloo *Administratiefreg*') 71 and 194–5; Prinsloo *Publiekreg* (supra) at 136–8. But see Myburgh & Prinsloo (supra) at 29 (Report that banishment is so serious that only immigrants can be punished in this way, and then only for persistent disobedience to the law or for contempt of the ruler.) Cf Kuper (supra) at 149. See, further, Schapera *Native Land Tenure* (supra) at 107–8; Letsoalo (supra) at 22; Hughes (supra) at 146–9. The customary duties of loyalty and respect for traditional leaders received statutory support in regulation 6 of the Regulations Prescribing the Duties and Powers of Chiefs. Proc R110 of 1957.

373 See Hamnett (supra) at 68; Ashton (supra) at 145–6; Prinsloo *Publiekreg* (supra) at 137; Sheddick (supra) at 155; Schapera *Handbook* (supra) at 207; Schapera *Native Land Tenure* (supra) at 181–2.

374 By the same token, however, frequent removals can create a sense of insecurity, especially among those who, by hard work and good husbandry, increase their farming yields. See Hamnett (supra) at 75–6; Hughes (supra) at 149; N Vink *Systems of Land Tenure: Implications for Development in Southern Africa* (1986) 40–1. See also Hughes (supra) at 148 (Notes that fear of banishment in Swaziland tended to inhibit agricultural development, because a man who was too successful ran the risk of being told that he had land surplus to his family's subsistence needs.)

Customary law provides no clearly defined restraint on the power to issue removal orders, apart from a procedural requirement that the ruler should consult his council³⁷⁶ and give reasons for his decision.³⁷⁷ It is uncertain, however, when a matter should go to council or which council is to be consulted. (And, of course, consultation offers no more than an assurance that an issue is considered; a ruler is not bound by the council's advice.) What is more, customary law does not always give the affected landholder a right of *audi alteram partem*. He or she may be allowed to make submissions to the ruler in council, but, when land is expropriated for public purposes, there is no automatic right to a hearing.³⁷⁸

The former Supreme Court often had cause to consider customary removal orders, which, in the language of the day, were termed 'trekpas'.³⁷⁹ The Court might have been expected to find the absence of a right of *audi alteram partem* incompatible with the principles of natural justice,³⁸⁰ but surprisingly, this was not the view of the leading case: *S v Mukwevho; S v Ramukhuba*.³⁸¹ In general, the courts did little other than to confirm customary practice, namely, that a council had to be consulted and that good and sufficient reasons had to be given.³⁸²

375 See Haines & Tapscott (supra) at 169-70; DR Tapson 'Rural Development and the Homelands' (1990) 7 *Development SA* 561, 572. See also Hamnett (supra) at 66. Hamnett argues that the power to issue an order of ejection is even more effective in controlling people than the threat of criminal prosecution.

376 If the order involves a number of families, the more representative national council should be consulted. See Myburgh & Prinsloo (supra) at 41-2 and 63-4; Prinsloo *Administratiefreg* (supra) at 134-5; Prinsloo *Publiekreg* (supra) at 154; Hunter (supra) at 394; HO Mönning *The Pedi* (1967) 284-5; Krige (supra) at 219-20. Cf Interim Protection of Informal Land Rights Act 31 of 1996.

377 The merits of a removal order will obviously be debated in council. See, eg, *Kekane v Mokgoko* 1953 NAC 93, 97 (NE).

378 See Prinsloo *Administratiefreg* (supra) at 70 and 138; Prinsloo *Publiekreg* (supra) at 154.

379 See *Mokhatle & Others v Union Government* 1926 AD 71, 77 ('*Mokhatle*'). Trekpas was described as 'the power to direct the removal, by means of expulsion from the tribal property, of any natives who have committed acts of insubordination and hostility to the duly constituted authority of the chief or of any sub-chief under him.' Although trekpas is widely reported in the ethnographic literature, *S v Mukwevho; S v Ramukhuba* held that not all systems of customary law would permit traditional rulers to issue such an order. 1983 (3) SA 498 (V), 501.

380 See the so-called repugnancy proviso in s 1 of the Law of Evidence Amendment Act 45 of 1988.

381 1983 (3) SA 498 (V), 500-1. This case was consistent with previous judgments. See *Mokhatle* (supra) at 77; *Kuena v Minister of Native Affairs* 1955 (4) SA 281 (T). Most of the earlier cases, however, dealt with the 'customary' power that used to vest in the Governor-General (later State President), as Supreme Chief, under s 5(1)(b) of the Black Administration Act. Act 38 of 1927.

382 See *Mokhatle* (supra) at 78-9; *Kekane v Mokgoko* 1953 NAC 93, 97 (NE).

The Final Constitution and the Interim Protection of Informal Land Rights Act³⁸³ now demand changes to these traditional practices. First, the Act removes the power of removal from traditional leaders, and, instead, vests it in a majority of landholders. Thus, it is provided that, although an individual may be deprived of an 'informal right to land'³⁸⁴ in accordance with the custom of a community, that custom must be modified to reflect principles of democratic governance. The Act does this by redefining custom to include:

the principle that a decision to dispose of any such right [namely, a customary interest in land] may only be taken by a majority of the holders of such rights present or represented at

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a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate.³⁸⁵

As its name indicates, the Act was initially intended as a temporary measure, and it required annual renewal by the Minister to remain in effect. The Communal Land Rights Act, however, removes the renewal requirement.³⁸⁶ It now seems that, when this Act comes into force, the Interim Protection of Informal Land Rights Act will lose its temporary nature.

As far as customary law is concerned, this Act has introduced a number of problems. In particular, the requirement that a majority of landholders are to support the removal order raises a problem of determining which landholders are to participate, members of a ward or the entire nation? It also appears improper to have a penal removal order taken by majority vote. Critics of the Act add that customary landholders are already protected by various constitutional rights, most of which guarantee a process of fair decision-making by the chief-in-council. The obvious concern here is that it is difficult for people in rural areas to assert constitutional rights. But this is a difficulty that is not addressed by the Interim Protection of Informal Land Rights Act, as decisions by meetings of landholders will, appropriately, be subject to the same scrutiny under the Bill of Rights as decisions of traditional leaders and their councils — democratic decision-making cannot on its own limit a right.

Removal orders are obviously now subject to the Bill of Rights, as well as the Promotion of Administrative Justice Act.³⁸⁷ The undifferentiated powers of government in customary law allow traditional rulers to exercise their removal powers on different grounds without specifying which. In order to assess the lawfulness of an order, however, its reason and purpose must be investigated, for only then will it be apparent which function of government is being exercised, and

383 Section 2 of Act 31 of 1996 ('Informal Land Rights Act').

384 See Informal Land Rights Act s 1(1)(iii)(a)(i) (Defines informal land rights to include customary interests.)

385 See Informal Land Rights Act ss 2(2) and (4).

386 See Informal Land Rights Act Schedule 1, Part 1.

387 Act 3 of 2000 ('PAJA').

hence which section of the Bill of Rights is applicable. For instance, if a landholder were deprived of rights for committing an offence, and, if the ruler performed a judicial (or quasi-judicial) function to determine guilt, s 34 of the Constitution would be applicable. The landholder would then be entitled to present a defence at a fair public hearing.³⁸⁸ Alternatively, guilt may already have been established in a separate hearing, in which case the removal is more likely to be an administrative function. If so, FC s 33, together with the Promotion of Administrative Justice Act, is applicable. The landholder would then be entitled to just administrative action.

If land is expropriated so that it can be used for a public cause, FC s 25 (the property clause) may also be applicable.³⁸⁹ FC s 25(2) permits 'expropriation only in terms of law of general application — (a) for a public purpose or in the public interest; and (b) subject to compensation . . .'.³⁹⁰ To determine the applicability of FC s 25, however, a distinction must be drawn between expropriation and control of use.³⁹¹ The former refers to the removal of private rights for public purposes, whereas the latter refers to regulation of the use of property in order to protect citizen from citizen. Whenever an order is intended to extinguish rights permanently, it falls within the ambit of s 25(2), and the affected landholder must be duly compensated. FC s 25 is not applicable if an order is simply aimed at regulating the way land is to be used.³⁹²

Regardless of whether a removal order was intended to expropriate land or regulate use, it may still be subject to FC s 33.³⁹³ FC s 33(1) imposes a requirement of 'lawful, reasonable and procedurally fair' action, and subsection (2) provides that anyone 'whose rights have been adversely affected by administrative action has the

388 Because the grounds for issuing removal orders vary, the courts have not been consistent in classifying them. See, eg, *Gaboetloeloe v Tsikwe* 1945 NAC (C&O) 2 (Considered the act to be administrative rather than judicial.) See also *Mokhatle* (supra) at 77-8; *Masanya v Seleka Tribal Authority & Another* 1981 (1) SA 522 (T), 525 (Held that it was not an exercise of criminal jurisdiction.)

389 Orders issued pursuant to the commission of an offence fall outside the ambit of this section, because they are acts of penal confiscation. FC s 25(1) allows individuals to be deprived of their property, provided that the deprivation occurs under a law of general application and the law does not permit arbitrary action.

390 Because FC s 25(2) provides that rights may be expropriated only 'in terms of law', it could be taken to imply a legislative enactment. On this interpretation, the power of removal would no longer be valid. On the other hand, if 'law' is read to include customary law, which appears the more reasonable construction, then removal powers remain valid. In other respects, customary law is consonant with the requirements in FC s 25(2)(b) governing payment of compensation.

391 See J Murphy 'Property Rights in the New Constitution: An Analytical Framework for Constitutional Review' (1993) 26 *CILSA* 211, 218-19. See also T Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46.

392 See *Cape Town Municipality v Abdulla* 1976 (2) SA 370 (C), 375 (On control of resources.)

393 In this case, the act must be administrative, as opposed to executive, in the sense that it implements a rule or law already issued or promulgated. For the distinction between executive and administrative action, see *President of the RSA v South African Rugby Football Union*. 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at para 147.

right to be given written reasons'. Both provisions have been refined by the Promotion of Administrative Justice Act, which requires any administrative action³⁹⁴ that 'materially and adversely affects the rights or legitimate expectations of any person' to be 'procedurally fair'.³⁹⁵

(iv) The Communal Land Rights Act³⁹⁶

Once implemented, the Communal Land Rights Act will create an entirely new system of land tenure in traditional areas. To this end, land subject to customary

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tenure or a permission to occupy³⁹⁷ is to be transferred to 'communities'.³⁹⁸ The 'communities' are constituted as juristic persons and thus the registered titleholders of the land.³⁹⁹ The area of land involved is then to be subdivided into portions, and each portion must be registered in the names of individual persons.⁴⁰⁰

The powers to represent the community, dispose of rights in communal land, allocate and register individual rights and, generally, promote and safeguard the community's interests vest in land administration committees.⁴⁰¹ If a community is already subject to a traditional council (established under the Traditional Leadership and Governance Framework Act),⁴⁰² the council may exercise the committee's powers.⁴⁰³ Otherwise, communities may create new committee structures.⁴⁰⁴ The Act does not specify the number of members, but it does provide that one third must be women, one person must represent the interests of vulnerable members of the community (women, children, the elderly and the disabled), and that non-voting

394 Removal orders intended to expropriate land for public purposes or to regulate its use fall within s 1 of the Act, which defines 'administrative action' as action by 'an organ of state, when exercising a power in terms of the Constitution which adversely affects the rights of any person.'

395 See PAJA s 3(1). Section 4 lays down the even more stringent requirements for action affecting the public, but the choice of procedures is left to the official concerned. PAJA s 4(1)(d).

396 Act 11 of 2004 ('CLR Act').

397 The generalized terms in the text find fuller and more precise definition in CLR Act s 2(1).

398 'Communities' are defined in s 1 as groups of 'persons whose rights to land are derived from shared rules determining access to land held in common by such group.'

399 See CLR Act ss 3 and 5.

400 See CLR Act ss 18(3)(a) and (b).

401 See CLR Act s 24.

402 See Section 3 of Act 41 of 2003.

403 See CLR Act s 21(2).

404 See CLR Act s 21(1).

members may be designated by the Minister of Land Affairs, the chairperson of the appropriate land rights board, the MECs for agriculture and local government, and the municipality in whose area the committee falls. Subject to the rule allowing a traditional council to perform the functions of a committee, traditional leaders may not be elected.⁴⁰⁵

Section 19 of the Act provides that, prior to establishing a committee, the community must draw up a code of rules to regulate the use and administration of communal land. If it fails to draw up its own set of rules, those prescribed in regulations to be passed under the Act will apply. Provided that the rules comply with the Final Constitution and the Act, they may be registered, and they then become binding.

On the face of it, the Act deprives traditional rulers of all their customary powers over land. However, because traditional leaders are likely to constitute the dominant members of the land administration committees, they will continue to wield considerable influence. This possibility has provoked serious disquiet among women's groups and others doubtful of the value of traditional leadership.⁴⁰⁶

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Research driven by the theory of legal pluralism has shown that statutes such as the Communal Land Rights Act are unlikely to succeed in supplanting the role of chiefs. Members of rural communities will have to be strongly committed to the new regime, otherwise, strict enforcement will be necessary. To this end, the Department of Land Affairs will monitor land administration committees through Land Rights Boards.⁴⁰⁷ According to current estimates, however, the Department has neither the finance nor the personnel necessary to ensure a fully effective set of enforcement mechanisms.⁴⁰⁸

26.7 Traditional leadership: an institution in transition

Over the past ten years, attempts to fill out the sparse framework provided by the Constitution have proved to be hugely controversial. The two new laws that are at the centre of the government's attempts to bring the traditional practice of traditional leadership into line with South Africa's new democratic values, the Traditional Leadership and Governance Framework Act and the Communal Land Rights Act, remain deeply problematic. They satisfy neither the traditional leaders who are seeking more security nor those who argue that traditional government needs to transform radically to serve the new democracy.

405 See CLR Act s 22.

406 See, eg, B Cousins & A Claassens 'Communal Land Rights, Democracy and Traditional leaders in Post-Apartheid South Africa' in M Saruchera (ed) *Securing Land and Resource Rights in Africa: Pan-African Perspectives* (2004); B Cousins "'Embeddedness" versus Titling: African Land Tenure Systems and the Potential Impacts of the Communal Land Rights Act 11 of 2004' (2006) *Stellenbosch LR* — (forthcoming) (manuscript on file with authors).

407 See CLR Act, Chapter 8.

408 See A Claassens 'Women, Customary Law and Discrimination: The Impact of the Communal Land Rights Act' 2005 *Acta Juridica* 42, 77.

The main contribution to democracy in the new Acts is their requirement that decisions in traditional communities must be made by groups which include a percentage of democratically elected people and women. Thus, for the development of democratic practices, they rely on increasing pressure from the communities themselves and gradual change in customary practices. Their lack of clarity on the relationships between traditional leaders and their councils, on the one hand, and traditional leaders and local government, on the other, provides little incentive for traditional leaders to reconsider their roles. Admittedly, the new laws show some attempt to develop the accountability of traditional leaders and their councils, but, in general, the accountability provisions are weak, and, with decisions about succession to leadership positions placed firmly in the hands of traditional elites, ordinary community members are left with limited influence.

A number of serious constitutional problems posed by the institution of traditional leadership also remain unresolved by the new legal regime. The first, and most prominent, is probably the rule of patrilineal succession. It seems as if the courts have been left with the problem of finding a solution. Secondly, as *Mhlekwa & Feni v Head of the Western Tembuland Regional Authority & Another* found, the system of customary courts fails to meet the Constitution's requirements of judicial independence and impartiality.⁴⁰⁹ The progress made on passing a new law to regulate customary courts, however, has been painfully slow. Thirdly, for similar

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reasons, the administrative functions of traditional leaders are also likely to be challenged. This matter appears not to have received attention from the Law Reform Commission, Parliament or the executive.

Finally, a matter of greater concern to democrats: the new Acts may insert traditional leaders between members of rural traditional communities and their democratically elected representatives. This possibility is most likely to be realized in the local sphere of government, as the Traditional Leadership and Governance Framework Act anticipates considerable interaction between traditional councils and municipalities. There is already evidence, however, that bureaucrats and politicians in both the provincial and national spheres of government assume that consultation with traditional leaders is equivalent to consultation with the communities themselves. This trend is encouraged by the convenience of speaking to chiefs (rather than members of the public), by the fact that they are easily identified as leaders of their communities and by the likelihood that chiefs will be well informed on local affairs (because of their participation in the houses of traditional leaders). As submissions to Parliament on both the Traditional Leadership and Governance Framework Act and the Communal Land Rights Act demonstrated, however, the views of traditional leaders and those of different groups in their communities can differ considerably.

The question is whether the current position, which leaves change in the hands of communities, can serve the goals of the new constitutional framework. Many writers have emphasized the capacity of traditional communities to change, but, change, of course, has no predetermined outcome. In her study of several communities in Limpopo, Oomen gives a persuasive demonstration of this situation. In some cases democracy influenced traditional processes, in others, tradition displaced the democratic practices that had been introduced by the political struggle.

409 2001 (1) SA 574 (Tk), 2000 (9) BCLR 979 (Tk).

The record of 'living customary law' has a similar message. The idea of a 'living' law was expounded by writers who were concerned that the written law, as applied in the courts, did not reflect the actual practices of communities. Practice, it was argued, is generally progressive, and it adapts law to the needs of a modern society. But the rural women who came to Parliament in 2003 to protest about the chiefly powers protected in the Traditional Leadership and Governance Framework Act described oppressive customary practices which left them destitute, sometimes homeless, and often deprived of their children.

In this regard, it seems that the new laws, rather than allowing for the dynamic development of customary practice, in fact, introduce a rigidity. They offer no framework for the gradual democratization of traditional communities. Instead, there is a real danger that the Acts will maintain the dependence of leaders on government, which was the hallmark of colonial rule and apartheid. It is true that the Traditional Leadership and Governance Framework Act will change the composition of many tribal councils, but, like so much law, neither this nor the Communal Land Rights Act offers a programme for change. What is more,

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neither suggests ways in which the capacity of communities to change could be harnessed to ensure that hereditary leadership indeed comes to 'serve the interests of the people as a whole' in a democratic way.⁴¹⁰

It may be that, as local governments develop the capacity to fulfil their constitutional roles, members of traditional communities will come to rely on them for the services that are usually provided by accountable government. Traditional leaders will then exert the cultural influence which is appropriate to their status, not exercise governmental powers.

410 The Acts might, for instance, have given communities periodic opportunities to choose — and change — their form of government. They could require important decisions to be put to the vote, thereby insisting on community engagement in civic decision-making.