

# CHAPTER 1

## INTRODUCTION

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*'They (chiefs and headmen) constitute the local power, whether one likes it or not. The increasing uncertainties about their future can have negative spin-offs'.<sup>1</sup>*

*'..... government acknowledges the role of traditional leaders in the governance processes of our country. In order to entrench this role, the Traditional Leadership and Governance Framework Act has been passed. The intention of the Act is to transform traditional leadership to be in line with the Constitution of the Republic of South Africa. In this Province, we will continue together with traditional leaders to seek measures to give meaning to the implementation of this Act'.<sup>2</sup>*

Some key definitions according to the 2003 Act (hereafter the 2003 Act):

The 2003 Act defines traditional leadership as “the customary institutions or structures, or customary systems or procedures of governance, recognised, utilised or practiced by traditional communities”.

Similarly, a traditional leader is defined as “...any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position, and is recognised in terms of the Act” (i.e. the 2003 Act).

Traditional community is defined as a “...traditional community recognised as such in terms of section 2 of the Act”. Section 2 of the 2003 Act states: A community may be recognised as a traditional community if it:

- a) is subject to a system of traditional leadership in terms of that community's customs; and
- b) observes a system of customary law.

The same section – in subsection 2 – empowers the premier to recognise a community as a traditional community.

In South Africa, as in many other African countries, the system of traditional leadership is firmly entrenched. Historically, traditional leaders served as governors of their communities with authority over all aspects of life, ranging from social welfare to judicial functions. Many countries in Africa retain a system of traditional leadership and many have gone a long way in incorporating traditional leaders into democratic forms of government.<sup>3</sup> Nonetheless it is acknowledged that traditional leadership presents a challenge to our constitutional democracy as we have come to know it today. However, creating a home for traditional leadership within the modern day democratic dispensation remains one of the most difficult areas of policy for African states.<sup>4</sup>

Like many other liberated African countries, South Africa had to consider how it was going to accommodate the system of traditional leadership in the newly acquired democratic dispensation. This was not an easy question to deal with, especially for a new government that had to address a myriad of other challenges related to the re-engineering and overhaul of the whole state machinery. Moreover, many regarded the institution of traditional leadership as having been so influenced by colonial and/or apartheid policies that it was in many respects more a reflection of those policies than of the traditional and/or cultural practices of South Africans. This view is based on the well-documented process of colonisation and apartheid governance, during which different administrations forced their political systems and methods on to traditional African communities. Even the African National Congress (ANC) is said to be undecided on the issue of traditional leaders. In words attributed to Albie Sachs, “the discussion on traditional leaders cuts the ANC in half”.<sup>5</sup>

While it may be a moot point why traditional leadership constituted a challenge to the architects of the new dispensation, it is common knowledge that traditional leadership has remained at the periphery of transformation in the country. Even the South African Constitution, which devotes one of its shortest chapters to traditional leaders,<sup>6</sup> does not sufficiently outline the constitutional status, powers and duties of these traditional leaders. Of significance in this chapter, among others, is that it provides for the establishment of Houses of Traditional Leaders.<sup>7</sup> Of the nine provinces, six have Houses of Traditional Leaders.<sup>8</sup> There is one National House of Traditional Leaders in which the provincial Houses of Traditional Leaders are represented.<sup>9</sup> The Houses of Traditional Leaders have been given an important role in the post-1994 democratic dispensation as the effective custodians of African tradition and culture. They act in an advisory capacity

(both nationally and provincially) on issues that affect traditional communities, traditional leadership and customary law.<sup>10</sup>

This monograph focuses on one province, Limpopo (a province with a significant number of traditional leaders), in interrogating the role that traditional leaders *ought to play, are currently playing and should play in future in the administration of justice*<sup>11</sup> and crime prevention in particular. Limpopo is 89% rural and is one of the poorest provinces in the country.<sup>12</sup> One hundred and ninety-two traditional authorities in the province are headed by chiefs, and only one is headed by a paramount chief.<sup>13</sup> There are also 1,742 headmen that serve under the chiefs.<sup>14</sup> Each traditional authority has support staff such as a secretary, a clerk and cleaners on the payroll of the state.

Crime prevention and the administration of justice – two aspects that are not seen as separate by many a traditional leader<sup>15</sup> – are some of the core responsibilities of the institution of traditional leadership. Traditional authorities devote a substantial amount of time to handling of cases and disputes. For instance, three traditional authorities<sup>16</sup> indicated that they devote at least three days a week to handling of cases and the resolution of disputes and conflicts in their communities. This participation of traditional leaders in the administration of justice – like the other functions they perform – constitutes a significant contribution to the governance of the country.

For this reason it is crucial to examine a number of issues inherent to the performance of a function of this nature. Among these are:

- The relevance and position of traditional leadership in the post-1994 democratic dispensation;<sup>17</sup>
- The appropriateness or otherwise of traditional courts to deal with cases;
- The type of law applied in the traditional courts and procedure followed, especially in relation to the Constitution, given that all laws are subject to the Constitution;
- The administration of justice in traditional courts that do not have clear lines of accountability;<sup>18</sup>
- The lack of uniformity of constitution and/or practice among the various traditional courts;
- The lack of training and awareness among traditional leaders regarding human rights, as entrenched in the country's Bill of Rights; and
- The possible policy direction, given that in the short term the state justice system will not be able to take over the cases dealt with in the traditional courts.

## Methodology

This research focused on three traditional communities in Limpopo Province, namely Mokopane, Moletji and Ramokgopa. One focus group interview was conducted with the traditional council of Ramokgopa, after which no further research was possible due to a dispute between the traditional leader and the traditional council. The research took the form of participant observation, one-on-one interviews and focus group interviews. Participant observation entailed researchers attending court while cases were being tried in Mokopane. One-on-one interviews and focus group interviews were also conducted with four senior traditional leaders (including the chairman and vice-chairman of the provincial House of Traditional Leaders), members of the judiciary (2), police officers (10), traditional councils (2), and headmen or matona (2). Members of the Limpopo government were also interviewed; three from Local Government and Housing, two from the research unit of the Department of Safety, Security and Liaison and one from the regional office of the Department of Justice and Constitutional Development (DOJCD). This research also benefited from a conference on 'Traditional Leaders and the Administration of Justice' held in Durban on 6 and 7 October 2004, where the researcher observed public deliberations and held discussions with different traditional leaders and local councillors.