

## CHAPTER 2

# POLICY AND LEGISLATIVE FRAMEWORK GOVERNING TRADITIONAL LEADERS IN SOUTH AFRICA

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Traditional leaders have been central to the lives of African people for centuries. However, with the advent of colonialism, traditional systems and the administration of justice in particular, were significantly influenced by Western systems of government. Customary law as we know it today, therefore, is a hybrid of African practices and aspects of the Western system of law. Moreover, the different South African provinces, independent states and homelands had different forms of customary law,<sup>19</sup> mainly as dictated by their respective colonial governments' approach to African affairs. Transvaal, of which Limpopo Province (then known as Northern Transvaal) was part, tended to acknowledge and recognise customary law, as did the then Natal. The Orange Free State and the Cape Province took a very different approach, as abundantly evident in the following damning observation by Brooks:

Under the impression that Natives were so barbarous that their laws must be worthless, the Orange Free State has failed with one or two exceptions, to recognise Native law at all. Under the equally mistaken impression that any differentiation between Europeans and Natives in the law courts meant oppression for the Natives and an infringement of the principle of equal justice for all the Cape province has similarly withheld all recognition of Native Law.<sup>20</sup>

It seems that the recognition of customary law by the Transvaal was influenced by British intervention. As Van Niekerk observed:

The Transvaal was annexed by Britain in 1877. One of the reasons for the annexation was the failure of the Republic's Native Policy. Shepstone's son who became Secretary of Native Affairs of the territory, was of the opinion that it was unjust to subject the black population to a law that was quite foreign to them. During the British rule, which ended in 1881, most of the old legislation was abolished and the position of indigenous law regulated by Ordinance 11 of 1881.<sup>21</sup>

Notwithstanding its recognition of customary law, P Stubbs criticised Transvaal for its selectivity in such recognition as follows:

In the former Transvaal, while the government was prepared to apply laws and customs of African population, it deemed polygamy and lobolo 'uncivilised'. As a result, the courts 'bastardised almost the entire Native population...deprived practically every Native father of guardianship or other rights to his children (and)...destroyed any equitable claim in property'.<sup>22</sup>

The question and interpretation of equality before the law for all citizens remains with us even today. However, legislative progress made in the post-1994 period indicates a realisation that equality before the law does not necessarily mean that state courts are the only forums to mete out justice, nor does it mean that the official law applied by state courts is the only law. As Schärf asserts:

It would be naïve to believe that access to justice means access to the courts only, state courts. That idea was already dispelled at the Third Legal Forum convened by the Ministry of Justice in Durban in 1995.<sup>23</sup>

It could therefore be said that legal pluralism forms part of the South African legal system.<sup>24</sup> This approach is evident in the work of the South African Law Reform Commission which seeks to preserve forms of traditional justice and allow them to operate within the post-1994 democratic dispensation.<sup>25</sup> To contextualise the customary law applied by customary courts (traditional courts), a short sketch of the development of the legal framework (both legal precedent and legislative intervention) delineating the laws applicable to the researched traditional authority is apposite.

Year	Legislation	Purpose/Results
1878	Natal Code of Zulu Law <sup>26</sup>	To eliminate uncertainties regarding customary law.
1881	Ordinance 11 of 1881	Recognised African civil law.
1885	Ordinance in Law 4 of 1885	Recognised African civil law subject to the repugnancy clause.
	Natal Native High Court & Transkei Native Appeal Court	Handed down written judgments that served as precedents on customary law.

Year	Legislation	Purpose/Results
1927	Black Administration Act	Created separate court system for black South Africans.
1967	Rule 6(1) of Chiefs and Headmen's Civil Courts Rules, No R2082 of 1967 Government Gazette Extra-ordinary No 1929	Required the traditional court to record the names of the parties, particulars of claim, particulars of defence, judgement and the date of judgement.
1951	Black Authorities Act	Created 'homelands'.
1988	Law of Evidence Amendment Act	Provided for admissibility of evidence of the existence of custom different from the official version.
1993	Interim Constitution of the Republic of South Africa Act	Provided for the recognition of customary law subject to the Constitution.
1996	Constitution of the Republic of South Africa Act	Chapter 12 dedicated to traditional leadership and section 166(e) providing for the recognition of courts outside the state system.
1996	Schedule 6 to the Constitution	Provided for the inclusion of all pieces of legislation from different homelands and independent states into the South African law.
1997	The Abolition of Corporal Punishment Act	Abolished traditional leaders' right to apply corporal punishment.
2003	Traditional Leadership and Governance Framework Act	Regulates traditional leadership and seeks to put it in line with the country's Constitution.

As evident from the table, it has taken a long time for the current government to introduce legislation that specifically deals with traditional leaders and provides a space for them within the sphere of governance. This delay was occasioned – at least partly – by the fierce battle for the soul of traditional leadership and its role as the custodian of African tradition.<sup>27</sup>

The battle is characterised by calls for and against the accommodation of traditional leadership within the current system of governance. At the one end of the spectrum the dismantling of the whole institution is called for. This line of thinking suggests that, given that South Africa is now a democratic dispensation where all citizens are equal, it would not make sense to subject some sections of the citizenry to forms of traditional leadership. Proponents

of this view put forward at least two main reasons. First, they question the legitimacy of some traditional leaders. They wonder whether, given the influence of colonial and apartheid governments that at some stage deposed rightful traditional leaders and replaced them with those of their choosing, it is still tenable to sustain traditional leadership on the basis of tradition. Crudely put, some of the traditional leaders (those appointed by the colonial and apartheid rulers) were *strictly speaking* not entitled to their positions.

In this line of thinking, the only basis for the maintenance of the system of traditional leadership is to reinstate the wrongfully deposed leaders. Secondly, and alternatively, they argue that traditional leadership does not have space within the current dispensation, as African communities have developed significantly. This point is well captured by Govan Mbeki, who stated:

If Africans have had chiefs, it was because all human societies have had them at one stage or another. But when a people have developed to a stage which discards chieftainship....then to force it on them is not liberation but enslavement.<sup>28</sup>

At the other end of the spectrum are those who point out the importance of tradition and the need to preserve the cultural practices of the diverse South African citizenry. Proponents of this view even see traditional leadership as the bedrock of African democracy.

Amid all these opinions, the government managed to develop a conciliatory position. It recognised the importance of traditional leadership, but pointed out that traditional leadership is an institution that is not static and should therefore be developed to remain relevant to current day realities, in particular the pressing need for balancing the post-1994 human rights culture and the practice of traditional leadership. This stance pervades a string of speeches by leading government figures, and is aptly captured by the spirit of the 2003 Act. The preamble to the 2003 Act succinctly paints a picture of the envisaged relationship between traditional authorities and the organs of state by stating that

- ... the State, in accordance with the Constitution, seeks:
- to set out a national framework and norms and standards that will define the place and role of traditional leadership within the new system of democratic governance;

- to transform the institution in line with constitutional imperatives;
- to restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices.

Importantly, the 2003 Act entrenches the institution of traditional leadership by obliging the state to develop and support it. The pertinent part of the preamble continues:

- the State must respect, protect and promote the institution of traditional leadership in accordance with the dictates of democracy in South Africa;
- the State recognises the need to provide appropriate support and capacity building to the institution of traditional leadership'.

While the 2003 Act introduces a framework for the functioning of traditional leadership and stands to bring about significant changes, there are some provisions that are striking. Without attempting to provide an exhaustive list, the following are some of the important provisions:

#### ***Establishment of the Local House of Traditional Leaders***

This is a new development, as the National House of Traditional Leaders Act<sup>29</sup> only provided for national and provincial houses of traditional leaders. The local house of traditional leaders is provided for in municipalities that have five traditional leaders or more.<sup>30</sup> Importantly, the 2003 Act provides that the electoral college (consisting of all relevant traditional leaders) should ensure sufficient representation of women in the local house of traditional leaders. This development is bound to impact significantly on the functioning of traditional leaders within a municipality, and may provide scope for the enactment and enforcement of by-laws by the traditional authorities within a given municipality.

#### ***Service agreements between municipalities and traditional authorities***

The 2003 Act provides that municipalities may enter into service agreements with traditional authorities.<sup>31</sup> This provision is crucial given that such agreements will provide a clear framework within which the two organs will function, stipulate the exact minimum requirements for compliance with the agreement, and provide for penalties in the case of non-compliance on either side. This may go a long way in dealing with the complaint by many traditional leaders that they are in the dark as to what is expected of them in the current democratic dispensation.<sup>32</sup>

### ***Transitional arrangements***

The Act allows for the recognition of all traditional authorities and communities duly recognised as such at the date of commencement of the Act. In other words, all traditional leaders, traditional authorities and traditional communities that are recognised as such as on the date determined by the President in terms of the Government Gazette, as well as their functions, remain in force.<sup>33</sup>

### ***Code of Conduct for Traditional Leaders (see Annexure A)***

The Act provides a Code of Conduct for Traditional Leaders and allows for provincial governments to introduce codes of conduct in respect of traditional leaders within their provinces. This is a welcome measure in that traditional leaders will know what is expected of them in terms of their conduct. Equally, members of traditional communities will be able to hold traditional leaders accountable by referring them to the expectations contained in the code of conduct. Judging by recent newspaper reports,<sup>34</sup> traditional leaders need to be subjected to a clear code of conduct so as to protect traditional authorities and communities under their jurisdiction.

### ***Commission on Traditional Leadership Disputes and Claims***

Section 22 of the 2003 Act provides for the establishment of a Commission on Traditional Leadership Disputes and Claims. Given the extent of disputes regarding traditional leadership this commission is to be welcomed as it provides a mechanism through which disputes can be resolved without resorting to the courts. The courts are often resorted to at a very advanced stage of disputes, when the damage has already been done, perhaps even dividing communities. These disputes over traditional leadership normally affect the functioning of traditional communities and that of traditional authorities. If the spirit of the 2003 Act is to prevail, especially as regards the relationship between traditional authorities and state organs, the institution needs to be firmly protected against unnecessary disputes that tend to hamper progress and development within traditional communities.