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Department of Provincial and Local Government

# **THE WHITE PAPER ON TRADITIONAL LEADERSHIP AND GOVERNANCE**

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**FOREWORD BY ADV. S NTHAI,**

## **CHAIRPERSON OF THE TASK TEAM ON THE WHITE PAPER ON TRADITIONAL LEADERSHIP AND GOVERNANCE**

### **FOREWORD**

This White Paper is a culmination of a long process wherein the country engaged in a dialogue regarding the role and place of the institution of traditional leadership in contemporary South Africa as a democratic state. South Africans have overwhelmingly expressed a view that the institution of traditional leadership has an important role to play in deepening and enriching democratic governance at a local level.

This White Paper moves from the premise that traditional leaders must constitute part of the cadre of leadership that should continue the struggle for a better life for all in a democratic South Africa. It recognises that traditional leadership, as an institution located in the rural areas, has a role to play in the fight against poverty, homelessness, illiteracy, and the promotion of good governance throughout all the corners of our country.

This White Paper marks a new era. It opens a new chapter for the institution of traditional leadership to work closely with government in the reconstruction and development of rural areas. The task of building a democratic state requires that the values enshrined in the Constitution are shared by all South Africans.

The participation and contribution of national departments, provinces, constitutional bodies, traditional leaders, traditional authorities, religious bodies, academics, individuals and organs of civil society to this historic process of transforming the institution of traditional leadership to be in line with the dictates of the Constitution, has been truly remarkable.

May I therefore, take this opportunity to thank all who have contributed to this

historic process. I would like to thank Minister FS Mufamadi for affording me the opportunity to lead a team of esteemed and dedicated members of the White Paper Task Team (Mofumahadi MF Mopedi (Deputy Chair), Mr D Masimola, Prof R Mqeke, Prof P Ntuli, Adv T Mayimane-Hashatse, Kgosi BLMI Motsatsi, Kgosi SV Suping, Mr S Mkhize, Mr Z Titus, Mr S Selesho) supported by the White Paper Secretariat (Mr J Meiring, Mr S Khandlela, Ms W Khuzwayo, Ms V Maleka and Ms D Pienaar), the Director-General, Ms L Msengana-Ndlela and the entire Department of Provincial and Local Government.

I am confident that this White Paper has laid a firm foundation for the enactment of both national framework and provincial legislation on the institution of traditional leadership.

Baie dankie.

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# FOREWORD

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The institution of traditional leadership occupies an important place in African life and, historically, in the body politic of South Africa. It embodies the preservation of culture, traditions, customs and values of the African people while also representing the early forms of societal organisation and governance. However, when South Africa adopted the Interim Constitution and, subsequently, the 1996 Constitution, our people declared the Republic of South Africa to be a sovereign, democratic State founded on a number of universal values, including the supremacy of the Constitution. This marked the ushering in of a new era.

Following the 1994 elections, the new government embarked on a course to transform the South African State. This included the transformation of institutions of governance in accordance with the new democratic order and constitutional principles such as equality and non-discrimination. One of these was the institution of traditional leadership. Like our forebears in the African continent, we were thereby presented with the singular challenge of defining the place and role of the institution of traditional leadership in the new system of governance. The new Constitution laid the basis for this and enjoined the new government to develop legislation that would conclusively address this matter.

For a while now, the Department of Provincial and Local Government has been engaged in this task. The Department initiated a policy process that involved, in the early stages, extensive research and the audit of traditional leadership. This exercise led to the publication of the Discussion Document: Towards a White Paper on Traditional Leadership and Institutions. This document was discussed at a consultative conference held in August 2000 and attended by all key stakeholders. At that conference there was consensus on the need to urgently transform the institution. In October 2002, the Department of Provincial and Local Government published a draft White Paper. The draft White Paper was subsequently disseminated widely to stakeholders and the general public. A large number of submissions were received. These were compiled from inputs

stemming from consultation workshops held in various parts of the country. The White Paper, therefore, draws from extensive consultations with the stakeholders and the general public.

The key issues addressed in the White Paper relate primarily to the place and role of the institution of traditional leadership in the new system of governance. It sets out a broad policy framework that lays the basis for the drafting of national framework legislation. This legislation will, in turn, set norms and standards that will inform the drafting of provincial legislation necessary to deal with peculiarities prevailing in various provinces. Mechanisms will be put in place to ensure consistency with the national framework legislation. The government has no doubt that the White Paper will go a long way towards restoring the dignity of the institution of traditional leadership and ensuring that it occupies its pride of place within the democratic system of governance.

It is the government's considered view that the institution not only has a place in our democracy, but that it has the potential to transform, to contribute enormously towards the restoration of the moral fibre of our society, and to play a significant role in the reconstruction and development of the country, especially in rural areas. It is also important that conditions for democratic governance and stability in rural areas are created so that accelerated service delivery and sustainable development can be achieved. This will only be possible if measures are taken to ensure that people in rural areas shape the character and form of the institution of traditional leadership at a local level, inform how it functions and hold it accountable.

Having addressed these issues before, the whole continent of Africa is watching with keen interest as our country grapples with the vexed questions this White Paper deals with. Being the beneficiaries of the experiences in Africa and elsewhere, government is confident that a solution to the uniquely South African situation is being found whilst at the same time contributing to the body of knowledge in this important aspect of governance.



The government therefore remains committed to continue working with all the people in ensuring that this White Paper is successfully implemented. I would like to thank all women and men who put their shoulders to the wheel to ensure the successful completion of this important policy process.

**F.S. MUFAMADI**

**MINISTER FOR PROVINCIAL AND LOCAL GOVERNMENT**

# INTRODUCTION

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## Preamble

When the process of negotiations started in South Africa after the unbanning of the liberation movements, one of the issues tabled for discussion was the role and status of traditional leaders and traditional leadership institutions. The agreements reached in this regard were legislated upon in Chapter 11 of the 1993 Interim Constitution. All other outstanding issues were left to the processes which led to the adoption of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).

Section 211 of the Constitution provides that the institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution, and that a traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, including amendments thereto.

Section 212 of the Constitution left the finer details regarding the issue of traditional leadership to legislation. The 1998 White Paper on Local Government laid the basis for transforming local government and highlighted the fact that the issue of traditional leadership would be addressed in a White Paper dealing specifically with traditional leadership issues.

In 1998, Cabinet endorsed a policy process that would lead to the finalisation of all outstanding issues around the institution of traditional leadership. Subsequently, in April 2000, the Department of Provincial and Local Government published a discussion document wherein a number of issues and challenges pertaining to the institution were raised for public comment. The inputs received on the discussion document and during subsequent consultations led to the development of a draft White Paper. The draft White Paper was published in

October 2002 for public comment and consultation. Following extensive consultations on the draft White Paper, this final White Paper was drafted.

## **Objective of the White Paper**

The central objective of this White Paper is to set out a framework that will inform legislation intended to:

- (a) define the place and role of the institution within the new system of democratic governance;
- (b) transform the institution in accordance with constitutional imperatives; and
- (c) restore the integrity and legitimacy of the institution of traditional leadership in accordance with customary law and practices.

## **Background to the White Paper Policy Process**

The policy process comprised four phases. During the first phase, a national audit on the institution of traditional leadership was conducted. This audit focused on, among others, the identification of statutes in terms of which traditional leadership institutions were established or carried out their responsibilities, their role and functions, the relationship between the institution and other structures of governance and the relevant statistical information on traditional leadership.

This phase culminated in the production of the Status Quo Report (SQR), which is the founding document for this White Paper.

The second phase saw the production and launch of the Discussion Document: Towards a White Paper on Traditional Leadership and Institutions, in April 2000. This document outlined relevant issues on which policy was required. The views of traditional leaders, organised local government, government departments, statutory bodies, the general public and other relevant stakeholders were obtained on identified policy issues, through an extensive and coordinated

consultation process. This consultation process culminated in a two-day national workshop held in August 2000, involving all relevant stakeholders.

The third phase resulted in the production of a draft White Paper published in October 2002. The draft White Paper outlined various preliminary policy positions. A large number of submissions were received. These were complemented by workshops nationally, provincially and in many local areas of the country.

The fourth phase saw the production of this White Paper following consultations on the draft White Paper. This White Paper paves the way for the drafting of the national framework legislation relating to the institution of traditional leadership, to be followed by complementary provincial legislation.

It has become necessary to review names used within the institution. The White Paper also proposes new names for structures which used to operate in the past.

This is intended to rid the statutes and records of names or words which are regarded as offensive. This issue will be dealt with further when the required legislation is drafted. While provinces can use province-specific terminology, it is important for national legislation to address terminology which ought to be uniform across the country.

## **Summary of Chapters**

The White Paper comprises six chapters.

**Chapter 1:** Reviews how a number of countries in the world generally, and in Africa particularly, have handled the issue of traditional leadership, and the various legal and constitutional mechanisms that have been developed in order to accord traditional leadership a suitable role. This chapter also deals with the South African context, in particular the history of traditional leadership, including how colonial powers interfered with the institution, introduced laws to

regulate it with a view to turning it into a tool that would serve the interests of the colonisers. It outlines how this was continued by the apartheid government and extended into the era of homeland governments created by the same government through a myriad of laws. It addresses how this period distorted custom, changed the institution such that it often worked against the wishes of the people and gave it powers and responsibilities that fell outside its original functions. It also addresses the current state of traditional leadership and the contradictions relating to its role and functions.

**Chapter 2:** Outlines government's vision for the transformation of the institution of traditional leadership and the principles guiding such transformation.

**Chapter 3:** Highlights governance and development challenges facing the institution. It reflects on the co-operative nature of the new state, the role the institution can play, the role the Houses of Traditional Leaders can play, and, in particular the role that can be played by traditional leadership structures at all levels of government. It also addresses the issue of traditional leadership and participation in politics as well as traditional leadership institutions in relation to municipal and provincial boundaries.

**Chapter 4:** Deals with institutional issues internal to the institution of traditional leadership, including succession, and addresses the different challenges pertaining to the institution. It also outlines the position of government on all these aspects. The chapter also addresses the question of disputes relating to traditional leadership that arose as a result of continuous interventions by successive regimes, and proposes the establishment of an independent commission to resolve them. Finally, it is also indicated that the proposed legislation dealing with traditional leadership issues will also apply

to the Khoi-San and their claims to traditional leadership.

**Chapter 5:** Sets out the different laws relating to the institution, the need to rationalise such laws and to amend and repeal some of them, and the need to introduce legislation that outlines the national framework to regulate the institution of traditional leadership.

**Chapter 6:** Concludes the White Paper and further consolidates government's view that traditional leaders should act as custodians of tradition and culture, and play a complementary, supportive and advisory role to government. It also addresses the provincial and regional variations and thus moots the enactment of provincial legislation informed by the norms and standards set by national framework legislation.

# 1. SETTING THE CONTEXT

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There is no universally acceptable approach for dealing with the accommodation of the institution of traditional leadership within newly established democracies. The manner in which the institution of traditional leadership has been dealt with at an international level has varied greatly from country to country. This section, therefore, looks at how some countries have dealt with the issue. It will show, among others, that South Africa is not the only country which had to deal with this issue and that there are lessons to be learned from elsewhere in the world.

It will reveal that the institution of traditional leadership is not an unchanging facet of society and that it can adapt.

## 1.1 International Experience

Traditional leadership is not unique to South Africa. Almost every country in the world has had various forms of hereditary leadership and/or absolute monarchies. However, the demand for representative forms of government, based on universal franchise, the struggles by countryside peasants and urban factory-based workers for better wages and working conditions, and the struggles for gender equality, resulted in the birth of the democracy movement all over the world.

The revolutions that occurred in various Eastern European states led to the complete elimination of systems of traditional rule and the introduction of different forms of governance. In Western Europe, countries like the United Kingdom, Spain, Holland, Sweden and Norway abolished the essential nature of the systems of traditional rule and replaced them with democratic governance systems, though rudimentary elements of the institution still remain. In the United Kingdom, the monarchy, headed by the Queen, still plays a significant role in national affairs. Her role is, however, essentially symbolic and ceremonial and its character is not political or administrative. The House of Lords, which is the

second and upper House of Parliament of Britain, although founded on the principles of traditional rule, has, over time, transformed and is generally seen as part of the democratic parliament of the United Kingdom. It is, however, important to note that, recently, there have been calls for dispensing with the House of Lords.

In Africa, prior to colonisation, systems of governance were characterised by traditional leadership rule, and traditional leaders and institutions dealt with a wide range of issues which related to traditional communities.

The subsequent colonisation of different African states by European powers achieved results which were in accordance with the dictates and needs of the colonial powers. Whereas other European states saw the institutions as uncivilised and necessitating assimilation, others drew them into the colonial administrative framework, albeit acquiring a diminished status and role. African societies were traumatised by the impact of European policies and practices. Several values and practices that were dear to Africans and which had been practised for centuries had to be sacrificed.

Under English colonial rule institutions such as the institution of traditional leadership were retained, but only after they had been violently suppressed to remove the possibility of them assuming political power. Entirely new and, in many cases, non-customary functions, ostensibly intended to advance colonial interests, were assigned to the institution. Sometimes this was done by distorting certain customary principles to fit the needs of colonialism. For example, colonialism used, to its own advantage, traditional leaders who were assigned responsibilities such as ensuring that law and order within their areas was maintained by empowering them to disallow assemblies and demonstrations and to effect arrests as peace officers.

Under French and Portuguese colonial rule, Africans were discouraged and sometimes prohibited from leading their way of life as they used to before the



advent of colonialism, even in cases where this was not contrary to the ideas of civilisation as entertained in the West. The French and Portuguese colonialists understood themselves as having been entrusted with a mission to "civilise" the native African in accordance with western ways of life.

The post-colonial era and the emergence of democracy in most African countries gave rise to the need for change. Africa has been undergoing many changes and some of these changes are at variance with long-held values and notions sanctified by history and the distortions introduced by the colonisers. It is necessary to make changes in order to advance the idea of universal values without having to sacrifice the very notion of being African.

It must be pointed out that some of the resistance to change in Africa has come from customary society and, in particular, from the institution of traditional leadership. This led to the portrayal of traditional leaders as opposed to change and democracy and, in some instances, led to their marginalisation.

Some African countries that have tried to effect substantial changes to the institution of traditional rule in the aftermath of democracy include Ghana, Namibia, Zimbabwe, Botswana and Uganda. The following is a brief summary of the experiences of these countries.

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

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

traditional institutions should give support to the policies of the central government and regional and local authority councils in the performance of their duties and functions. Where their powers conflict with those of government at all levels, the powers of the central government prevail.

In Zimbabwe, soon after independence, the government decided to dismantle the inherited legal dualism to create what was described as a single, politically united “non-tribal” nation. Traditional leaders were stripped of their judicial functions and remained explicitly as symbolic cultural figureheads. This decision was reversed in 1993, and today the Zimbabwean Constitution provides for a National Council and Provincial Houses of Chiefs. The National Council of Chiefs is also entitled to have 10 of its members sitting in the 150-member National Assembly. Traditional leaders are also represented in rural district councils. Traditional leaders are also eligible to stand for election to parliament on party political tickets.

In Botswana the Constitution provides for a House of Chiefs, which is an advisory body to the National Assembly and the Executive. The House does not have legislative powers but must be consulted on certain specific bills. There are also land boards, which are constituted by, among others, traditional leaders.

In 1966 the Constitution of Uganda abolished kings and kingdoms. After coming to power in 1986 President Yoweri Museveni restored title to traditional leaders but denied them political power or a political role. Article 246 of the Constitution of Uganda states that the institution of traditional leaders or cultural leaders may exist in any area of Uganda in accordance with culture, customs and traditions or the wishes and aspirations of the people to whom it applies and that the allegiance and privileges accorded to a traditional leader or cultural leader by virtue of that office may not be regarded as a discriminatory practice prohibited under article 21 of the Ugandan Constitution. However, any custom, practice, usage or tradition relating to a traditional leader or cultural leader which detracts from the rights of any person as guaranteed by the Constitution, is prohibited.

International agreements as well as regional agreements dealing with issues relating or relevant to traditional leadership and institutions form part of the legal framework regulating traditional leadership.

The following are the relevant agreements that South Africa has either ratified or acceded to:

**(a) International Covenant on Economic, Social and Cultural Rights of 16 December 1966**

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

**(b) The African Charter of Human and People's Rights of 21 October 1986**

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

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

Article 22 of the charter also provides that all peoples shall have the right

to their cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of humanity.

**(c) The Universal Declaration of Human Rights of 10 December 1948**

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

The trends at an international level indicate that traditional leaders and traditional leadership institutions have a much bigger role to play as custodians of culture and protectors of custom. However, they also have a clear role to play in the performance of judicial functions within their communities. They define and interpret customary law, and settle disputes in accordance with customary law.

## **1.2 South African Context**

Traditional leadership is indigenous to South Africa and to the continent of Africa. Its existence predates the colonial conquests and the apartheid era. Like other institutions and structures of governance, the institutions of traditional leadership evolved with time. Each traditional community was an entity and independent from the others. Such communities did not constitute a nation state as we understand it today. Prior to colonial invasion, these societies comprised structures and hierarchies stemming from a social organisation that was defined by family and kinship ties.

The European colonial expansion into Africa and the rest of the third world during the early 19th century significantly altered the social organisation of African societies and transformed them in a manner that made them amenable to European control. To this end, various statutes were introduced in South Africa. One of them, the South Africa Act of 1909, designated the Governor-General as the “Supreme Chief”, a position that gave him the power to create and divide

“tribes” and to appoint any person he chose as a chief or headman, and to depose such persons as he deemed fit. The Black Administration Act No. 38 of 1927, consolidated these powers and vested them in the Minister of Native Affairs. The Bantu Authorities Act of 1951 finally rendered traditional leaders part of the state’s bureaucratic machinery. In 1961 the position of the Governor-General was assumed by the State President of the Republic of South Africa. In terms of the 1993 and 1996 Constitutions these powers have now been assigned to the Premiers of the various provinces.

The net effect of these laws was that traditional leaders became important tools in the government’s strategy of extending its control over Africans in the countryside, through the establishment of “reserves”, “self-governing states”, “homelands” and, later, so-called “independent states”. Traditional leadership was transformed into a kind of local government whose main function was to serve as a source of, and a conduit for, cheap labour for the newly-developed mines, farms and urban industries. The Bantu Authorities Act significantly redefined the indigenous political institutions. Under this Act, tribal authorities were established in the African reserves, in line with the government’s stated intention of preventing “squattling” and eliminating black land ownership in “white areas”. The overall intention of the policy of separate development was to use the African reserves as reservoirs for cheap mine labour. The movement of young able-bodied Africans into urban centres, and the rapid growth of the population in the reserves, crippled production in these areas.

From the outset, the establishment of a native administration had, as one of its key objectives, the termination of tributary payments to traditional leaders and the introduction of salaries, which would come from levies, such as the “hut tax”, the “dog tax”, etc. These measures were intended to induce an exodus of Africans to the mines, farms and manufacturing firms to work as wage labourers. The creation, therefore, of a separate administration for Africans was seen as key to sustaining the labour demands of the colonial economy. This strategy for indirect

rule was centred around the notion of self-sufficiency for traditional leadership areas, while increasing the pressure on the peasants to leave the countryside in search of wage labour.

What followed was increased oppression, where control over rural local government was the sole preserve of traditional leaders, most of whom eagerly complied with government policy. The institution lost its inherent traditional role of providing leadership to the people. Some traditional leaders, however, led the early resistance against colonial subjugation of the African people. The sustained onslaught of successive colonial regimes had an extremely negative effect on people in the countryside, leading to resistance in such areas as Witziesshoek (1950), Sekhukhune (1956), Zeerust (1957) and Pondoland (1960).

Today, history records these struggles and, much as some battles were won, the war was nonetheless lost.

The system of Bantu authorities eroded the culture of consultation and, instead, traditional leaders relied more on the power of their backers than on the collective wisdom of the communities they were leading. It is against this historical background that steps which are intended to restore the integrity of the institution of traditional leadership are being taken.

With the establishment of a single government for the whole of South Africa in 1910, the institution was not given a role at national and provincial levels. Rather, it was used as a platform to divide and rule the people. The new structures did not have, as their primary objective, the delivery of services to the people, but rather the delivery of the people themselves to become subservient to the successive colonial and apartheid administrations. Clearly, it was never the intention of any of the governments prior to 27 April 1994 to confer on the institution the type of powers that would maintain its status as a traditional institution. As a result, it alienated itself from the people because it was used to further the aims of separate development and laid the foundation for the system of Bantustan Administration.

The struggle for national liberation and the demand for a government of the people was based, among others, on the need to democratise institutions of governance. Like other African states, following the attainment of freedom and liberation, South Africa was also confronted with the issue of integrating traditional leadership institutions within the democratic form of governance.

The 1993 interim Constitution, and later the 1996 Constitution, laid the basis for taking the issue further. The 1996 Constitution set out a framework for the recognition of the institution of traditional leadership in the new democracy. It was then left to government, through national legislation, to attend to the finer details of the place and role of the institution in the new system of democratic governance.

The Constitution further provided a framework for the transformation of local government. The White Paper on Local Government (1998), represented an initial policy attempt to deal with the issue of traditional leadership. It provided, in broad terms, for a co-operative model within which traditional leadership could co-exist with municipalities. In terms of this, traditional leaders were allowed to participate in debates in municipal councils but were not allowed to vote.

The new local government system was perceived by some traditional leaders as unacceptable, and that it would lead to the usurpation of their powers. This caused a lot of tensions in the rural areas. These tensions further gave rise to the need to speedily finalise the national legislation envisaged in Chapter 12 of the 1996 Constitution.

The White Paper on Local Government however, acknowledged that the issue of traditional leadership required a separate White Paper that would deal with all the issues comprehensively. This, together with the need identified in the 1996 Constitution for legislation, gave rise to the drafting of a comprehensive White Paper on Traditional Leadership and Governance. The White Paper, therefore,

represents an important milestone as it will constitute the framework that will guide the transformation of the institution, and bring about good governance and stability in rural areas.



## 2. VISION FOR THE INSTITUTION OF TRADITIONAL LEADERSHIP

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South Africa's transformation from undemocratic, unrepresentative and unaccountable systems of government necessitated that all values, practices, institutions and structures of governance, be reviewed in the light of the new order. Chapter 12 of the Constitution envisaged that this broad transformation of society would include the institution of traditional leadership, precisely because this institution has a critical role to play, especially in rural areas. It is the vision of government, therefore, to transform and support the institution of traditional leadership in accordance with the constitutional principles of democracy and equality and that it may represent customary interests of communities, play a role in socio-economic development and contribute to nation building, and be accountable.

The existence of traditional leadership and South Africa's present democratic order are not mutually exclusive. Traditional leadership has to function in a manner that embraces democracy and contributes to the entrenchment of a democratic culture, thus enhancing its own status and legitimacy amongst the people. To this end, the critical challenge facing both government and traditional leadership is to ensure that custom, as it relates to the institution, is transformed in accordance with the Constitution and the Bill of Rights. Such a transformation exercise must ensure that the institution:

- responds and adapts to change;
- is in harmony with the Constitution and the Bill of Rights, and promotes democratic governance and the values of an open and democratic society;
- promotes freedom, human dignity and the achievement of equality and non-sexism;
- derives its mandate and primary authority from applicable customary laws and practices;

- strives to enhance tradition and culture;
- respects the spirit of communality;
- promotes unity and peace amongst people;
- promotes and facilitates a sound relationship between the institution and the different spheres of government - in particular the local government sphere;
- mobilises rural people to participate in rural local governance so as to achieve the Reconstruction and Development Programme (RDP) goals and local economic development initiatives, and advances the human potential of people living in rural areas;
- manages an efficient, effective and fair dispute resolution system through customary law courts for traditional local communities; and
- acts in partnership with municipalities to contribute to, and creates co-operative and supportive relationships in, service delivery and secure and safe rural areas.

The task of building a democratic State requires that what is envisioned above is shared by all. The task of strengthening and consolidating democracy requires the participation of all of our leaders, traditional, religious and elected. Traditional leaders must constitute part of the cadre of leadership that is leading and transforming South Africa towards a better life for all.

## **3. TRADITIONAL LEADERSHIP, GOVERNANCE AND DEVELOPMENT**

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### **3.1 Background to Traditional Leadership and Governance**

The institution of traditional leadership has, over the years, performed various governance functions. These governance functions were not exercised in a unified territory, as this only came about later with the formation of the South African nation state. The institution, therefore, was never a government of South Africa. The institution only operated within the defined limits of its prescribed jurisdiction. The institution was, however, affected by colonisation as the colonisers altered its governance functions and roles.

The successive colonial and apartheid regimes did not directly provide development services and infrastructure in black rural areas. Unlike in urban areas, there were no local government structures in rural areas. This resulted in traditional leaders assuming a role of facilitating development in their respective areas. They played a role in ensuring that their traditional authority areas were developed. They worked with government to build schools, clinics, roads and other facilities.

Given the new dispensation, it is clear that the institution cannot be restored to its pristine precolonial form but has to adapt to change. South Africans who voted in the 1994 and 1999 national elections, as well as the 1995 and 2000 local government elections, were effectively ushering in this new order. In these elections, people clearly voted for a democratic form of state.

Traditional leadership is a creature of custom and generally carries out customary functions. It may, however, complement the role of government in

rural areas. Therefore, there cannot be contestation of authority between the institution of traditional leadership and the state.

The role of traditional leaders in governance and development has been receiving ongoing attention since 1993. The 1996 Constitution introduced a new constitutional arrangement for the whole country and assigned governmental functions across the three spheres of government. Most importantly, it introduced a multi-party system of democratic government for the entire country, and requires that elections be held on a regular basis.

The 1996 Constitution also provides that all law that was in force when the new Constitution took effect continues to be in force, “subject to consistency with the Constitution”. Furthermore, section 211(1) of the Constitution provides that “the institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution”. Finally, the Constitution, in section 212(1) went on to provide that “national legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities”.

The provisions of the Constitution, as outlined above, had an effect on the institution of traditional leadership. Our courts have analysed the implications of this constitutional arrangement, as follows:

- (a) *“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 in Constitutional Principle VI (CP) 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 CP’s recognising a degree of cultural pluralism with legal and cultural, but not necessarily government*

consequences.”<sup>1</sup>.

- (b) *“The New Text (of the Constitution) (NT) complies with CP XIII by giving express guarantees of the continued existence of traditional leadership and the survival of an evolving customary law. The institution, status and role of traditional leadership are thereby protected. They are protected by means of entrenchment in the NT and any attempt at interference would be subject to constitutional scrutiny. The Constitutional Assembly (CA) 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.”*<sup>2</sup>
- (c) *“Section 182 of the 1993 Interim Constitution (granting ex officio status to serve in municipal councils) is therefore an important constitutional entitlement for traditional leaders whose customary authority and role were being affected by the transition to democracy. Construed purposively, therefore, s. 182 means that traditional leaders are entitled to ex officio representation on local government in their areas. That entitlement arises once elections have been held for local government and once the procedural requirements contained in s. 182 have been met. This ensures that traditional leaders are entitled to representation on a council without having to stand for election. It also ensures that for the period of transition the traditional leaders who had previously been exercising the powers and performing the functions of local government will be represented on the newly established institutions which would now be responsible for those functions.”*<sup>3</sup>

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1. Constitutional Court, 1996 (Butterworths Constitutional Law Report, 1996 (October), pg. 1322)

2. Constitutional Court, 1996 (Butterworths Constitutional Law Report, 1996 (October), pg 1323)

3. Constitutional Court, 1998 (South African Law Report, 1998(3) pg 1 to 12)

Thus the Constitution entrusted to the three spheres of government all powers and functions which are governmental in nature, and assigned to traditional leadership those functions which are customary in nature. Secondly, the Constitution left the specifics relating to “how such leadership should function in the wider democratic society” to national legislation.

A detailed analysis of the old order legislation dealing with the powers and functions of traditional leadership, as provided for prior to 27 April 1994, has been conducted. On the basis of the said analysis the following conclusions can be made:

- (a) some of these functions are unconstitutional as they are inconsistent with certain provisions of the Constitution;
- (b) all the functions which are deemed unconstitutional and are governmental in nature have been transferred to the three spheres of government in accordance with the provisions of schedules 4 and 5 of the Constitution;
- (c) some of the functions allocated to traditional leaders and the institutions were never performed, although legal provision had been made therefor; and
- (d) in the exercise of their powers and performance of their functions prior to 1994 traditional leaders acted under the supervision of magistrates, homeland departments or the national departments responsible for “separate development”. They therefore never enjoyed any autonomy in the exercise and performance of these functions.

Where the Constitution allocates a function to a sphere of government, that sphere has jurisdiction over that function and cannot perform that function or exercise the power concurrently with the institution of traditional leadership. However, on matters of common interest, such as development and service delivery, co-operative relationships can be established. Also, spheres of government may allocate certain functions where this is provided for in law.

Finally, it is clear from the above that the issues that arise relate to the

functioning of government as a whole. Within the broad context as outlined, an important role does exist for traditional leadership.

### **3.2 The Roles of Traditional Leadership in Governance and Development**

A large number of people reside in rural areas where the institution of traditional leadership exists. In fact, it is estimated that about 14 million people live in areas falling under the jurisdiction of traditional leaders. It is primarily in these areas where people live in abject poverty and conditions of underdevelopment, and where there is a lack of access to economic opportunities, poor infrastructure and lack of access to basic services. This is the result of the legacy of colonialism, policies and measures that had the effect of systematically consigning a large majority of African people to conditions of perpetual underdevelopment. When the new democratic dispensation came into being in 1994, the new government adopted the Reconstruction and Development Programme (RDP). At the centre of the programme was the need to launch a concerted drive to address rural poverty and the legacy of underdevelopment in rural areas. It is for this reason that, following the adoption of the RDP, a number of initiatives geared towards improving living conditions in rural areas were launched. These included, among others, the Spatial Development Initiative (SDIs), the Consolidated Municipal Infrastructure Programme (CMIP), the Rural Housing Programme, the Local Economic Development Programme and the Land Reform Programme.

Currently, there is a renewed effort by government to focus on improving living conditions in rural areas in an integrated manner and to bring about sustainable development, through the provision of water, electricity, clinics, roads, housing, telephones, land restitution, etc. This initiative is being driven through the Integrated Sustainable Rural Development Programme, which seeks to ensure an integrated approach to rural development. These initiatives call for greater clarity regarding the role of the institution of traditional leadership in rural areas in relation to government at all levels; particularly given the fact that, today, the democratic state, through the three spheres of government, has assumed

authority and responsibility for the provision of infrastructure and basic services.

Government at all levels is mobilising all sectors of society to maximise the delivery of services at a local level. In the rural areas, the institution of traditional leadership can play a key role in supporting government to improve the quality of life of the people. The following are some of the roles that the institution can play:

To:

- Promote socio-economic development;
- Promote service delivery;
- Contribute to nation building;
- Promote peace and stability amongst the community members;
- Promote social cohesiveness of communities;
- Promote the preservation of the moral fibre and regeneration of society;
- Promote and preserve the culture and tradition of communities; and
- Promote the social well-being and welfare of communities.

In playing these roles, the institution of traditional leadership, as a custom-based institution:

- (a) can influence government policy and legislation especially in so far as it affects the institution and traditional communities;
- (b) can advise government especially on matters that affect custom;
- (c) must be consulted at appropriate levels on policy and programmes that affect rural areas in general and traditional communities in particular;
- (d) must complement and support the work of government at all levels; and
- (e) must form co-operative relations and partnerships with government at all levels in development and service delivery.

### **3.3 The Institution of Traditional Leadership and Governance**

In order to give effect to the roles referred to in the preceding section, it is important to look at the structures of the institution of traditional leadership and



their functions within each sphere of government.

### **3.3.1 Roles, Functions and Structures within the National Sphere of Government**

The National House of Traditional Leaders as established by national legislation will continue to exist as a mechanism for structured interface with national government.

The National House of Traditional Leaders shall:

- (a) advise government and participate in developing national policies impacting on rural communities;
- (b) advise government and participate in the development of national legislation that impacts on rural communities;
- (c) participate in international and national programmes geared towards the development of rural communities;
- (d) participate in national initiatives meant to monitor, review and evaluate government programmes in rural communities;
- (e) advise national government on the customary interests of traditional communities; and
- (f) perform tasks as may be determined by a member of the National Cabinet or as may be provided for in national legislation.

### **3.3.2 Roles, Functions and Structures within the Provincial Sphere of Government**

Subject to new legislation, the Provincial Houses of Traditional Leaders as established by provincial legislation will continue to exist as a mechanism for structured interface with provincial government.

The Provincial House of Traditional Leaders shall:

- (a) advise government and participate in developing provincial policy

- impacting on rural communities;
- (b) advise government and participate in the development of provincial legislation that impacts on rural communities;
- (c) participate in national and provincial programmes geared towards the development of rural communities;
- (d) participate in provincial initiatives meant to monitor, review and evaluate government programmes in rural communities;
- (e) advise provincial government on the customary interests of traditional communities; and
- (f) perform tasks as may be determined by a member of an Executive Council a Province or as may be provided for in provincial legislation.

### **3.3.3 Roles, Functions and Structures within the Local Sphere of Government**

#### **(a) District Houses:**

At a district level, District Houses of Traditional Leaders shall be established to advance a co-operative relationship with District Municipalities.

Therefore, the District Houses of Traditional Leaders shall:

- (a) advise district municipalities in developing the rules and bylaws impacting on rural communities;
- (b) advise district municipalities in the development of planning frameworks that impact on rural communities;
- (c) participate in local programmes geared towards the development of rural communities; and
- (d) participate in local initiatives meant to monitor, review and evaluate government programmes in rural communities.

#### **(b) Traditional Councils:**

At a local level, traditional councils, as established by custom, will promote co-operative relations with local municipalities. The institution of traditional leadership can also participate in the municipal Ward Committees established in terms of national legislation. Traditional leaders will also continue to participate in municipal councils in terms of section 81 of the Municipal Structures Act No. 117 of 1998, until legislation providing otherwise is introduced.

Traditional councils shall:

- (a) support municipalities in facilitating community involvement in development planning processes;
- (b) communicate community needs to municipalities and other spheres of government;
- (c) recommend appropriate interventions to government to bring about development and service delivery;
- (d) promote indigenous knowledge systems for sustainable development;
- (e) participate in the development programmes of municipalities and other spheres of government; and
- (f) participate in the development of policy and legislation at local level.

The functions set out above are in addition to the customary functions of traditional councils and traditional leaders.

Traditional councils may also enter into partnership and service delivery agreements with government, at all levels, to promote development. Partnerships between municipalities and traditional councils shall be strengthened through legislative and other measures. The envisaged partnerships will be based on the principles of mutual respect and recognition of the status and roles of the parties.

The partnerships will also be based on, and guided by, principles of co-operative governance. Partnerships could also include the roles of traditional councils as information centres for government programmes and service pay points, and so forth.

**(c) Additional roles/functions:**

In addition, national and provincial departments, through legislation or other means, shall provide for the traditional councils and their leadership, among others, to:

**(i) Arts and Culture**

- promote indigenous knowledge systems, music, oral history and commemorative events;
- promote the preservation of heritage resources;

**(ii) Land and Agriculture**

- play a role in land administration;
- advise government on agricultural development and improvement of farming methods;
- promote sustainable use of land;
- advise government and participate in programmes geared to prevent cruelty to animals;

**(iii) Health and Welfare**

- advise and play a role in traditional health practices and rituals including initiation schools;
- advise and participate in nation-wide health campaigns, e.g. cholera, HIV/AIDS, tuberculosis, etc.;
- facilitate community access to pensions and social grants;
- promote the protection of the vulnerable, including children, the elderly and the disabled;

**(iv) Justice, Security and Home Affairs**

- play a role in the administration of the traditional system of justice;
- play a role in the provision of safety and security to traditional communities;
- play a role in the registration of births, deaths and customary marriages;
- act as authorities for the administration of oaths;
- play a role in the restoration of peace in rural areas;

**(v) Economic Development**

- support local economic development initiatives;

**(vi) Environment and Tourism**

- promote environmental management;
- promote sustainable use of cultural resources within communities;

**(vii) Natural Resource Management**

- promote sustainable traditional approaches to water resource management;  
and

**(viii) Communication and Information**

- play a role in communication and information dissemination of government policy and programmes.

**(d) Customary functions:**

Traditional leaders will also continue to perform functions in terms of the customary laws and practices of different communities, subject to the Constitution and applicable legislation.

### **3.3.4 Guiding Principles and Norms for Allocation of Roles and Functions**

In providing for these roles, national and provincial departments must:

- (a) consult with the national Minister or the provincial MECs responsible for traditional leadership matters/issues;
- (b) consult with the relevant structures of traditional leadership;
- (c) ensure that the allocation of roles and functions is consistent with the Constitution and applicable legislation;
- (d) take into account customary law and customary practices of the different communities;
- (e) strive to ensure that the allocation of roles and functions is accompanied by resources and, where necessary, appropriate measures for accounting for the resources are put in place;
- (f) ensure that, to the extent possible, the allocation of such roles and functions applies uniformly in areas where the institution of traditional leadership exists; and
- (g) promote the ideals of co-operative governance, integrated planning, sustainable development and service delivery.

Government will put in place mechanisms to ensure an integrated, structured and coordinated involvement of the Houses of Traditional Leaders in various policy development processes and programmes.

## **3.4 Traditional Leadership and Participation in Politics**

Historically, various apartheid and homeland laws and policies brought traditional leaders to the centre stage of politics. Some formed political parties with the backing of the apartheid government. Traditional leadership structures thus became subjected to party politics. Some traditional leaders became ex officio members of newly-established homeland legislatures. They were compelled to participate in homeland politics on a party political basis. Some resisted and were

harshly dealt with.

The demise of the homeland system and the establishment of a new democratic order saw traditional leaders assuming roles in various political parties in 1994.

The right of everyone (including traditional leaders), to belong to political parties of their choice, stand for elections and vote is guaranteed by the Constitution.

At present, a number of traditional leaders belong to various political parties and participate in these parties in their personal capacities as traditional leaders. However, the Constitution accords every citizen freedom of association, and the right to participate in party politics and vote for the party of their choice. Therefore a balance needs to be struck between the rights of traditional leaders to participate in politics and the need for the institution of traditional leaders to continue to play a unifying role amongst communities.

Should a traditional leader participate in elected legislative structures through an electoral process, at any level, on a full-time basis, the royal family must take appropriate measures to ensure that the work of the institution is not adversely affected. A traditional leader who assumes a public office shall only be remunerated either as a traditional leader or as a public representative and shall not draw more than one salary. Provision will have to be made in law for someone else to be appointed as a deputy to act as chief for as long as the incumbent is not able, due to such political appointment, to carry out his/her normal duties.

Traditional leadership structures on the other hand are, in terms of section 195 of the Constitution, bound to observe certain principles and values. Thus all traditional leadership institutions, as entities, should be non-partisan.

### **3.5 Traditional Leadership and Municipal Boundaries**

Jurisdictional areas of traditional authorities and municipal boundary issues are

a reality. In terms of section 155(3)(b) of the Constitution, municipal boundaries must be demarcated by an independent authority. This authority, namely the Municipal Demarcation Board, was established by the Local Government: Municipal Demarcation Act, 1998. Section 25 of the Act identifies factors that the Demarcation Board must take into account in determining municipal boundaries. One of these factors is “areas of traditional rural communities”. It must therefore be accepted that, in determining the current municipal boundaries, the existing areas of traditional authorities were taken into account.

The recent demarcation of municipal boundaries, the restitution of land resulting from claims instituted by communities and the allocation of land parcels resulted in certain traditional authorities being situated in more than one local municipality and in more than one district municipality. Further complicating the issue is the fact that traditional authority areas are defined in such a manner that it is difficult, and in some instances impossible, to ascertain the exact boundaries of the traditional authority concerned. This has resulted in the exclusion of some sections of the communities from the legally defined boundaries. It must also be borne in mind that a number of traditional authority areas are not contiguous.

This situation has resulted in:

- (a) uncertainty as to which municipality the traditional leader of that authority should participate in - in terms of section 81 of the Local Government: Municipal Structures Act of 1998;
- (b) difficulty in the administration of an affected traditional community; and
- (c) disparities in the delivery of services by municipalities to a single traditional community.

The establishment and definition of traditional authority boundaries currently vests in the different provincial governments in terms of different pieces of legislation. In terms of this legislation there are different criteria and prescripts for redefining traditional authority boundaries. Consultation with or concurrence of the affected community is, however, a requirement in all cases where traditional authority boundaries are to be redefined. It is unlikely that the affected



communities, will in all instances, agree to the division of a tribal authority area and it is also not advisable to divide a traditional community.

It is therefore necessary that mechanisms be found to address problems resulting from the splitting of traditional authority areas. One mechanism would be the constant review of the situation by the Demarcation Board. Another mechanism could be the formulation of service level agreements to which all affected municipalities would be party.

### **3.6 Traditional Communities Situated in More than One Province**

As a result of the historical determination and adjustment of what are now provincial boundaries, traditional leaders are confronted with issues which are trans-provincial in nature. This has resulted in a situation where a senior traditional leader situated in one province has to perform a role in customary processes in another province.

Other factors compounding the trans-provincial boundary relationships are the merger and division of communities, the appointment of traditional leaders across boundaries and, lately, the restitution of land to communities who lost their land in terms of racially discriminatory legislation. Land parcels that are restored are, in some instances, situated in different provinces.

The affected provinces and provincial Houses should recognise the existence of such relationships, and should put co-operative mechanisms in place to deal with traditional and customary relations across provincial boundaries.

### **3.7 Traditional Leadership, Capacity Building and Support**

#### **(a) Capacity Building**

The Status Quo report compiled as part of this process identified a need to

embark on an intense capacity building programme for traditional leaders. The report found that a large number of traditional leaders require skills development in various areas.

Since traditional leaders function at a local level, side by side with municipal councillors, their capacity building programmes cannot be completely separated from those of councillors. However, owing to the distinctive nature of some of their functions, their capacity building programmes should also be more specifically focused.

The primary objective of the capacity building programme will be to enhance and empower traditional leaders and traditional institutions to enable them to address and respond to the challenges arising from this White Paper, relevant legislation and the Constitution.

The provincial governments and national government should share the responsibility for funding the programme.

### **(b) Support**

The advent of democracy and the extension of municipal governance into traditional leadership areas have resulted in a shift in the development role of traditional leaders and their structures. Development and the provision of services became local government competencies. The obligation, therefore, to fund service delivery and development lies primarily with municipalities, working with the national and provincial spheres of government.

It is accepted, however, that traditional leaders still have a major role to play with regard to development, custodianship and implementation of customary norms and practices of traditional communities. They also have a role to play in the resolution of disputes.

This means that traditional authorities will still have to be allocated funds to

ensure maintenance of their properties, personnel and infrastructure. Other institutions and government departments which allocate responsibilities and functions to traditional leadership on an agency basis will also have to assist with funding.

The authority to impose statutory taxes and levies lies with municipalities. Duplication of this responsibility and the double taxation of people must be avoided. Traditional leadership structures should no longer impose statutory taxes and levies on communities.

## 4. INSTITUTIONAL SYSTEMS

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This chapter focuses mainly on the extent to which structures of traditional leadership must be transformed. To this end, and based on extensive research, including the Status Quo Report that was produced in 1999, a wide range of issues which are germane to traditional leadership, have been identified for consideration, namely:

- (a) structures of traditional leadership;
- (b) the various levels of traditional leadership positions, the basis for a person to assume a position as a traditional leader and the replacement of existing structures, as well as the introduction of new ones;
- (c) the apparent inconsistencies relating to the exclusion of women from traditional leadership positions and structures, and the provisions of the Bill of Rights and equality legislation prohibiting gender discrimination;
- (d) salaries, allowances and benefits of traditional leaders;
- (e) the manner in, and extent to, which traditional leaders and the relevant structures should be held accountable;
- (f) conditions relating to the termination of service of a traditional leader;
- (g) the role, composition and accountability of National and Provincial Houses of Traditional Leaders, and their relationship to other levels and spheres of government;
- (h) the establishment of District Houses of Traditional Leaders;
- (i) the traditional leadership and governance issues pertaining to the Khoi-San communities; and
- (j) the resolution of traditional leadership disputes.

The chapter also proposes the establishment of a commission to deal comprehensively with the issue of traditional leadership disputes, including matters relating to deposed traditional leaders and succession disputes.

### 4.1 Structures of Traditional Leadership

Traditional leaders administered the affairs of their communities through customary structures. Each structure comprised the traditional leader, headmen and members of the community. Through these structures, a traditional leader coordinated the activities of his/her community, including ploughing and harvesting, hunting, war expeditions, ancestral worship, rituals and other traditional activities. In addition, through these structures, traditional meetings (*izimbizo/dipitso*) were called where the affairs of the community were discussed and disputes among members of the community were resolved.

These structures were also brought under formal control, and legislation was introduced to regulate them. Customary structures of traditional leadership came to be referred to as tribal authorities. However, the constitution of these structures remained essentially the same. Each structure still consisted of the chief, headmen and some members of the community.

Other structures of traditional leadership, which were not customary in nature, were created through legislation. These structures included community authorities and regional authorities. In the main, community authorities were created for rural communities without traditional leaders and consisted of elected chairpersons and members. In some instances, however, community authorities were established for communities under the authority of independent headmen.

Regional authorities differed from the tribal authorities in that, in general, each one was made up of representatives of tribal authorities in the same region, and the chairperson was elected from among the chiefs within the region. In some instances, the most senior traditional leader in status, in the region, was recognised as the only rightful person to chair the regional authority. In some areas, structures of traditional leadership similar to regional authorities were created. These were called councils of chiefs and *ibandla laMakhosi* and had more or less the same composition and functions as regional authorities. Some paramount chiefs became chairpersons of regional authorities by virtue of their positions.

The regional authorities, councils of chiefs and *ibandla laMakhosi* were given local government functions similar, to a certain extent, to those carried out by

municipalities. Most of them, however, lacked the necessary infrastructure and capacity to carry out these functions. As a result, these functions were carried out mainly by the relevant government departments, and, in some instances, these were not carried out at all.

In the light of the assignment of the governmental responsibilities by the Constitution to the three spheres of government, it is necessary that the role of traditional leadership structures be redefined so as to align them with the new constitutional arrangements. Secondly, the definition of the role and function of traditional leaders as outlined in chapter 3, also entails that such redefinition should take place.

Structures which were created by apartheid and homeland legislation, including community authorities, regional authorities, ward authorities and *ibandla la makhosi*, should be disestablished. Tribal councils, as they existed before colonialism, and which were based on custom, should be established and renamed “traditional councils”. Their constitution should also be based on custom and customary law. They should be well-resourced and their staff capacitated so that they can play a meaningful role.

Where, however, a number of traditional councils are subject to a king, a collective authority under such a king may be established. Its establishment should be based on custom and should be left to the discretion of the relevant communities and traditional councils.

This means that traditional councils established according to custom:

- will be revived and will exercise the powers and perform functions conferred upon them in terms of customary law, customs and statutory law consistent with the Constitution;
- continue to generally administer the affairs of the community in accordance with custom and tradition;
- continue to assist, support and guide traditional leaders in the exercise or

- performance of their responsibilities; and
- continue to advise and/or make recommendations to government.

These councils must also allow for the representation and participation of women in their own right. At the least, one third of the members should be women. Once women become part of these traditional leadership structures, these structures will be well positioned to initiate special educational programmes aimed at educating the rural youth about their cultural and other responsibilities in their own communities. Consequently the youth will come to realise the relevance of the institution of traditional leadership in their lives. Embracing change and extending full participation in community governance will make the institution relevant to all members, irrespective of gender and age.

The traditional councils should play a role similar to that previously played by tribal authorities prior to 1994. They will, however, not discharge the functions currently assigned to municipalities. The traditional councils should however support municipalities. They will focus primarily on issues which are customary in nature as well as the development and well-being of communities resident in traditional authority areas. Government will introduce measures meant to ensure that a co-operative relationship exists between these structures and municipalities.

Finally, in those cases where old structures are disestablished without a new traditional structure being put in place, communities will be able to establish at their discretion, voluntary community structures in accordance with the principle of freedom of association.

## **4.2 Leadership Positions within the Institution**

In the main, according to custom, three levels of traditional leadership positions are recognised, namely kingship, chieftainship and headmanship. However, colonial powers and the apartheid government introduced new and foreign levels of traditional leaders. The introduction of such levels within the institution of

traditional leadership was, in many instances, politically motivated and included levels such as “supreme chief”, “paramount chief”, “subchief” and “independent headmen”. For example, the level of a “supreme chief” was introduced by the previous regime to arrogate the power to rule over Africans to the Governor-General and, later, the State President. Other levels such as paramount chiefs, independent headmen and subchiefs were introduced to elevate/demote certain people to new positions, thereby according them new titles and status which were not appropriate in terms of custom. This, naturally, led to confusion, unfamiliar titles and the infringement of customary practices. This constituted a detraction from custom. More importantly, the new terms led to confusion in relation to the status of certain traditional leaders.

The level of headmanship needs elaboration because, historically, this level was substantially different from area to area. Whereas in some areas headmen were appointed in accordance with custom, in some they were elected. In some areas they were closely related to a traditional leader and formed part of the royal family. In others, individuals without any link to the royal family could be nominated to become headmen. These were also highly regarded members of the community. The introduction of colonial and apartheid governments also added to the complexity of headmanship as they introduced other positions like sub-chiefs, independent headmen and petty headmen. Independent headmen were those chiefs who were forcibly removed and relocated in the area of another chief, and whose status was then lowered to that of a headman in order to avoid having two chiefs in a single area.

Different views have been expressed about the remuneration of headmen. Whereas some are of the view that they should be remunerated by government, others say they should not. Others say they should be paid by their own communities. Others hold the view that they should not be remunerated because they carry out voluntary community services.

During colonial times, the term “king” was never used to refer to traditional rulers



as it was reserved only for the King of England. Whereas some were hereditary kings and their kingdoms had been established in terms of custom, the appointment of others was based largely on statutes, rather than on the customs of the tribes concerned.

The table below shows levels and numbers of traditional leaders remunerated by government:

	EC	NW	LMP	MP	KZN	FS	WC	NC	GP	TOTAL
<b>King/ Paramount Chiefs</b>	6	0	1	2	2	2	0	0	0	12
<b>Chiefs</b>	173	68	188	51	280	13	0	0	0	773
<b>Headmen</b>	935	100	527	0	0	78	0	0	0	1640

The approach to the different levels of traditional leadership positions should be as follows:

- the position of kings/queens, chiefs and headmen, should be the only ones to be recognised, and such recognition should be based on custom and customary law duly modified or adapted to bring it into line with the Constitution;
- the remuneration of headmen, given the peculiarities relating to their appointment, recognition, remuneration, numbers, status and role from community to community, should be dealt with by provincial governments, taking into consideration these peculiarities; and
- the Commission referred to in chapter 4.10 shall determine whether some of the existing kingships, paramountcies, chieftaincies and headmanships, and the appointment/designation of incumbents thereto, comply with custom and customary law.
- criteria for the recognition of a kingship, chieftainship or headmanship will be provided for in national/provincial legislation, and these will be based on the customs and traditions of the relevant communities and other relevant principles.

### **4.3 Succession to Traditional Leadership Positions**

Historically, the appointment of a person to a traditional leadership position was determined by custom and customary law. Each tribe knew who was eligible to be a successor, based on the history, norms, values and the customary law of that particular tribe. Males succeed to the position of traditional leadership in accordance with custom. Exceptions to this, however, are communities such as the Balobedu, where only women succeed. However, it must also be noted that, in a large number of areas in South Africa, where the heir is still a minor, women act as regents.

In accordance with custom and tradition, the head of a tribe could also appoint headmen who were each assigned a section of the tribe to administer their affairs on behalf of the chief. These were the chief's kinsmen or notable leaders of the tribe. This position was hereditary in some areas and non-hereditary in others. Where the position was hereditary, principles of succession according to customary law were applied.

In the past, the colonial and apartheid regimes tended to interfere with the succession of traditional leaders. They could select a chief or headman and depose such individuals as they deemed fit. The result was that the institution was forced to move away from custom and thus lost its dignity.

The existing rules of succession are in conflict with the principles contained in the equality clause in the Bill of Rights. The challenge, therefore, is to reconcile customary laws and practices in relation to succession with the principles of equality enshrined in the Constitution.

The debate relating to gender equality regarding succession to traditional leadership positions has been going on for a long time. There is no doubt that the law of succession discriminates against women in certain communities and men in others. Women can only be regents and not traditional leaders in their

own right. There is a strongly held view, especially by traditional leaders and communities, that the succession of women to leadership positions could spell the demise of the institution of traditional leadership. Despite this strong view, women are often appointed into acting positions, and in some instances for long periods, without any major consequences. The argument mostly advanced against the succession of women is that, in the event that a woman gets married, the rightful royal family will lose its status and traditional leadership will then vest in another family. The customary belief is that when a man pays lobola and marries a woman, her procreative being is transferred to her husband's tribe.

It is clear that this belief and practice is a fundamental violation of the rights of women, which rights include the right to free and full status, bodily integrity and other rights normally associated with freedom of choice, privacy and dignity.

South Africa has chosen to abide and be bound by democratic values and norms and has also, at the same time, agreed to recognise custom. However, the recognition of custom cannot reduce the effect of hallowed and entrenched principles of human rights, which include equality and non-discrimination especially on the basis of gender and status. In this regard, custom should not be seen to be static and archaic and an affront to change and the rights of women.

South Africa is a signatory to a number of international instruments aimed at adopting all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women. (e.g. the Convention on the Elimination of All Forms of Discrimination Against Women). Furthermore, the Promotion of Equality and Prevention of Unfair Discrimination Act prohibits discrimination against men and women on the basis of culture and tradition.

The approach to succession to traditional leadership positions should be as follows:

- custom and customary law should, generally, be the basis for regulating succession;
- custom and customary law should be adapted and transformed so as to comply with the principle of equality in the Bill of Rights and allow qualifying men/women who were previously discriminated against on the basis of gender to succeed as traditional leaders in their own right;
- principles regulating succession, as well as the date from which such succession shall take effect, will be provided for in legislation. The new legislation dealing with this matter should be effective from 27 April 1994; and
- the legislation to be introduced will acknowledge that the rules of succession are not uniform and differ from community to community, and that the communities themselves must adapt custom.

Government must play a limited role in the designation of traditional leaders. It is, firstly, the prerogative of the royal family, acting in consultation with other members of the traditional council, to identify a traditional leader. Government's role should be to confirm that customary processes have been followed, and issue a certificate of recognition to such a traditional leader which seeks to endorse and recognise such a designation. The appointment process will be regulated by national and provincial legislation.

#### **4.4 Salaries, Allowances and Benefits of Traditional Leaders**

Historically, traditional leaders, at all levels, were not remunerated. However, they enjoyed certain entitlements, for example, the entitlement to the first fruits, free labour from their communities, large tracts of land, etc. Only after the promulgation of the Black Authorities Act No. 68 of 1951, did the question of remuneration by government arise.

Under the homeland system, various homelands initiated their own laws governing, among others, the remuneration of traditional leaders. Even then, the determination of the remuneration of traditional leaders was not uniform across the country. Kings, chiefs and headmen were remunerated at different levels,

while in some homelands headmen and certain categories of headmen were not remunerated at all. In provinces like KwaZulu-Natal, where there is a large number of headmen, they are recognised but not remunerated by government. In some areas, however, they are remunerated by government. Their remuneration, though largely nominal, is in terms of statutory law. In certain areas communities took action which led to the abolition of the headmanship system.

Section 219(1)(a) of the Constitution of the Republic of South Africa, 1996, classifies traditional leaders as “persons holding public office” and requires that an Act of Parliament must establish a framework for determining their “salaries, allowances and benefits”. The framework referred to is set out in section 5 of the Remuneration of Public Office-bearers Act No. 20 of 1998.

It was only after the promulgation of Act No. 20 of 1998, that all traditional leaders at the level of kings/paramount chiefs, chiefs and members of the National and Provincial Houses of Traditional Leaders received remuneration based on uniform scales determined by the President. Such remuneration is not, as yet, based on clearly defined roles and functions of traditional leaders. The Independent Commission for the Remuneration of Public Office-bearers (the Remuneration Commission), which is responsible for making recommendations on the remuneration of public office-bearers, has indicated that it will not be able to work on the final and detailed framework for the remuneration of traditional leaders until policy issues relating to their role and functions have been clarified and finalised. The adoption of this White Paper and the enactment of the resultant legislation will thus facilitate the work of the Commission.

Regarding pension and medical aid benefits, Parliament enacted sections 8(6) and 9(6) of Act No. 20 of 1998. These excluded traditional leaders and members of the National and Provincial Houses of Traditional Leaders from the pension and medical aid arrangements provided for in the Act. The exclusion was made subject to “any other Act of parliament to the contrary”. The required Act of Parliament will be introduced.

Meanwhile, traditional leaders will, subject to the proposals set out in chapter 4.2 in respect of headmen, continue to receive salaries in terms of the framework set out in national legislation. Consequently, mechanisms will have to be devised to ensure that traditional leaders do indeed perform the functions for which they are remunerated. Traditional leaders should continue to enjoy certain entitlements or gifts recognised by custom. Any corrupt practices, however, will be dealt with in terms of applicable laws. Provision will have to be made in legislation for the disclosure of gifts.

#### **4.5 Accountability of Traditional Leaders and Structures**

During the pre-colonial period, traditional leaders and traditional structures of authority were largely responsive and collectively accountable to the people for their functions and obligations. This was largely due to the fact that traditional communities were relatively small, the people interdependent and bound together by affinity, kinship, marriage and ethnic affiliation.

With time, and because of undue interference by previous governments, accountability became substantially compromised.

There is a consensus view that traditional leaders and structures should be held accountable. Thus they should be accountable to government.

At a local level, traditional leaders and structures must ensure that, together with traditional communities, they put in place mechanisms through which they must account for their activities. In this regard, custom is not sufficient to regulate the accountability of traditional leaders and structures as this is only done through the calling of *imbizo/dipitso*. This, most often, is done as the prerogative, and at the discretion, of a traditional leader or, sometimes, the tribal authority.

Traditional structures must also ensure that, at least once a year, a meeting of the whole community is called where the chief and his counsellors report on their activities of the preceding year. The responsible authority in the province charged

with the administration of traditional affairs must ensure that traditional leaders and their authorities carry out their role and functions in accordance with custom and any applicable laws. Legislation to regulate the accountability of traditional leadership and authorities as well as a Code of Conduct, will be introduced. Such legislation must provide for transparency and the maintenance of records, auditing, reporting mechanisms, etc.

#### **4.6 Termination of Service of Traditional Leaders**

Traditional leadership is an ascribed position rather than an acquired position. In accordance with custom, a traditional leader reigned until death. A traditional leader was never deposed except under exceptional circumstances.

Legislation regulated circumstances under which the services of a traditional leader could be terminated. Whilst it is acknowledged that such termination was sometimes based on subjective factors and sometimes influenced by politics, in other instances it was based on objective principles.

Views expressed have indicated that government should not remove traditional leaders from office; instead, government and the royal family should develop a strategy to deal with the matter.

The approach to the termination of service of a traditional leader should be informed by the following:

- a traditional leader's service should, where circumstances warrant it, be terminated on the grounds of misconduct;
- he/she may, on the advice of the relevant Provincial House of Traditional Leaders, be removed from office, either temporarily or permanently, on the grounds of inability to carry out, or physical incapacity or mental infirmity which inhibits him/her from carrying out, his/her functions or duties efficiently; and
- where the service of a traditional leader is terminated, for whatever reason, a successor, according to the customary rules of succession and/or statutory

rules of succession, should assume the position, role and responsibilities.

Conduct that constitutes misconduct and conditions that constitute incapacity or inability will be elaborated upon in national and provincial legislation.

## **4.7 National and Provincial Houses of Traditional Leaders**

### **4.7.1 Introduction**

In order to enhance the institution of traditional leadership and give it a role at provincial and national levels, the Constitution makes provision for the establishment of provincial and national Houses. Accordingly, provincial Houses were established in the provinces of Limpopo, North West, Free State, Mpumalanga, KwaZulu-Natal and the Eastern Cape. The National House was also established at a national level. These Houses are intended to give a role to the institution at the highest level of government and to promote co-operative relationships. They are also meant to -

- ensure a smooth flow of information within institutions, and between government and traditional communities, with a view to enhancing the implementation of policy and programmes;
- ensure a deeper understanding of customary values and the prevention and resolution of conflicts and disputes; and
- advise government on matters affecting traditional leadership, traditional communities, custom and customary law.

Different opinions have been expressed on the role of Houses of traditional leaders. Some say that the original provisions of the Interim Constitution relating to the role of the Houses should be restored, whilst others suggest that they should play a unique role of unifying communities, be custodians of culture and tradition and play a nation-building role outside of governance. The opinions were in unison that the Houses are necessary and have a role to play.



#### **4.7.2 The Role of the National and Provincial Houses**

The Houses must play a supportive and advisory role to the structures of government and other institutions of traditional leadership at a local level. The role they play is unique. It must be based on the following principles: The Houses must: -

- ensure that there is cooperation between structures of traditional leadership, the three spheres of government and other organs of state;
- ensure that traditional leaders are properly elected to represent their communities in Provincial Houses and the National House of Traditional Leaders;
- ensure that there is adherence to a common national vision between structures of traditional leadership and other government structures;
- ensure that there are skills development programmes for traditional leaders;
- ensure that there is communal use of resources and that resources that are allocated to traditional leadership structures are appropriately utilised within the principles of co-operative governance;
- ensure that traditional leadership structures carry out their functions and account for their activities;
- ensure that traditional leadership structures are well-resourced so that they may carry out their functions; and
- ensure that there is close cooperation amongst the Houses and the government of the province within which they are situated.

The National House will also have the added responsibility of consulting with the government on any major issue of national importance pertaining to -

- traditional authorities, customary law or the traditions and customs of traditional communities;
- any other matter referred to the National House by the President and other structures of government at a national level;

- the remuneration and privileges of traditional leaders;
- the monitoring of the functioning of the Provincial Houses of Traditional Leaders; and
- legislation dealing with custom or customary law issues.

Finally, in addition to the above, the various Houses should continue to play the role they presently play in terms of existing legislation, which will be amended in accordance with the principles emerging from this White Paper. They will also play the role outlined in chapter 3.

### **4.7.3 Membership of the National and Provincial Houses**

#### *4.7.3.1 The National House*

The National House of Traditional Leaders was established in terms of the National House of Traditional Leaders Act No. 10 of 1998, as amended. It consists of 18 members (three nominees from each of the six Provincial Houses). Its members serve on a part-time basis, except the Chairperson and Deputy Chairperson, who are full-time members. The National House has indicated that it wants to become a full-time body and to play a more significant role in the formulation of policy and legislation.

The life cycle of the National House should be five years, as is presently the case. Its cycle should be linked to the life cycle of the Provincial Houses. Except for the Chairperson and Deputy Chairperson, membership should be part-time, and members should be drawn from Provincial Houses. The composition of the House will not be changed. However, the appointment/election process should ensure representation of women.

The National House should retain its current status and role, with the necessary adjustments necessitated by this White Paper. Attention should be given to elaborating on its programmes so as to enable it to play a more dynamic role.

#### *4.7.3.2 The Provincial Houses*

Presently, the composition of Provincial Houses differs from province to province. Members of these Houses hold different traditional leadership positions, and, in some provinces, some members are not traditional leaders. In others, headmen and princes qualify for membership. In some instances functionaries of traditional leaders are appointed. In some provinces, the Premiers or the MECs have the power to nominate persons as members of the Houses.

Our challenge, therefore, is to provide for Houses that are, whilst substantially uniform, also representative.

The views expressed in this regard were that, where there are kings/queens, they should, in addition to chiefs, have special representation in Houses. Others were of the opinion that only traditional leaders at the level of chiefs should become members of the Houses.

The approach to the membership of Provincial Houses is that only traditional leaders at the level of chiefs should become members of the Houses. Kings and queens should, however, also be represented - either directly or through their representatives. Membership of the Houses should be as uniform as possible across the provinces. The process in terms of which members are elected should be fair, democratic and representative. The chairperson and deputy chairperson should be full-time members of the Houses. The membership of the others should be part-time. This is so because traditional leaders should play a meaningful and complementary role within their communities. This will enhance the effectiveness of the Houses. Finally, the District Houses of Traditional Leaders should oversee the nomination of candidates to the Provincial House of Traditional Leaders.

The election process at a provincial level must ensure fair representation from all areas across the Province. The number of members must be reasonable and manageable. Details will be incorporated into legislation.

Each provincial House must ensure that at least one third of its membership is drawn from women. This requirement will be phased in.

The life cycle of the Houses should be five years as is presently the case.

#### **4.7.4 Accountability and Remuneration of Members of the National and Provincial Houses**

##### *4.7.4.1 Accountability of the National and Provincial Houses*

The existing legislation provides only for one form of accountability, namely the submission of annual reports to the relevant legislatures. The legislation does not provide guidelines regarding the content of such annual reports. As a result of this omission, our legislatures have found it difficult to evaluate the performance of the various Houses.

The existing laws also do not provide for the introduction of a performance management system for the various Houses. They also do not provide for reports to be presented by the Houses regarding the execution of their mandates, as set out in the applicable laws.

Provincial and national legislation will deal with all these matters.

Accountability for performance is closely linked to accountability for expenditure and for the use of the budget of the various Houses. The majority of the Houses are not directly accountable for the use of their funds. This matter will be addressed through the mechanisms provided for in the Public Finance

Management Act. This Act provides for the designation of accounting officers and for the control of public funds.

#### *4.7.4.2 Remuneration of Members of National and Provincial Houses*

Since members of the National and Provincial Houses of Traditional Leaders serve on a part-time basis, the status quo, in relation to their remuneration, should be maintained subject to decisions taken from time to time by the Remuneration Commission. In other words, they will be paid allowances in line with the sessional nature of their work. The position of the Chairpersons and Deputy Chairpersons, at both national and provincial levels, stands on a different footing. They will get salaries in accordance with their full-time status as full-time members of the Houses.

## **4.8 District Houses of Traditional Leaders**

At a district level it is proposed that District Houses of Traditional Leaders be established. This structure will replace regional authorities and other structures similar thereto. These Houses will focus primarily on advising district municipalities on matters pertaining to custom and customary law, traditional communities, traditional leadership and development. Generally, these Houses will, at a district level, exercise the same authority, and discharge the same responsibilities, as are presently entrusted to the Provincial Houses of Traditional Leaders. They will also play the role outlined in chapter 3. Membership will be part-time. The number of members must be reasonable and manageable. Women must be represented in accordance with the principles set out for Provincial Houses. The principles set out in chapter 4.7.2 will also apply in respect of the District Houses.

In those instances where traditional authorities exist within the area of jurisdiction of a metropolitan municipality, the National Minister responsible for traditional leadership may authorise the establishment of a Metropolitan House of Traditional Leaders.

## **4.9 Khoi-San**

The Department of Provincial and Local Government and the Northern Cape Provincial Government are presently handling issues relating to traditional leadership and governance in respect of the Khoi-San people. The matter is being dealt with within the context of the processes initiated by this White Paper.

Thus the recognition of traditional leadership will be handled by the proposed Commission on Traditional Leadership Disputes and Claims.

The proposed legislation dealing with traditional leadership issues will also apply to the Khoi-San and their claims to traditional leadership.

## **4.10 Resolution of Traditional Leadership Disputes**

The customary law of African communities was characterised by a lack of effective mechanisms to deal with claims and dispute resolution. For example, when there was a dispute regarding a traditional leadership position, some of the methods used to settle the dispute were to split the tribe, to declare war or to suppress one of the claimants or parties to the dispute. Later, legislation was devised as a means of addressing and settling disputes. Such legislation also transferred powers to identify, appoint and/or recognise and depose traditional leaders from traditional institutions, to the government. In the process, the role of customary institutions in the application of the substantive customary rules and procedures as regards the identification, appointment, removal and settlement of disputes relating to traditional leadership, were substantially reduced. In some instances, not only was illegitimate traditional leaders and authority structures appointed or established, but other legitimate traditional leaders were removed and legitimate authority structures disestablished.

In addition, the absence of well-defined boundaries led to conflict and boundary disputes. The advent of colonialism, and later apartheid, saw the definition and determination of areas of authority and jurisdiction of traditional leadership. In many instances, this definition and determination was arbitrarily done and also led to conflict and divided or led to the disintegration of communities. This has imposed new challenges where the democratic government must ensure that historical matters such as the division and amalgamation of tribes, the establishment and recognition of new tribes, the exclusion of some community members from their traditional authority areas as a result of the determination of traditional authority boundaries and the resolution of disputes where the same portion of land has been defined to form part of two or more traditional authorities, are addressed.

Homeland governments, too, passed their own laws that empowered them to, among others, appoint and/or terminate services of traditional leaders, in some cases in a manner that did not comply with custom. This, in some cases, also led to disputes. Various commissions of inquiry were appointed for purposes of resolving traditional leadership disputes and claims. Because these commissions were provincially/regionally appointed and those who appointed them had a substantial interest in the disputes, and because these commissions could only make recommendations on their findings, they failed to resolve the disputes either because their recommendations were rejected or not implemented. In a number of cases, the courts were also asked to pronounce on the legality of administrative acts as well as on the application of customary rules and procedures. They held that the statutory and subsequent administrative framework superseded customary processes. They took cognisance of customary processes only to the extent that the legislation concerned provided for the recognition thereof, if at all.

There is a strong body of opinion, also supported by traditional leaders and traditional communities, that an independent mechanism should be established to deal with the legitimacy and/or illegitimacy of traditional leaders. Indeed, this is the correct approach. An independent national commission should be established within the national sphere of government to address this situation.

In order to ensure that it is given adequate authority, it must be established in terms of national legislation that is separate from provincial legislation and the Commissions Act No. 8 of 1947. The Commission will be established for a period of five years, and its life may be extended from time to time as circumstances may demand.

The commission shall investigate the following cases:

- (a) where there is doubt as to whether a kingship, chieftainship or headmanship was established in accordance with custom and customary law;
- (b) a traditional leadership position, where the title or right of the incumbent is contested;
- (c) claims by communities to be recognised as traditional communities;
- (d) legitimacy of establishment or disestablishment of tribes; and
- (e) disputes resulting from the determination of traditional authority boundaries and the merger of tribes; and
- (f) where good grounds exist, the Commission may, either on request or of its own accord, also investigate any other matter relevant to the above issues, and which the Commission deems fit.

The commission may, subject to paragraph (f) above, consider cases dating as far back as 1927. This is the year in which the Black Administration Act No. 38 of 1927 was promulgated.

When discharging its mandate, the commission will be guided by the requirements set out in legislation relating to the recognition of traditional leaders and traditional leadership institutions. The commission will also conduct investigations and research into the background of the claims and disputes that will be placed before it. It will, therefore, be provided with the necessary resources to enable it to discharge its functions effectively.

During the existence of the National Commission, all provincially appointed



commissions' recommendations shall not be implemented. Claims that arise after the term of office of the commission will be dealt with by structures provided for in terms of other applicable legislation.

The commission will use the Constitution, applicable legislation, custom and customary law as a basic source of reference. Although the commission will be nationally-based, provincial issues, in their variety, will be the key matters that the commission will be addressing. The commission will report to the national Ministry responsible for traditional leadership and its findings will be final and binding on all the parties involved.

## **5. LEGISLATIVE COMPLEXITY**

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### **5.1 Continuation of Old Law**

The 1996 Constitution provides for the continuation of all law that was in force when the 1996 Constitution took effect, provided such legislation is consistent with the Constitution. Included in this body of law is the so-called “old order legislation”, for example, legislation that was enacted before the 1993 Constitution took effect. Where this old order legislation has not been amended to have a wider application, it only applies in the area, and to the people, for which it was originally enacted. This means that all the old order legislation pertaining to traditional leaders and traditional leadership institutions remains in place today. This legislation differs from province to province, and was passed during a now discarded ideological framework and period.

### **5.2 Assignment of Laws**

The 1993 Constitution provided for the assignment of the administration of a law to a province if that law, amongst other requirements, fell within the functional areas that were specified in Schedule 6 to the 1993 Constitution. “Traditional authorities” and “indigenous law and customary law” were among those functional areas. Most of the laws pertaining to traditional leadership were assigned to the respective provinces under the 1993 Constitution. The laws that were so assigned under the 1993 Constitution are regarded as provincial legislation in terms of section 239 of the 1996 Constitution. Some of the laws so assigned are set out in the Annexure hereto.

However, it must be borne in mind that there are several instances where only particular provisions of a law were assigned to provinces. The remaining provisions became the responsibility of different national departments either as a result of the subject matter falling within an exclusive national competency that is the responsibility of a particular national department, or as a result of an

assignment to a particular Ministry in terms of Proclamation No. R.102 of 3 June 1994. This approach has resulted in a fragmentation of laws in so far as responsibility for the administration of different provisions is concerned. This can best be illustrated by referring to the position pertaining to the Black Administration Act No. 38 of 1927. Some sections are the responsibility of the Department of Land Affairs (sections dealing with land), the Department of Justice (sections dealing with customary courts and inheritance), the Department of Home Affairs (the section dealing with marriages) and the Department of Provincial and Local Government (responsible for a number of other sections). Since 1994, the following sections of the Act have been assigned to the provinces concerned:

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

### **5.3 Current Reality**

In terms of Part A of Schedule 4 to the 1996 Constitution, “Traditional leadership” and “Indigenous law and customary law” are functional areas of concurrent national and provincial legislative competence, subject to Chapter 12 of the 1996 Constitution. Section 76, read with section 44, of the Constitution entitles Parliament to pass legislation in respect of traditional leadership, with both the National Assembly and the National Council of Provinces being involved. Although Parliament does not have the competence to repeal or amend provincial legislation, national legislation would prevail over provincial legislation if it complies with the requirements set out in section 146 of the 1996 Constitution.

The fact that provinces have to administer different sets of laws within their area of jurisdiction has raised the need for rationalisation of such different laws within the provinces themselves.

## 5.4 Rationalisation of Existing Legislation

Whereas the Black Administration Act No. 38 of 1927, and the Black Authorities Act No. 68 of 1951, were the key statutes which outlined the policy on Blacks and the institution of traditional leadership, there are numerous laws relating to the institution and which require review.

In order to lay the basis for a coordinated approach to address the current fragmentation of legislation relating to traditional leadership, it is proposed that national framework legislation be enacted as a matter of urgency. The national legislation will be complemented by concomitant provincial legislation. It stands to reason that the envisaged national framework legislation must comply with section 146 of the Constitution if it is to prevail over existing provincial legislation.

In the light of the requirements of section 146 of the Constitution, it is proposed that the following matters be addressed in the proposed national framework legislation:

- structures of traditional leadership;
- categories of traditional leadership;
- role and functions of traditional leadership;
- general principles relating to the identification, appointment and recognition of traditional leaders;
- the framework for the remuneration, benefits and termination of service of traditional leaders;
- the constitution and definition of a tribe/community;
- areas of jurisdiction of traditional leaders;
- legislation-making role of traditional leaders, for example by-laws, regulations, levies and taxes;
- locus standi of traditional leadership;
- accountability of traditional leaders - reporting, standard setting, misconduct

- enquiries and penalties;
- judicial role of traditional leadership;
- co-operative relationships;
- assignment of roles and allocation of functions by other spheres;
- dispute resolution mechanism for traditional leadership disputes;
- notion of Supreme Chief; and
- the support the three spheres of government will give to the institution.

The complementary provincial legislation should address the following:

- identification, appointment and recognition of traditional leaders;
- removal of a traditional leader;
- remuneration of traditional leaders;
- regulation of issues which traditional leadership are empowered to adjudicate on;
- clear indication of matters traditional leaders cannot entertain; and
- financial arrangements relating to traditional leadership institutions.

The above lists are not exhaustive.

It is envisaged that the drafting of the national framework legislation will be attended to by a specially constituted task team. This task team will also assist provinces with the drafting of the envisaged complementary provincial legislation.

The following are the main pieces of legislation governing the regulation of the institution of traditional leadership in South Africa, namely:

- (a) Black Administration Act No. 38 of 1927;
- (b) Black Authorities Act No. 68 of 1951;
- (c) KwaZulu Amakhosi and Iziphakanyiswa Act No. 9 of 1990;
- (d) Bophuthatswana Traditional Authorities Act No. 23 of 1978;
- (e) Proclamation 110 of 18 April 1957;

- (f) KwaNdebele Traditional Authorities Act No. 8 of 1984;
- (g) QwaQwa Administration of Authorities Act No. 6 of 1983;
- (h) Government Notice No. 11 of 1985 (QwaQwa);
- (i) Transkei Constitution Act No. 15 of 1976;
- (j) Transkei Authorities Act No. 4 of 1965;
- (k) Ciskei Administrative Authorities Act No. 37 of 1984; and
- (l) Venda Traditional Leaders Administration Proclamation of 1991.

The future of these laws will be dealt with when the proposed national framework legislation is being formulated.

Once the basic national framework legislation and complementary provincial legislation have been enacted, a more comprehensive process of rationalisation of other existing laws will be embarked upon to clear the statute book of unnecessary and unconstitutional laws.

## 6. CONCLUSION

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Traditional leaders should be custodians of tradition and culture. Their role in respect of governance should be advisory, supportive and promotional in nature. In this regard, they should work with all three spheres of government. The advisory role referred to must also be enhanced by, among others, ensuring that the National and Provincial Houses play a meaningful role in legislative processes and other matters affecting tradition and culture.

The legitimacy of those occupying positions within the institution should be beyond reproach. Traditional leaders should be involved in nation-building initiatives and, at the same time, they must promote the rights of cultural, linguistic and religious communities. Traditional leaders should promote the implementation of development proposals by assisting municipalities in building consensus in respect of development projects and plans. The institution should also continue to play a defined role within the criminal justice system and in land administration issues.

When traditional leaders have to be identified and designated as such, the State should play a limited role which is guided by the culture and tradition of the relevant community. This will ensure that our country retains the African character of the institution.

In addition, a number of national and provincial departments intend, within the context and parameters of the 1996 Constitution, to allocate roles and responsibilities to traditional leaders and traditional leadership institutions. Municipalities can also allocate certain responsibilities to traditional leaders.

The functions performed by traditional leaders throughout the country differ from one province to another. The Constitution also entrusts the responsibility to legislate on traditional leadership issues to the national government and the provincial governments. In view of this constitutional reality, national legislation

setting out a national framework for the provinces, and providing norms and standards, will be passed.

The institution of traditional leadership is also not homogeneous. Culture and tradition differ from one community to another. Accordingly, the various provincial legislatures will, when developing legislation on the role of the institution and on other issues flowing from this policy document, and falling within their legislative competence, take into account their peculiar circumstances. The national and provincial spheres of government will, at an intergovernmental level, have to agree on the timeframes for this legislative process and how it is going to be managed.

The legislative process referred to will deal, primarily, with the laws cited in chapter 5. However, there are a number of other laws that have a bearing on the institution. There is an ongoing process relating to the rationalisation of these laws. This rationalisation process will lead to the repeal or amendment of a number of laws administered by the national and provincial spheres of government.

The policy positions contained herein reflect the views of South Africans from different parts of the country.

Potential investors are furthermore awaiting the clarification of certain policies relating to rural governance. Rural development is a priority of government. The legacy of underdevelopment in rural areas will, through such discussions, be addressed to the benefit of all our people. It is only through unity in action for change that we will prosper as nation.

The section of this document dealing with values should also be used to kindle debates on such values as UBUNTU. A value-driven society can, and will, achieve prosperity. We look forward to traditional leaders assuming a leadership role to tackle, not only this challenge, but a myriad of other challenges our society is confronted with. This White Paper thus signals the way to a future



where co-operative governance and accountable government in traditional authority areas will be the features which stand out for all to see. Finally, government will promote discussion and debate aimed at ensuring better understanding of the changes being brought about by this White Paper. The transformation of the institution of traditional leadership is one of a number of challenges which have a direct bearing on the advancement of rural communities.

## **ANNEXURE: Legislation Assigned to the Provincial Premiers**

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The following are the most important pieces of legislation assigned to the provincial Premiers:

- The old Transkei, Bophuthatswana, Venda and Ciskei Constitutions
- Old homeland and South African legislation.

### **Eastern Cape**

- Black Administration Act No. 38 of 1927, only sections 1 and 2(7)*bis*; (7)*ter* and (8)
- Regulations Prescribing the Duties, Powers, Privileges and Conditions of Service of Chiefs and Headmen, 1957 (Proclamation No. 110 of 1957)
- Land Regulations, 1969 (Proclamation No. R. 188 of 1969)
- Pounds Ordinance 1938, (Ordinance 18 of 1938)
- Transkeian Authorities Act No. 4 of 1965
- Chiefs Courts Act No. 6 of 1983
- Administrative Authorities Act No. 37 of 1984
- Pounds Act No. 43 of 1984
- Land Use Regulations Act No. 15 of 1987
- Black Authorities Act No. 68 of 1951
- Regulations for the Control of Residents on and the Occupation of Privately Owned or Tribally Owned Land in Black Areas, 1967 (Proclamation No. R. 129 of 1967)
- Betterment Areas Proclamation, 1967 (Proclamation No. R. 196 of 1967)
- Nature Conservation Act No. 10 of 1987. The whole except Part 1 of Chapter 4, Chapters 6 and 7 and section 70
- Proclamation Concerning Payment by Blacks of Rentals for Arable and Residential Allotments and of Fees for Grazing on Certain Land Owned by

the South African Development Trust, 1968 (Proclamation No. R. 300 of 1968).

## **Free State**

- Bophuthatswana Traditional Authorities Act No. 23 of 1978, including Government Act No. 137 of 8 December 1978
- Bophuthatswana Traditional Courts Act No. 23 of 1979
- Bophuthatswana Registration of Customary Unions Act No. 8 of 1977
- QwaQwa Administration of Authorities Act No. 6 of 1983, including the Regulations prescribing the Duties, Powers, Privileges and Conditions of Service of Chiefs and Headmen (Government Notice No. 11 of 25 February 1985)
- QwaQwa Levying of Tribal Taxes Act No. 5 of 1983
- QwaQwa Pounds Act No. 4 of 1974
- QwaQwa Nature Conservation Act No. 5 of 1976
- Black Administration Act No. 38 of 1927, only sections 1 and 2(7)*bis*; (7)*ter* and (8)
- Regulations prescribing the Duties, Powers, Privileges and Conditions of Service of Chiefs and Headmen, 1957 (Proclamation No. 110 of 1957)
- Land Regulations, 1969 (Proclamation No. R. 188 of 1969)
- Bophuthatswana Wheel Tax Act No. 43 of 1979
- Regulations Relating to Community Services in Black Areas (issued in terms of Act No. 38 of 1927)

## **KwaZulu-Natal**

- KwaZulu Pounds Act No. 8 of 1980
- KwaZulu Amakhosi and Iziphakanyiswa Act No. 9 of 1990
- KwaZulu Act on the Payment of Salaries, Allowances and other Privileges to the Ingonyama, No 6 of 1993
- KwaZulu Act on the Code of Zulu Law, No. 16 of 1985
- KwaZulu Act on the Licensing and Control of Dogs, No. 19 of 1988
- KwaZulu Nature Conservation Act No. 29 of 1992

## **Limpopo**

- Black Administration Act No. 38 of 1927, only sections 1 and 2(7)*bis*; (7)*ter* and (8)
- Regulations prescribing the Duties, Powers, Privileges and Conditions of Service of Chiefs and Headmen, 1957 (Proclamation No. 110 of 1957)
- Land Regulations, 1969 (Proclamation No. R. 188 of 1969)
- District and Territorial Councils Act No. 15 of 1986
- Venda Traditional Leaders Proclamation, 1991 (Proclamation No. 29 of 1991)
- Gazankulu Pounds Act No. 8 of 1976
- Lebowa Tribal Rates Act No. 2 of 1975
- Lebowa Royal Allowance Act No. 3 of 1984
- Lebowa Pounds Act No. 8 of 1990
- Black Authorities Act No. 68 of 1951
- Regulations for the Control of Residents on and the Occupation of Privately Owned or Tribally Owned Land in Black Areas, 1967 (Proclamation No. R. 129 of 1967)
- Betterment Areas Proclamation, 1967 (Proclamation No. R. 196 of 1967)
- Proclamation Concerning Payment by Blacks of Rentals for Arable and Residential Allotments and of Fees for Grazing on Certain Land Owned by

the South African Development Trust, 1968 (Proclamation No. R. 300 of 1968)

- Gazankulu Nature Conservation Act No. 5 of 1975
- Lebowa Nature Conservation Act No. 10 of 1973
- Lebowa Dipping Tax Act No. 9 of 1976
- Venda Pounds Act No. 6 of 1976
- Venda Registration and Control of Dogs Act No. 9 of 1977
- Nature Conservation and National Parks Act No. 20 of 1986
- Venda Land Affairs Proclamation, 1990 (Proclamation No. 45 of 1990) sections 6 and 7 and 14-9

## **Mpumalanga**

- Black Administration Act No. 38 of 1927, only sections 1 and 2(7)*bis*; (7)*ter* and (8)
- Regulations prescribing the Duties, Powers, Privileges and Conditions of Service of Chiefs and Headmen, 1957 (Proclamation No. 110 of 1957)
- Land Regulations, 1969 (Proclamation No. R. 188 of 1969)
- Licensing and Control of Dogs Act No. 5 of 1980
- Payment of Allowances to Members of the Regional Authority Act No. 3 of 1988
- KaNgwane Land Levies Act No. 8 of 1992
- KwaNdebele Pounds Act No. 8 of 1981
- KwaNdebele Levying of Taxes by Traditional Authorities Act No. 5 of 1983
- KwaNdebele Traditional Authorities Act No. 2 of 1994
- KwaNdebele Lingoma Act No. 4 of 1994
- Black Authorities Act No. 68 of 1951
- Regulations for the Control of Residents on and the Occupation of Privately Owned or Tribally Owned Land in Black Areas, 1967 (Proclamation No. R. 129 of 1967)
- Betterment Areas Proclamation, 1967 (Proclamation No. R. 196 of 1967)

- Proclamation Concerning Payment by Blacks of Rentals for Arable and Residential Allotments and of Fees for Grazing on Certain Land Owned by the South African Development Trust, 1968 (Proclamation No. R. 300 of 1968)
- Nature Conservation Act No. 3 of 1981
- Nature Conservation Act No. 3 of 1973
- Registration and Control of Dogs Act No. 4 of 1976
- Registration of Customary Unions Act No. 8 of 1977
- Bophuthatswana Traditional Authorities Act No. 23 of 1978
- Bophuthatswana Wheel Tax Act No. 23 of 1979
- Bophuthatswana Traditional Courts Act No. 29 of 1979
- Lebowa Tribal Rates Act No. 2 of 1975
- Lebowa Royal Allowance Act No. 3 of 1984
- Lebowa Pounds Act No. 8 of 1990
- Lebowa Dipping Tax Act No. 9 of 1976.

## **North West**

- Black Administration Act No. 38 of 1927, only sections 1 and 2(7)*bis*; (7)*ter* and (8)
- Regulations Prescribing the Duties, Powers, Privileges and Conditions of Service of Chiefs and Headmen, 1957 (Proclamation No. 110 of 1957)
- Land Regulations, 1969 (Proclamation No. R. 188 of 1969)
- Pounds Act No. 7 of 1974
- Registration and Control of Dogs Act No. 4 of 1976
- Registration of Customary Unions Act No. 7 of 1977
- Bophuthatswana Traditional Authorities Act No. 23 of 1978
- Bophuthatswana Wheels Tax Act No. 23 of 1979
- Bophuthatswana Traditional Courts Act No. 29 of 1979
- Mmabana Cultural Foundations Act No. 15 of 1987
- Black Authorities Act No. 68 of 1951

- Regulations for the Control of Residents on and the Occupation of Privately Owned or Tribally Owned Land in Black Areas, 1967 (Proclamation No. R. 129 of 1967)
- Betterment Areas Proclamation, 1967 (Proclamation No. R. 196 of 1967)
- Proclamation Concerning Payment by Blacks of Rentals for Arable and Residential Allotments and of Fees for Grazing on Certain Land Owned by the South African Development Trust, 1968 (Proclamation No. R. 300 of 1968)
- Bophuthatswana Nature Conservation Act No. 3 of 1973
- Livestock and Grazing Control Act No. 16 of 1983.

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