CHAPTER 2
POLICY AND LEGISLATIVE FRAMEWORK GOVERNING TRADITIONAL LEADERS IN SOUTH AFRICA

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

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

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

The Transvaal was annexed by Britain in 1877. One of the reasons for the annexation was the failure of the Republic’s Native Policy. Shepstone’s son who became Secretary of Native Affairs of the territory, was of the opinion that it was unjust to subject the black population to a law that was quite foreign to them. During the British rule, which ended in 1881, most of the old legislation was abolished and the position of indigenous law regulated by Ordinance 11 of 1881.
Notwithstanding its recognition of customary law, P Stubbs criticised Transvaal for its selectivity in such recognition as follows:

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

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

It would be naïve to believe that access to justice means access to the courts only, state courts. That idea was already dispelled at the Third Legal Forum convened by the Ministry of Justice in Durban in 1995.23

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

<table>
<thead>
<tr>
<th>Year</th>
<th>Legislation</th>
<th>Purpose/Results</th>
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<tbody>
<tr>
<td>1878</td>
<td>Natal Code of Zulu Law26</td>
<td>To eliminate uncertainties regarding customary law.</td>
</tr>
<tr>
<td>1881</td>
<td>Ordinance 11 of 1881</td>
<td>Recognised African civil law.</td>
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<tr>
<td>1885</td>
<td>Ordinance in Law 4 of 1885</td>
<td>Recognised African civil law subject to the repugnancy clause.</td>
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<tr>
<td></td>
<td>Natal Native High Court &amp; Transkei Native Appeal Court</td>
<td>Handed down written judgments that served as precedents on customary law.</td>
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As evident from the table, it has taken a long time for the current government to introduce legislation that specifically deals with traditional leaders and provides a space for them within the sphere of governance. This delay was occasioned – at least partly – by the fierce battle for the soul of traditional leadership and its role as the custodian of African tradition.27

The battle is characterised by calls for and against the accommodation of traditional leadership within the current system of governance. At the one end of the spectrum the dismantling of the whole institution is called for. This line of thinking suggests that, given that South Africa is now a democratic dispensation where all citizens are equal, it would not make sense to subject some sections of the citizenry to forms of traditional leadership. Proponents
of this view put forward at least two main reasons. First, they question the legitimacy of some traditional leaders. They wonder whether, given the influence of colonial and apartheid governments that at some stage deposed rightful traditional leaders and replaced them with those of their choosing, it is still tenable to sustain traditional leadership on the basis of tradition. Crudely put, some of the traditional leaders (those appointed by the colonial and apartheid rulers) were strictly speaking not entitled to their positions.

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

> If Africans have had chiefs, it was because all human societies have had them at one stage or another. But when a people have developed to a stage which discards chieftainship....then to force it on them is not liberation but enslavement.\(^3\)

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

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

> ... the State, in accordance with the Constitution, seeks:

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

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

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

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

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

This is a new development, as the National House of Traditional Leaders Act only provided for national and provincial houses of traditional leaders. The local house of traditional leaders is provided for in municipalities that have five traditional leaders or more.

Importantly, the 2003 Act provides that the electoral college (consisting of all relevant traditional leaders) should ensure sufficient representation of women in the house of traditional leaders and the house of traditional leaders may provide scope for the enactment and enforcement of by-laws by the traditional authorities within a given municipality.

**Service agreements between municipalities and traditional authorities**

The 2003 Act provides that municipalities may enter into service agreements with traditional authorities. This provision is crucial given that such agreements will provide a clear framework within which the two organs will function, stipulate the exact minimum requirements for compliance with the agreement, and provide for penalties in the case of non-compliance on either side. This may go a long way in dealing with the complaint by many traditional leaders that they are in the dark as to what is expected of them in the current democratic dispensation.
The administration of justice in rural South Africa is predominantly carried out by chiefs’ courts, which administer justice largely on the basis of customary law.35

One of the responsibilities of a traditional leader is to settle disputes in the traditional community. This is done through the traditional court (also known as the chief’s court or, as recommended by the South African Law Reform Commission, ‘customary court’). This court deals with all disputes that are brought to it as long as they are not serious cases. Asked what they regard as serious cases, traditional leaders invariably mention rape, murder and assault with intent to do grievous bodily harm (GBH), i.e. serious assault. The court also deals with dissolution of customary marriages, with the proviso that the maintenance of children is referred to the magistrate’s court for resolution.

According to the traditional leaders interviewed, it is not for lack of jurisdiction that traditional leaders do not deal with maintenance cases, but due to practical constraints. For example, as the traditional councillors of Mokopane stated, the traditional court does not have the capacity to make sure that maintenance orders are enforced. On the contrary, they reason, the magistrate’s court has the necessary resources, as evident in that court’s ability to get maintenance money directly from the employer of the parent.

From the previous chapter it appears that in dealing with the administration of justice, traditional leaders are acting within their legislative mandate. In terms of Schedule 6 of the Constitution, laws that applied to the different homelands are part of South African law. For instance, laws that applied in the former homeland of Lebowa remain in force until legislative or judicial intervention. Equally important to note in this respect is the recent work of the South African Law Reform Commission, which, though not having a binding legal effect, shows that the move is towards allowing traditional leaders to proceed with their judicial functions. Both the Discussion Paper of 1999 and the report – with the proposed Bill – submitted to Parliament in January 2003 show that