

The Role of Traditional Leaders in South Africa: Comparison between the Traditional and Khoi-San Leadership Bill, 2015 and the Traditional Leadership and Governance Framework Act 41 of 2003

MP Sekgala¹

Abstract: *The role of traditional leaders in a democratic South Africa has been a hot-potato since the dawn of democracy. There has been a lack of clarity on the role of traditional leaders in the Constitution of the Republic of South Africa (1996). The Constitution stipulates that legislation must provide the role of traditional leaders. In accordance with the provisions of the Constitution, the Traditional Leadership and Governance Framework Act (41 of 2003) (TLGFA) was passed in 2003. However, the TLGFA ambiguously provides the role of traditional leaders. As the name speaks for itself, the TLGFA is a framework legislation providing guidelines on how the provinces may enact laws regulating traditional leaders within their borders. Nevertheless, some provinces have repeated what the TLGFA stipulates when it comes to the role of traditional leaders. It is against this backdrop that TLGFA received negative comments from some traditional leaders who continued to appeal for the clarification of their role. The appeal of traditional leaders was sought to be addressed by Traditional and Khoi-San Leadership Bill (2015). The article examines the similarities and differences between TLGFA and TKLB in order to see the changes, if any, that will be brought by TKLB. The article concludes that there are many similarities than the differences between the TKLB and TLGFA.*

Keywords: traditional leaders, traditional leadership and governance framework act, Traditional and Khoi-San Leadership Bill, customary law, customs, South Africa

Introduction

The role of traditional leaders in South Africa is recognised by the Constitution (1996). The Constitution instructs the Parliament to enact legislation which will provide the role of traditional leaders. In accordance with this provision, Parliament enacted several laws which attempt to provide the role of traditional leaders. Among those laws, there is TLGFA which is regarded to be a principal legislation when it comes to the recognition of the institution, status and role of traditional leadership.

One of the objectives of the TLGFA is to outline a national framework and norms and standards that will define the role and place of traditional leadership within the democratic governance (RSA, 2003, preamble). Since the TLGFA is framework legislation, provincial laws are to provide details with regard to role traditional leadership. However, provincial laws provide little on the role of traditional leaders and in most cases repeated the words used in the TLGFA to describe the role of traditional leaders. This has left the role of traditional leaders being not clearly defined. The poorly defined powers and roles of traditional leaders in democratic South Africa have given traditional leaders time to mobilise and campaign for recognition (Buthelezi & Yeni, 2016). The debate of the roles of

¹ University of Limpopo

traditional leaders has also gained momentum when Khoi-San communities and their leaders appeal for their recognition.

In 2012 the President of the Republic of South Africa, in the State of the Nation Address, announced that the government will table the Bill in Parliament which will provide for the recognition of the Khoi-San communities, their leadership and structures (Zuma, 2012). Finally, the Traditional and Khoi-San Leadership Bill (2015) (TKLB) was introduced in Parliament in 2015 and it is now before the National Assembly committee. Once the TKLB is passed as the Act of Parliament, it will repeal the TLGFA entirely. The aim of this paper is to examine the similarities and differences between TKLB and TLGFA with regard to the role of traditional leaders. This effort will help to identify the changes, if any, on the role of traditional leaders when the TKLB is inaugurated as an Act of Parliament.

The functions of traditional leaders in terms of customary law and customs

The Constitution prescribes that the institution, status and role of traditional leaders are recognised according to the customary law but subject to Constitution (RSA, 1996, s 211 (1)). It furthermore stipulates that a traditional authority that observes a system of customary law may function subject to, apart from legislation, customs as amended (RSA, 1996, s 211 (2)). When it comes to the weighing of customary law the Constitutional Court in *Alexkor Ltd and Another v Richtersveld Community and Others* stated that whereas previously the customary law was falling within the common law, however, now customary law must be seen as a fundamental component of South African law (Constitutional Court of South Africa, 2003: 51). The Recognition of Customary Marriages Act (120 of 1998) defines the customary law as usages and customs which were customarily obeyed by the aboriginal African peoples of South Africa and which constitute a component of the culture of those persons (RSA, 1998, s 1). Customary law develops when the persons who live by its norms change their patterns of lives (Constitutional Court of South Africa, 2003: 53). In the case of *Bhe and Others v Magistrate of Khayelitsha and Others* the Constitutional Court stated that due to the dynamic nature of society, official indigenous law as it exists in legislation and the text books is generally a poor reflection, if not a distortion of the true customary law (Constitutional Court of South Africa, 2005: 86).

A custom can be defined as a practice that has been followed in certain community and is to be accepted as part of the law (Law & Martin, 2009: 149). In *Van Breda v Jacobs* the Appellate Court stated that for a custom to be recognised as a source of law it must meet these requirements: First, the practice must be certain, secondly, it must be uniformly obeyed for a long period of time and thirdly, such practice must be reasonable (Appellate Division of South Africa, 1921: 334). However, in *Shilubana and Others v Nwamitwa and Others* the Constitutional Court stated that the requirements listed in *Van Breda* cannot be applied to customary law, where the development of living customary law is at issue (Constitutional Court of South Africa, 2008: 56). The Constitutional Court also stated that customary law must be allowed to develop and the enquiry must be established in the present-day practice of the community at issue (Constitutional Court of South Africa, 2008: 55).

The TLGFA mandates a traditional community to alter and redesign their customary law and customs in order to comply with the relevant principles enshrined in the Bill of Rights in the Constitution, especially preventing unfair discrimination, promoting equality and advance gender representation in the succession to traditional leadership positions (RSA, 2003, s 2 (3)).

During the pre-colonial times, the role of traditional leaders, in terms of customary law and custom, was to adjudicate disputes fairly and to provide for the wellbeing of their people (Nicholson, 2006: 184). For traditional leaders to exercise their powers and perform their functions, they were vested with secular powers and privileges (Nicholson, 2006: 184). Moreover, traditional leaders had to lead military expeditions, initiate and perform different ceremonies to promote the well-being of the tribe, maintain peace and order as well as to allocate and regulate tribal land (Ntonzima & Bayat, 2012: 92).

It seems clear that the roles of traditional leaders during apartheid were allocation of land held in trust, resolution of disputes, the provision of administrative services at local government, the preservation of law and order, administration of access to education and finance, administration of social welfare and the promotion of education such as the erection and maintenance of schools (South African History Online, 2016). According to Mokgoro (1996), the traditional leadership performed the simultaneous role of development facilitator, law maker, executive, and judiciary.

With the advent of democracy and the Constitution, the role of traditional leaders in terms of customary law and customs was reduced and subjected to the Constitution. It is now trite that every law or conduct must bow before the Constitution, otherwise that law or conduct will be declared null and void by the court of law. It must be noted that traditional leaders' role in terms of customary law or customs is limited by the Constitution and thus must be amended to be in line with the Constitution. The White Paper on Traditional Leadership and Governance provides that the "critical challenge facing both government and traditional leadership is to ensure that custom, as it relates to the institution of traditional leaders, is transformed in accordance with the Constitution and the Bill of Rights" (RSA, 2003: 15).

As things stand, the role of traditional leaders in terms of customary law or custom has changed tremendously. The White Paper on Traditional Leadership and Governance provides that the traditional leaders may play the following roles:

- (a) Promote and preserve the culture and tradition of communities;
- (b) Promote the preservation of the moral fibre and regeneration of society;
- (c) Promote social cohesiveness of communities;
- (d) Promote socio-economic development;
- (e) Promote service delivery;
- (f) Contribute to nation building;
- (g) Promote the social well-being and welfare of communities; and
- (h) Promote peace and stability amongst the community members (RSA, 2003: 18).

The changes of the role of traditional leaders in terms of customary law and customs are mandated by the Constitution. Consequently, the Constitution vests certain powers in the democratic government. The traditional leaders can no longer perform the functions of law-making, executive and judiciary. The Constitution vests those functions in the democratic government to the exclusion of traditional leaders. The White Paper on Traditional leadership and Governance provides that traditional leadership is a creature of custom and generally carries out customary functions (RSA, 2003: 16). Moreover, it provides that there cannot be contestation of authority between the institution of traditional leadership and the state (RSA, 2003: 16). In contrast, traditional leaders often argue that they are not given the necessary recognition and treatment they deserve, and that their responsibilities were taken by councillors and mayors (Parliament of the Republic of South Africa, 2015: 10). At worst, the National House of Traditional Leaders (NHTL) and its Mpumalanga branch indicated that municipalities should be replaced by traditional councils as service providers in their areas of control, rather than work in parallel (De Wet, 2012: 42). It is therefore submitted that there is a clear contestation of the roles and functions between the traditional leaders and government, especially in municipalities which incorporate the areas of traditional leaders.

At present, the TLGFA is the principal legislation when it comes to the regulation of traditional leaders and traditional matters. It was hoped that the TLGFA would provide the role and functions of traditional leaders unambiguously. However, the hope did not materialized because the TLGFA provided not much when it comes to the role and functions of traditional leaders. The TLGFA provides that a traditional leader performs the functions provided for in terms of customary law and customs of the traditional community concerned, and in applicable legislation (RSA, 2003, s 19). As Rugege asserted that the TLGFA is framework legislation and the provinces should be able to put more flesh to it depending on the capacities, budgets and other considerations (Rugege, 2003: 188). However, the Limpopo Traditional Leadership and Institution Act (6 of 2005) (LTLIA) repeat the words of the TLGFA. It provides that a traditional leader performs any function provided for in terms of customary law (RSA, 2005, s 18 (1)). Moreover, the Eastern Cape Traditional Leadership and Governance Act (4 of 2005) (ECTLGA) repeats the words of the TLGFA by stipulating that a traditional leader performs the functions provided for by the customs and customary law of the traditional community as stipulated in the TLGFA and in other applicable legislation (RSA, 2005, s 24 (5)). Rugege (2003) has noted that it is not apparent as to what is the role of traditional leaders in terms of customary law and customs.

It is therefore submitted that, although the TLGFA provided a framework for the role and place of traditional leadership within the democratic governance, provincial legislation were unable to clearly define the role of traditional leaders in terms of customary law and customs. Provincial legislation repeated the words of the TLGFA at best, and thus failing to clarify the role of traditional leaders in terms of customary law and customs. Sithole & Mbele (2008) argue that to deal with customary matters can be complicated than a probability of the roles being spelt out in terms of local government roles. Moreover, in the Certification of the Constitution of the Republic of South Africa the Constitutional Court stated that the Constitutional Assembly cannot be constitutionally faulted for not

addressing the complicated, varied and ever-developing specifics of how traditional leadership should function in the wider democratic society (Constitutional Court of South Africa, 1996: 197). It is indeed difficult to deal with the role of traditional leader in a democratic South Africa. This is manifested by the debate on the role of traditional leaders which spin over two decades since the dawn of democracy.

It is imminent and inevitable that the TLGFA is about to be repealed by TKLB when it formally becomes an Act of Parliament. However, the TKLB is unlikely to augment the functions and role of traditional leaders. With regard to the functions and the role of traditional leaders, the TKLB repeated the words of the TLGFA. The TKLB prescribes that a traditional leader performs the functions provided for in terms of customary law and customs of the traditional or Khoi-San community concerned (RSA, 2015, s 19). The only adjustment is that of inserting Khoi-San communities. The TKLB provides how a Khoi-San community may apply to the Premier of the province concerned for its recognition provided that such community meets the requirements listed in section 5 (1) (a).

The recognition of Khoi-San communities and their leaders means that the Khoi-San leaders will be given seats in the municipalities of their jurisdiction to represent their communities in terms of section 81 of the MSA. In order to be given a seat as a Khoi-San leader in a municipal council, first, one has to be recognised as a Khoi-San leader in terms of section 10 of the TKLB. Secondly, a Khoi-San leader will then have to be identified by the MEC of local government in the province of that municipality in terms of section 81 (2) (a) of the MSA. Thirdly, the Khoi-San leader must be an ordinary resident within the jurisdiction of that municipality.

Moreover, the TKLB thus extends the role of traditional leaders' participation to a province which previously had no traditional leaders. The Western Cape did not have any recognised traditional leaders within its borders; however the recognition of Khoi-San leaders will result in Western Cape having traditional leaders within its borders. Currently, eight provinces have traditional leaders in South Africa. Most Khoi-San leaders and their communities are found in the Western Cape and Northern Cape Provinces. Whereas the Northern Cape is having few traditional leaders within its borders, the TKLB through its recognition of Khoi-San leaders will add to the list of traditional leaders in that province. When the TKLB becomes an Act of Parliament, all provinces in South Africa will have traditional leaders participating in their municipalities.

The functions of traditional leaders in terms of legislation

Apart from traditional leaders functioning in terms of the customary law and customs, they may also function in accordance with applicable legislation. It is worthwhile to state that TLGFA provides for the recognition of traditional community and traditional leaders, establishment of traditional councils, the role of traditional leaders and any matter related to customary law and customs.

The TLGFA provides a list of matters which national and provincial government, through legislative and other measures, may consider when providing a role to traditional leaders and councils. These

matters are arts and culture, land administration, agriculture, health, welfare, the administration of justice, safety and security, the registration of births, deaths and customary marriages, economic development, environment, tourism, disaster management, the management of natural resources, the dissemination of information relating to governmental policies and programmes and education (RSA, 2003, s 20 (1)).

The above list of the matters which may be allocated to traditional leaders is not helpful because, first, the allocation of a role to traditional leaders is at the discretion of the national and provincial governments. There is nothing in the law that compels the national and provincial governments to allocate the abovelisted matters to the traditional leaders and their traditional councils. Secondly, the above listed matters are wide. For example, the term tourism comprises of many things. Therefore, the above list lacks specification.

The allocation of function by national or provincial government to traditional leaders represents a system of delegation. The Municipal Systems Act (32 of 2000) defines delegation as a mandate to perform a function (RSA, 2000, s 1). It is clear that almost all matters listed above fall within Schedule 4 of the Constitution. Both national and provincial governments share exercise of power and performance of the functions as listed in the said schedule. Legally speaking, traditional leaders have no power over functions listed in the said schedule, unless and until such functions are delegated to them by national or provincial government. The TLGFA provides that when organ of state (as the holder of the delegated function) has allocated a function to traditional councils or traditional leaders, such organ of state must monitor the implementation of such function to ensure that function is performed and that the implementation is constitutional (RSA, 2003, s 20 (3)).

The TKLB does not provide a list of matters in which may serve as a guideline when national and provincial government allocate functions to traditional leaders. Instead, it provides that the traditional and Khoi-San leaders may be allocated a role in any functional area of the national or provincial department provided that such a role may not include any decision-making power (RSA, 2015, s 25 (1)). In deed decision-making power is reserved for government, even the role of traditional leaders in municipal councils exclude a voting right. Therefore, without decision-making power, a role to be allocated to traditional leaders is to be an advisory role. However, it was criticised that TKLB permits national or provincial government departments to allocate roles that deal with any of government's functions to traditional council and traditional leaders without any guidelines on how this should be performed or what roles can be allocated (Land & Accountability Research Centre, 2016). It was further pointed that the TKLB is equivocal when it comes to the relationship between elected local government and traditional leaders and traditional councils should the government allocate the roles to them (Land & Accountability Research Centre, 2016).

When a function is allocated to traditional leaders, resources must be made available to ensure the performance of that function. The TLGFA, on the one hand, mandates an organ of state within the national government or a provincial government, when allocating a role to traditional councils or traditional leaders, to ensure that the allocation of a role or function is accompanied by resources and

that appropriate measures for accounting for such resources are put in place (RSA, 2003, s 20 (2) (e)). In passing, it should be noted that even traditional leaders who participate in the proceedings of the municipal councils are entitled to the payment of out of pocket expenses in respect of their participation (RSA, 1998, s 81 (5) (b) (i)). Failure to provide resources will defeat the intention of allocating a function and ultimately lead to poor performance of the allocated function.

The TKLB also provides that the allocation of a role to traditional leaders may be accompanied by conditions and resources as determined by the allocating department (RSA, 2015, s 25 (2)). Moreover, the TKLB provides that the Minister may, by notice in the government gazette, determine the resources to be made available to traditional and Khoi-San leaders as may be necessary to enable them to perform their function effectively (RSA, 2015, s 15 (2)). Before determining the resources for traditional and Khoi-San leaders, the Minister must take into account taking into account a recommendation made by the Independent Commission for the Remuneration of Public Office-bearers and consult with all Premiers (RSA, 2015, s 15 (2)).

Both TLGFA and TKLB provide that the allocation of a function to traditional leaders must be accompanied by resources. It follows that no allocation of a function, no resources to be made available to traditional leaders. In *Mbhashe Traditional leaders in Municipal Council v Mbhashe Local Municipality* the High Court stated that out of pocket expenses are derived from traditional leaders' roles in the municipal council (Eastern Cape High Court, 2012: 3).

Both TLGFA and TKLB do not spell out or enumerate the roles of traditional leaders. The roles which were previously performed by traditional leaders are now given to democratically elected government, especially local government by the Constitution. For that reason, traditional leaders are performing advisory role in almost all functions accorded to them by legislation. This is even clear from the Bill, which prohibits traditional leaders to perform a decision-making role.

It is therefore submitted that the TKLB will not address the demands of traditional leaders, since they want to be involved in the decision-making role. At worst, traditional leaders call for the amendment of the Constitution and argue that in their areas of jurisdiction, traditional councils should replace municipalities (De Wet, 2016: 42). They do not want work side by side with municipalities; instead they want to be in charge of their areas. This can have adverse effects on democracy. Democracy must enable people to choose their own leaders through regular elections. The traditional councils, inter alia, comprise of traditional leaders who are not elected but born to seat on the throne and lead their people for the rest of their lives. Although TLGFA provides that 40 per cent of members of traditional council must be democratically elected, but this per cent is small as compared to the fact that traditional leader will still elect the remaining 60 per cent of the members of traditional council (RSA, 2003, s 3 (2) (c)). Similarly, the TKLB provides that 60 per cent of the members of traditional councils will be elected by traditional leaders and 40 per cent will be elected be democratically elected by members of the community (RSA, 2015, s 16 (2) (c)).

Moreover, it appears that amending a Constitution to allow traditional councils to replace municipalities in the areas of traditional leaders will be against the spirit of the Constitution. In the case of Certification of the Constitution of the Republic of South Africa (1996) the Constitutional Court clearly stated that had the drafters of the Constitution meant to guarantee and institutionalise governmental powers and functions for traditional leaders, they should have incorporated the words “powers and functions” in the Constitutional Principle XIII (Constitutional Court of South Africa, 1996: 190). The Constitutional Principle XIII provides that the institution, status and role of traditional leadership, as per customary law, shall be recognised and protected in the Constitution (RSA, 1993, schedule 4) It is therefore submitted that the governmental powers are reserved for democratically elected government and granting traditional leaders governmental powers will overshadow the intention of having democratically elected government in local level.

The functions of the Houses of traditional leaders

The Constitution prescribes that an Act of Parliament or provincial legislation may establish the houses of traditional leaders (RSA, 1996, s 212 (2) (a)). There are three types of houses of traditional leaders in South Africa, namely the National House of Traditional Leaders, the Provincial Houses of Traditional leaders and the Local Houses of Traditional Leaders (RSA, 2003, s 16 (1) (a) & (b)). The provincial legislation, in the provinces where there are traditional leaders, must provide for the establishment and the role of the Provincial Houses of Traditional Leaders. The houses of traditional leaders are to deal with the matters relating to traditional leadership, the role of traditional leaders and customary law and customs of the communities (RSA, 1996, s 212 (2)). The Act of Parliament intended by the Constitution is the TLGFA which provides for the establishment of the houses of traditional leaders. Since TLGFA is about to be repealed by the new law called TKLB, so below is the comparison of how the TLGFA and TKLB provide for the role of the houses of traditional leaders.

The National House of Traditional Leaders

The TLGFA did not provide for the role of the National House of Traditional Leaders (NHTL) in details. It only provides that any parliamentary bill concerning customary law and customs of the communities must be send to the NHTL in order to make submissions (RSA, 2003, s 18 (1) (a)). This provision is also seen in section 39 (1) (a) of the TKLB. Therefore there is similarity with regard to this provision. The reason why TLGFA does not provide the role of the NHTL in details is that National House of Traditional Leaders Act, 2009 (Act No.22 of 2009) (NHTLA) provides in details the role of the NHTL. It would have been senseless to have two Acts of Parliament providing for the role of the NHTL.

However TKLB provides the role of the NHTL in details when compared to the way TLGFA prescribes. Section 36 of the TKLB prescribes the roles of NHTLas follows:

- (1) The duties of the National House are—
 - (a) to cooperate with the provincial houses, to promote—

- (i) the role of traditional and Khoi-San leadership within a democratic constitutional dispensation;
- (ii) nation building;
- (iii) peace, stability and cohesiveness of communities;
- (iv) the preservation of the moral fiber and regeneration of society;
- (v) the preservation of the culture and traditions of communities;
- (vi) socio-economic development and service delivery;
- (vii) the social well-being and welfare of communities; and
- (viii) the transformation and adaptation of customary law and customs so as to comply with the provisions of the Bill of Rights in the Constitution, in particular by—
 - (aa) preventing unfair discrimination;
 - (bb) promoting equality; and
 - (cc) seeking to progressively advance gender representation in the succession to traditional and Khoi-San leadership positions; and
- (b) to enhance co-operation between the National House and the various provincial houses with a view to address matters of common interest.

It must be noted that these duties are not provided in the TLGFA, but they are provided in section 11 (1) of the NHTLA. It is submitted that TKLB does not provide new roles of the NHTL but it echoes the roles of NHTL as provided in the NHTLA. This is also seen from the fact that once the TKLB becomes an Act of Parliament it will repeal, inter alia, NHTLA. This can be labelled as copying the previous roles of the NHTL from the NHTLA and pasting them TKLB. In other words, it can be called rearrangement of the roles of the NHTL by removing them from the one Act of Parliament to another.

The Provincial Houses of Traditional Leaders

The TLGFA does not provide the role of the Provincial Houses of Traditional Leaders (PHTL); instead it leaves this issue to the provinces to enact provincial legislation to deal with the establishment and the role of the PHTL within their areas of jurisdiction. It must be noted that both national and provincial legislatures have competence to legislate in the matters listed in schedule 4A of the Constitution. Customary law and indigenous law, among others, fall within the said schedule.

The TLGFA only provides for guidelines on what the provincial legislation must regulate. It instructs provincial legislatures to ensure that women are represented in the PHTL and also to be elected as representatives of the PHTL to the NHTL (RSA, 2003, s 3 (a) (i) and (ii)). Moreover, the TLGFA prescribes that the term of the PHTL must be in line with the term of the NHTL (RSA, 2003, s 3 (b)).

The TKLB provides for the same guidelines provided by TLGFA ensuring that women are represented in both PHTL and NHTL (RSA, 2015, s 49 (2) (a) and (b)). In nutshell both TLGFA and TKLB do not provide for the role of the PHTL. This means that the role of the PHTL is left to the provinces to enact provincial laws which will establish and prescribe the role of the PHTL.

The Local Houses of Traditional Leaders

The Constitution clearly stipulates that the national legislation may provide a role for traditional leadership as an institution at local level on matters affecting local communities (RSA, 1996, s 211 (1)). The national legislation contemplated by the Constitution is the TLGFA. Section 3 of the TLGFA provides the functions of local house of traditional leaders (LHTL) are as follows:

- (a) to advise the district municipality or metropolitan municipality:
 - (i) matters pertaining to customary law, customs, traditional leadership and the traditional communities within the district municipality or metropolitan municipality;
 - (ii) the development of planning frameworks that impact on traditional communities;
 - or
 - (iii) the development of by laws that impact on traditional communities.
- (b) to participate in local programmes that have the development of rural communities as an object; or
- (c) to participate in local initiatives that are aimed at monitoring, reviewing or evaluating government programmes in rural communities.

Section 3 (a) of the TLGFA provides that the LHTL is to advise district or metropolitan municipality whereas section 50 (6) (a) of the TKLB provides that the LHTL is to advise local municipality, district municipality or metropolitan municipality. There was an omission of the words 'local municipality' in section 3 (a) of the TLGFA. The exclusion of local municipalities from the advice of the LHTL may be that local municipalities are represented in district municipalities. By providing advice to district municipality will be covering all local municipalities within that district municipality. Despite been represented in the district municipality, a local municipality has its own municipal council and a right to govern its own territory. Therefore there is a need for local house of traditional leaders to provide advice to local municipalities. Cognizance to that omission, the TKLB extended the advice of the LHTL to the local municipality.

Conclusion

It is clear that the TKLB will face the same challenges face by TLGFA, because there are many similarities between the provisions of TLGFA and TKLB with regard to the role of traditional leaders. Unfortunately, the TKLB neither clarify nor spell out the roles of traditional leaders. The TKLB repeats the words of the TLGFA by stipulating that traditional leaders perform the functions in terms of customary law and customs and applicable legislation. These words are even seen in the provincial

legislation, such as LTLIA and ECTLGA. Neither the TKLB nor TLGFA explain what is the role of traditional leaders in terms of customary law and customs. Provincial laws also do not explain the role of traditional leaders in terms of customary law or customs. It must be noted that the Constitution, as the apex law in South Africa, serves as a limit on the role of traditional leaders in terms of customary law and customs. This means that the customary law and customs cannot confer a role to the traditional leaders which is now conferred to the democratic government by the Constitution.

It seems like the debate on the role of traditional leaders is not yet over because it is apparent that the TKLB will not address the demands of traditional leaders. The appeal of traditional leaders that the traditional councils should replace municipalities in their areas of jurisdiction will meet constitutional challenges. It appears that proposed amendment of the Constitution to allow traditional councils to replace municipalities in their areas will be against the spirit of the Constitution because governmental powers are for democratically elected government.

A notable change that will be brought by TKLB is that the LHTL will advise the local municipalities, along with district or metropolitan municipalities. As things stand, the TLGFA allows LHTL to advise district and metropolitan municipalities to the exclusion of local municipalities. Furthermore, the TKLB brings recognition of Khoi-San communities and their leaders in South Africa. This means that the Khoi-San leaders will be granted seats in the municipal councils of their areas of jurisdiction in terms of section 81 of the Municipal Structures Act 117 of 1998. It remains to be seen whether the Khoi-San leaders will use this opportunity to influence the decisions of the municipal councils in their areas of jurisdiction.

References

- Appellate Division of South Africa, 1921. *Van Breda and Others v Jacobs and Others*. 1921. AD. 330.
- Buthelezi, M. & Yeni, S., 2016. *Traditional Leadership in Democratic South Africa: Pitfalls and Prospects*. https://www.nelsonmandela.org/uploads/files/Land__law_and_leadership_-_paper_1.pdf .Accessed 08 November 2016.
- Constitutional Court of South Africa, 2003. *Alexkor Ltd and Another v Richtersveld Community and Others*, 2003. (12). BCLR .1301. (CC).
- Constitutional Court of South Africa, 2005. *Bhe and Others v Magistrate of Khayelitsha and Others*, 2005. (1). BCLR. 1. (CC).
- Constitutional Court of South Africa, 1996. *Certification of the Constitution of the Republic of South Africa*, 1996. (4). SA. 744. (CC).
- Constitutional Court of South Africa, 2008. *Shilubana and Others v Nwamitwa and Others*. 2008. (9). BCLR. 914. (CC).
- De Wet, P. 2012. *Chiefs lobby for power lost in apartheid transition*. www.mg.co.za/article/2012-05-11-chiefs-lobby-for-power-lost-in-apartheid-transition .Accessed 11 June 2016.
- Eastern Cape High Court, 2013. *Mbhashe Traditional leaders in Municipal Council v Mbhashe Local Municipality*. Unreported case no 1282/2012. (26 September 2013). (EHC).

Land & Accountability Research Centre, 2016. Traditional and Khoi-San Leadership Bill. <http://www.customcontested.co.za/laws-and-policies/national-traditional-affairs-bill/> .Accessed 07 November 2016.

Law, J. & Martin, E.A., (eds.) 2009. Oxford Dictionary of Law. Oxford University Press Inc. New York.

Mokgoro, Y., 1996. Traditional Authority and Democracy in the Interim South African Constitution. *Review of Constitutional Studies*, 3(1): 60-75.

Nicholson, C., 2006. A Critical Analysis of the Role of Traditional Leadership in Modern South African Law, *Fundamina*, 12 (1): 184-191.

Ntonzima, L. & Bayat, M.S., 2012. The Role of Traditional Leaders in South Africa: A Relic of the Past, or A Contemporary Reality? *Arabian Journal of Business and Management Review*, 1(6): 88-108.

Parliament of the Republic of South Africa, 2015. Insession Monthly magazine of the Parliament of the Republic of South Africa, 15(19). Parliament: Cape Town.

Republic of South Africa, 2005. Eastern Cape Traditional Leadership and Governance Act 4 of 2005: Pretoria: Government Printers.

Republic of South Africa, 2005. Limpopo Traditional Leadership and Institution Act 6 of 2005. Pretoria: Government Printers.

Republic of South Africa (RSA), 1998. Local Government: Municipal Structures Act 117 of 1998. Pretoria: Government Printers.

Republic of South Africa (RSA), 2000. Local Government: Municipal Systems Act 32 of 2000.

Republic of South Africa (RSA), 2009. National House of Traditional Leaders Act 22 of 2009. Pretoria: Government Printers.

Republic of South Africa (RSA), 1998. Recognition of Customary Marriages Act 120 of 1998. Pretoria: Government Printers.

Republic of South Africa (RSA), 1996. The Constitution of the Republic of South Africa, 1996. Pretoria: Government Printers.

Republic of South Africa (RSA), 1993. The Interim Constitution of the Republic of South Africa Act 200 of 1993. Pretoria: Government Printers.

Republic of South Africa (RSA), 2003. The White Paper on Traditional Leadership & Governance, 2003. Pretoria: Government Printers.

Republic of South Africa (RSA), 2015. Traditional Khoi-San Leadership Bill. Pretoria: Government Printers.

Republic of South Africa (RSA), 2003. Traditional Leadership and Governance Framework Act 41 of 2003. Pretoria: Government Printers.

Rugege, S., 2003. Traditional Leadership and its Future Role in Local Governance. *Law, Democracy & Development*, 7: 171-200

Sithole, P.& Mbele, T., 2008. Fifteen Year Review on Traditional Leadership. http://www.thepresidency.gov.za/docs/reports/15year_review/governance/traditional.pdf .Accessed 08 November 2016.

South African History Online, 2016. The role of traditional leaders during Apartheid. <http://www.sahistory.org.za/article/role-traditional-leaders-during-apartheid>. Accessed 30 October 2016.

Zuma, J.G., 2012. State of the Nation Address of 2012. <http://www.thepresidency.gov.za/pebble.asp?relid=6381> .Accessed 08 November 2016.