A LEGAL HISTORY OF TRADITIONAL LEADERSHIP

IN

SOUTH AFRICA, BOTSWANA AND LESOTHO

Thesis submitted in fulfilment of the requirements for the degree of Doctor of Laws in the Faculty of Law at the North-West University (Potchefstroom Campus)

BY

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DEDICATION

This thesis is dedicated to my mother Magret Keaboifa Khunou, my late brother Edwin Makgweng Khunou and late grandmother Nkoko Mpheka Kotsedi.

DECLARATION

I duly declare that this thesis for the Degree of Doctor of Laws at the North-West University (Potchefstroom Campus) hereby submitted has not previously been tendered by me for a degree at this institution or any other University. I further declare that this thesis is my own work in design, structure and execution and that all materials and sources contained herein have been acknowledged.

_____ _____

Khunou Samuel Freddy Date

Title: A LEGAL HISTORY OF TRADITIONAL LEADERSHIP IN SOUTH AFRICA, BOTSWANA AND LESOTHO

Keywords: Traditional leadership, Legal History of Traditional Leadership, Traditional Authorities, Traditional Courts, Male Succession, Polygamy, Patriarchy, Colonialism, *Apartheid*, Homeland System, Indirect rule, Democracy, *Constitution*, Transformation, Local Government, Legislation, Proclamation, Gender Equality, Land Administration, Traditional Communities, District Councils, Municipal Council.

Aim of the study: The main aim of the study is to examine and pursue research regarding the history and role of law in the disintegration of the institutions of traditional leadership in South Africa, Botswana and Lesotho in order to make recommendations regarding the challenges and opportunities facing traditional authorities in these countries. The traditional systems, roles and functions of these institutions are traced from the pre-colonial era up to the period of democratic regimes in these countries. This study is based on the premises that the jurisprudence of the institution of traditional leadership is as old as mankind and that this institution is rooted in the rural soil of African communities.

Research Methodology: This study is based on legal comparative research with reference to South Africa, Botswana and Lesotho. A literature survey of the most important sources dealing with history, legislation and policy documents was undertaken.

Conclusion and Recommendations: The institution of traditional leadership is one of the oldest traditional institutions of governance in South Africa, Botswana and Lesotho. During the pre-colonial era traditional authorities constituted an important component in the traditional system of the administration of the traditional community. Traditions placed a great amount of responsibility on traditional leaders to look after the best interests of their communities. When the colonial government took over the reigns of these three countries, they changed

the pre-colonial form and nature of traditional authorities. These colonial governments exercised control over traditional leaders and allowed minimum independence in their traditional rule.

The post-colonial governments of South Africa, Botswana and Lesotho retained the institution of traditional leadership. The *Constitutions* of these countries provide the legal framework for the recognition and functioning of the office of traditional leaders. However, it has been noted in this study that the relationship between the traditional leaders and the governments of these countries has been a mixture of conflict and cordiality. One of the reasons for this uneasy relationship between the traditional leaders and the central governments of these countries is that the status, authority, power and functions of traditional leaders have been reduced considerably when new institutions such as Local Governments, Land Boards, District Councils and Village District Councils were given powers and functions previously exercised by traditional leaders.

The post-colonial transformation of traditional leadership in these three countries has led to a steep decline in the authority of traditional leaders. In order to encourage active participation of the traditional leaders in the new democratic structures and bodies, the institution of traditional leadership must be adapted to the changing political, social and economic environments. Rural local government bodies and the national governments of these countries should not view the institutions of traditional leadership as competitors for political power. The post-colonial governments of South Africa, Botswana and Lesotho should introduce traditional leaders as equal partners in the development and advancement of rural communities. In order to achieve this goal the governments of these countries should empower and capacitate traditional leaders so that they do not become misfits in the new constitutional and democratic settlements.

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LIST OF ABBREVIATIONS

A

AC	African Council
ANC	African National Congress
AWB	Afrikaner Weerstands Beweging
AC	Annual Conference
AC	Arbitration Committee
AC	Assistant Commissioner
ANC	Assistant Native Commissioner
AG	Attorney General

B

BACP	Basotholand African Congress Party
BCP	Basotholand Congress Party
BNP	Basotholand National Party
BNC	Basotholand National Council
BPA	Basotholand Progressive Association
BPP	Bechuanaland People's Party
BPFP	Bechuanaland Progressive Federal Party
BP	Bechuanaland Protectorate
BCM	Black Conscious Movement
BPP	Black People's Party
BDF	Botswana Defence Force
BDP	Botswana Democratic Party
BDP	Botswana Independent Party
BLP	Botswana Labour Party
BLP	Botswana Liberal Party
BLR	Botswana Law Report

BNF	Botswana National Front
BPP	Botswana People's Party
BPU	Botswana Progressive Union
BB	British Bechuanaland
BBP	British Bechuanaland Protectorate
BSAC	British South African Company

C

CJC	Chief Justice of Colony
CP	Cape Province
CPC	Cape Provincial Council
CNC	Chief Native Commissioner
CTLA	Ciskei Traditional Leaders Association
CC	Colonial Commissioner
CG	Commandants General
CPSA	Communist Party of South Africa
COSATU	Congress of South African Trade Union
CONTRALESA	Congress of Traditional Leaders of South Africa
CP	Conservative Party
CA	Constitutional Assembly
CODESA	Convention for a Democratic South Africa
CS	Council Secretary

D

DI	Declaration of Intent
DJ	Department of Justice
DLA	Department of Land Affairs
DNA	Department of Native Affairs
DC	Deputy Commissioner
DC	Development Committees

DC	Disciplinary Hearing
DP	Dikwankwetla Party
DDC	District Development Committees
DDO	District Development Officer
DRC	Dutch Reform Church
DEIC	Dutch East Indian Company

E

EAC	European Advisory Council
EC	Executive Council

F

FC	Finance Committee
FC	Freedom Charter
FF	Freedom Front
FP	Freedom Party

G

GNU	Government of National Unity
GG	Governor General

H

HC	High Commissioner
HCT	High Commissioner of Territories
HC	House of Chiefs

I

IFP	Independence Freedom Party

ICU	Industrial Commercial Union
IFP	Inkatha Freedom Party
IC	Interim Constitution
INM	Inyandza National Movement
IPA	Interim Political Authority

J

J	Journal
JAC	Joint Advisory Council
JAL	Journal of African Law

K

KWAYCO	Kwandebele Youth Congress
KZP	Kwazulu Police

L

LP	Labour Party
LAC	Land Administration Committee
LPP	Lebowa People's Party
LA	Legislative Assembly
LC	Legislative Council
LLJ	Lesotho Law Journal
LLR	Lesotho Law Report
LG	Lieutenant–Governor
LLB	Lekhotla La Bafu
LLB	Lesedi La Botswana
LCD	Lesotho Congress for Democracy
LB	Local Branches
LMS	London Missionaries Society

M

MTFP	Marema Tlou Freedom Party
MTP	Marema Tlou Party
MDM	Mass Democratic Movement
MLES	Marxist-Leninist, Engels and Stalinist Movement
MP	Member of Parliament
MNC	Minister of Native Affairs
MMPR	Mixed Member Proportional Representation
MPNP	Multi Party Negotiating Process

N

NA	National Assembly
NC	National Convention
NC	National Council
NEC	National Executive Committee
NAFCOC	National Federal Chambers of Commerce
NF	National Front
NP	National Party
NPC	National Peace Conference
NAC	Native Advisory Council
NAD	Native Affairs Department
NC	Native Commissioner
NEC	Native Economic Commission
NHC	Native High Court
NLC	Native Land Commission
NPR	Native Parliamentary Representatives
NRC	Native Recruiting Corporation
NRC	Native Representative Council
NNP	New National Party

NGOs	Non Governmental Organisations
NR	Northern Rhodesia

O

OFS	Orange Free State

P

PAC	Pan Africanist Congress
PC	Political Council
PWV	Pretoria Witwatersrand Vereeniging
PV	Privy Council
PFP	Progressive Federal Party
PAJA	Promotion of Administrative Justice Act
PC	Provincial Council

R

RJ	Raad van Justitie
RC	Resident Commissioner
RM	Resident Magistrate
RN	Republic of Natal

S

SC	Security Council
SNA	Secretary for Native Affairs
SSCR	Secretary of State for Commonwealth Relations
SACP	South African Communist Party
SADF	South African Defence Force
SADT	South African Development Trust

SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SANNC	South African National Native Congress
SANC	South African Native Convention
SAP	South African Police
SAPR/PL	SA Publiekreg/South African Public Law
SATF	South African Trust Fund
SWA	South West Africa
SAYCO	South African Youth Congress
SADC	Southern African Development Community
SATSWA	Southern African Tswana Forum
SR	Southern Rhodesia
SQR	Status Quo Report
SC	Steering Committee
SCCSA	Swazi Council of Chiefs of South Africa

T

TARG	Traditional Authorities Research Group
TEC	Transitional Executive Council
TA	Transkei Assembly
TTLA	Transkei Traditional Leaders Association
TVL	Transvaal
TC	Tribal Councils
TP	Tricameral Parliament
TRC	Truth and Reconciliation Commission
THRH	Tydskrif vir Hedendaags Romeins-Hollandse Reg

U

USA	Union of South Africa
UAP	United Action Party

UDF	United Democratic Front
UNSC	United Nations Security Council
USP	United Socialist Party
USANP	United South African National Party

V

VIP	Venda Independent Party
VDC	Village Development Committee

W

WNLA	Witwatersrand Native Labour Association

Z

ZAR	Zuid - Afrikaanse Republiek

CHAPTER 1: INTRODUCTION

1.1 BACKGROUND

The position and role of traditional authorities in South Africa is controversial. Some people argue that they no longer have a role to play in a democratic dispensation. Sections 211 and 212 of the *Constitution*[1] however recognise a role and place for traditional leadership. The legal history of traditional leadership has not been written in South Africa and it might be that people's perceptions rest on a lack of historical knowledge. It seems that during the pre-colonial period the traditional institutions of governance and traditional leaders[2] in South Africa, Botswana and Lesotho played an indispensable role within their traditional communities. It is one of the oldest institutions in Africa. Traditional leaders were considered and viewed as the heads of their areas and the sole leaders of their people. They existed and enjoyed authority over their traditional communities and were respected by their communities.[3]

1.1.1 PRE-COLONIAL PERIOD

In the pre-colonial era traditional leaders and traditional authorities were important institutions, which gave effect to traditional life and played an essential role in the day-to-day administration of their areas and the lives of traditional people. The relationship between a traditional community and a traditional leader was very important. The normal functioning of the traditional community was the responsibility of the traditional authority. Pre-colonial traditional leadership was based on governance of the people where a

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[1] *Constitution of the Republic of South Africa*, 1996. Hereafter referred to as the 1996 *Constitution*. See 4.3.5 below.

[2] The words "traditional leader" were used differently to refer to a leader of a traditional community. A traditional leader was also known as Chief, *Kaptein*, traditional authority, *Kgosi*, *Inkosi*, *Hosi*, *Morena* etc. These names will be used interchangeably according to their historical context. The word black will also be used differently to refer to an African, Native and *Bantu*. A traditional leader was also known as African ruler, Native leader or *Bantu* leader. These names will be used interchangeably throughout this discussion.

[3] See 2.2 below.

traditional leader was accountable to his subjects. Tribal land was controlled by a traditional leader.[4]

1.1.2 COLONIALISM

The leadership monopoly of traditional leaders changed when the colonial administrators and rulers introduced their authorities on the other hand.[5] During the early period of colonial rule, the colonial government exercised minimal control over local administration at tribal level. The new changes and alien systems challenged the authority of traditional leaders. The colonial governors gradually enforced their power over traditional leaders and their communities. In so doing, it appeared that traditional leaders in traditional authorities' areas became second-class rulers of their subjects and subjects of the colonial masters. In South Africa, Botswana and Lesotho the system of indirect rule was introduced. Through this system, traditional leaders became agents of the colonial governments. These new political arrangements disrupted patterns of traditional leadership. The institution of traditional leaders seemed to be recognised and shaped by colonial governments to suit, adopt and promote the objectives and aims of their colonial strategies and missions.[6]

The colonial governments enacted a considerable number of legislative measures, which influenced the structure of the traditional leadership. This legislation seemed to interfere with the traditional institution of the traditional leadership. Due to the colonial policies and laws as well as the influence of missionaries, traditional communities were introduced to the principles of Christianity[7] and western civilisation. The institutions of traditional leadership, traditional courts and other indigenous institutions were gradually replaced and substituted by western structures and systems of administration.[8]

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[4] See 2.2, 5.4 and 8.2.7 below.
[5] Dutch settlers introduced their authorities at the Cape in 1652. The British followed them in 1795 and 1806 respectively. In Botswana colonial administration was introduced in 1885 to 1966. See 3, 6 and 9 below.
[6] See 3, 6 and 9 below.
[7] See 3.2.4, 6.2.8 and 8.2.6 below.
[8] See 3.4, 3.2.2, 6.2 and 9.5 below.

The pattern of the disintegration of traditional leadership seems to differ in South Africa, Botswana and Lesotho. In South Africa during the *apartheid*[9] era, for example, racial discrimination was legalised and institutionalised. As a result, the *apartheid* government created homelands[10] on the basis of language and culture of a particular ethnic group. Traditional authorities in these homelands seemed to be used by the *apartheid* regime and were no longer accountable to their communities, but to the *apartheid* regime.[11] In Lesotho and Botswana traditional authorities were not marginalized in the same manner.[12]

In addition to the forces of colonialism and *apartheid* (South Africa), other non-legal factors such as migration, Christianisation, urbanisation and industrialisation played a major role and contributed greatly towards the fragmentation of traditional authorities in South Africa, Botswana and Lesotho. These factors shook the pillars of traditional life and systems in these countries. With the discovery of gold and diamonds, many rural people in South Africa flocked to the cities and towns to seek employment. Both Lesotho and Botswana also experienced a massive exodus of migrant labourers to South Africa. This development interfered greatly with the traditional setup in these countries.

1.1.3 POST- COLONIALISM

In the post-colonial era, the 1993[13] and 1996[14] *Constitutions* of South Africa, the 1966 *Constitution* of Botswana[15] and both the 1966[16] and 1993[17]

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[9] See 3.5.1, 3.5.2 and 3.5.3 below.
[10] See 3.5.3 below.
[11] See 3.5.1, 3.5.2.1, 3.5.3.2 and 3.5.3.3 below.
[12] See 11.5 below.
[13] *Constitution of the Republic of South Africa* 200 of 1993. Hereafter referred to as the Interim *Constitution*.
[14] 1996 *Constitution*.
[15] *Constitution of the Republic of Botswana* 83 of 1966. Hereafter referred to as the 1966 *Constitution*.
[16] *Lesotho Independence Order* 1172 of 1966. Hereafter referred to as the 1966 *Constitution of the Kingdom of Lesotho*.
[17] *Lesotho Constitution Order* 5 of 1993. Hereafter referred to as the 1993 *Constitution of the Kingdom of Lesotho*.

Constitutions of Lesotho redefined the roles of the institutions of traditional leadership.

Post-colonial and post-constitutional legislation impacted on the structures of traditional authorities in South Africa, Botswana and Lesotho and seemingly made serious inroads in the institution of traditional leadership by altering the functions, which traditional leaders had during the colonial era. In Botswana, for example, and recently in South Africa, legislation was promulgated to introduce Land Boards and committees responsible for the allocation of land. This legislation seems to distort the independence and sovereignty of traditional leaders in rural communities.

1.1.4 DEMOCRATISATION OF TRADITIONAL LEADERSHIP

The post-colonial governments of South Africa, Botswana and Lesotho established democratic institutions in all levels of governments.[18] With the introduction of the democratic dispensation, traditional leaders were paired with the democratically elected representatives at local level.

In South Africa, traditional leaders more especially in the Province of Kwazulu-Natal challenged the process of democratisation. According to these leaders, democracy posed a threat to the existence of traditional authorities. However, the democratic government of South Africa argued that democratic processes of governance would increase participation and involvement of traditional leaders and their communities on matters of administration, particularly those closely related to traditional communities, traditions and customs.

In Botswana, traditional leaders worked with elected councillors and government officials in structures such as Land Boards, Village Development Councils, District Development Committees and District Councils.[19] Lesotho introduced similar local government structures to ensure procurement of

[18] See 4.3.2, 4.3.4, 4.5.2, 7.3.2, 7.3.3, 7.3.4 and 10.4.2.4 below.
[19] See 7.3.2, 7.3.3, 7.3.4 and 10.4.2.4 below.

service delivery to the people at local level. In as far as central governments in these countries are concerned, traditional leaders were excluded from active politics. In South Africa and Botswana, separate houses for traditional leadership have been created. For instance, in Botswana, traditional leaders deal with matters concerning their traditional communities and cultures in the House of Chiefs (now *Ntlo ya Dikgosi*)[20] while in South Africa they represent the aspirations of their communities in the Provincial Houses of Traditional Leaders and the National House of Traditional Leaders. In South Africa, traditional leaders still want to be assured that democracy at local level is not a threat. In Botswana, areas of conflicts between traditional leaders and elected representatives seemed not to be so rampant and acute.

1.2 AIM OF STUDY

The aim of the study is to investigate and analyse the history and role of law[21] in the disintegration of traditional leadership in South Africa, Botswana and Lesotho. Some recommendations regarding the challenges and opportunities facing traditional leaders within the post colonial legal framework in these countries are also made. The traditional systems, roles and functions of these institutions are traced from the pre-colonial era up to the period of democratic rule. This study is based on the premise that the jurisprudence of the institution of traditional leaders is as old as mankind and that this institution is rooted in the rural soil of African communities.

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[20] See 8.7.2 below.

[21] Legal history is the investigation of the internal legal history (material law) in the light of the external legal history (social, economic, political and philosophical considerations that influence the development of material law). See in this regard Van Zyl 1983 *THRHR* 1; Du Plessis 1992 *De Jure* 289-307. See also Kötz *Comparative Law* 48. History of law or legal history in general is concerned with the organic development in time of legal institutions. In context of this study it is apparent that legal history and comparative legal analysis are two sides of one coin. In this study the emphasis is on the legal history with reference to its influence on the internal legal history. This legal historical study is coupled with a legal comparative analysis as Heirbaut submitted that both legal history and comparative law expand beyond their own places and times, the difference only being one of orientation. Legal historians travel in time, whereas comparative legal scholars travel in space. This study demonstrates a connection between the legal history of traditional leaders in South Africa, Botswana and Lesotho and gives comparative perspectives and exposition of these three countries. See also Heirbaut 2005 *Fundamina* 136-153.

1.3 RESEARCH METHODOLOGY

This study is based both on the legal historical method with emphasis on the external history as well as on legal comparative research with reference to South Africa,[22] Botswana, and Lesotho. The study is based on a literature survey of the most important sources dealing with history,[23] legislation and policy documents. Sources of the pre-colonial era are based on oral history, which were probably written from the specific authors' perspectives. It is realised that with regard to the pre-colonial dispensation only interpretations of other peoples' views could be given. As the author grew up in a traditional authority area, some personal observations are also made.

In this study the pre-colonial, colonial and post-colonial legal history of South Africa will be analysed, after which Botswana and Lesotho will be discussed in the same manner in order to come to a conclusion and to make recommendations.

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[22] The South African colonial position is dealt with in more detail and may seem to be out of proportion to the rest of the discussion. However, it was during this period that vicious laws were introduced to curb traditional leadership in a much more extensive manner than in Botswana and Lesotho.

[23] The author referred to those external historical factors that influenced or impacted upon traditional leadership in South Africa, Botswana and Lesotho. In selecting historical details one may also tend to be biased. This is therefore a selection of external facts that according to the author had a major influence on traditional leadership. There may be others.

SECTION A: SOUTH AFRICA*

CHAPTER 2: PRE-COLONIAL SOUTH AFRICA

In this chapter an exposition is given regarding the nature and origin of traditional leadership in South Africa, whereafter the controversial debate on the hereditary nature of traditional leadership will be referred to. Discussion on the structures and memberships of different tribes will also be captured. The pre-colonial people of South Africa lived in an order regulated solely by customary law. This system evolved over the centuries to the needs of collective solidarity based on kingship. Furthermore, it will be shown in this chapter how the pre-colonial societies generated wealth and means of production. In terms of this system, property including land, livestock and crops, belonged to families as critical entitites to which individuals and their efforts, talents, creativities and lack of them belonged. Members of the pre-colonial communities co-existed and co-operated in their enjoyment of wealth. The pre-colonial roles and duties of traditional leaders in their communities with regard to traditional governance and the administration of justice will also be discussed.

2.1 ORIGIN AND NATURE OF TRADITIONAL LEADERSHIP

Pre-colonial South Africa was a mosaic of different cultural and linguistic communities. It consisted of different African population groups with different languages, cultures and traditions, which were governed by traditional and not elected leaders.[24]

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* I am inevitably indebted to Prof R Mqeke, Law Faculty (Rhodes University) for his comments, advice and recommendations pertaining to the section dealing with South Africa. However, I am solely responsible for omissions inherent in this discussion.

[24] Mireku 2002 *Speculum Juris* 91. When communities were still disorganised individuals who were more gifted in eloquence and skills in solving intricate problems in the community found themselves taking the leadership of a particular community. Naturally the sons of those in power took place of their forbearers but also for the community to prefer that the sons of those leaders should take the leadership. This is how traditional leaders came into being. It is evident therefore that such leaders were not elected. Suffice to conclude that they were natural leaders.

Koyana posited that there was a difference of opinion pertaining to the roots and origins of traditional leadership in these black groups of South Africa and elsewhere in Africa.[25] The origins of traditional leadership were linked with God. This was a belief which traditional leaders encouraged. According to Koyana, a link between God and traditional leaders was also noted in the report of the 1930 Native Economic Commission (NEC):[26]

> The hereditary chief is the link between the living and the dead. He is a high priest, and with certain tribes, he may become a god during his lifetime ... The reverence for the chief and his family is, therefore, a quality deeply ingrained in the Abantu.

Despite this theory, which explained the origin of traditional leaders in the light of God, Koyana explained that originally human beings were vagabonds. They originally inhabited caves and had no fixed abode. They lived under conditions, which dictated survival of the fittest.[27] People were scattered and not organized. As the population increased, there was need for regulation and organization. In view of this development, individuals came together for cooperation in order to improve the quality of their lives.[28]

Along these circumstances developed a theory of social contract[29] where individuals agreed to live together in harmony and peace. According to Koyana, those who could solve the intricate problems of those emerging communities became leaders. It is in this light that their populace perceived

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[25] Koyana *Chieftenship* 145.
[26] Koyana *Crucial Role of Traditional Leaders* 1.
[27] Koyana *Crucial Role of Traditional Leaders* 1. The idea of social contract originated from Locke and Hobbes. According to Hobbes the state of nature where men lived under the principle of survival of the fittest was a state of "war of all against all" and the life of human beings in this state was solitary, poor, nasty, brutish and short. He further said that the state of nature was completely devoid of justice and the categories of right and wrong did not apply because there was no sovereign power to impose law, which will define them. Distribution of property was regulated by the principle which says that: "every man that wish he can get: and for so long: as he can keep such property". To counter Hobbes' proposition, Locke attempted another re-interpretation of the state of nature. He described the state of nature as a state of perfect freedom and equality and not as one devoid of law or rights. He also argued that the state of nature provided human beings with natural rights to life, liberty and property. See in this regard Roederer and Moellendorf *Jurisprudence* 43-44.
[28] Koyana *Crucial Role of Traditional Leaders* 1; Ntloedibe *Role of Traditional Leaders* 2.
[29] Koyana *Crucial Role of Traditional Leaders* 1- 2.

them as natural leaders as they shared in the pleasures and woes of their people.[30]

Ntloedibe expressed Koyana's sentiment when he stated that in the original pre-colonial societies, traditional leaders did not come into existence as rulers.[31] They emerged as leaders, often during crisis such as war or natural disaster. In other words, they earned their leadership positions by some distinctive and unique participation and service in the community. In return communities appreciated and acknowledged their efforts by accepting them as their leaders. According to Ntloedibe, it was this type of traditional leadership that became titled offices of headmen, chiefs and kings.[32]

A point of great significance is the fact that it was the people who "made" a traditional leader a leader. This is so because when people accepted a person as a leader, they in turn countenance his leadership. Ntloedibe asserted that it was a fact of great importance in that it informed the handling of power and laid the roots of consensus and participatory democracy in pre-colonial societies.[33] Hence, Ntloedibe explained that democracy derived from and grew out of ordinary customary rule of the community.[34] Traditional leaders knew that the fate of leadership depended entirely on the support and the will of their people. Any traditional leader who undermined the wishes and aspirations of his people ran the risk of the security of his position.[35] As a

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[30] Koyana *Crucial Role of Traditional Leaders* 1.

[31] Ntloedibe *Role of Traditional Leaders* 2.

[32] Ntloedibe *Role of Traditional Leaders* 2. It seems that scholars of Southern Africa disagree as to whether these pre-colonial rulers should be referred to as "Chiefs", "Kings" or "princes". Since "King" implies no one sovereign above him, the Tswana term kgosi, is perhaps best translated as King when referring to the ruler in the pre-colonial era. For more information regarding *kgosi*, see 5.2, 5.3, 5.4, 5.5 and 5.6 below.

[33] Ntloedibe Role of Traditional Leaders 2. In theory, argued Ntloedibe, a traditional leader had absolute power to carry out the people's will. However, in practice traditional leaders were more or less democratic in a sense that a will of a man whether a traditional leader or headman rarely determined the fate of those societies. Members of the pre-colonial communities, especially male adults participated in the governance of the tribe. For instance they took part in the proceedings of the tribal parliament, courts and councils.

[34] Ntloedibe *Role of Traditonal Leaders* 2.

[35] Dlamini 2002 *Speculum Juris* 29-30. See also Van Tromp *Xhosa Law* 8. The fear that he may lose some of his subjects had a great effect on the actions of a traditional leader. If he committed a crime or a breach he will be resented by his people, his punishment might be tribal disintergration. His dissatisfied people might leave him and join the ranks of another traditional leader. According to Van Tromp this is actually what happened to a portion of

consequence, a traditional leader had to respect the will of the people and knew that if he abused his power the likelihood was that he might be deposed.[36]

Law was regarded by the members of the traditional community as binding on both traditional leaders and subjects alike.[37] Dlamini further explained that a traditional leader is the one who passed laws, judged with the consent of his Council and took action through the tribes' members.[38] This philosophic approach is confirmed in Tswana adage, which says *Kgosi ke kgosi ka morafe*.[39] He also ruled in terms of customary law and practice.[40]

In the light of the above assertion and reasoning, it is argued that a notion of hereditary leadership was created[41] and preferred when the sons of those in power wished to take place of their forebearers.[42] On the other hand, the communities reinforced this notion when they preferred and accepted the sons and grandsons of those who proved themselves to be capable leaders in difficult times, to take the lead. This is how traditional leaders became hereditary.[43]

Ngqika's tribe, when Chief Ngqika took Tutula, the wife of his uncle Ndlambe, as his wife. For being the wife of his uncle, she was considered to be his 'mother' because an uncle was considered also to be a 'father'.

[36] Dlamini 2002 *Speculum Juris* 29-30.

[37] Dlamini *African Legal Philosophy* 7.

[38] Dlamini *African Legal Philosophy* 7.

[39] This Tswana phrase implies that a traditional leader is a traditional leader by virtue of tribe.

[40] November and Wessels 2002 *J for Contemporary History* 141.

[41] See in this regard *Siqcau v Siqcau* 1944 AD 67 where the court dealt with a dispute as to who the rightful heir is to the property and chieftainship of the Great House of the Paramount Chief of Eastern Pondoland. The late Chief Madlonke died in 1938 and after his death two rival claimants Nelson Siqcau and Botha Siqcau appeared and each of them claimed both the chieftainship and property. Watermeyer stated that traditional leadership is not hereditary and the government in making an appointment of a traditional leader is not bound to appoint the man who will be a Chief according to native custom. In *Ratsialingwa and Another v Sibasa* 1948 (3) SA 781 (A) the court stated that the statutory power to depose Chiefs implies that on deposition a Chief lost his legal status as a Chief and therefore his legal status become that of a common tribesman. The court went on to say that in customary law, succession to the position of chieftainship is not governed by the rules of customary law and is therefore not hereditary. The court concluded that succession to the hereditary chieftainship does not depend solely upon birth, the person having the best claim on grounds of birth may be passed over in favour of another who is regarded as the most suitable.

[42] Koyana 2002 *Speculum Juris* 145.

[43] Koyana 2002 *Speculum Juris* 145.

Koyana also asserted that headmanship was initially not hereditary[44] but was merely an aspect of political organisation among the people. Headmanship was a means to an end and that end was orderly governance at the discretion of the powers to be. It owed its status and position to the will of the traditional leaders or the hierarchy of leaders at a given time. Koyana illustrated this when he said that:[45]

> District chiefs, like Paramount (Chief) had under them subordinates, head-men, nearly or distantly related or not related at all, and where they were strong enough they supplanted all except near relatives with sons of their own.

In view of the above, it seems that headmanship was never meant to be hereditary. However, headmen's sons began to take their fathers' positions when they die. When this practice was repeated, the impression was created that headmanship was hereditary. Sons of headmen again in their own personal interest perpetuated the myth that headmanship was hereditary.[46]

November and Wessels maintained that traditional leadership was hereditary and based their premise on the Tswana proverb *Kgosi ke Kgosi ka e tsetswe.*[47] However, they explained that the rules of succession differed from tribe to tribe. They further argued that in the case of the Nguni, Sotho and Venda communities, traditional leadership normally passed from father to son, with the rightful heir being the eldest son of the traditional leader's great wife. In terms of the Shangaan-Tsonga rule of succession, the traditional leadership is passed to his brothers. Only when the last brother had died, succession returned to the sons of the eldest son. In a situation where a direct heir could not be found, the male family member next in order of seniority

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[44] In *Ndisiro v Mbanderu Community Authority* 1986 (2) SA 532 (SWA) the court declared that the administrator may recognise or appoint any person as a Chief or headman in charge of a tribe or a location or a native reserve. The words "any person" confirmed that the position of a Chief or headman is not hereditary. Any person who is a choice of the Administrator could become a Chief.

[45] Koyana 2002 *Speculum Juris* 154-155.

[46] Koyana 2002 *Speculum Juris* 155.

[47] The above Tswana proverb literally means that a traditional leader is a leader by virtue of birth. The adage perpetuates the myth that traditional leadership is hereditary.

succeeded a traditional leader. It seems that November and Wessels explanation is based on the principle of male primogeniture.[48]

According to Dlamini, the rules of succession[49] to traditional leadership and inheritance of property were not unfair discrimination.[50] Even the male child who was not the eldest son was not entitled to succeed his father as long as the eldest son was still alive and capable to discharge his duties.[51] The eldest son was required to step in the shoes of his father and under the customary obligation, to continue his life after him. Dlamini argued further that women were excluded from succession because they were expected to get married.[52] The fear being that once they were married, traditional leadership would be transferred to their in-laws. The idea was to secure and retain leadership in the royal family. Even sons of traditional leaders especially the eldest ones were encouraged to marry in royal families.[53] Women could, however, under certain exceptional circumstances act as regents for and on behalf of their minor children.[54]

An exception to the general rule of male succession was evident among the Lubedu people, where a traditional leader always had to be a woman. However, it was generally acknowledged among the Lubedu people that a woman was regarded as male for social purposes, therefore she was required by custom to marry wives.[55] In view of the above discussion, it may be derived that a traditional leader is a person who inherits his leadership position from

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[48] November and Wessels 2002 *J for Contemporary History* 1.

[49] Seymour *Native law* 176. In case of succesSon to property or traditional leadership, where the eldest son has predeceased the head of the family leaving no male issue, the second son becomes the heir and if he too has precedeased the head of the family, the third son is the heir and so on through all the sons of the family. Where the family head died without male issue then his father succeeds. When the family head's father has predeceased him, then the eldest brother of the family head or one of his descendants becomes the heir.

[50] See *Mthembu v Letsela and Another* 1997 (2) SA 936 (TPD) where Le Roux J stated that there are instances where a rule of intestate succession differentiates between men and women but which no right-minded person considers to be unfairly discriminatory. The court in *Letsela and Another v Mthembu* 2000 (3) SA 867 (SCA) went further to say that to strike down customary rule of succession would be to dismiss an African institution without examining its essential purpose and content.

[51] Dlamini 2002 *Speculum Juris* 39.

[52] Dlamini 2002 *Speculum Juris* 39.

[53] Dlamini 2002 *Speculum Juris* 39.

[54] November and Wessels 2002 *J for Contemporary History* 141.

[55] November and Wessels 2002 *J for Contemporary History* 141.

his father or appointed to such position according to the customs and tradition of the tribe.

2.2 POLITICAL MORPHOLOGY OF TRIBES

Traditionally, pre-colonial societies in South Africa and elsewhere in Africa consisted of tribes. Wylie pointed out that the pre-colonial traditional governments had an identical factor, which was common to all the tribes. This factor was that each tribe had a traditional leader.[56] The leader of each tribe was therefore said to be a member of the royal family. According to Balatseng and Van der Walt[57], there was no recorded instance where a traditional leader of a tribe was a commoner during the pre-colonial South Africa. However, abundant evidence shows that commoners used to become headmen of wards in many tribes. Similarly it was previously argued that initially no 'royal' family existed and it was a strong leader who became the traditional leader and was later regarded as 'royal'.[58]

Each tribe had its own name, which usually derived from its traditional founder or some former traditional leader. But sometimes the name of a tribe derived from a totem of the royal family.[59] Schapera stated that the name of a tribe sometimes but not usually originated from a historical incident.[60] The first determining factor of the membership of a tribe[61] was firstly descent as a man normally belonged to the same tribe as his father and in most cases remained there for life. Membership of a tribe was increased in many ways. For instance, alien groups were sometimes annexed by force or submitted voluntarily when another tribe invaded their land. Sometimes alien groups joined the tribe as refugees from an invading enemy or after running away

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[56] Wylie *Little God* 1.
[57] Balatseng and Van der Walt *History of the Traditional Authorities* 1.
[58] See 2.1 above.
[59] Balatseng and Van der Walt *History of the Traditional Authorities* 1.
[60] Schapera *The Tswana* 34-35.
[61] In *S v Bhoolia* 1970 (4) SA 692 (A) the court stated that the natural meaning of membership of a tribe is membership by blood or descent. See also *Masenya v Seleka Tribal Authority and Another* 1981 (1) SA 522 (TPD) where the court declared that tribal custom empowers the Chief after consultation with his Tribal Council to order a member of a tribe to quit tribal land. This decision suggests that membership of tribe can be forfeited.

from their own tribe as a result of internal dispute.[62] Hammond-Tooke commented:[63]

> Tribal government differs from all other political forms in that the territorial basis is not sharply defined. In its memory sense such tribe is a community organised on the basis of kinship ... and usually claiming to be descended from a common ancestor.

Hammond-Tooke further explained that kinship authority differed fundamentally from territorial authority. Kinship authority was exercised only over kinsmen while political authority was effected and directed to all the members of the community irrespective of their kinship status and links. Membership of the tribe was also acquired through an act of loyalty to traditional leader. Membership of individuals was also confirmed by granting a new member permission to settle on land under the control of a particular leader. In return, a traditional leader reciprocated by providing members of his tribe protection and supplying them with food material at the times of famine.[64]

He forged political links and social bonds with members of the tribe through a system of *ngoma*.[65] The *ngoma* transaction was regarded as being between a traditional leader and his subjects. Its purpose was to make those who were destitute economically independent.[66]

According to Letsoalo, the core members of the tribe were related through common ancestors.[67] A traditional leader was a central figure in the tribe, which was usually associated with ancestors. In other words, a traditional leader was a connection between the tribe and its ancestors. Hence, a traditional leader was regarded as the highest authority in the territory and his

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[62] Schapera *The Tswana* 34-35.
[63] Hammond-Tooke 1985 *J of Southern Africa Studies* 310.
[64] Hammond-Tooke 1985 *J of Southern Africa Studies* 310.
[65] *Ngoma* is a Nguni term which literally refers to custom of the traditional contract or transaction where the destitute were given cattle by the rich or traditional leader to look after them and in return benefit from their milk and even inherit their offsprings.
[66] Hammond-Tooke 1985 *J of Southern African Studies* 311-312.
[67] Letsoalo *Land Reform* 18.

subjects always accorded him special veneration.[68] There is a Tswana proverb, which says *Kgosi ke Modingwana ga e sejwe.*[69] However, Wylie emphasised that it is significant to note that this Tswana adage did not necessarily imply that a traditional leader was the most feared person in the community.[70] As indicated above, he did not perform his various functions as an autonomous individual but with a traditional council that represented people.

Ntloedibe indicated that traditional leaders played a crucial role as spiritual leaders of their respective tribes. It was in this capacity that they served as a network between the dead traditional leaders of their nation and the living. They mediated and communed with the royal ancestral spirits on behalf of their tribes. They were regarded as spiritual media through which the royal ancestral spirits communicated with the tribe. For this reason, traditional leaders were expected to perform ceremonies and rituals of cultural importance involving the security and the material well-being of their tribes. They led their tribes in prayer in times of disaster such as drought, floods, storm and other natural disastrous occurrences.[71]

Traditional leaders enjoyed limited and undefined powers over their tribes or communities.[72] The administration of the tribe was in the hands of the traditional leader who was usually assisted by headmen and other functionaries. His advisers and more generally his Council assisted him in the execution of his duties. The participation of these traditional structures in the tribal government often limited the powers of a traditional leader.[73] The powers of the traditional leader were also limited by the existence of the advisers and generally the devolution of the authority to the regional and local

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[68] In *Mamogale en Andere v Minister van Naturellesake* 1960 (3) SA 414 (TPD) the court declared that at native law a tribe cannot exist or cohere without a Chief.

[69] Wylie *Little God* 1. This Tswana proverb means that a traditional leader is a little God and nothing evil should be said about him. It should be clearly understood that by referring a traditional leader to a "little God", it does not necessarily mean that he was God in a real sense. It is just that the amount of respect given to him was so affectionately exaggerated to a point of him being called a little God.

[70] Wylie *Little God* 1.

[71] Ntloedibe *Role of Traditional Leaders* 3.

[72] Sharma *Role of Customary Courts* 6-7.

[73] Dlamini *African Legal Philosophy* 5.

headmen.[74] It is therefore argued that the pre-colonial governments had evolved mechanisms to control absolutism and political tyranny.

Matlapeng indicated that not only the traditional leader but also traditional structures of authority such as the Council and advisers were collectively accountable to the people for their functions and obligations. It was through these traditional structures of authority that community members were encouraged to participate in the governance of the tribe.[75] Hence Dlamini concluded that:[76]

> All these as well as the intangible but effective factor of public opinion serve to protect law and custom by controlling the arrogation of royal power.

Elias put it by emphasising that there were a few cases in which traditional form of rule could in strict sense be described as authoritarian. In support of this assertion, Elias cited authoritarianism of the former military empire of King Shaka of the Zulus.[77]

However, both Leach and Elias agreed with Dlamini that there were mechanisms in the pre-colonial societies in which popular uprising would dislodge a dictator. For instance, the subjects could threaten to actually

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[74] Dlamini *African Legal Philosophy* 7.
[75] Matlapeng *Traditional Authorities* 2.
[76] Dlamini *African Legal Philosophy* 7.
[77] Elias *Nature of African Law* 22. Leach also submitted that there were factors, which ascribed to the type of dictatorship, which manifested itself in Shaka. He said Shaka and his mother, Nandi suffered personal humiliation in the early years and worries Shaka regularly received over the smallness of his penis made him to be vengeful. See in this regard Leach *South Africa* 27. The fact that Shaka led an unhappy and difficult early life where he was brought up away from his father's home and was always taunted and harassed by his playmates contributed to his sense of dictatorship. As a result, he showed a high degree of courage, intelligence and qualities accompanied by arrogance and indifference to human suffering. History described Shaka as a man who was ruthless and merciless. For these reasons when Shaka became an important figure he wanted to prove that he was the Greatest General, hence he became a brutal dictator. The dictatorship of Shaka and brute character became evident when his mother, Nandi died. After the death of his mother Shaka proclaimed national mourning for a whole year. Women were not allowed to cohabit with men during the period of mourning. Women who became pregnant during that time were put to death. The nation was also not allowed to drink milk for a period of three months. Those who were not mourning or not mourning adequately were killed. If these historical reports are correct, it goes without saying that a despotic king ruled the Zulu kingdom.

withdraw their support from such a dictator. In some severe circumstances a traditional leader might be assassinated. For example, Shaka was killed by his brother as a means of disapproving his dictatorship.[78] There was no room for demagogue or incompetency in the office of traditional leadership.[79]

In as far as land tenure was concerned, each tribe in the pre-colonial South Africa possessed a piece of land, which was controlled by a traditional leader for and on behalf of a tribe. The traditional leader was a custodian of communal or tribal land and allocated it to tribesmen for ploughing, grazing or residential purposes.[80] Granting of allegiance to a traditional leader was regarded by the Nguni people as a duty in return for protection and land.[81] The subjects executed different forms of tribute labour including participation in hunting, agricultural labour and communal labour they performed in the fields of a traditional leader. Traditional leaders were also entitled to tributes in form of trade goods, hides, the products of a hunt among others.[82] Guy proclaimed that a traditional leader could also be given tribute in the form of unmarried women, daughters and cattle. Such a tribute was a recognition given to the traditional leader for his protection, political allegiance, settlement of disputes and other political and judicial interventions on behalf of his subjects.[83]

The tribe as a social group was united under a traditional leader. As highlighted above, it was in this regard that the tribe was bound by allegiance to a traditional leader by considering him as both father and son. The traditional leader was therefore responsible for the common good.[84]

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[78] Keane *Boer States* 106.
[79] Elias *Nature of African Law* 22.
[80] Sharma *Role of Customary Courts* 6-7.
[81] November and Wessels 2002 *J for Contemporary History* 141. It was in this light that in a case of the Venda, Northern Sotho and Tshonga, a traditional leader was elevated to an almost godlike eminence. On the contrary, in other tribes such as Batswana a traditional leader was far more approachable even though he was treated with a high degree of veneration.
[82] November and Wessels 2002 *J for Contemporary History* 141.
[83] Guy 1985 *J of Southern African Studies* 27.
[84] Letsoalo *Land Reform* 18.

In the pre-colonial South African societies, traditional leaders were symbols of perfect unity and strength of their tribes. It is also argued that their military roles were crucial and critical to the survival and strength of the tribe. Normally a traditional leader was not allowed to participate actively in the wars. The rationale for that was to prevent enemies from capturing him. If the enemy captured a traditional leader he would be killed and parts of his body would be cut in order to concoct lethal medicine to destroy his tribe.[85]

2.3 WEALTH AND MEANS OF PRODUCTION

Leach explained that the centre of family life among pre-colonial black people was the kraal.[86] This kraal was an enclosure, which consisted of the several huts for the head of the family, his wife or wives in case of polygamous marriages and children. Every member of the family was the owner of the property through the head of the family.[87] Traditionally the head of the kraal, which included several other relatives, was the husband or his eldest son in

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[85] Ntloedibe *Role of Traditional Leaders* 33.

[86] Leach *South Africa* 24.

[87] The legal position of the head of the family was illustrated in the case of *Sijila v Masumba* 1937 NAC (N and T) 121. The court said that although the head of the family is the legal owner of the family estate his ownership was burdened by personal rights. The court went on to emphasise the issue of considerable restraint on the head of the family in regard to his management of the estate in his life time, for customary law looks to him as the father of the family rather than the owner of the estate. See *Mpungose v Mpungose* 1946 NAC (T and N) 31, where the court stated that the African social system regards the family as a whole and all members of the family to participate in its possessions. The head of the family is virtually a trustee or director of the family's possessions and not necessary the owner. In *Nosentyi v Makonza* 1900 Henkel 37, the court dealt with a matter concerning a widow who sued the heir of her deceased husband for maintenance and support in cases where he abandoned his duties. The court said that every widow has a right of action unassisted against the guardian of her late husband's estate to protect herself, her children and property from improper administration by the heir. The principle laid down in this case is not contrary to the spirit of customary law, which allows the woman to complain to the guardian or to her deceased husband's brothers who will take up the case to the family, and finally to the traditional leader who will see that justice prevails. See also *Bhe and Others v Magistrate Khayalitsha and Others* 2004 (1) BCLR 27 (CC) where the court said that every member of the family is the owner through the head of the family. The court noted that ownership by the family head is akin to trusteeship as regards immovable property under communal ownership. This mode of ownership in this context is tolerated under such conditions in a traditional community. The court did, however, pointed out that the customary law mode of ownership is not suitable in an urban environment where property is privately owned. This proposition of the Constitutional Court was taken further by section 2 of the *Repeal of the Black Administration Act and Amendment of Certain Laws Act* 28 of 2005 which provides that in respect of the property belonging to a minor governed by the priciples of customary law, the Master of the Higher Court has jurisdiction over the property.

case he was dead.[88] These types of families were normally called extended families. It is also important to note in this regard that members of traditional communities were subsistence economists.

In the pre-colonial societies of South Africa, the economy was based on the accumulation of cattle. The wealth of a traditional leader and his subjects were cattle and the control of trade. There was a strong belief that cattle were the most important source of subsistence products, for example milk, dung for making fire and for leather and meat.[89] Traditional life was characterised by division of labour. For instance, heading of cattle and hunting of other animals were the responsibilities of men while women were obligated to till the fields. Here the most preferred crops were maize and sorghum. Boys looked after the cattle, sheep and goats and girls performed household chores, for example cooking and cleaning. As Guy noted, a division of labour, which was determined amongst other things, by sex, age and gender, characterized the homestead activities.[90]

Cattle were also viewed as the most important form of *bogadi.*[91] Therefore, individual wealth was assessed in the light of the number of cattle a person possessed. It was for that reason that a man's number of wives and daughters determined the number of cattle he could obtain.[92] According to Wilson, the Tswana, Pedi and Southern Sotho preferred cousin marriages so that they could keep cattle in the hands of one lineage or two related lineages.[93] Hence, Motswana always says *Ngwana wa Malome nnyale di boele sakeng.*[94]

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[88] Leach *South Africa* 24. Traditionally the eldest son of the first married wife or one of his descendants was the sole heir of the deceased kraalhead. If there are no sons in the house of the first wife then the eldest son of the second wife became the sole heir and so on. See in this regard Bekker *Seymour's Native Law* 177.

[89] Guy 1985 *J of Southern African Studies* 19-20.

[90] Guy 1985 *J of Southern African Studies* 21.

[91] *Bogadi* is a Tswana word, which literally means or refers to dowry. The bride family normally paid this bogadi to the bridegroom family in the form of cattle.

[92] Guy 1985 *J of Southern African Studies* 19-20.

[93] Wilson 1971–1972 *Botswana Notes and Records* 71.

[94] Literally meaning that one was encouraged to marry a daughter of his junior maternal uncle so that the cattle should be retained in the clan family.

This proverb, as Wilson observed, demonstrates the fact that the advantage of keeping wealth in the lineage was recognised and observed in pre-colonial societies.[95] Contrary to the Tswana and both Northern and Southern Sotho speaking people, the pre-colonial Nguni societies insisted on a system of clan exogamy. It was under this system that the cattle were widely spread through the intermarrying community.[96]

It was also observed by Wilson that the system of polygamy and marriage with cattle contributed to the large concentration of dominant lineages in pre-colonial black societies. It was through polygamous marriage that a rich man, usually a traditional leader, could marry many wives and begot many children. As a result, lineages spread faster among the Nguni than those of the San hunters or Sotho speakers who cultivated and hunted because they lost their stock or never owned cattle.[97]

The main aim was to ensure that the female partner in a polygamous marriage was regarded as a wife and not merely a mistress without any status. It was for this reason that polygamous marriages in pre-colonial societies elevated the status of women as supposed to lifelong spinsterhood. It is important to note that women were not forced into the polygamous marriages but it was their choices to do so. As a result, the continued existence of polygamy meant that there were women who were prepared to be part of it.[98]

In almost all pre-colonial societies of South Africa, production of wealth manifested itself in the homestead and its environs. The homestead was under the helmet of the male person who was usually a father or a husband. The head of the homestead discharged supervisory functions. Homestead

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[95] Wilson 1971–1972 *Botswana Notes and Records* 71.
[96] Wilson 1971-72 *Botswana Notes and Records* 71.
[97] Wilson 1971-72 *Botswana Notes and Records* 71. The policy rationale behind polygamy was not necessarily to put a man in a position to have sex with many women. Normally rich men married so many wives in order to take care of them and their children. That is why it was rare to find a poor man marrying many wives. Polygamous marriage was an institution of support, poverty alleviation and group solidarity.
[98] Dlamini 2002 *Speculum Juris* 41.

labour was used to generate and produce the means of subsistence upon which the whole family was entirely dependent. A traditional leader exercised external powers and authority over homesteads as they were politically linked. The aggregations of these homesteads were grouped together to form polities. As already highlighted above,[99] individual subjects were expected to owe their allegiance to a traditional leader who placed them under his legal jurisdiction. These subjects were to perform certain duties for the development and advancement of the chiefdom.[100]

In as far as settlement patterns and kinship structures of the Sotho and Nguni were concerned, the two groups differed radically. According to Wilson the pre-colonial Sotho were congregated in villages while the Nguni were scattered.[101] It appeared that the large military villages of the Zulu, Ndebele and Swazi were temporary phenomena and as a result did not last many years. The Sotho speakers lived in large settlements. For instance, the early 19th century Kaditshwene had 13000–16000 inhabitants, Dithakong 10000–15000 and Phitshane in the country today known as Botswana, had up to 20000 inhabitants. Large settlements were attributed to the wealth of the traditional leaders of the Tswana, Pedi and Southern Sotho.[102]

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[99] See 2.2 above.

[100] Guy 1985 *J of Southern African Studies* 27. These duties included inter alia, policing and military functions. Guy shared the same sentiments with Hammond-Tooke mentioned above that in return subjects were given lands to establish homesteads and establish their families.

[101] Wilson 1971-72 *Botswana Notes and Records* 71.

[102] Wilson 1971-72 *Botswana Notes and Records* 71. Wilson explained that the Nguni people mainly the Xhoza and Zulu inhabited the territories formally known as Transkei and Natal in the sixteenth century. He also noted that in almost the same time the Sotho speakers were iron and copper workers while the Nama lived along the lower reaches of what is now Free State Province of South Africa and obtained metal from the Rolong near the place in what is today called Kuruman. Consequently, Wilson suggested that the copper which Da Gama saw being sold at the coast, north of territory now known as Maputo in 1498, probably came from the Sotho speakers. Wilson further held a view that perhaps such a copper came from the mines near the modern Messinah in the present Limpopo province of South Africa. Of great significance is the fact that pre-colonial mining project created wealth for pre-modern black societies of South Africa. In support of this argument that large settlements created wealth for the traditional leaders, Wilson quoted the French missionary, Casalis saying that: "the people lived almost exclusively on the milk of their chief's cows and the population of the town increased at the same rate as the number of the cattle, which the Chief had at his disposal. It was the wealth, generosity and authority of a Chief, which held the people together, his poverty, stinginess that caused them to scatter".

The regimental groups were organised to protect and defend the wealth of traditional leaders and the tribe at large. This regimental system was based on the development of *Amabotho* in Sesotho and *Mephato* in Setswana. The regimental groups were made up of young men who were organised according to age and physical development. These groups performed certain duties in the village and rendered services to the traditional leader. Their duties included, *inter alia*, military functions and protection of the chiefdom. Guy also noted that the regiments played a distinctive role in the rise of chiefly power.[103]

2.4 ADMINISTRATION OF JUSTICE

According to Ntloedibe, the most important institutions, which were responsible for the administration of justice during pre-colonial South Africa, were traditional courts.[104] It is of great significance to mention that pre-colonial traditional courts were deeply rooted and embedded in the inner systems of indigenous culture and religion of the traditional societies. In this regard, Ntloedibe stated that the powers, duties, actions and obligations of traditional leaders were tried into the inner chambers of custom and culture that became synonymous with the principle of *ubuntu*.[105] At the centre of the whole concept

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[103] Guy 1985 *J of Southern African Studies* 31-32.

[104] Ntloedibe *Role of Traditional Leaders* 3-4.

[105] Ntloedibe *Role of Traditional Leaders* 3-4. In *S v Makwanyane and Another* 1995 (3) SA 391 (CC), the court described *ubuntu* as the source of the communal tradition. The court also considered it important to recognise African values. One such value was the value of ubuntu. According to Mokgoro J, *ubuntu* translates into humanness, personhood and morality and envelopes the key values of group solidarity, compassion, respect, human dignity and collective unity. The court stated that the need for *ubuntu* expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women, the joy of and the fulfilment involved in recognising their innate humanity, the reciprocity this generates in interaction within the collective community, the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve. The court in *S v Williams* 1995 (3) SA 656 (CC) also touched on the fundamental principles of *ubuntu* when it dealt with the question regarding the constitutionality of corporal punishment. The court stated that the deliberate infliction of pain with a cane on a tender part of the body as well as the institutionalised nature of the procedure involves cruelty in the system that functions it. The court went further to point out that corporal punishment offends contemporary concepts of decency and human dignity and precepts of civilisation which society professes to possess. It is clear that the notion of *ubuntu* rejects all forms of inhuman, cruel and degrading punishment.

of *ubuntu* was the belief that no person was an island. The Nguni aphorism, which captured this, was that *umuntu ngumuntu ngabantu.*[106]

The traditional courts differed from one place to another. Traditional leaders served in these courts as supreme judges and acted with the advice of their executive Councils. Jobodwana further pointed out that in traditional South African societies, the idea of separation of powers was an alien concept. This means that the separation of the entire judiciary from the traditional executive and parliament was completely unknown to traditional leaders and their subjects.[107]

It is important to note that lack of separation of powers did not mean that traditional leaders were not impartial because they were part of the executive arm of government. This was so because the judicial process was mainly aimed at mediation and reconciliation rather than categorically finding for or against a litigant. This procedure worked well in predominantly traditional societies with subsistence economies. According to Bekker, as far as it could be ascertained, no serious irregularities or harmful practices have occurred in pre-colonial societies.[108] Bekker analysed this matter and concluded that:[109]

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[106] This Nguni adage means that a person is a person because of other persons and how he relates to them. People in traditional communities related to each other in many ways. That is why people were unlikely to act arbitrary against one another. People knew that they have a moral obligation to respect each other. Being a person in pre-colonial societies was not a matter of possessing a body and being able to walk and talk. But it was all about the good qualities that made up an ideal person. The whole idea of treating each other with respect instilled a sense of justice in the people. Hence, Jobodwana argued that, it was beyond a point of dispute that one of the most outstanding characteristics common to all traditional systems of pre-colonial South African societies was the doctrine of *ubuntu.* Jobodwana cited Kamenka eliciting the similarities between African culture and early Greek and Chinese cultures when he stated that men in pre-modern societies saw man as part of a social organism, a structure of community based on common religious traditions, a hierarchy of powers, network of mutual obligation that made and shaped man rather than served them. Jobodwana further commented that the same observation is similarly made with reference to African societies: that the individual was not autonomous or possessed of rights above and prior to society. The individual's place in African society was fixed by a defined role or status in a greater whole, be it family, clan, tribe or community. See in this regard Jobodwana 2000 *SAPR/PL* 26-27.

[107] Jobodwana 2000 *SAPR/PL* 26-27.

[108] Bekker 2002 *Speculum Juris* 245. However it should be noted that Bekker does not suggest that traditional courts had no irregularities at all. The irregularities, which were there could not do a lot of damage to justice. They were easily detected and rectified.

[109] Bekker 2002 *Speculum Juris* 245. Generally speaking it was difficult to speak about separation of powers under a traditional setup. The reason being the fact that there was a

> It is arguable that at the level of traditional courts, the judicial process administering largely simple customary law rules in simple disputes, a formal separation of powers between the executive and the judiciary is not crucial.

This kind of procedure outlined by Bekker was simple and flexible. Moreover those present in court saw themselves as part and parcel of the adjudication process. It is submitted that the success of the traditional courts should be attributed to the fact that they were an integral part of the social system of the people involved. These courts were not necessarily designs of higher authority despite that traditional leaders were nominally granted jurisdiction.[110] The reason being that the presiding traditional leader and his councillors who constituted the bench of the court were natural components of the community. These officers of the court were usually elders of the community. Another factor, which contributed towards the success of the traditional courts, was the fact that the proceedings were conducted in the local language known to the litigants. So the risks of misinterpretation and misunderstanding were nil.[111]

According to Hume, all men were sensible of the necessity of justice to maintain peace and order for the general maintenance of society. Justice emanated from law itself.[112] Law was a powerful tool used to discipline, correct and shape human personality. Tradition, culture and customs were building units of individual character and the individual was but part of the entire group. Therefore, if an individual committed an offence the whole group was involved and every member was liable, not as an individual but as part of the group or clan that committed the wrong.[113] Hartland established that pre-

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thin line between members of executive and those of judiciary. Practically speaking there was no demarcation between the two.

[110] Bekker 2002 *Speculum Juris* 246. In a traditional court system a success of the court or litigants was not a success of the legal representative. It was a success attributed to all the participants of the court. The contribution of all the people involved was crucial and important.

[111] Bekker 2002 *Speculum Juris* 246.

[112] Hume *Political Thought* 20.

[113] In *S v Kwinana* 1985 (3) 369 (TK-SC), the court said that in a traditional community a wrongdoer was brought before the traditional court by his or her victim, who preferred the

colonial societies were organised in clans and members of these clans regarded themselves as brothers and sisters. Their duty to one another was of mutual trust, support and defence.[114]

Holomisa explained that under the traditional system of the administration of justice, a hierarchy started at the level of the clan and close relatives especially if the parties were from the same clan. It was at this level where family heads in conjunction with family elders often settled family disputes.[115] According to Holomisa, this level was then followed next by courts of sub-headmen, whose areas of jurisdictions would be the village comprising the various neighbouring clans. Third in the hierarchy would be the court of the headman whose area of jurisdiction was made up of various villages headed by sub-headmen under his authority. On top of the hierarchy was the court of the traditional leader. Holomisa stated that this arrangement was officially known as the traditional authority.[116]

The last level in the hierarchy was the court of the King. The King's court was also the court of appeal. This set up was officially called the regional authority. The above hierarchy of the administration of justice differed slightly from one tribe to the other. However, the basic arrangement and formula remained the same in all the tribes of pre-colonial South African societies.[117] The paramount traditional leader or *Ukumkani Okanye Inkosi*[118] as was known among the Xhosa always sat in Council with his subordinate traditional leaders. It was in this court where a traditional leader was responsible for the administration of justice.[119]

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charge against him. This is in conformity with traditional custom, which does not know the office of the prosecutor. The group charged and prosecuted a wrongdoer where a traditional leader would act as a judge.

[114] Hartland *Primitive Law* 48.

[115] Holomisa *Administration of Justice* 2.

[116] Holomisa *Administration of Justice* 2. The structure of a traditional legal system was hierarchical in that there were a series of courts of progressively greater jurisdiction. With that of initial jurisdiction being the local courts. There were other bodies apart from the regular courts, which ameliorated disputes. In more traditional times there were also regimental courts that dealt with offences pertaining to initiation schools and regimental matters.

[117] Holomisa *Administration of Justice* 2.

[118] According to the Xhosa *Ukumkani Okanye Inkosi* refers to the King.

[119] Jobodwana 2002 *SAPR/PL* 27.

Jobodwana stated that the traditional societies also applied the supernatural means of settling disputes. This mechanism of supernatural approach was adopted in cases where the traditional leader and his headmen did not know the perpetrator. The procedure was that the perpetrator would be identified before the trial could start. There were various methods, which were applied to identify the perpetrator, for example, ordeals, oath swearing and divination.[120]

The application of ordeal in the case of theft was for example, regarded to be capable of harming not only the thief but also those who have benefited or even innocently shared in the stolen goods. The use of supernatural modes was purposeful and was intended to achieve practical results and social objectives. Jobodwana warned that its psychological basis needed not to be taken for granted.[121]

The courts of traditional leaders had jurisdiction over criminal and civil cases. As Holomisa observed, court proceedings were held openly both verbally and figuratively. Normally court proceedings were conducted under the tree or near the cattle kraal. The process and procedure were all inclusive. All present in the court were given the opportunity to participate in both the examination and cross-examination of all the parties to a case. The proceedings were conducted informally and in a relaxed atmosphere. Rules about hearsay evidence were not strictly enforced. However, Holomisa cautioned that the system should not be understood to mean that there was chaos and disorder in those courts. There was in fact decorum and high respect for authority of the court and the traditional leader.[122]

After evidence had been led and gathered from the witnesses and parties involved, verdict was reached. This was done normally at the conclusion of all

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[120] Jobodwana 2002 *SAPR/PL* 27. The way Jobodwana stated above it seems as if the victims used muti (traditional medicine) to deal with perpetrators. The Diviners or *Dingaka* (traditional doctors) were always involved to trace the perpetrators. It is important to note that the pre-colonial customary law made no recourse to oaths or ordeal.

[121] Jobodwana 2002 *SAPR/PL* 27-28.

[122] Holomisa *Administration of Justice* 2.

deliberations. It was then that the traditional leader who acted as a presiding officer pronounced the judgement. Reasons for judgement were clearly articulated to the parties concerned. The traditional leader's decision was to be approved by his councillors. He could not make decisions without consulting his councillors. As Rakate noted:[123]

> The Chief himself was not above the law. Should his actions run counter to accepted standards of what is right and proper, he is severely criticised by his councillors and the people at large. Should he hurt any of his subjects, he is expected to make the customary reparation, and in some tribes (such as Swazi and Tswana) may even be tried and punished by his Council.

Holomisa emphasised the fact that the main objectives of the traditional administration of justice were centred around the following key principles, namely:[124]

- Rehabilitation of the offender;
- Compensation of the aggrieved party;
- Promotion of peace within the community; and
- Promotion of reconciliation and inquisitional procedure.[125]

The adjudicators in traditional courts perceived their role of administration of justice in the light of reconciliation. It was in this spirit of reconciliation that the wheel of justice revolved.[126] The jurisprudence of justice in the pre-colonial

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[123] Rakate *Status of Traditional Courts* 8.

[124] Holomisa *Administration of Justice* 3.

[125] Rakate *Status of Traditional Courts* 8. Rakate expressed the same sentiment of Holomisa when he articulated that the procedures in traditional courts were designed specifically to effect compromise and reconciliation. He further remarked that the Lobedu custom of *Lu Khumelwa* (to beg pardon of one another), by which reconciliation is reached by emissary who intervenes between the two parties, usually accompanied by the slaughtering of a goat. (Nguni *hlumba* ritual). This granting of pardon stops court procedure and it is estimated that about 80% of disputes were solved without ever coming to court.

[126] It is clear from the above that traditional leader's authority was conciliatory and persuasive. Traditional leader was in fact a unifying force of the tribe. Therefore, he was regarded as the personification of unity and a mediator between his people. Rakate correctly noted that Justice is realised if a reconciliation ensures, the court not only rejoices but watches from afar, vicariously participating in the return of the prodigal son, the wrong doer, with the beer

South African societies was deeply rooted in the notion of collective responsibility. Therefore, as Rakate put it, any interpretation of traditional law during the pre-colonial period, which failed to take into account the social, economic and political realities within which traditional courts functioned, was misguided.[127]

In the exercise of their judicial functions, traditional leaders were required by traditional justice to restore the social equilibrium and secure the agreement of both parties to a compromise judgement. Pre-colonial traditional courts practiced a judicial system, which suited the parties. The pre-colonial societies possessed an integrated culture where law and justice occupied the central position and everybody knew it.[128] As Dlamini put it, there was no sharp cleavage between what ordinary members of the community regarded as proper conduct and what the officials of organs such as judicial society decreed as law. Therefore, legal representation was not warranted in a traditional court. The reason for this was that there was no specialised law in traditional courts where one could draw a sharp distinction between law and what ordinary members of the tribe believed to be fair and just.[129]

2.5 CONCLUSION

There are three arguments regarding the origin of the traditional leadership in South Africa namely,

- A linkage with god;
- Social contract theory; and
- Strong leadership.

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he has brewed and brought to become reconciled with his father, the aggrieved party. See in this regard Rakate *Status of Traditional Courts* 8-12.

[127] Rakate *Status of Traditional Courts* 11.

[128] Dlamini 2002 *Speculum Juris* 30.

[129] Dlamini 2002 *Speculum Juris* 40.

Succession to traditional leadership was dealt with in the family and in some instances led to male premogeniture. Only the Lobedu preferred women. The tribe consisted of:

- Family units;
- Clans;
- Villages; and the
- Traditional Community.

The economy was mainly based on subsistence. The wealth of a traditional leader was also based on subsistence economy and tributes from the tribe. The functions of traditional leaders included:[130]

- Administration of justice;
- Support;
- Religious functions;
- Military functions; and
- Administration and allocation of land.

In the light of the above exposition, it is clear that pre-colonial societies were organised politically beyond the family, clan or tribe:[131]

> In spite of the technological backwardness, Africans can cope with their environment, and achieve a fair amount of security against famine, disease, disorder and aggression. They had attained a high standard of political and legal organisation, observed a strict moral code and governed themselves with dignity, discipline and self-restrained.

Dlamini contended that African law was obeyed because it was accepted.[132] The reason for this was that law and justice were parts of the social organisation and manifestations of tribal life. Reverence for the authority,

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[130] See 2.2 above and 11 below.
[131] Dlamini 2002 *Speculum Juris* 28.
[132] Dlamini *African Legal Philosophy* 10.

whether it be of the traditional or of the established order, was ingrained in the justice itself. That is why Elias correctly put it that even in chiefless pre-colonial societies the group of interlocking but mutually balancing segments retained its social cohesion and political structure by this sense of traditional administration of justice and by an innate instinct for a political and democratic ideal of orderly existence.[133]

[133] Elias *Nature of African Law* 22.

CHAPTER 3: COLONIAL SOUTH AFRICA

3.1 HISTORY OF COLONIALISM AT THE CAPE COLONY

3.1.1 DUTCH COLONIALISM

At the time of the first European contact[134] with the Khoikhoi and the San, the Cape Province was not home to a wide variety of languages, ethnic populations and foreign cultures. The Khoisan[135] mainly inhabited the western side of the Cape Province. According to Mitchel, the Khoikhoi who were the herders, arrived at the Cape and put pressure on the San communities. The San, a hunting population, predated the Khoikhoi at the Cape. The San were the original occupiers of the Cape to the exclusion of any other human population.[136] Conflict between these two groups became inevitable during the process of interaction. This conflict originated as a result of direct competition for land occupation and access to resources such as water and game.

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[134] Benyon *Political Incorporation* 367. According to Benyon the first contact between the blacks and whites made the process of political incorporation of the blacks a major theme of South African history. At first competition between blacks and whites upon traditional society generated friction where *quasi*-diplomatic methods failed to neutralise. See also Saunders Annexation of the Transkeian 1. The inclusion of blacks in white-ruled politics in South Africa started with the extension eastward of the Dutch East Indian Company (DEIC) settlement. This inclusion of blacks did not find favour in Cape Colony. It was argued by the Dutch officials that since contact between blacks and whites at the Cape bred friction, total segregation should be maintained between blacks and whites. Segregation had since remained the aim of policy of both the Dutch and their British successors.

[135] *Khoisan* is a word, which is usually used to refer to both Khoi and the San. The Khoikhoi were far most peaceful herdsmen. See in this regard Keane *Boer States* 95.

[136] Mitchel 2000 *J for African History* 434-435; Were *History of South Africa* 8-9. The San are known by various names in South Africa. As Were has observed, they were referred to as Bushmen by the whites. Xhosa used to call them Twa, they were also known as the Rwa among the Sotho and Tswana and as San among the Khoikhoi. A considerable evidence of numerous relics of their stone implements, rock paintings and sculptures proves the San's early occupiers of South Africa. Abundant evidence of history confirmed the fact that the San were the first to settle in South Africa and then followed by the Khoikhoi. According to Were originally this group of people called themselves *Khoikhoin* which means "men of men". However, many history authors referred to them as Khoikhoi omitting the suffix "n". Whites called them Hottentots. Although the San and the Khoikhoi are widely known as Bushmen and Hottentots respectively, these names have been removed from the Statute books of South Africa. As a result the use of these names is illegal and constitute a hate speech.

At a later stage black groups who migrated from central and North Africa followed both the San and Khoikhoi to South Africa. When these black groups arrived on the scene, they pushed the San and the Khoikhoi out of their otherwise rich lands into the inhospitable barren lands of the Kalahari deserts.[137]

There were a considerable number of reasons why the Black people managed to out-class the San and the Khoikhoi. The newcomers, that is blacks, knew and introduced the art of iron working and as a result, were able to make and use iron implements, which were superior to both the stone and bone implements used by the Khoisan. The fact that blacks demonstrated a high form and degree of political organization, practised a different form of economy and settled in organised settlements made them superior invaders over the Khoisan.[138] Later the Europeans followed the black people. The coming of the whites on the scene particularly the Dutch and English had destructive effects on the San, the Khoikhoi and the blacks.[139]

The Xhosas mainly populated the eastern part of the Cape. According to Jordan, these Xhosas were sub-divided into a number of principalities or paramountcies as the colonialists later preferred to call them. In the north east of South Africa was the Zulu kingdom, Tshonga Kingdom and Venda Kingdom.[140] On the highveld were the Pedi Kingdom, the Tswana and Southern Sotho Kingdom. In addition to these were the independent principalities of the Griqua and Nama under the leadership of traditional leaders. Jordan also explained that leaders of the Griqua and the Nama were referred to by the settlers as *Kapteins.*[141]

Pheko argued that history, archaeology and linguistics and other political factors demonstrated an inaccurate theory of an empty land when the Dutch

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[137] Ngandwe *Jurisprudential Approaches* 2.
[138] Were *History of South Africa* 8-9.
[139] These destructive effects directed on the *Khoisan* and the blacks by the white community disintegrated the social, economic and political organisations of these groups.
[140] Jordan *National Question* 4.
[141] Jordan *National Question* 4. *Kaptein* is a Dutch or Boer word, which means leader of particular group.

East Indian Company (DEIC) arrived in South Africa on 6 April 1652. According to Pheko, long before the settlers established a provisional station under Van Riebeeck where part of the Cape stands today, blacks occupied and ruled that portion of South Africa as a blackman's' country.[142]

According to Walter, the first white group to land at the Cape were Portuguese. This party had no interest in the Cape area but consequently opened the road for Dutch settlement.[143] Thompson pointed out that initially, Holland's intention was to establish a small fortified base at the Cape, where their annual fleets bound to and from Batavia could rendezvous, take in fresh water, fruits, vegetables, grains and land their sick for recuperation. The other intention was for the employees of the DEIC[144] to purchase fresh meat from

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[142] Pheko 1987 *LLJ* 147-148; Wilson 1971-72 *Botswana Notes and Records* 70. Wilson sustained a similar view when he posited that the story that black people crossed Limpopo about the same time when Van Riebeeck occupied the Cape, which was written in South African histories and political pamphlets, was false. According to Wilson, Portuguese records showed that the Nguni tribes mainly Xhosa and Zulu were the inhabitants of Natal and Transkei in the 16th century. Contrary to these views, Leach sustained the argument that black people came south in various migrations. But he did not specifically state their whereabouts before they inhabited south. He was also not certain which group arrived first and which route they took. See Leach *South Africa* 24-28.

[143] Walter *South Africa's War* 9. According to Walter, before the Dutch settlers occupied Cape and came into contact with the Khoisan, South Africa's Cape Province was discovered by the Portuguese maritime expedition led Diaz, who was searching for a sea route to the East. Diaz spent only few days at the present Algoa Bay and returned to Portugal in order to provide King John II with the report of his trip. Walter further explained that on July 7, 1497, king John II despatched a second expedition under Da Gama, which rounded the Cape of Good Hope on November 22, 1497, and anchored in Mossel Bay. On reaching the shore, the group was greeted by friendly Khoikhoi who were willing to barter cattle for Western ornaments. It is significant to note that once a sea route to the East had been established, the Portuguese lost interest in the Cape area of South Africa. What this situation explains is the fact that the Portuguese did not stay long at the Cape. As Walter expounded the reason why the Portuguese lost interest in the Cape area, was that, they concentrated their interests in the mining activities of the Makalanga in what is now Zimbabwe and Mozambique and later in Angola in search of silver and slaves to send them to South America. It is further explained that Diaz's first visit at the Cape was marred by violence between his expedition and the Khoikhoi. So Diaz was forced to turn his ship back to Portugal in March 1488. As it has been stated earlier, the road opened to Holland to settle South Africa's Cape through the DEIC. Van Riebeeck and his wife left Holland on Christmas Eve of 1651 sailing on board the Drommedaris accompanied by the Reyger and the Goede Hoop. Van Riebeeck arrived at Table Bay on 6 April 1652. On his arrival Van Riebeeck found that the Cape was wild. His task was both to establish a refreshment station and to secure entrance to the Indian Ocean against foreign competitors. The indigenous people that Van Riebeeck encountered were the Khoikhoi and the San. The estimated populations of these groups at that time were 15 000 and 10 000 respectively.

[144] The DEIC was a state outside the state. It operated under a Charter from the State General and had sovereign rights in East and Cape of Good Hope. In sending Van Riebeeck to occupy the present Table Bay, the directors of the company intended the Colony to serve a specific and limited role as a link between Holland and the Eastern

the Khoisan pastoralists. The interaction between the Khoisan and the DEIC's employees then intensified. In order to regularise this contact, the directors of the DEIC decided to establish a permanent base at Cape Province.[145] The new period in the history of South Africa began as Van Riebeeck and his men decided to settle permanently at the Cape.

For the first few years after the arrival of the Van Riebeeck expedition, relations were fairly cordial. Like their predecessors the Portuguese, the Dutch acquired sheep and cattle in exchange for Western goods. They also cultivated friendship with three co-operative Khoikhoi whom they called Doman, Eva and Harry, using them as interpreters for communication with the traditional leaders of the Khoikhoi communities.[146] However, Mitchel indicated that from the beginning of permanent settlement of the DEIC and its employees at the Cape Colony the interaction between the Dutch and Khoikhoi was ambivalent. When the Dutch colonialists and the Khoikhoi first engaged in sustained contact a violent struggle ensued over land and resources such as water, shelter and game. In fact, this conflict had to do with contested resources. It was in this conflict that the Khoikhoi fought for access to means of economic subsistence independent from the colonial service. They also fought to maintain the integrity of their social, political and traditional systems.[147]

As the contact between these two cultural groups intensified more and more, the Khoikhoi started to bear the brunt of the Dutch innovation. Elphick stated that the Khoikhoi tribes experienced at different times and varying measures three major challenges from the Dutch, namely:[148]

Empire, centred on Batavia, Java. In an endeavour to promote the economic interests of the DEIC at the Cape, the company's officials embarked on a trading mission with the friendly and hospitable Khoikhoi traditional leaders and their traditional communities. According to Thompson, the Dutch settlers discovered that their best interests were first in the cattle and sheep trade with the Khoikhoi. See in this regard Thompson *History of South Africa* 33.

[145] Thompson *History of South Africa* 33.

[146] Thompson *History of South Africa* 37-38.

[147] Mitchel 2002 *J of African History* 434–435.

[148] Elphick *Khoikhoi* 217.

- Penetration of their territories by the DEIC officials;
- Settlement of their pastures by free farmers; and
- Displacement of the people, herds and flocks by semi nomadic cattlemen.

These challenges led to a war between the Khoikhoi and the Dutch settlers. The Khoikhoi first destroyed Dutch settlers' farms and captured sheep and cattle, but as Thompson observed, the Khoikhoi victory did not last long.[149] The Dutch used superior weaponry and tactics to establish control over the Khoikhoi. Chief Qora of the Khoikhoi was killed in the war while resisting these well-armed colonialists. Gaining confidence from their defeat of the Khoikhoi, the Dutch settlers became brutal. They branded, thrashed and chained Khoikhoi who they suspected of theft and placed them on the present Robben Island.[150] The Khoikhoi communities were gradually set on a path of disintegration as their traditional institutions such as traditional authorities were threatened. More specifically in the sense that their traditional leaders were either killed or manipulated by Dutch authorities.[151]

The establishment of the refreshment station at the Cape rather provided a means of dispossessing the black of their land, providing the Dutch settlers with the idea to occupy the Cape permanently by colonisation.[152] It was during this process of colonisation that the Khoikhoi were unable to withstand the invasion of the DEIC and its settlers. They lost most of their livestock and their most valued possessions including land. According to Thompson, the records of DEIC showed that between 1662 and 1713 it received 14,363 cattle and 32,808 sheep from the Khoikhoi.[153] This was because their fragile political system had collapsed and their traditional leaders had become pathetic

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[149] Thompson *History of South Africa* 38.

[150] Robben Island housed a number of the prominent political prisoners during the 20th century inter alia, included the former president of the Republic of South Africa, namely Mandela.

[151] Thompson *History of South Africa* 38. Autsumao the Khoikhoi leader who was known to the Dutch settlers as Harry the Strandloper was banished to Robben Island by Van Riebeeck during the war between the Khoikhoi and the Dutch. Autsumao was reputed to be the first and only man ever to escape from Robben Island. He rowed to the mainland in a small boat.

[152] Pheko 1987 *LLJ* 147-148.

[153] Thompson *History of South Africa* 38.

clients of the company. Poverty began to grip the Khoikhoi communities, which led the individuals and families to begin to detach themselves from their societies and to serve Dutch settlers as shepherds and cattle herders.[154]

As Thompson has observed, the Khoikhoi now were becoming a subordinate caste in the colonial society, set apart by appearance and culture from both the white and the slaves, technically free, but treated no better than slaves:[155]

> The Company and the settlers in combination assaulted all five components of independence (of the Khoikhoi) together, they absorbed livestock and labour from the Khoikhoi economy, subjected Khoikhoi Chiefs to Dutch overrule and their followers to Dutch law, encroached on pastures and endangered the integrity of Khoikhoi cultures.

Both the DEIC and its employees were responsible for the disintegration of the political, social, economic and legal institutions of the Khoikhoi communities at the Cape. In as far as the traditional legal system of the Khoikhoi was concerned, the Dutch settlers applied a non-recognition policy to Khoikhoi laws. Since the Dutch did not recognise the laws of the Khoikhoi, they subjected them to their foreign laws, namely Dutch laws.[156]

Elphick also pointed out that the Khoikhoi had been reduced to small fraction of their former population possibly because of wars, which were launched by the Dutch on the Khoikhoi:[157]

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[154] Thompson *History of South Africa* 38.
[155] Thompson *History of South Africa* 38.
[156] Thompson *History of South Africa* 38.
[157] Elphick *Khoikhoi* 217. The Dutch defeated the Khoikhoi and it was through these wars that many Khoikhoi were killed. It also transpired that Khoikhoi ancient economic and political institutions had virtually disappeared and even their traditional culture was showing signs of erosion. All this had happened in the years since the DEIC had to take control of the Cape Colony. As it has been submitted earlier, this is another reason why the Khoikhoi were reduced to small component of society. Many Khoikhoi died in their huts in or around the Colony. Khoikhoi were reduced to small component of society. They laid elsewhere on the road cursing at Dutchmen, who they said had bewitched them and they fled their land with kraals, huts and cattle in hopes to be freed from the malign disease.

> The Dutch destroyed the Khoikhoi nation, they repeated at the extreme the bloody scenes for which Spain had given an example in America.

The small pox epidemic of 1713 was one of the last of many disasters to befall the Western Cape Khoikhoi. The Khoikhoi began to die and it was soon evident that they had far low resistance to infection than the Dutch and slaves besides they had no medical lore to combat it. By the time Van Riebeeck handed over the command to his successors, Wagenaer, the Colony became a complex, racially stratified society making the dissolution of the Khoikhoi social organisations and traditional life. Another significant point to be noted is that at that time, the San were also well disintegrated. Unlike the Khoikhoi, the San were a highly haphazard and disorganised type of community. Therefore, they were no match to the Dutch authorities. Many of them had fled to the present Namibia and Kgalagadi in the present Botswana while some moved further to the northern parts of the Cape.[158]

According to Thompson, there were three processes, which led to the racially stratified society at the Cape. First, the DEIC released some of its employees from their contracts and gave them land and the status of *free burghers*.[159] These free burghers were allowed by the company to run their own affairs. As a result they began to cultivate the land and raise cattle. They gradually moved with time further into the interior setting up homesteads. It was during this time of their development that the free burghers called themselves the *Boers*.[160] Secondly, the company set slaves to work under Dutch supervision on creating basic infrastructure for the Colony. Thirdly, as the Dutch settlement expanded slowly but surely from the shore of the Table Bay and engrossed and enclosed land for cultivation, the Cape society increased.[161]

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[158] The San communities were nomadic and organised in bands under the leadership of the elderly member of the family.
[159] The free burghers were DEIC's employees who were relieved of their company duties and given permission to run their own affairs as individual farmers.
[160] Leach *South Africa's* 21. The word Boer means a farmer.
[161] Thompson *History of South Africa* 38.

The creation of the community of burghers should also be seen as another contributory factor, which dismantled and uprooted the institution of traditional leaders of the Khoikhoi. The reason being, the *Veeboers,*[162] organised fighting commandos who often effectively dislodged Khoikhoi population in raids. As a result of these raids, gradually the Khoikhoi were pushed far to the East and North of the Cape or pressed into client-age relationships. Without their stock, the Khoikhoi social and economic organisations dissolved.[163] According to Clifton, between 1786 and 1795, well over 2504 Khoikhoi were killed by commandos and at least 669 mostly children, were forced into servitude as *inboerlinge* and thus were legally obliged to work for colonial farmers until the age of twenty five.[164]

Other reasons that Elphick highlighted as contributory factors for the disintegration of the traditional communities of the Khoikhoi are attributed to the nature of the Khoikhoi communities themselves.[165] The Khoi groups' political, social and economic institutions were fragile. This might be the reason why the Khoikhoi society was easily disintegrated by the Dutch contact more easily than any other black group at a later stage. Suffice it to say that the Dutch government succeeded in establishing their authority over the Khoikhoi whose political structure was disintegrated, leaving them with no system of authority around which to rally.[166]

3.1.2 LIFE IN THE FRONTIER

Approximately in the 1770s, some of the burghers built huts near the Gamtoos river and Bruitjieshoogte where they lived rudimentarily and also met up with the Xhosa speaking people.[167] Elphick *et al* posited that when the Xhosa and white settlers met, the so-called Eastern Frontier opened.[168]

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[162] The word *Veeboer* is a Dutch term, which was used to refer to free employees of the company.
[163] Freud *Making of Contemporary Africa* 55.
[164] Clifton *White Supremacy* 42.
[165] Elphick *Khoikhoi* 298.
[166] Elphick *Khoikhoi* 298.
[167] The Xhosa speaking people are the branch of the Nguni people.
[168] Elphick *Khoikhoi* 298.

Hence, the process of interaction between white and black began and dominated South African history. When the Xhosa made a contact with these free burghers, they were organised at three levels. Patrilineages, consisting of the descendents of a common ancestor. Clans composed of a number of lineages, all claiming descent from a putative common ancestor and traditional authorities which were political units, each occupying a certain area under a traditional leader. Chiefdoms, which were usually spatially separated, enjoyed a great measure of independence from one another.[169]

The Xhosa were cattle-herders and hoe farmers who lived on well watered lands in dispersed kraal settlements, each of which, could supply most of the economic needs of its inhabitants. Contact between Xhosa and white farmers in Zuurveld became a confined space where traditional authorities and white farmers jostled each other in competition for land. The competition was exacerbated by the conflicting view about the landholding of the colonists, who considered a certain defined area as belonging exclusively to them. The Xhosa saw land as communal property, the boundaries of which, according to Elphick *et al*, were hardly ever sharply defined.[170] Conflict over livestock was also important, for in both Xhosa and colonial society, cattle were a major form of capital and a commonly recognised symbol of wealth.[171]

As Davies *et al* noted, the slow expansion of Dutch colonialism rested on the expropriation of the land of the indigenous inhabitants and their enslavement as farm workers and other type of labourers for their white colonial master.[172] With the scoring success in the dispossession process of the Xhosa land, the Dutch government began to assert their authority over the Xhosa traditional leaders in the Zuurveld. It was at this stage that the Xhosa traditional leaders sensed that the colonial government intended to expel them forcibly from their land. As a result, tension soon developed and quarrels over livestock escalated into warfare.[173]

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[169] Elphick *et al Shaping of Southern Africa* 294.
[170] Elphick *et al Shaping of Southern Africa* 296.
[171] Elphick *et al Shaping of Southern Africa* 296.
[172] Davies *et al Struggle for South Africa* 4.
[173] Warwick *South African War* 186.

The dispossession of the Xhosa of their land by the Dutch colonists was met with resistance from traditional leaders and their communities. The question of land dispossession led inevitably to a war between the Dutch and the Xhosa. The Cape Xhosa and their traditional leaders engaged the colonialists in wars in a move to protect their land and thwarted invasions and colonisation.[174] On reflection, it was apparent that traditional leaders could not successfully protect their land against the Dutch because they used traditional inferior weapons. Dutch settlers used superior weapons and always had the upper hand leading to many Xhosa traditional communities lost their land during that time.[175]

The defeats of the Xhosa communities by the Dutch and the dispossession of their land tempered with the institution of traditional leadership in the Eastern Cape. The existence of traditional authorities was however, also tempered with when the colonial government established itself as an undisputed authority on the frontier.[176] Dutch rule over the Xhosa disrupted the ways of traditional communities. Many Xhosa could not make means end and were subjected to slavery as farm workers. The occupation of the Cape by the white settlers laid a foundation stone for a systematic disruption of the black traditional governments not only of the Xhosa but many South African communities.

3.1.3. BRITISH CAPE COLONIALISM

Van Aswegen noted that as a result of war between Britain and France, Britain decided to terminate Dutch rule at the Cape. British decision was prompted by the occupation of the Netherlands by France in 1795. Consequently Prince William of Orange fled to Britain and asked her to protect his colonies against French aggression.[177] It was for this reason that in September 1795, nine British warships sailed into the present Simon's Bay.

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[174] Pheko 1987 *LLJ* 148-149.
[175] Pheko 1987 *LLJ* 149.
[176] Warwick *South African War* 186.
[177] Van Aswegen *History of South Africa* 156. The war between Britain and France came to an end in 1814-1815 when Napoleon was defeated.

According to Walter, those British troops encountered brief resistance from the Dutch government and the colonists, who were already in the rebellion against the DEIC. When the Dutch Governor surrendered, the British occupation began to take its roots and Britain formerly hoisted its flag at the Cape in 16 September 1795. It lasted until France and Britain made peace by signing the Treaty of Amiens in 1802. The terms of the treaty required the transfer of Cape to the Republic of Batavia.[178]

Peace in Europe lasted until 1803 when war broke out between France and Britain again. To protect its sea routes, England despatched 63 ships with 7000 soldiers on board to retake the Cape. Surrender was signed on January 1806, making the Cape inhabitants including the Xhosa and Khoisan, once again the subjects of the king of England. At the end of the war in Europe in 1814, the Cape became a British colony. Once the Dutch rule had been terminated, Great Britain introduced its legal institutions at the Cape. British settlers were encouraged to migrate to the Cape. For the Cape Xhosa and Khoisan, the introduction of the British rule meant that they were to be subjected to the British laws and regulations.[179]

Bennett explained that when Britain occupied the Cape, black customary law was dismissed as barbarous and pre-legal custom.[180] However, it should be borne in mind that the British government retained Roman Dutch law as the law of the Colony of the Cape of Good Hope to the exclusion of African customary law and its institutions. The British non-recognition policy of African customary law impacted negatively on the institution of traditional leaders at the Cape. During the early years of British occupation, the British settlers undermined the political authorities of the Khoisan in the western Cape and the Xhosa in the eastern Cape.[181]

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[178] Walter *South Africa's War* 9. By the Treaty of Amiens, Britain agreed to restore her colonies except Cylon and Trinidad. See also in this regard Hostein *et al Introduction to South African Law* 194.
[179] Ritner *Death of Africa* 30.
[180] Bennett 1994 *SAJHR* 122.
[181] Bennett 1994 *SAJHR* 122.

This was done in many ways. Firstly, as Keegan explained, the British took a stringent step when it recommended the expulsion of all the Xhosa beyond the Fish River and the settlement of British settlers in the Zuurveld in order to stabilize the border.[182] This was done with great brutality between 1811 and 1812. An estimated 20 000 Xhosa were expelled. Consequently, the Xhosa traditional communities and their traditional leaders were stripped off their land. This approach weakened the institution of Xhosa traditional leaders. According to Keegan, the colonial authorities achieved this goal by exploiting divisions within the Rharhabe branch of the Xhosa who initially dominated west of the Kei and formed alliance with Chief Ngqika.[183] It is said that Chief Ngqika who was heavily exploited by the British, was willing to accept the Fish River as the boundary as well as the withdrawal of all Xhosa behind it.[184]

Consequently, Xhosa land laid helpless before the tide of British settlers and Chief Ngqika bore a heavy responsibility for this transformation. According to Saunders, his name and deeds were a source of some embarrassment to his descendants and their subjects.[185] Traditional leaders at the Cape, including Chiefs Ngqika and Rharhabe signed away lands belonging to their tribes without knowing what they were doing and thus without consulting the tribes they were responsible for. The British achieved this by dividing the Xhosa communities and their traditional leaders and as a result, most of the land was taken.[186] Even though land was taken or given to the British settlers, Chief Ngqika was by and large prepared not to give away his culture and traditions.[187] However, it should be remembered that it was during the reign of Chief Ngqika that Xhosa societies and their traditional institutions were being

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[182] Keegan *Colonial South Africa* 79-112.
[183] Keegan *Colonial South Africa* 79-112.
[184] Keegan *Colonial South Africa* 79-112.
[185] Saunders *Black Leaders* 15-28.
[186] Saunders *Black Leaders* 15-28.
[187] Saunders *Black Leaders* 15-29. Paradoxically as it might seem, Chief Ngqika who did more than any other to undermine Xhosa resistance to white encroachment was passionately attached to his customs and traditions. Saunders quoted him telling the British officials that: "You have your manner to wash and decorate yourself on the Lord's day and I have mine, the same in which I was born and that I shall follow. I have given a little to listen to your words but now I have done, for if I adopt your law I must surely overturn all my own and I shall not do. I shall now begin to dance and praise, and I shall let all see who is the Lord of this land".

fundamentally changed and distorted by the encroaching forces of British colonialism.[188]

Keegan stated that another aspect of colonial penetration came in the form of the mission stations.[189] The missionaries formed a formidable tool of British colonialism to erode traditional institutions and re-oriented the Xhosa communities to new patterns of life. Mbenga reported that missionaries frowned upon and actively suppressed many aspects of Xhosa culture such as initiation ceremonies and polygamy. In particular, the missionaries actively discouraged cultural activities that were expressed in physical bodily form, such as dancing. The general view of the missionaries was that the culture of indigenous people was corrupt, sinful and needed to be redeemed.[190] During the 1817s the Methodist Church took up the task of setting up stations among the Xhosa beyond the Cape frontier with Somerset's blessings.[191]

Relations between missionaries and Xhosa traditional leaders were fraught with ambiguities and misunderstandings. Consequently conflict was always close to the surface. Conflict not only concerned the allegiance of followers, acolytes and converts or the powers and privileges of traditional leaders. As Keegan reported, it also concerned more deeply and less explicitly:[192]

> A long battle for the possession of salient signs and symbols, a bitter, drawn-out contest of conscience and consciousness about linguistic forms, spatial forms, the forms of rational argument and positive knowledge.

The missionaries saw their task as the capture of souls, but in the process they proved a powerful solvent of indigenous political, social and economic systems of the Xhosa people. Keegan emphasized the fact that whatever their intentions, they served wittingly or unwittingly as agents of a pervasive

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[188] Saunders *Black Leaders* 15-29.
[189] Keegan *Colonial South Africa* 79-112.
[190] Mbenga *Bakgatla-Ba-Kgafela* 48-49.
[191] Keegan *Colonial South Africa* 79-112.
[192] Keegan *Colonial South Africa* 133.

economic and cultural imperialism.[193] Apart from their political role, missionaries were particularly important as agents of the trade frontier. Missionary trade began with the London Missionaries Society (LMS). This mission society traded with the Xhosa people, acquiring cow milk for thirty metal buttons each and an ox for forty. Traditional leaders' wealth was used to feed the communities at the time of famine but the missionary trade eroded the wealth of the Xhosa society.[194]

3.1.4 BRITISH RULE AND FRONTIER WARS

British colonialists like their Dutch predecessors dispossessed the Xhosa of their land through different ways. The dispossession was in some quarters met with resistance. As a result, the Cape Xhosas and their traditional leaders engaged the colonialists in wars in a move to protect their land and to thwart invasion and colonisation. For instance, in 1818 when Chief Ndlambe refused to hand over a piece of land to the British settlers, the British forces launched an attack on him and forced his warriors and tribe to cross the Fish River. This war was a serious blow to King Ndlambe because he lost vast tracks of land. As Pheko noted, today's Grahamstown was built in order to prevent King Ndlambe and his people to return to land.[195]

King Makhanda led another war of resistance at the battle of Amalinde. Makhanda and his people lost the battle against the superior and sophisticated military technology of the British colonialists. After Makhanda's defeat, the British imperialists seized the land of King Makhanda between Fish and Keiskama River. In 1834, the Xhosa led yet another war of resistance against the colonialists to regain their land. The colonial soldiers fought back again with the superior weapons. It was during this war of the Kei River that King Hintsa was killed while he led his troops in battle. King Hintsa also lost a large portion of land. This conquered land was named Queen

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[193] Keegan *Colonial South Africa* 133.
[194] Pheko 1987 *LLJ* 148-149.
[195] Pheko 1987 *LLJ* 148-149.

Adelaide's territory and a large portion was given to the British settlers for farming.[196]

The Xhosa were not happy about the fact that they lost their land. As a result, they took up arms against the British colonialists in what was called the battle of Mlanjeni. Again the battle of Mlanjeni went in favour of the British and again Xhosa land was acquired through conquest. The white settlers converted these lands into farms and the Xhosa people who found themselves without land were forced to work on white farms. It was on these farms where they were treated as tenants without any title to land ownership. The frontier wars rendered the majority of Xhosa landless and poor. To the traditional leaders, landlessness meant erosion of their power, independence and authority.[197]

3.1.5 THE GREAT TREK

The arrival of the British at the Cape colony interfered with the Boers as it made them to no longer be decision-makers of the Cape colony and their own destiny. Britain introduced a policy of englisation were Dutch language was abolished as a medium in public service and in courts. The use of Dutch in schools and churches was gradually obliterated. In 1820 British made matters worse when they funded a larger scale emigration of settlers to the Cape. The arrival of these 1820 settlers marked a clear line of two large white groups in South Africa. These newcomers developed English settler towns in Port Elizabeth and Grahamstown. Of great significance about the arrival of the English settlers at the Cape is the fact that they increased the demands for democratic rule of government.[198]

The newcomers including lawyers, traders, teachers, missionaries and administrators were armed with advanced ideas about the equality of the races at the Cape. These British emigrants were also armed with new statute such as the *Emancipation Act* of 1833. According to this Act there was to be

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[196] Pheko 1987 *LLJ* 149.
[197] Pheko 1987 *LLJ* 149.
[198] Leach *South Africa* 22.

no discrimination on the grounds of colour as far as the free inhabitants of the Cape were concerned. Secondly the Act abolished restrictions, which were imposed on the individual's freedom of movement and no person, was to be forced, to be limited to a fixed place of abode, way of life or work. According to Muller the Act was a turning point in the history of the Cape colony.[199]

The abolition of slavery in the Cape precipitated the exodus of Boers[200] as they held their new British compatriots, evangelists and progressive legislation in equal abhorrence. Subsequently, contradictions aroused between the British and Dutch in respect of their relationship with the Cape black people. As a result of these contradictions, the Dutch settlers emigrated out of their vicinity.[201] This movement came to be known as the Great Trek.[202]

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[199] Muller *Period of Great Trek* 137-138.

[200] Ritner *Death of Africa* 30. Muller *Period of Great Trek* 137-138. Rither is on record citing MacMillan categorically labelling the Great Trek as the "great disaster of South African history". Perhaps it was for this reason that the Great Trek was described as fundamentally a desperate protest against equality between black and white. In fact the Great Trek was a decision by the *Voortrekkers* to give up frontal attack and undertake an outflanking movement. It was this movement, which linked the future of all South Africans with the Boer race. The reason being the fact that practically the Great Trek had ensured that the descendants of the early Dutch settlers occupy the whole of what is today known as the Republic of South Africa. One of the main reasons why the Dutch settlers left the Cape was that the British policy of relaxing control over labour and other markets increased the economic pressure on the Dutch pastoralists and led to increasing antagonism between these two white groups. On the whole the Boer conservatism had expressed itself in terms, which epitomized themselves in the Great Trek. Some of the *Voortrekkers* claimed Christian motives for their departure from the Cape Colony. According to Chidester, Steenkamp, niece of the *Voortrekker* leader, Retief, explained their departure as follows: "As their being place on an equal footing with non-Christians (blacks), contrary to the laws of God and the natural distinction of race and religion, so that it was intolerable for any descent Christian to bow down beneath such a yoke, wherefore we rather withdrew in order thus to preserve our doctrines in purity". Pheko is on record citing the spokesperson of the Dutch settlers, Buchner explaining the reasons for the Great Trek as follows: "the uncontrollable behaviour of the blacks here is contrary to the care of the Afrikaner sentiment, and that alone is the motivating cause of the migration." See in this regard Chidester *Religions of South Africa* 45; Pheko 1982 *LLJ* 149-150.

[201] The word *voor* in English means to be in front or ahead. The word *trekker* in English means the puller. The Boers left their homes and fields and organised themselves into a journey to begin a new life. They packed their belongings into the ox wagons. It is said that they were armed with their Bibles and a firm belief that God had chosen them to explore the territories of South Africa and built their own independent states. This movement placed at the centre of very dangerous journey where they crossed Drakensburg into Natal, Orange river into the Orange Free State (OFS) and Vaal river into Transvaal (TVL). These Boers were known as the *Voortrekkers.*

[202] Ritner *Death of Africa* 30.

Retief, one of the leaders of the Great Trek, articulated the reasons for migrating in his manifesto:[203]

> We quit this colony, under the full assurance that the English government will allow us to govern ourselves without interference. We are resolved that we will uphold the just principles of liberty, but whilst we will take care that no one shall be held in the state of slavery, it is our determination to maintain such regulations as many suppress crime and preserve proper relations between master and servant.

As Muller explained some of the Voortrekkers regarded the period of the Great Trek as an heroic epoch and the source of national inspiration. It also framed their basis of their policy towards blacks in general and their traditional leaders in particular. It was this Boer movement, which led into the formation of the Voortrekker Republics, and the founding of Natal, which was later, annexed by the British government. At the time of migration only the Cape was colonised while the territories of what was later called by the Voortrekkers as Natalia, Transvaal (TVL) and Orange Free State (OFS) were independent and inhabited by blacks under traditional leaders who ruled through traditional governments.[204]

In as far as the black communities at the Cape were concerned, it is significant to underline the fact that in the end it was the British administration at the Cape, which had to decide and design their future. After the departure of the Boers from the Cape Colony, the British drove the Blacks off their land. They also disintegrated the natural economy and social systems of the indigenous people. The British government at the Cape imposed taxes on the black peasants. They promulgated the *Masters and Servants Act* of 1856,[205]

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[203] Pheko 1987 *LLJ* 150.

[204] Muller *Period of Great Trek* 148.

[205] Act 15 of 1856. Section 10 of Act 15 of 1856 provided that if any servant whose contract of service still subsists refuse or neglect upon his master's requests to discharge his service under his contract he shall be liable to be imprisoned with or without hard labour. Section 12 further declared the absence from the duty by the servant an offence. Section 13 made a servant liable for any lost or damaged property of the master due to his act or omission. The Act generally provided that once a person is employed in business and on farms he or

which lay down labour measures to govern black workers who were supposed to perform both manual and menial works. Once blacks were employed in business and on farms they were under legal obligation to be kept there as employees. These black servants were made liable and fined if they deserted, were absent or even displayed disobedience.[206]

Although slavery was abolished from a political point of view, it clearly appeared that the *Masters and Servant Act* reintroduced slavery at the Cape. Masters who were whites in this instance had unlimited powers over their servants (mainly blacks) and grossly violated their rights in some instances. In order to channel black people into the mines, the British government enacted *Glen Grey Act* of 1894.[207] The primary objective of this Act was to make farming inefficient and denied blacks self-sufficiency. To achieve this goal the Act limited ownership of land to 10 acres by blacks. Another characteristic of the British regime at the Cape was to be found in the areas of labour and racism. For example, the British administration introduced a *Vagrancy Act.*[208]

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she was to be kept there as an employee. Servants were made liable and fined if they deserted or displayed disobedience.

[206] Mbeki 2001 *Umrabulo* 53.

[207] Act 25 of 1894. The Act provided inter alia for the allocation and registration of land to blacks. Section 14 of *Glen Grey Act* further made provision for the payment of such allotted land by the registered holder. The piece of land granted could not be alienated or transferred. Section 24 provided that the allotment and other immovable property of every registered holder could be devolved upon and be claimable according to the rule of male primogeniture and to be determined as follows: (a) His eldest son of the principal house. (b) If the eldest son has previously died without leaving any male descendant, the next son or his male descendant and so on through the sons respectively and through the several houses in their order. (c) If no son or male descedants of any son be living then the father. (d) If no father then the eldest brother of such deceased person of the same house or his male descendant and so on through the brothers of that house and their male descendants respectively. (e) If no brother or male descendant of any brother of the same house be living, the eldest brother of the allied house of higher rank or next rank as the case may be or his male descendant and so on through the brothers of such allied house and their male descendants respectively. (f) If no brother or male descendant of any brother of such allied house the eldest brother or his male descendant of the left hand house. (g) If no brother or male descendant of any brother or any house the eldest brother of the father of such deceased person or his male descendant and so on through the brothers of his father and their male descedant respectively. (h) Failing brothers or their male descendants then to the grand father or his male descendant. (i) If there be no male descendant of the deceased person, the Crown dispose of such property. The Act had two important implications for the black people residing in Glen Grey area. Firstly it excluded black women from the realm of inheritance and ownership of land. In terms of the Act only male persons could inherit the land. Secondly the Act forced the labour off the farms and onto mines, limited ownership to 10 acres by blacks, making farming inefficient and denying them self sufficiency.

[208] Act 23 of 1879. The Act provided for the prevention of vagrancy and squatting. The Preamble of the Act stated *inter alia* that whereas it is expedient as far as possible to suppress idleness and vagrancy and whereas serious losses of stock by thefts are

This Act was directed at both Khoi and blacks in the Cape. Under this law all blacks and Khoi not in the employ of a white person were declared vagrants. According to Mbeki vagrancy was made a crime. In other words all black people and Khoi who were not working were by law criminals.[209]

The Cape black inhabitants were required to have passes to prove that they were not vagrants. Mbeki further argued that for the indigenous inhabitants to get passes they had to enter into a written labour contract with white employers. This arrangement was made by the British regime in order to meet the labour shortfall created by the non-importation of slaves.[210] It is submitted that the *Vagrancy Act* turned the Khoi and black inhabitants into permanent wage earners. Many people were driven off their land and their independent existence was obliterated. The Cape Colony destroyed the independence of the black communities and directed their labour where it was needed most, especially in the industries, mines and farms.[211] This approach greatly influenced traditional life in many negative ways and impacted on the institution of traditional leaders and traditional systems in that the members of their tribes were enslaved.

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experienced by farmers of this Colony and there is a reason to believe that the same are in a great measure traceable to the facilities afforded to unemployed persons and persons without sufficient means of support, of residing upon Crown and other lands, and of roaming about without proper control and it is expedient that such facilities as aforesaid should be restricted. Section 2 of Act 23 of 1879 provided that any person found wandering abroad and having no visible lawful means or insufficient lawful means of support who being there into required by any Resident Magistrate, Justice of Peace, Police Officer or owners of land and may not give a good a satisfactory account of himself may be deemed and taken to be an idle and disorderly person. Section 4 further provided that every person found wandering over any farm or loitering near any dwelling house, shop, store, garden, vineyard, kraal or other enclosed place may be deemed and taken to be an idle and disorderly person and shall be liable to be imprisioned with or without hard labour and with or without spare diet and with or without solitary confinement.

[209] Mbeki 2001 *Umrabulo* 53.

[210] Mbeki *Africa* 14.

[211] Mbeki 2001 *Umrabulo* 53.

3.2 *REPUBLIC OF NATAL*

3.2.1 VOORTREKKERS AND BRITISH ENCROACHMENT

Maré and Hamilton established that in the early 19th century, the strongest state yet seen in southeast emerged under the leadership of Shaka Zulu.[212] The formation of the Zulu kingdom involved deep-seated changes in the social and the economic structure of the productive units that made up the Zulu nation. King Shaka created the Zulu nation largely through the conquest of his neighbouring tribes.[213] But some of the tribes, which feared Shaka, fled from the war zones of Zululand. So, the construction of the Zulu state was also characterized by huge tides of migrants. For instance, Mzilikazi also took his tribe to the present Zimbabwe. His plan to establish his own kingdom in South Africa failed when the Voortrekkers defeated him. Subsequently he crossed Limpopo and established his kingdom in *Kwa-Bulawayo.*[214]

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[212] Maré and Hamilton *Appetite for Power* 17.

[213] Were *History of South Africa* 74-75. This state was the Zulu kingdom. This was the state, which was born in war and organised for war. According to Were the Zulu became powerful, aggressive, ambitious and expansionist under the leadership of King Shaka. The Zulu kingdom was a state of warriors. These warriors maintained it. Therefore, it goes without saying that the Zulu state was maintained and sustained by warfare and its survival depended entirely on enough fighting to keep King Shaka and the warriors busy. In view of the above, the logical conclusion to be made here is that the Zulu nation was a military state ruled by a king who had qualities of a brave and persistent warrior. As a consequence, the Zulu army was the source of all power and army commanders became the king's advisors. Absolute loyalty to Shaka became the order of the day. Power vested on the king and the army. In the light of new political and militaristic arrangement, traditional leaders within the kingdom lost their powers and their authority was confined to routine tasks such as the minor administration of justice. It is argued by Were that in most cases if not all such traditional leaders were the reliable nominees of King Shaka himself. Since traditional leaders are born to the leadership, it clearly appeared that Shaka's procedure of nominating traditional leaders was contrary to the African rule of succession to the leadership position. This was the kind of state created by Shaka. It was this state which led to and resulted into a numerous conflicts amongst the blacks in South Africa. These conflicts constituted the most remarkable events in the history of the 19th century in Southern Africa as well.

[214] Leach *South Africa* 27. Kwa-Bulawayo is the Zulu name which means the "Place of the persecuted one". Despite the kingdom formed by Mzilakazi in Zimbabwe, these migrations led to the emergence of other states in South and East Africa. For instance, after the collapse of Zwide's army at the hands of Shaka, the Ndwandwe tribe disintegrated into a considerable number of sections. Two of these groups migrated into Mozambique under the leadership of Soshangane and disintegrated into a considerable number of sections. Later these two fought each other and Soshangane emerged victorious and created a state known as Gaza. This new Soshangane's state was named after his grandfather. Zwangendaba, the loser led his followers to the present Malawi. Having absorbed people on their way, he finally settled in Ufipa in mainland Tanzania. The settlement of the Zwangendaba in the mainland Tanzania was followed by further migrations to Songea,

According to Maré and Hamilton, the first penetration of this Zulu state by the forces of colonialism was through the agency of hunters, traders and missionaries, even though by then, the political power and the Zulu monarchy were wholly unchallenged.[215] The Zulu state was later penetrated by the first small party of the Voortrekkers who were followed in 1836 by a second and large one under the leadership of Maritz and Retief.[216] These Boers soon came into contact with Dingaan, at that time the King of the Zulus. The Voortrekkers leaders were willing to proceed to Zulu land for the purpose of obtaining cession of land direct from King Dingaan himself. Upon their arrival King Dingaan promised them land, on condition that they made a neighbouring Chief Sekonyela restore a large number of cattle stolen from the Zulus. They succeeded in doing so.[217]

Retief appealed for friendly and good relationship between the Zulu tribes and the Voortrekkers. Indeed his message was actually calling for peace in the newly founded country. However, his message seemed to be contrary to what later happened to be wars and conflicts between the Zulus and the Voortrekkers. Davenport enunciated that the arrival of the Vootrekkers in Natal inaugurated a new era in the history of the Zulu kingdom. The Republic of Natal, bordered by the Black Umfolosi, the Drakensburg and the Umzimvuba, was declared the first Boer State by the Voortrekkers and became for five years after Blood River, the main territorial base for the Trek as a whole.[218]

Safwe, Pangwa and even across the Rovuma River. It was here in Tanzania where the Gwangara Ngoni settled at Songea, the Tuta in Unyamwezi to the north of Tabora and the Maseko Ngoni at Songea. As a consequence, the arrival of these newcomers in these areas encouraged the local inhabitants to build large and strong states. The Nyamwezi under Mirambo and the Hehe are the examples of these strong political units formed as a result of migrations.

[215] Maré and Hamilton *Appetite for Power* 17.

[216] This second penetration was by the Boers as a result of Great Trek.

[217] It appears that King Dingaan gave the Boers land so that they could help him to reclaim the livestock, which was taken from his Kingdom by Chief Sekonyela.

[218] Davenport *South Africa* 68; Leach *South Africa* 27. Retief, one of the leaders of the *Voortrekkers* stated on their arrival in Natal that they proposed in the course of their journey and arriving in the country (Natal) in which they would permanently reside to make known the native tribes their intention and their desire to live in peace and friendly intercourse with them.

The result of the Blood River was that the *Voortrekers'* government after defeating Dingaan, installed Mpande as a puppet king at Dingaan's place. Although the *Voortrekkers* recognised Mpande as the new ruler of the Zulus, he did so in the face of internal challenges as they dictated to him. The administration of Natalia tampered with the Zulu kingdom and divided the royal family and the traditional leaders in Zululand. Mpande and the Voortrekkers marginalized those traditional leaders who supported Dingaan. The repercussion of the war of Blood River is that two opposing camps of traditional leaders were created.[219] One teamed with Mpande and the other with King Dingaan.

According to Saunders, the war of Blood River, one of the most decisive in the history of the Zulu kingdom, is still remembered among the Zulus as the breaking of the rope that held the nation together. This event engendered undesirable consequences for the Zulu kingdom. It gave the *Voortrekkers* in Natalia the chance to intervene decisively in Zulu affairs and therefore introduced a new element into the nation's political life. It is said that by his own account to the *Volksraad* in Pitermaritzburg, Mpande was content to remain in Natalia and submit to *Voortrekkers* authority in return for protection.[220]

Saunders further elaborated that, if paradoxically, the presence of the Voortrekkers on the Zulu borders helped to maintain Mpande's authority, it eventually came to pose a serious threat to the existence of his kingdom.[221] The Voortrekkers saw the fertile and productive Zulu country as a means of satisfying their land hunger, and of providing access to the sea that would render them independent of British domination. The arrival of the Voortrekkers in Zululand sowed the seeds of divisions of the traditional leaders. It also brought about land dispossession, which was accompanied by poverty and misery on the part of the Zulu communities.

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[219] De Villiers *White Tribe Dreaming* 137.
[220] Saunders *Black Politics* 51.
[221] Saunders *Black Politics* 51.

On 3 February 1838 an entourage of approximately 69 Boers and a number of their Khoikhoi servants, led by Retief arrived at the Zulu royal house where they were welcomed by Dingaan.[222] The main aim of their visit was to negotiate with Dingaan the question of land transfer. Leach stated that Dingaan agreed to transfer land to the Boers when he signed a document, which was drafted by Boers. If indeed Dingaan signed his people land away, it is logical to say that King Dingaan signed away land belonging to his kingdom without knowing what he was doing, as tribal land can never be given away.[223] Retief only received at the most, a right to occupy and farm.

The Voortrekkers came to Zululand with foreign ideologies where everything done or said had to be documented. When the Voortrekkers came to Dingaan he was hospitable, but they took advantage of this fact and utilized it to the fullest. According to Leach, two days after Dingaan had signed the land transfer document, he arranged the festivities. It is said that Retief was annoyed by the menacing sound of the wardrums. Leach stated that Dingaan leapt suddenly from nowhere and instructed his wariors to kill the Boers whom he called the wizards. Boer families were also wiped by Dingaan. At the end of this massacre melodrama, 41 men, 56 women, 185 children and 250 servants were killed.[224]

In December 1838 the battle of Blood River took place. The Boers defeated the Zulus who lost about 3600 of their men.[225] Dingaan was unable to recover from the crushing defeats of Blood River and fled northwards where he was assassinated by one of his own captains.[226]

In as far as the kingdom and the institution of traditional leadership were concerned, the arrival of the *Voortrekkers* had far reaching consequences on these traditional structures. Firstly, the *Voortrekkers* separated King Dingaan

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[222] Dingaan was the King of the Zulu kingdom who succeeded Shaka.
[223] Leach *South Africa* 28.
[224] Leach *South Africa* 28.
[225] Since then Ncome river has been called Blood River. This Boer victory was celebrated every year 16 December as the Day of the Vow. However, since 1994 the 16th of December the public holiday is recalled as Day of Reconciliation.
[226] Keane *Boer States* 108.

and his half brother Mpande, who allied himself and his army of about 10 000 followers to the *Voortrekkers* in return for their support as contenders for the Zulu throne. Against this alliance, Dingaan's defeat was inevitable. A number of traditional leaders in the kingdom were dissatisfied with their positions under Dingaan and hoped that by ousting him, they would assert their power over a new king. After the outbreak of war with the *Voortrekkers* and crushing defeat of the Zulu forces under King Dingaan at *Ncome*[227] River, Mpande began to emerge as an alternative form of alliance.

The *Constitution* for the new state of Natalia was adopted in March 1839. It featured the principle of representative democracy ruled by *Raad van Representatitien Van Het Volk*. In order to cater for the needs of Voortrekkers elsewhere, the Republic of Natalia admitted to its *Volksraad*, representatives of the highveld communities,[228] but did not mention traditional leaders and communities.

It is impossible to underline the fact that the new administrators of Natalia were never able to settle the case of the blacks in the new Republic. The *trekkers* never understood that the land was not theirs by right of cession. Nor did they understand that the land had never been empty. In fact, if the land was theirs, it was not by cession but was theirs by right of conquest. As De Villiers illustrated, it was not a surprise to realize that the *Constitution* of Natalia did not allow blacks in the so-called white areas at all, except as farm workers and servants. Surplus blacks were to be moved south of the new Republic.[229]

Potgieter governed his *Voortrekker* communities from the Mooi River across the Vaal, but Pretorius began to work for amalgamation when he visited the Mooi River settlement in 1839. Two years later, after a visit by Potgieter to Pietermaritzburg, an *Adjunct Raad* was set upon the Mooi River, where

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[227] The word *Ncome* is a Zulu term for blood. In fact, Ncome river is where the *Voortrekkers* and the Zulu fought over the question of land in a war which was popularly known as the Blood river.
[228] Davenport *South Africa* 68.
[229] De Villiers *White Tribe Dreaming* 137.

Potchefstroom was built to be occupied by *Volksraad* members living in the highveld. The *Adjunct Raad* was not to be a separate body, rather a committee of the *Raad* proper, and it was supposed to report to the *Volksraad* twice yearly. According to Davenport, the *Adjunct Raad* became important, and a growing point in *trekker* constitutionalism. But of much importance to be reckoned is the fact that, at first the Republic of Natalia was ran by a *Volksraad*, which was legislative, executive and judiciary in one. De Villiers established that there was no president, only a commandant with uncertain and ambiguous powers in the highveld area.[230]

3.2.2 BRITISH AND THE ZULU KINGDOM IN NATAL

As events unfolded in Natal, the British authorities were keeping an eye on the political administration of the Voortrekkers in the Republic of Natal. Initially, Britain had no intention to extend the Cape Colony through annexing Natal but there were some fears that another power might take advantage of the unsettled state and decided to move in. Moreover, Sir Napier, who had succeeded D'Urban as Governor of Cape Colony, did not want another flood of black refugees to put more pressure on the eastern boarder of the Cape.[231]

Bulpin reported that on 13 December 1842, the British government made up its mind about the incorporation of Natalia into the Cape administration. As a result, Governor Napier was mandated to send a suitable person as Commissioner in Natal. The Commissioner was duly instructed to communicate the British intention with the *Voortrekkers* and examine the country in detail. On 12 of May 1843, British authorities announced the incorporation of Natal into the Empire as a British Colony and the appointment of Cloete as Her Majesty's Commissioner.[232]

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[230] De Villiers *White Tribe Dreaming* 137.
[231] Willcox *Southern Land* 203.
[232] Bulpin *Shores of Natal* 124-125.

Cloete had instructions to consult with the *Voortrekkers* over the form of government to be introduced and to inform them that three principles would be followed, namely:[233]

- That there shall not be in the eyes of the law any distinction of colour, origin, race or creed, but that the protection of the law, in the letter and in the substance, shall be extended impartially to all alike;
- That no aggression shall be sanctioned upon the blacks residing beyond the limits of the colony, under any plea whatever, by any private person or anybody of men, unless acting under the immediate authority and orders of the government; and
- That slavery in any shape or under any modification was absolutely unlawful as in every other portion of Her Majesty's dominion.

On 8 August 1843, all but one of the members of the *Volksraad* signed an acceptance of the terms in what Willcox called the second Great Trek, a great many of the Voortekers left Natal and returned to the highveld which was then beyond the British rule.[234] As Van Niekerk noticed, the task of administering Natal with its black inhabitants was not going to be an easy one[235] as there were about 100 000 displaced blacks to be settled. In dealing with this problem, the authorities appointed a Commissioner under Shepstone to make enquiries about the land question. The establishment of locations by which the blacks could settle on tribal lines solved the problem of resettling many blacks, temporarily. The unsuccessful attempt to house the refugees in locations was followed by Shepstone's scheme of indirect control of the black population by restoring tribal leadership.[236]

This system of indirect rule was introduced among other things to deal with the demand for cheap administration. The British government saw traditional

[233] Willcox *Southern Land* 203.
[234] Willcox *Southern Land* 203.
[235] Van Niekerk 1990 *Codicillus* 38.
[236] Van Niekerk 1990 *Codicillus* 38.

leaders as cheap administrators who could be used to minimise the cost of running the colony. As a result, the British authorities allowed traditional leaders to be in charge of their communities. The government gave traditional leaders certain privileges with regard to the performance of their colonial administrative duties.[237] It should be borne in mind that the British authorities put traditional leaders in charge of their tribal administration not because they fully had confidence in their traditional authorities but as a stopgap measure. Maré and Hamilton are on record quoting Justice Beaumont saying:[238]

> In Natal you are undermining the authority of the Chiefs everyday. Every act dealing with the natives that is passed more or less undermines the authority of the Chiefs, and, on the other hand, you are trying to bolster them up to retain their position.

The traditional leaders were given less administrative and judicial powers by the colonial power than they had in independent pre-colonial societies. For example, traditional leaders now became the agents of the authorities and became accountable to them.[239] The effect was to undermine the legitimacy

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[237] Section 57 of *Native Law* (*Code*) 19 of 1891 provided for the personal privileges of the Chiefs as follows: (a) The rank they held. (b) The salaries paid to them. (c) The fees of their civil court. (d) The fines lawfully imposed by them. (e) The right to the respect and obedience of the members of their tribes.

[238] Maré and Hamilton *Appetite for Power* 18.

[239] Welsh 1968 *Acta Juridica* 81. In Natal traditional leaders where made to swear upon oath that they would obey the laws and commands of the Lieutenant-General as great Chief and representative of the Queen of England. As quoted by Welsh, in terms of Ordinance 3 of 1849 the Lieutenant-Governor was to "hold and enjoy, over all the Chiefs and natives in Natal, all the power and authority which according to the laws, customs and usages of the natives, are held and enjoyed by any Supreme or Paramount Native Chief with full power to appoint and remove Chiefs or other authorities among them". The Supreme Chief was the apex of bureacratic control in Natal. He wielded absolute executive, legislative and judicial powers. Tribes were moved or dispersed and Chiefs were deposed or appointed in his name. The Supreme Chief could also command traditional leaders to furnish him with labourers under a system of forced labour. See *Mathibe v The Lieutenant-Governor* 1907 TH 557, where the court dealt with the issue concerning a Chief who had been deposed from office by the Lieutenant-Governor. The Chief had not been given an opportunity of defending himself. The question was whether Lieutenant-Governor had power to depose a Chief? The court held that he did and that he could exercise it arbitrarily. Further evidence on the power of the Lieutenant-Governor on the African traditional leaders was heard in *Mokhatle and Others v Union Government* 1926 AD 71. In this case the appellants were members of a tribe who were directed by the Lieutenant-Governor as Supreme Chief to leave a certain location. The court held that it was consistent with the law of the Colony for a Supreme Chief to expel from tribal land any subjects who committed acts of insubordination or hostility to his authority.

of their positions.[240] As it would be discussed in detail below,[241] most of the functions and powers were given to magistrates' officials.[242]

The other reason why the system of indirect rule was introduced, is because the use of traditional leaders in administration in the early days of Natal's existence as a British possession, was largely necessitated by the small number of civil servants available to rule the black population. According to Welsh, around 1871, the black population of Natal was 300 000 and the total number of magistrates only eleven. These magistrates found it difficult to cope with the workload of administering justice. As a consequence, many traditional leaders were appointed by the government to assist the magistrates. These appointments made traditional leaders in Natal more amenable to control by government. Welsh cited Shepstone reporting that:[243]

> Hereditary Chiefs may be officially deposed by the paramount power, may be refused recognition, may be sent into exile or placed under personal disabilities.

In view of this political arrangement and administration, traditional leaders were not disposed to rebel against the government and Shepstone had influence on the traditional leaders. Traditional leaders, who did in fact revolted as Chiefs Sidoyi and Matyana did, lost their traditional positions. This helped to ensure that for many years in Natal, traditional leaders could not dare openly to resist British authorities.[244] The war of the British against the

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[240] Benyon *Political Incorporation* 377. The most dramatic event of the British administration in Natal was the demolition of the Zulu military system, hereditary monarchy and traditional leadership. As a result the Zulu Kingdom and the institution of traditional leaders lost their identities.

[241] See 3.2.3 below.

[242] Maré and Hamilton *Appetite for Power* 18.

[243] Welsh *Roots of Segregation* 111-112.

[244] Welsh *Roots of Segregation* 111-112.

Zulu ended in 1879.[245] Despite the defeat, the Blacks in Natal developed an ideology called Zuluism.[246]

Traditional leaders derived popular support from this ideology of Zuluism or what MacKinnon termed re-invented Zulu nationalism.[247] Both the conservative traditional leaders and political leaders reinvigorated Zulu traditions as they amassed support of their subjects. As a result, despite all the impediments and wars on their ways, the traditional leaders proved to be much more resilient than traditional leaders elsewhere in the colonial South Africa. They redefined their roles to deal with the colonial government. At local level, they relinguished powers over their wards to *Izinduna*[248] while at broader level, they asserted their power and significance as the drivers of traditional rule in the reserves. Consequently, MacKinnon argued that traditional leaders in Zululand were important instruments to the state's construction of the political structures of segregation.[249]

McIntosh observed that during the colonial period traditional leaders in the Zululand continued to act as intermediaries between their rural masses and the segregationist government even though both Zulu kingdom and individual traditional leaders had been subjugated and subjected to the government rule.[250]

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[245] Chidester *Religions of Southern Africa* 38.

[246] Hamilton 1993 *Indicator South Africa* 44. After this war, the blacks in Natal colony began to feel the weight of oppressive and exploitative rule by white settlers. The colonial officials and settlers frustrated the Zulus by placing obstacles and hurdles in the way of economic, social and political aspirations. Consequently, the blacks in Natal began to develop an ideology, which combined elements of African nationalism with what Hamilton called Zuluism. Zuluism was the term which signified that the black people of Natal-Zululand region were all Zulus by virtue of the fact that their forbearers had supposedly once all been ruled by the Zulu kings. However, it is important to note that outside the Zulu kingdom the term Zulu was used differently. Hamilton pointed out that the blacks of the 19th century in Natal were categorised as Zulus by the European traders, travellers and missionaries from the neighbouring colonial world. Consequently by the mid 1830s, the word Zulu was becoming established in the literature on Southern Africa. European settlers in the Natal Colony also began to call the black inhabitants of Natal Zulus. Zuluism was used to rally the Zulus together during the times of conflicts and confrontations with the British.

[247] Mackinnon 2001 *J of Southern African Studies* 590.

[248] *Izinduna* in a Zulu context means a senior counsellor or headmen who is responsible for the administration of the ward.

[249] Mackinnon 2001 *J of Southern African Studies* 590.

[250] McIntosh *et al* 1996 *Development of Southern Africa* 55.

According to Welsh, not all traditional leaders in Natal were hereditary.[251] Some of them were created by government simply because they toed the government line. It is in this view that an argument could be raised that the British authorities in Natal created a political environment, which was intended to extinct traditional leadership. Shepstone confirmed this attitude when he wrote that:[252]

> I believe that the power of the Chiefs will become extinct from the force of circumstances, as a rule, the people precede them in civilization, the nature of the questions before them become complicated in proposition to their progress and in the same proposition the inability of the Chiefs to deal with them will be felt.

This statement indicates the fact that the British authorities in Natal undermined in no uncertain terms the relevance and significance of traditional leaders. Instead the colonial regime wished the institution of traditional leadership a speedy demise.[253]

3.2.3 REALM OF ADMINISTRATION OF JUSTICE

The magistrates had been tasked to administer justice in Natal. However, it transpired that few magistrates knew anything about African customary law, apart from some garbled and inaccurate ideas. Therefore the British authorities decided to reduce customary law to writing. Welsh cited extracts of a report of the 1852-3 Commission as follows:[254]

> The non-existence of a full and complete digest of true rules and principles of kaffir law for the guidance of magistrates. At present each magistrate

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[251] Welsh *Roots of Segregation* 115.
[252] Mackinnon 2001 *J of Southern African Studies* 590.
[253] Welsh *Roots of Segregation* 115.
[254] As quoted by Welsh *Roots of Segregation* 159. The word *kaffir* as it appears in the above quotation was used to refer to the black people of South Africa during the colonial and apartheid periods. According to the *Longman Dictionary of Contemporary English*, *Kaffir* means a black African. The word *kaffir* is a derogatory term, which was used by the Colonists. This word has been excised from the Statute book of South Africa. Under the new constitutional dispensation it is regarded as hate speech.

> administers within his own jurisdiction what he considered was or ought to be kaffir law, the kaffir see and comment upon the contradictory decisions hence arising uniformity of management is absolutely essential to success.

In view of the problem expressed above, in 1862 the Legislative Council instructed the Lieutenant–Governor (LG) to codify the Zulu law. The Council further mandated the Lieutenant–Governor to appoint a Board consisting of the Chief Justice of the Colony (CJC), the Attorney General (AG), the Secretary for Native Affairs (SNA), the Judge of the Native High Court (NHC) and any other three persons who were either magistrates or justices of the peace to codify the Zulu law. It is said that any five of these were to constitute a quorum. It was this board, which was tasked to codify customary law of the Zulu in the Colony.[255]

The Board produced a Code, which was a curious document, divided into sixty-eight sections. This Code of the Zulu law was to serve as a guide for Magistrates' courts and was binding on Zulus only. It concentrated on family law and succession, with but superficial reference to public law and procedure. It is submitted that the Code was incomplete, however, and was not a true reflection of Zulu indigenous law. The reason for its incompleteness and lack of authenticity might be attributed to the fact that its framers were white officials who were unable to make comprehensive research of the Zulu law. For this reason the Code was vague and greatly distorted as traditional leaders, the custodians of the Zulu law and culture were denied an opportunity to participate in the drafting of the Code. The indigenous Zulu communities largely disregarded the Code.[256]

As a result of its distorted nature by white officials, the Code was amended in 1891[257] and made applicable to the rest of Natal. It was then called the Natal

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[255] Welsh *Roots of Segregation* 165-160.

[256] Van Niekerk 1990 *Codicillus* 38; Du Plessis 1992 *De Jure* 289-307.

[257] See *Native Law* (*Code*) 19 of 1891. The Code dealt inter alia with the Zulu customary law of succession, criminal law and traditional leadership. Section 46 of Chapter IV of *Native Law* (*Code*) 19 of 1891 provided that a Chief was responsible within his location or among

Code. Although this Natal Code paid more attention to criminal law as well, it was still incomplete and the unwritten indigenous law remained the residual source of indigenous law. Even though traditional leaders' judicial powers were retained in Natal, their jurisdiction was not defined and they were under the control of white magistrates. The Zulu monarch being replaced as the Supreme Chief[258] of all the indigenous people of the territory by the Lieutenant-Governor of Natal evidenced their inclusion in the white government control. In fact the indigenous people and traditional leaders of Natal were placed under white rule.[259]

The Supreme Chief assumed all the traditional powers and the authority of the paramount traditional leader. This replacement of the Zulu monarch was the demonstration of how the colonial government curtailed the powers and functions of the Zulu monarch and the traditional leaders in general. This

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the people of his tribe for: (a) The general good conduct of his tribe. (b) The prompt supply of men for the purpose of defence. (c) The prompt supply of men as labourers for public works or for the general needs of the Colony. (d) The immediate notifications to the Magistrate or to the Administrator of native law of all crimes or offences. (e) The due publications of all such public orders, directions or notices affecting the members of his tribe. (f) The appointment of sufficient men to act as District Headmen for sections of his tribe. (g) The appointment of sufficient number of Official Witnesses for marriage purposes. (h) The due compliance with the *Marriage Law Regulations* by the people of his tribe. (i) The prevention of crimes and offences of the production, sale and use of "*Isityimiyana*" or of any intoxicating liquour whatever native beer (*utywala*) (j) The recognition and control of strangers not being people of his tribe and of cattle other than cattle known to be the property of the tribe. (k) To discharge such further and other duties as may from time to time be required by the Supreme Chief. In terms of section 49 of *Native Law* (*Code*) 19 of 1891, Chiefs also have power to try all civil cases (divorce cases excepted) between natives whether arising from contract or from tort or otherwise. The defendants or respondents or the persons complained of in all such matters must be members of their tribes otherwise they had no power to deal with the same. An appeal lies from all their judicial acts to the Administrator of native law having jurisdiction.

[258] In terms of section 6 of Chapter I of *Native Law* (*Code*) 19 of 1891 the words "Supreme Chief" denote the officer for the time being administering the government of Colony of Natal. Section 33 of *Native Law* further provided that: "the Supreme Chief appoints all Chiefs to preside over tribes or sections of tribes and also divides existing tribes into or more parts or amalgamates tribes or parts of tribes into one tribe as necessity or the good government of the natives may in his opinion require". It is also important to note that such divisions of tribes by the Supreme Chiefs in Natal led to the breakdown of traditional leadership and again resulted into the unnecessary and illegitimate multiplications of traditional leaders. Section 34 of the *Native Law* provided that: "the Supreme Chief in Council may remove any Chief found quilty of any political offence or for incompetency or other just cause from his position as such Chief and may also order his removal with his family and property to another part of the Colony".

[259] Van Niekerk 1990 *Codicillus* 38.

arrangement was contrary to the African belief that a traditional leader is born to the throne.[260]

3.2.4 MISSION AND TRADITIONAL LEADERSHIP

As noted above,[261] the missionaries were amongst the first group to arrive in Zululand. Their active role in Natal and of course in other provinces of South Africa contributed greatly towards the breakdown of African culture and traditions. While the Zulu kingdom was still intact, the traditional leaders in Zululand welcomed missionaries not for their gospel but for the material benefits. Missionary teachings and practices, however, undermined the political authority of traditional leaders and subverted the social order of the Zulu communities. When Britain took over the control of Natal, missionaries advocated the replacement of traditional leaders by British rule in order to make way for Christian civilization. It is equally true that the missionaries in carrying out their objects and mission worked *in tandem* with the colonial administrators.[262]

Maré and Hamilton citing Comaroff further put it that the basic purpose of the missionaries':[263]

> In civilizing colonialism was to reconstruct the Zulu society and culture by encouraging Zulu to adopt European modes of thought of life. For example, they took practical steps to implant individualism, the nuclear family, private property and commerce in the Zulu society.

Mbenga stretched this argument further when he said that the missionaries in Zululand frowned upon and actively suppressed many aspects of Zulu culture, such as initiation ceremonies and to some extent polygamy.[264] The

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[260] It was an insult to the Zulus and contrary to their culture to impose a white official, Lieutenant-General on them as their traditional leader.
[261] See 3.2.1 above.
[262] Maré and Hamilton *Appetite for Power* 18.
[263] Maré and Hamilton *Appetite for Power* 18.
[264] Mbenga *Acquisition of Land* 49.

missionaries, for example, actively discouraged male circumcision, which they regarded as most immoral and did all they could to stamp it out. The general missionary view was that Zulu culture was fundamentally corrupt, sinful and needed to be redeemed.[265]

Warner insisted that:[266]

> The sword must first not exterminate them (Zulu), but break them up as tribes, and destroy their political existence, after which when thus set free from the shackles by which they where bound, civilization and christianity will no doubt made rapid progress among them.

Missionaries introduced mission schools, which were intended to promote social change. These schools taught *inter alia*, gospel and Christian doctrines. Many traditional leaders realised that Christian convention robbed them of their subjects, since converts seemed to owe their loyalty to the alien political power of the British Empire or the colonial government that the mission represented. This problem of dual loyalty remained a matter of great concern to the traditionalists who owed allegiance to their traditional leaders and not the missionaries.[267] Chidester, echoed the Zulu King Cetshwayo's principal adviser mentioning that:[268]

> We will not allow the Zulus to become so-called Christians. It is not the King (who) says so, but everyman in Zululand. The missionaries desire to set up another power in the land, ... and as Zululand has only one King that cannot be allowed.

It has previously been alluded to[269] that traditional leaders were the custodians of culture and traditions. Given the intention of the missionaries to dismantle the Zulu culture, it became obvious that there was no way the

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[265] Mbenga *Acquisition of Land* 49.
[266] As quoted by Chidester *Religions of Southern Africa* 40.
[267] Chidester *Religions of Southern Africa* 40.
[268] Chidester *Religions of Southern Africa* 40.
[269] See 2.1, 2.2, 2.3 and 2.4 above.

existence and authority of traditional leaders could not be affected. The reason being the fact that, the pillars of the traditional authorities were anchored in culture, customs and traditions. It is therefore not difficult to sustain the argument that the missionaries altered the traditional life, existence of the Zulu communities and traditional authorities.[270]

The Zulus strongly believed that the missionaries had to be resisted because they were representatives of a foreign political system. Another major factor, which fuelled resistance, was the fact that the missionaries wanted to introduce another form of power in Zululand. According to the Zulus there was only one power or King in Zululand and another power or King could not be tolerated. Despite this resistance, surely but slowly the missionaries canvassed for the replacement of traditional leaders by British rule and paved a way for Christian civilization. The missionaries acquired this goal despite the resistance by the Zulus and their traditional leaders.[271]

3.2.5 CAPITALISM

Another aspect, which had a profound negative impact on the institution of traditional leaders in Zululand, was capitalism. Capitalism benefited white agriculturalists, industrialists and mining magnates who had great interest in

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[270] Chidester *Religions of Southern Africa* 44-55. However, it must be remembered that even though the missionaries penetrated the cultural life of the Zulu and made impact on their life generally, traditional leaders resisted the activities of the missionaries. For instance the Zulu sacred specialists conducted rituals near mission stations on Sundays in order to disrupt the rituals of the missionaries. The homestead was also used as a strong base of resistance to the mission. Chidester pointed out that in Zululand usually the heads of the families allowed their children to attend mission schools but often deregistered them before they could be baptised. Many Zulu people ignored the teachings of the missionaries except the social outcasts, misfits and refugees who supported the missions. The Zulu traditionalists saw these people as anti-social individualists. Most of the traditional leaders found the teachings of the missionaries highly incomprehensible. For instance, Owen, the missionary in the Zululand was once surprised to learn that many Zulu people including King Dingaan could not understand him when he taught them about God. Among the questions they asked were: "Is there one? Can he see us if he is in the air? He must be a good climber". Many people thought that Owen was talking to King George in England and not necessarily God. It is also submitted that even King Dingaan was confused when the missionaries talked about God as the highest Chief. Dingaan further said "was God among the English Kings?" The Zulus attempted to understand the new concept of God in terms of the Zulu religious principle of *Unkulukulu* (the first ancestor of the Zulus). To the understanding of the Zulus the missionaries used the term *Unkulukulu* to refer to their notion of God.

[271] Chidester *Religions of Southern Africa* 45.

cheap labour. The Zulus who were the main sources of cheap labour were exploited and oppressed. When this colonial oppression gained high degree of momentum, traditional leaders in Natal south of Thukela, began to look to the Zulu kingdom for leadership against the national oppressor. The turning point came with the Bambatha rebellion in 1906, the last major resistance of African traditional leaders against capitalist encroachment. The rebellion was about labour and specifically the £1 tax imposed by the Natal government in 1905 on every male over the age of 18 years.[272]

Traditional leaders south of Thukela supported Dinuzulu in the Bambatha rebellion even though his status was merely that of an ordinary traditional leader. Maré and Hamilton remarked that the rebellion distinguished:[273]

> Between two periods in the history of the blackman in South Africa, the early period of tribal war against white invaders, and the second period, one for struggle of national and democratic rights within the framework of present day South Africa were black and white intermingled in complex economic and political relations.

In a measure in which British troops used guns against the Zulu warriors, between 3000 and 4000 of Bambatha's followers and those of the other Zulu traditional leaders who had joined him were maimed down in the Nkandla forests. Bambatha's head was cut off and displayed to prove that he was dead and the rebellion over. After the rebellion, the colonial regime in Natal-Zululand started to push the Zulus into the system of migrant labour. They did so without any opposition from the traditional authorities. The reason being that they had eliminated Chief Bambatha who seemed to be an obstacle in the colonial regime's way of labour exploitation.[274]

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[272] Maré and Hamilton *Appetite for Power* 18. The various forms of taxation such as Hut taxes and Poll taxes were implemented more vigorously at the request of mine owners who asked the government to force people off the land so as to seek labour on the new mines.
[273] Maré and Hamilton *Appetite for Power* 18.
[274] Hamilton 1993 *Indicator South Africa* 45.

As migrant labour became widespread in Natal, traditional leaders felt the erosion of their authority. This continued erosion of chiefly authority was attributed to a number of reasons. Firstly, a large number of commoner families entered white-owned farms as both farm workers and tenants. Men were pushed into the mining industries of the Witwatersrand. In Zululand the Zulus were pushed into towns and farms. Migrant labour tampered with the existence of traditional authorities in Zululand as they were drained of their subjects who happened to live in towns and cities. The people detached themselves from their traditional authorities, culture and traditions.[275]

3.3 VOORTREKKER REPUBLICS

The *Voortrekkers* not only had a major influence in Natal but the *Voortrekker* Republics also influenced the structures and roles of traditional leadership. The establishment of the *Voortrekker* Republics will be analysed, after which the relationship between governments of these Republics and traditional authorities will be discussed.

3.3.1 ESTABLISHMENT OF A NEW STATE OF TRANSVAAL

It has been stated earlier[276] that the occupation of Transvaal (TVL) was the outcome of the Great Trek, which was caused by the dissatisfaction of the frontier farmers in the Cape with the British administration of the Colony. Jackson held the view that the Voortrekkers had a great desire to establish a satisfactory form of government outside the realm of the British administration.[277] It has been said that the centre of authority gravitated to Natal when many Voortrekkers decided to go there. Later this centre of authority moved to Potchefstroom in the TVL when people started returning from Natal and then to Ohrigstad in the Northern TVL, which was founded by Potgieter. Jackson further explained that after this, a period of strife and

[275] Hamilton 1993 *Indicator South Africa* 45.
[276] See 3.2.5 below.
[277] Jackson *Ndebele of Lange* 13.

division followed, which resulted in the *Voortrekker*'s efforts to establish a strong centralised government.[278]

When the *Voortrekkers* arrived in the area, which they later called TVL or Zuid-Afrikaanse Republic (ZAR),[279] they found various tribes scattered throughout the region. For instance, in the Western TVL they found Bakgatla-Ba-Kgafela and other groups known as Ba-mosetlha, Ba-makau and Ba-mosha. As noted above[280] in the northern TVL, they came into contact with the Pedi-speaking people, Venda and Tshonga while in the eastern TVL, they found themselves in the region of the Swazis and Ndebeles.[281]

When these *Voortrekkers* arrived in the territory of the Tswana, the region which they later called western TVL, they found that the Tswana were organised in tribal states. Davenport explained that the tribal state hierarchy was characterized by the organisation of the whole territory of the tribe into three divisions.[282] The first division was the area for residence. This category constituted settlements known as *Metse*.[283] The second area was earmarked for growing and ploughing purposes. This category was called *Masimong*[284]

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[278] Jackson *Ndebele of Lange* 13.

[279] Terreblanche *History of Inequality* 222. When the *Voortrekkers* established the Republic of TVL, their independence was recognised by Britain at the Sand River Convention in 1852. See Document on Sand River Convention of 1852 2-3. The Sand River meeting was held in the place of Mr PA Venter on Friday 16 January 1852 between Major W Hogge and CM Owen, Her Majesty's Assistant Commissioners for the settling and adjusting of the affairs of the eastern and north-eastern boundaries of the Colony of the Cape of Good Hope. The emigrant farmers or *Voortrekkers* residing north of the Vaal River were represented by: AWJ Pretorius (Commandant-General), HS Lombard (Landdrost), WF Joubert (Commandant-General), GJ Kruger (Commandant), JH Grobbelaar (Raadslid), RE Scholtz, PG Wolmarans (Ouderling), JA van Aswegen (Veld-cornet), FJ Botes (Veld-cornet), NJS Basson, JM Lehman and P Schutte. It was agreed inter alia at the Sand River Convention that: (a) No slavery would be permitted or practised in the country of the north of the Vaal River by the emigrant farmers. (b) No objection would be made by any British Authority against the emigrant Boers purchasing their supplies of ammunition in any of the British colonies and possessions of South Africa. (c) Firearms and ammunition should not be sold to African communities and their traditional leaders. See also the London Convention of 1884. Article 1 defined and confirmed the boundaries of TVL thereby embracing the land of the territory of TVL beginning from the point where the north-eastern boundary line of Griqualand West meets the Vaal River, up to the course of the Vaal River to the point of junction with it at the Klip River.

[280] See 3.1.1 above.

[281] Mbenga *Acquisition of Land* 2.

[282] Davenport *South Africa* 58.

[283] *Metse* is a Tswana word, which in English refers to places of residence. Its singular is *Motse*.

[284] *Masimong* is a Tswana term which refers to area where tribal people cultivated crops.

and the third category of tribal estates was for grazing and hunting.[285] This section was normally referred to as *Morakeng.*[286] The main obligation of Tswana traditional leaders in this kind of tribal state arrangement was to regulate the land use.[287]

The northern Pedi of TVL differed from the Tswana in a sense that state building among the Pedi involved a traditional leader in the amalgamation of a number of separate tribal estates. The hierarchy of leadership structure headed by *Bakgomane,*[288] with *Balata,*[289] *Bafaladi*[290] and *Mathupya*[291] as the lowest class. Davenport asserted that the Pedi kingdom could not be defined in terms of a nation or state. He argued that in fact it was a federation built by force and marriages. Suffice to state that the Pedi Empire was a product of conquest and diplomacy. For instance Chief Sekwati, the founding father of the Pedi empire refused to install any traditional leader to the throne who did not marry from the royal family.[292]

The matrilineal Lovedu who inhabited north of what the Voortrekkers later called Olifants river claimed some similar characteristics of origin with the Kgatla. The Venda of the area, which was later, referred to by the Voortrekkers as Soutpansberg were culturally connected with the Tsonga. The TVL Ndebele were different from the Mzilikazi Ndebele. According to Davenport this group claimed to have arrived in the TVL from the southeast.[293]

The *Voortrekkers* had many clashes with the people of the chiefdoms enunciated above, during their trek in search of the new republic of TVL and freedom from British rule. Mbenga stated that after the defeat and the expulsion of Amandebele of Mzilikazi from the Western TVL, the Voortrekkers

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[285] Davenport *South Africa* 58.
[286] *Morakeng* is a Tswana word, which refers to cattle posts.
[287] Davenport *South Africa* 58.
[288] *Bakgomane* is a Pedi word, which refers to traditional leaders.
[289] *Balata* in Pedi denotes the commoners.
[290] *Bafaladi* as Pedi term means in English incorporated foreigners.
[291] *Mathupya* is a word used by the Pedi speaking people to denote or refer to the slaves.
[292] Davenport *South Africa* 60.
[293] Davenport *South Africa* 60.

under the leadership of Potgieter proclaimed the TVL a Boer republic, by right of conquest. Consequently, these groups of the *Voortrekkers* considered all traditional leaders and their subjects to be under their jurisdiction as the new authorities and owners of the land in TVL.[294] Hence, the *Voortrekkers* annexed the land of these black groups. In doing so they took more and more land.

It was Potgieter's attitude that all the country previously ruled by Mzilikazi was now subject to the latter's victors. This attitude affected the policy towards the black inhabitants of the TVL. It should be born in mind that the land, which Potgieter claimed, belonged to the traditional leaders and their communities who were, in fact the owners of the region. This land dispossession affected the system of traditional authorities. The *Voortrekker*'s exercise of land dispossession undermined the authorities of traditional leaders as the custodians of land. The arrival of the *Voortrekkers* in the region of TVL marked the breakdown of the sovereignty and independence of traditional authorities.[295]

In order to assert their power in the region, the *Voortrekkers* passed resolutions from time to time. In April 1844, a *Constitution*[296] containing 33 articles was adopted at Potchefstroom. This *Constitution* was re-adopted and re-affirmed in May 1849. The *Constitution* did not make reference to the traditional leaders. Willcox is of the view that the birth of TVL was not an easy one. The reason being that the *Voortrekkers* had still not achieved unity in their own house and the black tribes of the TVL had not, as they had hoped, submitted to them as the conquerors of Mzilikazi. In other words, traditional leaders still regarded themselves as the rightful owners of the land. Conflict between the Voortrekkers and the traditional communities became more and more inevitable.[297]

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[294] Mbenga *Acquisition of Land* 2.
[295] Willcox *Southern Land* 41.
[296] See *The Statute of the Transvaal*: *The Thirty-Three Articles* of 9 April 1844. Hereafter referred to as the 1844 *Constitution*. The Thirty Three Articles were drawn up at Potchefstroom, 9 April 1844 and ratified at Derdepoort on the 23 May 1844.
[297] Willcox *Southern Land* 41.

The TVL government decided that in view of the ensuing conflict with the rightful owners of the land, the services of the Commandants would be necessary. Therefore, four Commandants-General (CG)[298] were appointed (for example Potgieter for the Soutpansberg region). It was also decided in December of that year that black affairs would fall under these Commandants. Based on this decision, Potgieter led a commando to force the submission of the Pedi under Chief Sekwati. Although they failed to storm his stronghold, the Boers returned with many captured cattle.[299]

According to Willcox, the threatened tribes in the Marico districts in the west banded around Kolobeng under the Bakwena Chief Sechele who had acquired firearms and seemingly hoped to play the same role as King Moshoeshoe of Basotoland.[300] In August 1852, Potgieter led a commando and attacked towns in the Marico region, destroyed crops and carried off black women and children. There was also intermittent trouble with the Venda in the Soutpansberg whose territory was overrun by elephants, hunters and traders. The methods of the republic government to collect taxes from the Venda people provoked reprisals and the region fell into disorder. The Voortrekkers caused disorder in the black communities and disrupted the authority of traditional leaders. They treated traditional leaders and their people with contempt.[301]

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[298] Volksraad *Resolution* 19 September of 1853. Section 68 of 1844 *Constitution* provided the Commandant-General with the powers to deal with small black tribes in such manner as they deem fit in order to get the firearms from among them and to impose an annual tax upon them for public treasury. It is important to highlight that although black people were denied any form of participation in the activities of *Volksraad* and other political institutions of TVL, they were required to pay tax. This system of taxation forced many black people particularly men to go out of their families and looked for jobs in white farms and industries. *Volksraad Resolution* 28 November 1853. Section 124 of 1844 *Constitution* provided that with regard to lands granted to blacks and their leaders for occupation in TVL, the Commandant-General and Commandants were ordered where necessary to grant the same. The *Volksraad* resolved that such a land may be occupied by them and their descendants conditionally as long as they behave in accordance with the law and obediently. In case of disobedience such tenure was declared lapsed and if so it would remain a loan farm and the conditions or rent may be summed up in the words: "Good behaviour and obedience."

[299] Willox *Southern Land* 40.

[300] See 8.1.5, 8.2.1, 8.2.2, 8.2.3, 8.2.4, 8.2.5, 8.2.6, 8.2.7 and 8.2.8 below.

[301] Willcox *Southern Land* 41. The case of Chief Maubane and his followers who lived in the Pretoria district provided an example of the burdens imposed on black groups. In their instance, the land upon which they lived in the 1850s came into the ownership of a consortium of Boers including the local veldkornet.

In 1852 Commandant Scholtz, leader of the Boer mercenaries attacked Chief Sechele of Bangwaketse in the present Botswana, with a force of 300 men capturing 3000 heads of cattle, 11 horses and few goats, 2 wagons and about 250 women and children as prisoners, among whom were 2 children of Chief Sechele. With typical Boer arrogance and undermining close ties between Chief Montshiwa and the Bechuanaland Protectorate, Scholtz had written to Chief Montshiwa demanding not requesting the Tshidi Rolong people to provide regiments to assist in attacking Sechele. Some of the attacks of Scholtz's letter read as follows:[302]

> Chief Montshiwa, you are hereby commanded to send immediately two hundred armed men on horseback, and provide them with victuals for a fortnight to assist us in punishing Sechele.

Chief Montshiwa replied to the Scholtz's command with utmost contempt:[303]

> As I am responsible to God and man for what I or people under my command do, I cannot accede to your order. Please first distinctly inform me what the sin unto death of (Chief) Sechele is?

After attacking and defeating Sechele, Scholtz kept true to his threat. Chief Montshiwa fearing reprisals from the Boers was in no condition to offer resistance, he fled to Setlagole 45 miles northwest of Mafikeng. A Boer commando followed Montshiwa and his subjects and engaged them at

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[302] As quoted by *The Mail Mafikeng* 26 March 1999 18. In June 1851, some Boer farmers came to settle to the west of Lichtenburg upon land owned by Montshiwa at the eye of Molopo River. *The Mail Mafikeng* quoted Chief Montshiwa of Barolong stating that: "If you dispossess a robber of stolen goods, do the goods become yours or must be reverted to their original owner". Chief Montshiwa refuted the Boers' claim that they defeated Mzilikazi and therefore had the right to occupy TVL. In other words, both Mzilikazi and the Boers had no land rights of Barolong. It seems that the Boers were delusional to assume that the land they conquered belonged to Mzilikazi. This misunderstanding led to land grapping, which eventually resulted, into considerable number of battles for land.

[303] *The Mail Mafikeng* 26 March 1999 18.

Mosite, killing about 30 subjects of Chief Montshiwa and capturing a large herd of cattle.[304]

Among other battles that took place before the outbreak of the Anglo-Boer war, was the Battle of Tigela. This battle was lesser known than the Anglo-Boer war. The Boers ignored the notification that a British Protectorate had been established over Bechuanaland and a cession of jurisdiction had been accepted from Chief Montshiwa. The Boers went ahead with raiding and fighting. On 31 July 1885 approximately 300 Boers from Rooigrond near Mafikeng raided Barolong and Bangwaketse cattle posts at Tlapeng, sixteen miles to the north west of Mafikeng and took over many heads of cattle.[305]

Cope explained that in 1858, the *Voortrekkers* in TVL decided to draft another *Constitution*, which would serve as a basis for law in the Republic.[306] One of the reasons for the re-drafting of the *Constitution* was to put the question of black policy in a clear perspective. The inequality between blacks and whites were entrenched in the 1858 *Constitution*.[307] Kruger, the President of TVL, was one of the Committee of three who drafted the 1858 *Constitution* of the TVL Republic and as Cope noted, his personality was stamped on almost every page of the document. His concept of ideal democracy was a religious inspirited *Volk* with a God-fearing leader who consulted the elders. Consultation being mainly a process of passing on his decisions and instructions. It is said that Kruger linked himself and the Afrikaner *Volk* to

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[304] *The Mail Mafikeng* 26 March 1999 18. It was reported in *The Mail Mafikeng* newspaper that the battle of Tugela saw the death of Chief Molema who was killed by a chronic bullet wound in the lung in 1896. This battle was one of the clashes between the Boers and the Barolong. Although the war was a loss to Barolong and Bangwaketse, it was important as one of those conflicts that shaped the relationship between British and Barolong. A relationship that resulted in the Barolong-Boo-Ratshidi choosing to support the British during the Anglo-Boer War.

[305] *The Mail Mafikeng* 26 March 1999 18.

[306] Cope *South Africa* 129.

[307] Cope *South Africa* 129. See *Grondwet of the South African Republic*. Hereafter referred to as the 1858 *Constitution*. See also *Volksraad Resolution* 13 February of 1858. Section 21 of 1858 *Constitution*, where the *Raad* resolved that: "a flag shall be adopted for South African Republic, consisting of the following colours: red, white and blue, each of equal breadth, horizontally superimposed one on the other and a green perpendicular stripe along the staff. Thereon shall be placed the words 'Unity is Strength'. A coat of arms composed as follows: a wagon and a gold anchor on a silver field and on that shield an eagle couchant, on the right side of the shield a man in the clothing of the country armed with a gun and equipments on the left side a lion".

Moses and Israelites and he often said that he could find no justification for politics in the Bible.[308]

When the Committee of three drafted the principles of the *Constitution*, Cope noted that Kruger insisted the name for the new Republic to be the Zuid-Afrikaanse Republic (ZAR) and not the TVL Republic.[309] Kruger's insistence of the name ZAR was based on the argument that one day Afrikaners would be amalgamated throughout South Africa, and therefore they must be offered a home now. Contrary to Kruger's position, Britain insisted that the new state would be termed TVL Republic. Kruger defied the British despite a protest by the British residents in Pretoria and went on calling it the ZAR.[310]

It was evident that the future of the new state of TVL or ZAR was in the hands of the Afrikaners and the British. Traditional leaders and their communities were not even considered despite the fact that they were also the inhabitants of the state in question and the original owners of the land. The *Constitution* of TVL made no provision for black participation in the political and socio-economic affairs of the new Republic. Traditional leaders in the Republic were sidelined and left out of the country's politics and their authority was undermined and disregarded.[311]

The government of the ZAR, which excluded the blacks of the Republic, consisted of the President, his Executive Committee and *Volksraad*.[312] A second *Volksraad* was added in order to give the *uitlanders*[313] on the goldfields some say in the affairs of the state. Still on this second Volksraad,

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[308] Cope *South Africa* 129.

[309] See *Volksraad Resolution* 21 November 1853. Section 115 of 1844 *Constitution* stated that the *Volksraad* proceeded to adopt a name of the Boer State as: "The South African Republic North of the Vaal River". The *Volksraad* further resolved that all State documents would be sent and filed with this name and title.

[310] Cope *South Africa* 130.

[311] When the *Voortrekkers* occupied the traditional authority areas in what they later called TVL they disregarded the ownership of such land by traditional leaders. The *Voortrekkers* were of the opinion that by defeating Mzililakazi they automatically acquired the right to occupy the land of traditional leaders and their communities.

[312] *Volksraad* is a word used to refer to the legislature or the parliament of the Boer Republics.

[313] The word *uitlanders* was used by the Boers to refer to the new white settlers in the TVL. These settlers came mainly from United States of America, Germany, France and Eastern Europe.

blacks were not represented. As noted above, the 1858 *Constitution* ruled out equality between black and white in matters concerning church and state. This ideology persisted throughout the 19th century and after, for example, forced labour was in the opinion of the Boers based on the natural and divinely determined order of their relations with the blacks over whom they claimed authority. Mbenga quoted Kruger telling the *Volksraad* that:[314]

> Our *Constitution* want no equality between white and black and equality is also against the Bible, because social classes were also applied by God.

Mbenga has recorded Kruger's expressed opinion of blacks and their traditional leaders as follows:[315]

> Where there was only a handful of white men to keep hundreds of thousands blacks in order, severity was essential. The black Chief had to be taught that he came second, that he belonged to the inferior class which must obey and learn.

It appears that Kruger's opinion expressed above represented the views of other *Voortrekkers*. Therefore, the establishment of TVL on the then region of the traditional leaders and their communities had profound implications for the future of the traditional authorities in TVL. It was clear from the foregoing that the government of the TVL was not prepared to integrate black rulers into the system of governance. This means that even the social, economic and political opportunities of TVL would not be made available to the traditional communities. Inevitably, traditional governance would be altered.

3.3.2 FORCED LABOUR AND CAPITAL PUNISHMENT

According to Mbenga, the Voortrekkers, when they came into contact with Bakgatla-Ba-Kgafela, named the area Pilanesberg after the tribe's traditional leader, Chief Pilane.[316]

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[314] Mbenga 1997 *J of African Studies* 131.
[315] Mbenga 1997 *J of African Studies* 132.

Blacks were only allowed to procure land grants through purchase from the Voortrekkers. For instance, between 1884 and 1899 Chief Linchwe of Bakgatla-Ba-Kgafela bought for his people Saulspoort, Modderkuil, Kruidfontein and Holfontein. According to Mbenga, these farms were occupied by Bakgatla-Ba-Kgafela long before the *Difaqane* or the arrival of the *Voortrekkers*. Chief Linchwe therefore bought his own property. It is also submitted that the Boer commandants Potgieter, Maritz and Uys gave Barolong Chiefs Montshiwa and Gontse and the Bahurutshe Chief Moiloa grants of land for having assisted them in expelling Mzilikazi. This land was owned by Barolong and Bahurutshe before the Boer invasion.[317]

The Boer invasion on the land of black people had far reaching results on their borders of land ownership. Most traditional leaders in TVL were left without land and that forced them to buy "their own" land in a hurry.[318] This created an acute shortage of land. Consequently many blacks were forced to work on farms of the Boers as tenants. For instance most Bakgatla-Ba-kgafela lived on the property of Kruger around Rustenburg.[319]

As many blacks became farm workers and tenants on farms, they became subjects of the farm owners and no longer subjects of traditional leaders. This is so because some of these people resided permanently on white farms. Suffice to say that the newly created Boers farms "robbed" traditional leaders

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[316] Mbenga *Acquisition of Land* 3. As already highlighted that at that time various Batswana groups were already in the weakened position because of the turmoil caused by the Amandebele of Mzilikazi in what is referred to as Difaqane. It seemed the *Voortrekkers* took advantage of these Tswana groups including Bakgatla-Ba-Kgafela. When the *Voortrekkers* conquered blacks in the western TVL, they also extended their authorities to eastern and northern TVL. The *Voortrekkers* declared themselves the owners of the whole TVL. Land was given to the *Voortrekkers* in TVL on generous basis. According to Mbenga, when Kruger was 16 years old, he was entitled to choose two farms for himself, one for grazing and another for growing crops. Mbenga explained that by 1840s, some Voortrekkers had already settled in Rustenburg and Pilanesberg areas. For example, in 1839 Potgieter obtained a farm, Doornkop in Rustenberg and by that time, Kruger had already acquired a farm in Saulspoort. Saulspoort farm was approximately 4, 525 morgen with a large number of Kgatla farm workers.

[317] Mbenga *Acquisition of Land* 3.

[318] For instance as highlighted above, Chief Linchwe of Bakgatla-Ba-kgafela bought some portions of land, which were originally owned by the Bakgatla tribe.

[319] Some of these people were forced to render unpaid labour to Kruger and other Boers.

of their subjects. In severe cases, some of these people literally became the "property" of the Boers. They grew and worked on farms, and were finally buried there.

The black question in TVL and elsewhere in South Africa had been described and articulated as the question of land. Agar-Hamilton asserted that this approach was half the truth because the black question in the Boer republics was a matter defined in terms of labour. Since the arrival of white people in the Cape their ingenuity had been channelled to exploit labour to the fullest.[320] Mbeki cited the Chamber of Mines in its Annual report stating that:[321]

> (Whites) viewed the Native purely as a machine, requiring a certain amount of fuel.

The supply of labour was also part of a wider set of exchange in which trade in arms and ammunition also played an important role. From this attitude manifested the belief that blacks had either to work for whites or be driven out. The Boers considered blacks mere instruments of labour. According to Mbenga, the Boers could not accept that they should use their own children for manual labour while there were thousands of blacks around.[322]

The idea of racial superiority included the idea of discipline. Good behaviour had to be prompted not only by example and direction but also when necessary by corporal punishment. It was for this reason that Kruger said that:[323]

> Child-like peoples had to be schooled and disciplined with physical force, and corporal punishment was a

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[320] Agar-Hamilton *Native Policy* 169.

[321] As quoted by Mbeki 2001 *Umrabulo* 54. Quoted Froneman commenting on black labour that: "an African was not an individual, comparable to a white individual. Rather, he was the repository of the commodity, labour and power, which could and must be qualified in a profit and loss amount to the point of the very negation of life itself. In that real sense the African therefore belonged to the category of commodities to an equal extent of gold, diamonds and any other commodity you could mention, to be bought and sold, hoarded and even destroyed depending exclusively on the state of the market".

[322] Mbenga 1997 *J of African Studies* 132. According to Boers of TVL, manual labour was specifically designed for blacks. Their communal living was likened to a collection of rats.

[323] Mbenga 1997 *J of African Studies* 132.

> necessary coercion, the most effective and economic way of training and disciplining black labour.

The sentiment expressed above, simply meant that corporal punishment was the only punishment readily understood by blacks and their rulers. This belief was demonstrated practically in 1870 when a Commandant, Kruger, who was based in Rustenburg became exasperated by the refusal of a traditional leader of Bakgatla-Ba-Kgafela, Chief Kgamanyane, to continue providing labour to dam a stream in the Pilanesberg mountains. The dam was intended to provide large quantities of water to irrigate wheat fields Kruger had began to cultivate in the Kgatla heartland. Kruger convened a meeting in Saulspoort and in front of the public gathering, personally flogged Chief Kgamanyane. Mbenga explained:[324]

> Kgamanyane's hands and feet were bound and he was tied to the wheels of a wagon. Kruger then personally flogged the prostate Kgamanyane. The incident took place in front of all the neighbouring Chiefs in the Pilanesburg, who had been instructed to attend to witness the flogging, so that they might see what could happen to them if they did not do as they were told.

This incident is an example of how the Commandants of TVL humiliated traditional leaders and their people. Those who refused to provide labour were chastised. Indeed this was an insult to the institution of traditional leadership. Traditional leaders like Chief Kgamanyane were treated with utter contempt. After the flogging incident, in 26 April 1870, Chief Kgamanyane who was angered by the insult of the flogging moved with half of his people to Mochudi in the present Botswana.[325]

According to Mbenga, there were many instances, which demonstrated the fact that the Boers in TVL Republic routinely punished traditional leaders. For instance, in 1851 the Tlhaping Chief Mahura was forced to appear before the

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[324] Mbenga 1997 *J of African Studies* 129-130.

[325] When the system of forced labour and corporal punishment became so intensified in the Pilanesburg areas, many Tswana young men fled to Mochudi in Botswana to join Chief Kgamanyane while others fled to Chief Sechele in Molepolole in Botswana.

Volksraad and he was instructed to pay a fine of 2070 head of cattle for an alleged attack on his Tswana neighbours and shedding blood on lands belonging to the Republic.[326]

The relations between traditional leaders and the Boer Commandants in TVL were marked by racial, economic and political tensions and harsh conditions. The Boer Commandants tampered and fiddled harshly with the institution of traditional leaders in TVL. Traditional leaders were always on the run and their communities became scattered in the present Botswana. The TVL authorities divided the Tswana tribes and created problems of leadership for these tribes and traditional authorities. This led to a situation whereby two or more traditional leaders ruled one Tswana tribe thus creating confusion in the line of leadership.[327]

3.3.3 DISCOVERY OF GOLD

The discovery of gold played an important role in the history of the TVL Republic. It brought into the Republic large numbers of all classes of men that frightened both Boers and blacks. The discovery of gold, more than any other event, changed the economy of South Africa. According to Christopher, gold had been worked before the arrival of the whites, but it was only in the 1860s and 1870s that the metal was discovered in the western TVL.[328] The discovery of gold in the Witwatersrand in the 1880s was followed by the sequence of events that established the area as the main mining region in South Africa leading to a high demand for labour.[329]

The establishment of gold and diamond mines created a conducive atmosphere, which signified the beginning of capitalism in TVL. For black communities, capitalism meant that thousands of blacks that were largely depended on self-subsistence economies were either forced or attracted to

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[326] Mbenga 1997 *J of African Studies* 138.
[327] For instance, Bakgatla-Ba-Kgafela in Saulspoort have a traditional leader who is based in Botswana and another one in South Africa.
[328] Christopher *South Africa* 124-126.
[329] Christopher *South Africa* 124-126.

the emerging mining industries to provide labour. Black people who were dispossessed of their land became providers of labour in these new industries. The wealth of the white mining magnets of these diamond and gold industries was created through the toil of black labourers who were recruited from traditional communities.[330]

These new recruits, mainly young men, were hired to work in the underground sections of the mines. Many died as a result of regular mining incidents. This led to the breakdown of families in the rural areas as husbands lost their lives or became crippled. The results being poverty and misery in many black families. The discovery of gold affected the landscape and the existence of traditional communities. It also tampered with the institutions of traditional leaders, as sons of traditional leaders and some members of the royal families were recruited to the reefs. Some of the sons of traditional leaders never came back to succeed their fathers, thus shifting traditional power from one family to another. In some instances this caused succession disputes.[331]

When the mining activities became hectic, more black workers were needed. In 1893 the Chamber of Mines appointed a black labour Commissioner, and in 1896 the Witwatersrand Native Labour Association (WNLA) was established to recruit labour from Mozambique and the northern territories.[332] Later the Native Recruiting Corporation (NRC) was formed to obtain labourers from the adjacent former British Protectorates, now Botswana, Lesotho and Swaziland. These miners came on short term contracts without their families. The mines

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[330] Christopher *South Africa* 125-126. In order to provide labour into the mines and industries, traditional areas were turned into 'reservoirs' of cheap labour. Suffice to mention that the discovery of gold and diamond created an economic arena for the exploitation of black workers.

[331] Throughout TVL most of the traditional authorities became under the control of the people who were not rightful and legitimate rulers. In some instances the regents led communities while in others people who were not even traditional leaders by birth ruled them.

[332] Andrews *South African Foundation* 5. These territories of the north included inter alia Malawi, Tanzania and Zimbabwe. Andrews contented that, gold mines have had by far greater impact because of greater size of the industry. It drew many workers from South Africa and from abroad. The TVL government had to cope with the intrusion of gold seekers in embarrassingly large numbers, whose presence threatened to engulf the impoverishment and essentially rural society over which it ruled. By 1899 Johannesburg had a population of over 100 000. About half was blacks. A clear sign of the fact that, the discovery of gold disarmed the traditional leaders many of their subjects.

built large compounds in which their black staff lived as a virtually self-contained community.[333]

It has been said above that many black men were drawn into the reefs of the gold mines and that it led to the breakdown of rural families. This problem extended to other territories of Africa, which served as recruitment regions, where traditional leaders also lost control of many traditional institutions, such as traditional regiments, which used to protect the tribes. Black miners were gradually detribalised and lost contact with their traditional roots. In a way, traditional leaders were to some extent altered and modernized. The black miners inculcated new ideas and lifestyles in the villages.[334]

Davenport stated that intrusion of the *Uitlanders* facilitated the growth of urbanisation.[335] The mineworkers in the surrounding areas of the mines accommodated these *Uitlanders*. Small factories, shops and other market places emerged. Black women started to flock into these areas in order to seek employment, thus leaving their children in villages. Abandoned children became the burden of old people who could not work in the mines. In some instances, children were left under the care of their senior siblings. This trend attributed to lack of parental care, which led into the bad upbringing of the children.[336]

3.3.4 ORANGE FREE STATE REPUBILC

According to Keegan, the early Boer settlers of Orange Free State (OFS) found Griqua and Koran bands occupying river sites in the west.[337] These settlers were interspersed by remaining San communities and the Sotho

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[333] Christopher *South Africa* 124-126.
[334] Christopher *South Africa* 126.
[335] Davenport *South Africa* 74.
[336] Christopher *South Africa* 126. These black children wandered about the streets of the rural areas because they had no schools to go, or no parents at home to see that they go to schools. The reason being that parents had to work in the mines to keep the families alive. As Mandela remarked this state of an affair led to breakdown in moral standards and rise in illiteracy. Suffice it to say that the discovery of gold disintegrated traditional families, communities and authorities.
[337] Keegan *Rural Transformation* 2.

speaking people.[338] As the Ndebele moved across the Limpopo River, the resistance to white settlement in the OFS became weak and people were alienated from their land.

The Boer contact with the Griquas, Basotho and Tswana under the authorities of Adam Kok, Chiefs Moshoeshoe[339] and Moroka gave rise to a conflict over land. The traditional leaders of these black groups were reluctant to succumb to the authority of the Voortrekkers. Subsequently British authorities of the Cape intervened through the Governor Maitland who appointed a Resident with a few troops in Bloemfontein[340] to restore order in the region. All the parties to the quarrel (Boers, Griquas, Basothos and Tswana) were instructed to submit their troubles to the Resident. The Boers defied the Resident and appealed to arms instead of the Arbitration Court. Consequently, British proclaimed their sovereignty.[341]

In 1849, Sir Harry Smith, British governor at the Cape, extended the Cape Colony's boundaries to incorporate the whole area between the Orange and Vaal Rivers, spurred by land speculators and by coastal merchants who saw the trading frontier rapidly advancing beyond the political control of the Cape colonial authorities.[342]

During the years of the British sovereignty over the said region between Orange River and Vaal River, Sir Harry, High Commissioner and the self appointed *Inkosi Inkulu*,[343] did not tolerate disputes from either blacks or whites. According to Meintjies, Sir Harry exerted his powerful control over the traditional leaders in the region. He claimed that he did so in the interest of peace and civilization. As Meintjies also noted, Sir Harry set a sorry example by humiliating traditional leaders by duplicity and greed and an almost total

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338 Keegan *Rural Transformation* 2.
339 For more information regarding the land of Basotho, see 8.1.7 below.
340 Bloemfontein was founded in 1846 on a farm between Kaalspruit and the Modder River. Bloemfontein became the capital of Orange Free State during the Sovereignty (the British rule). See in this regard Meintjies *Voortrekkers* 227.
341 Kean *Boer States* 113.
342 Keegan *Rural Transformation* 3.
343 *Inkosi Inkulu* is Zulu phrase used in English to refer to the Great Chief of the blacks with a particular reference to the Zulus.

insensitivity to the feelings of others. For instance, Sir Harry instructed Adam Kok to cede all the land outside Griqua reserve. When the Griqua Chief Kok refused, Sir Harry threatened to tie him in the beam in the room in which they were sitting. As a result Chief Kok gave up and ceded his claims. This is a poignant demonstration of how white rulers took land from traditional leaders and their communities.[344]

In February 1854 the British withdrew their administration from Bloemfontein in terms of the Bloemfontein Convention and handed power to the President of the newly created OFS Republic, situated between the Orange River in the south and Vaal River in the north. The Bloemfontein Convention was seen as a Magna Carta, the Bill of Liberty for the Boers. While the Boers of OFS seemed to be free from British control, that was not the case with the black inhabitants of the OFS. The Boers immediately subjected them to severe subjugation. In the Convention it was not agreed to make any alliance with black tribes and traditional leaders nor to sell them firearms or ammunition.[345]

This new Boer Republic was created without the involvement of the traditional leaders and the black inhabitants of the OFS. The Boers established an only white government in the OFS Republic. According to Davenport, this Boer Republic was lacking in bureaucratic muscle and infrastructure. The popular exerted *Volksraad* was largely an ineffective and inefficient political institution. Land-owning and commercial elite exercised power and patronage informally and locally. Apart from the appointed *landdrosts* in the small commercial centres, policing and judicial functions at a more local level in the districts were exercised by prominent local notables, the elected *veldkornette* and appointed *Vrederechters*.[346]

After the Bloemfontein Convention, firm guidelines were set for Boer constitutionalism intended to work out an effective form of government. The

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[344] Meintjies *Voortrekkers* 228.
[345] Keegan *Rural Transformation* 3.
[346] Davenport *South Africa* 74.

new *Constitution*[347] was based on American and European precedents. The OFS *Constitution* restricted the vote to male citizens of 18 years and over, and limited citizenship to whites thereby excluding blacks.[348] This means that blacks were not regarded as the citizens of the OFS. Therefore, traditional leaders and their communities were not citizens in their own country. The new *Constitution* provided for a unicameral *Volksraad*,[349] an executive government, which was placed in the hands of the President, chosen for a five year term, by direct public vote, from a list drawn up by the *Volksraad.*[350] The OFS *Constitution* did not recognise the authority of the traditional leaders.

The state, for which the *Constitution* was drawn up, became and remained a country controlled by the white farmers. When these farmers occupied OFS, they conquered the land, which belonged to the Rolong under Chief Moroka.[351] Chief Moroka of the Seleka branch of Barolong of Thaba Nchu died on 8 April 1880 and his death was followed by a succession dispute. The Boers capitalized on this dispute by dividing the warring parties. The reason

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[347] *The Statute Law of the Orange River Colony* of 1854. Hereafter referred to as the 1854 *Constitution of the Orange River Colony*.

[348] See sections 3 and 4 of the 1854 *Constitution*. Section 3 of the 1854 *Constitution* outlined the qualification of white voters as follows: All burghers of full age would be competent to vote for the State President and members of the Volksraad (a) Who are born in the state of Orange River Colony. (b) Who have unencumbered fixed property to the value of at least £150 sterling registered in their names. (c) Who are lessees of fixed property having an annual rental value of at least £36 sterling. (d) Who have an annual income of at least £200 sterling. (e) Who are owners of movable property to the value of at least £300 sterling. (f) Who have obtained burgher rights. Persons who have been convicted by a court of high treason against the State, murder, coining, arson, perjury or gross immoral crime were not allowed to vote. Since blacks were not regarded as burghers it is evident that they were not allowed to vote.

[349] Sections 5, 6, 7 and 13 of Chapter IV of 1854 *Constitution* outlined the composition, powers and duties of the *Volksraad* as follows: (a) The supreme legislative power of the Republic was entrusted to the *Volksraad*. (b) The *Volksraad* consisted of one member for each Field-Cornetcy of the various districts and of one member for each main town of a district. The *Raad* was elected by majority of votes by the enfranchised inhabitants of each Ward and of each main town of a district. (c) Every burgher who had never been convicted by any jury of a crime, who had not been declared bankrupt or insolvent, who resided within the state and who had reached the age of 25 years and who owned unencumbered fixed property to the value of at least £500 strerling was eligible to be member of the *Volksraad*. The *Volksraad* had powers to pass laws, regulate the administration and finances of the state.

[350] Davenport *South Africa* 74.

[351] See sections 11 and 12 of the 1854 *Constitution* concerning the land of Chief Moroka. The Orange River State gave the Coloured people ground rights on the land of Chief Moroka. These guaranteed ground rights allowed Coloureds to sell or cede such rights to their parents, children, their descendants or to their brothers and sisters.

for this was to procure the land of the Rolong. Something, which the Boers eventually achieved.[352]

This dispute occurred because power was passed to Tshipinare, son of the second and favourable wife, Nkhabele. Tshipinare, contrary to the Rolong custom of succession, did not test his legitimacy in a normal way by convening a *pitso.*[353] As a result, Samuel Lapulere Moroka, who was the half brother of Tshipinare, but the son of Chief Moroka, did not accept his claim.[354]

The dispute developed after Brand, the then President of OFS, who offered to arbitrate and was eventually accepted by both parties, decided in favour of Tshipinare on 17 July 1880. As Davenport explained, for whatever reason president Brand ignored the Rolong custom, which required ratification of the successor by the people, and he chose Tshipinare. Brand undermined the Rolong procedures in this regard. This move also undermined the traditional authority of the Rolong.[355]

After some provocation, Tshipinare banished Samuel. Samuel was assisted by the land hungry Boers to prepare his counter-revolution. Eventually, on 10 July 1884, Samuel headed a force of at least 400 men, including 11 white OFS farmers to attack Tshipinare's home in Thaba Nchu where he was shot. It should be borne in mind that the Boers who assisted Samuel did so in order to be compensated with land. Brand who also had an interest in the matter, immediately decided with his Executive Council to call a large commando to march on Thaba Nchu, where Brand raised the Free State flag and annexed the territory.[356]

The annexation of Thaba Nchu by the government of OFS had profound implications for the Rolong people and their traditional authorities. Firstly,

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[352] Davenport *South Africa* 74. In most cases, the Boers divided traditional leaders more especially members of the royal family to obtain their land.
[353] *Pitso* is a Sotho name, which refers to tribal gathering or assembly by the adults' members of the tribe in order to discuss the affairs of the tribe.
[354] Davenport *South Africa* 140.
[355] Davenport *South Africa* 140.
[356] Davenport *South Africa* 140.

Tshipinare who was assisted by the OFS government gave the white settlers a large number of farms as compensation. In this way he rendered his people landless. According to Davenport, only 51% of the original 142 farms were still in Rolong hands by 1904, while 6% of land in Thaba Nchu, was set aside for reserves. This demonstrated white monopoly of land ownership of Rolong at Thaba Nchu district, as it existed anywhere in Southern Africa. Those blacks who lived on the land at the time of white settlement provided labour for the farms and subsequently became labour tenants.[357]

Although the Barolong tribe of Thaba Nchu did have ownership of the land they occupied as a tribe, it was legally impossible for a black person to become a landowner in his own right in the OFS before the Union of South Africa. The myth of the white nation with an exclusive claim to land rights survived remarkably in the OFS, where at any given moment, the black population was at least double the white in size.[358]

3.3.5 ANGLO-BOER WAR

As illustrated above,[359] the Great Trek led to the establishment of the Boer republics namely Natal, TVL and OFS. However, Natal was annexed by Britain after only four years of its creation.[360] The greater South Africa was divided into four separate entities namely the two Boer republics and the two English colonies. The idea of a federation failed because of the discovery of diamonds between 1857 and 1859 in Griqualand West, an area situated to the west of Kimberley. When the disputes recurred between the Boers and Tswana traditional leaders over the ownership of diamonds fields, Britain decided to annex the Boer republics.[361]

When TVL was annexed by Britain in 1877, Kruger went to England where he asked Queen Victoria to cancel the annexation of TVL. The Queen refused. It

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[357] Davenport *South Africa* 140.
[358] Davenport *South Africa* 140-142.
[359] See 3.1.5 above.
[360] See 3.3 above.
[361] Leach *South Africa* 29.

is argued that such refusal by Queen Victoria prompted the outbreak of the Anglo-Boer war. Another factor, which must be seen as one of the causes of the Anglo-Boer, was the emergence of Rhodes as a powerful mining magnate. Rhodes founded the De Beers mining company, which, mainly controlled the diamond industry, and he later in 1887 enlarged his economic interests to form Gold fields of South Africa. In 1893 he established the British South Africa Company (BSAC), which turned the economy of Southern Africa around and exerted both political and economic influences in many areas of Southern Africa.[362]

Both Rhodes and Kruger were the vanguards who determined the fortunes of the British and the Boers. Kruger wanted to protect the interests of the Boers while Rhodes was determined to expand the British imperial interests. The differences between these two men coupled with the Jameson raid placed the two white nations on a path leading towards the war.[363]

On 9 October 1899 the Boer republics (TVL and OFS)[364] issued an ultimatum to the British demanding that their differences be referred to the Arbitration Committee and that Britain should withdraw its troops from the TVL boarders. The British ignored the ultimatum and on 11 October 1899 the Anglo-Boer started.[365] According to Wessels, the Anglo-Boer war was the biggest war

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[362] Leach *South Africa* 29.

[363] Leach *South Africa* 29. In fact it was gold and British greed led by Rhodes that started the war. It was through Mafikeng that the infamous Jameson raid of 1895 passed on its way from Bechuanaland to Johannesburg. Jameson one of the leading staunch supporters of Rhodes, led a small contingent of men from Bechuanaland, confident that he would topple the power of Kruger and exploited TVL's gold deposits. The Boers thwarted Jameson move and subsequently his effort failed miserably. In the process the British government was highly embarrassed since they were implicated in the raid. It is argued that Rhodes among the British plotted the Jameson raid. That is why his political career was destroyed after Jameson's *coup d'état* became abortive. As a consequence the relations between the Boers and British became sour and war became inevitable.

[364] See *Document on Political Treaty* of 1889 1. Shortly before the outbreak of the Anglo-Boer War the two Boer Republics signed a political treaty where they mutually pledged themselves and declared themselves prepared to support each other with all power and by all means should the independence of one of the two States be threatened or attacked from outside unless the State which should have to render the support show the injustice of the cause of the other State.

[365] Leach *South Africa* 31.

ever fought in Southern Africa. It is said that about half a million British soldiers and 70,000 Boers participated in the Anglo-Boer war.[366]

Both blacks and Coloureds took part in the war. Approximately 100 000 blacks and Coloureds fought on the side of the British. They did so either in a combatant or non-combatant capacity. Wessels further stated that about 10 000 blacks and Coloureds fought on the side of the Boers. About 28 000 Boers and 14 000 blacks died in concentration camps. More than 22 000 British soldiers also died in the war. Generally speaking the participation of the blacks in the Anglo-Boer war affected traditional institutions such as the regiments. Traditional leaders deployed their regiments to the war. Consequently this deployment tampered with the traditional order and arrangement of the regiments.[367]

Death statistics shown above, illustrate the fact that the participation of blacks in the war was accompanied by huge lost of lives. This war left many black communities and families in a state of misery. Wives were left without husbands to look after them. Children were left without their fathers to take care of. Some of the traditional communities were destroyed by the activities of the war. Traditional leaders were left without tribal soldiers to look after the tribes as regiments were dismantled by the war.[368]

One of the remarkable characteristics of the Anglo-Boer War was that despite vilification and abuse engendered by the war, both the Afrikaans and English-speaking South Africans had many common objectives. As Judd and Surridge noticed they needed to keep adequate control of the black majority and exploited their labour in their different businesses, trade and occupations.

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[366] Wessels *Anglo-Boer* 1.

[367] Wessels *Anglo-Boer* 1. Since the British army was trained to fight on the European continent, they found it difficult to apply conventional military strategy to the unique kind of war fought in South Africa. Wessels intimated that the British army found themselves in what he described as a Vietnam situation. In order to deal with the war situation effectively the British army resorted to the unconventional methods of warfare. As a result of scorched earth policy more civilians, both blacks and Boers were killed than combatants.

[368] Anglo-Boer war disrupted many traditional communities and families in South Africa. Moreover, some of the husbands and rural men who left their villages to fight either on the side of the British or the Boers were killed in the battlefields.

These white groups were responsible for the introduction and maintenance of white supremacy in South Africa even though there were fundamental differences in ideology and emphasis when it came to their treatment and perception of the black majority. As a result of their common ground and attitude regarding relations between blacks and whites, the negotiations that resulted in the peace settlement of Vereeniging in May 1902 was the search for compromise rather than antagonism.[369]

According to Judd and Surridge the negotiations for Treaty of Vereeniging did not include the political aspirations of blacks and Coloureds.[370] This happened despite their participation and sacrifices in the war. Traditional leaders allowed their subjects to participate in the war either on behalf of Britain or the Boers. According to Odendaal, the interests of blacks who had shown their loyalty by heart and deed to Britain during the war were ignored.[371]

It was for these reasons that traditional leaders were greatly disappointed about the terms of the Peace Treaty of Vereeniging, especially clauses which favoured and offered the Boers better opportunities than blacks. It was believed at the beginning of the war that once the Boer Republics had been toppled, the political and socio-economic opportunities offered to blacks in the Cape would be extended to blacks in the TVL and OFS,[372] based on a statement made by Chamberlain in the House of Commons shortly before the war:[373]

> Their treatment of the Natives in the Voortrekker Republics has been disgraceful, it has been brutal, it has been unworthy of a civilised power.

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[369] Judd and Surridge *Boer-War* 2-3.
[370] Judd and Surridge *Boer-War* 2-3.
[371] Odendaal *Vukani Bantu* 37.
[372] Warwick *South African War* 189.
[373] As quoted by Warwick *South African War* 149

However, the constitutional dispensation of the Union of South Africa was designed in such a manner that it excluded blacks from the electoral process in TVL, OFS and Natal.[374]

3.4 UNION OF SOUTH AFRICA

3.4.1 BACKGROUND

The Peace Treaty of Vereeniging set the stage for social, political and economic reconstruction of South Africa after 1902. After the signing of this Treaty, the British imperial government in London withdrew Britain's political power from South Africa and gave all power to white minorities (English and Afrikaans).[375] These white groups were given a blank cheque by Britain to determine the political future of South Africa.[376] The total colonization of South Africa was fundamental in the creation of a racist South Africa regime, and in fact, if it were not for Britain, the colonial racist situation in South Africa would not have been there.[377]

As Ronald put it, the debate on black rights and the position of traditional leaders in the contemplated Union of South Africa now shifted from Britain to the former four colonies themselves.[378] The political leaders of these colonies hoped that by setting up the Union they would put an end to the dispute, which caused the Anglo-Boer war and promoted the economic and political development of South Africa as a whole. They believed that this could be attained without the participation of the black leaders both political and traditional in the running of the government.[379]

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[374] Judd and Surridge *Boer-War* 3. See also 3.4.1 below.
[375] Basil *Modern Africa* 37.
[376] Anon *Document issued by the Policy Research Unit of ANC Youth League* (2005) 2.
[377] Anon *Document issued by the Policy Research Unit of ANC Youth League* 2.
[378] Ronald *Africa Since 1800* 178.
[379] Ronald *Africa Since 1800* 178; De Crunchy *Church Struggle* 3. These two white groups agreed to work together on a terrain where the indigenous black population would not be party to the Union political and constitutional dispensation. All what was left to blacks was to be kept under white domination and to be used by them in whatever manner they saw fit. As Crunchy noted, in withdrawing from South Africa, Britain left behind a caste-like society by its white minority. The prize of unity and conciliation between the Boers and Britons was the institutionalisation of white supremacy.

An agreement or contract was written into the so-called *South African Act of Edward VII C 9* of 1909.[380] This agreement marked and endorsed the continuation of the methods and practices of exploitation of black people by whites in the former Boer republics[381] and revealed the white's intention to bar black representation in parliament permanently and to retain the existing system of discrimination. Black leadership responded by sending a multicultural delegation to London to protest against this agreement but they were unsuccessful. In March 1909 traditional leaders and black elites convened a South African Native Convention (SANC) in Bloemfontein to oppose the Draft Act of the Union as proposed by whites in their own Convention. Still, their efforts to oppose the Draft Act became a fruitless exercise.[382]

Although the whites of the former four colonies disagreed in many ways, they were firmly united against the blacks and to deny black communities social, political and economic opportunities, which might be provided by the Union. According to Basil, many Afrikaners (not necessary all) were racists by doctrine, habit and tradition. Many English speaking whites were in practice just the same or else if they were new immigrants soon became racists. These two white groups, generally agreed with each other in passing laws for the whole Union, which reduced or eliminated rights and opportunities for black people and their traditional leaders.[383]

Consequently, all the deliberations which led to the said agreements between the British and the Boers were articulated at a National Convention (NC) in Durban from 12 October 1908 to 1909, thus being a remarkable process of reconciliation between these two white groups. Of great significance with

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[380] *South Africa Act of Edward VII C* 9 of 1909. Hereafter referred to as the 1910 *Constitution of the Union of South Africa*. Section 4 of Act of 1909 proclaimed the Union of South Africa and provided that the King with the advice of the Privy Council had powers to declare the colonies of the Cape of Good Hope, Natal, the TVL and the OFS united under the name of the Union of South Africa.

[381] Mbeki 2001 *Umrabulo* 53. See also 3.2 and 3.3 above.

[382] Ronald *Africa Since 1800* 179.

[383] Basil *Modern Africa* 37.

regard to this historic development was the fact that traditional leaders who represented the majority of Black population were not invited at the NC to decide the future of the envisaged Union of South Africa. During deliberations, the important question of franchise for Blacks, a delicate matter that underlined all South African politics, was raised.[384]

When this important issue of franchise was debated, the negotiators were unanimous in their opposition to black participation in the mainstream politics in the Union of South Africa. The reason for this was that white negotiators felt that white and black races in South Africa could never be amalgamated. Odendaal stated that delegates in the National Convention argued vehemently that the history of the world showed that traditional black communities were incapable of civilization. Therefore, it was decided that a franchise for blacks should be based on a laborious civilization test only in the Cape.[385]

Finally, it seemed, delegates in the National Convention reached a compromise by which the first Union parliament[386] was to be elected on the basis of the existing franchise. This meant that qualified blacks and traditional leaders in the Cape would retain the vote, whereas blacks in Natal, the TVL and OFS would have no political rights.[387] However, membership in the new parliament was restricted to whites. This meant that the Union parliament was the parliament of the whites only. This compromise was enacted in the *Constitution* of the Union of South Africa:[388]

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[384] Odendaal *Vukani Bantu* 137.

[385] Odendaal *Vukani Bantu* 137. However, the civilisation test was also applied in Natal but the authorities administered it in such a way that blacks could not vote.

[386] Section 19 of *Act of Edward VII C* 9 1909 vested the legislative power of the Union in the Parliament of the Union that consisted of the King, a Senate and a House of Assembly.

[387] Section 36 of *Act of Edward VII C* 9 1909. The qualification of parliamentary voters were intended to be the qualifications necessary to entitle persons of all races in the Cape Province to vote for the election of the members of the House of Assembly.

[388] Section 35(1) and (2) of Act of 1909, commenced on 31 of May 1910. This Act was an Act of the parliament of the United Kingdom. The Act constituted the Union of South Africa. Before the 1930s the entrenched provisions in the *Constitution of Union of South Africa* appeared to be an effective constitutional constrain on any direct curtailment of the black franchise. This was reinforced by the decision in *R v Ndobe* 1930 484 (AD) in which it was held albeit in obiter that section 35, voting clause was binding on the Union Parliament. However, in *Ndlwana v Hofmeyer* NO 1937 AD 229 the court stated that Statute of Westminister relieved parliament of any necessity to adhere to the entrenched procedure.

> (1) Parliament may by law prescribe the qualifications, which shall be necessary to entitle persons to vote at the election of members of the House of Assembly, but no such law shall disqualify any person in the Province of Cape of Good Hope who, under the law existing in the Colony of Cape of Good Hope at the establishment of the Union, is or may become capable of being registered as a voter from being so registered in the Province of the Cape of Good Hope by a reason of his race or colour only, unless the Bill be passed by both Houses of parliament sitting together, and at the third reading be agreed to by two-third of total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have duly passed by both Houses of parliament.
>
> (2) No person who at the passing of any such law is registered as a voter in any province shall be removed from the register by reason only of any disqualification based on race or colour.

This section implied that the Cape black franchise was not abolished.[389] It was further agreed that not even in the Cape should any black be able to stand as a parliament candidate.[390] Ronald quoted General Smuts, an Afrikaner leader, saying that:[391]

In *Harris and Others v Minister of the Interior and Another* 1952 (2) SA 428 (A) it was argued that because the Statute of Westminister, 1931 gave the Union of South Africa the status of an independent dominion, therefore there was a necessary inference therein that the entrenched provisions of South African Act of 1909 were repealed. See also *Minister of Interior and Another v Harris and others* 1952 (4) SA 169, where the court found accordingly that an alteration of entreched clauses without the due compliance with the special procedure is invalid.

[389] In terms of black franchise not all blacks could vote in the Cape Colony. Blacks in the Cape were required to pass the civilisation test. This test was a requirement to be passed by all male adult British subjects including Whites. According to the civilisation test the eligible voter who could write their names, addresses and occupations and who earned at least £50 in wages a year or occupied property worth of at least £75 was allowed to cast his vote. The voters were eligible to vote in parliamentary elections. There was no colour bar as far as memberships of the houses were concerned. In Natal only male British subject could become enfranchised if he earned at least £96 in wages a year or owned property worth at least £100 a year. However, the law was administered in such a way that blacks were debarred from obtaining the franchise.

[390] Ronald *Africa Since 1800* 127.

[391] Ronald *Africa Since 1800* 127. Although Smuts seemed to sympathize with the black majority of South Africa in their political plight of being excluded from government of the future union, it was doubtful whether he practiced what he preached. His above statement, later appeared to be a smokescreen. White government would decide the future of blacks

> I sympathise profoundly with native races of South Africa, whose land it was long before we came here to force a policy of dispossession on them. And it ought to be policy of all parties to do justice to the natives and to take all wise prudent measures for their civilization and improvement. But I do not believe in politics for them. When I consider the political future of the natives in South Africa, I must say I look into shadows and darkness.

3.4.2 LABOUR SEGREGATION AND PRAGMATIC BLACK POLITICS

South Africa consolidated white settler rule and sowed the seeds of the ideology of racial segregation. One of the immediate main tasks of the Union government when it took over the political reigns of South Africa was to continue to drive blacks into labour service for white farms, industries and families. This arrangement encouraged an exodus of blacks from traditional areas to urban areas and white farms for the purpose of employment. This systematic rural-urban migration meant changes for the institutions of traditional leaders and rural life. The abled-bodied men who used to form age-regiments and rendered services to traditional leaders and the tribe had to leave their rural areas for farms and mines in the Union of South Africa.[392]

Faced with a large number of black workers in the mining industries and factories of South Africa, the Union government consolidated the colour bar provisions of the former Boer states. They achieved this through the passage of *Mines and Workers Act*[393] to place severe limitations on blacks wanting to enter certain job categories by expecting for example, Certificates of

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and their leaders only. The white parliament laws impacted directly or indirectly on the institutions of traditional leaders. Traditional leaders and black communities were not represented in the parliament, which made those laws.

[392] Rich *State, Power and Black Politics* 16. The sons of the traditional leaders who were supposed to take over the reigns of leadership after the death of their fathers also found their ways to urban areas, this movement to the farms and mines more specifically in the reefs dislocated the original standing and frameworks of traditional authorities. The reason for this was that in many tribes there were no sons to take over the leadership and that caused leadership by regency which led to a series of unabated succession disputes. That is why the problem of succession dispute is still rife even in the contemporary South Africa.

[393] Act 20 of 1911.

competency. The white unions threatened agitation if this law was not put into place:[394]

> The existing colour bar, whether it is justifiable on general grounds or not has always been looked upon by the European workers of these fields as a protection set up by law against the tendency of the system of indentured native labour to encroach upon his sphere of livelihood.

The Act aimed to ensure that since blacks were not represented in the Union government, the only choice they had in order to protect their rights as workers and human beings at a centre of Union regime was to form a political movement that would protect their rights. As Nigel observed, blacks unified against segregation.[395] In view of the above exposition, two years after the formation of the Union of South Africa, traditional leaders, black intellectuals, workers, peasants and clergymen gathered in Bloemfontein to establish an organisation, namely, the South African National Native Congress (SANNC) to defend the rights of black people in the Union. The SANNC was the forerunner of the African National Congress (ANC).[396]

According to Tambo, the SANNC turned out to be more than a negative reaction to the formation of the Union of white foreigners and conquerors.[397] Instead, it became the symbol of black unity and gave black people a sense of nationhood that survived the most determined application of the policy of divide and rule.[398] The delegates who formed SANNC represented a wide cross-section of black public opinion in the Union. But an interesting dimension was added when the delegates from the former adjoining British

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[394] Williams *European Community* 12. Therefore, the colour bar provisions entailed in this Act were aimed at protecting skilled white miners against displacement of blacks. Williams gave a graphic description of this Act when he explained that the existing colour bar, whether it was justifiable on general grounds or not had always been looked upon by the European workers of those fields as a protection set up by law against the tendency of the system of indentured native labour to encroach upon their sphere of livelihood.

[395] Nigel *Making of Modern* 81.

[396] Nigel *Making of Modern* 81. South African Native National Congress (SANNC) was formed in 1912 to protect the rights of black workers in particular and those of blacks in general. In 1923 SANNC was renamed ANC.

[397] Tambo *Preparing for Power* 6.

[398] Tambo *Preparing for Power* 6.

Protectorates, namely, Basotholand, Bechuanaland and Swaziland attended the Bloemfontein black political gathering. Odendaal expounded that it was for the first time traditional leaders co-operated enthusiastically with the educated elites on an inter-territorial basis.[399]

Several paramount traditional leaders were represented directly or indirectly. The most important development, noted Odendaal, in this regard was the attendance of a strong Basotho contingent. Chief Moama, Phillip Modise and half dozen followers represented Paramount Chief Letsie I. Sub-Chiefs[400] also attended on behalf of Chiefs, Gaseitsewe of Bangwaketse of the Bechuanaland Protectorate and Lekoko of Barolong. Chief Mopeli and Ntsane of Witzieshoek were also present as well as many other traditional leaders from different traditional persuasions of South Africa.[401]

Nkosi Sikelel iAfrika (God bless Africa) which became the black nationalist anthem was sung for the first time in Bloemfontein Congress of the traditional leaders. This anthem is translated in English as follows:[402]

> Lord our God, bless Africa our home, May her head be lifted up on high, Let your ear be open to our cry That your blessing may come, Bless the Chiefs and leaders of our land, Since you made them, may they always hear Your commandments and your name revere, Bless them, under your Lord.

The anthem made a call to the traditional leaders to guide the people towards greater goodness. *Nkosi Sikelel iAfrica* symbolized the black struggle intended to achieve political rights for all the people of South Africa. It

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[399] Odendaal *Vukani Bantu* 270-271.

[400] Sub-Chiefs is a term used during both the colonial and apartheid regimes to refer to the subordinate traditional leaders who were not Paramount Chiefs. Again the term Paramount Chief was used in pre-colonial times to refer to the principal traditional leaders. This breed of traditional leaders occupied the highest position in traditional authority as compared to sub-Chiefs and headmen.

[401] Odendaal *Vukani Bantu* 270-271.

[402] Leach *South Africa* 20. This anthem is sung in Zulu, the other parts in Sotho and Xhosa.

reflected the political initiative and willingness by the traditional leaders to lead the oppressed black masses to freedom.[403]

Delegates conveyed a strong message of unity and peace. Nigel is on record stating that delegates strongly agreed and believed that if the British and the Boers, despite the bitterness of a hard-fought Anglo-Boer War could come together as a united front against the black people, why could not the blacks unite and face their common problems and enemy.[404] It was further noted and agreed that blacks could successfully solve their problems not as individuals, separate tribes, separate traditional leaders but as a unified people. For this reason, Nigel correctly quoted an important extract from the 1912 *Constitution* of SANNC as follows:[405]

> To encourage national understanding and bring together into common action as one political people all tribes and clans of various tribes and races and by means of combined effort and united political organisation to defend their freedom, rights and privileges.

It is important to underscore the fact that SANNC was far from being a mass movement at its early formative years. Although it included some of the main traditional leaders and rural leaders, its members were still primarily middle class men who feared being thrust back into a rank of rural and urban poor by the legislation of the Union. The initial tactics of SANNC were accordingly moderate. As a result, its leaders hoped to exert influence by petitions, delegations and journalism.[406]

The SANNC posed a serious threat to the continued political and economic domination of the country. It is for this reason that the white rulers of the Union of South Africa and their successive governments employed a variety of measures to eradicate it. Tambo explained that the Union regime

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[403] Leach *South Africa* 20.
[404] Nigel *Making of Modern* 81-82.
[405] Nigel *Making of Modern* 81-82.
[406] Nigel *Making of Modern* 81-82.

intimidated and victimized traditional leaders, teachers and government employees who supported the organisation.[407] The regime also engaged the services of informers and agent provocateurs and encouraged the foundation of splinter and opposition groups to confuse the people, to undermine their struggle for national emancipation and in that way to perpetuate oppression and exploitation.[408]

Since the union government had been intimidated by the growth and strength of the SANNC it tried to divide its leadership and the blacks in general as a means to crush the unity and power of the organisation. Some of the traditional leaders were infiltrated by the regime to betray the movement. This was done through bribery, favours and better opportunities. Some of the traditional leaders were recruited to spy on the activities of the SANNC. The primary aim of this arrangement was not only to use traditional leaders as pawns but to diminish the strength and unity of the entire black population as well.[409]

Despite gallant efforts of the SANNC to negotiate issues around the political participation of blacks in the Union government, it appeared that the government was not prepared to include them into the government. Instead the Union government did everything within its powers and might to consolidate and perpetuate segregation and oppression.[410]

A point of significance is that traditional leaders did not sit idle and watched the political events as they unfolded in the Union. They refused to be relegated to positions of mere spectators. Instead, they led the struggle by example and action. They exerted concerted effort to oppose all forms of

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[407] Tambo *Preparing for Power* 6-7.
[408] Tambo *Preparing for Power* 6-7.
[409] Tambo *Preparing for Power* 6-7.
[410] Hennis *United Nations* 318 is of the view that the Union government refused to integrate blacks into the mainstream of politics because they believed that it was impossible to include South African's heterogeneous populations with their desperate culture in the same constitutional framework. According to the Union government such a move would lead to such internal stress and strain that it would be impossible to gain political stability, economic and social developments.

segregation and oppression of blacks by whites.[411] Therefore, it is necessary to underline the fact that the first two years of the Union, united blacks throughout the country more than ever before. What remained to be seen was how traditional leaders tackled the question of segregation and their political exclusivity in the future Union of South Africa.

3.4.3 POLITICS OF LAND AND TRADITIONAL LEADERSHIP

The land issue was initially strongly debated.[412] In view of all these debates, the parliament passed the *Native Land Act,*[413] (later known as *Black Land Act*) on 26 of June 1913. This Act was an attempt to make South Africa a white man's country. The Act had profound effects and implications for communal land administered by traditional leaders. The Union government did not consult the traditional leaders to get their views when it passed the Land Act. People who were forced to leave their farms went to occupy the traditional authorities' areas thereby exacerbating the problem of overcrowding and poverty. The Act provided for the purchase and lease of land by blacks and other purposes in connection with the ownership and occupation. The Act restricted blacks from entering into agreement or transaction for the purchase, lease or the acquisition from whites.[414] Whites were also not allowed to buy or lease land from blacks. Any agreement entered contrary to the provisions of this Act was declared *null and void ab initio.*[415] It also stated that no black person might own land outside the reserves.[416]

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[411] Hennis *United Nations* 318. It is evident that the gallant efforts of traditional leaders to represent the aspirations and interests of their people through the formation of ANC could not be left without commendation.

[412] Pheko 1987 *LLJ* 156-157. The first step the government embarked upon was to turn United South Africa into what Pheko termed a white man country. Pheko justified his assertion when he quoted Colonel Sir Wool Sampson, Member of Parliament (MP) for Braamfontein, telling the House of Assembly that: "to the best of his recollection during the recent elections in the Transvaal the majority of honourable Members declared themselves in the most positive terms their determination to make this a white man's country. He hoped a vote would be taken on this matter, so that the people should be able to see who were prepared to make South Africa a white man's country, and those who were prepared to make it a black man's country".

[413] *Black Land Act* 27 of 1913. Hereafter referred to as 1913 *Land Act.*

[414] Section 1(a) of Act 27 of 1913.

[415] Section 4 of Act 27 of 1913.

[416] Cope *Bind the Nation* 18.

Black landowners who resided outside the reserves were forced to leave their land. It is also significant to state that not only individual black land owners lost land but also tribes. The Registrar of Deeds registered tribal land in the name of the relevant Minister that was registered in, for example the names of tribes under their traditional leaders. Many traditional communities thefore lost land.[417]

Blacks were allowed to remain on white-owned land only if they stayed on as paid labourers or tenants.[418] The Act was to be laid down that in future all black tenants performing labour services for the landowner and that all other types of black tenancy on white owned land would be phased out.[419] The Act had far reaching consequences for black communities in the sense that it made provision that all black people living on farms either had to leave the farms surrendering them to white farmers or live on the farms not as co-cultivators but as farm labourers working for white farmers. For these reasons, it was an offence for white persons to have black people on their farms if they were not labourers.[420]

The aim of the 1913 *Land Act* seemed to finally destroy the black tenant farmer and turned him or her into the labour market. The outcome of the Act was to create reserves of cheap labour on tribal land and to keep the *status quo* of areas outside the reserves.[421] The result of the Act was that blacks were left with 12.5% of the total land area, which was mostly some traditional authority land, while the whites had 87.5% to themselves.[422]

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[417] Cope *Bind the Nation* 18.
[418] Section 1(a) and (b) of Act 27 of 1913.
[419] Cope *Bind the Nation* 18.
[420] Pheko 1987 *LLJ* 157.
[421] Cope *Bind the Nation* 18. These other types of tenancy to which Cope cited fell under the generic term squatting. Squatters in this context, referred to black tenants who did not supply labour but instead paid for their tenure, either in the form of cash, rent or in the form of agricultural produce.
[422] Pheko 1987 *LLJ* 157. Callinicos explained that Plaatjie, the former Secretary General of ANC reacted to the passage of the Act with a feeling of disbelief that fellow human beings, whites could be so callous about the consequence of their actions. As a result, he made reference to Plaatjie uttering that when: "he awaken on Friday morning, June 26 1913, the South African black found himself not actually a slave but a pariah in the land of his birth." See in this regard Callinicos *Working Life* 18.

Another consequence of the Act was the establishment of social, economic and territorial segregation in rural areas and also the reduction of the ability of blacks to maintain rural economic independence. It also freed them to become wage labourers either on white farmers or in urban areas. Rural women and men were forced to migrate to the so-called whites farms and industries for employment. Consequently the traditional leaders in rural settlements lost direct control over their subjects.[423] The whole process of migration also disintegrated family life as men left wives and children behind or *vice versa*.

It is important in view of the aforegoing to note that the *Land Act* did not result in people being removed from tribal land but rather from farms they bought and land they lived upon as labour tenants. The land in the so-called scheduled areas was tribal authority land. As a result of the dislocation of families and movements of people from farms to other unknown areas various traditional communities were established with new leaders.[424] It was under this period of land dispossession that a new breed of traditional leaders emerged. It may be deduced that the *Land Act* directly or indirectly created a class of opportunists who under these pressing circumstances made themselves traditional leaders. The Act therefore also interfered with the existence and authorities of traditional leaders. Balatseng and Van der Walt argued that this Act is one of the reasons why South Africa has a multiplicity of traditional leaders.[425]

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[423] Cope *Bind the Nation* 18. It would suffice to state that the Act laid a strong foundational stone for the disintegration of tribes and even traditional authorities. Effectively, traditional leaders became leaders without the majority of their people. This in itself somewhat stifled rural developments as there were no men to render services for their tribes. Cope quoted Dube, the former president of SANNC, saying that:"it was abundantly clear to them that the authorities knew perfectly well that the natives could not leave private lands entirely. He further stated that the Act was simply aimed at compelling natives to say they would rather remain on the white farms and live under those irksome conditions than to leave the white farms."

[424] This assertion confirms the fact that some of the traditional leaders in South Africa are not traditional leaders by birth.

[425] Balatseng and Van der Walt *History of Traditional Authorities* 4-5; Cope *Bind The Nation* 19. Cope cited Caluza, a music teacher at Ohlange School in Natal, responding to the passage of *Land Act* with a song called, "The *Land Act* Song". The song ran as follows: We are children of Africa. We cry for our land. Zulu, Xhosa, Sotho. Zulu, Xhosa, Sotho unite. We are mad under the *Land Act*. A terrible law that allow sojourners. To deny us our land. Crying that we the people. Should pay to get our land back. We cry for the children. Who roam around the world without a home. Even in the land of theirs (Chiefs)."

The land dispossession led to poverty and untold suffering.[426] The SANNC decided to go to England to appeal against the 1913 *Land Act* but was told by the British government that it was a domestic affair that had to be addressed and solved by the people who created it. The British government hereby countenanced the 1913 *Land Act*.[427] The Queen of England still had to sign the 1913 *Land Act*. The SANNC mounted a campaign against the 1913 *Land Act* and resolutions and telegraphic representations were made. In March 1913, the Annual Conference of the SANNC appointed a deputation to present their objections to the Union government.

This deputation consisted of JL Dube, Dr WB Rabusana, Mangena, Rev L Dube, WZ Fenyane, S Msane, LT Mvabasa, D Letanka and ST Plaaitje.[428] Later this delegation came back to its constituency and reported that every effort had failed. It was during this period of the Union that the pleas and petitions of the SANNC fell on the deaf ears for most of the time. Delegation after delegation told the story of disappointments and failure after another whether in dealing with Britain or the South African government. Blacks wanted to change the political situation of South Africa through peaceful and non-violent means.[429]

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[426] Balatseng and Van der Walt *History of Traditional Authorities* 4-5; Paton *Solomon Thekisho Plaatjie* 2. Both Balatseng and Van der Walt were also ad idem that black life has been interrupted since the arrival of whites in South Africa. They further contended that since the Union of South Africa, black life was nothing but a misery. It is this misery that had been sanctioned by the Union government and the courts alike. Such misery led to a situation of untold suffering and poverty. This suffering constituted an aggression upon the dignity of the black people. Paton expressed the same sentiments when he said that poverty engendered by the process of land dispossession in South Africa dislocated the moral infrastructure of the black nation and created a feeling of inferiority. In support of his view, he referred to the experience of Plaatjie about the introduction of the *Land Act*. Paton, therefore quoted Plaatjie saying that: "he would never forget the scenes he had witnessed in the Hoopstad district during the cold sharp of July, of families living on the roads, the numbers of their attenuated flocks, emanated by lack of fodder on the trek, many of them dying while the wandering owners ran risks of prosecution for travelling with unhealthy stock." He further stated that: "he saw the little children shivering, contrasted their conditions with the better circumstances of my own children in their Kimberley home, and when the mothers told me of the home they had left behind and that they had endured since eviction I could scarcely suppress a fear."

[427] Balatseng and Van der Walt *History of Traditional Authorities* 5-8. Petitions were also sent to the Native Land Commissioners from different black persuasions. These petitions came from various traditional leaders, churches and individuals.

[428] However it has to be noted that Plaatjie was unable to proceed to Cape Town.

[429] William *Sol-Plaatjie* 165.

Both the SANNC and traditional leaders protested in vain.[430] Hence, blacks were denied the right to own land even if by then they outnumbered the whites by four to one. The 1913 *Land Act* must be seen as a big reinforcement of the South African racist system, which later developed into *apartheid*. Collins observed that whites generally viewed traditional leaders whom they called native leaders in relation to land as follows:[431]

> When we westerners call people "Native Chiefs", we implicitly take cultural colour out of our perception of them. We see them as trees walking, or as wild animals infesting the country in which we happen to cross them. In fact, we see them as part of local flora or fauna, and as men of like passions with ourselves and seeing them thus as something intra-human, we feel entitled to treat them as though they did not possess ordinary human rights. They are merely natives of the land which they occupy. Their tenure is provisional and precarious as that of the forest trees.

Land was the source of wealth to traditional leaders and their communities. Black families who were evicted from their farms began to lose their wealth and source of livelihood. Hence one of the powerful slogans in the liberation struggle in South Africa was "*Izwe Lethu*".[432] Many black leaders felt bitter about their national dispossession. Biko one of the greatest leaders of Black Conscious Movement (BCM) had these words:[433]

> We black people should all the time keep in mind that South Africa is our country and that it belongs to us. The arrogance that the white people had to travel all the way from Holland to come and balkanise our country and shift us around has to be destroyed. Our kindness has been misused and our hospitality turned against us. Whereas whites were guests to us on arrival in this country they have now pushed us to 13% corner of the land and are acting as bad hosts in the rest of the country. This we must put right.

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[430] Collins *Problem in the History* 241
[431] Collins *Problem in the History* 241.
[432] The phrase *Izwe Lethu* is a Zulu term, which means the Land is ours.
[433] Pheko 1987 *LLJ* 176.

It is clear from the above that black communities and their leaders, both traditional and political were discontented about the issue of land dispossession. The 1913 *Land Act* inevitably laid the foundation for the broader political struggle of black people in South Africa.

3.4.4 BLACK ADMINISTRATION AND LEGISLATION

3.4.4.1 Black Affairs Act of 1920

Since blacks were not allowed to participate in the Union government, their administration became a matter of great concern to the white rulers of South Africa. This concern was also based on the protest from the SANNC. Government decided to allow them a certain form of self-government to run their own domestic affairs.[434] In 1920 the Union government enacted the *Native Affairs Act.*[435] (later *Black Affairs Act*). This Act made provision of the establishment of black local Councils[436] in rural areas. These local Councils, whose members could be appointed or democratically elected, were to have considerable powers in the administration of local rural communities and land on which they lived.[437]

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[434] Cope *Bind the Nation* 99-100. In view of the above statement, it appears that the Union government wanted blacks to run their political affairs outside the white South Africa. As it will be elaborated below, this philosophy was developed fully by Verwoerd in 1959 when he introduced a policy of Bantustans. See also 3.5.1, 3.5.2, 3.5.3, 3.5.3.1 and 3.5.3.2 below.

[435] Act 11 of 1920. The architect of this Act was General Smuts, who succeeded Botha as the Prime Minister of the Union government.

[436] Section 5 of Act 23 of 1920 provided that the Governor-General may on the recommendation of the commission responsible for black affairs established a local Council for the whole or any portion of any of the black areas. All members of each Council were to be blacks and not exceeded nine in number and an officer in the public service was designated by the Minister of Native Affairs to preside at meeting of any such Council and generally to act in advisory capacity in regard to it.

[437] Cope *Bind the Nation* 99-100. Section 6 of Act 23 of 1920 dealt with the powers of local Council which provided inter alia for: (a) The reconstruction and maintenance of roads, drains, dams and furrows and for the prevention of erosion. (b) An improved water supply. (c) The suppression of diseases of stock by the construction and maintenance of dipping tanks and in any other manner whatsoever. (d) The destruction of noxious weeds. (e) A suitable system of sanitation. (f) The improvement in methods of agriculture. (g) Afforestation. (h) Educational facilities.

Smuts, Prime Minister by then, told the government that the principle of self-government for blacks was part of the law of segregation.[438] Cope asserted that one of the main aims of the 1920 *Black Affairs Act* was to divert the aspirations of the traditional leaders and black communities away from white South Africa and to focus their attention on the black reserves.[439]

The new system of rural self-government was received with mixed feelings within the circles of traditional leadership. In fact, the introduction of rural self-government divided traditional leaders as some saw it as a means to endorse segregation while others believed that a half loaf was better than no bread. As indicated above, the *Black Affairs Act* required that rural local councillors be elected.[440] This arrangement undermined traditional authorities as in some cases traditional leaders were approved by their subjects. It also transpired that those who were elected into the local Councils were accountable to the Union government and no longer to their people. In other words, the Act made traditional leaders agents of white government. This led to some traditional leaders becoming submissive to the government.[441]

This Act divided South Africa into two systems of governments, namely the white government and the black local rural government. In so doing the Union government qualified its policy of segregation.[442] The South African

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[438] Cope *Bind the Nation* 99-100. According to Smuts the white parliament would always remain the sovereign power in the country. As a result Smuts did not see a reason why a certain amount of self-government should not be allowed to the black Chiefs so that they would be able to attend to their own domestic affairs in their territories.

[439] Cope *Bind the Nation* 99-100.

[440] The office of traditional leadership requires that the incumbent should occupy the position by virtue of blood. This implies that traditional leadership is hereditary. It is in this view that it must be noted that traditional leaders were by custom not elected but borne to the throne. The requirement of election ran contrary to the principle upon which the institution of traditional leadership was based. The Act also implied that traditional leaders who were not elected to the Council were excluded from running the affairs of their rural areas.

[441] The opponents, who were traditional leaders in many cases, were supposed to toe the line of the government. Those who refused to take the orders where marginalized.

[442] Cope *Bind the Nation* 99-100. Another important objective of the 1920 Act was to ensure that cheap labour was withdrawn from the rural reserves. As more and more blacks were drawn into the cities, a new class of detribalised blacks emerged. This consolidated black resistance towards the regime. This resulted into urban conflicts, which were attributed to the influence of detribalised agitators. In the 1920s, the winds of change were apparent at a theoretical level, this was clearly evident within the Communist party of South Africa, CPSA (later known as SACP) founded four years after the Russian revolution which continued to send shock waves through the white dominant classes as proof that both capital and

Communist Party (SACP) was formed in the 1920s as a result of this segregation. This party focused on the countryside and believed that:[443]

> South Africa is black country, by majority of its population, is black and so is the majority of the workers and peasants. The bulk of the South African population is the black peasantry, whose land has been expropriated by the white minority ... the land is owned by the whites. Hence the national question of South Africa, which is based upon the agrarian question, lies at the foundation of the revolution in South Africa. The black peasants constitute the basic moving force of the revolution in alliance with and under the leadership of the working class.

Alongside the SACP, the Industrial Commercial Union[444] (ICU) showed determined efforts to protect and defend the interests of blacks in the countryside. Adu pointed that black workers interpreted the acronomy of ICU to mean "I see you white man". To the black workers this meant that they were aware of the intentions of the white people to deny them their rights.[445] According to Brandford, its supporters were primarily blacks, who constituted not only the oppressed group within the broader black populace, but also the vast majority living in the countryside.[446]

The activities of the ICU and SACP in rural areas had profound implications, which were both negative and positive for traditional leaders. Firstly, they were positive in the sense that black workers in the countryside were conscientized about their rights and traditional leaders also benefited from this pool of political knowledge dispatched by ICU and SACP. The negative side manifested itself when those who procured a sense of political awareness began to undermine the existence of traditional authorities. These groups

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minority regimes could be overthrown. SACP had on its agenda an item designed to protect the interests of black workers.

[443] Brandford *Taste of Freedom* 1-2.

[444] The ICU was formed by Kadalie in 17 January 1919. Kadalie was a Malawian migrant worker in South Africa.

[445] Adu *General History* 688.

[446] Brandford *Taste of Freedom* 1-2.

accused traditional leaders of conniving with the regime and not serving their interests.[447]

In view of the above, there were two important things, which need to be underlined in respect of the 1920 *Black Affairs Act*. These critical issues were centred on the idea of political segregation and black labour. As noted above, the Act prevented integrated government by both black and white thereby creating rural self-governing institutions. These political institutions, as adjunct of the Union government, served the interests of the white government more than they served the rural masses. Hence, there was no rural development whatsoever. This clearly illustrated the fact that traditional leaders who co-opted into the new system served the master more than their subjects. That is why the Union government was successful in manipulating traditional authorities.[448] As a result, the legitimacy and the motives of rural self-government became questionable. Secondly, the Act turned the reserves into the labour reservoirs, draining traditional leaders' human resources and manpower.[449]

Even though the 1920 *Black Affairs Act* pushed many blacks into the mining sectors, the socio-economic positions of the blacks did not improve. Instead blacks were subjected to the worst poverty than ever before they left their

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[447] The ICU was founded in January 1919 in Cape Town. ICU sought to unite the most diverse trades. Its political activities were focused in rural areas.

[448] Those traditional leaders who served in rural local Councils were paid. As a result of personal gains, they were reluctant to oppose the regime.

[449] Brandford *Taste of Freedom* 188. As many rural people flocked into the cities and white farms, traditional authorities were adversely affected. Those who were left behind were the sick, old aged people, women and children. As many blacks went into the cities to look for the employment, the union government passed a number of legislation to entrench discrimination at the workplace. This was successfully done when the Nationalists and Labour Party (LP) coalition came into office in 1924. This coalition resulted into the formation of the Pact government, which entrenched and extended the racial division of labour under its civilized policy. The imperatives of this policy produced a division of labour within the working class in which whites did skilled, highly paid tasks and black workers performed unskilled or semi skilled jobs for low wages. This division of labour within production created extreme social and ideological division within the emerging South African proleteriat. The Pact government encouraged white workers to see themselves as part of the civilized colonising population, somehow innately superior and intelligent to the raw tribal black workers who constituted the bulk of the mine labour force. As a consequence poor and unskilled workers were not employed in skilled jobs. The unskilled jobs were associated with black workers. Hence white workers developed highly racist ideologies and a demand for rigid job colour bar reserving skilled work for whites.

rural areas. Blacks were severely exploited in the mines. As a consequence, they were unable to improve the living conditions of the families they left in rural areas. Poverty, famine and misery increased in the rural areas as the husbands who worked in the mines were unable to support their families.

3.4.4.2 Black Administration Act of 1927

It has been stated earlier[450] that the 1913 *Land Act* created instability and insecurity in the black communities. At that time the institution of traditional leaders was in disarray as there were no specific legislative measures or provisions in the Union, which gave recognition to customary law and in particular the institution of traditional leadership. Therefore, in 1927 the Union parliament enacted the *Native Administration Act* (later *Black Administration Act*).[451]

The main aim of this Act was to create separate political and legal institutions for the governance of black people. The *Black Administration Act* was enacted as a national legislative measure *inter alia* to consolidate all administrations by the former colonies, the recognition and application of customary law and to make provision for the regulation of the institution of traditional leadership. Bennett posited that the individual colonies produced curiously diverse tribal court structures and a degree of recognition of customary law.[452] It was for this reason that the principal concern of the Union government was to improve uniformity in the application of customary law and the regulation of traditional leaders. The policy rationale behind the desire to achieve uniformity was to promote tribalism and chiefly authority. In government circles, it was believed

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[450] See 3.4.3 above.

[451] Act 38 of 1927. This Act was repealed by the *Repeal of the Black Administration Act and Amendment of Certain Laws Act* 28 of 2005. The Act provides *inter alia* for the repeal of the provisions of the *Black Administration Act* 38 of 1927 incrementally. The Preamble of the Act states inter alia that since the *Constitution of the Republic of South Africa* as the supreme law of the Republic is to establish a society based on democratic values, social and economic justice, equality and fundamental rights and to improve the quality of life of all citizens and free the potential of all persons by every means possible, the *Black Administration Act* is regarded as a law that is repugnant to the values set out in the *Constitution* particularly section 1 and the Bill of Rights in Chapter 2 thereof, is reminiscent of past divisions and discrimination and ought to be repealed as a matter of the utmost urgency.

[452] Bennett 1994 *SAJHR* 62.

that a return to traditional institutions could deflect the threats posed by the growing urbanized black proletariat.[453]

Bennett further explained that the date of the promulgation of the 1927 Act was a decisive moment in South African legal history. This Act introduced a new structure to black legal affairs.[454] But the principal concern in the Union government in passing the Act was to establish a form of public administration that sought to subjugate blacks in all spheres of life. In other words the Act enforced a form of colonial relationship between the dominant white minority group and a subordinate black majority who were to be administered by them. Therefore, one of the key values promoted and held by the Act was the segregation of races.[455]

The provision of the *Black Administration Act*, which regulated the institution of traditional leaders, was laid down as follows:[456]

> The Governor General (later the state president) may recognise or appoint any person of a native tribe and may make regulations prescribing the duties, powers and privileges of Chiefs so recognised and appointed ... The Governor-General may depose any Chief so recognised or appointed.

The Act gave limited powers and roles to traditional leaders. As emphasised in the above quotation, the power to recognise, appoint and depose traditional leaders was placed in the hands of the Governor-General who was also made a Supreme Chief of all traditional leaders in the Union of South Africa.[457] As

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[453] Bennett 1994 *SAJHR* 62.
[454] Bennett 1994 *Acta Juridica* 19.
[455] The 1927 *Black Administration Act* was one of the Union legislation, which laid a foundational stone for racial segregation.
[456] Section 2(7) of Act 38 of 1927.
[457] Section 1 of Act 38 of 1927. In *Minister of Native Affairs and Another v Buthelezi* 1961 (1) SA 766 (A), the court held that the appointment of a Chief is made by the Governor-General as Supreme Chief. The court further stated that there is nothing in the Act or any other statutory provision, which in any way limits the discretion vested in the Governor-General in regard to the appointment of a Chief. See *Buthelezi v Minister of Bantu Administration and Another* 1961 (3) SA 760 (CLD), where the court stated that in all cases of quarrels regarding chieftainships or successions to chieftainships the Chief Native Commissioner had to make an enquiry for the information of the Governor-General in his capacity as the

already elaborated above[458] this idea originated in Natal where the Governor-General was also the supreme traditional leader.[459] These limitations militated against the customary rules and procedures for appointing and deposing of a traditional leader. These provisions were put to test in a number of cases in South Africa. For instance, Watermeyer explained the legislative powers of the Governor-General when he said that:[460]

> The government in making an appointment is not bound to appoint a man who would be chief according to native custom.

Supreme Chief of all Chiefs in South Africa. *In Saliwa v Minister of Native Affairs* 1956 (2) SA (AD) 310 the court stated that the Governor-General has absolute power of the Supreme Chief in native law and he had no obligation to grant a person hearing before the order of removal or dismissal is granted. See also *Sibasa v Ratsialingwa and Another* 1947 (4) 369 (TPD), where the court held that Governor-General in his capacity as Paramount Chief has legal right to depose a Chief. The court also confirmed the powers of Govenor-General in respect of the traditional leaders in *Mabe v Minister for Native Affairs* 1958 (2) SA TPD where the court dealt with a matter concerning a deposition of a Chief by the Governor-General. The Governor-General relied on information put before him that a Chief was not fit to be a Chief. The Governor-General accepted that information and determined that a Chief should no longer hold an appointment as Chief. The court concluded that the Governor-General's decision in good faith could not be set aside even if the information upon which he acted was subsequently found to be incorrect.

[458] See 3.2.2 and 3.2.3 above.

[459] The structure of the tribal system was modified considerably such that a traditional leader was no longer the higher authority. As stated above that the white Governor-General was appointed a Supreme Chief, the generally accepted customary practice that a traditional leader represented the highest authority in the community and became God during his lifetime as a ruler was deconstructed when the power of colonial rule asserted that it should not be taught that the policy of indirect rule was *laissez-fair*. Traditional leaders were subordinate to Governor–General and they were not necessarily sovereign authorities. The Union government recreated its own institution of traditional leaders, where the Governor-General became the King of all the black people in the provinces of the Union South Africa. Hence, Mokotong remarked that the *Black Administration Act* appointed the Governor-General as the Supreme Chief of all Africans and gave him power to govern Africans by proclamation. The powers given to him were virtually absolute. Later the State President who also became the Supreme Chief of all Chiefs in South Africa replaced the Govenor-General. In *Moepi v Minister for Administration and Development* 1965 (1) SA 533 (TPD), the court stated that the Bantu Commissioner represented the State President when he deposed a Chief of Bakgatla-ba-Motha tribe of Skilpadfontein. The court further stated that the State President in his capacity as Supreme Chief has legal power to appoint, recognise and dismiss a Chief. See Section 1 of Act 38 of 1927. See also 3.2.2; 3.2.3 above.

[460] Koyana 2002 *Speculum Juris* 149. As quoted by Watermeyer in *Siqcau v Siqcau* 1944 AD 67. See also *Buthelezi v Minister of Bantu Administration and Development and Another* 1961(4) SA 835 (A), where the court held that the conduct of the Governor-General in appointing a Chief was entirely in accordance with the statute and was unimpeachable. The court further stated that there is nothing in Act 38 of 1927, which gives the son of a Chief any claim, whatever to the chieftainship and the Govenor-General is entitled to appoint a successor without any notice to him.

Hoexter stated that:[461]

> There is nothing in the Act which gives the son of the hereditary Chief any claim ... to chieftainship, on the contrary, the object of the legislation appears to have been to put to an end hereditary chieftainship for the purpose of the Act.

Customary law also prescribed duties, powers and functions, which were enjoyed and bestowed on a traditional leader. The introduction of the *Black Administration Act*'s, regulations prescribing the duties, powers and privileges of traditional leaders vested on the Governor-General.[462]

The *Black Administration Act* undermined and interfered with the institution of traditional leaders. The Act empowered the Minister or Secretary of the then Department of Black Administration and Development to appoint any person as a traditional leader or headman.[463] A traditional leader who could not toe the line of government could be summarily deposed or dismissed by the Governor-General.[464] Furthermore, by giving the Governor-General the powers to prescribe the duties and functions of traditional leaders, indicated that the government took away the customary roles of traditional leaders and gave them to the Governor-General.[465] This was done despite that, the

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[461] As quoted by Koyana 2002 *Speculum Juris* 149. For more information regarding the above comments by Hoexter, see *Buthelezi v Minister of Bantu Administration and Development* 1961 (4) SA 835 (A), where the Court emphasised that the position of a Chief is not per se hereditary. The appointment and recognition of a person as a Chief resides in the hands of the Governor-General.

[462] Section 1 of Act 38 of 1927. The traditional leaders performed their functions and exercised powers under the helmet of the Governor-General who was their supreme chief. Furthermore, by giving the Governor-General the powers to prescribe the duties and functions of traditional leaders, indicated that the government took away the customary roles of traditional leaders and gave them to the Governor-General.

[463] Section 2(8) of Act 38 of 1927.

[464] Section 2(8) of Act 38 of 1927.

[465] In *R v Ezekiel* 1958 (10 SA (TDP) the appellant was charged with contravening section 2(9) of Act 38 of 1927 in that he did wrongfully and unlawfully refuse to obey a lawful order issued by the native Chief in the lawful execution of that Chief's duties. The court stated that in circumstances where a native disobeyed order of a Chief it is essential to allege that the Chief was one appointed by the Governor-General and discharged his duties on behalf of the Governor-General as the Paramount Chief of all native Chiefs. See also *R v Buthelezi* 1957 (4) SA NPD, where the court stated it is essential to allege that the proceedings of a meeting obstructed by the accused was lawfully convened by a Chief performed duties prescribed to him by the Governor-General.

Governor-General was someone who was not conversant with black ways of life.[466] Hence Balatseng and Van der Walt remarked:[467]

> During its application the 1927 Act changed the institution of traditional authorities to a point where the institution had become the symbolic institution amongst the indigenous communities. It has eroded the institution to an extent that today there is a reigning confusion as to what traditional authorities are. If one looks at the provision of the Act, the divisions that have taken over the decades in respect of the Act, one is left with no option but to question the authenticity of the institution. Only in a few settlements does one get a feeling of what is happening but in most villages and settlements there is a lot of uncertainty.

Traditional leaders lacked effective power to take proper decisions on important matters affecting the lives of their communities and public order in their areas. They became servants of government. As a result, they were perceived by their communities as showing favouritism to government, members of their families and those who gave them bribes.[468]

The *Black Administration Act* further empowered the Governor-General to create new tribes, divide existing tribes and demarcate the areas occupied by the members of the tribe.[469] The Act was an attempt by the Union government

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[466] Balatseng and Van der Walt *History of Traditional Authorities* 12.

[467] Balatseng and Van der Walt *History of Traditional Authorities* 15; Rakate *Status of Traditional Courts*. Rakate expressed the same view of Balatseng and Van der Walt when he reported that the *Black Administration Act* had reduced traditional leadership to a very different institution. He further commented that: "traditional leadership was a public office created by statute. Rakate argued that such a legislative arrangement is a reversal of the provision of the Chief in traditional society, in which the role of the Chief was to represent his or her people according to the dictates of customary practice. This reversal, effected by the Act, has plainly made the appointment, suspension and deposition of Chiefs ... The powers of the Governor General (later state president) under the Act to appoint, suspend and depose Chiefs have quite often been used against Chiefs who have incurred official displeasure or proved troublesome."

[468] Rakate *Status of Traditional Courts* 16.

[469] Section 5 of Act 38 of 1927. Mitchell, the representative of Natal South-Coast in parliament stated that: "the law as it stands, the 1927 Act lays down quite clearly what the legal position is, that when the Governor-General deems it expedient in the public interest to remove a tribe or to demarcate the areas occupied by the members of the tribe, he may order them to withdraw to some other places and to remain there. At the end of that section there is the proviso that: 'If the tribe refuses or neglects to withdraw as aforesaid no such order shall be of any force and effect until a resolution approving of the withdrawal has

to create tribes and traditional authorities as if they were new institutions and failed to build on what was already in existence. This statute drastically and dramatically altered the original meaning of the institution of traditional leaders and caused it to evolve in a manner that did not remain faithful to its indigenous concept and communities.[470]

Tribes came to be controlled by white officials with the traditional leaders aided by the government. Letsoalo pointed out that the *Black Administration Act* stressed the need for blacks to be retribalized under a distinct system of law and a government department.[471] Consequently, the then Native Affairs Department was given a more regulatory role, which included disciplining traditional leaders and the possibility of relocating communities[472] to fit the government notion of ethnic distribution within the reserves.[473]

According to Letsoalo, traditional leaders who challenged and opposed the regulations of the department were viewed as "undisciplined" and "derogatory" to the system.[474] The rationale to impose the Native Affairs Department in the administration of the blacks was explained by Letsoalo as follows:[475]

> The essential function of the Native Affairs Department is to assist, guide, protect and generally to subserve the interests of the large underdeveloped and, for the most part, inarticulate native population which is rapidly emerging from barbarism while at the same time its own tribal organisation, control, discipline, customs and traditions rapidly and inevitably breaking down.

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been adopted by both Houses of Assembly". See in this regard South Africa Debates of the House of Assembly 1240. Despite what the 1927 Act laid down as a procedure for the removal of tribes for public interest, blacks were removed from their areas by the government without following proper legal procedure. It seemed that it was a government norm to remove blacks from their areas even if they objected to such removal.

[470] Zibi *Reforming the Role of Traditional Leadership* 12.

[471] Nigel *Making of Modern* 75.

[472] Section 5 of Act 38 of 1927.

[473] Letsoalo *Land Reform* 37.

[474] Letsoalo *Land Reform* 37.

[475] Letsoalo *Land Reform* 37.

The introduction of white government officials into traditional authorities disintegrated the tribal systems and organisation. The reason being that these white officials did not understand the *modus operandi* of the traditional authorities. That is why they were unable to develop and shape customary law and traditional leadership effectively and appropriately as traditional leaders and tribal people could. As Nigel noted, the 1927 Act marked a rejection of the notion of political assimilation of blacks into the Union. Instead this Act backed the Natal principles of bolstering traditional authorities in the reserves under the Supreme Chief, the Governor-General of South Africa, in ways, which resembled the old Shepstonian system.[476]

The 1927 Act also had a profound effect on the judicial authority and functions of traditional leaders. The Act recognised the judicial authority of traditional leaders subject to the authority of the Minister acting on behalf of the Governor-General. The traditional leaders were authorised to hear civil disputes arising out of the black laws and customs between black residents within their areas of jurisdiction.[477] However, traditional leaders were not allowed to settle disputes pertaining to nullity of divorce or separation in respect of customary marriage.[478] This is an example of how the government undermined the expertise of traditional leaders regarding matters of the dissolution of marriage.[479]

Another factor, which really undermined the judicial expertise of traditional leaders, was the fact that government did not allow them to settle disputes between black and white litigants.[480] Traditional leaders could not summon

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[476] Nigel *Making of Modern* 75. See also 3.2 and 3.2.3 above.

[477] Section 12(1)(a) of Act 38 of 1927.

[478] Section 12(1)(b) of Act 38 of 1927. In terms of these provisions the Minister may authorise any traditional leader recognised or appointed to hear and determine civil claims arising out of black law and custom provided that a traditional leader may not have power to determine any question of nullity, divorce or separation arisng out of a marriage.

[479] The Act generally implied that traditional leaders were not capable of settling divorce matters. The conclusion which literally undermined their judicial know-how concerning divorce matters.

[480] Section 12(1)(a) of Act 38 of 1927. The traditional courts were re-organised through the introduction of *Black Administration Act*. The traditional courts were established on the basis of authority given by government warrant. The Commissioners' Courts and Special Courts of Appeal were established. Black litigants were required to make an appeal from the traditional courts to the Commissioners' Courts and from the Commissioners' Courts to

persons who were not of African descent. Where a case involved black and white parties, even in the area of a traditional leader such a matter had to be referred to a magistrate.[481] In the area of criminal offences, traditional leaders were allowed to try and punish any black person who committed an offence in his area of jurisdiction.[482] However in terms of the Act they were not allowed to inflict punishment on matters pertaining to death, mutilation, grievous bodily harm or imprisonment or imposing a fine exceeding twenty pounds or two heads of cattle.[483] As alluded to above that the powers that were allocated to the traditional leaders by the *Black Administration Act* were mainly judicial in nature, it is evident that most of the customary functions of the traditional leaders vested in the office of the Governor-General.

3.4.4.3 Black Representation Act of 1936

In June 1936, both Hertzog and Smuts created the United South African National Party (USANP). According to Kruger, Hertzog personally drafted its programme of principles. Officially the USANP aimed at developing a strong feeling of white South African national unity. The party undertook to strive towards the achievement of the national aspirations and convictions of the white people of the Union with the motto of South Africa first.[484]

The first step the USANP led government took was to enact a *Native Representation Act*[485] (later *Black Representation Act*) which brought an end to the registration of qualified blacks as voters on the common roll with whites in the Cape Province.[486] Smuts supported this Act as his side of compromise.

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the Special Court of Appeal. These courts were established to recreate the flexibility and informality of the traditional courts which blacks were accustomed. See in this regard Bennett *African Customary Law* 62–63.

[481] It was unheard of a situation where a white person was tried by a traditional court in South Africa.

[482] Section 20 of Act 38 of 1927.

[483] Third Schedule of Act 38 of 1927 added by section 2 of *Criminal Procedure Act* 13 of 1955. This Schedule covered among other things offences such as rape, robbery, sedition, public violence, treason etc.

[484] Kruger *Making of Nation* 145-150.

[485] Act 12 of 1936

[486] When the Parliament passed the *Native Representation Act* 12 of 1936, which removed blacks voters from the electoral rolls in the Cape Province, the legality of this Act appeared beyond doubt. Nevertheless in *Ndlwana v Hofmeyer NO* 1937 AD 229 the removal was

Hertzog's side of the compromise was to modify his anti-British line, both in South Africa and in relation to the Commonwealth. Hofmeyer spoke against the 1936 Act as follows:[487]

> By this (Act) we are sowing the seed of far greater potential conflict than is being done by anything in existence today. Now what is the political future for those people (and their traditional leaders). This (Act) says to the natives "there is no room for you".

After blacks in the Cape were removed from the *common voters roll* from both parliament and Provincial Council (PC), the government placed them on separate electoral lists from which they could elect three white representatives to the House of Assembly and three to the Cape Provincial Council (CPC). There was also a provision for four senators to be indirectly elected by blacks to the upper house. These white representatives formed Native Parliamentary Representatives (NPR). According to Boulle this arrangement was a sort of compensation for the disenfranchised Cape black voters.[488]

Boulle pointed out that another compensatory measure was the creation of the Native Representative Council (NRC).[489] This Council was made up of government officials, state nominees and indirectly elected blacks. The traditional leaders were also represented in this Council. In fact the NRC comprised of twelve black representatives who were indirectly elected by blacks throughout the country and the other four blacks who were selected by government. This body was also staffed with white commissioners. The NRC was placed under the championship and control of the Secretary for Native Affairs who was a white official.[490]

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challenged as being ultra vires the power of parliament. The basis of the challenge was that the Act did not only in reality disenfranchise blacks but merely changed the constitutional context in which they could vote. In responding negatively, the court established what was to become the most important juridical principle of the constitutional system: "Parliament's will as expressed in an Act of Parliament cannot now in this country, as it cannot in England be questioned by a court of law whose function is to enforce that will not to question it. It is obviously senseless to speak of an Act of a sovereign law-making institutions as ultra vires."

[487] As quoted by Nigel *Making of Modern* 75.

[488] Boulle *Race* 13-14.

[489] Boulle *Race* 13-14.

[490] Boulle *Race* 13-14.

The NRC had only advisory powers, among other things, in respect of provincial and parliamentary legislation. This Council and white representatives of blacks to the House of Assembly and Senate constituted a form of vicarious representation. As Boulle noticed, the NRC was unable to convince the Union government to disband its policy of segregation and its concomitant racial laws. The white representatives also lacked alacrity to defend the political interests and aspirations of blacks in parliament and Senate.[491]

It was proposed through this Act that blacks throughout the Union of South Africa would gain the right to elect through their traditional leaders, headmen and black Council, seven white representatives in the white parliament and four in the Senate. This implied that whites in the parliament indirectly represented traditional leaders. As Kruger put it, those white representatives were not true ambassadors of the black aspirations and their needs. In fact, they represented the interests of the white regime more than the rights of the blacks they were supposed to defend.[492] As result, both the NRC and NPR were attacked by black communities as dummy bodies, which were greatly insignificant and worthless.[493]

It follows from the above that blacks denounced any kind of white representation designed by the Union government as an insufficient form of government. However, it must be noted that some of the traditional leaders participated in the proceedings of the NRC. The black majority who wanted full representation in the Union government regarded those traditional leaders as "stool pigeons."

Hertzog's proposed a solution to the black problem. Hertzog had for many years been studying all aspects of the black question and he had concluded that the only principle on which a lasting solution could be based, was that of

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[491] Boulle *Race* 13-14.
[492] Kruger *Making of Nation* 150.
[493] Boulle *Race* 13-14.

a complete separation of races. He therefore, as Kruger argued, differentiated between the Cape Coloureds and the South African blacks. He regarded the former as part of the white population in regard to customs, speech and civilization generally. The Coloureds were not to be classed with the black population but with the European people, economically, industrially and politically and he was inclined to extend their political rights, which they enjoyed in the Cape and the Northern province.[494]

The position with regard to the Cape traditional leaders and black population was fundamentally different. They stood far lower on the scale of civilization and advancement and, like Smuts, Hertzog believed that the traditional leaders and their people were by no means far enough advanced to enjoy the fruits of European civilization. It is for this reason that the *Black Representation Act* was introduced to deprive the Cape black voters of traditional rights of voting in common with the rest of the electorate.[495]

The consequence of the Act was that it removed 11000 Cape black voters from the common roll and all other black voters were divided into four constituencies, which were the Cape proper, the Transkei, Natal, the Free State and Transvaal.[496] Suffice it to say that the 1936 Act diminished the hopes of the blacks to be part of the electoral process in South Africa. This was true more especially to the blacks in TVL, OFS and Natal who had been waiting to be enfranchised. When the Cape black voters were removed from the common voters roll, the blacks in these three provinces of united South Africa found themselves in a state of despair. The blacks in the Cape and throughout South Africa who had hoped that there would be an evolution of

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[494] Kruger *Making of Nation* 150. It is also important to note that the Coloureds were also disfranchised by the apartheid regime. According to Hertzog, the Coloured people were much more civilized than the black people. Therefore, he saw it prudent to protect the voting rights of the Coloureds. As Kruger noted the Coloureds who lived principally in the Cape Province where the descendents of whites and slaves imported from Madagascar, Tropical Africa, South East Africa, the local KhoiKhoi and San. Most spoke Afrikaans and were members of the Dutch Reformed Church. They had almost no ties with traditional black cultures.

[495] Kruger *Making of Nation* 150.

[496] Kruger *Making of Nation* 150.

the democratic process extending the black vote to other provinces saw the 1936 Act as a total onslaught on their remaining rights.

3.4.4.4 Native Trust and Land Act of 1936

As a result of the negative effects of the 1913 *Land Act* [497] mentioned above, land was becoming more and more scarce in the reserves. The reserves were also overcrowded. After debates in the Union parliament, however, the parliament passed the *Native Trust and Land Act* (later known as *Black Trust and Land Act).*[498]

With the introduction of this Act, more acres of land were added to the reserves thus making it possible for black communities to secure 13% of land for the blacks and whites ended up with 87%. The additional land set aside by this Act was solely for exclusive occupation. Hertzog, promised to furnish the Trust with liberal funds to achieve its purpose of buying and developing land for the blacks. Of the 18 million hecters released, about 3 million were Crown lands, which the Trust at once acquired. Hertzog believed that traditional leaders should have their own areas in the reserves. Therefore, blacks were denied the opportunity to live in places of their own choice. They were also denied the opportunity to live side by side with other population groups. The land of traditional leaders and their people was defined in the light of the barren reserves.[499]

Hertzog set out his views on black policy as follows:[500]

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[497] See 3.4.3.

[498] Act 18 of 1936. The Act provided for the establishment of a South African Native Trust and defined its purposes and made further provisions as to acquisition and occupation of land by blacks and other persons. The Preamble of Act 18 of 1936 made provision for the so-called released areas and further provided inter alia that the *Black Land Act* 27 of 1913 referred to as the 'principal Act' be construed as if it formed one Act with Act 18 of 1936 and the Governor-General may from time to time whenever he considered it in the public interest so to do, excise from any released area such land other than the land held by a black.

[499] Williams *European Community* 18.

[500] As quoted by Williams *European Community* 18.

> We are dealing here with the place of the native, not in native territory, but in the land of the white man where the white man shall rule and have the right to live safely and peacefully. Nobody compel the native to settle in this territory, but if he does so it is demanded from him that he shall respect the white man and obey the laws of the country. I wish to warn the natives that whoever is so presumptuous as to claim equal authority with the white man will experience the greatest disappointment and failure.

In order to control and regulate the blacks in the Trust Land, the Act introduced and established a black trust to buy up land in released areas to be occupied by the blacks under stringent supervision by trust white officials. The state president who had powers to delegate any of his powers and functions to the Minister had powers to administer the trust land, as such a trust land was under the trusteeship of the president of South Africa.

3.5 THE REGIME OF APARTHEID

3.5.1 POLITICAL ISSUES

In 1948 the National Party (NP) won the general elections and ascended to political power and Malan was chosen as the Prime Minister of South Africa. The party's victory was marked by the formal introduction of *apartheid*.[501] The main goal of NP was racial, cultural and political purity.[502] Malan, and his NP's

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[501] Gobodo-Madikizela *Human Being* 144. The ideology of *apartheid* was laced with different terminologies such as multinational development, plural democracy and a confederation of independent nations or even good neighbourliness. See also Deane 2005 *Fundamina* 1-3, where she stated that the aim of apartheid was to maintain a white domination and extended racial segregation. Whites invented *apartheid* as a means to cement their power over the economic, political and social systems. See also Liebenberg *National Party* 481. According to Liebenberg, the *apartheid* policy was not a new one. It was an old policy, which could be traced back to the time when Jan Van Riebeck at the Cape planted a lane of wild almond trees to indicate the boundary between the Khoikhoi area and the white area. However, the policy applied after 1948 was different from the pre-1948 policy. The difference lies in the ruthlessness with which from 1948 this policy was implemented in South Africa. The 1948 policy was also enforced by the government with the aid of legislation.

[502] Schapera *Tswana Law* 67-68. A study by Shapera revealed that the foundation of apartheid was already laid down by the formulation of the 1913 *Land Act*. See also Deane 2005 *Fundamina* 5-6. Racial, cultural and political divides and discrimination were achieved through the enactment of laws prohibiting interracial sex, cultural and political intergration.

plan were anchored in the philosophy of separate development. The foundational stone of the policy of *apartheid* was based on the formation of artificial black nations in reserves and the rest of South Africa for the whites.[503]

According to Mtintso, *apartheid* was a special type of colonialism, which was unique in a sense that the coloniser lived side by side with the colonised masses within one country.[504] The theoreticians of *apartheid* in South Africa justified it on some pseudotheoretical precepts to give it an appearance of rationality.[505] As Tambo observed, the theoreticians of racism and *apartheid* designed theories that biology and social anthropology provided the basis to justify the notion that all black people carried with them an innate and a cultural inferiority to the white, giving the latter the right and duty of guardianship over the former.[506]

One of the earliest of these racist theoreticians was Smuts:[507]

> It has now become an accepted axiom in our dealings with the natives that it is dishonourable to mix white and black blood ... we have felt more and

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[503] Chidester *Religions of Southern Africa* 204. See also Barber *Mandela's World* 11-12. The core idea of apartheid was to grant formal independence to blacks or tribal 'nations' thereby excluding them from the so-called white South Africa. Separating territories for the black 'nations' and placing them in the reserves achieved the goal of apartheid.

[504] Mtintso 2001 *Umrabulo* 28.

[505] *South Africa Debates of the House of Assembly* 7759. Commenting on the relevance of *apartheid* in South Africa, Mentz NP MP, representative of Wakkerstroom postulated that: "There is just one thing to be done and that is to keep the various races apart ... apartheid gives us the opportunity to get the natives back to their own tribal customs whereas today they have been severed from their tribal connections ... racial clashes can only be avoided in one way. Keep those people apart ..."

[506] Tambo 2001 *Umrabulo* 59; Deane 2005 *Fundamina* 5-6. See also Sparks *Beyond the Miracle* 21, where he submitted that *apartheid* regime prevented black people from acquiring skills. The result was that black people were deliberately given an inferior education. This system relegated blacks to an inferior status. Consequently, blacks were prevented from receiving an education that would lead them to aspire to positions they would not be allowed to hold in society. See Beinart *Twentieth-Century* 147. It was also stated that biological racism was part of the theories of *apartheid*. Social Darwinists feared that mixing blacks with whites would result in racial decline. *Apartheid* also addressed formal political anxieties about racial electoral power, which might be diluted by the long-term arithmetic of mixing.

[507] Tambo 2001 *Umrabulo* 60. See also Beinart *Twentieth Century* 147 where it is stated that Smuts was far more ready to exploit white fears of what was called 'miscegenation'. Hostility to miscegenation distilled unspoken racial reflexes. It played on deeply set white notions of purity especially that of white women.

> more that if we are to solve our native question, it is useless to try to govern black and white in the same institutions of government and legislation. They are different not only in colour but in minds and in political capacity.

The lack of human dignity experienced by black communities and their traditional leaders was the direct consequence of a policy of white supremacy. In this context white supremacy presupposed black inferiority. The *apartheid* government enacted legislation to entrench and institutionalise this notion. As a result, whites tended to view black people as a separate breed. As Mandela intimated, white people did not look upon the blacks as people with emotions and dignity, hence they justified a policy of separate development.[508]

Apartheid was given further impetus when its theoreticians justified it on the basis of the philosophy of Darwinism. Darwinist notions of evolution and hierarchy were applied to human races in South Africa.[509] Whites readily came to believe that they were at the top of the evolutionary scale. This attitude was exacerbated by their belief in the superiority of technology and the dynamism of imperial expansion. It was because of these circumstances that whites people placed blacks at the bottom of human race and regarded them as primitive, less intelligent and sluggard. According to Nigel, this kind of pseudo-scientific social Darwinism squarely fitted whites view of themselves and their world.[510]

The government policy of *apartheid* also obtained a huge support from the Dutch Reformed Church. The *Volkskongress*[511] also made it clear that in South Africa, it was possible for whites and blacks to grow and live together in one community. The *Volkskongress* resolved that:[512]

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[508] Mandela 2001 *Umrabulo* 45-46.
[509] Tambo 2001 *Umrabulo* 59.
[510] Nigel *Making of Modern* 65.
[511] *Volkskongress* is an Afrikaans word, which literally means People's Congress. This was a Congress of the Dutch Reform Church, which resolved to support *apartheid*.
[512] Chidester *Religions of Southern Africa* 206.

> The policy of integration will inevitably give rise to increasing racial tension and racial conflict and will eventually lead to the annihilation of the national existence of one or both of the groups ... the congress is convinced that the only acceptable policy, and a policy which is also particularly possible, is a policy which is based on the principle of separate development, which must provide for the existence of separate communities in their own territories where each community will have the opportunity to full self expression and development, and will be assured of a free existence and of the right of self-determination.

The English also practiced the policy of separate development long before *apartheid* and this ideology was referred to as a policy of segregation.[513] In 1948 the nationalists, mainly the Afrikaners took the task of completing this project of separation between races. In fact the policy of *apartheid* was an intensified segregation designed by the English people. That is why Butler firmly argued that the British laid down, designed, co-ordinated and engendered a master plan of *apartheid*.[514] It is also submitted and argued that the seeds of separate development or *apartheid* were sown in the fertile soil of Afrikaner religious belief and fed with the conviction that a Christian national policy and way of life was fundamental to the survival and proper growth of Afrikanerdom.[515]

The persons responsible for this idea were a group of well educated, highly articulated Afrikaners who were gradually replacing the old Boer generals in the Afrikaner hierarchy and struggle for power. These Afrikaners were bound together in a secret society known as the *Broederbond*. As Butler noted these Christian intellectuals believed that the Afrikaner nation was specifically put in South Africa by God to fulfil a particular calling as a nation and that the maintenance of Afrikaner identity was essential to this task and therefore part of the will of God. As indicated above, for all these reasons and convictions

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[513] See 3.5.1 above.
[514] Butler *et al Democratic Liberalism* 363.
[515] Butler *et al Democratic Liberalism* 363.

the Afrikaner churches in South Africa deemed it fit to buttress the policy of, *apartheid* and the separation of races.[516]

When the deputation of about 12 black leaders including traditional leaders presented an address of loyalty to Malan, in October 1948 after his election, his reply was:[517]

> I regard the *Bantu* (and their traditional leaders) not as strangers and not as menace to the white people, but as our children for whose welfare we are responsible, and as an asset to the country. What you want is rehabilitation of your own national life, and not competition and intermixture and equality with a white man in his particular part of the country.

According to Butler, the policy of traditional or classic *apartheid* did not constitute a clean break with the past, but rather an elaboration or intensification of the policy of segregation.[518] Like *apartheid*, segregation contained a blend of racism and cultural idealism. Malan stressed that *apartheid* did not mean a rejection of cultural idealism.[519]

Malan believed that *apartheid* was a renaissance in the national life of the blacks. According to him blacks were still in need of a rehabilitation programme. This presupposed that it was too early for black leaders and their people to compete mix and interact politically, socially and economically with a white man. As it will be demonstrated below, *apartheid* according to Malan was not intended to drive the blacks out of South Africa but to create their national states where they could develop, nurture their national life and compete among themselves.[520]

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[516] Butler *et al Democratic Liberalism* 363.
[517] Khunou *Critical Assessment* 6.
[518] Butler *et al Democratic Liberalism* 363.
[519] Butler *et al Democratic Liberalism* 363. Butler quoted Malan saying in 1948 that: "*Apartheid* is not the caricature, which is so often made of it. On the contrary, it means for the non-whites the development of a greater degree of autonomy and of self respect with the provision of greater opportunity for autonomous development according to their nature and capacity."
[520] Malan was the first Prime Minister of *apartheid* South Africa. His *apartheid* government legalised institutionalised apartheid as government official policy. Malan was already a man

The architects of *apartheid* argued that the system of separate development would benefit black communities by giving them access to political office, social service, professional jobs and business opportunities on a separate basis. Therefore, *apartheid* in South Africa developed into a systematic and legalized discrimination, shaping the economic, social and political structures of the whole country in a more persuasive way.[521] In order to entrench the policies of *apartheid*, the NP government started by passing the *Prohibition of Mixed Marriages Act.*[522] *Apartheid* according to Malan meant:[523]

> Abolition of black representation in the House of Assembly and the Cape Provincial Council, recognition of the native reserves as the true black homelands and strict control of black influx to the cities, segregation of whites and blacks to the maximum extent possible when ever the two groups necessarily come together.

To the traditional leaders and black communities, *apartheid* meant that they were not allowed to integrate with white communities in all respects. Even their freedom of movement into the cities was limited.[524] It is therefore firmly

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of 74 when he took over from Smuts in May 1948. He did not have Smuts' international prestige but he was an experienced politician who enjoyed confidence of Afrikaans speaking people. The government wanted to base self-government of the blacks on the traditional government system. One of the basic principle of *apartheid* was that blacks would have no say in matters affecting whites therefore it was important for them to run their affairs in rural areas. See in this regard Liebenberg *National Party* 466-467. See 3.5.3, 3.5.3.1 and 3.5.3.2 below.

[521] Nigel *Making of Modern* 65.

[522] Act 55 of 1949. The Act provided for the prohibition of marriages between whites and blacks. Section 1 of Act 55 of 1949 provided that a marriage between a European (white) and non-European (black) may not be solemnised, any such marriage solemnised was to be void and of no effect provided that: (a) any such marriage shall be deemed to be valid if it has been solemnised in good faith by a marriage officer and neither of the parties concerned or any other person in collusion with one or the other of them has made any false statement relating to the said marriage. (b) any party to such marriage professing to be a European or an non-European as the case may be is in appearance obviously what he professes to be or is able to show in the case of a party professing to be a European, that he habitually consorts with Europeans as a European or in a case of a party professing to be a non-European that he habitually consorts with non-Europeans as a non-European. (c) where any such marriage has been solemnised in good faith by marriage officer any children born or conceived of such marriage before it has been declared by a competent court to be invalid shall be deemed to be legitimate.

[523] Newell *Afrikaner Politics* 136.

[524] This limitation was enforced through a number of legislation more in particular the *Bantu*

argued that *apartheid* was a systematic nationalist government policy, which owned the being of traditional leaders and their subjects as well as blacks in general. It mapped out and dictated to a black person what to wear, talk about and where and when to travel. As a consequence, legislative measures were set in place to safeguard this policy. For instance, legislation was passed to suppress freedom of expression and association among others.[525]

One of the crucial legislative measures, which was critical to the understanding of the racial restructuring of the *apartheid* society was the *Population Registration Act.*[526] According to Devenish, the notorious system of race classification based on this Act, was necessary to the political philosophy and constitutional practice of race differentiation and pseudo-decolonisation.[527] The Act introduced a register of the complete South African population, which indicated the classification of each person as a white person, coloured person, Indian person and a black person.[528]

Urban Areas Consolidation Act 55 of 1945 as amended.

[525] Barber *Mandela's World* 15-16. For example it was offence to talk and promote the activities, philosophies and ideologies of the then banned liberation movements such as ANC, PAC, SACP and BCM. It was unlawful to associate oneself with the operation of these movements. Leaders of these movements were forced into exile while others such as Mandela, Sisulu, Sobukwe and Motsoaledi were imprisoned.

[526] Act 30 of 1950. This Act was popularly known as the *Race Classification Act* because one of its obnoxious positions was that it classified every born and living South African according to their race or ethnic group or both.

[527] Devenish *Cardinal* 98-99. When a *Bill on Race Classification or Population Registration* was proposed, Malan, a representative of Gezina in the South African parliament told members of the Assembly that: "When a Bill such as this is proposed one should try to think practically about it but when one wants to apply it to the objections from the other side of the House in connection with ethnic groups one finds that their point of view is impractical. First of all it is undesirable to emphasise the ethnic differences in our European population. Most of us are most probably descendants of the Nordic racial groups and that would mean that the Semitic groups would have to stand apart. I mention this merely as an instance to indicate that the emphasising of the differences in the ethnic groups would not be desirable in our country and not practical, either because as the European group we are regarded as a unit in the country. As far as the non-European section of our population is concerned, it is exactly the opposite. Among the non-Europeans if we start with the Coloureds, we have groups which completely diverge and which differ from one another. Among them we find the Coloureds of the Cape Province, the Coloureds as a whole, we have the Asiatics from the East and the Indians. We know the difficulties. I am speaking now only of the Coloureds." See in this regard *South Africa Debates of the House of Assembly* 5717.

[528] Devenish *Cardinal* 98-99. According to the *Population Registration Act*, a white person is one whose appearance is obviously a white person who is generally not accepted as a Coloured person or is generally accepted as a white person provided that a person shall not be classified as a coloured person or a *Bantu*. A *Bantu* person is a person who is, or is generally accepted as a member of any aboriginal race or tribe of Africa, and a Coloured person is one who is not a white person or a *Bantu*. See in this regard section 5(1) and (2) of Act 30 of 1950, which provided that every person whose name is included in the register

According to Slabbert, enthusiastic nationalists referred to this Act as the *Magna Carta* of race relations for South Africa.[529] The practical effects of race classification resulted in an incalculable human suffering. Its application led to breakdown of tribes and families. This is so because families were torn apart when husbands and wives, parents and children, brothers and sisters were differently classified with all the consequences to their personal, economic and political lives. The Act created a situation where one parent could be classified as white and the other as Coloured. One child white, his brother coloured and his sister black. This statutory arrangement undermined the sanctity of the families. On similar vein, tribes were also affected by this arrangement where some members of a particular tribe were classified as members of another group. The tragic consequences of this statutory race classification created a legacy of acrimony and bitterness, which contributed to racial polarization, which militated against the prospect of successful eradication of racism.[530]

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shall be classified by the Director as a White person, a Coloured person or a *Bantu* and every *Bantu* and every Coloured may be classified by the Director according to the ethinic or other group to which he belonged. The Governor-General may prescribe and define the ethnic or other group into which Coloured persons and *Bantu* may be classified. See also section 7(1) of Act 30 of 1950, which provided for the particulars to be included in respect of every person other than the *Bantu* whose name is included in the register. These particulars included *inter alia*, his full names, sex and ordinary place of residence, his classification in terms of section 5, the date and place of his birth, his citizenship or nationality, his marital status.

[529] Slabbert *Lost White Parliament* 43.

[530] Slabbert *Lost White Parliament* 43. A question of race classification was a very complex and crucial one, more especially classification between blacks and Coloureds. During the 1950s and 1960s blacks who had white complexion pretended to be Coloureds. In most cases they succeeded because the members of the Coloured community they claimed to belong accepted them. That is why today in South Africa one could encounter black people with surnames such as Olifant, Grootboom and so forth. There were many advantages of being classified as Coloured rather than black, such as the fact that Coloured men were not required to carry passes.

In 1950, the NP parliament promulgated the *Group Areas Act.*[531] The Act distributed land for residential and other purposes on a racial basis. In other words, the Act provided different residential areas for every section of the population. This Act cut across all traditional property rights and led to the eviction of thousands of blacks, Indians and Coloureds from their homes. With the introduction of this Act, traditional leaders and their communities lost vast tracks of land. Other legislation which were used to dislodge tribes included the *Resettlement Act*[532] *and* the *Black (Urban Areas) Consolidation Act.*[533] The *Resettlement Act* empowered the government to remove blacks from specified areas and to provide them with settlement elsewhere.[534]

This dispossession was achieved in different ways. Firstly, black people were dispossessed of scheduled areas, which were registered in the name of the Minister and the land was thereafter proclaimed a white area.[535] Secondly, land was taken from the black communities through the *apartheid* policy of forced removals. With these forced removals and taking away of land, traditional authorities and communities were disrupted.[536]

In 1953, when Verwoerd was the Minister of Native Affairs, he initiated the promulgation of *Bantu Education Act.*[537] The main objective of this Act was to place black education squarely under the control of the NP government and to

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[531] Act 41 of 1950. Under the 1950 *Group Areas Act*, the *apartheid* government divided urban areas into zones or group areas where members of one specific race only could live. It was under this arrangement that the prime areas were reserved for whites. Often, areas previously owned and occupied by blacks were later zones for exclusive white occupation. As noted above, this obviously resulted in the inevitable removal of black people from their traditional areas. One of the most notorious removals was Sophiatown, about 10 km west down Johannesburg. Sophiatown was one of the few townships where blacks had for decades owned land in terms of the South African law. See also the *Group Areas Act* 36 of 1966.

[532] Act 19 of 1954.

[533] Act 25 of 1948. This Act provided for the procedure to deal with idle and the so-called undesirable blacks in areas outside the provision for the regulation of the ingress of blacks into their residents. See also 3.5.1 above.

[534] Section 12 of Act 19 of 1954. Thousands of blacks were also dispossessed of their land when the betterment schemes were implemented in the Bantustans. Under the betterment schemes designated areas were divided into distinct land use zone for residential, arable and grazing purposes. As a result thousands of people were forced to move into demarcated residential zones and were consequently dispossessed of arable and grazing land.

[535] Balatseng and Van der Walt *History of Traditional Authorities* 20.

[536] Balatseng and Van der Walt *History of Traditional Authorities* 20.

[537] Act 47 of 1953.

control and restructure black education in line with the policy of the state.[538] Under this Act, black primary and secondary schools operated by church and mission bodies were instructed to turn over their schools to the government or gradually received diminished subsidies.[539] The government made it clear that it would either take over education for blacks or there would be no education for them at all. Its impact on the black people was not only negatively psychological but also immoral with all its intents and purposes. When the Bantu education was introduced, Verwoerd stated as follows:[540]

> My department's policy is that *Bantu* education should stand with both feet in the reserves and have its roots in the spirit and being of *Bantu* society. There is no place for the *Bantu* in the European community above the level of certain form of labour.

This Act was designed to deny black people the type of quality education they desperately needed. In traditional communities, people were denied access to proper education. Traditional leaders of the communities were not well equipped to handle the challenges of their communities. The reason being,

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[538] Brink *et al Soweto* 179. When the NP came to power in 1948 it ordered an investigation of Bantu education as it was then known or called. The result of this investigation was the promulgation of Act 47 of 1953, which transferred the control of black education from the Department of Education to much loathed Native Affairs Department. The Act also removed black education from the control of the missionaries and instituted a four-year state controlled junior primary curriculum. This curriculum was designed to incorporate ideas of NP educationalists about the future role, need and culture of the black children.

[539] Brink *et al Soweto* 179. As a result of diminished subsidies, many missionary schools were forced to close down. Therefore black learners from former missionary schools had no choice but to enroll in public schools, which were controlled by the *Apartheid* government.

[540] Harrison *White Tribe* 191. See also *South Africa Debates of the House of Assembly* 5623. Maree, MP for Newcastle supported the idea of *Bantu* education and justified its existence and relevance in black society. He quoted Prof Ottoway of the University of Leeds who said that: "Education is an activity which goes on in society and its aims and methods depend on the nature of the society in which it takes place". He went on to ask: "Why separate it (*Bantu* Education) from his surroundings as far as the non-whites is concerned? In regard to this principle there is no difference between lower and higher education. If it is true of lower education it must also be true of higher education. Why separate *Bantu* from his surroundings. No, I think that if one really wants to do the *Bantu* in South Africa a favour, one should see to it that (*Bantu* education serve him) from his community, from his surroundings and from his educational institutions. Suzman, member of the opposition party dismissed the above assertion of Maree concerning *Bantu* education as nonsensical speech. According to Suzman, Maree talked as if the blacks were still living purely in their tribal set-up and as if they had no contact with western civilisation and as if the whole direction of blacks was not towards urbanisation and integration in the South African economy.

many of them were illiterate and innumerate.[541] Bantu education prepared and trained blacks to render unskilled labour in white communities.[542] Verwoerd confirmed this policy when he said that:[543]

> What is use of teaching the Bantu child mathematics when it cannot use it in practice? That is quite absurd. Education must train people in accordance with their opportunities in life, actually to the sphere in which they live.

The consequence of this measure was that blacks were denied opportunities to participate in the mainstream economy and politics in South Africa. It was designed to institutionalise and entrench a sense of inferiority in black communities. The majority of these people underestimated their skills and rated themselves as underdogs. In fact, it instilled a sense of inferiority among black people.[544]

In 1954, Malan resigned and the NP chose Strijdom as the new Prime Minister. Strijdom explained his black policy as follows:[545]

> Call it paramountcy, baasskap or what you will, it is still domination. I am being as blunt as I can. I am making no excuses. The only way the Europeans can maintain supremacy is by domination. And the only

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[541] Caldwell *South Africa* 54. *Bantu* education reduced black people mentally as hewers of wood and drawers of water.

[542] *South Africa Debates of the National Assembly* 782-783. In 1976 *Bantu* Education was challenged by the black youth especially students from SOWETO. Among other things black students rejected the use of Afrikaans as a medium of instruction in black schools. Loots, ANC MP commented in parliament of South Africa about Afrikaans language as follows: "It is probably generally known that the first person who seriously made use of Afrikaans was Louis Henri Meurat, who published the first Afrikaans book in 1861. Meurat got the inspiration for the book in the Katrivier Valley, where he was living at the time ... Afrikaans is a very beautiful language. Honourable member should listen to a few lines from Eugéne Marais' Winternag, which appeared in 1905: '*O koud is die windjie en skraal. En blink is die dof-lig en kaal, So wyd as die Heer se genade, lê die velde in sterlig en skade*". He went on to say that to those in Freedom Front (FF) the NP and others who were trying to use the issue of Afrikaans as a weapon against democracy, I would like to say the following: "The use of Afrikaans as a core election issue can only lead to disaster as it did in 1976".

[543] Caldwell *South Africa* 54.

[544] See 3.5.1 above.

[545] As quoted by Walter *South Africa's War* 20.

> way they can maintain domination is by withholding the vote from the non-Europeans.

When Strijdom took over the reigns of the *apartheid* government, racism, division and white domination became integral parts of every day life. The South African society encouraged by the state, the schools, the church, the press and employers practically created a racial world in which people were expected to behave according to the colour of their skin as well as the class they belonged to. Employers emphasized the doctrine of *baasskap*[546] in all quarters of job markets. Strijdom's government entrenched the notion of white supremacy everywhere in the workplaces. As Mandela observed, when anything had to be cleared or carried, the white man would look around for a black person to do it for him or her. Whether a white man was a black person's employer or not was immaterial.[547]

Strijdom believed that Malan's attitude towards *apartheid* had been nurtured in a more liberal atmosphere of the Cape. Therefore, his order of business where Malan failed was to remove Coloured voters from the common roll in the Cape. Strijdom realized his dream when the parliament enacted the *Senate Act.*[548]

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[546] *Baasskap* is an Afrikaans word which means white supremacy.

[547] Mandela 2001 *Umrabulo* 45-48.

[548] Act 53 of 1955. This Act increased the number of senators in senate from 48 to 49. With the introduction of the *Senate Act*, parliament obtained two-third majority and amended the *Separate Representation of Voters Act* 46 of 1951. Subsequently, the Coloureds were removed from the common voters roll and the NP government made sure that the white people were alone in charge of the government. See also Van Wyk *South African Constitution* 135. South Africa's status as a dominion and its increasing independence from Britain and the assertion of its domestic soveregnity formed the key elements of removing the Coloureds from the common voters roll. In *Harris and Others v Minister of the Interior and Another* 1952 (2) SA 428 AD, the court found that the *Separate Representation Act* 46 of 1951 was passed by the House of Assembly to provide that the Coloured voters of the Cape be removed from the common roll and placed on a separate roll to elect four white representatives to the National Assembly and two to the Cape Provincial Councils. The court declared *Separate Representation Act* 46 of 1951 *null and void* and of no force and effect as it was not in conformity with the provisions of sections 35 and 152 of the *South African Act* of 1909. The court went further to protect the rights conferred by sections 35 and 152 in *Minister of Interior and Another v Harris and Others* 1954 (4) SA 769 AD, when it declared invalid the *High Court of Parliament Act* 35 of 1952, which established a High Court of Parliament consisting of all senators and members of the House of Assembly, with power to review decisions of the Appeal Division of the Supreme Court of South Africa, altered section 152 of the *South African Act* of 1909. The court went further to state that the High Court of Parliament is not a court of law. See also *Collins v Minister of the Interior*

Indians were immigrants in South Africa. As blacks, Indians initially never participated in the parliamentary government of South Africa. However, as it will be shown below,[549] a political structure for Indians was later created. The NP maintained *apartheid* also between coloureds, blacks and Indians.[550]

In order to reinforce the policy of *apartheid* towards the blacks, the government embarked on a programme to relocate black South Africans to the reserves. They achieved that relocation programme through pass laws,[551] settlement Acts,[552] numerous amendments to Land Acts[553] and forced

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1957 (1) SA 552 (A), where the court accordingly stated that the object of passing the *Senate Act* 53 of 1955 was to provide the government with a two-thirds majority of a joined sitting of the two Houses in order to pass at that joined sitting an Act to validate Act 46 of 1951. The ultimate purpose to validate Act 46 of 1951 was to finally remove the Coloureds from the common voters roll. After this has been done the number of senators was reduced in 1960. See also in this regard Horrell *Race Relations* 25.

[549] See 3.6.1 below.

[550] Newell *African Politics* 19. The separation between white and black (including Coloureds and Indians) was taken further through residential and social *apartheid*. For instance *Group Areas Act* 36 of 1950 introduced residential segregation. When the *Group Areas Bill* was debated in parliament Van der Byl, NP MP stated that: "You could not solve the native problem by trying to buy sufficient land for the natives and putting them into reserves. In fact there is no enough land in South Africa to do that ... therefore the only solution to this problem was that natives would have to be absorbed into industries. To ensure that there should be absolute residential and social separation between black and white, parallel villages near the big industries would have to be provided for them so that the native permanent worker could live in his own area, an area which the white man would not be allowed to go into but in which he would be near enough to the industry in which he is employed, to be able to go to work in the morning. He further quoted four to five lines from the pamphlet printed by the Nasionale Pers which read as follows: "In future natives from rural areas and the reserves will be allowed to enter the European urban areas only as temporary workers and must return to their homes regularly on the termination of their service contracts". See in this regard *South Africa Debates of the House of Assembly* 7695. The primary objective of *Group Areas Act* was to try and create proper separate residential areas for black and white.

[551] See *Black (Urban Areas) Act* 25 of 1945; the *Black (Urban Areas) Amendment Act* 42 of 1957, the *Black (Urban Areas) Amendment Act* 61 of 1955 and the *Black (Urban Areas) Amendment Act* 25 of 1965. These amendments empowered any urban local authority to order any black whom it believe to be detrimental to the maintenance of peace and order to depart from the urban area within a specified period and thereafter not to return to or to be in such area without the permission of the urban local authority. See also Olivier *Presence and Employment* 10.

[552] See *Black Resettlement Act* 19 of 1954. This Act provided for the removal of blacks from any area in the magisterial disctrict of Johannesburg or any adjoining magisterial district and their settlement elsewhere. Section 2 of Act 19 of 1954 established the Black Resettlement Board, which was responsible for the removal of blacks from their areas.

[553] See *Black Trust and Land Amendment Act* 18 of 1954, the *Black Trust and Land Amendment Act* 73 of 1956, the *Black Trust and Land Amendment Act* 41 of 1958 and the *Black Trust and Land Amendment Act* 110 of 1976. See also the *Black Land Adjustment Act* 36 of 1931. This Act authorised certain transactions affecting land to be withdrawn from or to be reserved for black location. The *Black Lands Further Release and Acquisition Act*

removals.[554] Through the process of relocation, many tribes were further divided. As a result of this dispersal, the traditional authorities were also dislocated. The relocation programme led to the emergence of new categories of traditional leaders in South Africa. Between 1960 and 1983, the government forcibly relocated about 3.5 million black people throughout South Africa.[555]

3.5.2 BLACK AUTHORITIES AND TRADITIONAL LEADERSHIP

3.5.2.1 Purpose of Black Authorities Act

The first task of the National Party government when it took over was to interfere with the traditional governments. The government first achieved its objective of tribal divisions through the promulgation of the *Bantu Authorities Act*[556] (later known as *Black Authorities Act*).

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27 of 1935. Sections 1 and 2 authorised certain transactions affecting land reserved for black occupation and extended the application of the *Black Land Act* of 1913 to certain pieces of land. Section 2 of Act 27 of 1935 further provided for the excision of land from Taung Reserve.

[554] Miller *Land Title* 34–35. Forced removals in South Africa have a history which goes back long before apartheid. According to Miller the process assumed a dimension of unprecedented hardship in Verwoerd's premiership. Almost all of those who have been moved under apartheid were blacks who had no say in the law-making process that surrounded their removal. The creation of black homelands was essential provision for the accommodation of blacks removed from white areas. The introduction of the *Black Homelands Citizenship Act* 26 of 1970 provided a basis for deeming blacks to be citizens of one or other of the homeland territories. Miller also quoted Devenport saying that: "Under the *Native Resettlement Act* of 1954 the government moved the African residents of the Western Suburbs of Johannesburg to a new area called Meadowlands twelve miles from the City. Sophiatown was re-zoned for whites and renamed Triompf in 1956 and the Southern part of the district was set aside for Coloured township and occupation in 1957. The removals were carried out with the precision of a military operation, and left a thousand "unlawful" residents of Johannesburg homeless". See also Kristin http://www.law.kuleuven.ac.be/jura 03 November 2005 1. The white South Africa's system of *apartheid* created and maintained a strategy of forced removal for the majority of the black population as a means of dividing and controlling the economic and political power of blacks South Africans. The policy of forced removal was a pillar of apartheid system without it apartheid could not have became as fully entrenched as it was in South Africa before the establishment of black majority rule with the first multi-racial election in April 1964.

[555] Chidester *Religions of Southern Africa* 205.

[556] Act 68 of 1951.

The *Black Authorities Act* was supposed to modify and give the definition to traditional authorities and traditional governance. The Act established three tiers of administrative hierarchies in rural black South Africa:[557]

- Traditional authority: consisting of the traditional leader and his councillors;[558]
- Regional Authority: consisting of tribal authorities in a particular district;[559] and
- Territorial authority: administering a particular ethnic group as a homeland or Bantustan government.[560]

3.5.2.2 Traditional Authority

The powers and functions of traditional authority are described in the Act and included *inter alia* to administer the affairs of the tribes and communities, to assist and advise a traditional leader in connection with performance of his duties, to assist and advise government on any other territorial or regional authority having jurisdiction in any area for which such tribal authority has been established.[561] The functions marked a remarkable departure from the customary functions of a traditional council.[562] The traditional leader and his

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[557] Schapera *Tswana Law* 67-68. See also section 2 of Act 68 of 1951; TARG *Conference Documentation* 7. According to TARG report, traditional leaders were *ex officio* members of these three tiers of tribal authorities. This arrangement brought traditional leaders into the centre of apartheid government system. As a result of their direct involvement and participation in the governance activities of apartheid government, their legitimacy was greatly eroded. The institutions or authorities created by this *Black Authorities Act* never existed before in the traditional way of living. The apartheid government used these authorities to exercise control over the people in the rural areas. However, TARG team suggested that these authorities could not be disregarded or abolished without due consultation with all the affected and interested parties. According to TARG, there might be communities who want their authorities to continue as the government nearest to the people.

[558] Section 4 of Act 68 of 1951.

[559] Section 5 of Act 68 of 1951.

[560] Section 7 of Act 68 of 1951.

[561] Section 4 of Act 68 of 1951

[562] See also section 7 of Act 68 of 1951 dealt with the developmental roles of the traditional leaders at the local government level. These developmental roles included *inter alia* the service provision of educational and agricultural facilities to the rural people. See 2.2, 2.3 and 2.4 above - these topics dealt with the functions of the traditional leaders during the pre-colonial era, which were different from the statutory functions conferred to by the *apartheid* government.

Council never performed these functions before the enactment of *Black Authorities Act.*

3.5.2.3 Regional Authority

A regional authority had power to advice and make representations to government in matters regarding the general interests of blacks within any area under the jurisdiction of such authority. Among many other things, the regional authority was required to establish, maintain and manage educational institutions, to construct roads and bridges, to suppress diseases of livestock, establish and maintain hospitals and clinics and also to improve farming and agriculture.[563]

The regional authority differed from the tribal authorities in the sense that its functions and duties were limited to the entire region in which different traditional authorities fell. Hence functions of regional authorities were more extensive than those of traditional authorities.

3.5.2.4 Territorial Authority

In terms of the Act, the Territorial Authority was required to maintain the closest possible contact with the then Commissioner-General appointed for a particular ethnic group. The territorial authority assumed a leading role with regard to both material and social welfare of the black population of a particular ethnic unit. The territorial authorities also played a pivotal role in ensuring effective administration of justice and of courts of law within the areas of their jurisdictions. Furthermore, the territorial authorities had power to provide for the establishment of markets and pounds, control of the erection and maintenance of buildings, the licensing and allocation of trading regarding black population.[564]

[563] Section 5 of Act 68 of 1951.
[564] Section 7 of Act 68 of 1951.

The powers and functions of territorial authorities differed from those of the traditional and regional authorities in many respects. Firstly, a territorial authority was responsible for the administration of the entire Bantustan or homeland. This authority administered areas, which fell under traditional and regional authorities. Therefore, their governance role was much more extensive than those of the tribal and regional authorities.

3.5.2.5 A Critique of the Black Authorities Act

The originators and architects of this Act saw it as the way for revival of traditional leadership and the creation of political institutions in the Bantustans designed to employ traditional leaders in maintaining control over the homeland populations. As a consequence, the Act granted traditional leaders greater authority than they had previously enjoyed under traditional form of government, thereby giving them a vested interest in the continuance of separate development. This led into the emergence of a group of traditional leaders who worked with the Bantu Affairs Commissioners who were white officials.[565]

The government did not hesitate to act against recalcitrant appointees. For instance, in 1952 a dramatic step was taken when Chief Luthuli was dismissed from his traditional leadership of the Umvoti Mission Reserve in Zululand. The reason for the dismissal of Chief Luthuli was that he refused to give up his membership of the ANC. The extent of government control over traditional leaders could be seen in the deposition of 34 traditional leaders and

[565] Surenda *Documentary History* 2-3; Khunou *Critical Assessment* 7. After the establishment of the so-called homelands in the 1960s and 1970s traditional leaders were associated with homeland leaders or were regarded as puppets of these governments. Almost all the Bantustans or homelands were under the leadership of traditional leaders. For example Chief Mangope was a leader of Bophuthatswana, Chief Mathanzima in Transkei, Chief Mphephu in Venda, Chief Buthelezi in KwaZulu and so forth. See also Letsoalo *Land Reform* 79. According to Letsoalo, that is why the term "Chief" had come to be associated with the homeland leaders and in some circle it was a synonym for puppet. With the introduction of this Act, traditional leaders became officials of the Department of Native Affairs (DNA) and lost the traditional power associated with their positions. Traditional leaders were placed at centre of bureaucratic system through the creation of traditional authorities at all levels. They were responsible to the *apartheid* government. See also 3.5.3 below.

headmen during the years 1955 and 1958.[566] This Act also made traditional leaders paid employees of the *apartheid* regime. As a result those who earned salaries owed their allegiance to the regime and no more to their people.[567]

The Act led to the establishment of a new system of black rural local government. The government justified the passage of the Black Authorities Act on the basis of the fact that it created a framework for black development. Contrary to this government standpoint, some of the traditional leaders denounced it and described it as a policy of divide and rule, which was geared to perpetuate white supremacy and oppression.[568]

Traditional leaders suffered a lot of hardship. Those who were against government directives were simply removed from office and replaced with those who were willing to adhere to the new institutions.[569] Others were marginalized while the collaborators whose traditional status was dubious were favoured.[570]

Traditional leaders' responsibility for the maintenance of law and order encouraged new trends of policing and tough measures for the maintenance of law and order. Lodge noted that traditional leaders were incited:[571]

> Be your own police in your own interest, find out those men who respect authority and tribal institutions and band them together as the Chief's and headmen's impis which will turn out when called to help keep your tribes and locations clean and well behaved. Use moderate violence ... just like a good Chief should do.

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[566] Khunou *Critical Assessment* 7.
[567] Ntloedibe *Role of Traditional Leaders* 4.
[568] Shapera *Tswana law* 68.
[569] Thobejane *Traditional Leadership* 1.
[570] Those who were favoured by the government derived material benefits from the regime while the opponents were banished or sent into exile.
[571] Lodge *Black Politics* 261.Traditional leaders were required to assist the government with regard to the maintenance of social and moral welfare of black people. In so doing they were supposed to maintain law and order to ensure that moral infrastructure in their communities is not fragmented.

The *Black Authorities Act* made traditional leaders both police officers and officials of the Native Commissioner (NC) and agents of the government, [572] fragmenting the legitimacy of traditional leaders. Hence, most traditional leaders viewed the institution of the black authorities with suspicion. Lodge cited Chief Moiloa of Bahurutshe saying:[573]

> It seems to us that they want us Chiefs to sign a document which says destroy me, baas. Let them destroy us without our signatures.

Many traditional leaders opposed the *Black Authorities Act.* This opposition led to a number of revolts throughout the country in Soutpansberg, Sekhukhuneland, Witsieshoek and Zeerust in 1958.[574] According to Lodge, other rebellions took place in Natal reserve in 1958 and 1959 and in Mapondoland, Transkei in 1960 and in the Tembu district of the Western Transkei between 1962 and 1963.[575]

3.5.3 HOMELAND AFFAIRS

3.5.3.1 STRATEGIC CREATION OF HOMELANDS

The borders of the homelands were 'fixed' long before *apartheid* was introduced as official government policy, namely by the *1913 Land Act and*

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[572] Lodge *Black Politics* 261.
[573] Lodge *Black Politics* 266.
[574] Kotzé *Witzieshoek Revolt* 127. The causes of the revolts in Sekhukhuneland, Witzieshoek and Zeerust culminated in a clash between traditional leaders, traditional communities and the police. For instance when measures for agricultural development were promulgated in 1939 in Witzieshoek. These measures included inter alia betterment policy for grazing and culling of animals. The authorities made a mistake since the betterment policy was carried without proper statistics on people, grazing capacity and land. The authorities also ignored local popular participation when it designed new policies on culling and betterment. These factors contributed among many others to protest in Witzieshoek. See also Van Kessel *Beyond our Wildest* 78, where she stated that although these factors were matters of peasant concerns they were also of great importance to traditional leaders and rural communities in general who regarded rural means of livelihood as essential part of their survival strategy.
[575] Lodge *Black Politics* 268.

1936 Trust and Land Act.[576] When Verwoerd became Prime Minister of South Africa in 1959, he introduced the *Promotion of Black Self-Government Act.*[577] The main objective of this Act was to create self-governing black units. The Black population was arranged and categorised into national units based on language and culture, thus there was North-Sotho unit, the South-Sotho unit, the Swazi unit, the Tsonga unit, the Tswana unit, the Venda unit, the Xhosa unit and the Zulu unit.[578]

The administrative authorities in these national units were to be based on the tribal system. The government's contention was that each nation had to develop according to their own culture under their own government. The government further argued that in this process of development no nation was supposed to interfere with each other.[579]

This Act laid a foundation for the constitutionalization of separate development. This is so because it had the effect of creating radical separation not only for blacks from the rest of white South African population, but also of black ethnic groups from each other. According to Venter, this was aptly illustrated in the preamble of this Act as follows:[580]

> The *Bantu* people of the Union of South Africa do not constitute a homogenous people, but form separate national units on the basis of language and culture ... it is desirable for the welfare of the said people to afford recognition of the various national units and provide for their gradual development within their own to self-governing units on the basis of *Bantu* system of government ... and its expedient to provide for

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[576] See 3.4.3 and 3.4.4.4 above.

[577] Act 46 of 1959. The purpose of Act 46 of 1959 was among other things intended to provide for the gradual development of self-governing black national units and for direct consultation between the government of the Union of South Africa and the national units in regard to matters affecting the interests of such national units. According to the Preamble of Act 46 of 1959, it was expedient to develop and extend the black system of government and to assign further powers, functions and duties to regional and territorial authorities. See also Beinart *Twentieth Century* 146. Beinart submitted that apartheid in its broader conception had increasingly became associated with Verwoerd. He further argued that Verwoerd dominated policy towards blacks. He described Verwoerd as one of the ideologues who moulded notions of separate cultures, nations and homelands.

[578] Section 2(1) of Act 46 of 1959.

[579] Act 46 of 1959. The Act described 'black population' as a heterogeneous group.

[580] Venter *Perspectives* 6.

> direct consultation between the various *Bantu* national units and the government of the Union.

The basis of the *Promotion of Black Self-government Act* was to ensure that blacks lived in the Bantustans and ran their own affairs without any shares in the greater South Africa. The *Bantu* reserves were transformed into Bantustans, later called homelands. The communities in these Bantustans were to be guided and led by traditional leaders. Traditional leaders were used by the system to sustain the legitimacy of the Bantustans because the idea of the homeland system was to divide and rule black people.[581]

Verwoerd argued that the policy of independent black homelands would offer black economic opportunities and political representation in the reserves. As a result, traditional leaders were manipulated by the government to accept the idea of self-rule or independent homelands. Some of these homelands gained independence with the idea to form a commonwealth with South Africa at its core. This vision of grand *apartheid* became the ideal for white South Africa. The independence of the four South African homelands meant that all the Xhosa, Tswana, Venda and many other black population groups had effectively become foreigners in their own country.[582]

The leaders of these four homelands who sold their subjects out and accepted independence endorsed this independence. Mostly these leaders in their personal capacities have reaped the fruits of independence. To them this vision of separate development was an alternative to domination by the black majority. To achieve this ideal, they thought it prudent to divide and rule the

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[581] De Klerk *Man of his Time* 8-9. Verwoerd is quoted by De Klerk describing his viewpoint of homelands system as follows: "If we treat the Coloured, the Indian in such and such a manner, how will the Bantu Chief react? Will he not demand the same rights since he will not differentiate between one dark skin from another. And if he is granted those rights, will it not mean the end of our western civilization? Is it therefore not preferable that all persons of colour should be treated as races separate from the white, thereby eliminating all possibility of overthrowing western culture and western institution in South Africa? I say that if it is within the power of the Bantu, and if the territories in which he now lives can develop to full independence, they will develop in that way."

[582] See 3.5.3.2 below with regards to the homelands of the Xhosa, Tswana and Venda.

black majority. In fact the plan to create the Bantustans was a result of fear of the united black community.[583]

After Verwoerd's assassination in 1966, Vorster became the Prime Minister of South Africa. According to Walter, Vorster described his black policy, which differed little from his predecessor as follows:[584]

> I believe in the policy of separate development, not as a philosophy but also as the only practical solution in the interests of everyone to eliminate frictions and to do justice to every population group as well as every individual. I say to the Coloured people, as well as to the Indians and the *Bantu*, that the policy of separate development is not a policy, which rests upon jealousy, fear or hatred. It is not a denial of the human dignity of anyone, nor it is so intended. On the contrary, it gives the opportunity to every individual, within his own sphere, not to be a man or woman in every sense, but it also creates the opportunity for them to develop and advance without restriction or frustration as circumstances justify and in accordance with the demands or development achieved.

Vorster believed that separate development was the only policy that could accommodate otherwise irreconcilable political and cultural differences among the various national groups. Therefore, he insisted that each nation was to determine its own future. One of the objectives of Vorster's government was to make South Africa save for white population. This could only be achieved if blacks were given citizenship of the homelands and were denied citizenship of the so-called white South Africa.[585] In 1970 the *National States Citizenship Act*[586] was promulgated to provide citizenship for blacks to homelands.[587]

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[583] There were ten Bantustans, which were created by *apartheid* regime in South Africa. These were KwaZulu, Qwaqwa, KwaNdebele, KaNgwane, Lebowa, Gazankulu, Venda, Ciskei, Transkei and Bophuthatswana.

[584] Walter *South Africa's War* 23.

[585] See 3.5.1 above.

[586] Act 26 of 1970.

[587] Section 2 of Act 26 of 1970.

This measure provided that all blacks of South Africa would be citizens of their respective homelands.[588] The system was designed in such a way that Bophuthatswana would be for the Batswana, Venda for the Vendas, Transkei for the Xhosas and Ciskei for the Xhosas as well. In other words, this Act eliminated all blacks from the Republic of South Africa thereby taking a policy of separate development to its full fruition. As a result, black South Africans became citizens of ten homelands depending on their ethnic groups.[589] The NP government intended to achieve a policy of pure *apartheid* by racial separation.[590]

The Department of Native Affairs was mandated to shape the policy of racial discrimination by creating more black nations with languages, cultures and interests of their own.[591] It seems Jansen, the then Minister of Native Affairs, hoped that by creating more black nations, the government would foster solidarity between different tribes in South Africa. In fact, the policy of *apartheid* divided and separated tribes. In so doing *apartheid* sowed the seeds of hatred and hostility between different tribal groups. The *apartheid* government was successful to sustain its policy of tribal divisions for many decades.[592] For example Transkei became a self-governing territory in 1963 and was the only homeland, which was dealt with outside the *Self-Governing Territories Constitution Act.*[593]

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[588] Section 5 of Act 26 of 1970.

[589] Act 26 of 1970. Finally in 1970 all black people in South Africa were stripped of their citizenship.

[590] Chidester *Religions of Southern Africa* 204. Chidester confirmed this new order of separate development when he quoted one of the Ministers of Bantu Administration, Mulder when he said that: "If our policy is taken into its logical conclusion as far as the Bantu people are concerned, there will be no one black with South African citizenship."

[591] Chidester *Religions of Southern Africa* 205. Chidester further cited the Minister of Native Affairs, Jansen saying: "We are of the opinion that the solidarity of the tribes should be preserved and that they should develop along the lines of their own national character and tradition."

[592] It was through the policy of *apartheid* that communities and families were disintegrated. Further more members of the same tribe were separated and fragmented. The whole notion of apartheid was the antithesis of the notion of unity and cohesion among the black people of South Africa. For example in 1963 Transkei received its self-government status. This was an achievement on a part of *apartheid* government in breaking unity and cohesion among the black of South Africa. See 3.5.3.2.1 below.

[593] See *Transkei Constitution Act* 48 of 1963. The *Transkei Constitution* established a unicameral legislative assembly consisting of 109 members of which 45 were directly elected by all Trankeian citizens and 65 *ex officio* members comprising Paramount Chief and other traditional leaders. The *Constitution* further made a provision for the granting of

The *Self-Governing Territories Constitution Act*[594] provided for the establishment of legislative assemblies and executive governments vested in executive councils in respect of homelands.[595] With the introduction of this Act, self-governing territories were allowed to legislate for their citizens. It was also through the passage of this Act that blacks were to run their own affairs in their homelands. According to Balatseng and Van der Walt, homeland leaders could only pass their own legislation with the permission of the South African government. This demonstrates the fact that the South African government was still in control of the homelands.[596]

The Act also provided for the recognition and retention of the functions and powers lawfully exercised by traditional leaders in terms of the *Bantu Authorities Act.*[597] As a result, both tribal and regional authorities were retained while territorial authorities were disestablished.[598] The conditions in the homelands were not conducive enough for the creation of employment. Some land in the homelands was barren and not good for any kind of development while some homelands such as Zululand and Transkei were fertile. Some of homelands such as Lebowa, QwaQwa, Gazankulu, KwaNdebele and others, were places of misery. Poverty in the homelands was cause for concern.[599] Malnutrition was common in the communities of

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Transkeian citizenship as well as national symbols such as a flag and anthem and coat of arms. See also in this regard Vorster *Republic of Transkei* 25.

[594] Act 21 of 1971.

[595] Section 1 of Act 21 of 1971. TARG *Conference Documentation* 24. TARG team stated that the promulgation of Act 21 of 1971 was a step further on the part of the apartheid government to realise the goal of denying the black people any claim in the government of South Africa. According to TARG blacks had to govern themselves in small patches of land far from industrial and commercial sites. Traditional leaders in these homelands also played a very crucial role in assiting the government to achieve its goal of entrenching *apartheid.*

[596] Balatseng and Van Der Walt *History of Traditional Authorities* 8.

[597] Section 11 of Act 21 of 1971.

[598] Sections 12 and 13 of Act 21 of 1971.

[599] *South Africa Debates of the National Assembly* 782. Commenting of the *Economic Co-operation and Promotion Loan Fund Amendment Bill,* Dalling ANC MP stated that the so-called homelands' prime and only exports were the sweets and the toil of their people who were forced into a cruel system of contract and migratory labour. He went on to say that: "Perhaps it is important to reflect on how much of the money handed over to the petty dictatorships of the TBVC terrirtories was wasted and not used for beneficial purposes. I remember for instance, Lennox Sebe built on the extravagent international airport, which during the entire life of the state of Ciskei never saw the lending of any aircraft from any country other than from South Africa. President Sebe also purchased two – not one, but two

these homelands not forgetting the overcrowding due to the acute shortage of land. Thefore the introduction of the system of the homelands worsened the living conditions of the black people.[600] However, the industries that were placed on the boundaries of these states provided a minimal income to the workers from these homelands.

3.5.3.2 INDEPENDENT BLACK STATES

3.5.3.2.1 Transkei

The 'architects' of the independence of Transkei sought to justify its political legitimacy by producing a mixture of both democratic and tribal policies. According to Chidester, an election held in 1963 in Transkei which led to the creation of self-government, was intended to legitimise the idea of the homeland system.[601] The status of self-government in Transkei was conferred on Transkei through the passage of the *Transkei Constitution Act.*[602] This was followed by the *Status of Transkei Act,*[603] which granted Transkei independence.[604]

The *Status of Transkei Act* endorsed the status, roles and functions of traditional leaders in the legislative assembly of the Transkei as constituted in terms of the *Transkei Constitution Act.*[605] In other words, this Act indirectly recognised the legislative role of traditional leaders in Transkei. The majority

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jets for his planned Ciskei airline. This cost several million and stood idle on the airport apron for years. Mr Mangope and Chief Matanzima used South African money to build their palaces, to stock their farms and so on".

[600] The black inhabitants of the homelands were greatly subjected to untold suffering and poor socio-economic conditions. For instance they had no access to electricity, clean water, sanitation and so forth. However, in homelands such as Bophuthatswana, there were a considerable number of developmental projects, which signified economic growth and progress. Some of the residents of Bophuthatswana had access to clean water, electricity and sanitation.

[601] Chidester *Religions of Southern Africa* 207-208.

[602] Act 48 of 1963.

[603] Act 100 of 1976.

[604] See the *Republic of Transkei Constitution Act* 3 1976. Transkei adopted this *Constitution* when the independence was granted to it by South Africa in 1976. Section 22 of Act 3 of 1976 provided inter alia for the representation of traditional leaders in the National Assembly. The National Assembly consisted of the Paramount Chiefs and 72 traditional leaders who represented the districts of Trankei.

[605] Act 48 of 1963.

of seats in the legislature were reserved for traditional leaders. These traditional leaders were given seats in the legislature to give the homeland system a flavour of a democratic mandate. The *Transkei Authorities Act*[606] was promulgated to regulate the institution of traditional leaders. Traditional leaders in Transkei were used as puppets to legitimise the notion of separate development. In this regard, it is important to note that the creators of the homeland of Transkei used traditional leaders to validate the so-called 'independence' of Transkei.[607]

The white authorities employed traditional leaders that participated in the Transkei government. As already been highlighted above,[608] a majority of those traditional leaders who collaborated with the white regime as early as the introduction of the *Black Authorities Act* were minor traditional leaders. For instance, the leading traditional leader of Transkei, Chief Matanzima who later became its President, was a minor traditional leader under the authority of the Paramount Chief of the Tembu. Matanzima was declared a Paramount Chief by the South African government when conflict arose in the 1960s between Matanzima and the Paramount Chief of Tembu. Chidester noted that in 1979 when Matanzima was in power of the homeland, he stripped the Paramount Chief of the Tembu of his traditional authority and had him arrested.[609]

Chief Matanzima undoubtedly supported the idea of separate development. He declared at the Transkei celebration in 1968 that:[610]

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[606] Act 4 of 1965. This Act dealt *inter alia* with matters pertaining to appointment, recognition, suspension and deposition of traditional leaders in Transkei. In *Matanzima v Holomisa NO and Another* 1992 (3) SA 876 (TK-CD), the court dealt with the matter concerning the suspension of a Paramount Chief in terms of section 47 (1) (b) of the *Transkei Authorities Act* 4 of 1965. The court found that the suspension affected the interests and the reputation of the suspended Chief and secondly there was a non-compliance with the audi alteram partem maxim. The court further stated that the position of Paramount Chief and the tribal authority are institutions, which give effect to tribal custom and hierarchy and play an important role in the day to day administration of the area and in the lives of the Transkeian citizens. The mere existence of the tribal authority and the position of Paramount Chief, Chiefs and headmen is evidence of the tribal customary ways of all Transkeians. The position of Paramount Chief is hereditable and the suspension of a Paramount Chief must be seen against this background.

[607] Chidester *Religions of Southern Africa* 207.

[608] See 3.5.2.5 above.

[609] Chidester *Religions of Southern Africa* 207.

[610] Chidester *Religions of Southern Africa* 208.

> We believe in the sincerity of Dr Verwoerd policy. The Transkei should cling to its ideals and continue building its nationhood as a separate entity ... within the framework of separate development.

Lipton held the view that the argument of Matanzima to accept independence and also loss of South African citizenship was that partition in their own separate states was the only way blacks could win the political rights, and that the history and cultural identity of Transkei made it well qualified for independence as neighbouring Lesotho. Many nominated traditional leaders supported this policy of Matanzima. Those people whom Lipton called its 'beneficiaries', namely the Matanzima brothers, also supported the Matanzima's policy. They were rewarded by the Transkei Assembly (TA) for their faithful service in the development of Transkei by granting them valuable farms in the land transferred by South Africa to Transkei.[611]

3.5.3.2.2 Bophuthatswana

Bophuthatswana became a self-governing homeland in 1972 and gained its nominal independence on 6 December 1977.[612] Bophuthatswana was granted independence through the enactment of the *Status of Bophuthatswana Act.*[613] Although the *Status of Bophuthatswana Act* did not

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[611] Lipton *Capitalism* 298.

[612] See the *Republic of Bophuthatswana Constitution Act* 18 of 1977. When Bophuthatswana became independent she adopted the *Constitution* containing fundamental rights and freedoms. For more information in this regard see Chapter II of *Bophuthatswana Constitution Act* 18 of 1977. In *Segale v Government of Bophuthatswana and Others* 1987 (3) SA 237 (B), the court stated that the rules of interpretation in a *Constitution of Bophuthatswana* or Bill of Rights regime amounted to no more than the following general propositions: (a) Whereas in a Westminister based legal system the will of parliament reigns supreme, a Bill of Rights rendered the *Constitution* the supreme law of the land. However, in *Government of the Republic of Bophuthatswana v Segale* 1990 (1) SA 434 (BA), the court interpreted the Bophuthatswana Bill of Rights in terms of adherance to the clear and unambiquous language of statute encroaching on fundamental rights, particularly where the interests of state so demanded. See also *Smith v Attorney-General, Bophuthatswana* 1984 (1) SA 196 (B) where the court stated that the Bophuthatswana parliament operated under self-imposed restraints which were foreign to the Westminister system of a supreme parliament clothed with unfettered legislative power. The court also upheld the supremacy of the *Constitution of Bophuthatswana* in *S v Marwane* 1982 (3) SA 717 (A).

[613] Act 89 of 1977. The sovereign and independent status of Bophuthatswana was questioned in the case of *S v Banda and others* (1989-1990) BLR 45-53. The defence contended that

directly articulate and define the roles, functions and powers of traditional leaders, it did so tacitly when it recognised the legislative assembly of Bophuthatswana as constituted in terms of the *Self-Governing Territories Constitution Act*[614] which gave direct recognition[615] to the authority of traditional leaders in the legislative assembly.[616]

Bophuthatswana consisted of tribal land, initially administered as a black reserve under the authority of traditional leaders. Later land acquired by the

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Bophuthatswana was not recognised by any state except South Africa nor was a member of United Nations. It was further contended that by virtue of its non-recognition, Bophuthatswana did not have the attributes of a sovereign, independent state. This contention followed the theory of the constitutive school, which postulated that by non-recognition, Bophuthatswana was not a sovereign entity although on the basis of the declaratory theory it might be a sovereign independent state. The state argued that the question of non-recognition was inspired by political considerations. The state further argued Bophuthatswana was recognised as an independent state according to the law of South Africa and Bophuthatswana and that it complied with the essentials of statehood according to the norms of international law. The court concluded that Bophuthatswana was an independent sovereign state possessing *majestas*. The court applied sections 1 and 2 of the *Status of Bophuthatswana Act* 89 of 1977 which provided that: "Bophuthatswana is hereby declared to be a sovereign and independent state and shall cease to be part of the Republic of South Africa and the Republic of South Africa shall cease to exercise any authority over Bophuthatswana". The court therefore rejected the notion that Bophuthatswana was an agent or an extension of the Republic of South Africa.

[614] Act 21 of 1971.

[615] See also section 56 of *Bophuthatswana Constitution Act* 18 of 1977, which provided for the retention of the personal status of traditional leaders in Bophuthatswana and recognised the authority of traditional leaders. Section 57 of the *Bophuthatswana Constitution* further provided that the designation of Chiefs, acting Chiefs, headmen, acting headmen and independent headmen vested in the President of Bophuthatswana. In Bophuthatswana the recognition of Chiefs resided in the President. In recognising a Chief the President was required to do so with proper observance of the law and customs of the tribe concerned. In case a conflict occurred with regard to such law and customs proper steps had to be taken to establish correct law and customs and such conflict to be resolved before President could properly exercised his powers. In *Molotlegi and Another v President of Bophuthatswana and Another* 1989 (3) SA 119 (B), the court held that section 57 of the Constitution and section 36(1) of the *Traditional Authorities Act* 23 of 1978 empowered the President to appoint and recognise George Molotlegi (not a Chief) as acting Chief of the tribe. The court further held that President as he was obliged to do so by section 36(1) had recognised George Molotlegi as acting Chief with due observance of the law and customs of the tribe. The President's appointment was held to be valid. In *Deputy Minister of Tribal Authorities v Kekana* 1983 (3) SA 492 (B), it was alleged that the Deputy Minister failed to have due regard to the traditional laws and customs of the tribe when he deposed a Chief and recognised another. The court held that the Minister exercised his administrative discretion correctly by having due regard to traditional laws and customs of tribe concerned. In *Mosome v Makapan NO and Another* 1986 (2) SA 44 (B), the court held that section 36 of *Traditional Authorities Act* 23 of 1978 did not compel the President to adhere slavishly to tribal law and customs among the factors on which he based the exerice of his discretion.

[616] Section 11 of Act 21 of 1971.

South African Development Trust (SADT) was added into Bophuthatswana.[617] Lawrence and Manson pointed out that Chief Mangope, who was its president until March 1994, emphasized the ethnic origin of the emerging Tswana nation and his own position as an important and powerful traditional leader within this ethno-nation entity.[618] Mangope claimed to be a significant paramount traditional leader of Bahurutshe and the main architect of Bophuthatswana and transition to modernity. It was in this sense that Mangope justified his control over the Bantustan structures on the basis of his status as a traditional leader of significant status. However, Lawrence and Manson explained that Chief Mangope's claim to paramountcy even over Bahurutshe lacked both validity and legitimacy.[619]

Mangope gave the origins of Bophuthatswana mythical justifications. For instance, he emphasized the fact that Tswana people emerged from a bed of reeds of *Ntswana Tsatsi*.[620] Mangope believed that history,[621] which placed the Tswana on the political map, began and moved through the stages of homeland development and led into the granting of Bophuthatswana independence by the South African government in December 1977.[622] When Bophuthatswana was declared an independent state, Chief Mangope mentioned that such a move was a turning point in history.[623]

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[617] Francis 2002 *J of Southern African Studies* 532-533. Bophuthatswana was politically controlled by the then *apartheid* South African government and depended on it financially and economically.

[618] Lawrence and Manson 1994 *J of Southern African Studies* 449.

[619] Lawrence and Manson 1994 *J of Southern African Studies* 46.

[620] Ntswana Tsatsi is a Tswana phrase, which means the place, where the sun sets.

[621] Lawrence and Manson 1994 *J of Southern African Studies* 450.

[622] Lawrence and Manson 1994 *J of Southern African Studies* 451. The Mangope clan was at one time amongst the Bahurutshe but it did not occupy land in the reserve north of Zeerust. Due to the shortage of land Mangope clan moved to today's Botswana. Twenty years later this groups returned to the Zeerust reserve. But since they have left the area, they were under legal obligation to accept the authority of Chief Gopane. In 1941 the independence of Bahurutshe at Motswedi was recognised and this move drove Mangope chiefly family to the government.

[623] Chidester *Religions of Southern Africa* 210. Chidester cited Mangope saying the following words in a symposium held in Germany in 1986 to justify the political legitimacy of Bophuthatswana: "The concept of homeland should be used in referring to his nation in the same sense that Jewish people use it when they refer to Israel, that is, as the ancestral land of their forefathers, the forefathers of my people; the Tswana, were buried in Bophuthatswana."

Bophuthatswana introduced the *Bophuthatswana Traditional Authorities Act,*[624] to regulate the institution of traditional leadership in Bophuthatswana. The Act prescribed the powers, functions and roles of the traditional authorities.[625] It terms of this Act, traditional leaders were also made *ex officio* members of the Bophuthatswana parliament.[626] As members of Parliament, they were paid salaries or stipends.[627] In this regard Bophuthatswana government almost placed all the traditional leaders in the centre of political bureaucratic arena. It was through this legislative measure that the independence and authority of traditional leaders were eroded and curtailed[628] in Bophuthatswana. The reason for this assertion was that those traditional leaders who would not toe the line were deposed and replaced by appointed traditional leaders.[629]

Chief Molotlegi of the Bafokeng tribe near Rustenburg defied Mangope at all costs. He refused to hoist the Bophuthatswana flag at the local tribal offices. Chief Lebone also informed the Bafokeng to relinquish Bophuthatswana citizenship. The Bophuthatswana government declared a state of emergency in Phokeng and ordered a commission of inquiry into affairs of the Bafokeng tribe. According to Cooper *et al*, about 20 headmen told the Commission that they preferred a traditional form of government under the leadership of Chief Lebone to that of the elected Bophuthatswana government.[630]

The activities of the Bafokeng tribal police also widened a rift between Chief Mangope and Lebone. The Bafokeng Tribal police instituted a reign of terror on the non-Tswana and those who haboured them. These non-Tswanas were tried in Phokeng before a tribal court. Those who could not afford to pay fines

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624 Act 23 of 1978.
625 Section 19 of Act 23 of 1978.
626 Section 27 of Act 23 of 1978.
627 Section 39 of Act 23 of 1978.
628 In *S v Molubi* 1988 (2) SA 576 (B), the court held that the judicial powers of traditional leaders in Bophuthatswana were limited by the *Traditional Courts Act* 29 of 1979 and therefore traditional courts had no power to impose strokes on a married men over 30 years for contempt of court even if committed in facie curiae.
629 Balatseng and Van der Walt *History of Traditional Authorities* 23.
630 Cooper *et al Survey of Race Relations* 295.

were sjambokked.[631] Although non-Tswanas were unpopular with Mangope the crucial activities of tribal police moved them more closely to Mangope than Lebone. Mangope capitalized on the activities of tribal police to attack Chief Lebone and his tribal police to abuse non-Tswanas and their landlords who rented them their houses.[632]

It also transpired that it was not only Bafokeng who wished to relinquish their Bophuthatswana citizenship. A large group of Ndebele who lived in the Hammanskraal area of Bophuthatswana led by Chief Kekana also threatened to secede. According to Cooper *et al*, Mangope warned them that unless they became citizens of Boputhatswana, they would be evicted from the land where they lived. These cases of Chief Lebone and Kekana demonstrate that in Bophuthatswana traditional leaders ran the risk of being deposed or harassed by Mangope.[633]

In most cases, Mangope relied on the *Bophuthatswana Traditional Authorities Act*, which gave him as President of Bophuthatswana the powers to recognise, appoint[634] and depose traditional leaders.[635] This Act was to a very large extent a replica of *Black Administration Act* discussed above.[636] Like the Governor-General (later State President) under the *Black Administration*

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[631] The non-Tswanas were mainly the Xhosas from the defunct Transkei and Ciskei homelands as well as the Sothos from Lesotho who worked in Bafokeng mines and resided in Bafokeng as tenants. Those who were mainly harassed and flogged by the police were wives of these non-Tswanas.

[632] It was also discovered that some of these non-Tswanas who were harassed by the Bafokeng tribal police had documentary proof of land ownership. It was alleged that corrupt headmen sold tribal land to more than 2000 illegal squatters in Phokeng.

[633] Cooper *et al Survey of Race Relations* 295.

[634] In *Chief Pilane v Chief Linchwe* 1995 (4) SA 686 (B), the court held that in terms of the *Traditional Authorities Act* 23 of 1978, the law and customs of the tribe concerned must be considered and the Constitution of Bophuthatswana never intended to give the President a *carte blanche* right to appoint anyone as Chief but the laws and customs of the tribe concerned must be considered and also the acceptability of the person to the tribe. The appointment of the Chief who is not acceptable to the tribe would result in an intolerable situation. The court concluded that Chief Nyalala Pilane was most acceptable to the overwhelming majority of the tribe and that in recognising him the ex-President certainly followed the laws and customs of the tribe. The court ordered that the Premier who superseded the President should formalise the appointment of Chief Nyalala Pilane as a Chief of Bakgatla-Ba-Kgafela in Saulspoort.

[635] Sections 36(2) and 42(4)(e) of Act 23 of 1978.

[636] See 3.4.4.2 above.

Act,[637] the President of Bophuthatswana also had a power to depose of a traditional leader or headman and install his appointed traditional or acting leader. In 1985, Chief Mangope invoked the provision of this Act when he deported Chief Lebone. Chief Lebone was deported under the guise that he wanted to topple the State President of Bophuthatswana.[638]

It is also significant to note that both the central and local government of Bophuthatswana were firmly anchored on the institution of traditional leaders. The President was a traditional leader of the Bahurutshe Bo-Manyane and the Bophuthatswana government appointed traditional leaders.[639] Some of these traditional leaders were members of the Cabinet and the Bantustan legislature. Francis posited that while some of the traditional leaders were popularly considered legitimate, some were thought to be little more than stooges.[640]

Mangope's regime was characterised by personal rule and was held together by patronage and corruption. In this regard, jobs, land and trading licenses were pieces of patronage distributed in ways that aimed to maintain and sustain political support. Political activities were banned and opposition were severely punished, repressed[641] and intimidated. This political climate made it

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[637] See 3.4.4.2 above.

[638] For instance, when Chief Mangope stripped Chief Lebone of his office and sent him to exile, he appointed Edward Mokgwaro the younger brother of Chief Lebone as the Paramount Chief of Bafokeng tribe.

[639] Sections 36(1) and 57(1) of Act 23 of 1978.

[640] Francis 2002 *J of Southern African Studies* 532-533.

[641] The government of Bophuthatswana had a tendency to violate the fundamental human rights entrenched in the Constitution of Bophuthatswana. For instance freedom of movement and association and freedom of speech were severely curtailed. In *Segale v Bophuthatswana Government* 1987 (3) SA 237 (B), the court stated that section 31 of the Internal Security Act 32 of 1981 which required the political parties to apply for permission to the government to hold the meeting was *ultra vires* the *Constitution of Bophuthatswana*. However, in *Government of Bophuthatswana v Segale* 1990 (1) SA 434 (BA), the Appeal Court of Bophuthatswana stated that the ban on meetings in terms of section 31 of *Internal Security Act* 32 of 1979 could not be said to be permanent and thereafter *ultra vires* the *Constitution of Bophuthatswana* as it was for the parliament to decide when the provision of section 31 sould be relaxed. See also *Lewis v Minister of Internal Affairs and Another* 1991 (3) SA 628 (B), where the court accordingly found that the Minister power's to order removal of persons from Bophuthatswana in interest of public safety was not unconstitutional. The cases of *Lewis and Segale* (appeal case) failed to appreciate that the *Constitution of Bophuthatswana* was not only a supreme statute but it was also supreme authority. The *Constitution of Bophuthatswana* provided a framework and set limits of government power and acted as a controlling instrument against which all other laws were

impossible to develop strong participatory political institutions in Bophuthatswana.[642]

Bophuthatswana was mostly an authoritarian and unpopular bantustan.[643] It alienated its inhabitants and did not create loyalty. The government of Bophuthatswana failed to achieve legitimacy or even credibility within the majority of its people or South Africa. According to Lipton, instead Bophuthatswana became ridiculed as Casinostan and a source of cheap labour.[644]

Interested groups such as the Bophuthatswana government, academics from the former Universities of Bophuthatswana and Potchefstroom, farmers and businessmen established the South African Tswana Forum (SATSWA) in the 1990s. In the first meeting of SATSWA, these groups explored the possibility of regional co-operation in respect of agriculture, mining, business, education, health, social services and rural development. As Lawrence and Manson observed, this meeting was referred to as a "Tswana-Boereland Super State".[645]

The main aim of SATSWA was to establish and promote a "Great Bophuthatswana" which would guarantee white farming interests against the envisaged new South Africa. According to Lawrence, SATSWA was a product of fear shared by its role players. They feared a unitary state based on "one man, one vote and winners take all". Mangope argued that both the Tswana and Boers shared in many respects the same values, faith and norms.

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to be tested. The restrictions imposed on the political parties and citizens of Bophuthatswana by the government were seen in the light of the state, which oppressed its people.

642 Francis 2002 *J of Southern African Studies* 533. In the 1990s the landscape of politics changed drastically in South Africa. Mandela was released from prison and the realities of the new South Africa based on the ideals of democracy and freedom became evident. See also 3.7.1 below, with regard to the release of Mandela.

643 The people of Bophuthatswana including workers, students and public servants defied Mangope and his regime. The populace demanded the incorporation of Bophuthatswana into South Africa.

644 Lipton *Capitalism and Apartheid* 339. Places like Sun City, the gambling of Bophuthatswana attracted white South Africans who usually indulged in the gambling, mixed sex and blue sex forbidden in puritan South Africa.

645 Lawrence and Manson 1994 *J of Southern African Studies* 456.

However, it appeared that such a historical justification for SATSWA was false and a mere political myth. History, as Lawrence and Manson proclaimed, had shown that the relationship between Afrikaners and Tswana had been fraught with conflicts and contradictions. As already mentioned above[646] that this conflict was sparked by the competition for the land and resources between the Tswana and Boers of the South African Republic, the relationship between the two groups had always been sour.[647]

3.5.3.2.3 Ciskei

The territory known as Ciskei was declared a self-governing area in 1972 by the South African government and its territorial authority was replaced with a Legislative Assembly.[648] It is important to note that the Transkei government vehemently opposed the independence of Ciskei. Chief Matanzima pointed out that the Ciskei independence contravened the *Promotion of Black Self-Government Act*. As a result the then president of Transkei, Matanzima, warned Chief Sebe that the march of time would catch up on him. Chief Matanzima produced a petition document signed in 1976 by 12 Ciskei traditional leaders who were in favour of the incorporation of Ciskei into Transkei. Cooper *et al* cited Matanzima saying that:[649]

> The Ciskei celebrations (and independence) were the culmination of a systematic defiance of the natural leaders of the Ciskei now scared of Chief Sebe's wrath.

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[646] See 3.3.1 and 3.3.2 above.

[647] Lawrence and Manson 1994 *J of Southern African Studies* 456. For instance, the traditional leaders of the Tshidi Rolong, the Ratlou, Bakgatla-Ba-Kgafela and Rapulane became longstanding enemies of the Boers due to the fact that South African Republic government attempted to advance on their land. Chief Moiloa of Bahurutshe was also embroiled in conflict with the Boers over the question of pass laws, tax and labour. Hence Chief Moiloa moved that he was not a "dog" of Boers. Mangope's claim of the cordial relationship with the Boer was far from the truth. Mangope took a further step when joined forces with the Afrikaner Weerstandsbeweging (AWB). It was for this reason that when the people toppled Mangope on the 10 March 1994, the AWB invaded Bophuthatswana in an attempt to rescue Mangope and his government.

[648] Zinge 1984 *Indicator South Africa* 4. Since its independence in 1981, the Ciskei had became in many ways the most controversial of South Africa's homeland states. See also the *Constitution of the Republic of Ciskei Act* 20 of 1981. Section 6(3) of Act 20 of 1981 provided for the representation of traditional leaders in the National Assembly.

[649] Cooper *et al Survey of Race Relations* 301.

Shortly before independence, Chief Sebe announced what was termed a "Package Deal" agreed upon between himself and the then Minister of Co-operation and Development, Koornhof. According to the deal, the envisaged independence of Ciskei was to be different from that negotiated by Transkei, Bophuthatswana and Venda. The Package Deal *inter alia* outlined that the Ciskeians would retain their identity and nationality while at the same time not surrendering their citizenship.[650] Subsequently the *Status of Ciskei Act*[651] was promulgated and Ciskei was granted independence on December 1980.

On 5 December 1980, the National Assembly of Ciskei chose Chief Sebe as the Executive President. Chief Sebe appointed a Vice President and eleven members of the Cabinet. The National Assembly consisted of 22 elected members, 33 nominated traditional leaders, one Paramount Chief and five members nominated by the President for their special knowledge, qualifications and experience.[652] Chief Sebe declared his intentions to support the idea of separate development by stating that separate development of nations had always been a characteristic of traditional African life.[653] Sebe saw the homeland system as a way to re-establish their own traditions and customs both religiously and politically and not as a product of *apartheid*.[654]

Chief Sebe was a commoner. He made all the necessary arrangements for his installation as a traditional leader. He declared himself a traditional leader in order to legitimise and justify his traditional and political power. Sebe put it clear at his own installation ceremony that:[655]

> The Chief was the central symbol of national honour and pride, the custodian of all those tribal and national customs and practices that are dear and sacred to the tribe.

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650 Cooper *et al Survey of Race Relations* 297.
651 Act 110 of 1980.
652 Cooper *et al Survey of Race Relations* 297.
653 Chidester *Religions of Southern Africa* 208. Chidester quoted Sebe uttering that: "Ciskei was our homeland were we lived as a proudly independent and free nation, quite separate and distinctly different from the other black nations of South Africa Ciskei nation was not being created but was being restored to its former glory."
654 Chidester *Religions of Southern Africa* 209.
655 Chidester *Religions of Southern Africa* 209.

Ciskei's lesson is of great historical importance in a sense that it shows how traditional leadership was recreated and manifested by the *apartheid* government. It is therefore difficult to refer to pristine institutions of traditional leadership under these political circumstances. In fact, the traditional leaders and not the people supported the independence of Ciskei. It is evident that both the Ciskei parliament and Cabinet were staffed with traditional leaders. Suffice it to say that the traditional leaders in Ciskei including Chief Sebe manipulated institutions of traditional leaders to justify the concept of homeland system and Ciskei nationality.

3.5.3.2.4 Venda

Venda[656] was the smallest of the four independent black states in South Africa. The Venda National Party (VNP) under the leadership of Chief Mphephu was the political vehicle, which introduced Venda to independence.[657] The VNP consisted mainly of traditionalists particularly the traditional leaders. The VNP came into power in 1973 and again at independence elections in 1979, largely as a result of the influence of traditional leaders and headmen. Venda became the third homeland to gain independence from the South African government, with the introduction of the *Status of Venda Act*[658] on 13 September 1979. Although the Venda Independent Party (VIP), the opposition party won the overwhelming majority of elected seats in both the 1973 and 1978 elections, the ruling party,

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[656] TARG *Politico-Historical Background* 4-5. According to TARG, the Venda homeland consisted of six districts and covered a total area of approximately 639 000 hecteres. These districts were again divided into tribal areas. The characteristic of the political system amongst the VhaVenda was highly centralised in a sense that each tribal area was under the authority of a traditional leader assisted by his sub-Chiefs and headmen. In most cases this hierarchy of subordinate headmen were for the most part hereditary in certain families. TARG report states that in the VhaVenda community a traditional leader often performed the ritual on the tribal or national scale and was himself frequently believed to have a mystical relationship with the ancestors and the land. He was described as the "owner" of tribal land because it was believed that he was by tradition the protector of the people and their lands.

[657] The *Status of Venda Act* 107 of 1979 preceded the independence of Venda. According to the *Status Venda Act*, the Legislative Assembly of Venda was authorised to pass laws including *Constitution*. See *Constitution of the Republic of Venda Act* 9 of 1979. Traditional leaders were represented in the National Assembly of the Republic of Venda.

[658] Act 107 of 1979.

assumed power each time because VNP support of the nominated traditional leaders turned the results in the National Assembly.[659]

Traditional leaders seemed to be used to act as hurdles towards democracy. The Venda hegemony was centred on the institution of traditional leaders. The *Venda Tribal and Regional Councils Act*[660] regulated this institution. The traditional leaders were used by Chief Mphephu to lubricate the political wheel of the Bantustan administration of Venda. It was difficult to refer to Venda as a democratic state or homeland. Chief Mphephu confirmed this proposition when he announced his intention to declare Venda a one party state because the western style of democracy was not appropriate and compatible in an African country like Venda. This announcement justified Mphephu's sense of intolerance of democracy and political opposition.[661]

In 1983, Chief Mphephu became life President of the homeland. In 1984 the first post independence elections were held in Venda. The VNP won 41 of the 45 elected seats. During the independence of Venda, political activity was not tolerated in Venda and members of the opposition were detained. This earned Mphephu's administration a reputation for ruthlessness. It is important to note that since mainly traditional leaders ruled Venda, it is suggested that

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[659] Cooper *et al Survey of Race Relations* 297. The dominance of the traditional leaders in the government of Venda made it unpopular to the vast majority of the citizens of Venda. In *Tshivhase Royal Council and Another v Tshivhase and Another* 1990 (3) SA 828 (V), the court stated that the tribal system embedded in government had two main drawbacks for a fast growing country like Venda, namely, firstly that it created a parallel system of government to the newly formed National Assembly and State President, thereby acting as a retarding force in certain highly desirable developments such as for instance, land reform and private land ownership and secondly it tended to divide the tribe rather than unite it as it served to perpetuate old tribal rivalries and feuds.

[660] Act 10 of 1975. This Act repealed the *Bantu Authorities Act* of 1951 as far as Venda was concerned. The primary objective of Act 10 of 1975 was amongst many other things promulgated to deal with the following matters: (a) To substitute Tribal and Regional Councils for the Tribal and Regional Authorities in Venda. (b) To define their constitution, powers, authorities and functions. (c) To regulate the appointment, deposition, discharge and discipline of Paramount Chiefs, Chiefs and Headmen and to define their powers, functions and duties. Section 35 of Act 10 of 1975 provided for the functions and duties of the traditional leaders in Venda as follows: (a) To exercise their functions in terms of indigenous law and custom. (b) To maintain law and order. (c) To report without delay any matters of concern including any condition of unrest or dissatisfaction. (d) To ensure the protection of life, person and property. (e) To disperse or order the dispersal on any unlawful meeting or gathering. (f) To make known to the residents of their areas the requirements of any law. (g) To ensure compliance with all laws, the orders and instructions of any competent authority.

[661] Codman 1986 *Indicator South Africa* 82.

traditional leaders perpetuated human rights oppression and violation, and therefore became unpopular in Venda.[662] They became the enemies of the people and servants of *apartheid*.[663]

Another critical element, which reduced and undermined the status and pride of traditional leaders in Venda was the dramatic resurgence of witchcraft in Venda. According to Minnaar, witchcraft cases posed a serious challenge and threats to the credibility of traditional leaders. Some of the traditional leaders were accused of working in cahoots with witches.[664] It should also be remembered that after the death of Chief Mphephu in April 1988, a considerable number of cases of witches and medicine murders were reported. Some believed that Chief Mphephu made it difficult for the people to attack the witches because he was also linked with witchcraft. This resulted into witch burning. When the climate of terror intensified, anyone accused of being a witch was simply killed on the spot despite protestations of innocence. Minaar observed that in some villages up to five or more accused witches were either killed or driven out of their homes each night.[665]

Various reasons were advanced for both witch burning and *muti*.[666] Witch burnings were associated with certain political motivations, personal jealousy of individual success and revenge of setting old scores. Medicine murders

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[662] TARG *Politico-Historical Background* 16-17. TARG team noted that the public opinion was that traditional leaders had been turned into politicians by the homeland politics representing a system, which was not popular to many people because they were seen as upholders of that system. As a result traditional leaders became a target of the politicised youth. These youth fought the traditional leaders in rural areas. They saw traditional leaders and government as the supporters of apartheid. As a result they continued to be in a forefront of the political struggle. After the death of President Mphephu, Chief Ravhele became the new President of Venda. His government was more unpopular than that of Mphephu.

[663] Cooper *et al Survey of Race Relations* 297.

[664] TARG *Politico-Historical Background* 16-17. According to TARG report, in 1979 Chief Ramovha, a Deputy Minister of Post and Telegraphs killed one Nyathela, a local high school principal for ritual purposes. For the first time in Venda history a Chief was indicted and brought before the Supreme Court of Venda. Chief Ramovha was subsequently found guilty and sentenced to death and was in fact hanged. Throughout the so-called independence of Venda a considerable number of witch burning and of medicine murder occurred. People accused of witchcraft were burned whle driven from their homes. Both Cabinet Ministers and top government officials were competing for power in government. As a result there were allegations that this political competitors indulged in medicine murders to secure their positions.

[665] Minnaar 1991 *Indicator South Africa* 53.

[666] *Muti* is a Nguni term, which is always used to refer to medicine murder.

were commonly attributed to an individual's attempt to enhance his own personal power or to ensure success in a new business venture. Traditional leaders were also accused of medicine murders. These accusations disintegrated the image of traditional leaders. In this regard, traditional leaders were no longer seen as the guardians and protectors of their subjects but criminals who murdered people for their material or political gain. As a result, traditional authorities lost a great deal of respect in the eyes of the Venda people.[667]

3.5.4 SELF-GOVERNING TERRITORIES

3.5.4.1 Introduction

The *Self-Governing Territories Constitution Act*[668] made provision for the establishment of self-governing territories. Unlike the states of Bophuthatswana, Transkei, Ciskei and Venda that opted for independence, the leaders of these territories had not immediately accepted the idea of independence. These self-governing national units consisted of different and separate ethnic groups on the basis of language and culture, namely KaNgwane, Lebowa, KwaNdebele, Gazankulu, KwaZulu, and QwaQwa.

3.5.4.1.2 KaNgwane

According to Cooper *et al,* many Swazi people in South Africa lived in scattered reserves in the former Eastern Transvaal. These Swazi people[669] inhabited the areas of White River and Nelspruit. It was through the process of resettlement that the *apartheid* government heavily challenged Swazi

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[667] Minnaar 1991 *Indicator South Africa* 53.

[668] See 3.5.3.1 above.

[669] Anon Swasi http://reafricatours.com/swazi.htlm, 15 June 2006 2. Swazi society consisted of a group of closely related Nguni chiefdoms organised around patrilineal descent groups. At that time a powerful Chief Ngwane I seized control over a considerable number of smaller neighbouring chiefdoms of Nguni and Sotho people to strengthen his own chiefdom and army against Chief Mthethwa forces led by Dingiswayo. Later Chief Ndwandwe subjugated Mthethwa and killed Dingiswayo. Thereafter Ndwandwe put Chief Ngwane I under pressure and he fled to the territory known as Swaziland while some members of his group inhabitated some of the areas of the territory which is today known as Mpumalanga Province.

traditional leaders and people. Firstly, Swazi traditional leaders lost vast tracks of their land. Secondly, traditional leaders' sons who were to inherit leadership became scattered and eventually traditional leadership ended up in the wrong hands. The Swazi tribes were also broken up. The South African government settled these people on a narrow stretch of land along the northern and western borders of Swaziland in the middle of the 1970s. The area was named KaNgwane.[670] The Swazi people under the control of their traditional leaders owned these areas communally.

In 1977, a legislative assembly was established in KaNgwane where Mabusa became Chief Executive Councillor. Since its inception in 1977, the Legislative Assembly requested the South African government to grant it self-governing status. However, the Council of Mabusa vehemently rejected the concept of independence. The Cabinet argued that independence of KaNgwane would result in the forfeiture of the claim by the South African born Swazis to a share in a South African political power and its wealth. It is worth noting the fact that the Swazi Council of Chiefs denounced the idea of self-government and independence of KaNgwane. Instead, they proposed that KaNgwane should be incorporated into Swaziland.[671] However, the Council of KaNgwane on the other hand wanted self-government status.[672]

KaNgwane obtained self-governing status from South Africa in terms of the *Self-Governing Territories Constitution Act* in June 1982.[673] Sezwati was made an additional official language of the homeland. An Executive Council served as a Cabinet while the Chief Executive Councillor and Executive Councillors assumed the status of a Chief Minister and Ministers respectively. The *Self-Governing Territories Constitution Act* provided for the duties,

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[670] Cooper *et al Survey of Race Relations* 52.

[671] Anon http://reafricatours.com/swazi.html, 15 June 2006 3. The kingdom of Swaziland also pressured South Africa for the return of Swazi occupied areas of South Africa since the 1960s. In 1982 South African government agreed but that the South African Supreme Court reversed the decision.

[672] Cooper *et al Survey of Race Relations* 52.

[673] Anon http://reafricatours.com/swazi.html, 15 June 2006 3-4. KaNgwane was declared a self-governing territory with a population of about 400 000 people. KaNgwane's Chief Minister Mabusa rejected the idea of incorporating KaNgwane into Swaziland. Mabusa also clashed with the government of South Africa by expressing strong support for the ANC.

powers and functions of traditional leaders.[674] The Chief Minister of KaNgwane, Mabusa interpreted the South African government's consent to grant KaNgwane self-government as evidence of sincerity by the central government not to incorporate KaNgwane into Swaziland. Contrary to Mabusa's stance, the Swazi Council of Chiefs of South Africa (SCCSA), were in favour of incorporation of KaNgwane into Swaziland and vehemently opposed the idea of self-government.

The KaNgwane traditional leaders petitioned the then Prime Minister of South Africa, Botha, in 13 August 1982 in attempt to oppose self-government. They also petitioned the opposition parties in KaNgwane demanding the incorporation of Swazis of South Africa into the Kingdom of Swaziland. The petition was also supported by the members of *Inyatsiya ya Mswati* Movement. Chief Dlamini of the Swazi loyalists and traditionalists who were pro-incorporation formed this movement. The petition document outlined a close relationship between all the Swazis and the historical claims of Swaziland to both KaNgwane and Ingwavuma. The document further claimed that Inyandza National Movement (INM), which opposed the transfer of KaNgwane into the Kingdom of Swaziland was made up of non-Swazis who had no interest of the Swazis at all. Chief Dlamini of *Inyatsiya ya Mswati* Movement commented:[675]

> The conditions in Swaziland were superior to those Swazis in South Africa and that Swazis were South African citizens by incident of history and not by choice.

Chief Dlamini, supported by King Sobhuza II of Swaziland, continued to press for border adjustments and for the creation of a "united" Swazi nation. It appeared that any incorporation of KaNgwane into Swaziland could have resulted into about 75 000 South African born Swazis forfeiting their claim to South Africa citizenship.[676]

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[674] Section 11 of Act 21 of 1971.
[675] Cooper *et al Survey of Race Relations* 52.
[676] Cooper *et al Survey of Race Relations* 309. For this reason Mabusa stated in the Cabinet of South Africa that: "it was insincere in telling that preference should be given to possible

However, Mabusa made it clear at the official ceremony held at Kanyamazane Stadium granting self-government to KaNgwane that:[677] "KaNgwane's future did not include independence and the homeland should be seen only as a "stop-gap" measure." The politics of KaNgwane was unique in the sense that unlike other homelands traditional leaders did not spearhead the issue of independence or self-government. As shown above, some of the traditional leaders opposed the idea of self-government and pushed for the incorporation of KaNgwane into Swaziland. Since traditional leaders were not at the forefront of self-government of KaNgwane, traditional authorities played a limited role in the politics of this homeland. Even the extent to which homeland politics disintegrated the institution of traditional leadership was not so extensive. But it is not correct to assume that traditional leaders at KaNgwane were left without some political bruises. The *apartheid* government as well as the government of KaNgwane also tampered with their existence.[678]

3.5.4.1.3 Lebowa

Lebowa was a homeland for the North-Sotho and Pedi peoples. This homeland was geographically situated in the former Northern Transvaal in what is today called the Limpopo province. Lebowa became a self-governing territory in 1973.[679] Dr Phatudi was elected Chief Minister of Lebowa. His chief rival in 1973 was the prominent traditional leader known as Chief Matlala who was in favour of independence. Dr Phatudi[680] was not in favour of the

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unification with Swaziland. South Africa must prove its sincerity by asking Gazankulu and QwaQwa to amalgamate with Mozambique and Lesotho respectively".

[677] Cooper *et al Survey of Race Relations* 52.

[678] KaNgwane was also integral part of the separate development, which was the strong base of *apartheid*.

[679] TARG *Politico-Historical Background* 33. The Lebowa homeland was reclassified as a self-governing state in the 1970s and it did not take the option of gaining independence. According to TARG under reclassified status system of a self-governing state, the traditional leaders held land on behalf of the communities under them and allotted it to the members of the tribe.

[680] TARG *Politico-Historical Background* 33-34. Lebowa as a self-governing state had a Chief Minister, Dr CN Phatudi as opposed to other independent states namely, Bophuthatswana, Transkei, Venda and Ciskei, which had Presidents. According to TARG report Dr Phatudi guided and led Lebowa through the trying times of era in which political instability was

independence for Lebowa. In 1978 Dr Phatudi was re-elected Chief Minister and his rivals for leadership were Ramusi of the Lebowa People's Party (LPP) and Chief Molapo who led the Black People's Party (BPP).[681] Traditional leaders in Lebowa did not play a central role in the administration of the government of Lebowa.[682] Chief Matlola who supported the idea of independence did not succeed in his endeavours to lead Lebowa into independence.

The first capital of Lebowa was Seshego. Seshego was initially built as a dormitory and labour reservoir township for the then Pietersburg.[683] Later the Lebowa administration moved the capital into Lebowakgomo. According to Cooper, about 3888 blacks who lived in Lebowakgomo in 1979 were civil servants and their families.[684] Many people were drawn from the rural areas of Lebowa to render their services to the Lebowa administration. Some of the traditional leaders also left their villages to become members of the Lebowa Legislative Assembly. Other traditional leaders who were not members of the Assembly, were also paid by the Lebowa government for their leadership in the rural areas. This arrangement and new developments by the Lebowa administration tampered with the existence of the institution of traditional leadership. Traditional leaders who were in the Legislative Assembly of the Lebowa government were placed at the centre of Bantustan politics. Many of those who were paid by the government were also drawn into the government administration, thus shifting their allegiance from their people to the Bantustan authorities.[685]

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heightening and the legitimacy of Chief Ministers, traditional leaders and homeland governments was rejected. The homeland leaders were regarded as puppets of the then South African *apartheid* government.

[681] Cooper *et al Survey of Race Relations* 305.

[682] TARG *Politico-Historical Background* 35. However, as TARG research team observed, the self-governing territory of Lebowa had the largest number of traditional leaders. According to TARG there were many traditional leaders in Lebowa who were not the right heirs to the throne and this increased the number of traditional leaders and created division in some villages. Traditional leaders who opposed the homeland government were always removed from their positions. For this reasons some of the tribal areas belonging to these traditional leaders who opposed the system were not developed.

[683] Pietersburg is now known as Polokwane.

[684] Cooper *et al Survey of Race Relations* 307.

[685] Traditional leaders became the agents and servants of the Bantustan authorities and shun away from their people.

3.5.4.1.4 KwaNdebele

The South African government established KwaNdebele as a homeland for blacks of Southern Ndebele people in the mid 1970s. When the original list of Bantustan was drawn in 1959, no provision was made for the South Ndebele. This homeland was established near Groblersdal in the former eastern TVL, now part of the Mpumalanga province. In 1979, a first stage Legislative Assembly was established in KwaNdebele. Its capital was Siyabuswa.[686] In 1981, the South African government granted KwaNdebele self-government status.[687] The Chief Minister of KwaNdebele was appointed from the ranks of traditional leaders. Between 1984 and 1986 Chief Skosana acted as the Chief Minister of the homeland. After his death, the Legislative Assembly elected another traditional leader by the name of Chief Mahlangu, Chief Minister. According to Makanjee, land consolidation plans increased Kwandebele in size from 98 000ha to 341 000 at an estimated cost of R150m to R200m in 1983.[688]

The consolidation plan proposed the addition of 11 Nebo farms between Groblersdal and Mapoch, which were owned by the South African Development Trust (SADT). According to Cooper *et al*, the plan further proposed 150 000 ha from the Moloto region and 63 000 ha from Moutse one, two and three to be added in KwaNdebele. The South African government also intended to acquire the Ekandustria growth point, the Enkangala residential area and 1000 ha around the Nyabele area for KwaNdebele. However, the proposed incorporation of Moutse and 11 Nebo farms to KwaNdebele was disputed by the people of Moutse and by the Lebowa administration. [689]

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[686] Siyabuswa is the Ndebele name, which literally means we are controlled.

[687] In *Minister of Law and Order, KwaNdebele and Others v Mathebe and Another* 1990 (1) SA 114 (AD), the court stated that KwaNdebele was self-governing territory having been so proclaimed from 1 April 1981 by *Proclaimation* R60 of 1981.

[688] Makanjee 1987 *Indicator South Africa* 62.

[689] Cooper *et al Survey of Race Relations* 51. See also *Mathebe v Regering van die Republiek van Suid Afrika* 1988 (3) SA 667 (TPD), where the court stated that the decision of the State President of the Republic of South Africa as contained in *Proclamation* R227 of 1985, promulgated in terms of section 1(2) of the *Self-Governing Territories Constitution Act* 21 of 1971, whereby the area of Moutse was added to the self-governing territory of

In view of the above consolidation plans proposed by the *apartheid* government, it appears clearly that the policy of separate development was full of contradictions and inconsistencies in KwaNdebele. The South African government always justified separate development on the basis of the fact that different tribal groups must be kept separate to ensure peace and harmony. KwaNdebele, however, was the creation of a mosaic homeland consisting of different tribes. This move contradicted the key objectives of the *Promotion of Black Self-Government Act*. KwaNdebele was an artificial conglomeration of tribes and different pieces of land. The inevitable results of the process intended to create KwaNdebele was marred with conflicts and hostilities between different tribes. For instance, Sotho speakers and the Ndebele took up arms against each other. Traditional leaders of these two communities were also in dispute regarding the incorporation of Moutse into KwaNdebele.[690]

Traditional leaders of Moutse region disputed the transfer of their subjects to KwaNdebele. In a meeting which was organised by Dr Phatudi, the Chief Minister of Lebowa, Chief Mathebe of Moutse told about 3 000 people that Chief Skosana of KwaNdebele had told him that the Moutse people were now his subjects. The KwaNdebele proposal of amalgamating people was done for the sake of creating a homeland, which implies that the weak tribes were likely to be absorbed by the bigger ones against their wishes with the danger

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KwaNdebele was invalid because the decision was taken not with the object of promoting the political development of the population of Moutse. See also *Lebowa v Government of the Republic of South Africa* 1998 (1) SA 344 (AD), where the court dismissed an appeal from a decision in a Provincial Division refusing an application by the government of Lebowa for an order declaring that the district of Moutse formed part of the self-governing territory of Lebowa. The court accordingly declared the *Proclamation* R229 of 1985, which added Moutse to the self-governing territory of KwaNdebele *null and void* and of no force an effect. For more information regarding the powers of the State President on the self-governing territories, see also *Government of the Republic of South Africa v Government of Kwazulu* 1983 (1) SA 164 (A), where the court held that the State President may amend the area of self-governing territory only after there has been consultation by the Minister with the Cabinet and Legislative Assembly of the territory concerned. This requirement indicated that parliament of South Africa regarded these bodies of self-governing territories as sufficiently independent or representatives of the citizens of such a territory to be entitled to be consulted before changes could be effected by the State President.

[690] This shows how the Bantustan political arrangement made by the *apartheid* government divided ethnic groups and made them to fight each other in South Africa.

of imposing traditional rule on the people.[691] Another critical issue, which became a problem for the politics of KwaNdebele was the fact that senior members of the KwaNdebele government did not call for the independence.

Mbokotho, the pro-independent vigilante group was in favour of independence.[692] Tribal traditionalists, traditional leaders, civil servants and the youth under the aegis of KwaNdebele Youth Congress (KWAYCO), however, opposed independence.[693] According to Makanjee, at least 160 people were killed in 1986 in bitter clashes between KwaNdebele authorities, Mbokotho and anti-independence activists vigilant action. More people joined those opposing independence. Chief Mahlangu of the KwaNdebele royal family was detained outside Pretoria Supreme Court in 1987 after applying for a restraining order against the KwaNdebele police. The police outside the British Embassy in Johannesburg also detained his brother, Prince Cornelius Mahlangu, in May 1987. Both the royal kraal of Chief Nzundza and the meeting place for anti-independence were fire bombed in 1987.[694]

Contrary to the expectations of the South African government, the traditional leaders of KwaNdebele who dominated the Legislative Assembly and the Ndebele government, denounced at all cost the proposed independence of KwaNdebele. Unlike in many homelands as stated above,[695] the traditional leaders in KwaNdebele assumed a totally different position concerning the independence of KwaNdebele. To the disappointment and frustration of the South African government, the *apartheid* regime harassed and detained those who were at the forefront of the anti-independence campaign.[696] It was under these political circumstances that traditional leaders were humiliated for their

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[691] It seems that the *apartheid* government's attempt to amalgamate different tribes to create and build a homeland of KwaNdebele failed.

[692] Makanjee 1987 *Indicator South Africa* 62. Mbokotho was later banned by the Legislative Assembly, which cancelled proposed independence plans for December 1986.

[693] Makanjee 1987 *Indicator South Africa* 62.

[694] Makanjee 1987 *Indicator South Africa* 62.

[695] See 3.5.3.2.1, 3.5.3.2.2, 3.5.3.2.3 and 3.5.3.2.4 above.

[696] See *Mabena v Commissioner of Police KwaNdebele and Another* 1988 (4) SA 446 (TPD), the court noted that Mabena, a member of radical group, which was anti-independence of KwaNdebele was regularly harassed and arrested by the police. The court declared that such arrests were unlawful since Mabena was not arrested by the members of KwaNdebele Police Force.

antithesis of independence. They suffered the consequences of their actions. However, it must be noted that the KwaNdebele traditional authorities have proven to be extraordinarily resistant.[697]

3.5.4.1.5 Gazankulu

The apartheid government through the enactment of the *Promotion of Black Self-Government Act* also created Gazankulu. This tiny homeland was situated in the former Northern TVL adjoining Venda, in what is now called the Limpopo province. In February 1973, Gazankulu attained self-governing status.[698] According to Cadman, Ntswanisi[699] had consistently rejected the homeland style of independence. In 1983, Ntswanisi cemented his stance when he met other likeminded homelands leaders to sign a declaration of intent. The signatories to this document committed themselves to work ceaselessly for the establishment of the greater South Africa based on non-racialism and democracy.[700]

In 1983, Ntswanisi established *Ximoxo Xa Rixaka*. This organisation was a national cultural liberation movement. *Ximoxo Xa Rixaka* had approximately 35 000 members by December 1984. Cadman identified the following as the fundamental aims of *Ximoxo Xa Rixaka*:[701]

- To promote the ethnic culture and interests of Gazankulu's Tshangaan/Tsonga people;
- To abolish racial discrimination; and
- To identify government created institutions through which black interests can be facilitated.

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[697] Makanjee 1987 *Indicator South Africa* 62
[698] Cadman 1987 *Indicator South Africa* 101.
[699] When the first elections of the homeland for the Legislative Assembly were held Ntswanisi was elected the first Chief Minister of Gazankulu. He was a professor with fairly well established credentials. Ntswanisi guided the territory through difficult circumstances. There was opposition to the homeland leaders in general and Ntswanisi was no exception. The legitimacy of his government was questioned and many political groupings believed that the homeland of Gazankulu like other South African homelands was an extension of the *apartheid* system. See in this regard TARG *Politico-Historical Background* 43.
[700] Cadman 1987 *Indicator South Africa* 101.
[701] Cadman 1987 *Indicator South Africa* 101.

Many of the traditional leaders supported *Ximoxo Xa Rixaka* because of its pro-Tshangaan cultural position. Both Ntswanisi and his successor Nxumalo[702] staffed the Legislative Assembly and Cabinet of Gazankulu with some of the most influential traditional leaders. Recognised traditional leaders in Gazankulu were also an integral part of the whole civil service because the government paid them for services they rendered in their tribal offices.[703] However, it must be noted that unlike in other homelands discussed above,[704] the traditional leaders in Gazankulu were not the driving force of the Bantustan administration. Many of the traditional leaders opposed independence, thus agreeing with Ntswanisi that independence would strip the Tshangaan off their citizenship.

Gazankulu like many homelands of South Africa was largely rural and poor. The majority of the people were unemployed in the under-developed rural areas. These people became unpopular with the traditional leaders who were well off because of the stipends and salaries they got from government. Some of the traditional leaders were accused of bribes and corruption. Suffice to say that although institutions of traditional leaders were not completely obliterated in Gazankulu, its origins and traditional image, pride and glory suffered a serious blow. Though many Tshangaan still adhered to their traditional life, many viewed traditional leaders with a great deal of suspicion. Gazankulu, like many South Africa's homelands was no better exception or different exemplary as a Bantustan.[705]

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[702] After the death of Chief Minister Ntswanisi, the Gazankulu Minister of Works, Nxumalo was elected the Chief Minister of the homeland administration.

[703] In June 1993, the Gazankulu administration invited Mandela to address its Legislative Assembly and Mandela advised them to forget about the past and its criminal actions. He further urged them to work together to address the rights of workers, including civil servants, teachers and nurses. According to Mandela, the ANC viewed the homeland's parliament as highly illegitimate, however, he had accepted the invitation to address the Assembly without hesitation. In this context, when Mandela appealed for co-operation between ANC and the public servants, traditional leaders became no exceptions.

[704] See 3.5.3 above.

[705] Copper *et al Survey for Race Relations* 637. In any case there was no way Gazankulu could be better than other homelands of South Africa. Gazankulu like other homelands was financially dependent on *apartheid* government, which had no intention to improve its socio-economic conditions in the same way as it did to the so-called white South Africa.

3.5.4.1.6 KwaZulu

The KwaZulu homeland (self-governing territory)[706] was also created in terms of the *Self-Governing Territories Constitution Act.* Upon the creation of this homeland, Chief Buthelezi became its Chief Minister. According to Anthea, Chief Buthelezi not only consistently refused independence of KwaZulu but also sought to dissuade other homeland leaders from accepting this option. That is why in 1973 Chief Buthelezi organized a conference of homelands leaders in which he encouraged other homelands leaders to reject the so-called independence of their territories. Chief Buthelezi later vigorously criticized the leaders of Transkei and Bophutswana, namely Chiefs Matanzima and Mangope, for reneging the initial agreement reached in the 1973 Conference where it was agreed that leaders of the homelands should reject independence.[707]

Chief Buthelezi's strategy was to become the Chief Minister of KwaZulu so that he could prevent the independence of KwaZulu and made sure that Africans would always outnumber white citizens in South Africa. Anthea explained that because of Buthelezi's strategy, the ANC supported the view that Buthelezi should assume traditional leadership despite the fact that his entitlement to traditional leadership was uncertain.[708] It seemed the ANC preferred Buthelezi rather than Mceleli, his first born brother, as a tactic on the

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[706] In *Government of the Republic of South Africa and Another v Government of Kwazulu and Another* 1983 (1) SA 164 (A), Rabie C J described the status of self-governing territory as follows: "It is clear that while KwaZulu is not an entity that completely severed from the state, it is not a mere instrument or representative of South Africa. The parliament of South Africa has in certain respects permitted it to act independently of the state. It is clear that a self-governing territory such as Kwazulu is recognised by parliament as a territory, which is entitled to have its own flag and its national anthem and also a territory, which can conclude conventions, treaties and agreements with the South African government. There are features which indicate that parliament does not regard a self- governing territory created in terms of the 1971 Act as a mere instrument or representative of the state".

[707] Anthea *Story of Natal* 23. Chiefs Mangope and Matanzima gave the South African government a breathing space and further exacerbated the suffering of black people in their territories. An idea that became true as many people in these homelands were subjected to devastating conditions of misery and poverty.

[708] The reason for this uncertainty was due to the fact that Buthelezi was the son of the Chief's tenth wife and was illegitimate. It is submitted that Buthelezi's father, Chief Mathole was too old to father a child at the time he married Buthelezi's mother, the Princess Magogo. In view of this issue of illegitimacy Buthelezi's brother Mceleli, the first born of the first wife of Chief Mathole disputed his claim. See in this regard Anthea *Story of Natal* 23-44.

basis that Buthelezi would challenge and fight the *apartheid* system and secure the interests of the ANC. The ANC used the traditional leadership of Buthelezi to suit their political interests and agenda. The traditional office of Buthelezi as the traditional leader of the Zulus was the making of the ANC, which did not seem to differ much from the NP government.[709]

Subsequently Buthelezi was appointed acting traditional leader in 1953 and finally in 1957. The *apartheid* government confirmed Chief Buthelezi as traditional leader of the Buthelezi tribe. Maré and Hamilton asserted that Buthelezi believed in the position of traditional leadership and its validity during his tenure of office as the Chief Minister of KwaZulu. It is submitted that Buthelezi was sensitive about his own traditional leadership and he more often uttered claims for its legitimacy. The reason why he regularly did so was to justify the authority due to him. He therefore supported the roles[710] of traditional leaders in KwaZulu and placed himself at the top of all the traditional leaders. However some of traditional leaders defied him and rallied behind the King of KwaZulu.[711]

To bring traditional leaders under his direct control,[712] Buthelezi created a special directorate in the department of the Chief Minister (his department) to accelerate the activation and participation of traditional leaders in local

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[709] Anthea *Story of Natal* 44. Buthelezi said that they would preserve the traditional system of traditional leadership in Kwazulu and reaffirmed their constitutional relationship with the Paramount Chief (King) and built their future state with due regard to their cultural heritage and traditions adapted and fructified by the ideals of western civilisation and democracy and modern scientific principles.

[710] See The *Kwazulu Amakhosi and Iziphakanyiswa Act* 9 of 1990. This act provided for the recognition, appointment and conditions of service, discipline, retirement, dismissal, deposition, roles, duties and functions of *Amakhozi*. Matters pertaining to discipline included suspension of *Amakhosi* (senior traditional leaders) or *Iziphakanyiswa* (a traditional leader who holds office in terms of customary electoral procedure) misconduct and enquiry.

[711] Maré and Hamilton *Appetite for Power* 89.

[712] TARG *Administrative and Legal Position* 20. The direct control of traditional leaders in KwaZulu by the government bred a considerable number of problems. These general problems were identified by TARG as follows: (a) The perpetuation of government appointment and control of traditional leaders. (b) The politicisation of traditional leaders. (c) Traditional leaders had to act as go-between between the state and their subjects. Here traditional leaders acted as servants of the KwaZulu government. (d) The enhancement of powers of traditional leaders opened the way for corruption, maladministration, bribery and incompetencies. (e) The legitimacy of traditional leaders was questioned as they were seen as the instruments capable to implement homeland laws. (f) Since the KwaZulu government paid the salaries of the traditional leaders their loyalty was called into question. (g) Traditional leaders were subservient to the government of KwaZulu.

government. He also encouraged the training of traditional leaders in local government activities. In view of this approach, it should be stressed that Buthelezi and the KwaZulu government took efforts to make the traditional leaders more effective in the local government.[713]

In 1974 Buthelezi launched Inkatha to demonstrate opposition to *apartheid*. With the formation of Inkatha, Buthelezi did everything within his power to reduce the independence of traditional leaders. He placed them at the centre of Inkatha politics. According to Maré and Hamilton, Buthelezi told traditional leaders in Ulundi in September 1977 that the institution of traditional leadership could only survive as long as it served the interests of the people, and their role in Inkatha. Buthelezi politicised the institution of traditional leaders. By drawing the traditional leaders into Inkatha, Buthelezi reduced their powers and created a conducive political environment to manipulate them.[714]

As the membership of the Inkatha increased, Chief Buthelezi's capacity to confront the *apartheid* state also grew in size and bounds. He revealed his capacity to challenge the state in 1979.[715] As commented above, throughout his term as the Chief Minister of KwaZulu, Chief Buthelezi rallied the traditional leaders of KwaZulu around the notion of rejecting independence of Kwazulu. However in the 1980s Chief Buthelezi's support of the ANC withered. He vigorously opposed the idea of an armed struggle and disinvestments, which were the key strategies of the ANC to dismantle *apartheid*. As Cooper *et al* noted this argument against disinvestments was

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[713] Maré and Hamilton *Appetite for Power* 88-89

[714] Maré and Hamilton *Appetite for Power* 88-89. This assertion is confirmed by the fact that Buthelezi warned that if traditional leaders did not involve themselves in the affairs of the movement it would be regarded as dereliction of duty and active involvement against Inkatha would be of course much worse. He told them that Pretoria no longer controlled their fate as Chiefs, which would be decided at Ulundi if necessary. The position of traditional leaders in KwaZulu Natal became so weak. As a result they struggled to protect an image of inherited respectability. See in this regard McIntosh *et al Traditional Authorities* 31.

[715] Anthea *Story of Natal* 130. Anthea quoted *Sunday Express* writing about Buthelezi that: "although Chief Buthelezi broke the law by defiantly quoting Nelson Mandela at a public meeting, nothing happened. It also transpired that Buthelezi said things, which were banned about the government and the system and again nothing happened. However, when other black leaders said the same things they were sent into exile or marginalized and he (Buthelezi) still walked on a tightrope".

that it would increase poverty and unemployment and instead he called for increased investment contrary to the ANC call for disinvestments.[716] He also rejected to accept Congress of Traditional Leaders of South Africa (CONTRALESA)[717] in KwaZulu, which was the ally of ANC.

As the gap between the ANC and Inkatha became wider, Chief Buthelezi began to strengthen his position by recruiting the KwaZulu traditional leaders to join Inkatha. The KwaZulu police and Inkatha Youths consistently harassed those who refused to join Inkatha. For example, when the First Session of the Fourth KwaZulu Legislative Assembly was held at Ulundi in October 1982, Chief Mapumulo who refused to join Inkatha was assaulted outside the Assembly at its opening by Inkatha Youths. Chief Buthelezi condemned the assault, but emphasised that whoever challenged him challenged the people.[718]

Besides many convoluted political problems and violence which fraught the people of KwaZulu in the 1990s, the KwaZulu government managed to consolidate the institution of traditional leaders more than any of the other homelands.[719] For instance, according to Cooper *et al,* shortly before the homelands were dismantled there were about 208 proclaimed tribal authorities in KwaZulu grouped under 24 regional authorities. Seven tribal court houses were completed in 1982 with 22 under construction. Buthelezi's government deepened the roots of the institution of traditional leaders but not their powers.[720]

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[716] Cooper *et al Survey for Race Relations* 345.
[717] See 3.6.2 below.
[718] Cooper *et al Survey for Race Relations* 347.
[719] *South Africa Debates of Constitutional Assembly* 134-135. Rabinowitz stated that KwaZulu-Natal was fortunate in retaining strong traditional values. It gave the people of that region the kind of community, traditions and identity, which Alan Paton lamented the loss of in Cry the Beloved Country. He went further to say that the sadness of urbanisation and loss of identity (and violence) was linked to the weakening of *ubuntu*, which was the culture of respect common to all Africans. It seemed that the government of KwaZulu in its attempt to consolidate traditional leadership went further to consolidate and sustain Zulu culture and tradition more than any other homeland in South Africa.
[720] Cooper *et al Survey for Race Relations* 349.

It follows from the above that the history of traditional leaders in the homeland of KwaZulu rested and revolved around the leadership of Buthelezi. He led traditional leaders throughout the period of homeland administration and the first ten years of democracy in South Africa. He fought against the demise of institution of traditional leaders and he shaped and trimmed the institution according to his patterns and whims. He also manipulated the institution of traditional leaders.[721]

3.5.4.1.7 QwaQwa

QwaQwa was the self-governing territory for the Southern Sotho people. Like all other Bantustans, architects of the policy of separate development created it. Its first Legislative Assembly was created in 1975.[722] In 1980 QwaQwa was granted self-governing status by the government of South Africa. Unlike other homelands of South Africa, QwaQwa was a very small area with limited economic resources. It comprised mainly of two tribal areas under paramount traditional leaders. These areas were the Bakwena tribal area and the Batlokwa tribal area. Both Bakwena and Batlokwa tribal areas were divided into the seven and three districts respectively with their own district traditional leaders.[723] Its Chief Minister, Mopeli of Dikwankwetla Party (DP), had since its creation, rejected independence.[724]

The reason was that it was feared that to rubber stamp and countenance the policy of *apartheid* the government will rob the Southern Sotho their birth right

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[721] This analysis regarding Buthelezi is based on conclusions, which have been drawn by the author concerning the political and traditional roles Buthelezi played in his capacities as a traditional leader and Chief Minister of KwaZulu in the history of KwaZulu administration and South Africa in general.

[722] Cooper *et al Survey for Race Relations* 307.

[723] Cooper *et al Survey for Race Relations* 541. Both the Tlokwa and Kwena tribes formed the Batlokwa and Mopeli tribal authorities. The communities developed into a Black Regional Authority and later Territorial Authority for which the Basotho-QwaQwa Legislative Assembly was established on 1 October 1971. The area became self-governing territory on 1 November 1974 by *Proclamation* R203 of 1974. See in this regard *Lefuo v Staatspresident en 'n Ander* 1983 (3) SA 924 (O), where the court said that the establishment of QwaQwa as envisaged in the *Black Authorities Act* 68 of 1951 and the *Self-Governing Territories Constitution Act* 21 of 1971 constituted an area within which homogenous community resided.

[724] Cooper *et al Survey for Race Relations* 307.

of the greater South Africa. Like some of the homelands stated above,[725] the QwaQwa Legislative Assembly also consisted of traditional leaders. However, these traditional leaders continuously rejected the independence of QwaQwa.[726]

Chief Mopeli's stance was that the homeland would not opt for independence. It seemed, however, that there was pressure for independence from certain circles inside the homeland. Chief Mopeli rejected the South Africa government's idea of a confederation of states and stated that the homeland government should rather be developed into a regional government within a federal South Africa. It is reported that Chief Mopeli clashed with the Commissioner-General Van Rooyen over the issue of independence of QwaQwa. As it transpired the QwaQwa Commissioner-General pushed the idea of independence. He asserted that while the South African government would never force QwaQwa to become independent the whole idea was that the homelands would do so and that QwaQwa would ultimately develop politically into some form of independence.[727]

Traditional leaders in QwaQwa had great powers and privileges. Firstly, the composition of the Legislative Assembly was biased towards them. Maloka reported that in QwaQwa of the 60 members of the Legislative Assembly in the 1970s, 20 were elected and 40 nominated by tribal representatives. This arrangement counteracted democratic representation in the Legislative Assembly. Secondly, traditional leaders were paid in their capacities as 'traditional leaders'. In QwaQwa each of the 36 traditional leaders who were members of the Legislative Assemby were paid R51 536 per annum and extra

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[725] See 3.5.3 above.

[726] Cooper *et al Survey for Race Relations* 439. According to Cooper et al on 28 January 1990 at a rally in the Orange Free State, the Chief Minister of QwaQwa, Mopeli intimated that: "they were very anxious to help Mr De Klerk to negotiate a new Constitution with all the leaders on a non-group basis. He also stated that there was no room for homelands in a new South Africa and that the homelands system should be overhauled immediately with a view of scrapping it. He was therefore of the view that existing structures should be transformed into a non-racial government within a greater South Africa and thus be amalgamated in South Africa".

[727] Cooper *et al Survey for Race Relations* 540.

R2 400 for their traditional duties.[728] Although the traditional leaders in QwaQwa similar to other homelands were seen as puppets of the *apartheid* government, it is important to state that the institution of traditional leaders played a critical role in rejecting the independence of QwaQwa. In so doing the *apartheid* government was unable to successfully complete its grand project of *apartheid*. Unlike most traditional leaders in the TBVC states, the traditional leaders in QwaQwa challenged the legitimacy of homeland system and political relevance of *apartheid*.[729]

3.6 POLITICAL CHANGES AND APARTHEID REFORMS

3.6.1 POLITICS OF THE TRICAMERAL PLAN

In August 1977 a proposal for establishing a tricameral parliament with separate chambers representing whites, coloureds and Indians were presented to the parliamentary caucus of the NP. It was proposed that a Council representing three chambers would mediate disputes in relation to matters of mutual concern, with ultimate power being exercised by the State President, which was no longer to be merely a ceremonial figure.[730]

The establishment of a Tricameral Parliament (TP) in South Africa marked the dissolution of the Whites only parliament.[731] Separate parliament assemblies

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[728] Maloka 1996 *J of Contemporary Studies* 175. Unlike in homelands such as Bophuthatswana and Ciskei traditional leaders were paid in proportion to the number of their subjects or followers.

[729] TBVC is an acronomy of Transkei, Bophuthatswana, Venda and Ciskei. See 3.5.3.2.1,3.5.3.2.2, 3.5.3.2.3 and 3.5.3.2.4

[730] Brewer *South Africa Survive* 256. Brewer established that the origin of these proposals went back to the deliberations of Theron Commission, which had been appointed in March 1973 to examine the position of the Coloured community in South Africa. According to Brewer, the Theron Commission report of June 1976 recommended that provision should be made for satisfactory forms of direct Coloured representation and decision-making at the various levels of authority and of government. The government set up a Cabinet Committee to examine the place of Coloureds and Indians within the political system. By then both the Coloureds and the Indians like the blacks had no say in the running of the South African government. These groups were not allowed to vote and as a result were not represented in the parliament of South Africa. The Theron Commission proposals culminated into the constitutional reforms enacted in the *Republic of South Africa Constitution Act* 110 of 1983. Hereafter referred to as 1983 *Constitution*.

[731] Leach *South Africa* 39. The South African Parliament Building is in Adderley Street, Cape Town. It was first used by the parliament of Cape Colony of the Good Hope in 15 May

for Whites, Coloureds and Indians members of the Parliament were created.[732] Each house controlled its own affairs[733] such as education, health and community administration. All three houses dealt with matters so-called general affairs.[734] The combined house was, however, monopolized by the White House of Assembly, which retained the overall majority of seats.[735] The 1983 *Constitution* was based on the distinction between own and general affairs and incorporated a political colour bar in a sense that blacks were excluded from this political arrangement. The 1983 *Constitution* made a distinction between general affairs and own affairs. Matters pertaining to blacks were regarded as general affairs on which the combined three parliaments had to decide on. This again gave the authority to the goverment other than blacks to decide on their future.[736]

1885. The white parliament established in 1910 met for 74 years and was dissolved on 13 July 1984.

[732] The 1983 *Constitution* had ethnic base. In terms of section 37(1) of 1983 *Constitution*, parliament consisted of three Houses, namely a House of Assembly, a House of Representatives and a House of Delegates. See also section 52 of 1983 *Constitution*. This provision dealt with matters pertaining to franchise and furthermore stated that Whites, Coloureds and Indians were entitled to vote at an election for a member of the House of Assembly, House of Representatives and House of Delegates respectively. House of Assembly was the white chamber in South Africa's three chambers parliament. Members of this House were white citizens. House of Delegates was the chamber of parliament reserved for Indians. The House of Representatives was the chamber of parliament reserved for Coloured voters.

[733] Section 14(1) of 1983 *Constitution*. This constitutional provision stated that matters which specifically or differentially affected a population group in relation to the maintenance of its identity and the upholding and furtherance of its way of life, culture, traditions and customs were own affairs in relation to such population group. See in this regard *Savvas v Government of the Republic of South Africa* 1988 (2) SA 327 (TPD), the court stated that the legislative power is vested in the State President and parliament, that is, all three Houses, except when a Bill is certified by the State President as a Bill dealing with 'own affairs' of a particular population group in which case the Bill has to be dealt with and passed only by the House of that particular population group and thereafter assented to by State President.

[734] Section 15 of 1983 *Constitution* dealt with the matters, which are not own affairs of a population in terms of section 14.

[735] Ellis *et al Comrades against Apartheid* 142. The main provisions of the 1983 *Constitution* included *inter alia*, the creation of an executive presidency, the establishment of a tricameral parliament which each chamber being serviced by its own ministerial Council and having jurisdiction over its respective community own's affairs. Provision was also made for the referral of disputes among the chambers over matters of common concern or general affairs to the President's Council. The 1983 *Constitution* further provided for representation within the structure of Whites, Coloureds and Indians on a proportional base of 4:2:1 according to population and ensuring a overall white majority within the system.

[736] The 1983 *Constitution* gave some degree of political freedom to Coloureds and Indians at national level. To many blacks leaders both political and some of the traditional leaders, the reforms initiated by Botha were not enough. As a result, liberation movements such as UDF and ANC which was in exile by then demanded constitutional settlement which will include blacks as well.

Blacks, who comprised 75% of the country's population, were still excluded from the franchise. Traditional leaders were not considered in the creation of the 1983 constitutional arrangement. Nigel pointed out that the principle remained that constitutional representation for blacks was confined to the homelands that were mainly controlled by traditional leaders.[737] Leaders of the TBVC states were comfortable about this arrangement and did not rigorously oppose the tricameral constitutional dispensation.[738]

Government strategists believed it was possible to win support from the bulk of the Coloured and Indian communities and in time middle-class blacks too, for a government dominated by the NP. This was so because there were some urban and homeland leaders such as Chief Mangope who rejected united South Africa for all. In other words there were some of the traditional leaders who were in comfort zones of *Apartheid* and feared fundamental political changes.[739]

The recognition of the permanent status of some black township residents had been given in 1977 when Vorster, the then Prime Minister of South Africa, introduced Community Councils to administer townships affairs under the aegis of white government officials. Black residents in townships were represented in the Township Councils by their elected councillors. This arrangement resulted in numerous series of protests and boycotts because the township councillors were not wanted. Some of them were even killed. The exclusion of blacks from the tricameral parliament implied that traditional leaders and their communities were not allowed to vote and participate in the tricameral parliament.[740] The 1983 tricameral parliamentary dispensation, led

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[737] Nigel *Making of Modern* 124.

[738] Nigel *Making of Modern* 124. The apartheid regime was still convinced that blacks could only enjoy their rights to vote in their various Bantustans. For instance the Tswana voter voted in Bophuthatswana, the Zulu in Zululand, the Xhosa in Transkei and Ciskei respectively. Since the Coloureds and Indians had no homelands, the government attended through the 1983 Constitutional settlement to accommodate their voting aspirations in the white parliament. See also Ellis *et al Comrades against Apartheid* 142.

[739] Ellis *et al Comrades against Apartheid* 142.

[740] Mogoba *et al Sanctions and the Alternatives* 31; Walter *South Africa's War* 18. The inclusion of the Coloureds and Indians in the tricameral parliament should be seen as an important movement towards political reforms. Although Botha, the then President of South Africa had been intellectually convinced of the need for reform. Walter quoted Botha saying

to a revolt in South Africa during the years of 1984 to1986. The exclusion of blacks was an important cause of this unrest.[741]

The outcome of this dissatisfaction was the establishment of two anti-*Apartheid* organizations. The National Front (NF) on 11 to 12 June 1983 and the United Democratic Front (UDF) on 20 August 1983. Resistance to the 1983 *Constitution* raised black political consciousness to its highest level yet. The composition of the UDF was non-racial and had a multi-class character. The UDF proposed a two stage strategy for the transformation of the South African society, namely nationalist and socialist transformation. Both stages were linked to the Freedom Charter.[742]

The UDF pooled huge support from the traditional leaders especially members of the CONTRALESA after it has been formed in 1986. On the other hand some of the traditional leaders of the independent states particularly Chief Mangope were vigorously opposed to the activities of the UDF and powerful trade movement such as COSATU in Bophuthatswana.

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that his government believed that the human dignity, life, liberty and property of all must be protected regardless of colour, creed or religion.

[741] Van Zyl *Last White Parliament* 106. The majority of blacks rejected the 1983 constitutional dispensation. The 1983 *Constitution* co-opted people who were not white into the center of political power, this was done in a segregated structure. It was a shift from exclude-divide-and-rule to include-divide-and-rule. This political arrangement was undemocratic and denied blacks rights to participate in the political and economic institutions of South Africa. Raw, the MP for Durban-Point foresaw political violence and riots in South Africa as far as 1959 when he said that: "If democracy is destroyed, then the people must seek some other weapon to express their will. The people have the choice between democracy and other forms of government and if the apartheid government denies the people their democracy then the government will of course have only itself to blame if those people turn to other weapons." The 1970s, 1980s and early part of the 1990s bore testimony to what Raw told the South African parliament in 1959. The fact that blacks were denied their democratic rights in South Africa should be seen as the main cause of political violence and unrest in South Africa during the heydays of *apartheid.*

[742] Berger *et al Future South Africa* 135. Both the UDF and NF were against the 1983 constitutional settlement. They viewed the constitutional settlement as unjust and undemocratic because blacks were completely excluded from the political system. As a result black opposition movements such as UDF and NF among others challenged the *apartheid* regime through mass mobilization, protest and strikes. The government responded by imposing the state of emergency in many parts of South Africa on July 1985. The UDF was in a dire need of the constitutional dispensation, which would include all the South Africans irrespective of colour or race. As elucidated above, in order to challenge the 1983 political settlement, the UDF mobilized and organized the blacks in the urban areas against the system. The UDF created and led a racially inclusive political movement. The vision of the future of UDF was of an essentially social democratic polity where neither ethnicity nor race was the base of power.

His fears were fuelled by the fact that both the UDF and COSATU undermined and despised the integrity of his homeland's government.[743] According to Van Kessel, members of UDF regarded most of the traditional leaders in the Bantustans and independent states or homelands as the rural equivalent of the town councillors.[744] This section of traditional leaders was widely portrayed as the collaborators of "puppet structures".

The Progressive Federal Party's (PFP) leader, Van Zyl, also launched a heavy attack on the tricameral parliamentary plan. Slabbert campaigned against the 1983 *Constitution*, believing it to be politically flawed. Graham commented about 1983 *Constitution* as follows:[745]

> It was the nationalist government which has made it constitutionally impossible for the majority of the people subjected to its laws to consider parliamentary strategies for change. Therefore those thus excluded have no option. It is pure hypocrisy and downright provocation on the part of the government to equate all extra-parliamentary strategies for change with unconstitutional and even subversive strategies.

Botha's initial political reforms during his tenure of office had far reaching results on the landscape of black politics. During Botha's years in office, the government participated in placing the question of black political rights, including contacts with the ANC at the center of the political debate.[746] The government of Botha also took a giant step when it abolished pass laws and let black people move freely in cities. They also abolished the *Prohibition of*

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[743] Cosatu is an acronomy for Federation of Trade Unions in South Africa.

[744] Van Kessel *Beyond our Wildest* 42. See also 3.5.3.1 above.

[745] Graham *Afrikaners* 143–144. Motsuenyane, the then president of the National Federal Chambers of Commerce (NAFCOC) said that: "the confederal scheme and tricameral parliament were irrelevant to black aspirations. He further stated that black South Africans want a common society in a unitary state. This was what ANC had been calling for and fighting, ever since its birth. The ANC stood for equality of opportunity for black and white. They did not want to see people divided into separate nations, which the apartheid government was trying to do".

[746] Lipton *Capitalism and Apartheid* 381–385. Lipton intimated that in September 1985, some leading businessmen and women held discussions with an ANC delegation headed by Tambo in Lusaka, although Afrikaans businessmen withdrew from the meeting under the pressure from the South African government.

Mixed Marriages Act.[747] Although black communities were not yet direct beneficiaries of the mainstream of South African politics, signs of political reforms were evident and inevitable.[748]

3.6.2. POLITICAL FORMATION OF CONTRALESA

As already explained above,[749] both the colonial and *apartheid* governments designed and sponsored conflicts and divisions among the traditional leaders of South Africa. A major development was realized when the traditional leaders formed their own movement in order to build unity among themselves. The KwaNdebele traditional leaders and headmen in September 1987 formed CONTRALESA during the struggle against independence in that homeland.[750] The broad aim of CONTRALESA was to oppose the homeland system.[751]

Bank *et al* explained that according to its *Constitution*,[752] CONTRALESA sought to achieve *inter alia* the following goals:[753]

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[747] Act 55 of 1949. This Act was repealed by the *Immorality and Prohibition of Mixed Marriages Act* 72 of 1985. The *Prohibition of Mixed Marriage Act* was so-called micro-*apartheid*.

[748] Botha's regime laid a foundation upon which De Klerk's government was able to lead South Africa to fundamental political changes. Mandela described De Klerk as a pragmatist, a man who saw change as necessary and inevitable. See in this regard Mandela *Long Walk* 540.

[749] See 3.3.5 above.

[750] Bank et al 1996 *J of Legal Pluralism and Unofficial Law Year* 415. See also Van Kessel *Beyond our Wildest* 83. According to Van Kessel CONTRALESA had its origins in the violent protest against the independence in KwaNdebele and the battle of resistence in the district of Moutse against incorporation into KwaNdebele. The process, which led to the formation of CONTRALESA involved consultations of traditional leaders with the UDF, trade unionists and South African Youth Congress (SAYCO). After the broad consultations CONTRALESA was launched in Johannesburg. Initially CONTRALESA claimed membership of 38 traditional leaders and headmen from KwaNdebele and Moutse.

[751] Bank et al 1996 *J of Legal Pluralism and Unofficial Law Year* 415.

[752] See *Congress of Traditional Leaders of South Africa Constitution*, 1987. Hereafter referred to as 1987 *Constitution of CONTRALESA*. The Preamble of 1987 *Constitution* of Contralesa states *inter alia* that: "We, as members of the oppressed and exploited people, have been the most abused and alienated in the land of our forefathers by the evil of colonialism and apartheid and its violent and anti-people Bantustan system, that like Sekhukhuni, Ramabulanah, Cetshwayo, Shaka, Matikwana, Nyabele, Moshoeshoe, Luthuli and now Mandela, we have a duty and a role to play in the ongoing national liberation struggle for a free South Africa and that the aspiration of people can only be met under a democratic state based on the will of all the people in a unitary, non-racial and democratic South Africa".

[753] Bank et al 1996 *J of Legal Pluralism and Unofficial Law Year* 415. See also clause 3 of 1987 *Constitution of CONTRALESA*. In addition to the above goals, the aims and objectives of CONTRALESA include *inter alia* to build and deepen proper democratic relationships

- To unite all traditional leaders in South Africa;
- To school them in politics of liberation;
- To fight for the eradication of the Bantustan system;
- To win back the lands stolen from their forefathers during colonialism; and
- To contribute to the struggle for a unitary, non-racial and democratic South Africa.

At the official inauguration of CONTRALESA as a national body,[754] Chief Holomisa, the President of CONTRALESA emphasized that:[755]

> The primary objective of ... organization was to restore dignity, reverence and respect to the ancient institution of chieftaincy, which had been manipulated and abused by the *apartheid* regime . . . Chiefs must shed their image as collaborators and government sellouts and had to prove that they were worthy leaders who could make a real contribution in the struggle for national liberation.

Furthermore Holomisa urged traditional leaders to become more receptive to processes of democratization at the village level and make themselves accountable for their actions at the local level. In particular, he encouraged traditional leaders to co-exist with democratically elected residents'

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between youth, workers and all sectors of people, to take up the demands of communities jointly with them, to fight tribalism, ethnicity and all apartheid instigated conflicts among people, to build, develop and deepen the spirit of free exchange of cultural activities among all people in pursuance of the building and developing of a true South African culture and national talent, to run projects and self-help schemes together with other progressive organisations that will advance communities and enhance the good image of CONTRALESA.

[754] The membership of CONTRALESA is open to all traditional leaders and their spouses and children provided that such persons subscribe to beliefs, resolutions, aims and objectives of CONTRALESA. See also clause 6 of 1987 *Constitution of CONTRALESA*. The structures of CONTRALESA which is a legal person are described as follows: 6.1 National Executive Committee (NEC), 6.2 Annual General Meeting (AGM), 6.3 Provincial Councils (PC), 6.4 Local Branches (LB), 6.5 Finance Committee (FC), 6.6 Disciplinary Committee (DC). NEC consists of the President, Deputy President, General Secretary, Assistant General Secretary, Treasurer, National Organiser, Four Additional Members and the Provincial Chairpersons and Secretaries as *ex officio* members. PC consists of six Provincial Councils.

[755] Bank et al 1996 *J of Legal Pluralism and Unofficial Law Year* 415.

associations. At the time when Holomisa made these statements, many of the traditional leaders' administrations were not transparent and open and many traditional leaders were not responsible and accountable to their communities. There were allegations of corruption, bribery and abuse of power.[756]

However, in the late 1980s there was no doubt that many traditional leaders displayed alacrity to change and transform their authorities and be ready for the political changes which were sweeping South Africa by then.[757] For instance, in the then Transkei the traditional leaders joined both CONTRALESA and the Transkei Traditional Leaders Association (TTLA) after 1990. In the Ciskei, General Gqozo set up the Ciskei Traditional Leaders Association (CTLA) in opposition to CONTRALESA and encouraged local traditional leaders to join up. Unlike TTLA, the CTLA had ulterior motives that were to entrench the political power of Gqozo and not necessarily to advance the course of democratic liberation and political liberation. The homeland government seemed to manipulate traditional leaders in Ciskei.[758]

In QwaQwa, traditional leaders and headmen deserted the ruling Dikwankwetla Party shortly after the 1990 elections to join CONTRALESA. QwaQwa's traditional leaders demonstrated their eagerness to join the broad-base black led struggle against *apartheid*. In KwaZulu, CONTRALESA had limited impact, the majority of traditional leaders have remained loyal to Buthelezi and the IFP. They also subscribed to Zulu ethnicity, an ideology which was designed to promote and uphold Zulu cultural hierarchy. Those who were willing to join CONTRALESA ran the risk of being marginalized,

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[756] It was in the light of their existing positions that inevitably the institution of traditional leadership was to be transformed and prepared for the envisaged democratic South Africa.

[757] Van Kessel *Beyond our Wildest* 84. The formation of CONTRALESA and its partnership with the Mass Democratic Movement (MDM) was quickly welcomed by the ANC. In February 1988 CONTRALESA deputation went to Lusaka to meet the ANC delegation. The ANC praised CONTRALESA for its heroic and significant role it played against the forces of *apartheid*.

[758] Traditional leaders in Transkei demonstrated their readiness for the change while their counterparts in Ciskei were still silenced by the administration of General Gqozo.

because shortly after the release of the political prisoners, CONTRALESA was linked to the ANC.[759]

The Zulu monarch, King Zwelithini, discouraged traditional leaders in KwaZulu to join CONTRALESA. In May 1990, he told traditional leaders in a large gathering that:[760]

> The ANC was intent on disrupting their unity as a means of destroying Zulu power. The ANC's plan was to breakdown every thing in the country and (put) the pieces back together in such a way that South Africa becomes the ANC property.

Chief Buthelezi's point of view was that CONTRALESA was an attempt to thrust a spear into the heart of Zulu unity.[761] He and traditional leaders who supported Inkatha resolved in a meeting held in September 1989 to isolate Chief Maphumulo who joined CONTRALESA and became its President. Chief Buthelezi told traditional leaders that:[762]

> We have come to close ranks and to rejoice in our unity and to tell Chief Maphumulo to go to hell. We must do what needs to be done ... We have a duty to flush out anything that in any way undermines the unity and solidarity of our people ... the Congress had been formed as an ANC spear against Kwazulu's unity and against (its) leadership.

It follows from the above that the KwaZulu government was not prepared to accept CONTRALESA as a legitimate national organization to represent the views of the traditional leaders in South Africa. It seemed Chief Buthelezi and King Zwelithini wanted to bring all the traditional leaders in KwaZulu under the political fold of Inkatha. Those who refused to toe the line of the KwaZulu

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[759] Bank et al 1996 *J of Legal Pluralism and Unofficial Law Year* 416-417

[760] Coopers *et al Survey of Race Relations* 509-510.

[761] Coppers *et al Survey of Race Relations* 510. According to Cooper *et al*, Chief Buthelezi also told the traditional leaders that it was Inkatha, alone which stood between them and the destruction of the institution of traditional leadership. He further remarked that this was not because Inkatha was rural or tribal in orientation. But Inkatha looked to the future and knew that no government would govern successfully in the future unless it employed the institution in rural areas.

[762] As quoted by Coopers *et al Survey of Race Relations* 510.

administration were severely marginalized like Chief Maphumulo. A considerable number of traditional leaders in KwaZulu did not join CONTRALESA.

In Bophuthatswana, Chief Mangope suppressed political activity and traditional leaders were barred from joining CONTRALESA and any other external political organization or association. Those who defied Mangope were marginalized. As a result, traditional leaders in Bophuthatswana were denied an opportunity to partake in the activities of CONTRALESA and thus forfeited political education, which CONTRALESA offered its members. In as far as other self-governing territories were concerned, CONTRALESA made swift penetration and enjoyed the support of those traditional leaders.[763]

What needs to be considered most about CONTRALESA is the fact that this movement of traditional leaders succeeded during *apartheid* by building strength and unity amongst the traditional leaders of South Africa. In view of the division, which inevitably existed among the traditional leaders of different homelands, CONTRALESA was able to rebuild and revive the position of many traditional leaders. It seemed CONTRALESA intended to create a new institution of traditional leaders with a new vision and objectives.[764]

Many political movements in South Africa, particularly the UDF and even the ANC after being banned commended the objectives of CONTRALESA. Many political leaders appreciated the formation of CONTRALESA as a tremendous development and called on rural people to respect their traditional leaders especially those who had fought against *apartheid*. Mandela echoed similar words after being released from prison when he embraced traditional leaders who fought for the liberation and welcomed them into the fold of the liberation movement.[765]

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[763] Traditional leaders in Bophuthatswana were sycophants. That is why even after Mangope was toppled in March 1994, many were still afraid or reluctant to join CONTRALESA. Mangope was most feared person in Bophuthatswana. He was so feared not only by the ordinary citizens of the homeland even most of the traditional leaders.

[764] Bank et al 1996 *J of Legal Pluralism and Unofficial Year Law* 417.

[765] It seems all the liberation movements of South Africa including PAC, AZAPO and BCM supported the constitutional principles of CONTRALESA. However political organisations

It was ANC policy to welcome any homeland leaders who genuinely repented participation in the old oppressive structures of *apartheid.* The ANC's pragmatic approach to traditional leaders and homeland leaders was part of its strategy to develop a broad alliance in the build up to constitutional dispensation and to open up a divide between the government and its conservative black supporters. That is why the ANC's campaign was met with considerable success as various traditional leaders from the old regime "climbed abroad" the liberation bandwagon.[766]

There are few lessons, which deserve a special emphasis about the formation, vision and lifespan of CONTRALESA during the *apartheid* era. Firstly the formation of CONTRALESA should be hailed as a historic moment in the politics of traditional leaders of Bantustans and *apartheid* South Africa. The reason being that CONTRALESA increased the political awareness of the traditional leaders. Most importantly, it awakened most of the traditional leaders who were politically "buried" in the fold of *apartheid.* It raised the level of awareness among traditional leaders about the significance of the entire spectrum of black liberation. CONTRALESA de-generalized the institution of traditional leadership in *apartheid* South Africa and exposed those who were conservative and pro-*apartheid.* Suffice it to say that CONTRALESA did a lot of spadework to prepare traditional leaders to occupy the right place in the future democratic South Africa.[767]

3.7 ROAD TO DEMOCRACY

3.7.1 TRADITIONAL LEADERSHIP, POLITICS AND VIOLENCE

On 11 February 1990 Nelson Mandela was released from Victor Verster Prison near Cape Town. Pollard correctly stated that the release of Mandela from prison, coupled with the unbanning of the ANC, SACP, PAC and other

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and Bantustan governments, which opposed a united South Africa were against CONTRALESA. These groups included Bophuthatswana, IFP and KwaZulu government.

[766] That is why among many other reasons, in the 1994 first general elections the ANC procured a lot of support from the traditional leaders and their rural communities.

[767] For this reason, it is important to mention that CONTRALESA was the launching pad upon which the traditional leaders challenged the apartheid regime.

subsidiary political organisations intensified and accelerated the black led struggle against *apartheid*. It was during this time that traditional leaders more especially members of CONTRALESA, began to play a crucial and positive role in the mass led struggle.[768] Rural masses were mobilized and sensitised more than ever before in the history of South Africa. According to Pollard, Mandela declared the following when released:[769]

> I stand before you not as a prophet, but as a humble servant of you, the people. Your tireless and heroic sacrifices have made it possible for me to be here today. I therefore place the remaining years of my life in your hands.

The majority population, both urban and rural, had for a long time been longing to replace the *apartheid* system of governance with a more just and equitable social, political and economic order. The first major political challenges facing Mandela and the ANC led broad based movement were to advance a series of domestic demands. These demands included *inter alia* the repeal of discriminatory laws including those, which impacted directly or indirectly on traditional authorities, rural and urban black communities, the establishment of an *Interim Constitution* (IC) and a democratically elected Constituent Assembly (CA) to draft a new *Constitution*. Chief Buthelezi and some of the homeland leaders such as Chief Mangope of Bophuthatswana resisted these demands.[770]

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[768] Pollard 1994 *Africa Today* 70. See also Van Kessel *Beyond our Wildest* 84, where it is stated that despite the political problems, which CONTRALESA encountered at its nascent stage of development, CONTRALESA felt it was important to organise and unite all traditional leaders of South Africa and to urge them to refrain from aligning themselves with the apartheid regime. These problems involved among other things the involvement of SAYCO in the formation of CONTRALESA, which was viewed by some of the traditional leaders with a great deal of suspicion. As Van Kessel noted this suspicion was not unfounded and was based on the argument that SAYCO ultimate goal was to abolish the institution of traditional leadership. SAYCO was of the view that there was no place of traditional leaders in a democratic South Africa, which they were striving for.

[769] Pollard 1994 *Africa Today* 70.

[770] Pollard 1994 *Africa Today* 70. Sibanda 1994 *Africa Today* 83. Sibanda also unravelled other critical issues which according to him stood difficult as hurdles in the way of genuine majority rule, namely the confession by government officials that they gave Buthelezi about $60,000 to divide the MDM. Secondly, *apartheid* laws were "acquisitive laws" and that implied that their application would led to the acquisition by 5 million whites of 87% of the land against the 13% owned by traditional authorities and Bantustan governments in the homelands. However this problem was partly solved in 1991 when the key pieces of

One of the threats to real democratic rule was political violence, which was sparked by sudden emergence of the tribal factor.[771] Followers of the IFP and ANC killed Zulus and Xhosas. Violence, more especially in KwaZulu divided rural communities and traditional leaders along the lines of Pro-ANC and Pro-IFP forces. Rural communities fought each other on the basis of party politics. Traditional leaders who supported ANC were either killed or forced to leave their homes. It was under these political circumstances that the institution of traditional leaders in KwaZulu suffered another serious blow. Traditional leaders who were supposed to be apolitical were made politicians or forced to join politics. However, it must be noted that after 1994 the ANC managed to overcome tribal consciousness to a very large extent.[772]

In July 1990, the ANC and COSATU took a decision to elevate the national regional violence into a national issue. They further decided that stay-aways and marches should be organised to discredit and marginalize the IFP. This move was interpreted by IFP leaders that they would also be sidelined in the future negotiations of South Africa. The Xhosa-Zulu violence in both urban and rural areas of Natal and Pretoria-Witswatersrand-Vereeniging (PWV) drew the Zulu King, Zwelithini, and many traditional leaders into politics. Hostels were labelled "Zulu" and the townships "Xhosa". The ANC participated in the tribal war. Adam and Moodley stated that this tribal war was exacerbated by the political blunders of the ANC strategy to isolate rather than include the IFP in the broad-based anti-*apartheid* alliance.[773]

By way of contrast and comparison, the Xhosa royal house and paramount traditional leaders played a titular role while the Zulu King assumed a higher

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apartheid legislation were repealed, such as *Group Areas Act*, the *Land Act* and *Population Registration Act*. See also 3.5.1 above.

[771] Adam and Moodley 1995 *J of Modern Studies* 500.

[772] Adam and Moodley 1995 *J of Modern Studies* 500. To illustrate this point, the last President-General of the ANC before it was banned was the Nobel Peace Prize winner, Chief Luthuli, a respected Zulu traditional leader and some of the leaders of ANC both in exile and home were Zulus although they were generally unrepresentative members of Zulus.

[773] According to Adam and Moodley 1995 *J of Modern Studies* 500. The former Secretary General of IFP said that: "Chief Buthelezi skilfully utilized ANC blunders to his advantage. He claimed that everyone who demanded the dismantling of the Kwazulu government was challenging not only the Zulu nation, but also the Zulu king".

profile and role as the unifying symbol of all his people who owned allegiance to him regardless of ideology. The mere fact that the Zulu King took side undermined his authority and contributed to tribal disunity and political violence.[774] The participation of Zulu traditional leaders in the political upheaval undermined and eroded their image as traditional leaders. Although the Natal region violence was mainly between the Zulus and Xhosas other traditional leaders, *indunas, sangomas* and warlords claimed that their participation in violence was a legitimate defence of a traditional order.[775]

In an attempt to justify their participation in the political violence, the Zulu traditional leaders who were Pro-IFP pointed out that their cultural hierarchy was in danger.[776] Hamilton pointed out that the idea of Zulu ethnicity was an expression of a primordial identity, which had existed continuously among African people in Natal region since the emergence of the Zulu Kingdom under Shaka in the 1820s.[777]

Zulu culture as such was not in danger but the king and Buthelezi were threatened by the forthcoming new political dispensation. The King strongly felt that his traditional constituency would crumble while Chief Buthelezi feared that his political power in the KwaZulu government would collapse.

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[774] Adam and Moodley 1995 *J of Modern Studies* 500. At that time, the Zulu people had only one King that was Zwelithini, a nephew of Chief Buthelezi and by then a strong supporter of the IFP. King Zwelithini was supposed to be apolitical and acted as a symbol of Zulu unity, but he supported the IFP.

[775] Adam and Moodley 1995 *J of Modern Studies* 501. According to the Truth And Reconciliation Commission (TRC) report, the majority of reports of human rights violations in the region of KwaZulu referred to the conflict between supporters of the IFP and the ANC. Fighting between these two parties developed into open conflict, often amounting to civil war. The Commission received many more accounts of the political violence from the ANC supporters, creating the impression that the violations suffered by the ANC outnumbered those suffered by IFP by five to one. See also De Villiers S *et al* (eds) *Report of Truth and Reconciliation Commission of South Africa* (1998) 427. The use of traditional leaders was an essential part of control in KwaZulu and other homelands. Traditional leaders were granted additional powers, including the key authority over land allocation and communities and pro-ANC traditional leaders were refused access to services. The TRC noted that traditional leaders were sometimes used in recruiting vigilants in rural areas.

[776] Chief Buthelezi also confirmed hostility in tribal terms when he said at a rally at Bakkerdal that: "he wanted to make it clear that ANC attacks were not only attacks against Inkatha. But they were attacks on Zulu people just because they were Zulu".

[777] Hamilton 1993 *Indicator South Africa* 43. It was further argued that ethnic consciousness or tribalism as it was often called in its African context does not persist unchanged over time.

Both resisted changes in the name of Zulu culture and history. Hence, King Zwelithini told traditional leaders in the meeting held in Ulundi that:[778]

> Their ancestors would turn in their graves if they saw the extent to which the elite and their warriors were fleeing before ANC children. The Amakhosi of Kwazulu must now stand firm because any retreat is the first step towards a rout.

According to Anthea, traditional leaders in KwaZulu were given G-3 rifles by the KwaZulu administration. The KwaZulu administration claimed that such rifles were given to traditional leaders for protection. The weapons were only provided to those traditional leaders who were Pro-IFP and fought on the side of IFP.[779] Traditional leaders were pushed into the role of politicians and warlords. The homeland authorities of KwaZulu opened links with vigilante groups and encouraged them to cooperate with pro-IFP traditional leaders.[780]

In October 1993, the Kwazulu Legislative Assembly announced the establishment of an army. They argued that such an army was necessary to

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[778] Adam and Moodley 1995 *J of Modern Studies* 501.

[779] Anthea *Natal Story* 599.

[780] De Villiers *et al* (eds) *Report of Truth and Reconciliation Commission of South Africa* 1998 162-163. Again it became evident that both the King and Chief Buthelezi resorted to a call for cultural revival and pursued search for responses. The tribal wars between the Zulus and the Xhosas produced two categories of Zulu hostel dwellers in Soweto and Durban. There were those who drew pleasure and honour from the war and those who were ashamed of being associated with the tribal wars. The latter gathered steam and pride from the activities of war itself and their involvement in war. Zulus in particular used war to assert their Zulu identity. It should be noted that not all the Zulus in Natal and elsewhere in South Africa supported King and IFP's political mythology of the greatness of the Zulu culture. Some Zulus aligned themselves with the ANC. Although it is evident that this political violence was a power struggle between the ANC and IFP, it is significant as well to note the fact that the so-called "third force" also sponsored political conflicts. This "third force" manifested itself in the behaviour of some of the units of South African police (SAP) who took sides with the IFP supporters in political violence. KwaZulu police (KZP) and South African Police (SAP) were severely criticized for their failure to provide an efficient service to all sections of the community regardless of political affiliation. The IFP refuted these allegations and Buthelezi criticized the Goldstone Commission Report on an attempted purchase of rifles from Eskom by the KZP in March 1994. See also Anthea *Natal Story* 716. On the other hand ANC revealed its true colours in relations to the Shell House (now Luthuli House) issue. According to Anthea, Mandela gave ANC security order to use lethal force in order to protect Shell House from an IFP attack. At least eight IFP supporters were fatally shot. In KwaZulu/Natal former cadres of *Umkhonto we Sizwe* (*Umkhonto*) were harassed, assaulted and attacked by the IFP. Self-defence units remained operative and were strained in paramilitary warfare. So, the 1990 political violence involved the ANC, IFP, the South African government and their alliances. No one could blame another for the violence.

defend Natal communities against violence, which had left at least 10000 people dead in Kwazulu. The announcement was a follow up of an earlier call, which was made by Chief Buthelezi for the establishment of the defence unit in the homeland. It was said that 400 men were to be trained for that defence project. It was also envisaged that the defence unit would each consist of three or four men armed with ordinary or traditional weapons. The IFP supporters including traditional leaders who were on its side, were encouraged to contribute R5 each towards the establishment of self-defence units. These units were to be deployed in the PWV and other Natal areas. In response, the ANC pointed out that the creation of such units by the Kwazulu administration was tantamount to a "declaration of war" and an attempt to enforce secession.[781]

The political violence offered the ANC an opportunity to strengthen its support with other Bantustans such as Transkei, Lebowa, Gazankulu and QwaQwa, which sympathised and sided with the ANC. Buthelezi's cultural nationalism seemed not to reinforce tribal separations. Bophuthatswana refused to be drawn into the ANC alliance, Chief Mangope teamed with Buthelezi and other right wing movements such as AWB.[782]

For the institution of traditional leadership in KwaZulu and Natal Midlands and other homelands, the pre-1994 political violence had far-reaching consequences and implications. Firstly, the political violence in Kwazulu divided traditional leaders and their communities along political lines. The result for this split was into two camps, namely the ANC and IFP. Traditional leaders and their communities fought each other. Members of the same

[781] Cooper *et al Survey of Race Relations* 647. The ANC spokesperson in Natal, Makhanye remarked that: "their patience was not endless. Should they start a war it will be a tooth for a tooth and an eye for an eye". Rifts and political violence in KwaZulu were so serious that the KwaZulu region was referred to as the Lebanon of South Africa. See also in this regard Hamilton 1993 *Indicator South Africa* 43.

[782] Adam and Moodley 1995 *J of Modern Studies* 499. After all, Transkei was the first Bantustan to opt for independence while the alleged tribalist Buthelezi refused to steer a secessionist course. These political groups of the ANC alliance and Buthelezi-Mangope and the Right Wing Afrikaners set the country in the political map of war.

communities attacked each other, determined by individual political affiliation.[783]

The political violence disintegrated the dignity of traditional leaders in Kwazulu. People lost respect for their traditional leaders.[784] Secondly, the political violence greatly abused the Zulu monarchy and made it vulnerable to political attacks from the ANC alliance. Consequently, it suffered a great deal of integrity and respect in the eyes of the South Africans in general. It became difficult to draw a distinction between the Zulu monarchy and the IFP. Thirdly, the political violence engendered positive results for the ANC in respect of party support and mass mobilisation. Many traditional leaders across the country sympathised with the course of the ANC. The IFP entrenched itself in KwaZulu and became unpopular in other Bantustans of South Africa.[785]

3.7.2 POLITICAL MILIEU OF NEGOTIATION

As indicated earlier,[786] the political violence, which occurred in South Africa, especially in Natal region and PWV areas worsened the relation between ANC, IFP and the government. Consequently, churches and business community initiated a Peace Accord. The main aim of the Peace Accord was to set out codes of conduct, procedures and mechanisms intended to cease political violence. It was also agreed at the National Peace Conference (NPC), that the National Peace Committee (NPC) be formed to monitor and ensure compliance with the Code of Conduct for political parties and organisations.[787]

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[783] Those who affiliated in the ANC were likely to assault and kill those who were associated and linked with the IFP.

[784] Adam and Moodley 1995 *J of Modern Studies* 499. The political violence in the rural areas of KwaZulu and Natal Midlands disrupted traditional order and sowed the seeds of lawlessness and disorder. For instance, a situation arose where a subject of a particular traditional leader who was Pro-ANC would undermine the authority of his or her traditional leader who is Pro-IFP. This caused problems of rural administration and eroded traditional order.

[785] Many of the people across the country were of the view that the IFP was solely responsible for the political violence in the country. Consequently, they developed negative attitudes towards the IFP and took their support to ANC.

[786] See 3.7.1 above.

[787] Carpenter 1994 *SAPR/PL* 223. About 36 parties and organisations excluding the Conservative Party (CP), PAC and other Right Wing Organisations met at the National Peace Conference (NPC), Carlton Centre Hotel in Johannesburg and signed a Peace Accord.

According to Carpenter, the Peace Accord laid a foundation for the creation of a political climate conducive for the initiation of the formal negotiation process. It is important to note that CONTRALESA and even the Zulu King were not invited to participate in the proceedings of the Peace Accord. Since traditional leaders particularly in KwaZulu were implicated in political violence, one would expect them or King Zwelithini to make inputs on issues pertaining to violence in Kwazulu. However, it seemed the organisers of the NPC were content with the participation of only political leaders.[788]

After preparatory talks, delegates from twenty groups agreed upon the creation of Steering Committee (SC). The SC had a function of planning the Convention for a Democratic South Africa (CODESA). About 19 political parties, organisations and governments of South Africa and homelands participated in the deliberations of CODESA. The parties and movements from both the extreme right and left boycotted the proceedings of CODESA.[789] Unlike the 1908-1909 National Convention referred to above,[790] CODESA was a multiracial forum. It did not discriminate against delegates on the basis of colour or race.

The fundamental principles and aims of CODESA were enshrined in a Declaration of Intent (DI), which was signed by all the participating parties. Both IFP and the defunct government of Bophuthatswana refused an offer to sign the DI.[791] Initially, the Ciskei government under the leadership of Gqozo declined to append its signature but later reconsidered its position and signed the DI. The participating parties negotiated the agreements reached in CODESA 1. Traditional leaders were not invited to participate in the

[788] Carpenter 1994 *SAPR/PL* 223.
[789] Carpenter 1994 *SAPR/PL* 223.
[790] See 3.4.1 above.
[791] Cooper *et al Survey for Race Relations* 632-633. Chief Mangope elaborated that CODESA wanted them to blindly buy into a situation where the boundaries and power or regional states and the 1993 *Constitution* will be decided after the elections. He argued that the new political settlement would mean that those in the majority after elections would have the power to influence critical decision to suit themselves. Mangope argued that: "the South African government and the ANC and its alliance partners in particular SACP and COSATU wanted Bophuthatswana to give up independence and everything it had sacrificed over the past 15 years in exchange for something they could not even defined".

deliberations of 1991 CODESA 1 and were therefore not offered an opportunity to represent the aspirations and interests of their rural constituencies. Traditional leaders were therefore sidelined in the discussions.[792]

In 1992, the proceedings and gains of CODESA 1 were disrupted. The spiral of violence reached momentum and continued to claim lives. As Anthea noted the ANC withdrew from the negotiations of CODESA 1 because of the rising levels of violence in the black townships.[793] With the collapse of the proceedings of CODESA 1, the ANC and the South African government engaged on bilateral negotiations, sidelining the IFP. In February 1993, the KwaZulu Legislative Assembly passed a resolution warning that South Africa would be plunged into civil war if the South African government and the ANC continued to direct the negotiation process through bilateral talks between them.[794] The Kwazulu Legislative Assembly further threatened to ignore any agreements reached in negotiations forum in which IFP had not participated.[795]

In an attempt to appease the KwaZulu administration, the South African government transfer about 500 000ha of land from Natal to Kwazulu, in August 1993. The bulk of the land was given to the KwaZulu Finance and

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[792] Carpenter 1994 *SAPR/PL* 223-224. However, CODESA had no power to make law of any kind or implement them.

[793] Anthea *Natal Story* 269. Addressing the Security Council of the United Nations (UNSC) on 15 July 1992 Mandela said that: "the negotiations process had been brought to a halt by the carnage in the black townships. It was more than clear to them that violence was both organised and orchestrated. He further stated that Boipatong massacre had forced the ANC to withdraw from CODESA 1 and the blame for this lay squarely at the door of the regime". According to Anthea, Mandela implored the UNSC to appoint a special representative on South Africa to investigate the causes of violence and help South Africa to transform the country into a non-racial democracy. Subsequently the Security Council supported the ANC demand that a UN Special representative be appointed to investigate violence in South Africa. The Security Council (SC) also supported the government's call on the ANC to resume negotiations.

[794] Cooper *et al Survey of Race Relations* 638. According to Cooper *et al*, the IFP resolved that they reaffirmed their conviction that the bilateralism pushed by the Minister of Constitutional Development, Meyer, with the ANC was enormously dangerous for South Africa.

[795] Cooper *et al Survey of Race Relations* 638. The Commander of King Zwelithini said that: "the regime was ready for war and he was awaiting a signal from the King and Chief Buthelezi. The ANC and government should know that if they refused their demands at negotiation table, they would cross the bridge".

Development Corporation while other pieces were given to tribes and traditional authorities.[796] According to Cooper *et al*, this agreement between the South African government and the KwaZulu administration appeared to be a compromise on KwaZulu's original demands for land.[797]

The ANC objected the unilateral transfer of land at the time when it was important to reintegrate the homelands into South Africa. However, political progress was made when the second plenary session of CODESA took place on the 15 and 16 May 1992. It was in CODESA 2 where the participating parties and working groups reached an agreement on fundamental issues on the basic principles of democratic state including a supreme *Constitution* with a judicially enforceable Bill of Rights entrenching universally recognised human rights, freedom and civil liberties such as freedom of religion, speech, assembly and equality.[798]

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[796] See *KwaZulu-Natal Ingonyama Trust Act* 3 of 1994. The Act creates Ingonyama Trust to hold the land formally vested in the name of government of KwaZulu for and on behalf of the members of clans and communities residing on such land as contemplated in the *KwaZulu Amakhosi and Iziphakanyiswa Act* 9 of 1990. Section 2(1) of Act 3 of 1994 makes the Ingonyama (a King) a trustee of the Trust. It also provides for traditional authorities to grant consent for the use and development of such land. Furthermore, the Act transferred 93% of the land in KwaZulu to a Trust. The land transferred to the Trust was not only limited to all urban townships in KwaZulu, all government buildings, roads, public spaces and commercial sites but it also included nature reserves. The Act has led to many problems. It obstructed development in the area. Banks and Building Societies would not provide loans to holders of land in the area because bonds could not be registered over the land. People living in these areas could not obtain the national building housing subsidy because they did not own their land. The Act further prevented commercial and industrial development in the area, with serious consequences for the unemployment problems. The *KwaZulu-Natal Ingonyama Trust Amendment Act* 9 of 1997 addressed these problems. This Act repealed the Ingonyama's power to delegate and subject the Ingonyama Trust Land to the national land programmes. The Act further recognises the role of the Ingonyama in relation to tribal land but limits his role to that land. See also the *Communal Land Rights Act* 11 of 2004, which also has an impact on the Ingonyama Trust Land. Section 31 of Act 11 of 2004 governs the communal land which the *KwaZulu-Natal Ingonyama Trust Act* 3 1994 applies. Section 32 of Act 11 of 2004 changes the KwaZulu-Natal Ingonyama Trust Board into Ingonyama Land Rights Board for KwaZulu-Natal.

[797] Cooper *et al Survey of Race Relations* 639.

[798] Carpenter 1994 *SAPR/PL* 224. See also *South Africa Debates of the Constitutional Assembly* 134. Both CODESA and Kempton Park deliberations laid a strong foundation for the South African democracy and inventually the production of 1993 Constitution, which contained Bill of Rights. Fourie National Party MP stated that: "CODESA and World Trade Centre were not a dream. I hope it was not a nightmare either. (These institutions) negotiated Constitution that brought us to (democracy) after the first non-racial, democratic elections".

It should be born in mind that similar to CODESA 1, traditional leaders were not accorded an opportunity to participate in deliberations during the plenary sessions of CODESA 2. The debate on customary law issues in CONTRALESA meetings and gender groups created a political forum for traditional leaders to intervene and participate in the proceedings of Kempton Park negotiations. As a result, in 1993, when the Multi-Party Negotiating Process[799] (MPNP) took place at the World Trade Centre, traditional leaders were represented. This representation was a result of bargains struck between NP and ANC. Traditional leaders were promised that their traditional positions would be sustained, protected and maintained in the future constitutional order.[800]

Bennett explained that it became clear at the Kempton Park negotiations that if traditional leaders were to keep their role in government, a political bargain was not enough. The African patriarchal tradition, in particular the system of male primogeniture had to be challenged in negotiation. Traditional leaders argued for the protection of the system of patrilineal succession against the

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[799] Vorster *South African Constitution* 141. The MPNP took place at the World Trade Centre, Kempton Park. Although it was not formerly recognised as the successor of CODESA, the reports of the latter were accepted as sources of reference. MPNP was made up of the Negotiating Forum, the Negotiating Council and a Planning Committee with the Plenary on top. The Negotiating Forum met in July 1993 and declared that 27 April 1994 will be the date of the first inclucive election.

[800] Bennett *Human Rights* 21. The President of CONTRALESA, Holomisa met De Klerk in January 1993 to discuss inter alia the future of traditional leaders in South Africa. Few weeks after the meeting, CONTRALESA announced its readiness and willingness to participate in the multiparty conference. The new participants also included the KwaZulu administration, representing the Zulu King, Inkatha and other traditional leaders from Eastern Cape, the former OFS and parts of TVL. See also TARG *Development Management* 92, where the Research team of TARG found that even before the formulation of the relevant provisions in the Interim *Constitution* many submissions by the traditional leaders through their representatives were in support of the idea that the institution, status and role of traditional leaders according to indigenous law must be recognised and protected in the Interim *Constitution*. However, the ANC position was that it was sensitive to view expressed by some of the traditional leaders that they do not wish to be relegated to an advisory role at all levels of government. According to the ANC, careful and thorough consideration was to be given to the representation of the traditional leaders at all levels of government, powers and functions of the traditional leaders at all levels, the role of the traditional leaders in a new South Africa and the binding principles of democratic and accountable government to all levels subject to the fundamental rights contained in the *Constitution*.

onslaught of a gender clause, which was a highlight of the future *Constitution*.[801]

Women involved in the MPNP objected the notion of a patriarchal system. These women contended that the recognition of traditional leadership needed to take account of the fact that traditional authorities were not democratic in their formation more so they were highly patriarchal and historically underpinned the subordination and oppression of women. They argued that any recognition of traditional structures had to be limited by the democratic principles of full equality and particularly the principles of gender equality.[802]

Traditional leaders did not emerge victorious because the proposed constitutional order, which culminated into the 1993 *Constitution*,[803] entrenched equality between men and women in all spheres of life.[804] Chapter 11 of the 1993 *Constitution*[805] endorsed traditional leaders' existing powers under customary law[806] in the *Interim Constitution.*[807] However, as the election for April 1994 came closer, the IFP refused to take part in the election. The

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[801] Bennett *Human Rights* 21. Bennett cited Chief Nonkonyana saying that his daughter could successfully challenge his son for traditional leadership because the Bill of Rights abhored all forms of discrimination. CONTRALESA argued that women's subordinate role in society did not cause any dissatisfaction among them and as a result women displayed their satisfaction by merely accepting their status and position in society. Traditional leaders invoked this benign patriarchy model of pre-colonial times to oppose the proposed gender equality principles in the *Constitution*. The traditional leaders opposed the principles of gender equality at the negotiation forum. They stated that they were not prepared to give up and sacrifice their Africanism. According to them, the whole impact of equality had an impact on the *lobola* custom and traditional leadership.

[802] These women were pooled from different political parties, government institutions, NGOs and interested groups such as academics and human rights lawyers. The majority of women elaborated that democracy presupposed the principle of representation through the ballot box by voters who were citizens. Any non-elective and non-democratic institution that wielded authoritative and allocative power would threaten the principle of democracy. Thus the powers and role of traditional leadership in a democratic South Africa would have to be subjected to the principles, values and rules of democratic governance. Non-sexism and gender equality in all aspects of governance were fundamental to the process of negotiations in particular the rights of women within traditional communities should be protected and extended to at least equal those enjoyed by men.

[803] Act 200 of 1993. The negotiations at Kempton Park produced an interim *Constitution*. This *Constitution* was a compromise document between the ANC and NP. It was drafted under pressure that is why there was a need to draft a final *Constitution* with all the necessary constitutional details.

[804] See 4.3.1 and 4.4.5 below.

[805] Chapter 11 gave recognition to the powers, status, roles, and functions of traditional leaders.

[806] Bennett *Human Rights* 22.

[807] See 3.1.3 above and 4.3.1 and 4.3 below.

government deployed the South African Defence Force (SADF) to Kwazulu and Natal in order to prevent violence. Subsequently the elections were held as scheduled.[808]

The *Constitution* encapsulated constitutionally protected fundamental rights, judicial review, reconstruction and development, national unity and reconciliation.[809] South Africa's transition from the *apartheid* regime to a democratic state was a democratic process. The role of traditional leaders in MPNP should also be commended.[810]

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[808] Anthea *Natal Story* 269. Chief Buthelezi argued that there was no sufficient consensus on the issue of elections. According to Anthea, Chief Buthelezi also hinted the possibility of bloodshed in KwaZulu. His obvious strategy was to cause so much to be postponed. Transitional Executive Council (TEC) and the government of South Africa thwarted this strategy. The elections were won by the ANC with 62% while the NP secured 20% votes. Mandela became the first President of the democratically elected government by all people. He formed the Government of National Unity (GNU) with De Klerk and Mbeki as his Deputy Presidents. This political setting gave rise to the new legal order in South Africa. The interim *Constitution* of 1993 came into operation on the 27 April 1994.

[809] Van der Walt 1995 *SAJHR* 171.

[810] From the author's point of view the reason why traditional leaders should be commended is simply because they shaped and navigated the path of the constitutional making-process through their imputs and contributions regarding customary law and traditional leadership. Even though they did not win the entire battle it is worth noting that they made an impact with regard to developments leading to the drafting of the Interim *Constitution.*

CHAPTER 4: POST APARTHEID SOUTH AFRICA

4.1 INTRODUCTION

The primary objective of this part of discussion is to explore the conflicting arguments regarding the roles, functions and responsibilities, which the traditional leaders are expected to play under the new constitutional and democratic settlement. The post 1994 democratic government established democratic institutions in all spheres of government. As a consequence, the democratisation of traditional leadership and traditional institutions was both politically and constitutionally inevitable. This discussion is also intended to explain the new functions and status of traditional leaders within the new constitutional framework. Efforts will also be made to expound post-*apartheid* legislation, which impact directly or indirectly on the institution of traditional leaders in the new South Africa. This legislation affects the roles, functions and powers of traditional leaders in respect of communal land, their relationship with three spheres of government, namely local, provincial and national government.

4.2 CONFLICTING ARGUMENTS

One of the major political burning issues, which the post *apartheid* South Africa had to address, was what to do with the institution of traditional leaders under the new democratic dispensation. This institution was seen by its critics as inherently undemocratic since its role players, especially traditional leaders were not elected. The institution seemed to militate against the notion that an electoral system was a prerequisite for democracy.[811] Again, the institution of traditional leaders was viewed as a patriarchal organisation that had no place in an open and democratic South Africa founded on human dignity, the

[811] De Koker 1998 *THRHR* 99. The striking feature of democracy requires regular election for those who are in the public office and temporary tenure.

achievement of equality and the advancement of human rights and freedoms.[812]

Ntsebeza argued that it is only possible to have an institution of traditional leaders that is democratic once rural people are involved in decision-making processes. On the other hand, there is a valid reason to believe that since traditional leadership is anchored on hereditary rule the institution would still be undemocratic. Rural masses would still be denied an opportunity to choose their own institution and individuals to rule them. It is argued that the traditional framework makes some inroads into the values and ethos of democracy.[813] Williams simplified the problem as follows: [814]

> Because we all voted that is why we call ourselves ... democracy. We are unified and we have equal rights. We do have democracy here. The only problem is that we still do not understand it ... there is no democracy with Chiefs and izinduna ... they must be taught what is democracy.

Government's intention was to create a type of institution of traditional leaders that would be more representative and accountable to communities. Maloka quoted a civic leader from a village in Gazankulu saying:[815] "In the new South Africa, Chiefs will melt away like ice in the sun."

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[812] Patriarchal institution of traditional leadership was sufficiently inconsistent with the fundamental values of the 1996 *Constitution of South Africa*, which emphasizes the values of equality, human dignity and freedom in order to ensure the period of unequal worth of individuals and groups. See also *Ex Parte Chairperson of the Constitutional Assembly: In the Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), where the court declared that after a long history of deep conflict between a minority which reserved for itself all control over the political instruments of the state, majority was sought to resist that determination. The overwhelming majority of South Africans across the political divide realised that the country had to be urgently rescued from imminent disaster by a negotiated commitment to a fundmantally new constitutional order premised upon open and democratic government and the universal enjoyment of fundamental human rights.

[813] Ntsebeza 2003 *Transformation* 74.

[814] Williams 2004 *J of Modern African Studies* 113–114.

[815] Maloka 1996 *J of Contemporary African Studies* 173.

November and Wessels pointed out that negative attitudes towards the institution of traditional leaders were based on a number of combined factors. They argued that some of those factors were attributed to the ongoing western modernisation of rural life that reduced the power and integrity of traditional leaders. Some young people especially those who had contact with western education were detached not only from the institution of traditional leadership but also from their parents and ancestral culture.[816]

As already pointed out in earlier discussion,[817] the institution of traditional leaders suffered a great deal of respect and dignity during the colonial and *apartheid* era due to its oppressive authoritarian and corrupt nature. Chief Holomisa confirmed the flaws of the institution when he said:[818]

> We have admitted we made mistakes in the past, that deep in our hearts we never intended to act against the interests of our people. We are, after all, not the only ones who were used by *apartheid*. There was really no choice. Life had to go on. We should not be singled out.

The institution of traditional leaders in South Africa was a feature of national, provincial and local politics. Despite the role the institution played during the colonial and *apartheid* era, the institution continued to enjoy support from local and rural communities. Traditional leadership was regarded as legitimate and provided a voice for the rural masses, the most underprivileged and disadvantaged section of society.[819] According to Williams, those communities

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[816] November and Wessels 2002 *J of Contemporary History* 149.

[817] See 3.1, 3.2, 3.3, 3.4 and 3.5 above.

[818] Maloka 1996 *J of Contemporary African Studies* 173.

[819] TARG 1999 *Koers* 297. According to TARG, the following observations were made during fieldwork undertaken in North West, Limpopo and KwaZulu-Natal Provinces. The research team found that traditional leaders were still recognised and respected by the different traditional communities interviewed. According to TARG the communities interviewed stated that the idea of abolishment of the institution of traditional authorities would lead to chaos. They argued that traditional leaders had a definite role to play in traditional communities because they were the embodiment of law and order, the upholders of values and providers for the needs of the communities. It was also observed that the communities regarded traditional leaders as the institutional form of government closest to the people. It is apparent from these observations that traditional leaders have a definite role to play in the formulation of policy, decision-making, planning or the implementation of policy by local government structures. The court confirmed the positive role of traditional leaders in rural

living under this institution expected it to co-exist with newly established democratic institutions.[820] Traditional leaders were viewed by those who supported them as men of great importance in their communities:[821]

> They are the executive leaders of their people and are perceived as symbols of tribal unity and guardians of the community's customs and culture. They perform several judicial and governmental functions such as presiding over customary tribunals, allocating land, settling land disputes, levying taxes and regulating law and order. Their shortcomings, notwithstanding, traditional authorities are often more in touch with the needs and sentiments of their people than central government.

Despite the attitude of the rural communities, traditional leaders were still marginalized by government, non-governmental organisations (NGOs), academics and other sections of civil society.[822] The political debate on the role of traditional leaders in the new South Africa divided the anti-*apartheid* forces more especially the African National Congress (ANC) in particular. There were those who if given a chance would probably have voted for the abolition of the institution. Others, including former President Mandela upheld the veneration for traditional leaders. President Mandela commented on the conflict line between the civic associations and traditional leaders as follows:[823]

> How can civics ... and traditional leaders fail to work peacefully when ...(they) have the same cultural background. There is too much which unites ... (them).

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areas when it pointed out in *Tshivhase Royal Council and Another v Tshivhase and Another* 1990 (3) SA 828 (V) that the tribal government remained strong and active especially in the sphere of local and traditional politics. The court further declared that the system of traditional government served as a local government understood by the people with its roots deep in history.

[820] Williams 2004 *J of Modern African Studies* 115.

[821] Pieterse 1999 *SAJHR* 180.

[822] TARG 1999 *Koers* 295.

[823] As quoted by Maloka 1996 *J of Contemporary African Studies* 173. See also TARG *Project Background* 1, where TARG team established that the fact that the former President Mandela concerned himself with the future of traditional authorities and tried to defuse tensions between the democratic structures such as Civic Association and traditional leaders is an indication of the relevance and the importance of traditional leadership in a new South Africa.

The post-*apartheid* government had been confronted by the challenge to adapt the institution of traditional leadership to democracy. The government organised workshops and conferences throughout the country in an attempt to sort out and identify all problems inherent in the institution. The government also initiated the writing of *White Paper on Traditional Leadership* to determine how the institution could be adapted to the Bill of Rights in the *Constitution*.[824]

Traditional leaders lobbied for more powers in the new constitutional state. Since the early 1990s they lobbied to control development projects, to have more access to local government funds, for more representation in local government structures and to have a role in the law-making processes at provincial and national level.[825] These demands sometimes caused a rift between government and traditional leaders. At local government level conflict arose between councillors and traditional leaders. In view of the role of traditional leaders, President Mbeki stated in 2000 that if the government had to give a clear expression of the role of traditional leaders it had to do so in the context of a democratic society.[826]

Traditional leaders gradually acknowledged the fact that times had changed and democracy was a significant component and norm of civilized nation. According to Rugege, this sentiment was included in a memorandum to President Mbeki dated 16 May 2000, proposing *inter alia* that: [827]

> Members of the community falling within the area of jurisdiction of the traditional authority should democratically elect representatives to sit on the authority together with traditional leaders who will be automatic members. The elected members of the authority should be the majority.

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[824] Williams 2004 *J of Modern African Studies* 117. See also 4.4.1 below.
[825] Williams 2004 *J of Modern African Studies* 117.
[826] Tambo 2001 *Umrabulo* 59. President Thabo Mbeki was inaugurated for the first time as the President of South Africa on June 16, 1999. From 1994 to 1999 Mbeki served as a Deputy President of the South African Government of National Unity.
[827] As quoted by Rugege *Institutions of Traditional Leadership* 12.

4.3 CONSTITUTIONAL PROVISIONS

4.3.1 1993 CONSTITUTIONAL SETTLEMENT

In 1994 South Africa entered a new constitutional dispensation based on democracy, equality, fundamental rights,[828] the promotion of national unity and reconciliation. The new constitutional dispension culminated in the Interim *Constitution*.[829] Traditional leaders became alert and soon began to realize that their status, powers and authority might disintegrate in the new system. Inkatha Freedom Party (IFP) and CONTRALESA negotiated for the recognition and protection of the institution of traditional leaders and indigenous law.[830]

The efforts and determination of the IFP and CONTRALESA resulted in agreements, which were included in Chapter 11 of the Interim Constitution,[831] which provided for the recognition of all existing traditional leaders and customary law.[832] These constitutional provisions were as follows:[833]

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[828] See *Prince v President, Cape Law Society* 2001 (2) SA 388 (CC), where the court stressed that the fundamental rights in the Bill of Rights are the hallmarks of the free society. The court did, however, pointed out that these rights including the right to freedom of religion are not absolute.

[829] TARG 1999 *Koers* 295. The Interim *Constitution* was the supreme law of the Republic of South Africa. It was a rigid type of a *Constitution*, which differed fundamentally from an ordinary piece of legislation. There was a procedure, which was prescribed for amendments to the Interim *Constitution*. See in this regard *Premier, KwaZulu-Natal and Others v President of the Republic of South Africa and Others* 1996 (1) SA 769 (CC), where the Constitutional Court declared that there was a procedure which was prescribed for amendments to the *Constitution* and this procedure had to be followed. If that was properly done, the amendment was unassailable. The court further stated that the radical and fundamental structuring and re-organising of the fundamental premises of the *Constitution* might not qualify as amendment at all.

[830] Pieterse 1999 *SAJHR* 180.

[831] See 3.7.2 above.

[832] Although Chapter 11 recognised and protected the institution, status and role of traditional leadership according to customary law, the recognition of customary law and traditional leadership was subject to the supremacy of the *Constitution* and the Chapter on Fundamental Rights and the compulsory application of common and statutory law.

[833] Section 181 of 1993 *Constitution*. In *ANC v Minister of Local Government and Housing, KwaZulu-Natal* 1998 (3) SA 1 (CC), the Constitutional Court stated that section 181 of the Interim *Constitution* was an important constitutional entitlement for traditional leaders whose customary authority and role were being affected by the transition to democracy. The court went on to say that this constitiutional arrangement ensured that traditional leaders were entitled to representation on a Council without having to stand for election.

(1) A traditional authority which observes a system of indigenous law and is recognised by law immediately before the commencement of this *Constitution*, shall continue as such an authority and continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority.

(2) Indigenous law shall be subject to regulation by law.

The *Interim Constitution* further provided a function for traditional leadership at the local level of government.[834] It also provided for a National Council of Traditional Leaders at national level and a Provincial House of Traditional Leaders at provincial level.[835] The six Provincial Houses of the traditional leaders were established in terms of the legislation enacted by the provincial legislatures concerned.[836] These constitutional provisions were once again a victory for traditional leaders in the new democratic South Africa.[837]

Traditional leaders negotiated for the type of *Constitution* that would respect and uphold their aspirations and powers. CONTRALESA commented:[838]

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[834] Section 182 of Interim *Constitution*.

[835] Section 184(1) of Interim *Constitution*.

[836] See Olivier *Traditional Leadership and Institutions* 72. Provisional Houses of Traditional Leaders were established in North West, KwaZulu-Natal, Mpumalanga, the Free State, Eastern Cape and Limpopo. See in this regard *House of Traditional Leaders for the Province of the North West Act* 12 of 1994, *KwaZulu-Natal Act on the House of Traditional Leaders Act* 7 of 1994, *Mpumalanga House of Traditional Leaders Act* 4 of 1994 as amended in 1998, *Free State House of Traditional Leaders Act* 6 of 1994, *Northern Province House of Traditional Leaders Act* 6 of 1994 and *Eastern Cape House of Traditional Leaders Act* 1 of 1996. This provincial legislation is more or less similar in content. They determine the powers, functions and duties of their respective Houses. They also give provinces powers to advise on and make recommendations on any draft Bill in respect of the status, powers and functions of traditional authorities, the affairs of traditional communities, traditional and customary law. At the time of writing this thesis some parts of North West Province, which consisted of areas of Traditional Authorities were incorporated into Northern Cape Province. Northern Cape Provincial Legislature was expected to pass legislation for the establishment of House of Traditional leaders in that Province.

[837] Section 183(1) of Interim *Constitution*. This section was mandatory and therefore six Provincial Houses of Traditional Leaders were established. According to Olivier constitutional Principles XIII, which provided for the recognition and protection of traditional leadership was of paramount importance. The Interim *Constitution* gave effect to the protection of institutions of the traditional leadership.

[838] Maloka 1996 *J of Contemporary African Studies* 185.

> The democratic dispensation developed in South Africa should be developed in a manner, which reflects the values of the whole community it serves. The *Constitution* should therefore be a mirror of the soul of the nation - it must include all the aspirations, beliefs and values. The institutions and role of traditional leaders, which have been in existence as longer than - a liberal democracy in the West, have to be treated with respect and accordingly be integrated within the structures of national, provincial and local government.

4.3.2 NATIONAL COUNCIL OF TRADITIONAL LEADERS

The *Council of Traditional Leaders Act*[839] was promulgated to give effect to section 184(1), which set constitutional proposition for the establishment of the National Council of Traditional Leaders. The Act determined the composition, powers and functions of the Council.[840] It also envisaged a Council with an elected Chairperson and 19 elected representatives.[841] Initially the *Council of Traditional Leaders Act* was enacted but did not come into operation. As a result the Council was not elected because Provincial Houses of Traditional Leaders were also not established.[842]

The Council of Traditional Leaders Amendment Act[843] later amended the *Council of Traditional Leaders Act*[844] in 1998 replacing Council of Traditional

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[839] Act 10 of 1997. Section 7 of Act of 1997 dealt with the objects and functions of National Council of Traditional Leaders. These functions included inter alia: (a) To promote the role of traditional leadership within a democratic constitutional dispensation. (b) To enhance unity and understanding among traditional leaders. (c) To enhance co-operation between Council and the various Houses. (d) To advice government on matters relating to traditional leadership, role of traditional leaders, customary law and customs of communities observing a system of customary law. The Act also generally deals with matters relating to nomination of members of Council, duration and dissolution of Council, qualifications and period of office of members of Council, vacation of office and filling of vacancies meeting of Council etc.

[840] Section 7 of Act 10 of 1997.

[841] Section 9 of Act 10 of 1997.

[842] Pieterse 1999 *SAJHR* 180.

[843] Act 85 of 1998. The Act provides inter alia for the removal from office of the Chairperson and Deputy Chairperson of National House by way of a resolution supported by a majority of the members.

[844] Act 10 of 1997.

Leaders by the National House of Traditional Leaders.[845] The *National House of Traditional Leaders Act* prevented elected officials from serving in the National House of Traditional Leaders of South Africa. This restriction applied only to the National House and not to the various provincial houses.[846]

4.3.3 NATIONAL HOUSE OF TRADITIONAL LEADERS

The Council of Traditional Leaders Act later National House of Traditional Leaders Act[847] was enacted in 1997 and culminated in the establishment of the National House of Traditional Leaders. Each Provincial House of Traditional Leaders was required to nominate three members to represent it in the National House.[848] It consists of 18 members. These members are not to be members of national parliament or provincial legislatures.[849] These members represent their Provincial Houses in the National House. Thereafter, the National House elects its office bearers.[850] Members of the House render their services on part time basis. However it is important to note that the Chairperson and Deputy Chairperson are full time members. The life span of the House is five years as its life span is linked to the life cycle of the Provincial Houses.[851] The main challenge in respect of the composition of the National House is to provide a House, which is representative because the current Houses are male dominated institution.[852]

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[845] In terms of section 4(a) of *Council of Traditional Leaders Amendment Act* 85 of 1998, the word "Council" whenever it occurs except in section 15, is substituted by the words "National House". In terms of section 4(b) of Act 85 of 1998 the word House or Houses whenever it occurs except in section 1 are substituted by the words Provincial Houses respectively.

[846] This restriction was in force at the time of writing this thesis in 2006. According to this restriction, traditional leaders who have been elected to take part in the National Assembly, Provincial Legislatures and Municipal Councils could not serve in the National House of Traditional Leaders.

[847] Act 10 of 1997. Section 2 of Act 10 of 1997 provides for the establishment of the Council to be known as National House of Traditional Leaders.

[848] Section 4 of Act 10 of 1997.

[849] Section 6 of Act 10 of 1997.

[850] Du Plessis and Scheepers 1999 *Seminar Report* 74.

[851] *White Paper on Traditional Leadership and Governance* (2003).

[852] Interview with Chief Masibi of Batlharo Traditional Authority (Disaneng village Mafikeng 29 November 2005). Chief Masibi confirmed in an interview that men in all leadership positions dominate the National House of Traditional Leaders and Provincial Houses of Traditional Leaders. He further stated that the reason for this male dominated arrangement is attributed to the history of the institution, which has been deeply partriachal for many years.

The National House of Traditional Leaders functions in an advisory and consultative capacity. The National House is *inter alia*, responsible to: [853]

- Advise the national government on the role of traditional leaders and customary law.
- Deal with legislation pertaining to custom and customary law.
- Monitor the functioning of the Provincial Houses of Traditional Leaders.
- Advise the government on issues pertaining to remuneration and privileges of Traditional Leaders.

4.3.4 PROVINCIAL HOUSES OF TRADITIONAL LEADERS

The Interim *Constitution* made a provision for the establishment of Provincial Houses of Traditional Leaders.[854] It recognised the Zulu King as the Provincial King in KwaZulu-Natal. This constitutional recognition afforded to the King was a victory for the IFP, which pressed for the recognition of the Zulu monarch during the negotiations.[855] South Africa has nine provinces and six of these provinces have traditional leaders namely, Limpopo, North West, Eastern Cape, Mpumalanga, KwaZulu-Natal and the Free State. These Houses differ in size ranging from 84 in KwaZulu-Natal to 15 in the Free State.[856]

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[853] See also Section 7 of Act 10 of 1997.
[854] See 4.3.1 above.
[855] See generally the Interim *Constitution*.
[856] Maloka 1996 *J of Contemporary African Studies* 187. The provincial legislatures of the said provinces have promulgated legislation dealing with traditional leadership and governance. All these legislation are based on the *Traditional Leadership and Governance Framework Act* 41 of 2003. The content of this provincial legislation is more or less the same. Differences exist with regard to names of traditional leaders. For example, the KwaZulu-Natal legislation refers to a traditional leader as Inkosi and Isilo (in case of the King) of the Province of KwaZulu-Natal while the North West legislation refers to a traditional leader as Kgosi. Different names are also used in these provincial legislation to refer to a traditional leader namely, Ingwenyama, Indlovukati, Libambela etc. This legislation deals inter alia with the following matters: the recognition and appointment of traditional leaders, traditional councils and communities, roles and functions of traditional leaders, dispute resolution, code of conduct, co-operative governance, capacity development, trans-provincial issues etc. See in this regard *North West Traditional Leadership and Governance Act* 5 of 2005, *Free State Traditional Leadership and Governance Act* 8 of 2005, *Limpopo Traditional Leadership and Institutions Act* 6 of 2005, *Mpumalanga Traditional Leadership and Governance Act* 3 of 2005, *KwaZulu-Natal Traditional Leadership and Governance Act* 5 of 2005 and *Traditional Leadership and Governance (Eastern Cape) Act* of 4 of 2005.

According to Du Plessis and Scheepers, the functions of the Provincial House of Traditional Leaders as described and provided for in different statutes slightly differed.[857] However a *White Paper on Traditional Leadership and Governance* outlines a uniform approach concerning a number of responsibilities and roles of Provincial Houses of Traditional Leaders. The Provincial Houses are required to:[858]

- Ensure that traditional leaders are properly elected to represent their communities in Provincial Houses and National House of Traditional Leaders;
- Ensure that there are skills development programmes for traditional leaders;
- 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 the principles of co-operative governance are promoted.

Du Plessis and Scheepers indicated the following problems experienced by the Provincial Houses:[859]

- Lack of infrastructure and resources;
- Poor administration due to lack of professional staff and funds;
- Poor co-ordination and communication between different Houses of Traditional Leaders;
- Lack of uniformity and consistency in as far as the Provincial Houses carried out their activities and affairs;

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[857] Du Plessis and Scheepers 1999 *Seminar Report* 75. TARG *Development Management* 146-150. According to TARG, almost all traditional leaders interviewed in the North West and Limpopo stated that there were ignored by the government. These traditional leaders also argued that they were not trained and empowered to become able to participate in the new dispensation and they did not received some type of training given to other government officials. It is also contended that traditional leaders must be given adequate training to enable them to play a specific role in the development and management process of local government.

[858] *White Paper on Traditional Leadership and Governance* (2003) 58-59.

[859] Du Plessis and Scheepers 1999 *Seminar Report* 75.

- The composition of the Houses is not representative of all the regions in a particular province;
- Succession disputes have a bearing on the composition of the Provincial Houses;
- Need for empowerment and training of the members of the House;
- Reluctance on the part of the provincial government and legislatures to pay heed to suggestions or comments of the Provincial Houses; and
- Inability to force Provincial Legislature to take comments or suggestions into account.

According to Maloka if the case of the Northern Griqua traditional leaders was upheld and the incorporation process of some of the traditional authorities' areas from the North-West Province into Northern Province is finalised, only Gauteng and Western Cape would be without traditional leaders.[860] The Northern Cape Griqua traditional leaders negotiated with the government and in particular the Department of Provincial and Local Government for their recognition. It seemed the government was not prepared to encourage multiplication and proliferation of traditional leaders in the new South Africa. To this end, the government has taken steps to limit the number of traditional leaders.[861] The National Griqua Forum was established in Upington to represent the Griquas, the Khoi, San community, Nama, and Koranna. The main aim of the forum was to promote culture, language, heritage and traditional leadership of these groups.[862]

4.3.5 1996 CONSTITUTIONAL ARRANGEMENT

The *1996 Constitution*[863] recognises the institution of traditional leadership.[864] This recognition is contained in section 211(1), (2) and (3) of the *Constitution*:[865]

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[860] Maloka 1996 *J of Contemporary African Studies* 187. The incorporation of some of the traditional authorities areas into Northern Cape makes the Northern Cape the seventh Province with traditional leaders in South Africa.

[861] Maloka 1996 *J of Contemporary African Studies* 186.

[862] Burger and Feris *Traditional Leadership* 68.

[863] *South Africa Debates of the Constitutional Assembly* 93-95. The 1996 *Constitution* was drafted by the Constitutional Assembly (CA). The Constitutional Assembly was charged

> The institution, status and role of traditional leadership according to customary law, are recognised, subject to the *Constitution*. A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs that include amendments to or repeal of, that legislation or those customs. The courts must apply customary law when that law is applicable, subject to the *Constitution* and any legislation that specifically deals with customary law.

Many traditional leaders had consistently argued that the extent of this constitutional recognition of their roles was uncertain and too ambiguous. As Williams correctly stated, the 1996 *Constitution* recognises traditional leaders even though it does so in extremely vague and general terms.[866] Rugege took this assertation further when he asked: what was the role of traditional leaders under the customary law that was recognised by the *Constitution*? According to him the *Constitution* does not clearly spell out the role it recognised. Was it

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with the responsibility of passing a new constitutional text within two years from the date of the first sitting of the National Assembly on 9 May 1994. The Constitutional Committee was also appointed to co-ordinate under the control and guidance of the Constitutional Assembly the drafting of the new constitutional text and in particular the work of all committees, commissions, technical committees and other bodies appointed by or on the authority of the Constitutional Assembly. The Committee was also required to submit reports and recommendations to the Constitutional Assembly. The Constitutional Assembly resolved on 15 August 1994 that as part of the *Constitution* drafting framework – (a) Select Committees (hereafter referred to as the Theme Committees) of the Constitutional Assembly consisting of not more than 30 members each be appointed to deal with such themes of the new constitutional text as the Constitutional Committee may determine. Moosa, ANC MP commented about the role of Constitutional Assembly and the involvement of the public in the *Constitution*- making process as follows: "No stone will be left unturned in ensuring the involvement of all South Africans in the process. In doing this, merely calling on the public to make submissions as we have done in the past is simply not good enough. Only those with the means, the knowledge and the confidence to make submissions will do so. In other words we will be flooded with submissions from these privilleged sections of our community. We need to take special steps to ensure that the views of the disempowered majority in this country are also represented in (the Constitutional Assembly)". It seems as if what Moosa wanted could not happen because the majority of the people including the traditional leaders and their communities did not participate in the *Constitution*-making process. However, it is important to note that despite what seemed to be regarded as little participation by the majority of the South Africans in the drafting of the *Constitution*, the CA was successful in all its endeavours to produce the 1996 *Constitution*. For more information in this regard see South Africa Debates of the Constitutional Assembly 221.

[864] Zondo *Constructing a Constitution* 4.

[865] Section 211 of 1996 *Constitution*. See also Zondo *Constructing a Constitution* 4.

[866] Williams 2004 *J of Modern African Studies* 116.

the pre-colonial role or not?[867] Williams also observed that the 1996 *Constitution* does not state explicitly how the institution of traditional leadership should interact with other government institutions, nor did the *Constitution* enumerate what obligation the institution owed to local population.[868]

The 1996 *Constitution*[869] endorsed the existence of institutions such as the National House of Traditional Leaders and the Provincial House of Traditional Leaders. The powers and functions of these constitutional institutions were not entrenched. Chapter 12 of the 1996 *Constitution* afforded traditional leaders less protection than was the case under Chapter 11 of the Interim *Constitution*. The exact role that the institution should play in a democratic South Africa remained constitutionally unclear.[870]

Traditional leadership is subject to the 1996 *Constitution* and is required to be compatible with the 1996 *Constitution*. It seems that this constitutional provision requires traditional leadership to change its own rules and practices not to be in conflict with the Bill of Rights.[871] Discrimination would for example not be allowed and more inclusive participation in the decision-making process will have to be considered. The 1996 *Constitution* seems to be a legal

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[867] Rugege *Institution of Traditional Leadership* 16. See 1.1.1 above.

[868] Willliams 2004 *J of Modern African Studies* 116.

[869] Section 212(2) of 1996 *Constitution*. Section 212(2) of the *Constitution* provides that "to deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law – (a) National or provincial legislation may provide for the establishment of traditional leaders, (b) National legislation may establish a Council of Traditional Leaders". Section 212 of 1966 *Constitution* further left the finer details regarding the issue of the role of traditional leaders as an institution at local level on matters affecting local communities.

[870] 1966 *Constitution of Botswana*. Unlike in Botswana where the 1966 *Constitution of Botswana* provides the institution of traditional leadership with a judicial ceremonial and development role, the *Constitution* of traditional leaders in South Africa is still a grey area. See also 7.2 below.

[871] *South Africa Debates of the Constitutional Assembly* 134-135. Mr Maduna, ANC MP argued in the Constitutional Assembly that the question of traditional authorities and the *Constitution* was characterised by some ambiquity. He said that in as far as the Bill of Rights were concerned, it would well mean that certain forms of traditional leadership with regard to both the equality and the property provisions would be set aside under the present *Constitution*. Accordingly, this had an impact on the nature and content of the Bill of Rights in its attempt at harmonisation with traditional law.

attempt to recreate a new and democratic institution of traditional leaders in South Africa.[872]

4.4 1996-2004: LEGISLATION AND PUBLIC POLICY

In the first ten years of democracy the post–*apartheid* parliament of South Africa proposed legislation and policies intended to transform and democratise the institution of traditional leadership. Some of the statutes impacts directly on the institution while others do so indirectly. The legislation and policies are discussed hereafter.

4.4.1 WHITE PAPER ON TRADITIONAL LEADERSHIP AND GOVERNANCE

The White Paper on Traditional Leadership and Governance[873] was a product of approximately four phases of research, debates, extensive consultation and discussions. The first phase was mainly focussed on the national audit on the institution of traditional leaders, culminating in a *Status Quo Report* (SQR). The second phase culminated in the production of the Discussion Document titled *Towards a White Paper on Traditional Leadership and Institutions.* Policy issues were identified in this phase through an extensive consultation process.[874] This co-ordinated consultation resulted in a two-day national conference on traditional leadership.[875] These discussions led to the production of a *Draft White Paper* where preliminary policy positions were outlined. The fourth phase witnessed the launch of White Paper that paved

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[872] Williams 2004 *J of Modern African Studies* 116.

[873] *White Paper on Traditional Leadership and Governance* (2003).

[874] *White Paper on Traditional Leadership and Governance* (2003) 12-13. At the time of writing this thesis (2006) Sydney Mufumadi was the Minister for Department of Provincial and Local Government.

[875] The Conference was held at Eskom Conference Centre, Midrand from 17 to 18 August 2000. The author had the oppurtunity to attend the Eskom Conference on behalf of the defunct University of North-West and observed events as they unfolded. The first day of the Conference was fraught with the convoluted difficulties and problems to the organisers namely, the Department of Local Government and Provincial Affairs when the traditional leaders boycotted the Conference. They demanded that the *Municipal Structures Act* 17 of 1998 should be amended to give them 50% representation in the Municipal Council. However, in day two of the Conference traditional leaders attended the Conference only as observers.

the way for the drafting of *Traditional Leadership and Governance Framework Act*[876] concerning the institution of traditional leadership.[877]

Nthai, Chairperson of the task team on the *White Paper on Traditional Leadership and Governance* pointed out that the *White Paper* was a culmination of a long process wherein the country engaged in a dialogue regarding the role and place of the institution of traditional leaders in contemporary South Africa as a democratic state.[878] The key objectives of the *White Paper* centres around the principles of creating an institution, which is democratic, representative, transparent and accountable to its clients. The objectives include:[879]

- To define the place and role of the institution within the new system of democratic governance;
- To transform and support the institution of traditional leadership to play a role in socio-economic development and contribute to nation building; and
- To ensure the integrity and legitimacy of the institution of traditional leadership in accordance with customary law and practices.

Some of the critical issues addressed by W*hite Paper* included *inter alia,* the Bill of Rights (especially gender equality), democratisation and community participation, party-political affiliation of traditional leaders, appointment and recognition of traditional leaders, houses of traditional leaders, remuneration and co-operative governance.[880]

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[876] Act 41 of 2003.

[877] *White Paper on Traditional Leadership and Governance* (2003) 12-13. See also 4.4.2 below.

[878] *White Paper on Traditional Leadership and Governance* (2003) 4. The White Paper Task Team was made up by Adv S Nthai (Chairperson), Ms MF Mopeli (Deputy Chairperson), Mr D Masimola, Prof R Mqeke, Prof P Ntuli, Adv T Mayimane-Hashatse, Chief BLMI Motsatsi, Chief S.V. Suping, Ms S Mkhize, Mr Z Titus and 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 Msengane-Ndlela and the entire Department of Provincial and Local Government.

[879] *White Paper on Traditional Leadership and Governance* (2003) 12.

[880] *White Paper on Traditional Leadership and Governance* (2003) 12. The author summarises the general objectives of the *White Paper.*

Traditional leaders appeared not to be satisfied with the *White Paper*. The central point of their reservations was based on the fact that the *White Paper* proposed the removal of current decision-making powers and consign to traditional leaders merely the role as mere custodians of culture.[881] Chief Mzimela, rejected the provisions of the *White Paper on Traditional Leadership and Governance*:[882]

> The White Paper process is not an attempt to amend the *Constitution*. Our powers and functions have been obliterated. The government's aim was to abolish the institution of traditional leadership, but they have failed because we have resisted. But we have not won the battle. Some of us are tired of waiting. When people are tired, they must come up with another strategy, they should not surrender, that is cowardice.

Nthai, the Head of the Task Team responsible for the drafting of White Paper on Traditional Leadership replied:[883]

> Nobody is saying that the institution should not continue to exist. The White Paper enhances the role of traditional leaders. You can go through the White Paper. You will not find anything that say we want to erode it.

Maimela who seemed to be concerned about the plight of traditional leaders felt that the White Paper is influenced by European and not African ideas. The core of *White Paper* was an effort of the government to modernize and transform a tradition that dates back centuries:[884]

> How the country navigates the stormy water ahead and the extent to which African values and customs are protected will indicate the path chosen by government.

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[881] Williams 2004 *J of Modern African Studies* 116.
[882] *Sowetan* October 2003 18.
[883] *Sowetan* October 2003 18.
[884] *The Star* 2004 19.

4.4.2 *TRADITIONAL LEADERSHIP AND GOVERNANCE FRAMEWORK ACT* OF 2003

The Traditional Leadership and Governance Framework Act[885] is one of the major pieces of legislation in South Africa, which is framed to create an institution of traditional leaders that has to perform its traditional duties in a manner that embraces democracy. The *1996 Constitution* recognises the institution of traditional leaders without assigning its roles and functions. Thefore the promulgation of *Traditional Leadership and Governance Act* assists in filling this gap:[886]

> The Act is framed *inter alia* to set out a national framework and norms and standards that will define the place and role of traditional leadership within the new system of democratic governance, to transform the institution in line with constitutional imperatives and to restore integrity and legitimacy of the institution of traditional leadership in line with customary law and practices.

The *Traditional Leadership and Governance Framework Act* envisages an institution of traditional leadership that must *inter alia* strive to:[887]

- Promote freedom, human dignity and the achievement of equality and non-sexism;
- Derive its mandate and primary authority from applicable customary law and practices;
- Enhance tradition and culture;

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[885] Act 41 of 2003. Herein referred to as the *Framework Act*. See *Traditional Leadership and Governance Framework Amendment Act*, 2003 (Act 41 of 2003) This *Amendment Act* recognises traditional communities and makes provisions for the establishment and recognition of traditional Councils. It provides a framework for leadership position within the institutions of traditional leadership. It also provides for the recognition of traditional leadership and mechanisms for the removal of traditional leaders from office, the roles and functions of traditional leaders and for the establishment of the commission on traditional leadership disputes and claims and a Code of Conduct. The significance of this Act is that it restores the dignity of the institution of traditional leadership by intergrating this institution to governance. See also 4.4.1 above.

[886] Act 41 of 2003.The Preamble of this Act articulates and sets the legal framework within which the institution of traditional leadership should undergo transformation.

[887] See also the Preamble of the *White Paper on Traditional Leadership and Governance* 2003. See also 4.4.1 above.

- Promote nation building and harmony and peace amongst people;
- Promote the principles of co-operative governance in its interaction with all spheres of government and organs of state; and
- Promote an efficient, effective and fair dispute resolution system and a fair system of administration of justice.

This statute marks a new era that creates an opportunity for women to participate and serve as traditional leaders. It provides for the recognition of Kings and Queens, senior traditional leaders, headmen and headwomen.[888] It is the first statute in the history of South Africa which recognises the possibility of women becoming traditional leaders. Almost in all royal kraals, with exceptions such as that of Modjadji in Bolebedu, Limpopo, the successor to the throne would be the eldest son of the traditional leader usually appointed by the royal council.[889] The Act is an attempt to reverse the legacy of *apartheid*, which marginalized women for many years in South Africa. One of the pillars of this piece of legislation under discussion is the principle of women emancipation.[890]

The recognition of 'Kings' and 'Queens' should be seen as an attempt on the part of government to restore the pre-colonial titles of traditional leaders.[891] Traditional leaders argued that this Act is a ploy to destroy traditional leadership. Furthermore, they asserted that the purity of royal blood might be unduly interfered with.[892]

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[888] See Section 9 and 11 of Act 41 of 2003.

[889] See 2.1 above.

[890] Sections 9 and 11 of Act 41 of 2003. For instance *Black Administration Act* 38 of 1927 entrenched patriarchy and the rule of intestate succession, which excluded women from succession to family property and traditional leadership. The *Framework Act* was devised to reverse the legacy created and left by *Black Administration Act* and other apartheid laws intended to discriminate against women in respect of traditional leadership. See also 3.4.4.2 above.

[891] Dlamini *African Legal Philosophy* 18. As already highlighted, Dlamini noted that the word "Chief" or "Paramount Chief" was introduced by the British colonial government in order to avoid the constitutional clumsiness of having multiple Kings. Those Kings of the colonies were to be reduced in status so that there was one King who was in England. The words "*inkosi*" in Zulu, "*inkhosi*" in Siswati and "*kgosi*" in Tswana indicate the recognition of traditional leaders as Kings before the arrival of the British. See also 2.1 above.

[892] Holomisa *Administration of Justice* 3–5.

On a national level, an organ of state may consult with the Minister to allocate roles for traditional leaders in the sphere of national government.[893] At provincial level, an organ of state within the provincial government is required to consult the Member of Executive Council (MEC) responsible for the traditional affairs to allocate roles and duties for traditional leaders.[894] These roles of traditional leaders envisaged by the Act are in respect of:[895]

- Art and culture;
- Land administration;
- Agriculture;
- Health;
- Welfare;
- The administration of justice;
- Safety and security;
- The registration of birth, deaths and customary marriages;
- Economic development;
- Environment;
- Tourism;
- Disaster management;
- Management of natural resources; and
- Dissemination of information relating to government policies and programmes.

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[893] Section 20(2) of Act 41 of 2003.

[894] Section 20(2) Act 41 of 2003. The traditional leaders receive salaries, allowances and benefits for the execution of their duties and services rendered. See in this regard *Remuneration of Public Office Bearers Act* 20 of 1998, which *inter alia* provides for a framework for determining the salaries and allowances of the President, members of the National Assembly, permanent delegates of the National Council of Provinces (NCOP), Deputy President, Ministers, traditional leaders, members of Local Houses of Traditional Leaders, members of Provincial Houses of Traditional Leaders, members of the National House of Traditional Leaders. Section 5 of Act 20 of 1998 provides that salaries and allowances of traditional leaders may from time to time be determined by the President after consultation with the Premier concerned taking into consideration *inter alia* the role, status, functions and categories of traditional leaders, the affordability of different levels of remuneration of public office bearers, the current principles and levels of remuneration in society generally, the need for the promotion of equality and uniformity of salaries and allowances for equal work performed, the enhancement of co-operation, unity and understanding between traditional leaders nationally. It is submitted that payment of traditional leaders should not be used by the government as a tool to manipulate them. The government should avoid using payment of traditional leaders to achieve their own political ends.

[895] Sections 19 and 20 of Act 41 of 2003. See also Bekker *Legal Pluralism* 131-137.

The Act also provides for the establishment of a Local House of Traditional Leaders. The functions of a Local House of Traditional Leaders include *inter alia* to:[896]

- Advise the district or metropolitan municipal in respect to matters pertaining to customary law, customs, traditional leadership and traditional communities;
- Develop planning frameworks impacting on traditional communities;
- Develop by-laws that impact on traditional communities;
- Participate in local programmes of the development of rural communities; and
- Participate in local initiatives aimed at monitoring, reviewing or evaluating government programmes in rural communities.

However, it is important to note that the Act is not without some flaws, which put the institution of traditional leaders in a precarious political situation. Technically, the Act deploys traditional leaders in the office of the Premier and Minister for Provincial and Local Government. The Act makes the office of the Premier an official recruitment officer of traditional leaders in a particular province while the office of the President is responsible for the recruitment of Kings and Queens. The Act also empowers the Premier and the President to fire their "employees".[897]

Another onslaught which the Act makes on the institution of traditional leaders, is detaching them from their rural constituencies and placing them at the centre of civil service. As employees of the new institutions they are now accountable and responsible to the Premier and President and no longer their subjects.[898] As November and Wessel correctly observed the incorporation of

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[896] Section 17 of Act 41 of 2003.

[897] Sections 9, 10, 11, and 12 of Act 42 of 2003. See also 3.4.4.2 above, where the appointments and recognition of the traditional leaders vested on the Governor-General and later the State President.

[898] See *Remuneration of Public Office Bearers Act* 20 of 1998. The Premier of the Province is a paymaster of the traditional leaders. In other words he or she occupies the position of the employer while the traditional leaders may be regarded as the employees of the Office of the Premier.

traditional leaders into the civil service is determining their effectiveness. Hence they argue strongly that as "civil servants", traditional leaders are required to work from an office and are thus restricted in the execution of their duties by conditions of service and line of command.[899] The Act constitutes traditional leaders as public office bearers. As public office bearers they are bound by the *Constitution* and legislation issued to them. This was also the position in the colonial era.[900]

The Act does not make a remarkable shift from the colonial legislation, which regulated the institution of traditional leaders. For example, the institution is still subject to government control and regulation. In other words, the legislation is unable to assert the independent authority of the institution of traditional leaders. In stead it re-created the type of institution that is different from both the pre-colonial and colonial era. However, the Act promotes gender justice.[901] Unlike the colonial and *apartheid* legislation,[902] which regulated traditional leadership and governance, the Act has been promulgated amongst other things to align the institution with the values of the *Constitution.*

The *Traditional Leadership and Governance Framework Act* constitutes traditional leadership as public office bearers.[903] As public office bearers, they are bound by the *Constitution* and legislation issued to them. Other Acts[904] that impact on traditional leadership include *inter alia* the *Promotion of Administrative Justice Act*,[905] the *Promotion of Access to Information Act*,[906]

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899 November and Wessels 2002 *J of Contemporary History* 149.
900 See 3.1, 3.2, 3.3 and 3.4 above.
901 See 4.4.5 below.
902 See 3.1, 3.2, 3.3 and 3.4 above.
903 It is also important to note that a definition of an organ of state also refers to traditional leaders. According to section 239 of the 1996 *Constitution*, an organ of state means any Department of state or administration in the national, provincial or local sphere of government or any other functionary or institution exercising a power or performing a function in terms of the *Constitution* or provincial *Constitution* or exercising a public power or performing a public function in terms of any legislation but does not include a court or a judicial officer.
904 See 4.4.3, 4.4.4, 4.4.5 and 4.4.6 below.
905 Act 3 of 2000.
906 Act 2 of 2000.

the *Promotion of Equality and Prevention of Unfair Discrimination Act,*[907] and the *Communal Land Rights Act.*[908]

4.4.3 PROMOTION OF ACCESS TO INFORMATION ACT OF 2000

The central objective of the *Promotion of Access to Information Act* is[909] to give effect to the constitutional right of access to any information held by the state as well as information held by another person that is required for the exercise of protection of any right.[910] The main purpose of the Act is to foster the culture of transparency and accountability in public and private bodies and to promote a society in which the people of South Africa could have effective access to information that enables them to exercise and protect all their rights.[911]

The Act has an effect on the institution of traditional leaders in South Africa. Offices of traditional leaders are public offices and therefore they have to comply with the provisions of the Act and traditional communities should be given information by the institution of traditional leaders. The Act also applies to all records of the offices of traditional leaders, which include any recorded information in any form or medium that was in their possession regardless of who created the record and regardless of when the record came into existence.[912] The Act requires offices of traditional leaders to display maximum accountability and responsiveness to ensure checks and balances against the abuse of power.

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[907] Act 4 of 2000.
[908] Act 11 of 2004.
[909] Act 2 of 2000.
[910] Section 32 of the 1996 *Constitution* reads that: "(1) Everyone has the right of access to (a) any information held by the state, and (b) any information held by another person and that is required for the exercise or protection of any rights. (2) National legislation must be enacted to give effect to this rights". In line with this constitutional requirement the national parliament responded accordingly through the promulgation of the *Promotion of Access to Information Act* 2 of 2000.
[911] Section 3(a) and (b) of Act 2 of 2000. A public body for the purpose of the Act is defined as "any department of state in national, provincial, municipal or a local sphere of government or any functionary or institution when it is exercising a power or performing a duty in terms of the *Constitution* or a Provincial *Constitution.* Offices of traditional leaders are public bodies and are constitutionally required to be fair in their administrative acts.
[912] Section 3 of Act 2 of 2000.

This position was different in both colonial and *apartheid* era. Although it can be argued that traditional leaders were accountable to their people during the colonial and *apartheid* era, it seems that the system of checks and balances was generally flawed. Some traditional leaders were more accountable to the *apartheid* government than to their subjects.[913]

4.4.4 PROMOTION OF ADMINISTRATIVE JUSTICE ACT OF 2000

The *Promotion of Administrative Justice Act*[914] (*PAJA*) is based on the 1996 *Constitution*, which expresses vision of safeguarding and protecting individuals against any abuse of power by organs of state. The *Constitution*[915] provides only the broad framework for the constitutionally correct way for organs of state to act. It has been left to *PAJA* to augment the principles and values of the *Constitution* by providing an elaborated and detailed expression

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[913] See 3.5.2, 3.5.2.1 and 3.5.2.2 above.

[914] Act 3 of 2000.

[915] Section 33 of 1996 *Constitution* states that: (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair, (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons, (3) National legislation must be enacted to give effect to these rights and must (a) provide for the review of administrative action by a court or where appropriate an independent and impartial tribunal (b) impose a duty on the state to give effect to the rights in subsections 1 and 2(c) promote an efficient administration. In *Mafongosi and Others v United Democratic Movement and Others* 2002 (5) SA 567-568 (CC) the court stated that section 33 of the Constitution was more than just a codification of the position of common law. The court further held that an administrative decision could be justified only by the reasons underpinning it. It was these reasons, which showed whether the decision was reasonable or not. If it was not, the decision could not be allowed to stand and had to be set aside even if the decision was bona fide reached. In *Pharmaceutical Manufacturers of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) the court held that the common law principles that provided grounds for judicial review of public power have been constitutionalised. In addition the court emphasised that what is lawful, procedurally fair administrative action cannot mean one thing under the *Constitution* and another thing under the common law. See also *Mahambehlala v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 342-354 (SECLD), where the court declared that in considering administrative action in terms of the present constitutional order, it is necessary to bear in mind that the common law principles which provided grounds for judicial review have been subsumed under the *Constitution*. In *re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC), the court stated that common law and constitutional law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of validity of administrative decision within the purview of the *Constitution*. What is lawful administrative action, procedurally fair administrative action and administrative action justifiable in relation to the reasons given for it cannot mean one thing under the *Constitution* and another thing under the common law.

of the rights to just providing administrative action and remedies to vindicate them.[916]

The objects of *PAJA* include *inter alia* providing an efficient administation and good governance, creating a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function.[917] Traditional leaders perform public functions, as a result *PAJA* directs them to ensure that their administrative functions are discharged with due regard to representative and participatory democracy, accountability, transparency and public involvement.[918]

In terms of *PAJA*, an administrative action which materially and adversely affects the rights or legitimate expectation of any person must be procedurally fair.[919] A fair administrative procedure depends on the circumstances of each case. In order to give effect to the right to procedurally fair administrative action, an administrator (who may be a traditional leader) is required to give a person whose rights have been adversely affected an opportunity to:[920]

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[916] Govender 2003 *SAPR/PL* 405.

[917] See the Preamble of Act 3 of 2000. The South African administrative law now has a statutory basis, which means that all challenges to administrative action will be based on the provisions of *PAJA*. See also in this regard Mdumbe Administrative Action 267.

[918] Govender 2003 *SAPR/PL* 405.

[919] Section 3(1) of Act 3 of 2000. See also *Mkhatshwa v Mkhatshwa and Another* 2002 (3) SA 441-449 (TPD), where the court dealt with the matter concerning a deposition of a traditional leader by the Premier of Mpumalanga. The court accordingly stated that within the context of the new constitutional regime, when the Premier appoints or deposes a traditional leader he or she performed an administrative function and thus administrative law governs his or her conduct. The party affected by the appointment made by the Premier has a right to administrative action that is lawful, reasonable and procedurally fair. The court went further to say that the Premier being an administrative functionary executing a statutory duty is not beyond the reach of or exempted from the peremptory provisions of section 33(1) and (2) of the *Constitution*. In *Republic of South Africa v SARFU and Others* 1999 (10) BCLR 1059 (CC) the Constitutional Court considered the question of procedural fairness in the context of commission of inquiry. The court stated that when the President of South Africa appointed a commission, he was exercising an original constitutional power and that neither the subject matter nor the exercise of that power constituted administrative action.

[920] Section 3 of Act 3 of 2000. See also Oosthuizen *Aspects of Educational Law* 45; Beukes 2003 *SAPR/PL* 295. *PAJA* grants a right to procedural fairness in that everyone is entitled to administrative action, which is procedurally fair. At common law the rules of natural justice encompassing the maxims audi alteram partem (to hear the other side) nemo in judex sua causa (the rule against bias) are used to grant affected person an opportunity to be heard and hearing free from bias). The *PAJA* also introduces legal representatives in traditional courts. These legal representatives may be attorneys and advocates summoned

- obtain assistance and legal representation in serious cases;
- present and dispute information and arguments; and
- appear in person.

It is apparent from the *PAJA* that transparency is an important element of any administration, including the administration of traditional leaders. Discussions, which are shrouded in secrecy lead to suspicion and distrust on the part of the public. It is apparent too, that sections of *PAJA* which provide that transparency must be fostered in public administration by providing people or public with timely accessible and accurate information, will also assist in establishing a culture of openness in the institution of traditional leadership as an organ of public administration.[921] The provisions of *PAJA*, which call for fair administrative processes and transparency form a hallmark of the pre-colonial administrative system of traditional governance.[922]

The legal culture, which the Act attempts to introduce is not different from the pre-colonial position. However, it seems that some of the traditional leaders during the colonial and *apartheid* eras departed from the system of fair administration. There are instances where decisions were made during both the colonial and *apartheid* era without giving the affected party a hearing.[923]

4.4.5 PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT OF 2000

The 1996 *Constitution* places a duty on both the state and private persons not to discriminate unfairly. The 1996 *Constitution* guarantees equality but also requires government to adopt legislation to prohibit unfair discrimination.[924] It

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to court to represent a person who has been affected by the administrative decision of the traditional leaders concerned.

[921] Sections 4, 5 and the Preamble of Act 3 of 2000.

[922] See 2.2, 2.3 and 2.4 above.

[923] See 3.4.4.1, 3.4.4.2, 3.4.4.3, 3.5.1, 3.5.2, 3.5.3 and 3.5.3.2 above.

[924] See section 9 of 1996 *Constitution*. This section provides that: (1) Everyone is equal before the law and has the right to equal protection and benefit of law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race,

is against this background that parliament promulgated the *Promotion of Equality and Prevention of Unfair Discrimination Act.*[925] This legislation impacts on the institution of traditional leadership that traditionally excluded women from its leadership.[926] The Act intends to transform the social well being of the various structures within the community. The Act prohibits certain traditional aspects, which are seen to be in conflict with section 9 of the *Constitution.*[927]

The principle of equality[928] is the core value of the *Promotion of Equality and Prevention of Unfair Discrimination Act.* The Act stresses that no person may unfairly discriminate against any person on grounds of gender including *inter alia*:[929]

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gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection 3. (5) Discrimination on one or more of the grounds listed in subsection 3 is unfair unless it is established that the discrimination is fair.

[925] Act 4 of 2000. Hereafter referred to as *Equality Legislation*. The institution of traditional leadership has always been centred around the premise of patriachy with the exception of the leadership of Balobedi in Ga-Modjadji.

[926] Sowetan July 2005 4. The Ga-Modjadji has been under the rule of rain Queens since 1800. The first Queen was Maselekewane Modjadji who ruled from 1800 to 1854. Masalanabo Modjadji took power in 1854 and reigned until 1895. Khetoane Modjadji ruled between 1896 and 1959. Makoma Modjadji was Queen from 1960 to 1980. Mokope took over in 1981 and ruled until 2001. However, as stated earlier the Modjadjis of the Bolebedu were exceptional to the rule. See in this regard 2.1 above.

[927] Traditional authorities are inherently patriarchal. They exclude the participation of women in the political game of traditional leadership. For more information in this regard see 2.1 above. With regard to the issue of equality clause see also 4.3.5 above.

[928] The emphasis placed on the issue of equality, especially the eradication of practices, which in the past perpertuated the subordination of women and recognition of customary law, by the *Constitution*, the *Law of Evidence Amendment Act* 45 of 1988, the *Recognition of Customary Marriages Act* 120 of 1998 and other legislation create a conflict between African culture and equality. The debate concerning the apparent conflict between culture and equality was pre-empted by the Constitutional Court in *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC), where the court stated that sooner or later the question of the relationship between the *Constitution* and customary or indigenous law will have to be confronted. The court went further to predict a possible outcome of this conflict when it found that partriarchal principles which underlay much of indigenous law would be outlawed by the Bill of Rights and subsequent legislation on equality. In *Matukane and Others v Laerskool Potgietersrus* 1996 (3) SA 223 (TPD) the court in dealing with questions of equality and discrimination stated that the *Constitution* does not outlaw discrimination as such. The court went further to say the *Constitution* prohibits unfair discrimination. See also Vorster *Traditional leadership* 129. The conflict and inconsistencies that beset traditional leadership under colonialism and *apartheid* have been transferred to the new constitutional dispensation in South Africa.

[929] Section 8 of Act 4 of 2000.

- The system of preventing women from inheriting family property and traditional leadership;
- Any practice, including traditional, customary or religious practice which impairs dignity of women; and
- Systematic inequality of access to opportunities by women as a result of the sexual division of labour.

The equality legislation implies that female persons may in terms of the law inherit family property[930] and may also succeed to traditional leadership positions. Traditional authorities are required to comply with the provisions of the *Equality Legislation Act.*[931]

4.4.6 COMMUNAL LAND RIGHTS ACT OF 2004

South Africa's democracy attempts to uphold civil, economic and political liberties. The current system of communal land tenure is seen being in conflict with an individual's rights and freedoms to own property. The *apartheid* system bequeathed South Africa a complex and often irreconcilable tenure

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[930] In *Bhe and others v Magistrate Khayelitsha and Others* 2004 (1) BCLR 27, the court accordingly found that the rule of male primogeniture as it applies in customary law to the inheritance of property is declared to be inconsistent with the *Constitution* and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property. See *Shibi v Sithole and Others* 2005 (1) SA 580 CC. Here the Constitutional court dealt with the matter in which a woman was excluded from succession to property in terms of section 23 of *Black Administration Act* 38 of 1921. The court held section 23 was a racist provision that was fundamentally unconstitutional being contrary to section 9 (the right to equality) and section 10 (the right to dignity) of the *Constitution* due to its blatant discrimination on grounds of race, colour and ethnic origin and its harmful effects on the dignity of person affected by it. See also *Daniels V Campbell NO and Others* 2003 (9) BCLR 969 (CC), where the Constitutional Court declared that there is no justification for the limitation of the equality rights of persons in the position of the surviving spouse. The Constitutional Court promoted gender justice in *Bhe, Shibi and Campbell* cases. See also in this regard Vorster *Traditional leadership* 131, where it was noted that the system of male succession is regarded as being in conflict with the constitutional requirement of non-discrimination on the ground of gender.

[931] TARG *Overview Report* 59. According to TARG team, although the establishment of traditional authorities may be seen as being against the equality principle, it is not seen as discrimination in the communities themselves. TARG team further argued that a thorough analysis of developments regarding the content of the institution of the pre-colonial traditional leadership indicates the dynamic nature of the institution itself and does not describe it as institution that perpetuates discrimination. It is suggested that in the light of provisions of the *Equality Legislation* and *Constitution* regarding democracy and equality, provision should be made for a process which would empower rural communities to decide for themselves what the nature and content of the institution itself should be.

right regime. As a consequence, the National Parliament promulgated *Communal Land Rights Act*[932] to provide interested parties an opportunity to obtain a tenure regime that conforms to the cultural, political and economic specificities of their environments.[933] The *Communal Land Rights Act* gives effect to the 1996 *Constitution*, which requires the state to take reasonable legislative and other measures to enable citizens to gain access to land on an equitable basis.[934]

The Department of Land Affairs (DLA) maintains that the *Communal Land Rights Act* was an attempt to formalize land rights held by communities and their members on communal land and to provide for the transfer of state land to communities, including traditional communities. The state owns about 32 million hectares of land on which a third of the rural population and the majority of the poor reside. According to the DLA, the Act provides an opportunity to communities, government departments and NGOs to expedite the land reform process.[935] The purpose of the Act is to transfer communal or tribal land to rural communities and to lay the basis for democratic administration of communal land by communities.[936]

The Act provides for the establishment of a Land Administration Committee (LAC).[937] The Land Administration Committee must consist of a total number of members as determined by the applicable community rules and the provisions of the *Communal Land Rights Act.*[938] The members of Land Administration Committee must be persons not holding any traditional leadership position and must be elected by the community in the prescribed

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[932] Act 11 of 2004.
[933] *Sowetan* June 2003 10.
[934] Section 25(5), (6) and (9) of 1996 *Constitution*.
[935] *Sowetan* June 2003 10.
[936] *Sowetan* June 2003 10. The Act is heralded as a remarkable endeavour to provide community or person with legally secured tenure or redress if the tenure of land of such community or person is legally insecure.
[937] Section 21 of Act 11 of 2004 provides *inter alia* that a community must establish a Land Administration Committee, which may only be disestablished if its existence is no longer required. Furthermore, if a community has a recognised a traditional Council, the powers and duties of the Land Administration Committee of such community may be exercised and performed by such Council. When a traditional Council acts as a Land Administration Committee, its functional area of competence is the administration of land affairs and not traditional leadership.
[938] Section 22 (1) of Act 11 of 2004.

manner.[939] Traditional leaders are excluded from the Committee and only members elected by the Committee are entitled to be in the Committee. At least one-third of the total membership of a Land Administration Committee must be women.[940] One member of a Land Committee must represent the interests of the vulnerable groups such as women, children, the youth, the elderly and disabled.[941]

The Land Administration Committees have a number of responsibilities. These include *inter alia* the:[942]

- Allocation and registration of communal land and new order rights;[943]
- Establishment and maintenance of registers and records of all new order rights and transactions affecting such rights;
- Resolution of land disputes;
- Promotion and safeguarding of the interests of the community; and
- Liaison with the municipality and Land Boards for the provision of services and development of the communal land of the community.

The Minister in accordance with prescribed nomination and selection processes appoints a Land Rights Board. These members are appointed for a period of five years.[944] The DLA is required to provide a Board with staff, accommodation and financial resources.[945] The Board's duties include amongst other things to:[946]

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[939] Section 22 (2) of Act 11 of 2004. Each of the following persons may designate a person to be a non-voting member of a Land Administration Committee namely, (a) The Minister in respect of the Department. (b) The Chairperson of the relevant Land Rights Board. (c) The relevant provincial Member of Executive Council (MEC) responsible for Agriculture, the relevant MEC responsible for local government and every municipality in whose area of jurisdiction a Land Administration Committee functions.

[940] Section 22 (3) of Act 11 of 2004.

[941] Section 22 (3) and (4) of Act 11 of 2004.

[942] Section 24(3a-h) Act 11 of 2004.

[943] According to the *Communal Land Rights Act* 11 of 2004, new order right means a tenure or other right in communal or other land which has been confirmed, converted, conferred, or validated by the Minister. Old order right means a tenure or other right in or to communal land which is formal or informal, registered or unregistered, derived from or recognised by law including customary law, practices or usage and a right which exist immediately prior to a determination by the Minister. See section 18 of Act 11 of 2000.

[944] Section 26(1) of Act 11 of 2004.

[945] Section 29 of Act 11 of 2004.

[946] Section 28 (1) (a)-(d), (2) and (10) of Act 11 of 2004.

- Advise the Minister and assist a community with regard to matters relating to sustainable land ownership and use, the development of land and the provision of access to land on an equitable basis;
- Liaise with all spheres of government, civil institutions and other institutions;
- Monitor compliance with the *Constitution;*
- Inspect any document in possession of Land Administration Committee; and
- Convene and attend meetings of a community or Land Administration Committee.

The Act was met by criticism from the traditional authorities. One of the key challenges is whether the DLA has capacity to enforce it. The Coalition of Traditional Leaders[947] intimated in its *Submission Document to the Portfolio Committee on Agriculture and Land Affairs on the Communal Land Rights Bill* that the Act will separate land, people and traditional leadership. The Coalition argued that according to African culture and history of communal land in South Africa, land, people and traditional leadership are inextricably linked together.[948] The Coalition declared that separation of the three would be disastrous and a recipe for unnecessary conflict.[949] Some of the traditional leaders threatened bloodshed. Chief Holomisa and the Chairperson of National House of Traditional Leaders, Mzimela were strongly opposed to the

[947] The Coalition of Traditional Leaders is made up of the National and Provincial Houses of Traditional Leaders, Contralesa and the Royal Bafokeng nation.

[948] See Bennett *Human Rights* 152. According to Bennett, communal land tenure is essential to the protection of a cultural identity. The argument for the protection of communal land tenure is among other things based on this reason. Apart from this reason African communal land tenure system has close links with the constitutional principles of traditional leaders. The system of individual land tenure would strip traditional leaders of their functions namely, to allot and control land. To individualise land tenure would be contrary to the constitutional guarantee of their customary law practices. See also in this regard TARG Administrative and Legal Position 122. According to TARG, ownership of land was the cornerstone of the economic life of people. It is argued that the entire system of societal organisation of traditional leaders revolved around the system of the institutions of communal land, which is administered by the traditional leaders. Traditional leaders and land were bound together.

[949] Submission of the Coalition of Traditional Leaders to the Portfolio Committee on Agriculture and Land Affairs on *Communal Land Rights Bill*, Cape Town, 14 November (2003) 7. This submission document may be found in the National House of Traditional Leaders, Pretoria.

legislation and also took up the matter with President Thabo Mbeki. Ntsebeza quoted Chief Holomisa saying:[950]

> In 2000, we (traditional leaders) held three meetings with him (President Mbeki) and categorically stated that in no way would the powers of traditional leaders be reduced or diminished by his government. We ask him to put it in writing and he took exception, saying it looked as though we doubted his word.

The major dilemma arising from individualization of tenure is that it could render many rural people landless. The majority of rural people lived in a state of penury and the likelihood is that some may sell their registered plots in order to access cash and temporarily alleviate their poverty.[951] As a result, these "sellers" would remain without land. The land maybe sold to tribal members or anyone else. Another key problem as Kariuki observed, is that those who understand the new law are likely to establish claims to uncultivated land and hence aggravate social inequality in rural areas.[952]

Cross correctly pointed out:[953]

> The individualization trend is both a risk and an opportunity. The opportunity is a greater chance for local economic activity, the risk is loosing the last refuge of the poor while searching for economic empowerment ... Private tenure does not work in low-income rural communities. Poor families are forced by emergencies to sell their land and become tenants. Inheritance claims proliferate into paralysis, private allocators can exploit lack of community over site to pack in unvetted outsiders, promoting violence.

The proposed system for the registration of an individual title to land use calls for a system of individual ownership. The abolition of communal systems has

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950 Ntsebeza 2003 *Transformation* 89.

951 The reason being that many people in rural areas are unemployed and as a result they are in dire need of cash.

952 *Sowetan* June 2003 10. It is suggested that rural social relations of production, land ownership and livelihoods are far more complex than the Act purports to regulate them.

953 Cross 1997 *Indicator South Africa* 75.

the potential to disrupt traditional rules, values and customs that have governed the use of land during the pre-colonial and colonial era. So far the Act has introduced new institution of land administration that may not be readily accepted and as a result cause conflicts, confusion and disputes over access to land.[954]

Government's reliance on democratically elected bodies to administer land in rural areas seemed not to be a guarantee of economic development and secured land tenure. Cross observed that traditional leaders were not the only ones accused of misusing tenure authority,[955] many democratically elected Committees were also no more honest. According to Cross, those Committees were just as likely to sell off community land, and often performed no better when faced with the same thankless tasks.[956]

The *Communal Land Rights Act* is a remarkable departure from both the pre-colonial and colonial systems of administering the communal land.[957] Although the Act recognises the security offered by traditional communities and the role played by traditional leaders and other community–based institutions in upholding such communities, the administration and management of communal land vest on Land Rights Boards and Land

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[954] Pienaar 2004 *THRHR* 258.

[955] See the *Repeal of the Black Administration Act and Amendment of Certain Laws Act*, 2005. An obligation incurred by the traditional leader of a traditional community, does not bind that traditional community or land owned unless that obligation has been authorised or adopted by the traditional community. An obligation, which relates to land or rights in land has to be rectified by the Land Rights Board having jurisdiction and in the absence of such a Board by the national Minister responsible for land affairs. The decision by a traditional community in respect of an obligation must be informed and democratic decision of the majority of the male and female members of that traditional community who are 18 years or older and who are present or represented by a proxy. In terms of this Act the traditional community will not be liable for the personal obligations of their traditional leaders. The traditional community or land is not bound by the liability of a traditional leader unless the tribe has approved it. See also Pienaar 2005 *Stell LR* 70. Land held in the name of a traditional leader on behalf of a tribe or community can only be dealt with the consent of the specific tribe or community. The legal precedent in South Africa has been that communal land belongs to a traditional leader as a trustee for his people. However, there were incidents where traditional leaders who had over a long period of time abused their powers and without the consent of the community either used the land under their control largely to their own benefit or alienated.

[956] Cross 1997 *Indicator South Africa* 76. It seems that there were not enough checks and balances during the colonial era with regard to the administration and allocation of colonial land. Since there was no democratic institution to allocate land in rural areas the current democratic structures cannot be compared.

[957] See 2.2, 2.3, 2.4 and 3.4.4.1 above.

Administration Commitees. Previously the administration and management of land resided on traditional leaders and their councillors.[958] It seems the Act diminishes this function by placing the administration of land on Boards and Committees.[959]

4.5 TRADITIONAL LEADERS AND LOCAL GOVERNMENT

This part of the chapter will be thematically discussed with reference to the development of constitutional provisions regarding the role of traditional leadership in local government.[960] The local government legislation issued in terms of the Interim *Constitution* are intended to regulate the spheres of local government to ensure sustainable development and quality service delivery.

4.5.1 CONSTITUTIONAL TRANSFORMATION OF LOCAL GOVERNMENT

The *Local Government Transition Act*[961] was the first statutory step towards the transformation and democratisation of local government. [962] The primary

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[958] See 2.2 and 2.3 above.

[959] Pienaar 2004 *THRHR* 250.

[960] For further information see 4.3.1 above.

[961] Act 209 of 1993; TARG *Development Management* 190. The change of local government from apartheid structures to non-racial, democratic and efficient authorities in South Africa took place under the *Local Government Transition Act*. This Act was negotiated in the Local Government Negotiating Forum (LGNF). According to the TARG team, this Forum included politicians of all parties, people from existing provincial and local authorities and representatives of the non-government sectors. The Forum consulted with the Multi Party Negotiating Council, which was negotiating the Interim *Constitution*. The *Local Government Transition Act* did not deal with rural areas. There has been a great deal of confusion and controversy, for example, in KwaZulu-Natal on how local government would be introduced into areas where it did not exist before. A lot of confusion and conflict exist regarding traditional leaders would fit into a new system. During the transitional period created by this Act some of the traditional leaders were *ex officio* members in the local government. Their roles in the local government were not totally usurped by elected Councillors. These roles included *inter alia* provisions of water, electricity and construction of roads.

[962] In *Contralesa v Minister for Local Government, Eastern Cape* 1996 (2) SA 898 (TKSC) Contralesa contended that the application of the *Local Government Transition Act* 209 of 1993 to rural areas in the Eastern Cape deprived traditional leaders of their powers with regard to the local government. The court stated that the *Local Government Transition Act* 209 of 1993 provided the machinary for the transition from a racially based system of local government to a non-racial system. The court further stated that there is not a single function of local government, which is vested in Contralesa. The court concluded that Contralesa did not have direct interest in the matters of transitional local government and therefore did not have locus standi. See also with regard to the principle of *locus standi* *ANC (Boarder Branch) v Chairman of Council of State of Ciskei* 1992 (4) SA 434 (C), where

aim of this Act was to transform the previously racially based local government system into a democratic structure. This step was taken further by the *Interim Constitution*, which envisaged a complete transformation of local government. In terms of the *Interim Constitution*[963] local government was an independent sphere of government that had to perform functions and duties of service delivery in its own right. In performance of its functions local government was required to build and deepen democracy at local level.[964]

This constitutional provision implied that traditional leadership, which has been a primary structure of rural government, could not escape unchallenged and unaffected. The *Interim Constitution* provided for the participation of the traditional leaders in local government.[965]

> The traditional leader of a community observing a system of indigenous law and residing on land within the area of jurisdiction of an elected local government shall *ex officio* be entitled to be a member of that local government, and shall be eligible to be elected to any office of such local government.

Section 182 of the *Interim Constitution* introduced traditional leadership into the democratic arena of local government. The 1996 *Constitution* also recognises traditional leaders and envisages a role for them in local government:[966]

> A role for traditional leadership as an institution at local level on matters affecting local communities should be provided through national legislation.

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the court found that the ANC (Boarder Branch) had locus standi because parties had direct interest in the matter.

[963] Section 3 of the Interim *Constitution* provided the local government with the powers and functions to make provision for access by all persons residing within its area of jurisdiction to water, sanitation, transportation facilities, electricity, primary health services, education, housing and security within a safe and healthy environment.

[964] In other words local government is obligated by the *Constitution* to be transparent, accountable and representative in order to strengthen and consolidate democracy at local level.

[965] Section 182 of 1993 *Constitution*.

[966] Section 212(1) of 1996 *Constitution*.

The 1996 *Constitution* provides for the establishment of municipalities in all areas of South Africa. These municipalities include areas controlled by the traditional leaders.[967] Local government must:[968]

- Ensure the sustainable provision of services to community;
- Encourage the involvement of communities and community organizations in matters of local government;
- Promote social and economic development; and
- Promote a safe and healthy environment.

Schedules 4 (B) and 5 (B) of 1996 *Constitution* articulates the responsibilities of the municipalities as follows:[969]

- Provision of water and electricity;
- Waste removal;
- Sewerage removal;
- Constructing and maintaining municipal roads;
- Regulating municipal transport services;
- Running municipal health services;
- Maintaining fire stations, markets, abattoirs and cemeteries;
- Promoting tourism; and
- Developing an integrated development plan for their towns and outlying areas. This may include *inter alia* housing, promotion of small, medium and micro enterprises, attracting large industries and factories.

The *White Paper on Local Government* also explained in a most detailed way the role of a traditional leader at local government level namely, to:[970]

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[967] Section 151 of 1996 *Constitution*.

[968] November and Wessel 2002 *J of Contemporary History* 146. Section 152(1) of 1996 *Constitution* outlines these objectives of the local government.

[969] See also a Manual compiled by Educational Support Services Trust on "Local Government 2000 and Beyond Vote and be Involved" (2000) 11. See also 4.3.1 and 4.3.5 above.

[970] *White Paper on Local Government* issued by the Ministry for Provincial Affairs and Constitutional Development, March 1998. These roles of the traditional leaders were translated into local government legislation, for example *Local Government: Municipal Structures Act* 117 of 1998, the *Local Government: Municipal Systems Act* 32 of 2000, the

- Act as head of the traditional authority and as such perform certain limited legislative, executive and administrative powers;
- Preside over customary law courts and maintain law and order;
- Consult with traditional communities through *Imbizo/lekgotla;*
- Assist member of the community in their dealings with the state;
- Advise government on traditional affairs through the Houses of traditional leaders;
- Convene meetings to consult with communities on needs, principles and provide information;
- Protect cultural values and provide a sense of community in their areas through a communal social frame of reference;
- Be the spokespersons generally of their communities;
- Be symbols of unity in the community; and
- Be custodians and protectors of the community's customs and general welfare.

According to the *White Paper*, traditional leaders also have added responsibilities and a role in the development of the local communities. These included *inter alia* to:[971]

- Make recommendations on land allocation and settlement of land disputes;
- Lobby government and other agencies for the development of their areas;
- Ensure that the traditional community participate in decisions on development and contribute to development costs; and
- Consider and make recommendations to authorities on trading licenses in their area in accordance with law.

Intergovernmental Relations Framework Act 13 of 2005 and the *Traditional Leadership and Governance Framework Act* 41 of 2003.

[971] *White Paper on Local Government* issued by the Ministry for Provincial Affairs and Constitutional Development, March 1998. These responsibilities are translated into *Communal Land Rights Act* 11 of 2004.

Pimstone is of the opinion that democratisation in municipal decision-making and decision implementation is impossible without community participation.[972] The question was how the hereditary institution of traditional leadership could be accommodated in a democratic institution such as local government? Pimstone correctly pointed out that traditional leadership and the demands of democratic governance are fundamentally at odds because the system of electoral power is alien to the institution of traditional leadership.[973]

Equality forms the basis of the *Constitution* and *White Paper on Local Government.*[974] Critique against the institution of traditional leadership include that it was inconsequential and otiose in a new South Africa since it has a history of endemic corruption and political manipulation by colonial and *apartheid* government.[975] The critics also argued that the institution lacked the required expertise and skills to perform municipal functions.[976]

Pimstone explained that despite the anomalies and defects inherent in the institution of traditional authorities, it would be inappropriate to exclude them from the local government. Traditional leaders control vital community resources such as land and play a very important role to any service delivery and development strategies to be implemented in the rural areas. In many rural areas such traditional leadership is the only form of government structure. [977] Peters remarked in this regard:[978]

> Traditional forms of government ... continue to have direct relevance for millions of people, particularly many living in the rural areas, where the perceived

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[972] Pimstone *Constitutional Basis of Local Government* 12.

[973] Pieterse 1999 *SAJHR* 187. Opposition against traditional leaders also included the argument that traditional leaders discriminate against women and should not be allowed to participate in a democratic municipal institution. This argument was raised before the promulgation of *Traditional Leadership and Governance Framework Act* and the launch of *White Paper on Traditional Leadership and Governance*. Therefore it no longer holds water. See in this regard Pimstone *Constitutional Basis of Local Government* 12. See also 4.4.2 above.

[974] Section 9 of 1996 *Constitution.*

[975] See 3.4.1, 3.4.2, 3.4.3, 3.4.4, 3.5.1, 3.5.2 , 3.5.3 and 3.5.4 above.

[976] Pimstone *Constitutional Basis of Local Government* 12.

[977] Pimstone *Constitutional Basis of Local Government* 12.

[978] Pieterse 1999 *SAJHR* 187.

reality of government is the traditional authority rather than the modern state.

4.5.2 LEGISLATION AND LOCAL GOVERNMENT

Various local government statutes have been passed by parliament that impact on the role of traditional leadership in the sphere of local government. These legislation created a legal framework within which the traditional leaders discharge their duties and responsibilities at the local government level. This framework outlines and defines the roles, functions and powers of traditional leaders with regard to service delivery.

4.5.2.1 *LOCAL GOVERNMENT: MUNICIPAL DEMARCATION ACT* OF 1998

In terms of the 1996 *Constitution*, the *Municipal Demarcation Act*[979] was promulgated to determine municipal boundaries covering the whole of South Africa "to destroy the Berlin wall which cut off many impoverished communities from resources".[980] The effects of the demarcation had an impact on the main utilities and services at local government level, including electricity, water and health utilities and on transport, land use, planning and economic development sectors. The *Demarcation Act* made a provision for the establishment of an independent Municipal Demarcation Board, which was solely responsible to re-draw the boundaries of municipal areas in line with these objectives:[981]

- To establish an area that facilitates:[982]

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[979] Act 27 0f 1998. Hereafter referred to as *Demarcation Act*.
[980] Pieterse 1999 *SAJHR* 187.
[981] *White Paper on Local Government* (1998).
[982] The Act intended to promote co-operative models of governance between local, provincial and national governments. See also section 2 of the *Intergovernmental Relations Framework Act* 13 of 2005, which generally establishes a framework for the national government, provincial government and local government to promote and facilitate intergovernmental relations. The Act further recognises that the government is constituted as national, provincial and local interdependent and interrelated entity.

- Co-ordination between municipal, provincial, and national functions;
- Integrated social and economic planning and development; and
- An inclusive tax base.

- To permit the Municipal Council of that area to fill its constitutional obligations, namely:[983]

  - To encourage responsive and participatory democracy;
  - To deliver its municipal responsibilities in the most effective and efficient manner;
  - To attain financial and administrative viability;
  - To promote social and economic development; and
  - To create a safe and healthy environment.

The re-drawing of municipal boundaries and the establishment of primary municipalities affected the traditional authorities areas. The demarcation processes did not take the boundaries of traditional areas into account, for example, there was a situation where some members of a particular tribe belonged to a particular municipality while others belonged to another.[984]

4.5.2.2 LOCAL GOVERNMENT: MUNICIPAL STRUCTURES ACT OF 1998

The Municipal Structures Act[985] was enacted to overcome the legacy of socio-economic inequalities and racial discrimination, which polarized the masses of

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[983] The Act envisaged the creation of Municipal Councils, which were competent, effective and efficient in line with the obligations laid down by the *Constitution* thereby ensuring quality service delivery to the people.

[984] Khunou *Status of Traditional Leaders* 8. The demarcation process, which took place throughout the country of South Africa, posed tremendous threat to some of the traditional leaders. Divisions of traditional leaders particularly in the Kwazulu-Natal opposed the redrawing of municipal boundaries and the establishment of primary municipalities in the traditional authorities areas. For instance before the 2000 local government elections a number of municipal offices were burnt in Kwazulu-Natal. Since the demarcation process, which swept South Africa included boundaries of traditional areas some tribes were divided.

[985] Act 117 of 1998. Hereafter referred to as the *Municipal Structure Act*. See also the *Local Government: Municipal Structures Act* 20 of 2002. The purpose of the amendment is to enable a member of a Municipal Council to become a member of another party whilst

South Africa.[986] The Act has an impact and bearing on the institution of traditional leadership, because it provides for the participation of traditional leaders in the Municipal Council:[987]

> Traditional authorities that traditionally observe a system of customary law in the area of a municipality may participate through their leaders in the proceedings of the Council of that municipality and those leaders must be allowed to attend and participate in any meeting of the Council.

The number of traditional leaders who may attend and participate in the proceedings of the meetings of the Councils was limited. In as far as the attendance and participation of traditional leaders in the Council meetings were concerned, it seemed traditional leaders had forfeited their membership afforded to them by the *Interim Constitution*.[988] The words "attend" and "participate" diminished the status of traditional leaders as members of the Council. As a result of this statutory provision, traditional leaders can no longer vote in this Council. Pieterse asserted that their powers are diminished if compared to their position under the *Interim Constitution*.[989]

The *Municipal Structures Act* provides specifically for the participation of traditional authorities in the Municipal Council.[990] This provision implies that a traditional leader is entitled to participate only if he or she represents the traditional authority. The *Municipal Structures Act* departed from the provision of the *Interim Constitution* that gave traditional leaders *ex officio* membership of local government.[991]

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retaining membership of that Council and to enable the existing party to merge with another party.

[986] See the Preamble of Act 117 of 1998 which states *inter alia* that past policies have bequeathed a legacy of massive poverty, gross inequalities in municipal services and disrupted spatial, social and economic environments in which people continue to live and work,

[987] Section 81(1) and (2) of Act 117 of 1998.

[988] See 4.3.1 above.

[989] Pieterse 1999 *SAJHR* 186.

[990] Section 81(1) of Act 117 of 1988.

[991] In other words traditional leaders would no longer be members of the local government structures by virtue of their positions and status.

Initially the *Municipal Structures Act* provided for 10% representation of traditional leaders in municipal Councils. Traditional leaders argued that 10% was not adequate and demanded 50% representation in Municipal Councils. Traditional leaders argued that with 10% representation in Municipal Council, they were likely to be outnumbered by political voices and might not effectively influence decision-making processes. They objected to any form of arrangement, which could make them to play the role of rubber-stamps in Council meetings.[992] This objection resulted in representation of traditional leaders in the Municipal increasing from 10% up to 20%.[993]

Traditional leaders were dissatisfied with their statutory and constitutional position regarding local government.[994] They proposed that traditional authorities should be recognized as an independent institution of local government. They also demand more resources, facilities and funds so that they can be able to deliver services to their communities in a more effective and efficient way. Traditional leaders made these demands before and after the promulgation of the *Municipal Structures Act*.[995]

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[992] Section 181(2) of Act 117 of 1998.

[993] Rugege *Institution of Traditional Leadership* 17. According to Rugege, it seemed that traditional leaders were not likely to play a dominant role in local government. More powers would be concentrated in the hands of the elected councillors. Rugege quoted Mbeki saying that: "to give traditional leaders more powers in local government would be a betrayal to those people who fought for freedom and democracy". See also the *Local Government: Municipal Structures Amendment Act* 20 of 2000. This Act amended section 81 of the *Local Government: Municipal Structures Act* in 2000 providing an enhanced representation of traditional leaders in Municipal Council. That is why they currently enjoy 20% representation in rural areas where there are Municipal Councils.

[994] Rugege *Institution of Traditional Leadership* 17. See Act 117 of 1998. The *Municipal Structures Act* fails to resolve the legal position of traditional leaders in local government to the satisfaction of traditional leaders and those members of the society who still attach importance to the institution of traditional leadership in the promotion of African democracy and culture. They strongly argue that their powers and responsibilities have been reduced considerably under the 1996 *Constitution* and post-*apartheid* legislation such as the *Municipal Structures Act*.

[995] Rugege *Institution of Traditional Leadership* 17.

4.5.2.3 *LOCAL GOVERNMENT: MUNICIPAL SYSTEMS ACT* OF 2000

Although the *Municipality Systems Act*[996] was not designed to deal specifically with the institution of traditional leaders, it has far-reaching implications and influences on traditional authorities. The purpose of the *Municipal Systems Act* is to provide a framework for the core principles, mechanisms and processes necessary to enable Municipalities including rural Municipalities to ensure social and economic development of the local communities. The Act provides a mechanism for the development of a culture that complements formal representative government with a system of participatory governance.[997]

Traditional leaders through their representation in the Municipal Council are required to communicate to their communities information concerning the available mechanisms, processes and procedures to encourage and facilitate community participation, Municipal governance, management and development. When communicating this information, traditional leaders and politically elected councillors in the Municipal Council must take into account language preferences and the special needs of people who cannot read and write.[998]

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[996] Act 32 of 2000. This Act particularly within the ambit of its section 3 provides that local government must enhance co-operation, mutual assistance and sharing of resources among the municipalities to facilitate compliance with the principle of competitive government and intergovernmental relations. See also the *Local Government: Municipal Systems Amendment Act* 44 of 2003. The *Municipal Systems Act* was amended to make new provisions regarding the assignment and functions or powers of the municipalities, to provide for sumission of annual performance reports by municipalities and to provide for the establishment of municipal entities.

[997] Section 16 of Act 32 of 2000. Since some of the traditional leaders are members of the local rural Municipal Councils, it appears that those who take part in Municipal Councils should be encouraged to create conditions for their local communities to participate in the affairs of the municipality. The Preamble of Act 32 of 2000 which states that there is a need to set the core principles, mechanisms and processes that give meaning to developmental local government and to empower municipalities to move progressively towards the social and economic upliftment of communities and the provision of basic services to all people. The Preamble further envisages the new system of local government that requires an efficient, effective and transparent local public administration that conforms to constitutional principles.

[998] Section 18 of Act 32 of 2000.

The Act further provides for the participation of the local community in the affairs of the municipality through political structures and traditional authorities with regard to the rural traditional communities. The mechanisms, processes and procedures of rural people in the municipalities must take into account illiterates, people with disabilities, women and other disadvantaged groups.[999]

Since the system of local government under *apartheid* failed dismally to meet the basic needs of the traditional authorities and their communities, the *Municipal Systems Act* is designed *inter alia* to establish the new type of local government, which promotes active engagement of communities in the affairs of municipalities and more especially in planning, service delivery and performance management. In as far as the rural communities are concerned, it is envisaged that such participation will be formulated by traditional leaders who participate in Municipal Councils.[1000] This Act should be hailed as an important measure intended to deepen participatory democracy in rural communities and traditional authorities.

4.5.2.4 LOCAL GOVERNMENT: PROPERTY RATES ACT OF 2004

The post-*apartheid* local government dispensation has integrated rural areas into the local municipalities. In other words, rural areas including traditional authorities areas in South Africa form part of the local municipalities. The new areas need a tax base therefore, the *Local Government: Property Rates Act*[1001] was passed to give Municipal Councils a directive to adopt only a policy on the levying of rates on rateable property.[1002]

Section 229 of the *Constitution* is *inter alia* an attempt to support the development of sustainable local government, through regulating the discretionary power of municipalities to raise revenue. The Act has been

[999] Section 17(3) of Act 32 of 2000
[1000] Preamble of Act 117 of 1998.
[1001] Act 6 of 2004. Hereafter referred to as the *Property Rates Act.*
[1002] Section 2(1) and 3 of Act 6 of 2004.

devised to provide uniformity with regard to the local government tax base, rating policy, objections and appeal processes.[1003]

The Act has an effect on the powers of traditional leaders as property rates may be imposed on communal land without the involvement of the tribal authority. Rural people would be required to pay rates and such payment would be made to the offices of the Municipal Council and not traditional leaders. The Act is silent on the institution of traditional leaders and their role or involvement in the payment of Municipal Council. [1004]

The Coalition of Traditional Leaders of South Africa raised a considerable number of objections against the Act. They submitted that:[1005]

> For the first time in the lives of the traditional communities they will be liable to pay tax for the roundavels and structures that they have built and also their mealie fields. We would like to state clearly that the homesteads as well as the land in our communities ... (are) owned communally. The homes that are more often than not registered in the name of the head of household, in fact, belong to a family unit and not to that individual. Furthermore there is no title deed that is registered anywhere in the name of the head of that household ...

Chief Mzimela contended that the Coalition opposed any move of title deed and payment of rates in rural areas because this would expose the communities to a foreign system that would lead to them losing their inalienable right to own land in South Africa. He further highlighted in a

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[1003] This information was obtained from the Report on the Stakeholder Workshop held at the Kopanong Hotel in Benoni over the two day period from the 7-8 April 2004 4. This report was compiled by McLachlan N and Ebrahim Z of Organisation Development Africa (ODA) at the request of the Chairperson of Portfolio Committee for Provincial and Local Government 2003.

[1004] Statement from Report on the Stakeholders Workshop 7-8 April 2004 10. Already in the discussions around the Bill leading to the passage of this Act, it transpired that the Bill did not explain in clear terms and language the role of traditional leaders in the new regime of property rates. Since traditional leaders are governing bodies in rural areas the Act fails to afford them that recognition.

[1005] Submission by the Coalition of Traditional Leaders of South Africa on the Local Government: *Property Rates Bill* for presentation at the public hearing to be conducted by the Parliamentary Portfolio Committee on Provincial and Local Government, Cape Town 2003.

Submission by the Coalition of Traditional Leaders of South Africa on the Local Government: Property Rates Bill that property in rural communities should not be levied municipal rates in the same way as property that was in urban areas:[1006]

> (They) were assured that it was never the intention of government to incorporate (rural) areas only to benefit the bankrupt municipalities instead our areas would benefit by such incorporation so that the lives of our people would be better of. We may mention that we did state that it was our fear and that of our people that the government intended to incorporate our areas in urban areas so that the traditional communities could be burdened with urban tax to pay for municipalities that were heavily indebted. We believe that many municipalities are still heavily indebted. Furthermore both the culture and the system of governance in municipalities is not only foreign but also very oppressive to our communities.

According to the National House of Traditional Leaders, the Act could lead to individual title, which in turn would fragment land and encourage land speculation in rural areas. The Act allows municipal managers a directive to exercise their discretion on exemptions, reduction and rebates in the rates payable to the property without obtaining a resolution of a tribal or traditional Council.[1007] A municipality would levy a rate by resolution and traditional authorities will have no say whatsoever. In terms of this Act it seems traditional leaders have no powers in the regulation of levies imposed on rural property owners. The Act marginalizes and sidelines traditional leaders.

However, the Act may in the long run be beneficial. Firstly, it is argued that once rural people could afford to pay rates, the revenue could be utilised to improve the quality of lives of the rural masses and add value that would

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[1006] Submission by the Coalition of Traditional Leaders of South Africa on the *Local Government: Property Rates Bill* for presentation at the public hearings to be conducted by the Parliamentary Portfolio Committee on Provincial and Local Government.

[1007] Section 14(1) and (2) of Act 6 of 2004.

serve as a launching pad for future sustainable development in the rural areas.[1008]

4.6 CHALLENGES AND OPPORTUNITIES

The first part of this discussion explains the current challenges which traditional leaders encounter within the framework of the democratic and constitutional dispension. The actual effect of the 1996 constitutional scheme on the institution of traditional leadership has taken away from the traditional leaders the vast majority of powers and functions that were allocated to them in terms of pre-1994 legislation.[1009] The fact that the traditional leaders did not discharge some of those powers and functions during the pre-constitutional era, does not depart from the fact that the 1996 constitutional order has in real terms removed from traditional leadership the majority of powers and functions that they used to have.

This discussion will also focus on the opportunities available to traditional leaders within the framework of the constitutional order. These oportunities include *inter alia* the transformation of traditional leadership to embrace gender equality, participation and representation of traditional leaders in both National and Provincial Houses of Traditional leaders and their role in both local and District Municipalities. Most importantly it is the recognition of the tradtional leaders by the 1996 *Constitution*.[1010]

4.6.1 CHALLENGES

One of the major challenges facing the institution of traditional leaders in the new South Africa is that the institution is required to adapt to the new roles and powers assigned to it by the 1996 *Constitution* and subsequent legislation. New constitutional institutions of traditional leaders replaced the

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[1008] However, the problem with the payment of rates in rural areas was that many people were unemployed in those areas. Therefore one wondered if the objective set for the Act would be realized.

[1009] See 2.1, 2.2, 2.3, 2.4, 3.4 and 3.5 above.

[1010] See 4.3.1, 4.3.2, 4.3.3, 4.3.4 and 4.3.5 above.

old traditional institutions of governance and rule. With all these changes in place, the institution is bound to change and assume new roles and powers at national, provincial and local levels. However, it became apparent from early observation that this programme of reform did not escape resistance from traditional leaders.[1011]

It seems some of the traditional leaders developed a strong tendency to oppose every move taken by government to transform the institution of traditional leaders. One of these problems is attributed to a slow pace in which traditional leaders adapt to "democratic" changes and consequently the intentions of government were often not fully realized on implementation phase.[1012]

The most problematic side in a discourse of traditional leadership in the new South Africa is not that the institution is completely repugnant to modern democracy. Hence November and Wessels argued that the most extreme challenge is that the 1996 *Constitution* looks at South Africa from the perspective of the evolution of western societies. This observation became evident when the elected eurocentric politicians handled the roles of the traditional leaders.[1013]

There are instances where elected politicians and traditional leaders, particularly at local level, displayed uneasy coexistence and political tussel. The local government structures where traditional leaders worked with the elected councillors had become a terrain of political struggle and domination itself. They channeled most of their energies to political wrangle, and failed to realize that they serve the same customer, the South African citizen. Hence

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[1011] See 4.3 and 4.4 above.

[1012] It is evident that some of the traditional leaders in the country are still conservative and not prepared to change with times. For example, some of the traditional leaders in Kwa-Zulu Natal encouraged their subjects to boycott the 2000 local government elections.

[1013] November and Wessels 2002 *J of Contemporary History* 149; TARG *Project Background* 4. According to TARG, the process of transformation of the local government is likely to be frustrated by the absence of clear functions of traditional leaders in the rural areas. TARG suggests that a balance has to be found between the need for democratically elected rural local authorities and the constitutional provisions guaranteeing the existence of the institution of traditional leadership. One of the most important aspects of the problem is to identify the present and future role of traditional leaders in local government.

Mbeki alluded that for local government structures to respond effectively to the local needs of the people, elected leaders and traditional leaders must work hand in hand as partners in development.[1014]

There are other critical challenges, which impair the effectiveness of traditional leaders in the new South Africa. Some of these challenges are not necessarily new. They had been inherited by the democratic government from both colonial and *apartheid* regimes. These included *inter alia*:[1015]

- Lack of basic resources and equipments like tables, chairs, computers, personnel etc;
- Lack of financial resources necessary to undertake independent community service projects;
- Lack of formal education and deep understanding of the dynamics of economic and political modalities in a context of modernity;
- Difficulties in reclaiming the glory they lost during the colonial and *apartheid* eras;
- Continuity of the succession battles and disputes weaken argument for the recognition of institution of traditional leadership;
- The problem of how to harmonize conflicting concepts of African democracy and modern or western democracy without compromising the other;
- Lack of accountability and transparency in some office of traditional leaders; and
- Poor administration, bottlenecks and endemic corruption.

[1014] It is imperative to note that traditional leaders and elected councillors should work together at the implementation of the integrated rural development programmes. Since the rural masses have been denied socio-economic opportunities by the colonial and apartheid governments, their means of subsistence have been obliterated and subjected these people to poverty, landlessness and underdevelopment.

[1015] November and Wessels 2002 *J of Contemporary History* 148-149. These challenges also form part of the observations, which the author made during the writing of this thesis. Since the author grew up in a traditional authority area, he has personal experience relating to certain challenges faced by some of the traditional leaders. To cite a poignant example, there are some of the traditional leaders in the North-West Province who literally do not have offices and run the affairs of the tribe under the tree. This problem is common among the headmen particularly those who are not recognised and paid by the government.

4.6.2 OPPORTUNITIES

One of the commendable offers ever made to traditional leaders by the democratic government was the system of representation, which embraced gender equality and participation. As indicated earlier in this discussion,[1016] traditional leaders have constitutional institutions, which are intended to represent the aspirations of those leaders. Therefore traditional leaders should use this opportunity to initiate dialogue with a broad spectrum of civil society and government to bring a better understanding of African culture, customs and practices.[1017]

Government argued on several occasions that there is no genuine reason to believe that traditional leaders cannot work in tandem with the elected politicians. What is needed is the creation of an innovative institutional arrangement, which combines the natural capacities of both traditional and elected politicians of local government to advance the development of rural areas and communities. Hence a co-operative model of governance is an incredible opportunity,[1018] which can be utilized to deepen co-operation, communication and consultation between all organs of state and traditional leaders and institutions.[1019]

[1016] See 2.1, 2.2, 2.3 and 2.4 above.

[1017] Traditional leaders are represented in Houses of Traditional Leaders at both provincial and national levels. They are also represented in Municipal Councils of local government. Traditional leaders are expected to represent the aspirations of their rural people in these organs of government.

[1018] TARG *Administrative and Legal Position* 29-30. There are a considerable number of opportunities for both government and traditional authorities, which if they are utilised to their full potential may result in the successful implementation of development policies and laws in rural traditional authorities areas. These opportunities include *inter alia*: (a) The ability to facilitate and co-ordinate implementation of policies such as the *White Paper on Traditional Leadership and Governance* and recent legislation on traditional leadership and governance. (b) To expand the limited representation the traditional leadership have at present to more useful levels of representation at local, provincial and central levels of government. (c) To ensure that appropriate training is made available to traditional leaders. (d) To empower traditional leaders to implement development plans and projects in rural areas.

[1019] See also the *Intergovernmental Relations Framework Act* 13 of 2005. This Act promotes intergovernmental relations and co-operative governance amongst all organs of the government.

The 1996 *Constitution* requires co-operative government between all organs of state. Traditional leaders, traditional institutions, the National House of Traditional Leaders and the Provincial Houses of Traditional Leaders are organs of state. This entails compliance on the part of the traditional leaders with the provisions of the 1996 *Constitution* on co-operative governance.[1020] It is against this background that the important role traditional leaders had played in the development of their communities should be continued.[1021]

As Ntsoane concluded the role of traditional leaders in a democratic South Africa may not be taken for granted. It is significant to build the capacity of these leaders and ensure that they too benefit from the pool of knowledge, skills and opportunities, which their subjects could benefit from.[1022] The government has outlined the framework capacity building and empowerment of traditional leaders in a number of statutes and policies such as the *Traditional Leadership and Governance Framework Act and* the *White Paper* on *Traditional Leadership and Governance*. Through these legal documents, the government had shown commitment and determination to enhance the

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[1020] Section 41(1) of Chapter 3 of 1996 *Constitution*. The organs of state are required *inter alia* through co-operative government to preserve the peace, national unity and the indivisibility of the Republic, secure the well-being of the people of the Republic, provide effective, transparent, accountable, and coherent government for the Republic as a whole, co-operate with one another in mutual trust and good faith by fostering friendly relations, assisting and supporting one another, informing one another and consulting one another on matters of common interests, co-ordinating their actions and legislation with one another, adhering to agreed procedures and avoiding legal proceedings against one another. In *Uthukela District Municipality and Others v President of Republic of South Africa and Others* 2003 (1) SA 678 (CC), the Constitutional Court stated that organs of state have the constitutional duty to foster co-operative government as provided for in Chapter 3 of the *Constitution*. See also *Msundizi Municipality v MEC for Housing, KwaZulu-Natal and Others* 2004 (6) SA 1 (CC), where the court also dealt with litigation, which involved co-operative governance by the organs of state. The court stressed that co-operative governance is an essential element of an effective government. The court also in *Directory Advertising v Minister for Post and Telecoms* 1996 (3) SA 800-862 (CC) stated that an organ of state is an institutional body by means of which the state governed. An organ of state is not an agent of the state but a part of government at any of its levels. The court further held that the definition of organ of state adopted in *Baloro and Others v Unibo and Others* 1995 (4) SA 197 (B) was far too wide. The concept as used in section 7(1) of the *Constitution* had to be limited to institutions, which were an intrinsic part of government or the public service consisting of government appointees at levels of government and those institutions outside the public service, which are controlled by the state.

[1021] *White Paper on Local Government* (1998) 77.

[1022] Ntsoane *Role of Traditional Leaders* 14. At the time of constructing this thesis, Otsile Ntsoane was a Deputy Director in a Directorate of Indigenous Knowledge system (IKS), Department of Science and Technology Pretoria.

status of traditional leadership. Traditional leaders should use all these opportunities to restore and reclaim their pre-colonial glory.[1023]

4.6.3 CONCLUSION

The main objective of the democratic government of South Africa is to transform the institutions of traditional leadership and re-create the type of institution, which is completely in line with the values of the *Constitution* and democracy. The post-*apartheid* order rejects the old order in so far as it is sexist, racist, authoritarian and unequal in its treatment of persons. All the rules, principles and doctrines of the institution of traditional leaders apply in the new dispensation only because they are rules, principles and doctrines that will survive the scrutiny of the present society when measured against its compliance with the requirements of human dignity, equality and freedom. In order to transform this institution, the government in line with the 1996 *Constitution* passed a host of democratic legislation intended to change the institution of traditional leaders and make it consistent with the *Constitution*. Although the government has demonstrated its intention to retain and recognise position and status of traditional authorities, it has changed their pre-colonial and colonial roles and standing.

These changes resulted in the creation of a transformed institution of traditional leadership based on a number of core constitutional values, for example democracy, human dignity, equality, human rights and freedoms, non-racialism and non-sexism. The institution of traditional leadership is obliged to ensure full compliance with these constitutional values and other relevant national and provincial legislation. The right to equality, including the prohibition of discrimination on the basis of gender and sex has an important impact on the institution of traditional leadership and rural communities. Both national and provincial legislatures have passed legislation to promote the

[1023] Traditional leaders could only be in a better position to serve democracy once they had acquired the necessary knowledge and skills relevant to enable them to carry out their tasks efficiently and effectively. It is no exaggeration that without the necessary skills, formal education and expertise they would not be able to cope with the demands of democratic institutions. See also 2.1, 2.2, 2.3, 2.4 and 2.5 above.

values and principles of the *Constitution,* thereby taking into account the nature and functions of the institution of traditional leadership. These changes regarding the roles and functions of traditional leaders are evident in respect of their position and status in local, provincial and national government.

SECTION B: BOTSWANA*

CHAPTER 5: PRE-COLONIAL BOTSWANA

5.1 HISTORICAL PERSPECTIVE

It seems there are different versions and historical accounts and uncertainty as to the exact and precise origins of the Tswana groups. The underlying reason for the uncertainity is because there is a disagreement as to the origin of the Tswana groups, which dates the origin to 1250 AD when Tswana people already lived in the territory, which was named TVL by the *Voortrekkers*.[1024] Tlou and Campbell stated that few of the Tswana lived as far as Zeerust in the present North West Province of South Africa. They argued that the Bakgalagadi and the Sotho lived amongst the Tswana and some of them occupied dry areas of Botswana in the west along the fringes of the Kalahari Desert. According to these two authors, Tswana, Sotho and Kgalagadi were interrelated and were descendants of one original group.[1025]

Another theory traced the origin of the empire of the Tswana ancestors back to 1350 at the time when they used to inhabit the present region of Johannesburg in Gauteng Province of South Africa.[1026] Parson maintained that the main Tswana migration[1027] came westward from South Africa. This

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* To a large extent the success of this section on Botswana is indebted to Professor C Fombad (University of Botswana) and Chief Tumelo Seboko, the President of Customary Court of Appeal (Botswana) for their comments and advice. However, I am responsible for any omissions and commissions inherent in this discussion.

[1024] Tlou and Campbell *History of Botswana* 62. See 3.1.5, 3.2 and 3.3 above.

[1025] Tlou and Campbell *History of Botswana* 62.

[1026] Isaaks *Botswana, Lesotho and Swaziland* 39. Johannesburg is one of the biggest cities in South Africa. It is a producer of gold and other minerals of great importance to the South African economy. It serves as a great attraction of many people across the globe. The inhabitants of Botswana are known as the Tswanas (Batswana) or West Sotho and form part of the larger Tswana national group, which is found in the Northern Cape, Free State and Gauteng provinces of South Africa as well as Lesotho. The Tswanas are not confined to the present boundaries of the present Botswana, but are also found over a wide area of the North-West Province, in particular in the districts of Mafikeng, Taung, Kuruman, Rustenburg, Ventersdorp, Lichtenburg and so forth. Smaller groups are found in Thaba Nchu in the Free State Province, Plumtree in Zimbabwe and in the Gobabis district of Namibia.

[1027] Bishop 1998 *CILSA* 93. It seems the pre-colonial Tswana people came and went into the present day Botswana in response to ecological and sociological pressures. The Tswana groups continued with migration for many years in the territory of the San, they finally

migration was encouraged and stimulated by friction, competition for survival from others and subsequent Tswana contact with the Europeans. Parson also stated that the Tswana empire originated in the 18th century. That is why it is submitted that by 1800 many related Tswana groups were already organised and settled.[1028]

According to Hodgson and Ballinger at the time when the present Tswana people migrated into the territory known as Botswana they did so as the conquerors.[1029] They conquered the San and other black tribes (including Tswana communities who had migrated earlier than the main Tswana groups). Since the San were living a nomadic life they did not established a fixed and settled environment of existence. As a consequence, the new Tswana migrants occupied the traditional territory of the San.[1030]

Tlou and Campbell further stated that during the 18th century these Tswana groups had marks of their ancestry to Masilo. Masilo was the great-grandson of Mogale and had two sons by the names of Mohurutshe and Malope. After the death of Malope, his sons broke away from Mohurutshe and gathered sections of the Tswana tribes. These sons of Malope were called Kwena, Ngwato and Ngwaketsi. These three sons were traditional leaders of sections of their tribes in their own rights.[1031]

The followers or tribes of these three sons were named after them. For instance, those who followed Kwena were popularly known as Bakwena, the section of Ngwato became Bangwato and the followers of Ngwaketsi was called Bangwaketsi. Tlou and Campbell explained that as a result of *tlala e e*

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settled and established their tribal territories with tribal capitals and traditional leaders as heads of territorial administrations. For instance the Bangwato tribal territory was established with capital in Serowe, Bakwena in Molepolole and Bangwaketse in Kanye.

[1028] Parson *Botswana* 15-18.

[1029] Hodgson and Ballinger *Britain in Southern Africa* 14.

[1030] Hodgson and Ballinger *Britain in Southern Africa* 14. These main Tswana groups are the Kwena, the Ngwaketsi, the Ngwato, the Kgatla, the Lete, the Hurutshe, the Rolong and the Tlokwa. Other groups such as the San, the Kgalagadi, the Bayeyi, the Kaa, the Birwa, the Herero, the Yei or Kube, the Subia, the Talaote, the Tswapong, the Teti, the Mpukush and the Kalanga are said to be minor or minority groups. See 3.1.1, 3.1.2, 3.1.3, 3.1.4, and3.1.5 above. See also 6.1 and 6.2 below.

[1031] Tlou and Campbell *History of Botswana* 65; Isaaks *Botswana, Lesotho and Swaziland* 39.

boitshegang[1032] around 1800 these three amalgamated Tswana sections broke asunder in search of a better place for survival. At the time of fragmentation and migration, it is believed that Bakwena moved to the present Molepolole in Botswana, Bangwaketsi settled in Kanye and the Bangwato moved north to the present precincts of Serowe.[1033]

Bishop has another theory stating that the Tswana crossed the Zambezi River from either present day Zambia or Zimbabwe. After crossing the Zambezi River into Botswana, they split into a considerable number of independent groups namely, Tawana, Ngwato, Kwena, Ngwaketsi, Lete, Kgatla, Rolong, Tlokwa and Tlhaping. These groups moved freely and unrestrictedly in the territory of the San population.[1034]

What could be ascertained seems that although Botswana as the country name indicates is largely populated by Tswana people, it is generally acknowledged that the indigenous inhabitants were the San. According to Bishop, there is abundant evidence to the effect that the San used and occupied the Kgalagadi. Evidence was also found in place names such as

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[1032] This Tswana phrase of *tlala e e boitshegang* was generally used to refer to the great and terrible drought of that time. It was this great drought, which was responsible for the migration and fragmentation of the Tswana groups. The same drought caused a break up of the Barolong who were living somewhere west of modern Zeerust in South Africa. A younger son, Phuduhutshwana broke away from his father, Tshesebe and settled at Dikgatlhong near Harts and Vaal rivers. The famine was so severe that this group of Barolong was forced to catch and eat fish and as a result they were called Batlhaping (people of fish).

[1033] Tlou and Campbell *History of Botswana* 65; Isaaks *Botswana, Lesotho and Swaziland* 39. Drought possibly worsened by heavy over-grazing and human expansion had caused the group to scatter. About 1550, Kgabo with his followers, moved to Dithejwane, a hilly area west of Molepolole, where they found two groups known as Kgwatlheng and Naledi living in this area. Shortly, afterwards the Tswana split into three main groupings - the Kwena, Ngwato and Ngwaketse. The Tswana were predominantly pastoral, cattle owners and customs associated with cattle-transfer between families, playing a major part in their lives. Their possession was of the greatest importance and groups with few or no cattle tended to attach themselves to better-endowed groups. That might be the reason for the constant fragmentation and amalgamation, which played such a major part in the Tswana history.

[1034] Bishop 1998 *CILSA* 93. Traditionally these Tswana groups were made up of the eight principal tribal units namely the Lete, Bangwato, Bangwaketsi, Bakgatla, Balete, Barolong, Bahurutshe and Bakwena. These groups were said to be the most dominant one and later incorporated the subordinate groups such as Bayeyi, Bakgalagadi and the San. Before these Tswana groups came into contact with the Europeans they lived as herders and farmers or as hunters and gatherers under traditional rule. At that time they knew no authority other than traditional authority.

Ghanzi in western Botswana where rock art, painting and the San's intimate knowledge of indigenous flora and fauna of the area can be found.[1035]

Nq'onq'olo summarised the debate about the San as the indigenous people of Botswana as follows:[1036]

> As far as I have been able to ascertain the Masarwa (San) have always been true nomads, owing no allegiance to any Chief or tribe, but have ranged far and wide for a very long time over large areas of the Kalahari in which they have always had unlimited hunting rights.

The only conclusion that can be reached is that the San people were the most indigenous or aboriginal inhabitants of Botswana and held aboriginal title of the territory they claimed as *Nòresi.*[1037] Parson therefore correctly maintained that little is known about the origins or the social and political organisation of the early Tswana peoples. [1038]

5.2 TRADITIONAL TSWANA SOCIETY

The main part of the Tswana group is termed *morafe,*[1039] described by Ng'ong'olo as the most important political and social unit for land occupation, control and use purposes. Although many constraints limited the *kgosi's* authority,[1040] he nevertheless commanded unfailing loyalty from his people and was the *morafe's* supreme authority.[1041] The major political institution of

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[1035] Bishop 1998 *CILSA* 92.
[1036] Nq'onq'olo 1997 *JAL* 1-2.
[1037] The word *Nòresi* is a San term, which means the traditional territory or area of the San.
[1038] Parson *Botswana* 15.
[1039] The word *morafe* is Tswana term used to refer to a particular tribe or traditional community. There are different *merafe* (plural of *morafe*) in Botswana. Each *morafe* has its own traditional leader who is responsible for the administration of its affairs. The recorded oral history and traditions of the Tswana communities are associated with the ruling lineages of the chiefdoms, which form the Tswana political community. The office of a traditional leader was among others, judicial, ritual and administrative focus of morafe. See in this regard Legassick *Sotho-Tswana* 98.
[1040] See 2.1, 2.2, 2.3 and 2.4 above.
[1041] Samatar *African Miracle* 42-43; Tlou and Cambpell *History of Botswana* 78-79. The traditional leader authority formerly extended over many different spheres of tribal life. He was expected to watch over the interests of his subjects and be informed of tribal affairs generally. He shared his wealth with his subjects and his personal popularity often rested

morafe was the traditional authority. The *morafe* under the leadership of a *kgosi*[1042] occupied a particular and distinct geographical territory, which was normally named after the *kgosi* or his *morafe*. For instance, the name of a particular territory of *morafe* might be Gammangwato referring to the *morafe* of Bangwato.[1043]

The *morafe* lived in one village containing as many as 30 000 people. The *morafe* and consequently the village, were, and still are, split into a number of wards called *dikgotla*. Each ward had its own meeting place in the middle of the village - usually a crescent of poles in an open space called the k*gotla*[1044] where all affairs were conducted. Each extended family lived together. Each nuclear family had a courtyard containing its home and granary. Those courtyards were joined side by side by a crescent facing inwards. In the open space contained in the circle was the family meeting place.[1045] According to Isaaks on a smaller scale, this was a replica of the ward-meeting place, which again reflected the tribal meeting place in the traditional leader's ward.[1046]

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on his reputation for generosity. The cattle entrusted to common headmen were known as *kgamelo* (milk pail) cattle, for the fact that it was one of the principal duties of the herdsmen to milk them for the traditional leader's household and from time to time bring him thick milk (madila) in skin bags. The herdsmen were accordingly, sometimes-termed batshwari ba *kgamelo*, "holders of the chief's milk pail". They were also formerly termed *bagami ba kgosi*, "the Chief's milkmen or *batlhanka ba kgosi*, "the Chief's retainers".

[1042] See in this regard Comaroff and Roberts *Rules and Processes* 24–25, where they stated that the most important element of traditional leadership is the conceptual centrality in political and legal processes at the local level. In Setswana *kgosi* usually refers to a traditional leader of a particular traditional community or tribe. The position of kgosi is hereditary. In other words *kgosi* is not elected by the people but is born to throne.

[1043] Ng'onq'olo 1996 *SAPR/PL* 16. The *kgosi* was always treated with great respect. He was ceremonially addressed by the personification of the tribal name or by some other title of respect such as *kgabo* (monkey), a respective tribal totems or as *namane ya tau* (lion's cub) or *namane e tona* (great calf) or *motswa dintle* (goodness and virtue). His deeds were extolled in magnificent eulogies, recited on public occasions.

[1044] Isaaks *Botswana, Lesotho and Swaziland* 39. In Tswana context, the word *kgotla* has two meanings. The first meaning refers to a place where the affairs of the tribe are discussed. The second meaning refers to the tribal court. In most cases in one meeting place (*kgotla*) is used as tribal court and discussion place. The two are necessarily separated. All matters of public concern are dealt with finally before a general assembly of the men. One assembly of this kind known as *lekgotla* or *kgotla*. The *kgotla* was one legislative and judicial body in the pre-colonial period, which changed its functions on the advent of colonialism.

[1045] Isaaks *Botswana, Lesotho and Swaziland* 39. The family meeting place was used to discuss family business. The elder of a family group had judicial and administrative capacities on matters of a family group.

[1046] Isaaks *Botswana, Lesotho and Swaziland* 39.

The most basic unit of a *morafe* was the household. The husband headed this patriarchal unit. Under Tswana customary law, the family property belonged to the family as a whole and was administered by the head of the family.[1047] It consists of a wife (or several wives for wealthy men), her children and other dependent relatives. These units owned fields and cattle and shared grazing and water resources with other large groups. Several related households formed the next level of social organisation. The eldest men led the family groups, united by blood.[1048] Even when family group members did not live in close proximity, they still maintained kinship ties. The agnatic ancestor united the family group, they also interacted and maintained relations with other social units through marriage.[1049]

All members of the family group were subject to the administrative control of the *mogolwane*.[1050] The family elder was entitled to respect and obedience from other members and kept them in order. They must consult him in all their more important undertakings and he should assist them in any lawsuit that they might be involved in.[1051] His principal function was to preside over

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[1047] In *Lesholo v Sete* (1998) BLR 676-679, it was argued that under Tswana customary law a woman has no power or authority to be involved in the disposition of her late husband's properties which is a power vested upon the husband brothers or relatives, in this case the paternal uncles.

[1048] Samatar *African Miracle* 41. The tendency in recent years has been encapsulated in the Tswana saying *Bana ba kgwale ba bitsana ka melodi* literally meaning people of the same blood know each other irrespective of their place. The family group is always united. They always come together in difficult times such as funerals and illness. They also help each other during marriage ceremonies. One or more families make up a household, the group of people living in the same collection of huts. Several closely related households, living together in the same part of the village, make up the family group. One or more family groups, organised together into a well-defined local administrative unit of the tribe, make up the ward. See 2.1, 2.2, 2.3 and 2.4 above.

[1049] Samatar *African Miracle* 41.

[1050] *Mogolwane* is a Tswana name used to refer to an elderly member of the family. *Mogolwane* may be the head of the family or any other most senior member of the family.

[1051] In *Moeti Samotsoko v Itaoleng Palane* (1958) HCTLR 75, the court stated that it would not in itself be contrary to Batawana law and custom for an award of forty heads of cattle to be made in favour of an innocent wife who has cohabited with her husband over many years and who is discarded for another woman, where the husband is a man of substance and that an award of certain household effects and huts as well as twenty head of cattle was not excessive. The court went further to say that women of the Batawana tribe were allowed by law and custom to bring their own case in court instead of acting through a male guardian or head of the family. This decision seemed to be contrary to the Tswana law, which required that in case of litigation a woman should be assisted by a male guardian or elderly male person.

meetings of the family Council, *phuthego ya bana ba mpa.*[1052] The ward was the third level of *morafe* social organisation. A ward *kgotla* consisted of several family groups living together in the same section of the village, *motse.* The ward was an important political unit led by *kgosana.*[1053] The *kgosana* had clear administrative, judicial power and functions. Each ward had a *kgotla* where the group conducted its business. This group was normally made up of related families.[1054] The *kgosana* represented the *kgosi* and administered a ward on the *kgosi's* behalf.

The *kgosi* was the ultimate authority. However, political life was organised to ensure that effective government would result from the harmonious co-operation between the *kgosi* and his people: *Kgosi ke Kgosi ka morafe.*[1055] A traditional leader is a leader only because of the tribe, "Let a chief beware, without people he reverts to nobody." The traditional leader's position was not only prestige and power, but consisted of obligations. He was the holder of tribal property and had to use it on behalf of the tribe, he had to be available to his people at all times, help his people to run their affairs and to settle disputes.[1056]

[1052] The expression *phutego ya bana ba mpa* is used in Tswana to refer to a Council of people of the same blood. This Council is normally made up by members of the close relatives. It is in this Council where the mogolwane presides over the crucial and important matters of the relatives.

[1053] *Kgosana* is a Tswana term which is usually used to refer to the hereditary headman. In most cases *Kgosana* is a member of the royal family.

[1054] Samatar *African Miracle* 41. The elder of the family played an important role in unifying and developing the structure of the family group. He always reconciled members of the group in case of family disputes and misunderstanding. Indeed he was a building block of the family group. The family group always referred to as *bana ba mpa* or *bana ba motho* literally meaning children of the same man", or in a wider sense, as lesika, people descendent from a common ancestor. More generally it is spoken of, from the administrative aspect, as *lekgotlana* (the diminutive form of *lekgotla*, ward). If the family group is big enough, the group may have its own little lekgotla, presided over by its hereditary elder (*mogolwane* or *kgosana*), the senior male descendant of the common ancestor whose name it bears.

[1055] Samatar *African Miracle* 41. The Tswana idiom *kgosi ke kgosi ka morafe* means that a traditional leader is a traditional leader by a virtue of tribe or people. In other words kgosi cannot be *kgosi* without a tribe. His leadership resides entirely on the wishes and will of his people. See in this regard Konyana 2000 *Speculum Juris* 145. See also 2.1 above.

[1056] Samatar *African Miracle* 40. A traditional leader is not always the possessor of absolute power and authority. The traditional leader was expected to give an ear to all his subjects irrespective of rank. The expression "*Kgosi ke Kgosi ka morafe*" constitutes a powerful sanction for his authority, and a traditional leader too niggardly to provide lavishly for his subjects readily becomes unpopular. It is a common complaint of the old people today that young traditional leaders think more of their own welfare than of providing for the tribe.

5.3 AUTHORITY AND ADMINISTRATION

The Tswana traditional leader had to sustain and maintain the entire traditional life of his tribe. The limited authority of the traditional leader was divided into three major divisions. The first division was characterised by his political role. This role entailed his power to convene meetings (or gatherings) and preside over meetings at the *kgotla.*[1057] There were three categories of Tswana gatherings. At the *phutego,*[1058] serious issues were discussed and at the *letsholo,*[1059] matters pertaining to war and security of the tribe were tabled for discussion. The *letsholo* was equally important as the *phutego.*[1060] The third category was the *kgotla.*[1061]

Another major element of the Batswana's social structure was the age regiment (*mophato*). Adults belonged to an age grouping that was formed when boys and girls came of age. The male *mophato* was called *bogwera*, the female *mophato* was called *bojale*. The traditional leader presided over the *mophato* initiation. The process instilled a sense of group unity and trained the young about Batswana tradition, dedicating particularly their loyalty to the *morafe* and its traditional leader. So long as the traditional leader enjoyed the

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[1057] Chirenje *History* 32.

[1058] Chirenje *History* 32. *Phutego* in Tswana refers to a meeting of adult members of a tribe to discuss the affairs of the tribe. The elderly members of the tribe normally attended this meeting. The proceedings of *phutego* were always presided over or chaired by a traditional leader.

[1059] *Letsholo* is a meeting of the regiments. Normally a *letsholo* meeting was convened and presided over by a traditional leader. It was in this type of meeting where matters relating to the security of the tribe were discussed.

[1060] Chirenje *History* 32; Chirenje *Chief Kgama* 6. All matters of public policy were dealt with finally at an assembly open to all men of the tribe and variably termed pitso, lebatla or phuthego. Such assemblies were held frequently, at times almost weekly, and members usually met early in the morning in the tribal Council place, close to the *kgosi*'s residence. Normally only the men present in the capital attended, the business discussed and decisions reached being communicated, if necessary, to the inhabitants of outlying villages through their headmen. But on important occasions the men from outside were also summoned, and if the matter was at all critical (for example in cases of serious internal disputes) they might even be compelled to attend. A crucial meeting of this kind was sometimes held in the open veld some distance from the capital and the men all came to it armed and ready for trouble, it was then known as *letsholo*, a name applied to the collective hunt by which it was usually preceded or followed.

[1061] See 2.1 and 5.2 above.

support of the *mophato* he commanded enough force to coerce compliance.[1062]

The Tswana traditional leader was a Commander-in-Chief and in view of this capacity he had powers to declare war, make peace on behalf of his people and negotiate treaties and alliances. Therefore, this role of the Tswana traditional leader transcended his political functions to cover a wide range of diplomatic and external affairs. The *kgosi's* duty formerly extended over many different spheres of tribal life. With the aid of his advisers and Councils he decided questions of public policy, promulgated new laws and amended or abolished others after a broad consultation with the advisers and *morafe*. His advisers, variously known as *dintona*[1063] or *dikala tsa kgosi.*[1064] Suffice to state that the range of duties and responsibilities were vast. Chirenje confirmed this claim when he cited Thatatlhone addressing Rev Willoughby that: [1065]

> I have said that the Chief is the centre of everything done in the Bachwana (Tswana) tribe. They called the Chief their God. If the Chief spoke to a person, he assented by saying, "yes my God". This is the assent of mo(tswana). Their expression "my God" does not mean that the Chief is really God, it means that he is their superior ... he is the one who can pray for them to God, because he is the first born.

[1062] Chirenje *Chief Kgama* 7; Tlou *Political History* 250-252. A very prominent part was played in the public life of every Tswana tribe by the system of the age-regiments, *mephato*. Those regiments were formed every year, when all eligible boys and girls were initiated together. The formation of a men's regiment was in all tribes preceded by an elaborate series of rites, collectively known as *bogwera* or *go rupa* (to circumcise). The rites were among the most important ceremonial occasions in the life of the tribe. Corresponding to the men's regiments there were the regiments of the women known as *bojale*. *Bojale* was usually formed soon after the men's regiment had been formed.

[1063] The word *dintona* in this context is used to refer to lieutenants of a traditional leader.

[1064] Schapera *Handbook of Tswana Law* 66. In Tswana the phrase *dikala tsa kgosi* literally means the right hand men of a traditional leader. These men were often drawn from close relatives of a traditional leader. Together with his advisers, he judged all serious crimes and civil disputes, heard appeals from the various verdicts of lesser courts, controlled the activities of ward-heads and other local authorities and regulated the distribution and use of land, the cycle of agricultural work and many other economic matters. He was also the representative and spokesman of the tribe in all external relations. See 2.1 and 2.2 above.

[1065] Chirenje *History* 33.

Chirenje stated that some of the white observers interpreted such powers as a symbol of absolute rule but they were wrong as there were mechanisms in place that restrained his power.[1066] The *phutego* and *letsholo* could overrule the traditional leader's decisions and in case of a serious misconduct depose him.[1067] These mechanisms constituted an important element of Tswana democracy. The traditional leader was also restrained by his mother and uncles. Chirenje noted: [1068]

> (The Chief's mother) ... also has her own station. If a person has been beaten or perhaps his cattle have been seized, if he takes refuge with the mother of the Chief, he will be free even if he is in fault, and will not be molested. It is certainly the strong voice of a mother that can sway a Chief by charging him with 'treating the people of so-and-so with levity', when the Chief may cease to hamper the people because of this word of his mother.

The Tswana traditional leader was therefore subjected to the principles of checks and balances. Pre-colonial Botswana had one of the most hierarchical social structures in the region. This was a highly organised and central society. Given the relative small size of the Tswana groups and the concentrations of their populations in the large villages, it was possible to keep the centralised political order intact and effective. The link between royalty, particularly the traditional leader and the population centred around cattle. The traditional leader was thus looked upon as a source of wealth, reward and support in times of trouble. His most important source of wealth

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[1066] Chirenje *History* 33. See 2.1, 2.2, 2.3 and 2.4 above.

[1067] Shapera *Southern African Part III* 52. The existence of the Council and advisers of the traditional leader greatly limited his actual exercise of power. Despite the fact that control over almost every aspect of tribal life was concentrated in his hands and that in consequence his power was very considerable, he was seldom an absolute ruler and autocratic despot. In order to get anything done, he was expected first to gain the co-operation of his advisers and headmen, who played an important part in restraining his more arbitrary impulses. Any attempt to act without them was not only regarded as unlawful but would also generally fail. Offences against him personally were usually punished more severely than if committed against other tribesmen and disloyalty or revolt against authority was often met with death and the confiscation of the culprit's property. If his own conduct was unsatisfactory, he could be warned or reprimanded by his advisers or at public assemblies. If he ruled despotically or repeatedly neglected his duties, the people would begin to desert him or a popular relative would try to oust him by force or in the last resort he might even be assassinated as happened for instance, to the Kwena leader Motswasele II.

[1068] Chirenje *History* 34.

was cattle[1069] and he possessed the largest herd in the tribe. Most of them were the offsprings of cattle originally looted in war. The traditional leader could use force to dispossess those who were disloyal to authority and traditional belief systems. This centralised political order headed by an autonomous traditional leader, lasted until colonial rule in Botswana.[1070]

The traditional leader was the custodian of land and other societal resources. He gained his wealth by collecting tributes: [1071]

> Apart from being entitled to personal service from his subjects, the Chief used to receive from them various forms of tributes in kind. There included *sehuba* (specified hunting spoils), *dikgafela* (basket of corn after each harvest), and the produce of large fields (*masotla*) cultivated for him annually by the inhabitants of the capital and sometimes also by other local groups. He got an ox from the father of every child attending initiation ceremonies, and another as death token (*Tlatlo,* Tatodi) whenever an important man died. In addition, he kept all unclaimed stray cattle *(Matimela*), and most of those paid as fines in his court or looted in war. He also received special tribute from other subject communities.

The wealth was used to entertain guests, to provide for religious and other ceremonies, feed orphans and other needy *morafe* members. He loaned cattle to needy members of the tribe who were supposed to care for them and use their products. In fact the k*gosi* was referred to as a "milk-bail". The *kgosi*

[1069] Samatar *African Miracle* 40. Many of the cattle owned by the traditional leader were distributed for herding among his retainers, who lived upon their milk, while in times of famine he was expected to provide the people with corn from his granaries. The annual tribute of corn he received was used to make the beer given to the people at the harvest thanksgiving. In fact the wealth was not his but belonged to the tribe as a whole.

[1070] Samatar *African Miracle* 40.

[1071] As quoted by Samatar *African Miracle* 42. The traditional leader had a right in general to obedience from his subjects in all matters of public interest and also in minor matters of more personal concern. He was entitled to the tribute known as *sehuba*. This consisted primarily in the breast portion of every big game animal, in one tusk of every elephant and the skins of leopards and lions killed by his subjects. Whether hunting alone or in a regiment or in a *letsholo* (tribal hunt) this tribute was compulsory, failure to deliver it was a penal offence. Among the Kgatla, Tlokwa and Malete those who worked outside the tribal area gave him a cash-payment. This payment was also known as sehuba or among the Kgatla, as *setlhako*. It had died out among the Ngwato, in that people are no longer obliged to give it although they might do so if wished to.

could recall loaned cattle (*mafisa*) anytime he desired. Political and economic power rested with royals.

Three types of wards were distinguished, namely royal, commoner and immigrant. The *kgosi's* descendants governed royal wards. Unlike royal wards, commoners *(basemane)* who served at the *kgosi's* pleasure governed commoner wards. The *kgosi* appointed those men as a reward for supporting him during conflicts with royal kinsmen. Unlike the *basemane*, royal headmen inherited title and the *kgosi* could not arbitrarily deprive them of their property and title. As a result of security of tenure, those men occasionally challenged the *kgosi.* Immigrant wards were created for those groups who sought the protection of the *kgosi* and the *kgosi* appointed headmen from these ranks.[1072]

The traditional leader received his title by inheritance and was not elected. The first son of the principal wife automatically ascended to the throne when his father died or became incapable of administering the *morafe* affairs.[1073] The traditional leader was also a primary lawmaker and judge. His *kgotla* was the "administrative" and the "ideological" centre of his *morafe*. After the traditional leader, his relatives had the greatest influence and prestige.

[1072] Samatar *African Miracle* 40. The village headmen irrespective of their ranks or status acted as the traditional leader representatives in the village and were the media through whom official communications were made to the inhabitants. Each ward occupied its own separate portion of the village or town or might form a separate village in itself. In each case it was treated as a distinct social unit for administrative purpose. Each ward had its own kgotla, where cases were tried and other local business dealt with under the leadership of the headman.

[1073] Samatar *African Miracle* 42; Tlou and Cambpell *History of Botswana* 75. "*Kgosi ke kgosi ka tsalo*" - One was born into the Kingship. Cases were known were the traditional leadership had been usurped or acquired in some other way by trickery or force, but as a rule the traditional leader succeeded automatically to his office by right of birth. Women never succeeded although among the Ngwaketsi they acted as regents during the colonial era. Each tribe had a traditional leader who was normally the life long head of its government. In the olden days a newly deceased traditional leader was usually succeeded by the eldest son of his great wife or if there was no male issue in the house, by the eldest of the wife next in rank, if there was no sons or male descendents of sons in any of the wives the succession passed to the line of the traditional leader's next young brother and so on. The order of succession was determined primarily by seniority of descendents. Sometimes, however, doubts about the relative status of wives led to disputes between rival claimants, followed possibly by a split in the tribe. The traditional leadership was hereditary in the male line, passing normally from father to son. The traditional leader's son normally succeeded him as head of his household and to any political office (that is traditional leadership) that he might have held and also inherited the great bulk of his cattle and such other property. See also 2.1 above.

The traditional leader was expected to watch over the interests of his people and to keep him informed of tribal affairs. He had to look after tribal members' welfare and to protect them. They were regarded not as his people but his late father's people.[1074] It was his duty as trustee to treat his people well and justly and to see that no harm or misfortunes befell them.[1075]

Although the *kgosi* had a right to the service of every member of the tribe, he had a large number of servants directly attached to his household. One category of people is *malata* of whom the great majority especially among the Ngwato, Tawana, and Kwena, were recruited from such servile communities as the San and Kgalagadi. Some of the servants hunt for the *kgosi*, others herd his cattle, while others lived in his homestead and do all the routine household tasks. The *kgosi* had other servants (*batlhanka)* from the ordinary members of the tribe. Among the Kgatla, and probably in most of other tribes as well, a certain ward or certain family groups were specially attached to the *kgosi's* house as its servants. Those retainers continued to work for him and his successors.[1076]

The retainers lived at their own homes and had the same rights as other members of the tribe but they also had special obligations to the *kgosi*. These servants ploughed and looked after the traditional leader's cattle, fields, built his huts and repaired his homestead. The *kgosi* in turn let them use his wagons, ploughs and oxen for their own purposes. The *kgosi* also paid their

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[1074] There is a Tswana aphorism which says: "*Ga se batho ba gago ke ba ga rrago*" (they are not your people, they are your father's), his councillors will remind him if need be.

[1075] Schapera *Handbook of Tswana Law* 68. The traditional leader was expected to protect the rights of his subjects, provide justice for the injured and oppressed, and punish wrongdoers. "*Kgosi ke mosadi wa morafe*" literally translated to mean that the traditional leader is the wife of the tribe that is he provides the people with sustenance. He was thus looked upon as a source of wealth and support.

[1076] Amongst the Ngwato and Batawana there was another system of service as well. The traditional leader would entrust his share of the cattle looted in war and all other "tribal" cattle to commoners especially selected for their loyalty and bravery. Subject to various limitations, those commoners could use the cattle as their own property. In return they were expected to provide the traditional leader with meat and with milk and perform various domestic services for him.

tax, provided them with clothing and could assist them with *bogadi* (bride-wealth), blankets and other objects when they married.[1077]

5.4 SYSTEM OF LAND USE

Hodgson and Ballinger stated that before the Tswana came into contact with the Europeans they were a semi-pastoral and semi-agricultural stock of peasantry.[1078] Land was communally or tribally owned and inalienable.[1079] The control of the Tswana traditional system of land use vested in a traditional leader. Although in some Tswana areas some of the traditional leaders claimed ownership of tribal land by actions such as use of the land for ploughing, grazing and residence, such claims could not be substantiated in Tswana law. In actual fact, the land did not belong to a traditional leader personally. However there were certain parts of the land that a traditional leader was entitled to use and not owned personally for residence, cultivation and grazing.[1080]

Hitchcock asserted that in fact under Tswana land law a traditional leader held land in trust for the people of the tribe and administered it for and on behalf of his people and in their best interests. A traditional leader allocated land with the assistants of his advisors. They played an important role to monitor the processes of land administration and management. All major decisions pertaining to the land use and administration were first referred to the traditional leader's advisors before they could be made public. Although the traditional leader retained the ultimate and sole power over all land issues, the

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[1077] Schapera *Handbook of Tswana Law* 66. Household servants (*batlhanka*) were found as a rule only in the households of the traditional leader, his relatives, and other prominent or wealthy men. They did not have the same rights as other members of the tribe. Generally speaking, a servant must be fed, clothed and housed by his master. *Motlhanka* might acquire and own property, he was free to marry and to arrange marriages for his children. He was bound in return to serve his master by herding cattle, ploughing or doing domestic work.

[1078] Hodgson and Ballinger *Britain in Southern Africa* 13.

[1079] Hodgson and Ballinger *Britain in Southern Africa* 13.

[1080] Sillery *Founding a Protectorate* 29. Residential land was inheritable and could be transferred to other members of the family group. But it is important to note that residential land could not be sold or transfered to non-members of the family. Grazing land was generally communal in nature. Members of the tribe used this category of land for grazing purposes. Land was also allocated to a particular family for cultivation purposes. Such land was inheritable and was used for the benefits of the entire family.

people were free to appeal to him against the decisions of his assistants or advisors in this regard.[1081] Under traditional systems of Tswana law, every tribesmen had the right to land upon which to make a living.[1082]

The traditional leader had a corresponding duty to allocate land to his people for the purposes of grazing, residence and cultivation. According to Tswana law, land was not allocated to the individuals but to the group or community:[1083]

> The notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All members of the community have an equal right to land but in every case the Chief or headman of the community or village, or the head of the family, has charge of the land and in a loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family.

The existence of individual rights in respect of residential, grazing and ploughing areas is acknowlegded. However these rights were not absolute and co-existed with claims and interests of the community or group to which that particular individual belonged.[1084] This arrangement discouraged arbitrary use of land by the individuals.[1085] Sillery stated that in as far as the residential land was concerned every married man in the village was entitled to a piece of land for a house for free.[1086] In the case where he decided to leave the

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[1081] Hitchcock *Water, Land and Livestock* 97

[1082] Hitchcock *Water, Land and Livestock* 84-85; Sillery *Founding a Proctectorate* 29.

[1083] Ng'ong'olo 1997 *JAL* 145.

[1084] Under Tswana customary land law, the concept of the individual ownership of land is unknown. Land was owned by a group. Individuals such as the head of the family managed land on behalf of the family. Broadly speaking land belonged to the tribe or group and not individuals.

[1085] Ng'ong'olo 1997 *JAL* 145.

[1086] Hitchcock *Water, Land and Livestock* 85. Another important key element of the Tswana land tenure was that land could not be bought, sold or leased. Ndiwa, a Kalanga man from the North East District of Botswana was on record exploring this principle of Tswana land tenure as follows: "Can land be bought or can a person be bought? No, land cannot be bought, for Mwali (God) is the owner of land". Traditional leaders often stressed that land was inalienable. In as far back as 1876 Chief Khama of Bangwato explained the key principle of Tswana land tenure to the white traders that: "land on which they had built their shops and houses belonged to him on behalf of the tribe and as a consequence it could neither be bought nor sold". See 2.1 and 2.2 above. See also 8.2.7 below.

village such land was reverted to the tribe and became readily available for redistribution by a traditional leader or his advisors accordingly. Only married male persons were entitled to the allocation of arable land.[1087]

According to Ng'ong'olo, married women were only entitled to allocations from their husbands and children who were dependent on their parents.[1088] Traditional authorities were responsible for the allocation of these categories of land. With regard to *naga* (grazing category of land), normally this piece of land was used as *meraka*.[1089] These *meraka* were occupied throughout the year by the *badisa*.[1090] Some areas were known as hunting areas. The *badisa* usually used spears and dogs to hunt game. Tribesmen were expected to respect this categorization of land use. As a consequence, they were not free to grow crops or graze cattle wherever they wished. The land divisions established by a traditional leader were respected. Land allocations for the sole purpose of ploughing crops were termed *masimo*. These ploughing sites were usually some distance from *metse* (villages).[1091]

5.5 RELIGION AND RITUALS

The Tswana believe in spirits of the dead. They held that the souls of the dead people became spirits (*badimo),* which ultimately found their way to a world vaguely located somewhere underground. Members of the tribe worshipped their own ancestors.[1092] All members of a tribe acknowledged *kgosi* as a source of welfare and property. Just as he and his relatives guided their fortunes, so his ancestors were held to afford supernatural protection and assistance to the people they had ruled. On all important or critical

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[1087] Sillery *Founding a Protectorate* 30. Contrary to the system of the pre-colonial Botswana with regard to land allocation, women under the new post-colonial dispensation are entitled to a piece of land. In fact they have the right to own land in Botswana.

[1088] Ng'ong'olo 1997 *JAL* 143.

[1089] *Meraka* is a Tswana word used to refer to the cattle posts. Normally there are small huts in *Meraka* to house herdboys and other male persons who look after cattle.

[1090] The word *Badisa* in Setswana denotes those who look after livestock usually boys and male family members.

[1091] Hitchcock *Water, Land and Livestock* 87.

[1092] Cook *Social Organisation* 106-107. The power of the ancestors is proportionate to the power and influence they wilded on earth. For this reason the ancestors of a traditional leader were appealed to in times of calamity.

occasions, the traditional leader would sacrifice and pray on behalf of the tribe as a whole.[1093] The ceremonies which the *kgosi* conducted or sponsored on behalf of the tribe included the doctoring of the army (*go foka marumo*) after his father's death or in time of war, the conservation of the capital (*go thaya motse*) whenever the capital was moved to another site, the doctoring[1094] of the tribal boundaries (go *bapola lefatshe*) and above all, the making of rain (*go fetlha pula*).[1095]

Rainmaking was held to be an attribute to the traditional leadership. The *kgosi's* reputation and popularity were often determined by the nature of the rainfall during his period of rule. Some of the rites he performed himself, some were carried out at his request or under his supervision by professional rainmakers (*baroka ba pula*) and other members of the tribe.[1096]

[1093] See 2.2 above.

[1094] Shapera *Southern African Part III* 60-61. The word doctoring of the tribal boundaries has been used in this context to refer to a situation whereby a traditional leader and his advisers sprinkled herbs along the tribal borders. Normally this ritual was performed with the hope that the enemies would be driven away from the tribal land and would not attack the tribe. What always happened when a traditional leader "doctor" the army was that soldiers and the weapons were sprinkled with a herb. The belief was that once this ritual was performed enemies would fear the soldiers.

[1095] Shapera *Southern African Part III* 60-61; Ntloedibe *Role of Traditional Leaders* 3. The Tswana themselves speak of their laws as having always existed from the time that man himself came into being, or as being instituted by the ancestor spirits (*badimo*). The ancestral spirits were held to be the guardians of the existing social order, the custodians of tradition. The traditional leader's religious and magical activities had largely ceased since the introduction of Christianity. In pre-Christian times, so far as it could be gathered, the Tswana believed in a high god named *Modimo*, who was regarded as the creator of all things and the moulder of destiny. See also in this regard Vorster *Traditional Leadership* 133. The functions of the traditional leaders include customary as well as statutory functions. The customary functions included performance of various rituals such as rain rituals, initiation rites and agricultural feasts.

[1096] Shapera *Southern African Part III* 60. The traditional leader had a special rain enclosure (*segotlwana sa pula*) behind the hut of his great wife, where he kept several pots of rainmaking medicines. Every year, before the cultivating season started, the immature girls ceremonially brought water to fill the pots, they and immature boys then were sent to sprinkle some of the contents over the fields and crossroads near the capital. If rain did not come, driftwood and other objects connected with water were burned in the enclosure, so that the smoke could summon the clouds. Sometimes too, men were sent to capture a life wild animal of a specific species and sex, which was then slaughtered, portions of its flesh being added to the mixture in the pots. The traditional leader had a special rain enclosure (*segotlwana sa pula*) behind the hut of his great wife, where several pots of rainmaking medicines were kept.

5.6 FOREIGN THREATS AND INVASION

The depiction of growth and poverty in the Tswana tribes were tampered by forces, which intended to erode Tswana stability and independence. The period between 1810 and 1840 was a period of chaos because of incessant wars and external aggression. Attacks from the east were associated with the wars launched by the Zulu leader Shaka.[1097] As early as 1822, black groups launched the first attacks on Tswana tribes in the South of Bechuanaland. The main attack, however, came in about 1825 when the Matebele under Mzilikazi caused havoc in Southern and Western TVL. Tswana tribes were forced out of their previous settlements and migrated westwards to the Kalahari, while external threat compelled other groups to merge. In 1837, however, the Voortrekkers defeated Mzilikazi and he fled across the Limpopo river to the present-day Matebele land in Zimbabwe.[1098]

[1097] See 2.2 and 3.2 above.

[1098] Smit *Botswana* 1; Sillery *Founding a Protectorate* 25-26. External pressures of Tswana chiefdoms in the nineteenth century were not always peaceful. Most chiefdoms became caught up in the turmoil of the Difaqane in the 1820s and 1830s. People such as the Ndebele and Kololo, displaced by the expansion of the Zulu kingdom, migrated northward in search of a new home and clashed with various Tswana people in the process. But even after the Ndebele had settled beyond the Limpopo they continued to raid the Tswana. Following the events and disturbances of Difaqane, the Tswana groups experienced another turmoil caused by Mzilikazi. According to Sillery, this scourge was the greatest of all. Mzilikazi and his break away groups from King Shaka became terror among the Tswana people, the Mzilikazi people, known as Matebele raided the Tswana with merciless tactics and techniques. Like Difaqane, Mzilikazi's raids also disrupted both the political and economic stability of the Tswana groups. As already alluded to the Boers of both TVL and OFS with the assistance of some of the Tswana traditional leaders got rid of Mzilikazi after a series of engagements, as a consequence, Mzilikazi emigrated to the north and settled in Bulawayo in the present day Zimbabwe. Thereafter the Boers became interested in the land of the Tswana and conflicts arouse. The Boers also came into conflict with the missionaries of LMS who disliked them. These Boers moved into the lands of the Tswana and ploughed fields without the permission or consent of the affected Tswana traditional leaders. In order to sustain their power the Boers threatened to use rifles against any traditional leader who interfered or complained about their activities of land invasion. The TVL government supported and sponsored these activities. Britain did little to protect the Tswana traditional leaders who were pro-British. As a result of compromises the Tswana traditional leaders lost vast tracts of land and further moved northwards. See also in this regard Munger Bechuanaland 10. See also 3.2 and 3.3 above.

This upheaval was known as the Difaqane,[1099] or forced migration in South Africa. In the 1822 to 1836 period, this intra African warfare disrupted some Tswana societies, and similar disturbances further north later in the century had comparable destabilising effects. Voortrekkers from the Cape region moved into the interior in large numbers during the early nineteenth century to escape what they regarded as oppressive British rule.[1100] The Afrikaners' economy was similar to that of the Tswana. The Afrikaners, however, claimed large areas of land and African labour as their right. As early as the 1830s the expansive tendencies of the Afrikaners brought them into contact and conflict with the Tswana and this conflict persisted and was costly to Tswana societies.[1101]

The ultimate cost was that the Tswana societies were forced to enter into alliance with other Europeans who could resist the Boer encroachment. It was after 1870, however, that intra-European rivalry for exclusive colonial

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[1099] Munger *Bechuanaland* 10; Siller *Founding a Protectorate* 35; Chirenge *History of Northern Botswana* 31. Many of the Tswana were pushed out of TVL by the activities of the Zulu impis of King Shaka. The wars of Shaka caused a considerable amount of turmoil throughout Southern Africa, the victims of these wars, became displaced persons and loitered around the region and fed on those who came in their way. When these victims of war of Shaka invaded the Tswana in Dithakong, Moffat halted Basotho of Chief Sebitwane with the assistance of Griqua mounted riflemen. The Basotho fled to Kgalagadi where they attacked the Bakwena under Chief Sechele. Bakwena fled to Dithuboruba. Chirenge indicated that the Kololo also attacked the Ngwaketsi. The Ngwato who inhabited the northern part of Bechuanaland also felt the impact of *Difaqane*. The Kololo also attacked them. After the Kololo attacked on Bangwato, they settled in the region of Makololo in the present day Zambia. *Difaqane* caused a lot of disruptions into the entire life of the Tswana groups. These disturbances of *Difaqane* scattered the Tswana tribes throughout the country. *Difaqane* also disrupted the Tswana economic activities and greatly affected and tampered with the Tswana political and traditional authorities. Furthermore *Difaqane* undermined the sovereignty and independence of the Tswana traditional leaders thereby displacing them from their territories. See 3.2, 3.3.1 above. See also 8.2 below.

[1100] See 3.1.3, 3.1.4 and 3.1.5 above.

[1101] Mzilethi *Modern Political Institutions* 2; Sillery *Founding a Protectorate* 35-36. According to Sillery, the Boers attempted by hook or crook to acquire great portions of the land of the Tswana. On the other hand the Tswana traditional leaders and the missionaries were determined to keep the Boers out of their country. Despite all these efforts the Tswana in the south, mainly the Tlhaping and Barolong lost most of their land while those who were in the north escaped fairly lightly. As Sillery noted, amid this process of land grabbing by the Boers, Mackenzie of LMS raised a powerful voice of defence of the Tswana land. The British government wished to prevent the Boers from acquiring land in Bechuanaland, as the Boers' Republic might then receive foreign aid and thus endanger Britain's supremacy. As it was in Britain's imperial interest to prevent the Boer Republic from expanding, she annexed Bechuanaland in 1885, the land north of the Limpopo in order to protect the Tswanas and encircle the Republics. See also 3.3.1 and 3.3.4 above.

possession intensified.[1102] The presence of the Boers in the Tswana territory resulted into Tswana tribes migrating further north to what is today called Botswana. The years between 1820 and 1870 were years of chaos and anarchy and quarrels complicated by the impact of the Boers, determined to preserve their loose form of government, isolation and religious exclusiveness.[1103]

At a time when British colonial policy was strongly against expansion, there was hesitation on the side of the British government to assert its sovereignty over the emigrant Boers north of the Vaal River. Although the independence of the TVL from the Cape Colony was conceded in 1852 and the independence of the OFS, the claim of the Boers to a western boundary,[1104] which included the missionary road to the North (Bechuanaland) and the Tswana tribes along it brought them into conflict with Batswana.[1105]

Previously the Boers had been more concerned with consolidating their positions in the Highveld and extending their authority in Natal and the Eastern coast rather than acquiring territory in Bechuanaland. Even so, they had made occasional attacks on the Bakwena, among whom Livingstone was residing, who accordingly in 1852, made the first futile attempt to obtain British protection from the Cape authority.[1106]

[1102] Mzilethi *Modern Political Institutions* 2. See also 3.3.1 and 3.3.4 above.

[1103] Chirenje *Chief Kgama* 19. The traditional leaders were greatly worried about the encroachment of the Boers into their land. The Boer invasion into the land of Batswana prompted Tswana traditional leaders to ask for protection from Britain.

[1104] See 3.3.1 and 3.3.4 above.

[1105] Cohen *Politics and Society* 30-31. As it was not British colonial policy to extend its boundaries in South Africa, two conventions, the Sand River and Bloemfontein Conventions, were concluded in 1852 and 1854, thus creating two independent Boer Republics on the British borders. After the *Sand River convention* matters did not progress smoothly in the Tswana territories that is both southern Bechuanaland and northern Bechuanaland. There were quarrels and wars with the Tswana societies. The Boers kept slaves, maltreated and oppressed the Tswana and deprived them of their land by waging aggressive wars against them. See 3.3.1, 3.3.2 and 3.3.4 above.

[1106] Cohen *Politics and Society* 31. The danger offered by the hostile Boers created unhealthy social and political climate in the land of the Bangwato. The annexation of the Tati area brought with it direct conflict between the Boers and the Bangwato. This conflict necessitated the need for British protection.

The discovery of gold in the present day Tati area in 1866 increased the importance of the western frontiers. The Boers claimed the western frontier of the TVL as stretching to Lake Ngami. Cohen stated that this led to conflict with certain Tswana tribes and request for the British protection became more frequent. The British government, however, was reluctant to extend its sphere of authority and invoked the Pretoria Convention of 1881, to define the border between Bechuanaland and the TVL.[1107] This boundary line did not differ materially from that which is in force today.[1108]

These developments, together with the German interest in South West Africa (SWA) and the generally intensified interest being displayed in Africa, resulted in the British government attaching increasing importance in the road to the north. Furthermore, Britain had already initiated an enrichment policy aimed at denying the Boer Republics access to the sea.[1109] On the advise of a British missionary,[1110] John MacKenzie, Chief Masheng, without going so far as to

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[1107] See 3.3.1 and 3.3.4 above.

[1108] Smit *Botswana* 2.

[1109] Cohen *Politics and Society* 31; Billinger *Britain in Southern Africa* 22-23. However, when Germany threatened to join hands with the Boers to grab the Tswana land, Britain changed its policy towards Bechuanaland. Britain was driven into the path along which she had for so long refused to be led. Subsequently Britain agreed to protect the country of the Tswana against the Boers and Germans' invasion. As a follow up to her claim, Britain instructed Sir Warren to communicate with the Tswana traditional leaders, namely Chiefs Kgama and Sechele, her intention of protection over them. Britain made it clear to the Tswana traditional leaders that she had no intention of keeping them under her control forever. According to Billinger, Bechuanaland protectorate was unwelcome "child" in the British family and the hope of its adoption by BSAC and later by Union of South Africa after 1910 has been one of the main items in agenda of the British history.

[1110] Cohen *Politics and Society* 31; Sillery *Founding a Protectorate* 34-36. According to Sillery the first Tswana contacts with the Europeans started among the Tlhaping group when the missionaries, Trűter and Somerville visited this group in their capital known as Dithakong. These European visitors were next followed by Lichtenstein who described the Tlhaping as a peaceful community. After Lichtenstein, Burchell visited the Tlhaping in 1812. Later the Tlhaping moved down to Kuruman region in the present North West Province of South Africa where they founded the Kuruman station together with the missionaries. Under the direction of Moffat, Kuruman of LMS became a strong centre of Christian civilization and a base for proselytising of the north of Molopo river in the country today known as Botswana. As a consequence, the missionaries' position asserted considerable power and influence among the Tswana. Moffat's primary duty was to Christianise the Tswana people. As Sillery noted, Moffat was not interested in politics except to convert the Tswana people into Christians. Tswana traditional leaders welcomed this intervention by the LMS and solicited it. As the events between the Tswana and the missionaries unfolded themselves in both south and north Bachuanaland, the white traders were busy bartering gold for local commodities and seeking different advantages. Hunters from TVL invaded the Tswana tribal lands and slaughtered wild animals without permission. The Tswana tribes depended on game for survival. Later prospectors and miners added other problems to the lives of Tswana groups. As a result of the activities of the invaders, traditional leaders turned to the

equest total British jurisdiction, applied to the British Governor of the Cape Colony to occupy the Tati area. The Governor Sir Wildehouse took no action on the request. The discovery of diamonds prompted the British government, in 1871, to annex Griqualand West, an area inhabited by the Barolong in what came to be known as British Bechuanaland, but the tribes of northern Bechuanaland were not affected. The Tswana societies were destabilised and the forces of foreign encroachment and invasions threatened their sovereignty.[1111]

5.7 APPEAL FOR PROTECTION

In 1876, one of the most remarkable Africans of his time Khama III, son of Sekgoma I acceded to the chieftainship of the Bangwato tribe. During the first years of his reign, he enhanced the standing of his tribe. The Bangwato were recognised as one of the most prominent tribes in Southern Africa. Khama wanted to use protection as an opportunity to unite Tswana groups.[1112] The Batswana tribe, led by Chief Khama originally appealed with missionary support and guidance for British protection. Other traditional leaders such as Sechele and Bathoeng later supported him. Chief Khama wrote to a representative of the queen in 1876: [1113]

> I write to you, Sir Henry, in order that your Queen may preserve for me my country, and put it under her protection. The Boers are coming into it, and I do not like them. Their actions are cruel among us, black people. We are like a commodity to them. They sell

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missionaries for advice, guidance and assistance in all matters affecting the white newcomers. The missionaries consequently became the advisors of the Tswana traditional leaders and their people.

[1111] Cohen *Politics and Society* 31

[1112] Cohen *Politics and Society* 30-32. The discovery of gold created a climate where thousands of Tswana were recruited to provide cheap labour, which benefited the industries. The Tswana men were uprooted from their tribal surroundings and traditions and became an urban Black proletariat.

[1113] Mzilethi *Modern Political Institutions* 2; Chirenje *Chief Kgama* 19. Much as Khama and other traditional leaders might have abhorred the principles of westernisation and colonialism, they nonetheless were in desperate need of foreign support to assure their survival. Thus they ultimately adopted British metropolitan protection as essential instrument of policy. Out of necessity the Tswana traditional leaders accepted protectorate status. The traditional leaders were forced to ask Britain for protection because the Boers ill-treated them and their subjects.

> our children and us. I ask her Majesty to defend me as she defends all her people. There are three things which distress me very much–war, selling people and drink. All these things I shall find in Boers, and it is these things that destroy people to make an end of them in the country. The custom of the Boers had always been to cause people to be sold and today they are still selling people.

British liberal politicians in the Cape colony sympathised with the plight of the Batswana and sent police expeditions, led by Sir Warren, into Bechuanaland in 1798 and 1885. Yet no formal British control was envisaged at that time. Herbert of the colonial office summed up this lack of British commitment to the area in 1877 when he dismissed the area as " a worthless strip of territory". However, in the following few years, Bechuanaland was seen by Rhodes as being " the Suez Canal of the north". The creation of a German Protectorate on the coast of SWA in 1884 raised the possibility of a link between the Germans and the TVL Boers – a move that threatened to cut off the Cape from the interior. It was basically a question of strategy, rather than any humanitarian consideration for the Batswana, which led to the declaration of the Protectorate of 1885.[1114]

In May 1885, Khama decided that Warren met the three principal Chiefs of Bechuanaland – himself, Sechele of the Bakwena and Gaseitsiwe of the Bangwaketsi to inform them of British protection. Chief Khama proposed that the British accept his whole country, extending as far as the Chobe and Zambezi rivers in the east and Tati area and beyond in the east, reserving for himself only the 20 000 square miles in the area of Shoshane.[1115] While Warren had the authority to grant protection to the Bangwato, he could not

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[1114] Mzilethi *Modern Political Institutions* 2. In the early establishment of the Protectorate, the administration was slow in taking off the ground because the British government was not interested per se in Bechuanaland except that Britain wanted to establish the "road to the north". Britain had no interest in the country to the north of the Molopo, except as a road to the interior. Britain therefore confined herself to protect that part of the Protectorate from being occupied by either the Boers or foreign power, doing as little in the way of administration on settlement as possible. This portion delineated an important policy that reflected the Protectorate's strategic importance. The territory would be a British controlled buffer against Boer expansion and a safe belt for transporting imperial commerce between the former Rhodesia and the Cape. See also 6.1 and 6.2 below.

[1115] Cohen *Politics and Society* 35. The traditional leader of the Ngwato wanted British imperial protection and trusteeship. Chief Khama wanted to forestall Boer expansion and alliance with the Germans in SWA.

accept such a vast area whose ownership was debatable without first consulting London. The extension of British protection into the vast unmapped region to the north would have meant giving protection that would have cost England more trouble than it was worth.[1116]

Khama, in contrast to other traditional leaders, appeared more aware of the consequence, which might follow the declaration of a Protectorate over the territory. He emphasised that he did not desire to be: [1117]

> Baffled in the government of his own town or in deciding cases among his own people according to custom, but again I do not refuse help in these affairs. Although this is so, I have to say that there are certain laws of my country, which the Queen of England finds in operation and which are advantageous to my people and I wish that these laws should be established and not taken away by the government of England. I refer to the laws concerning intoxicating drinks that they should not go into the country of the Bangwato, whether among black people or white people. I refer further to our law, which declares that the lands of Bangwato are not saleable.

Khama also realised that the grant of protection inevitably involved the possibility that whites would seek grants of land directly from the protecting power. Chief Gaseitsiwe of the Bangwaketsi had similar views, while Chief Sechele of the Bakwena doubted that he needed protection at all and was inquiring what protection meant. Warren's own perception of the implications of "protection" was somewhat vague and he had to be reminded by the High Commissioner (HC) that the position of the Crown in Bechuanaland would not amount to sovereignty. At this time, the meaning of protection, either in a legal

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[1116] Cohen *Politics and Society* 35. Warren was not in a position to promise Bangwato protection of their land without consulting and obtaining permission from London.

[1117] Cohen *Politics and Society* 36. Chief Khama's spirited effort to banish the public use of alcohol beverages were near obsessive. He imposed stringent liquor laws, which included a ban on the brewing of African beer. The more he alienated his people by the enforcement of such measures, the more they were forced to rely on missionaries. In fact the connection he had with missionaries lay at the heart of their resistance through diplomacy to those who sought to dispossess him of his land.

or practical sense, was hardly considered or understood by either the British or the Batswana traditional leaders.[1118]

British protection was proclaimed to solve the immediate but different goals of the British and Batswana. According to Mzilethi the contentious meaning of protection at that time, from the British point of view was that: [1119]

> What was clearly envisaged was a Protectorate in the most literal sense, implying the very minimum of internal responsibility. It was accepted that the natives would be protected against outside aggression, for the rest, they must manage their own affairs in their own way with as little expense to Great Britain as possible.

From the viewpoint of the traditional leaders of the Batswana the early meaning of protection was ambiguous. Traditional leaders sought protection but not at the cost of their own authority. Chief Sebele of the Bakwena, was most outspoken against the idea of protection, which he resented, and other Batswana traditional leaders supported him: [1120]

[1118] Cohen *Politics and Society* 36. Traditional rulers sought protection but not at the expense of their own authority. Chief Sebele of Bakwena strongly opposed the colonial administration. When the traditional leaders enquired in 1885 what the concept of protection meant insofar as his rule was concerned. They were told that their traditional leadership remained in force over their town or people but that they would be protected against foreign enemies so long as they complied with Her Majesty's wishes as conveyed by the High Commissioner. See also Mzilethi *Modern Political Institutions* 4.

[1119] Mzilethi *Modern Political Institutions* 3. The Tswana traditional leaders interpreted protection to mean self-rule of Batswana and British protection against external aggression. Therefore some Tswana traditional leaders realised after the declaration of the Protectorate that protection meant British interference in their internal affairs. Consequently, the early part of the protection was thus characterised by traditional leaders' protests against the new colonial authorities. On the other hand, the Batswana traditional leaders saw "protection" to mean something else, again they envisaged that traditional authority and colonial authority would operate in two distinctive spheres. The traditional leaders supported the following conception of traditional-colonial authority relationship: "We find that a Protectorate in Bechuanaland means - a territory, the soil of which does not belong to the Great Britain but to its native inhabitants, the internal administration of which is in the hands of the natives, while the British Crown exercises protection of the lands and people interests and exclusive guardianship over such administration. It is also a protection of the land and its inhabitants against the neighbouring governments and their people interference".

[1120] As quoted by Mzilethi *Modern Political Institutions* 4. Sebele had conflicts with the Protectorate over the question of his political sovereignty. He contested for his sovereignty. Conflicts between some of the Tswana traditional leaders and the British signified that the term protection had different meanings to different traditional leaders in Bechuanaland. However, it appeared that to British government protection meant control and sovereignty over the Batswana.

> I wish to govern my country myself, and not have it governed by white people. As you know ... my wish is to remain independent. I do not want a magistrate. I want only independence. As for protection I say nothing. I like it and I do not like it anymore ... we have received no assistance from you, all we have got from you is trouble.

The impact of protection and alien authority on traditional authority produced an immediate reaction of potential conflict. This initial interaction between different authorities had been a major theme in changing nature of ruler-ruled relationships in the Bechuanaland Protectorate.[1121] On 27 April 1885, Warren formally notified the *kgotla* of the Bakwena that the Queen had unilaterally declared a Protectorate over Bechuanaland and the Kalahari, west of the South African Republic, north of the Cape Colony of Good Hope, westward of Namaqualand, and northwards to the boundaries of the Matabele country. During a meeting some of the Bakwena royals greeted the General's notice with reservations and others ranged from mistrust to open hostility.[1122]

A vague and ambivalent definition of traditional leaders and their subjects' relationship in Bechuanaland to the British government served as the basic framework for the legal spheres of colonial and traditional authority in 1891.[1123] This framework was to be developed at a later stage.

[1121] Mzilethi *Modern Political Institutions* 5. When the question of protection was discussed, the Tswana Chiefs wanted to retain their political authority without the British interference. They did not anticipate that protection would mean colonisation and reduction of their power. See 6.1 and 6.2 below.

[1122] To the Bakwena royal protection might perhaps be logical and in the long run inevitable, but to them it was not the advantageous time for carrying it out. The question of Protectorate remained a point of dispute between Sebele and Warren.

[1123] Tlou and Cambpell *History of Botswana* 151. Britain regarded Bechuanaland Protectorate as a necessary route to pass through on the way to the more lucrative trade of the African interior. Britain did not intend to establish British sovereignty in Bechuanaland. They wanted to keep their expenses to the minimum. The altercation and exchange of words between Sebele and Warren showed that Sebele was still thinking of himself as a classical traditional leader and was not yet prepared to accept the drastic changes on the limits of his powers. This altercation laid a strong foundation of conflict between Sebele and future British Protectorate administration. For instance, in the Kweneng, in May 1899 Sebele initiated his people to prevent the British from imposing hut tax. Chief Sechele saw protection as an object of resentment. He maintained that the imperial protection was incomparable with their own independence. The essential idea of a Protectorate in the late Victorian era was that the external relations of the protected area should fall under the exclusive control of the protector. Question of internal jurisdiction was to be determined and exercised by the protected leadership. It was widely accepted that the protector should have the right to

5.8 AMBIQUITIES OF PROTECTION

Batswana rulers did not realise that by accepting protection from the British their powers would be reduced. They thought they would continue ruling their people as before without interference from outside. Some Tswana traditional leaders only realised their mistake after the declaration of the protectorate and consequently started protesting against the new authority.[1124]

The British government was mainly motivated by international considerations to control and establish British authority over Bechuanaland. The fact that Batswana traditional leaders desired British overrule had little weight in the final decision to promulgate protection, although it made rationalisation for the establishment of colonial rule in the Protectorate that was much less difficult. The British interpretation of protection was to protect their interests.[1125]

5.9 CONCLUSION

From the foregoing discussion it appears that the there is no precise account regarding the exact origins of the Tswana people. However, it is clear from the above that traditional leaders ruled Tswana communities and that they eventually settled in the area known as Botswana. These leaders wielded political, social, economic and religious powers over these communities.

Both the wars of Shaka and Mzilikazi had profound effects on the landscape of Tswana traditional leadership and the way Batswana lived. The process of *Difaqane* scattered Batswana throughout the present Botswana, South Africa,

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administer justice over any white inhabitant of a Protectorate who was the subject of civilised powers. Protection was a matter of international prestige to the Great Britain. British protection over Bechuanaland and other states favoured the consolidation and expansion of the Empire that could serve as a force for good in the world. Above all British government wanted to serve nobody's interest but her own. See 6.1 and 6.2 below.

[1124] Molotsi *Impact of Colonialism* 2. Internal conflicts and disputes remained a characteristic of Tswana societies after the declaration of the British Protectorate. These conflict situations developed because certain individuals or groups were dissatisfied with the British rule or protection. The outcome of those conflicts varied from chiefdom to chiefdom.

[1125] Mzilethi *Modern Political Institutions* 3.

Namibia and Zimbabwe.[1126] This fragmentation of *merafe* led to the unintended breakdown of Tswana traditional systems. The situation was complicated by the impact on the southern and eastern Botswana borders of the Boers who wanted the land of Batswana. These Boers pressured them to concentrate in small areas of land. The contact of Batswana with the Europeans and missionaries transformed the traditional systems and life of Batswana long before the Protectorate was declared in 1885.

The Boers' settlement threatened the existence and independence of the Tswana traditional authorities. These factors transformed and shaped the Tswana society in many ways. The resultant conflicts disintegrated Tswana groups and caused migrations. As a result of the Boer invasion in the land of Batswana, Tswana traditional leaders asked for protection from Britain. The British intervention resulted in the establishment of a British Protectorate, which was not acceptable to the majority of the Tswana traditional leaders.

[1126] See 3.2.1 and 3.3.1 above.

CHAPTER 6: COLONIAL RULE AND TRADITIONAL LEADERSHIP

6.1 *BACKGROUND OF THE BECHUANALAND PROTECTORATE*

When the British government established the Bechuanaland Protectorate (BP) in 1885 three main branches represented the Tswana peoples. Shapera identified and categorized these branches as follows:[1127]

- Southern, comprising the Tlharo (Motlhware), Rolong (Tshidi division), Tlhaping, Hurutshe, Ngwaketse, Kwena, Kgatla (Mmanaana division) and some groups of Kgalagadi (Lehututu) districts.

- Northern, comprising the Ngwato, Tawana, Phaleng, Kaa, Khurutshe, and many groups of Kgalagadi. They inhabited the Ngwato (Serowe), Ngamiland, Ghanzi and Tati (Francistown) districts.

- Eastern, comprising the Malete, Tlokwa and Kgatla (Kgafela division) of the Gaborone and Mochudi districts. The tribes of this third branch, unlike the others, were all relatively recent immigrants from the Western Transvaal, having entered the Protectorate during the nineteenth century.

Apart from these peoples of Tswana communities, black peoples of other groups and clusters inhabited the Protectorate. Among these were the Kuba, Mpukushu, Nabya, Subia, and Rotse of the north-western districts, allied probably to the tribes of Angola and Rhodesia, the Herero (Damara), who have came from SWA, now Namibia, and were scattered in small communities over the northern half of the territory, principally in the Ngamiland, Ghanzi and Ngwato districts, the Kalaka, Talaote and Birwa of the Ngwato and Tati districts, who by origin belonged to the KwaZulu-Natal's Nguni (Zulu) cluster. The so-

[1127] Shapera *Handbook of Tswana Law* 1. Bechuanaland took its name from closely related black tribes known collectively as *Bechuana* (Batswana). At the time of the British Protectorate among the Tswana groups, Bangwato was the largest with about one-third of the total Tswana population. They were followed by the Bakwena, Bangwaketsi and Batawana. The Tswana group was more heterogeneous than ethinic groups in Lesotho and Swaziland. See also 5.1, 5.2, 5.3, 5.4, 5.6, 5.7, 5.8 and 5.9 above.

called Tswapong in the eastern parts of the Ngwato district were a mixture of peoples, some of Shona descent, others of early Tswana communities.[1128]

The Mafikeng district was established as a part of the Crown Colony of British Bechuanaland in about 1885. British Bechuanaland was bounded on the north by the Bechuanaland Protectorate, on the east by TVL, on the South by the Cape Colony, on the west by SWA and on the north east by Southern Rhodesia (SR). The Mafikeng districts covered an area of 6,520 square miles including the reserves, which were 1,074,5 square miles or 322,147 morgen in extent.[1129] According to Shapera, the 1946 census indicated that there were 579,800 Tswana in the Union of South Africa. The total black population in the Protectorate was roughly 292,800. The total number of 103,500 was people of alien origin who lived under the rule of traditional leaders.[1130]

Although the Bechuanaland Protectorate's African populations were all known as Tswanas and were by African standards relatively homogenous, underlying differences were observed. Each of the Tswana tribes in the Bechuanaland Protectorate was composed of peoples drawn from different communities. Even the Tlokwa, smallest of all, included many groups or families of alien origin,

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[1128] Shapera *Handbook of Tswana Law* 1. Batswana were also found in the western and central districts of the TVL. Those Batswana who inhabited TVL were found especially in the areas of Groot Marico, Rustenburg, Pretoria, Ventersdorp and Lichtenburg. Batswana also inhabited the western districts of the Cape Province particularly in Mafikeng, Vryburg, Kuruman, Ganyesa and Taung. Those districts were collectively known as a Crown Colony of British Bechuanaland (BB). Of great importance to note here, is that Mafikeng was the headquarters of the Bechuanaland Protectorate until 1965 when they were moved to Gaborone. It is also interesting to note that Batswana (the Kgatlas) who lived in Rustenburg more especially in the district of Saulspoort had their Paramount Chief in Mochudi (Bechuanaland Protectorate). Even today this group of Bakgatla-Ba-Kgafela is still under the hegemony of the Paramount Chief of Bakgatla in Mochudi. One could also trace the offshoots of Batswana in the OFS more particularly in the district of Thaba-Nchu. Batswana also inhabited the Plumbtree district of Southern Rhodesia (SR) and Gobabis district of SWA. According to Shapera the last two Tswana groups of Southern Rhodesia and South West were very small and particularly insignificant. Having mentioned some of those Tswana groups in this discussion does not necessarily suggest that they formed part of the Bechuanaland Protectorate at the time when the Protectorate was established.

[1129] Breutz *Tribes of Mafikeng District* 3. For instance the Molopo reserve had 235,763 morgen, Mosita reserve 4,720 while Setlagole was endowed with 81,093. The Tswana people who were found in these Mafikeng reserves included among others, Barolong-Bo-Ratshidi, Barolong-Bo-Ratlou and Barolong-Bo-Rapulane.

[1130] Shapera *Southern Africa Part III* 9. The Tswana in Southern Rhodesia and South West Africa were approximately 1,700. If that number was to be considered the total population of the Tswana group might be estimated at about 852,000.

which became part of the tribe through conquest, voluntary submission, immigration or some other reason.[1131]

In the larger tribes, only a small proportion of the people belonged to the nuclear community. About four-fifths of the Ngwato tribe for instance, consisted of what were originally foreign peoples and among the Tswana the portion was still greater. The members of a tribe, moreover, sometimes differed in customs and language. Among the Ngwato there were the San, who by language and culture were not the Tswana group and Kalaka, Kuba, Herero, Rotse, and others, who were of Tswana communities but differed in various details of law and custom from the Ngwato proper.[1132]

The Tswana communities were located in eight tribal reserves, named after the ruling community in each area. These reserves, as would be seen from the table below, varied considerably in size and population.[1133]

Official Name of Reserve	Estimate Area	Population
Ngwato Reserve	39, 000	101,481
Tawana Reserve	34,500	42,158
Kwena Reserve	15,000	26,439
Ngwaketse Reserve	9,000	23,584
Kgatla Reserve	3,600	3,855
Malete Reserve	178	5,855
Rolong Reserve	450	3,121
Tlokwa Reserve	56	1,563

Table 1:Bechuanaland Reserves

[1131] Other smallest Tswana groups in Bechuanaland Protectorate included among others the Bayeyi, the Tswapong and the Kalanga.

[1132] Smit *Botswana Resources* 48.

[1133] Smit *Botswana Resources* 48. The wide spread Sarwa scattered all over the western and northern portions of the territory belonged to entirely different racial groups. They were San who had in varying degrees absorbed black blood and represented the earliest surviving inhabitants of the Protectorate. Racially and linguistically akin to them were the KhoiKhoi (Kgothu) of the Kgalagadi district, who had drifted in from SWA.

These reserves aggregated 102,000 square miles and were finally demarcated by British government in 1899. About 7,500 square miles had been granted to European farmers. The remaining area of about 165,000 square miles remained Crown land, for the most part practically unoccupied and almost wholly undeveloped. European farmers were mostly concentrated in a narrow strip along the eastern border including the Tati districts and the Tuli block with the Gaborone and Lobatsi Blocks controlled by the British South African Company (BSAC).[1134]

All persons living in a particular reserve acknowledged the supremacy of the traditional leader and constituted a single political unit under his leadership and authority. Each tribe was independent of the rest and within the limits imposed by the Protectorate administration and managed its own affairs under its own system of government and jurisdiction. The British government after the establishment of the Protectorate gradually curtailed the powers of tribal authorities and made various changes to the institution of Tswana traditional leadership.[1135]

The Bechuanaland Protectorate[1136] differed widely from the other territories (Basotholand and Swaziland) administered by the High Commissioner for South

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[1134] Smit *Botswana Resources* 48. The area was somewhat larger than France. To the south and south west the river beds of the Molopo and Nossop almost always dry separate it from the Cape Province of South Africa. To the southeast and east it bordered on the former TVL, and Crocodile (or Limpopo) river. To the West it borders on SWA, including the Caprivi Strip to the North West the administration of which was taken over by the Union of South Africa in 1929. To the north it touched on the Zambezi, separating it from Northern Rhodesia and the northeast it boarded Southern Rhodesia.

[1135] Shapera *Southern Africa Part III* 49. See also 5.2, 5.3, 5.4 and 5.5 above.

[1136] Henderson *Institutionalization of Botswana* 219. Various questions were asked regarding the kind of state, which was the Bechuanaland Protectorate. One of those questions that had been asked was whether the Bechuanaland Protectorate was a country with future or not? To Lord Hailey, the concept of Bechuanaland as a potentially successfully polity was highly unlikely. To the South African government at the dawn of self-government, it was a Bantustan over which it wished to exercise indirect control. Indeed, at various times and places the country had been referred to as: "a poor state, a client state, a hostage state, bantustan, a land locked state ... an administrative state ... a small state, [and] a non aligned state".

Africa. The natural features, character and distribution of its population and the historical conditions determined the methods of administration.[1137]

6.2 EARLY ADMINISTRATION OF BECHUANALAND PROTECTORATE

6.2.1 ALTERATION OF POWER RELATIONS

The British altered the power relations within the northern Tswana chiefdoms but did not, contrary to some nationalistic interpretations, take away most powers of the traditional leaders. The British government wanted above all to avoid expense. The HC stressed that the British had no interest in the country north of the Molopo, except as a road to the interior.[1138]

British protection allowed traditional leaders to alter their relation to the land and therefore the basis of their rule. They become territorial monarchs rather than leaders of groups or communities. They gained inalienable rights to territories which boundaries are substantially similar to those of the present day Botswana's districts. In Khama's case, it began in 1885 when he drew a map to present to a British agent, Commissioner Sir Charles Warren, who arrived in Serowe's *Kgotla* to announce the terms of protection. Chief Lobengula of the Ndebele, the Northern neighbours of the Ngwato found the implications of the Protectorate quite disturbing. Chief Lobengula was frustrated about the new border lands arrangement and commented as follows: [1139]

> The white men are not your neighbours. I am your neighbour. You settle everything without consulting me. In olden times ... we never spoke about boundary lines. It is only now they talk about boundaries.

[1137] Bechuanaland was a landlocked country encircled by the then white controlled countries of South Africa, South West Africa and Southern Rhodesia. It also touched northern Rhodesia at the Zambezi river.

[1138] Wylie *Little God* 46; Ramsay, Morton and Mgandla *Building a Nation* 159. Initiallly when Britain declared Bechuanaland a Protectorate it interfered little in the rule of Tswana traditional leaders. Thereafter Britain gradually began to introduce a system of indirect rule. Under a system of indirect rule colonial officials ruled with *dikgosi* who were no longer free to run their own affairs without British interference.

[1139] As quoted by Wylie *Little God* 46.

By introducing taxation, fixed boundaries and courts of law, the thinly staffed tiers of the British administration, both strengthened and admonished the traditional leaders powers. The British recognized that their skeleton administration was incapable of governing without the traditional leaders and therefore imperial officials rarely interfered in local politics.[1140]

6.2.2 INTERFERENCE INTO POWERS OF TRADITIONAL LEADERS

Between 1885 and 1923, the British government passed several laws but only two proclamations set limits to what the traditional leaders could legitimately do. There were however, four courts of appeal above the office of the traditional leaders, namely the local Resident Magistrate (RM), Resident Commissioner in Mafikeng, the High Commissioner to South Africa, the High Commissioner of Territories (HCT) and the Privy Council (PV) in London. Any dissident could exploit the appeal process using the courts to try to make traditional leaders more accountable and less monarchical.[1141]

In the Bechuanaland Protectorate, legislative and administrative authorities were vested in a HC, who was also in charge of Basotholand and Swaziland. The HC was stationed in the capital of South Africa. He was responsible to the Secretary of State for Commonwealth Relations (SSCR) in Great Britain and accounted to the British parliament for all decisions on major matters of policy. The territory itself was placed under the immediate control of a Resident Commissioner (RC), with headquarters at Mafikeng (in British Southern Bechuanaland) who was authorized to act for the HC in certain matters and to make minor regulations. The local populations and their traditional leaders had no direct control over legislation, which was drafted by the HC and issued by proclamation.[1142]

Under imperial law there was only one sovereign entity but in effective terms, and through the instrument of parallel rule, the traditional Tswana states and

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[1140] Wylie *Little God* 49-50.
[1141] Wylie *Little God* 49-50.
[1142] Shapera *Southern Africa Part III* 49.

the Protectorate existed side by side. The *Foreign Jurisdiction Acts* of 1889 and 1892[1143] gave the authorities power to control. The traditional leaders played a vital role during the colonial era as instruments of the colonial administration. Britain introduced a system of indirect rule, which effectively meant that the British used traditional leaders to get what they wanted from their subjects. For instance, traditional leaders were responsible for the collection of tax.[1144] The first piece of legislation that the British introduced and which had a profound negative impact on the institution of traditional leadership was the Order-in-Council of 9 May 1891.[1145]

This piece of legislation gave the HC powers to legislate by proclamation, and marked the beginning of the erosion of traditional leaders' legislative powers. The HC was ordered to respect traditional law and custom as long as it was compatible with the interests and policies of Britain. The Order-in-Council meant that traditional leaders were now responsible to the British government and not to their subjects.[1146]

[1143] The concept of Foreign Jurisdiction was originally a device whereby British subjects could be tried and their cases adjudicated by a British court under a British law in a foreign country.

[1144] See 6.2.7 below.

[1145] Somolekae and Lerokwe *Chieftaincy System* 189. This Order was decreed to impose colonial rule in the Bechuanaland Protectorate. This Order made the British official called the High Commissioner the Queen representative in Bechuanaland. In the early years of the Protectorate the British administration was not so strong. The British officials from the HC downwards were unhappy about the lack of a strong administration for Bechuanaland. Shippard had tried to introduce it at Kopong in 1899, but the traditional leaders resisted. A new HC, Sir Henry Loch, was appointed and believed in a strong administration. Loch persuaded the British government to extend the border to include all Khama's country. The Order-in Council of 30 June 1890 extended the Protectorate to Chobe and Zambezi Rivers. Sir Loch wanted a strong administration in order to stop the British South Africa Company from taking over the Protectorate. The British government was worried that the administration Loch wanted would cost a lot of money. Loch stated that the money would come from taxes of different kinds. With this assurance, the British government authorized Loch by the Order-in-Council of 9 May 1891 to set up a proper administration. He was empowered to appoint the required officers and to do all other things necessary. The new administration was to be parallel or dual (double) one. There was to be a white man's administration based on British law. This would work alongside to an African administration based on Tswana law and custom. There was no parliament so the HC would make laws for Bechuanaland by proclamation. In doing all this, the HC was to respect those Tswana customs, which did not conflict with British laws. This means that the HC could do away with or disrespect certain Tswana customs. The respect of Tswana customs was a temporary measure intended to appease Tswana traditional leaders in order to prevent African opposition to the new administration.

[1146] Somolekae and Lerokwe *Chieftaincy System* 189.

The next piece of legislation, which further reduced the powers of traditional leaders, was the *Native Administration Proclamation* 75 of 1934.[1147] This Act changed Tswana law and customs. For example, it stated that a traditional leader's successor should be successor to be recognized by the HC. The Act further stipulated that after a traditional leader had chosen his Councillors, he should submit their names to the RC for consideration. This constituted a major deviation from the Tswana law of succession. It obviously weakened the strong position of the traditional leader within the community.[1148]

The *Native Tribunal Proclamation*[1149] further reduced the judicial and legislative powers of traditional leaders. It stated that traditional leaders could no longer hear cases of rape, murder and culpable homicide. The above two proclamations reduced traditional leaders to servants of the colonial administration, in that they were required to look after the interests of the colonial administration at the expense of those of their subjects. The HC not only had powers to appoint traditional leaders, but also could refuse to recognize a traditional leader or could even suspend a traditional leader if he deemed such action necessary.[1150]

[1147] The traditional leaders were not happy about the introduction of both the *Native Administration Proclamation* and the *Native Tribunal Proclamation*. Chiefs Tshekedi and Bathoen challenged the validity of these two proclamations in court. In *Tshekedi Khama and Another v The High Commissioner* (1926-1953) HCTLR 9, the matter concerned the two Chiefs of the Bangwato and Bangwaketse tribes who instituted actions in court to test the validity of the *Native Administration Proclamation* 74 of 1934 and the *Native Tribunal Proclamation* 75 of 1934. They claimed *inter alia* that these proclamations were of no legal force or effect on the grounds: (a) That the High Commissioner in the proclamations purported to make alterations in certain native laws and customs, that he had no power to make such alterations because the Order-in-Council directed him to respect native law and custom. (b) That the High Commissioner in the proclamations violated certain rights reserved to the Bangwato and Bangwaketse tribes and their Chiefs by treaty with Great Britain. The court found that the High Commissioner acting on behalf of the Queen of England had unlimited power to legislate for the government and administration of justice among natives.

[1148] It seems the *Native Administration Proclamation* placed traditional leadership at the hub of bureaucratic system of the colonial government. The reason being that traditional leaders were now controlled and subjected to the rule of Resident Commissioner on behalf of the High Commissioner.

[1149] *Proclamation* 75 of 1934. When this proclamation was introduced in 1934 traditional leaders raised objections. They argued that the 1934 proclamation was too abrupt. The changes introduced by this proclamation removed a variety of offences from the arena of traditional courts. These offences included inter alia murder, contracts, wills etc. See in this regard Otlhogile *History of the High Courts* 16.

[1150] Somolekae and Lekorwe *Chieftaincy System* 189.

There were, however financial and political constraints against the exercise of British sovereignty. Tswana traditional leaders challenged local government reforms brought forward by the British administration, by claiming sovereign rights. The challenge of the traditional leaders was defeated.

6.2.3 ADMINISTRATIVE OFFICIALS AND THEIR FUNCTIONS

Almost all the rural Tswana in British Bechuanaland fell under the jurisdiction of the Chief Native Commissioner (CNC). Under him were Native Commissioners (NC) in charge of predominantly so-called Native areas. Magistrates appointed by the Department of Justice (DJ) administered districts with mixed populations. There were usually also so-called Additional or Assistant Native Commissioners who dealt with matters affecting Tswana peoples only.[1151]

The principal duties of the Native (Tswana) Commissioner were to administer all laws and regulations applying to the Tswana. These included collecting taxes and exercising civil and criminal jurisdiction as may be conferred upon him to explain new laws and instructions to the Tswanas, inquiring into their complaints and communicating to the British authority any representations they wished to make on matters concerning them. They also had to be informed of all local developments and to promote social and economic welfare. In general, they were to preside over the meetings, whose primary concern was to raise and spent money on social and economic development.[1152]

The Protectorate was divided into 12 districts, several of which consisted of single reserves. A District Commissioner (DC), whose authority extended over both Europeans and the Tswanas administered each district. He conveyed all government communications to the tribal authorities, received and disbursed

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[1151] The introduction of the Native Commissioners and Assistant Native Commissioners interfered greatly with the activities of traditional authorities. In many respects these government officials usurped the traditional functions of Tswana traditional leaders. The British system was characterized by a measure of dualism. This theory in practice introduced a dual court structure whereby British and traditional courts existed side by side with the Native Commissioner and Magistrates acted as final arbiters in all matters pertaining to the administration of justice. See in this regard Mqeke *Traditionalism* 8-9.

[1152] Shapera *Southern Africa Part III* 49.

government moneys, attended tribal meetings to explain new or projected measures, heard appeals from the tribal authorities and tried cases excluded from their jurisdiction. He also supervised the work of the treasuries and other tribal committees, advised the traditional leaders and ecouraged them to promote social and economic development, toured the district regularly to keep in touch with local affairs and with inquiries, grievances and complaints.[1153]

6.2.4 OBJECTIVES TO BRITISH RULE

Some of the Tswana traditional leaders soon became disillusioned with British protection. In 1885, the traditional leaders welcomed the Protectorate, but they soon became disappointed. They questioned the vague definition of Protectorate status and, secondly, the obvious fallibility of the Tswana people in confrontation with a civilized power such as Britain. The traditional leaders were divided. There were those who decided to support the colonial government and those who went against them.[1154]

If a traditional leader was a traditionalist and tried to get support of his people for his anti-British stance, he was often unpopular with the Protectorate administration and vice-versa. Traditional leaders were therefore in a dilemma. The colonial government usually tried to co-opt traditional leaders into their administration by generally alienating them from the traditional environment which made the position of those traditional leaders difficult. This was because a traditional leader was the only representative of his people. Two examples in Kweneng illustrated this factor during the reigns of Sebele I and Sebele II.[1155]

[1153] Shapera *Southern Africa Part III* 49.

[1154] As it has been discussed before during the early years of Protectorate the traditional leaders of the southern Bechuanaland were always suspicious of the British rule. As a result of this attitude conflict arose between these leaders and British administration. However traditional leaders in northern Bechuanaland had a cordial relationship with the British. For example Chief Khama unequivocally supported the administration. Therefore it did not come as a surprise to see continuity of this conflict after the establishment of Protectorate. See also 6.2, 6.2.1, 6.2.2 and 6.2.3 above.

[1155] Molotsi *Impact of Colonialism* 7.

Sebele I[1156] was on several occasions nearly deposed because the colonial government felt he was a threat to them especially when he instigated a rebellion. Sebele I called two meetings to tell his people about his desire to end the encroachment by the British on the economy and land of the Bakwena. He also opposed the imposition of hut-tax on his people.[1157] The first meeting conveyed by Sebele I was *Letsholo* held in the bush outside Molepolole. That meeting was between Sebele I and three age regiments of young men where matters of war and peace were discussed. Sebele I told his young men to prepare for a possible war with the British over their occupation of the Kwena territory and the sudden imposition of a hut-tax.[1158]

In August of 1899 Shippard, the Deputy Commissioner visited Molepolole, Kanye and Mochudi. At each stop he informed the traditional leaders that it was their destiny to be annexed in the manner of British Bechuanaland. The Deputy Commissioner's (DC) remarks alarmed his superiors as well as his host. It might of course be coincidental, but shortly after his departure the Bakwena decided that the time had come to initiate a new *mophato* (Regiment). The missionary Vookey vigorously lobbied for government intervention to put a stop to what he called "vilest heathenism". He referred to the newly established *bogwera* (initiation), which incorporated a large number of "strangers" including the Bakgalagadi and the San.[1159]

Based on Vookey's accounts and other circumstantial evidence, it appeared that Sebele II with Kgosidintsi backing, championed the initiation, a show of strength for his traditional leadership to his aging father and, possibly uninitiated

[1156] Tlou *History of Botswana* 176-177. The great Sechele I died in 1892 and was succeeded by his son Sebele. The young traditional leader wanted to rule the Bakwena tribe without interference of the administration. He wanted to allow whoever he wished to trade and hunt in his area. He disregarded trading licenses issued by the administration. For example, he allowed a Boer trader called Gideon Fourie to trade without a license. The young ruler ignored warnings from government. The administration fined him ten head of cattle for disobeying its orders. Sebele had many other quarrels with government because he wanted to remain independent. The way Sebele was treated by the administration in the Fourie's case showed that both the British authority and the Kweneng traditional leader had a sour relationship.

[1157] See 3.3.1, 3.3.2, 3.2.5, 3.3.2 and 3.5.2 above.

[1158] Molotsi *Impact of Colonialism* 7.

[1159] The missionaries attacked the *bogwera* and *bojale* ceremonies. They often held a view that Batswana were worshiping spirits at these ceremonies. Therefore they preached against *bogwera* and put pressure on the *dikgosi* to end these ceremonies.

sibling rival Kgari. By the time Shippard had received Vookey's letters, he had been reprimanded and instructed to retract his remarks on his return journey. During Shippard return visit, Sebele II expressed his desire that the traditional leaders of the *merafe* bordering on Kweneng came together at Chief Sechele's *kgotla* in order to settle their outstanding differences. This suggestion was embraced by the other Bakwena who were present in a great meeting or *Pitso* of the traditional leaders at Molepolole. The Deputy Commissioner, Shippard, agreed to preside over such a gathering but its venue was shifted to Kopong.[1160]

In his invitation to the traditional leaders Shippard outlined a formal agenda that confirmed the worst of fears of most of his invitees, namely hut tax, defence against invasion, medicine and hospitals, opening of permanent waters, the telegraph, the railway and the amicable settlement of all disputes between traditional leaders. The first reaction by Sechele and sons, upon receiving the invitation was to boycott the conference. Sechele remarked: [1161]

> I was in agreement with your word, that anyone not wishing to be under the government would be let alone to rule himself, and I, Sechele have not any desire to be ruled by anybody.

Shippard who was nicknamed *Morena-Maaka* (Lord Liar) by Sechele realized that the situation was becoming critical and sought reasons to exaggerate. He therefore exaggerated and reported as follows: [1162]

> I am given to understand, by the Rev Vookey and others, that there is great excitement in Molepolole with reference to the possible imposition of the Hut Tax, that a massacre of Whites was threatened, that he himself was threatened with personal violence by Sechele and that all the Christian Tswanas and indeed all the better disposed among the people, headed by Kgosi Linchwe had left the station.

[1160] Ramsay, Morton and Mgandla *Building of Nation* 161. Shippard believed that he could trick traditional leaders at the Kopong conference. Disappointed by Chief Sechele's defiant attitude, Shippard dissolved the meeting.

[1161] Ramsay, Morton and Mgandla *Building of Nation* 161.

[1162] Ramsay, Morton and Mgandla *Building of Nation* 161.

Alarmists' reports were also received that the Bakwena and Bangwaketsi had jointly agreed to oust the British authorities from their territories. It was clear that Shippard, in the closing months of 1888 misjudged the then existing relationship between Sebele and Kgosidintsi. In reporting on his December meeting with the Bakwena, the Deputy Commisioner suggested that Kgosidintsi, along with Kgari and the majority of Batswana south of Khama's vast dominions had welcomed annexation as liberation from arbitrary rule.

Despite the confusion and misjudgment on the part of Shippard about the relationships of the Tswana traditional leaders, the Bakwena and all the other tribes sent delegations to Kopong.[1163] Sebele was empowered to represent the ailing Sechele, a development that served as a benchmark for the beginning of the soul's effective reign as acting traditional leader. [1164] In the meantime Shippard observed that:[1165]

> Even Kgosidintsi who had hitherto professed the cost of maintaining utmost friendliness towards the English seemed by all accounts to be doing his utmost to support Sebele in his opposition to any proposal whereby the Bakwena might be called upon to the cost of maintaining the British Protectorate.

The great meeting, *Pitso,* at Kopong was an important turning point. The first such gathering since the civil wars, gave rise to renewed division as well as unity. On one hand the various polities of the southern Protectorate united against the British administration except for the Balete. Chiefs Bathoen, Linchwe and Sebele thus became allies. Despite occasional border squabbles and other differences between them, they maintained a common front when

[1163] Kopong was a place where a conference between the Tswana traditional leaders except Kgama was held. Issues to be discussed at the Kopong conference included *inter alia* payment of hut tax by the Batswana, settlement of dispute among the merafe by Britain, communication such as telegraph line, defence matters and digging of wells.

[1164] Tlou and Campbell *History of Botswana* 152. In the meeting Shippard observed that: "Even Kgosidintsi who had hitherto professed the utmost friendliness towards the English, seemed by all accounts to be doing his utmost to support Sebele II in his opposition to any proposal whereby the Bakwena might be called upon to contribute towards the cost of maintaining the British Protectorate."

[1165] Tlou and Campbell *History of Botswana* 152.

challenged by administrative attempts to further erode their autonomy. The traditional leaders' resistance spread throughout the country.[1166]

On the other hand, Chief Khama, while jealous of his own rights as a ruler, initially spurned the southern consensus with the result that he was for a period ostracized by traditional leaders of Bakwena and Bangwaketsi. Khama who was thoroughly loyal and sincerely attached to the English appeared to be completely isolated.[1167] He was left out of all private meetings of the protectorate's traditional leaders and seemed to be regarded by them with suspicion and dislike as the "whiteman's friend". While it would be misleading to downplay the role of other actors, it was the Mokwena who by pedigree, plight and personal temperament was cast as a main protagonist to the Mogwato in an implicit debate over Tswana identity and tactics. In the process, a synthesis was formed between their positions, which would significantly shaped the relationship between traditional leadership and the colonial state.[1168]

Apart from the saga of Bangwaketse, Bakwena and Bakgatla, other traditional leaders in the region of Bechuanaland were also not in friendly terms with the administration. For instance, in the 1890s the Batawana in Ngamiland were divided. Some wanted Sekgoma Letsholathebe as their traditional leader. Others chose Mathiba Moremi. Sekgoma was a very strong traditional leader who wanted no interference by the administration in Batawana affairs. He had displeased the administration by refusing to the BSAC a concession to settle Boers at Ghanzi. Missionaries also disliked him because he defended Batawana custom against Christianity. He also quarrelled with Khama about the boundaries between the two states of Bangwato and Batawana in the Botati

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[1166] Tlou and Campbell *History of Botswana* 152. Linchwe I and Sebele joined together to oppose the continued British presence in their territories. They favoured to be independent rather than ruled by the British imperialists.

[1167] It was therefore unfortunate that their relationship had been generally ignored despite the fact that the Protectorate was established: In the middle of 1889 Sebele, son of Sechele, tried in vain to persuade Khama to adopt a pan-Tswana and anti-British attitude ... If Sebele was a symbol of Tswana resistance to colonial rule, Khama was certainly a paradigm of a collaborator and this for British rule seems to have become more pronounced after the Kopong conference.

[1168] Tlou and Campbell *History of Botswana* 152. Chief Khama was thoroughly loyal and sincere to the Britsh government. As a result he was isolated by Chiefs Sechele, Bathoeng and Linchwe for his pro-British attitude.

River area. For these reasons, the administration sent Williams, RC to dispose him. The dispute between Sekgoma and Mathibe gave the administration the pretext to dispose Sekgoma. It was at this time that Kgosidintsi gave Bakwena a description of the English as follows: [1169]

> We have been told that the English is a wise nation. Ashu! What is wisdom? We have been told that the English is a strong nation ... we are told that the English love all men. They give or sell ammunition, horses and guns to the Boers, who have red teeth, destroy us and if we ask to buy powder, we get none. No, no, no! Black men must have no ammunition, they must serve the whiteman. Is this love? The English are not friends of the Black man.

6.2.5 POLICE CONTROL

Shippard's administration of Bechuanaland and the Protectorate was often tough and cruel. He took the attitude that the march of western civilization through Bechuanaland must be accepted willingly by the Tswana and even be assisted by them. In 1889, he made the position quite clear to Kgosi Bathoen:[1170]

> All the traditional leaders who are under her Majesty's protection in the Bechuanaland Protectorate are bound to obey the government in all things lawful. They are only at liberty to take up arms when attacked by external enemies or when called upon or expressly allowed by their Majesty's government to do so. They are bound to afford every possible facility for the police, for the persons employed in or for the conveyance of her Majesty mails, for traders and for travellers along all the roads throughout their respective territories, an they will also be expected to do all they can to assist in the work of contracting and maintaining a line of telegraph.

If the traditional leaders objected to the white encroachment they could easily be browbeaten into submission. Sebele, Bathoen and Lentswe all protested against the extension of the telegraph through their territories. But all three were

[1169] Ramsay *Botswana Boer War* 201.
[1170] Maylam *Tswana and the British* 35.

forced to accept it, whether they liked it or not. Moffat was sent to try to win Sebele around accepting the telegraph but the traditional leaders' attitude was one of "sullen acquiescence in the inevitable". Lentswe's people were more fractious, they broke open a case of telegraph materials and Lentswe was informed to allow a telegraph office to be built in his territory.[1171]

The police were sent to overawe the Kgatla traditional leaders, who were told that government would not countenance any opposition to the erection of the telegraph. The traditional leaders were helpless against the superior power of the police and were easily intimidated into acquiescence. In 1889, Sechele objected to the police digging wells in his territory. Colonial Commissioner (CC) Carrington, visited Molepolole, the Kwena capital, and told Sechele that if the opposition did not cease, his town would be destroyed.[1172] The next year (1890), Sebele I objected to police's oxen grazing in his territory but he knew too well the helplessness of his position. He explained his weak position to Mr. Surmon: [1173]

> I see you ask a thing, he told Mr. Surmon, the assistant commissioner and if you cannot get it by asking you take it and if I object you do it all the same.

Shippard in his dealings with the Tswana was often arbitrary and overriding. Three Assistant Commissioners at Vryburg, Taung and Mafikeng assisted Shippard. None of those officials lived in the Protectorate itself. Their duties were not clearly stated except that they were supposed to maintain law and order.[1174] The British government was still concerned that the Amandebele and especially the Boers, might invade Bechuanaland and therefore introduced the Bechuanaland Border Police (BBP). These mounted (on horses) police patrolled the TVL to protect Bechuanaland and the road to the north. This was the most important group in the Protectorate administration. They were the only

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[1171] Maylam *Tswana and the British* 35.
[1172] Maylam *Tswana and the British* 35.
[1173] Maylam *Tswana and the British* 36.
[1174] Maylam *Tswana and the British* 36.

link between the RC and the various traditional leaders. The BPP which consisted of white men were sometimes sent to settle disputes.[1175]

6.2.6 USE OF BRITISH BY TRADITIONAL LEADERS TO ACHIEVE OWN ENDS

Although, initially the British government did not want to get involved in the internal affairs of the Protectorate, certain incidents pulled them in. For example in the Bangwato state, clever traditional leaders such as Khama, who was also very much liked and trusted by the administration, made use of the British government to extend their power and territory.[1176] Khama wanted to impose tighter control over the smaller *merafe*. In the 1880s the Bagaseleka who lived near Ngwape Hill, east of Shoshong near the TVL boarder, were ruled by Chief Kobe. Kobe did not consider his people to be under Khama. But Khama claimed Kobe to be under him. Kobe allowed some Boers to live and hunt in his area against Khamas wishes.[1177]

In 1887, Khama sent a *mophato* (regiment) to attack Kobe for allowing the Boers to enter Bangwato country. The administration did not want a big costly war. They sent Bates of the BPP to settle dispute and to find out whether the area indeed belonged to Khama. Shippard ruled that the area belonged to Khama but Kobe refused to accept this decision. He also refused to be ruled by Khama. Khama ordered an army of 4000 men to attack Kobe. Kobe, his son Seleka, and their people fled to the TVL where they settled near Ellisras (Lephalale) in a place called Ga-Seleka.[1178]

[1175] Tlou *History of Botswana* 176.

[1176] Tlou *History of Botswana* 176-177. Another incident was that involving a Boer called Grobler. In the 1880s Khama had problems with untrustworthy whites such as Grobler who illegally entered his country from the TVL. They came to hunt, sell liquor or look for minerals. He, therefore, sent a mophato to guard the Eastern boarder. It also happened that on his way from Lobengula's country Grobler passed through this area. He was later killed by the Ngwato regiment. The TVL government protested to the British government. Khama was asked to pay 1350 cattle for use by Grobler's widow. He refused because Grobler had illegally entered his country and had resisted arrest. The British government agreed to pay Grobler's widow £450 per year from Bechuanaland revenues (taxes) for the next fifty years. In this incident Khama was treated by the administration with silvergloves. It showed how Khama was a strong and favourite man of the administration.

[1177] Tlou *History of Botswana* 176-177.

[1178] Tlou *History of Botswana* 176-177.

This incident indicated how rulers of the major *merafe* like Khama used colonialism to extend their rule over smaller groups. The incident also demonstrated how the imperialists manipulated some of the Tswana traditional leaders to meet their political needs and score political gains. The incident also sadly showed how the British government divided tribes and traditional leaders in Bechuanaland. Some of the tribes like Bagaseleka were forced to abandon their land against their wishes. The breakdown of the bond between the traditional leaders of Bechuanaland was clearly demonstrated by the disjointed relationship between Khama and the traditional leaders of Kweneng, Ngwaketsi and Kgatla.[1179]

Khama sold traditional leaders of the Bakwena and Bangwaketse to the British government for both historical reasons and personal gains. As discussed above,[1180] long ago Bakwena, Bangwato and Bangwaketse were one tribe called Bakwena. Their Chief was Malope who had three sons-Kwena, Ngwato and Ngwaketse. Both Ngwato and Ngwaketse were discontented about the regime of Chief Kwena. Such discontentment resulted into a series of quarrels and conflicts. Ngwato moved with his people to the North and created the Bangwato nation (the people of Ngwato) and Ngwaketse moved with his people to the east and formed Bangwaketse nation (the people of Ngwaketse).[1181]

6.2.7 TAXATION

The independence and wealth of the Tswana tribes and their traditional leaders were swept away by taxation. Hut tax meant that every hut occupied by an adult

[1179] It seems Khama collaborated with the British administration at the expense of other traditional leaders in Bechuanaland Proctectorate. That is why he was never confronted in any way by the British authorities. See also 6.2.5 above.

[1180] See 5.1 above.

[1181] Head *Serowe* 14-17. When Ngwato and his people were settled and lived at Modikela, Chief Kwena and warriors attacked them. Ngwato then moved his village further north. But Bakwena came again and fought them and Ngwato moved north once more. When Bakwena came for the third time, Bangwato fought outside the village and during the battle Bakwena warriors saw Ngwato and chased him. Ngwato grew tired and crept into some thick bushes to hide and as he lay there he saw a phuti right in the middle of the bushes. Ngwato lay very still and suddenly the *phuti* jumped up and ran out. Bakwena warriors chased *phuti* and Ngwato was saved from the enemy. The phuti became the totem of the Bangwato.

male or males was taxed. The traditional leaders were made tax collectors. They were paid 10% of the total tax collected in their area.[1182] In the Protectorate the main reason for taxing Batswana was to raise money to pay for the administration of the area. The British government was reluctant to fund the administration direct from its own coffers. The HC, Loch promised that Bechuanaland would pay for its own administration as some of traditional leaders had already agreed to taxation in 1885.

Traditional leaders became the beneficiaries of the new scheme of taxation. As the beneficiaries they were bound to be loyal to the administration. The whole exercise made the Tswana rulers public servants of the administration. The introduction of taxation cracked their independence and threatened their loyalty to their own people especially those who used tax for their own benefits and personal gains.[1183] Some used it for the development of the *merafe.* In general, the system of taxation, like the old tributes[1184] benefited traditional leaders. As already indicated earlier,[1185] these old tributes and tax served as a source of wealth for traditional leaders in Bechuanaland and South Africa, as a result traditional leaders strongly supported taxation.

Tswana paramount traditional leaders like Khama and Tshekedi used some of the tax revenue given back to them by the British to pay a small cadre of salaried bureaucrats - initially about half dozen clerks, teachers and accountants who answered to a traditional leader alone. Together they planned and administered development schemes like schools and later livestock improvement camps. The traditional leaders carefully monitored those aspects of modern state they would allow their nascent states to adopt. British taxation seemed to serve the purpose of modernizing traditional leaders.[1186]

[1182] Tlou *History of Botswana* 181-182.
[1183] See 3.2.2 above.
[1184] These old tributes referred to sehuba (a portion of meat from hunted wild animal) and dikgafela (basket of corns). Traditionally these tributes were often given to a traditional leader by his subjects.
[1185] See 2.2, 2.3 and 3.2.5 above.
[1186] Wylie *Little God* 50.

However, it was clear that taxation was very hard on the Batswana. The introduction of taxation by the administration led to the impoverishment of those who had few cattle. There were no jobs in the Protectorate and they were expected to find money for taxes. Some sold their cattle. Many Batswana men were forced to seek work as workers at South Africa mines (particularly in Johannesburg and Kimberley) and farms. As many men left, the burden of family work such as ploughing fell on women. In some cases taxation led to the breakdown of families while men did not properly care for their families while others did not return home at all. They went *Bokgwela*[1187] in South Africa. In other cases agricultural production fell. General taxation in the British colonies was mainly aimed at enforcing the colonized people to work for Europeans. This was particular true in settler colonies were European capitalists were short of labourers.[1188] Bechuanaland reserves were transferred into a labour reservoir for foreign capital and British imperialism.[1189]

6.2.8 INFLUENCE OF CHRISTIANITY

In Khama's time and under his personal supervision, the old order of tradition, ritual and ceremony died and was replaced by completely new order of things. Khama's conversion to Christianity and his imposition of it on his tribe as a whole forced him to modify or abolish all the ancient customs of his people. He stripped them of certain securities which tradition offered.[1190]

His acceptance of Christianity was an individual and moral choice, but he curved a new road for the tribe - the discipline which people now had to

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[1187] The word *Bokgwela* is a Tswana term, which in specific term refers to a situation where by man leaves his family or home to look for a job somewhere else and never come back again. In most cases such a man would marry or stay with another woman and forget about his wife and children left behind.

[1188] See 3.2.5 above.

[1189] Wylie *Little God* 50. Over and above it could be concluded that the system of taxation led to the breakdown of communities in the Bechuanaland Protectorate. This development affected the landscape of traditional authorities in many respects. For example, when men left their communities the system of regiments collapsed in some tribes. This left traditional leaders and their subjects without soldiers to protect them and do public works.

[1190] Chief Khama discouraged polygamous marriages among his people. He strongly supported the system of monogamous marriages, which was mainly upheld and promoted by the missionaries. He also abolished the institution of bogadi in Bangwatoland. See in this regard Ramsay, Morton and Mgandla *Building a Nation* 187.

impose on themselves was internal and private. People might not have realized this, and this might account for the almost complete breakdown of family life in Bangwato country, which under traditional custom was essential for the survival of the tribe.[1191]

The earlier indirect rule affirmed the authority of the traditional leaders in Bechuanaland but the culmination of multiple Acts on the side of the British authority and the influence of commercialization served to undermine traditional leadership as a system of rule.[1192] This gave rise to a movement working towards the independence of Botswana.

6.3 WORKING TOWARDS THE INDEPENDENCE OF BOTSWANA

6.3.1 PARTICIPATORY RULE

Although lacking central legislative powers the Tswana traditional leaders and other Africans of the Union of South Africa did to a limited extent participate in dertermining government policy about their affairs.[1193] Formal participation by the Batswana through their traditional leaders in centralized government did not begin until 1919 when a Native Advisory Council (NAC), (later African Advisory Council (AAC)) was established by the colonial administration. Initially, in

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[1191] Head *Serowe* xiv-xv.

[1192] Peters *Divining the Commons* 44.

[1193] It seems that Native Representative Council also had representatives from Bechuanaland Protectorate. These representatives were mainly drawn from the ranks of traditional leadership. In the Union of South Africa, for instance a Native Representative Council was established in 1936. It consisted of a secretary for native affairs as Chairman the six Chief Native Commissioners as assessors and sixteen native members nominated by the Governor-General, and twelve elected by the people each of the four electoral areas for the senate was represented here by one nominated and three elected members. In 1949, three of the African members were of Tswana extraction. This suggests that blacks from Bechuanaland were also members a NRC. This Council met at least once a year, and might be summoned more often by the Minister of Native Affairs (MNA). It discussed the estimates of the South African Trust Fund (SATF) and all legislation certified as specially or differentially affecting blacks. It also had full powers of initiative and might did as well discuss other matters affecting blacks and even general issues of national life. It was, however a purely advisory body. Its resolutions had no force of law and frequently not accepted by the government. In practice this body was just a mockery of true representation. But there was no doubt at all that it had exercised quite a considerable influence on the deliberations of parliament and the decisions of the government. It was however abolished in 1951. See 3.4.4.2 and 3.4.4.3 above. See also in this regard Shapera *Southern Africa Part III* 49–50.

Bechunaland the NAC was a regional body only. It consisted of representatives of the six northern tribes, including the paramount traditional leaders and a maximum of four others from each reserve. The early annual session of NAC were attended by the representatives of the Bakwena, Bangwaketse, Bakgatla, Bamalete, Barolong and Batlokwa. Khama, the great, paramount traditional leader of Bangwato, refused to participate because of the failure of his fellow traditional leaders to follow his lead in banning all alcoholic beverages from their territories.[1194]

After the death of Khama, the Mongwato regent, Tshekedi attended as an observer. Because of transportation difficulties, representatives of the Batswana were only added to the Council in 1931. The name of NAC was formally changed to AAC in 1940. By 1950 each tribal reserve and district was represented roughly in proportion to its population. The AAC of 1950 constituted the first African political body that encompassed the entire Protectorate. The composition of the AAC in 1951 was as follows:[1195]

RESERVE OR DISTRICT	NUMBER OF REPRESENTATIVES
Ngwato	**8**
Kwena	**5**
Ngwaketsi	**4**
Tawana	**4**
Malete	**3**
Kgatla	**3**
Tlokwa	**3**
Rolong	**2**
Francistown	**2**
Kgalagadi	**2**
Chobe	**1**
TOTAL	**38**

Table 2 : Bechuanaland Reserves or Districts

[1194] Vengroff *Botswana Rural Development* 29-30.
[1195] Vengroff *Botswana Rural Development* 30.

Unlike the parallel European Advisory Council (EAC) it was not a statutory body, but it was officially recognized and the HC approved its *Constitution*. Its traditional leaders and one to seven other men chosen by the people at *Kgotla* represented each tribe. Heads of government departments and the District Council also attended but did not vote nor did they speak unless their work was under review.[1196]

The functions preformed by the AAC were broader than its legal advisory status seem to indicate. The prevailing African view was summed up by Chief Isang of the Bakgatla who suggested that the Council would serve as "a court of appeal for Tswana people of the Protectorate". Laws and regulations initiated by the administration were presented to the Council and on some occasions subjected to high critical review by the traditional leaders and headmen. During the 1930s for example, Tshekedi was extremely vocal in expressing opposition to the proposed draft proclamations of 1934, which significantly altered the established system of tribal administration.[1197] It seemed this Council was more powerful than its counterpart in the Union of South Africa.[1198] Perhaps this is an account of the fact that traditional leaders in Bechuanaland shaped and mapped out the road to independence more rigorously than their counterparts in South Africa.[1199] The ability of the AAC to delay the implementation of the *Native Administration Proclamation* of 1934 was indicative of the Council's influence.

One of the most important functions performed by the Council was to provide a platform for expression of vehement opposition to incorporation of the Protectorate in the Union of South Africa.[1200] The Union government intended

[1196] Vengroff *Botswana Rural Development* 30. It seems that even though the AAC was not a creature of a statute, it had status in the eyes of the British administration.
[1197] See also *Tshekedi Kgama and Another v The High Commissioner* (1926-1953) HCTLR 9, where Tshekedi and Chief of Bangwatse challenged the 1934 Proclamations and argued that they reduced the powers of the traditional leaders. The court did not rule in their favour and the two proclamations namely; *Native Administration Proclamation* and *Native Tribunal Proclamation* were declared to be valid.
[1198] See 3.4 and 3.4.4.3 above.
[1199] Vengroff *Botswana Rural Development* 30.
[1200] Vengroff *Botswana Rural Development* 31.

adopting *inter alia* the following terms of the schedule of *South African Act* of 1909 should incorporation be effected:[1201]

1.Europeans

- The Europeans of the three territories (Bechuanaland, Swaziland and Basotholand) will have the full right of parliamentary franchise, which apply normally to any European in the Union.
- The Europeans should place land of the territories on exactly the same footing as the Europeans owned land in any part of the Union.

2. Africans and administrative change

- The Africans will be treated as rightful residents of the Union in labour, trade and other matters. There would be no difference.
- The powers of traditional leaders would remain unchanged.
- There would be no alienation of land from any of the African reserves in the High Commission Territories (HCT)
- No Africans would be allowed into any of the African reserves of the territories without the permission of the inhabitants concerned.

The purpose was to transfer the administration of Bechuanaland to the Union of South Africa but the traditional leaders were totally against it. In 1935, Tshekedi Khama issued a pamphlet to the British people and parliament where he strongly opposed the question of transfer. In his pamphlet, Chief Tshekedi Khama held that the transfer of the administration of the territory of the Bechuanaland Protectorate from the British government to the government of the Union of South Africa would be a breach of the agreement reached between the early traditional leaders of the Protectorate and the British people. The purpose of the "protection" was for Britain to protect the Tswana against Boer invasion and encroachments. To allow the incorporation

[1201] Roberts *Restatement* 39. See 3.4.1 above.

of Bechuanaland into the Union of South Africa would amount to the disintegration of the British protection.[1202]

Another important issue, which confirmed the fears of the Batswana, was the passage of the *Native Land Act* in South Africa in 1913.[1203] The *Native Land Act* was carried out with harsh severity in South Africa. The traditional leaders stated objection to transfer because it would involve the application of the Act and prevent tribes from buying land under white occupation.[1204] A number of traditional leaders petitioned the Crown or wrote letters to the Protectorate's administration in opposition to the Union and incorporation. However, Linchwe had the effrontery to speak in blunt terms to Lord Selborne, the HC when he met the Protectorate traditional leaders at Mafikeng in 1910 to explain the position and status of the Union. Linchwe told the HC and assembled traditional leaders that in his opinion the administration was in the hands of the Dutch.[1205]

His remarks were published in the *Mafikeng Mail* and passed along official channels back to London. Soon after the SANNC was formed to oppose the

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[1202] What Chief Tshekedi meant was that the incorporation of Bechuanaland Protectorate into Union of South Africa would amount to an action intended to renege the initial contract entered into between Britain and the Tswana traditional leaders in 1885. Bechuanaland became a British Protectorate on account of the fact that Britain promised to protect the Batswana against the Boer invasion. Therefore incorporation of the Bechuanaland into the Union of South Africa would have defeated the purpose of protection. See also 5.7 above.

[1203] See 3.4.3 above.

[1204] Morton *Land, Cattle and Ethnicity* 43. Chief Linchwe of Bakgatla was also in the forefront of opposing the *Native Land Act* of 1913. On the eve of his fifty-year reign, Linchwe sent his designated successor and son, Isang, to appear before the Native Land Commission (NLC) of western TVL, sitting in Rustenburg and rebuked South Africa's segregationist laws. The Land Act of 1913 threatened to render traditional leaders mouthpieces of the administration and limit their authority to farms owned by tribes in designated locations. At risk was Chief Linchwe's position in the Union both as the major source of capital for the purchase and leasing of farms in the Saulspoort area and as one of the largest cattle owner in the TVL. In response to the *Land Act* of 1913, Chief Linchwe I's son Isang remarked: "Each nation on earth should apart from others own land but it is only those nations still in barbarism ... which can live under segregation policy. I say that man was made to live with others ... we say that it will in future be recognized by the worldwide that a great drawback has occurred ... I do not in the least expect the government to introduce or violate the laws of personal rights neither do I expect the government to expose the natives and their reaches to the ambition of land tenants ... as regards to the administration of the proposed native area I say it is distasteful to natives. We do not see any reason why the government can abolish the chieftainship among the natives and even go as far as abolishing the laws, customs and usages prevailing amongst them previous to the European government." See also 3.4.3 above.

[1205] Morton *Land, Cattle and Ethnicity* 43.

Land Act of 1913, Linchwe was one of the two traditional leaders to accept the honorary vice-presidency in the Congress. Significantly the other was Chief Lekoko of the Barolong, whose authority was recognized as extending from the Protectorate into the Union. Khama trusted that controversy over the Act would divert the Union government from designs on Bechuanaland, hence, as far as Bechuanaland was concerned the government intended any extensive alienation of the land, which would either disturb blacks already in occupation or would diminish the quantity of land available for those who were as yet insufficiently provided for. [1206]

Throughout the entire period, 1910-61 in which transfer remained a possibility, the Batswana traditional leaders were sensitive to any move by South Africa or Great Britain in that direction. Arguments set forth by the Tswana traditional leaders against transfer encompassed the economic, social and political aspects of transfer as well as questioning of the legal right of Great Britain to do so. As a result of the fears and the uncertainties of the issue of transfer any threat even remote made traditional leaders to argue for continued British protection.[1207] The Batswana accordingly also supported British's forces in the Second World War.[1208]

[1206] Tlou *History of Botswana* 183.To quote the admirable Lambert: "Even if the Union came along with solid official pressure, it is not clear that His Majesty's government could give way. Khama and company could not be trusted as so many chattels to be given away, for they have never parted with land like the Swazis who lived under the Boer rule, they came under the queen with assurances of protection which would not indeed avail them for ever, but which would be hard enough to get round at least during Khama's lifetime - he had many good friends here who would relate as some ancient history".

[1207] Mzilethi *Modern Political Institutions* 9.

[1208] Jackson *Botswana* 36; Roberts *Restatement* 35. Queen Victoria is still today known through out Botswana by her Tswana name, Mmamomosadinyana, meaning the "little woman" and Britons are commonly referred to as coming from *Lefatshe la ga mmamosadinyana* " the land of Queen Victoria. The Royal visit around 1890s also marked a memorable day in the history of the Bechuanaland Protectorate. The Royal family, their Majesties, King George VI and Queen Elizabeth and Princess Margaret visited the territory and were welcomed and paid homage by the traditional leaders, and representatives of all the people of the Protectorate at Lobatse. This Royal visit deepened and strengthened the cordial relations between British government and the principal traditional leaders in Bechuanaland. Despite a wide range of conflicts and squabbles between the traditional leaders and the colonial administration, it seemed that the Batswana traditional rulers did not abandon their loyalty to the British government. This positive attitude towards the British manifested itself during the Second World War and around the issue of incorporation in the Union of South Africa. It was widely believed that Britain was the protector of Batswana. Britain had protected them from the Ndebele, from the Boers and from the British South African Company. The meeting of the three main traditional leaders (Khama the Great, Sechele and Bathoen) of the Bechuanaland with Queen Victoria in 1885 had become a part

The Council suggested that there should be a broad explanation and discussion about any proposed law in the *Kgotlas* of each tribal area. In some cases, amendments were proposed and attached to government proclamations at the Council. In dealing with matters of direct concern the traditional leaders made it necessary for the RC to formally respond to the issues raised.

The British administration used the AAC as approval for proposed legislation. Obtaining the prior, often perfunctory, approval of the traditional leaders added a necessary measure of legitimacy to new regulations when they were presented to the populace. The Council was also employed as a tool to limit the necessity for direct administrative intervention in local affairs. Problems and possible solutions to be implemented by the traditional leaders could be discussed without requiring the issuance of formal legislation. In some instances, government action was limited to the passage of enabling legislation. For example, a proclamation issued in 1931 banned alcoholic beverages from tribal areas at the discretion of the traditional leaders.[1209]

In other areas, the traditional leaders would enforce the prohibition on their own or allow their reserves to remain "wet". The traditional leaders were satisfied because their traditional prerogatives were maintained. The administration for its part took pride in its ability to maintain order with minimal intervention and at minimal cost to the British taxpayer. As time passed, the

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of common folkore. When Queen Victoria died, Selogwe Pilane of Mochudi had lucidly explained this enduring memory of the dead Queen with the following words: "Yes, she had passed away. But here in Botswana we always refer to her and she was well liked and known. Like among us Bakgatla. There was a Chief who governed along time ago, Chief Pedi, the father of Pilane, father of Kgamanyane, father of Lentswe. We still refer to Bakgatla as people of that Chief, for example, when we greet we say, *Bana ba ga Pedi* (Pedi's children). But of course we all know that he is Long dead."

[1209] Tlou *History of Botswana* 183. In view of the above, it appears that the African Advisory Council played a pivotal role on all crucial matters pertaining to the legislation impacting on the affairs of their traditional communities. Undoubtedly, traditional leaders who were members of AAC laid a strong foundation for the independence of Botswana. They crafted the road map of the independence of Batswana.

Council could debate any matters the members wanted to discuss. This allowed African leaders to criticize the administration on matters such as:[1210]

- Lack of Batswana in the administration;
- Racial discrimination in government service;
- Low African salaries in government service;
- Lack of economic development in Bechuanaland;
- Poor education and health facilities; and
- The transfer of the Protectorate into the Union.

The AAC of the Bechuanaland Protectorate offered an avenue for resistance to the British colonialism in the territory. Batswana used this opportunity with varying degrees of success and there were improvements resulting from the Council actions. The Council promoted educational advancement and developed numerous water schemes that aided in the provision of water under the Council's advice and action. Medicine and veterinary services expanded and became more successful. This was particularly critical in the fight against cattle diseases. The advisory body also promoted improved agricultural practices. This issue further improved after 1936 when the British had more control and were willing to grant more funding to Batswana. Perhaps the Council's greatest attribute was the formalizing of communication between the administration and Batswana. They allowed the converted appeals by the " colonized" that had to be reported, which created an African dynamism and as such, sometimes Batswana power.[1211]

6.3.2 DISTRICT COUNCILS

Throughout most of the period of British rule, from the creation of the Bechuanaland Protectorate in 1885 to independence in 1966, the traditional leaders of the eight principal tribes exercised wide discretionary powers. They

[1210] Tlou *History of Botswana* 183.

[1211] Tlou *History of Botswana* 139-40. Suffice it to mention that the AAC strived for political, social and economic development of Bechuanaland. They initiated a considerable number of development projects and improvements in the areas such as education, agriculture and health services.

worked through subordinate officials, sub-traditional leaders, traditional leaders' representatives and village/ward headmen in controlling all aspects of tribal life with a minimum of interference from the British administration. The establishment in 1957, within each sub-division, of the tribal area of subordinate bodies, called District Councils, inserted a narrow democratic wedge into an indirect rule system that revolved around the traditional leaders.[1212]

6.3.3 RESISTANCE AGAINST COLONIAL ADMINISTRATION

The British encountered most of their difficulties from the Bangwato traditional leader, head of the most powerful and numerous ethnic groups in the Protectorate. In 1926, Tshekedi Khama cut short his education at Fort Hare in South Africa to return to Serowe and became the Ngwato regent. Tshekedi's traditional leadership focused on the Batswana struggle against British and South African imperial designs in the Protectorate. Tshekedi challenged the colonial administration from the outset of his regency. The African Advisory Council remained his strong platform to challenge and criticize the colonial administration.[1213]

Since the British faced a new force in Tshekedi, they sought to inhibit his position. The HC's office was bothered by Tshekedi's seemingly antagonistic attitude towards the colonial administration. The HC Lord Athlone was at a loss to account for Tshekedi's " truculence and reluctance to accept advice" and his lack of confidence in his office. Tshekedi did not want to compromise his regency, so he strove to maintain Bangwato independence. The colonial administration found Tshekedi's stance unacceptable, and the British pressed to undermine the position of traditional authority throughout the Protectorate.

[1212] Tordoff *Local Administration* 1.

[1213] Bernigham *Settler Imperial Complex* 62. Khama, the Great, a traditional leader who had led the deputation to London in 1895 remained the Ngwato leader until his death in 1923. His last few years were marred by his assessment that his people were fighting a losing battle. He was sceptical that his successor would be able to maintain the Ngwato political position in view of the British enchroachment. Sekgoma followed Khama taking over the traditional leadership in 1923, but his reign was brief as he died in 1925. Since Sekgoma's successor, his son Seretse Khama, was a minor, another of Khama's sons assumed the regency over the Bangwato. This regent was Chief Tshekedi Khama.

Proclamations to regulate the status and powers of the traditional leaders were suggested by the HC. By 1928, the administration had decided to implement those regulations. Once again, Tshekedi did not hesitate to challenge those regulations in their well-known political forum of African Advisory Council.[1214]

Unlike his father Khama the Great, Tshekedi defied the administration at all costs. The relationships between Tshekedi and the British were strained. Colonial authority opposed almost anything Tshekedi did. Tshekedi created another disturbance when he ordered the flogging of a white man, Phean McIntosh, who had attacked two Ngwatos.[1215] The local colonial authorities had ignored the Ngwato pleas to admonish or banish McIntosh, so Tshekedi took action on his own. The "flogging incident" caused uproar in Britain, Bechuanaland and especially South Africa. The Acting HC, Admiral Evans, invaded the Protectorate with a regiment of marines and suspended Tshekedi from his regency, ordering an inquiry into the affair. Ray characterized Tshekedi's attitude as "one of effrontery and insolence". According to Ray, Tshekedi's actions constituted a complete and bare-face defiance of all authority, so he recommended Tshekedi 's deposition.[1216]

[1214] Berningham *Settler Imperial Complex* 62.

[1215] Crowder *Flogging of Phinehas McIntosh* 34. McIntosh was born in Serowe and was a wagon builder by trade. He was always involved in a number of assaults on Bangwatos. These assaults resulted in McIntosh been sentenced to flogging by Chief Tshekedi. But what most concerned Chief Tshekedi was McIntosh frequent fornication with young Bangwato girls. Tshekedi had been concerned about the way some members of white community residing in his territory slept around with local girls.

[1216] Berningham *Settler Imperial Complex* 69. The irony of the whole flogging melodrama was that McIntosh had never actually been whipped even though Tshekedi had sentenced McIntosh to be flogged. The principle was the Dominion's office concern since Tshekedi had acted above the law as though he was immune from British sanctions. The traditional leaders throughout the Protectorate immediately protested and the battle over the new laws and the deposition of Tshekedi exploded with the AAC at the forefront. The fundamental issue focused on the territory's constitutional status and the definition of a "Protectorate". The address of the acting HC, Admiral Evans, when he deposed Tshekedi, took the tone of "I'm telling you, boy, we are not going to stand this sort of (defiance) from you". If one takes the story back to Khama's time, it seemed tentatively that in this conflict with the British, Tshekedi was made to suffer from a backwash of suppressed British resentment against his father's rule. Khama is on record as having said to the white man: "Well, I am black, but if I am black, I am Chief in my own country at present. When you white men rule in the country, then you can do as you like, at present I rule." See also Head *Serowe* 77.

When Ray took the reins of the Bechuanaland Protectorate, the subsequent history of the territory was marked by both positive outcomes and by his misjudgments. Ray, a man of quick judgment and prone to exaggeration decided after his arrival in the Protectorate that: [1217]

> Things are in an awful state, that his predecessors were all useless, that the settlers were seething with discontent with the administration and that the native (Chiefs) were utterly out of hand ... incompetent or drunkards and with no control over their peoples. So I am going out with both hands to reform, develop, discipline and organize.

Almost immediately, Lieutenant-Colonel Ray drafted changes to the *Constitution* governing Bangwato and their sister tribes, which from Tshekedi's point of view, seemed to be taking the Protectorate closer to the South African system. As stated earlier, for years the rights of black people in South Africa had been increasingly eroded and their power to control their own affairs whittled away, Tshekedi blocked every effort by Ray to introduce the new proposals.[1218]

A new RC, Arden-Clarke, replaced Ray. Arden-Clarke realized that the 1934 proclamations were too strong[1219] and he promised traditional leaders that he would retain some of their powers. He also told the Batswana that the question of the transfer to the Union of South Africa would be dropped for some time. In 1938 he allowed the traditional leaders to start African Treasuries to develop their reserves. The new RC also consulted and listened to the African Council. He built more schools and created a Board of

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[1217] Peters *Divining the Commons* 44.

[1218] Peters *Divining the Commons* 45. The dramatic events ended with Ray appearing as the loser and an opinionated bully and Tshekedi the victorious and courageous hero. In this incidence and other events of the period, both traditional leader (Tshekedi) and Ray acted in heroic style in ways ranging from absurd to astute and with effects that were frequently unintended and ironic. Ray thought admiral Evans would finally quash Tshekedi as a result of his position but the real victim became Ray himself. However, Tshekedi easy victory and success proved illusory. Moreover the extensive coverage by the press and other media of the flogging case opened a public about indirect rule in Africa and the need for reforms to reduce the powers of traditional leaders and to introduce more democratic means of administration into the colonies. In the long run, the tide was running against Tshekedi and the other traditional leaders and in favour of democratizing the political administration of the territories. See 3.1, 3.2, 3.3, 3.4, and 3.5 above.

[1219] See 5.2.1 and 6.5 above.

Education to advice on African education. All these actions pleased the Tswana traditional leaders.[1220]

The most important thing Arden-Clarke did was to set up a Committee to draft new proclamations[1221] which were to replace the disliked 1934 ones. Tshekedi Khama, M Seboni, Bogatsu Pilane, Sebopiwa Molema, Dr Silas Molema and some government officers were members. The Africans on the Committee were members of the African Council. Arden-Clarke and his successor presided over an era of cordial African-British relations, which lasted throughout the Second World War years.[1222]

The next exile and dispute, which involved Tshekedi, was a more serious affair than that first paltry show of power by the British. It involved the death of Bangwato chieftaincy, which had been for a long time the most powerful in the country. Tshekedi's nephew, Seretse Khama married an English woman, Ruth Williams in 1948. Tshekedi opposed the marriage on the ground that a King or Chief could not do as he pleased as he was the servant of the people and a heir to the chieftaincy.[1223]

[1220] Roberts *Restatement* 35.

[1221] See *Bechuanaland Protectorate Administration Proclamation* 32 of 1943. Its Premble stated that: "It is expedient to make provision for the designation, recognition and removal of Chiefs, Sub-Chiefs and Headmen and for the constitution and appointment of Native Authorities and the definition of their powers and functions in the Bechuanaland Protectorate." Section 2 of Chapter I of this *Proclamation* dealt with the designation, recognition and removal of Chiefs, Sub-Chiefs and Headmen. The Proclamation further made provision for a procedure for the appointment of a Chief in case of vacancy in the chieftainship. This procedure required the tribe to assemble at the kgotla to designate the Chief's successor according to native custom and to submit a name of such designated Chief to the Resident Commissioner with a view to seek the High Commissioner's recognition. Section 8 of the *Bechuanaland Protectorate Administration Proclamation* provided for the suspension and deposition of Chiefs. Section 12 of Chapter II constituted a Native Authority for each of the tribal areas. See also *Native Courts Proclamation* 33 of 1943. Its Preamble read as follows: "It is expedient to make better provision for the recognition, constitution, powers and jurisdiction of Native Courts and generally for the administration of justice within the Bechuanaland Protectorate in cases recognisable by Native Courts. Section 2 provided for the establishment of Native Courts." Section 4 dealt with the suspension and dismissal of members of Native Courts. The Resident Commissioner had powers to suspend or dismiss any member of Native Court who appeared to have abused his power or to be unworthy or incapable of exercising the same justly or for other sufficient reason.

[1222] Peters *Divining the Commons* 45.

[1223] Head *Serowe* 77. Tshekedi's prediction of the disintegration of Bangwato's chieftaincy seems to be real. Since the death of Sekgoma (Seretse's father), Bangwato had been ruled by regents. Ian Khama, the eldest son of Seretse was installed as Paramount Chief in 1979 but never inherited the Bangwato chieftaincy, because of his political commitments.

Still on the issue of Bangwato chieftainship, the administration had to deal with Tshekedi-Seretse dispute. The government approach towards the dispute threatened the relationship between the administration and Bangwato. With the return of the Chief designate of the Bangwato, Seretse Khama from Great Britain, tribal disputes about the succession to the traditional leadership arose. The government banned Seretse from the Reserve while Tshekedi Khama, renounced all claims to Bangwato chieftainship following his refusal to accept his nephew's wife to the tribe. In 1949 decided to settle with his followers at Ramatsana, in the Bakwena Reserve. In a judicial inquiry which was held later both Seretse and Tshekedi were banned.[1224] As a temporary measure, the District Commisioner (DC) termed "Native Authority" who derived powers from the government assumed the office of traditional leader.[1225]

Suddenly after Seretse was banned from Serowe the British administration proclaimed the *Bangwato Tribal Membership Proclamation.*[1226] Part of the proclamation reads as follows:[1227]

> The persons to whom this Act relates are all persons who left the Bangwato Tribal Territory in or after the month of July 1949, and who immediately before leaving the Tribal Territory were members of the Bangwato tribe. It is hereby declared that all persons to whom this Act relates and who returned before the 11th day of June 1952, shall be regarded for all

[1224] Parson *History of Southern Africa* 287; Dutfield Marriage of Inconvenience 207. Seretse Khama sent his wife, still in Bechunaland, a terse telegraph summing up the situation: "Tribe and myself tricked by British Government and banned from whole Protectorate. Love Seretse" Seretse bid a final goodbye to his Ngwato people with the following words: "I want you all to know that I leave you unwillingly. I am going because I and my wife had been served with an order to leave the country. I had planned that with God's help and your co-operation I would have been able to introduce reforms for the advancement and happiness of my people. To be deprived an opportunity to do so is a sad and bitter disappointment to me. While I am gone, I give you this advice. Pay your taxes and obey all lawful orders given to you by government. Above all pay due homage and remain loyal to His Majesty, King George VI. To each one of you, my wife and I with sorrowful hearts express our deep appreciation of your loyalty and unlimited kindness. Your constant concern wherever we may be. May God bless each one of you and protect you."

[1225] Roberts *Restatement* 35. In terms of the above arrangement, the DC performed the functions of the traditional leader in the Reserve of Bangwato.

[1226] Cap 41.02 of 1952.

[1227] Cap 41.02 of 1952.

> purposes as having lawfully so returned, and shall be deemed to have been restored to full membership of the Bangwato tribe. It is further declared that all persons to whom this Act relates and who had not returned before the 11th day of June, 1952, may be permitted to return on such conditions as may be prescribed by the tribal authority of the Bangwato tribe and upon being readmitted by the Tribal Authority of the Bangwato tribe shall be deemed to have been restored to full membership of the Bangwato.

The *Bechuanaland Protectorate Bangwato Succession Order in Council*, 1952 provided *inter alia*, as follows: [1228]

> It is hereby declared that neither Seretse Khama nor Tshekedi Khama nor their children shall hereafter be eligible to be Chief or acting Chief or regent of the tribe or to be a member of Council of regency of the tribe, or to summon the tribe in Kgotla for any of the purpose or to preside or exercise any of the functions of a Chief at any Kgotla of the tribe.

After Seretse was driven away from his homeland the British administration appointed an European officer in his position as tribal authority. This new arrangement and the failure of the Bangwato delegation, which was headed by Keaboka Kgamane to effect the return of Seretse from the United Kingdom, aroused bitterness among the Bangwato towards the government. As a result a serious rioting in June 1952 occurred when three African police were killed and a number of European administrative and police officers were injured. In 1953, however, after the tribe's refusal to designate a new traditional leader other than their traditional and constitutional traditional leader, Seretse Khama, the government appointed Rasebolai Kgamane as

[1228] *Bangwato Succession Order in Council* of 10 June 1952. See also Bangwato Reserve Administration Proclamation 10 of 1950. This proclamation made special provision for designation, recognition and removal of Chiefs in the Bangwato reserve. Section 1 of Proclamation 10 of 1950 provided the High Commisioner with the power to depose a Chief so designated by a tribe in the interest of peace, order and good government. Section 2 provided that upon such deposition, the High Commissioner could after consultation with the tribe appoint any person or body of persons to exercise all the rights, powers and obligations conferred upon a Chief in the *Native Administration Proclamation* 32 of 1943.

Native authority. Towards the end of 1956, the United Kingdom government allowed Seretse Khama to return to his homeland.[1229]

He was allowed to return on condition he renounced his traditional leadership. More importantly heavy pressures to bar Seretse from traditional leadership came from the South African National Party regime, which as indicated above had come to power in 1948,[1230] and from the government of white-ruled Southern Rhodesia (now Zimbabwe). Seretse Khama's marriage threatened the whole future of *apartheid* in separating black and white. DF Malan, Prime Minister of South Africa demanded immediate incorporation of the HC's territories into the Union to stop the threat. Huggins in Southern Rhodesia added his voice to the protest.[1231]

In South Africa, the National Party's government forced blacks to accept the eventualities of *apartheid*.[1232] In view of this political development, the Afrikaners of South Africa were not prepared to accept the installation of a black man and his white wife as Chief and queen of the main tribe of a neighbouring territory. Looking closely into political benefits of Seretse marriage, it appeared that the British refusal to recognize Seretse as a

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[1229] Roberts *Restatement* 36.

[1230] See 3.5 above.

[1231] Dutfield *Marriage of Inconvenience* 186. When Seretse was banished from the Protectorate, he wrote a letter to *Times Newspaper* and detailed his situation as follows: "I have been banished from my people who have wanted me also from the land to which I belong. For what? No crime, except that I have married an Englishwoman ... The present (law in the Union of South Africa) forbids the marriage of a native to a European. There is no such prohibition anywhere in the colonial Empire yet it was the policy of racial discrimination, which influenced the Imperial government in their decision regarding my succession to the chieftainship ... The questions, which the British people have to ask themselves are: Is our conscience clear over the whole event? Have we allowed expediency to prevail over political integrity? Upon these answers alone is greatly dependent morally and politically (upon) Britain status as the mother country of the Commonwealth." For the British government Seretse's relationship with Ruth was a very inconvenient marriage. Therefore, Britain saw it necessary to appease South Africa at the expense of Seretse and the chieftainship of Bangwato. A critical analyses of Seretse's marriage saga exposed Britain as country, which condoned directly or indirectly some elements of racism. It appeared that racial discrimination and inequality were also not only conspicuous in South Africa but also in some areas of the Protectorate even though they were not in a statute book. For instance, the British, while encouraging local blacks to join the administration, paid them rates often half to those given to whites for performing the same jobs. No matter how highly qualified a black might be, he would always find a white man above him. Of it all was that the few hostels along the railway line in the Protectorate were "WHITES ONLY", barred even to traditional leader (Tshekedi) himself.

[1232] See 3.5 above.

traditional leader yielded indirect good results for the political future of the Batswana. Firstly, the British approach, appeased and comforted the leadership of the National Party in South Africa and that in itself thwarted the threat of incorporation of Bechuanaland into South Africa. The success to prevent incorporation made it difficult for South Africa to subject the Tswana traditional leaders and their subjects to the evil policies of *apartheid.*[1233]

The *Bangwato Succession Order-in-Council* disintegrated and disjointed the traditional leadership of Bangwato. Since Seretse Khama was forced by the British government to renounce his traditional leadership, the traditional leader in accordance with the succession order had never ruled the Bangwato.[1234] The chieftaincy of Bangwato shifted from the line of succession after the death of Sekgoma I in 1925 until to date. Since Sekgoma, Bangwato had consistently been ruled by regents. The following Ngwato line of traditional leadership represents the abridged Ngwato Royal Family:[1235]

[1233] Dufield *Marriage of Inconvenience* 24. It must be noted that the Afrikaners of South Africa opposed the marriage of Seretse and Ruth. Of immediate importance in this regard is the fact that some whites in Bechuanaland Protectorate and Britain were also against that marriage. In order to appease South Africa for the sake of uranium the British government compromised Seretse and decided to banish him from his country of birth, Bechuanaland. If the banishment of Seretse was a crime, it would suffice to state that both the British and apartheid South Africa were partners in crime in this regard.

[1234] Wylie *Little God* 56.

[1235] Wylie *Little God* 56.

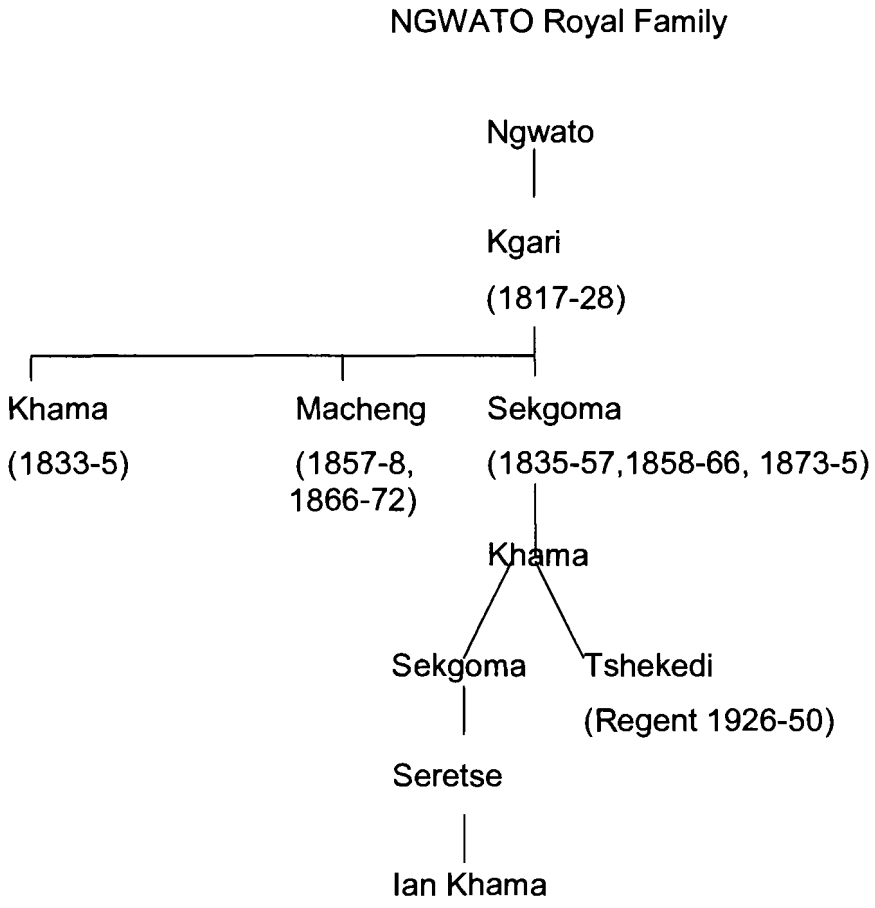


Diagram 1: Ngwato Royal Family

6.4 ROAD TO INDEPENDENCE

It was primarily in the 1950s and the 1960s that the most significant developments occurred in Bechuanaland. The earlier phase, 1953-1965, culminated in the winding down of the colonial administration and preparations for independence. During that period, there was a growing concern in Britain and within the Protectorate to substitute civilized methods for autocratic rule and semi-barbaric methods. There was also a call from non-traditionalists and politicians alike to bring African traditional institutions into conformity with the requirements of a civilized administration resting on a money economy and civilized political system.[1236]

[1236] Wylie *Little God* 56. In 1930s Pim was sent to the Protectorate to advise on how the country could be developed. In his report in 1933 he stated that as long as the traditional leaders remained so powerful it would be difficult to develop the country. The traditional

Reforms regarding the position of traditional leaders were proposed by AAC. One of them was that a traditional leader would rule with agreement of the AAC. Initially, the traditional leader was obliged (forced) to obey the RC.[1237] He would not be allowed to collect taxes or tributes unless the RC gave him permission. Above all, no one could be a *kgosi* without the approval of the British government. The administration could depose, suspend or banish a traditional leader. Secretary Macdonald replied:[1238]

> His Majesty has unfettered and unlimited power to legislate for the government and administration of justice among the native tribes in the Bechuanaland Protectorate, and his power is not limited by treaty or agreement.

Tshekedi[1239] led the opposition to these attempts to reform tribal rule, which he argued contradicted the doctrine of indirect rule and violated the treaty between the earlier generation of traditional leaders and Britain.[1240] The administration felt that traditional leaders especially the likes of Tshekedi were too powerful and therefore the government wanted to reduce their powers. The administration also complained that throughout Bechuanaland, *Batlhanka*[1241] still existed. The San especially were badly treated. The British government wanted to end the system of *Batlhanka* because:[1242]

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leaders would resist laws, which encouraged development. Pim was not absolutely correct. Some Batswana rulers were anxious to develop their reserves. Seepapitso and Bathoen II of Bangwaketse, Isang, regent of the Bakgatla, and Tshekedi of the Bangwato were such men. For instance Tshekedi encouraged the Bangwato to attend schools. During his rein, Tshekedi built Moeding College to provide his subjects with formal education. As succinctly mentioned in this discussion soon after the arrival of Resident Commissioner Ray in the Protectorate, the British administration drafted laws designed to bring the territory into modernized rule by placing controls of the traditional leaders authority including the establishment of the tribal Council and by reducing the powers of the traditional leaders' courts. Furthermore the Protectorate was placed on the path of economic, social and political development. See also 6.1 above.

[1237] See 6.3 above.

[1238] Tlou *History of Botswana* 184.

[1239] See 6.3.3 above.

[1240] Peters *Divining the Commons* 64.

[1241] The word *Batlhanka* is a Tswana term used to refer to people who were treated like slaves. In the Bechuanaland Protectorate the Batlhanka were always members of minority groups such as the San and the Bakalaka.

[1242] Tlou *History of Botswana* 184.

- The anti-slavery movement criticized colonial powers for not ending slavery and *Batlhanka;*
- The United Nations also put pressure on colonial government to end slavery;
- The British government wanted the *Batlhanka* to be free so that they could work in the British-owned mines in South Africa; and
- Thus, in turn, would earn money for the Protectorate through taxation.

The colonial administration had been confronted by a major effort in African resistance and British interests had shifted to seek absolute control within the Protectorate. For Bechuanaland, the evolving *de facto* administration finally was recognized and the Protectorate's status had been changed to a "Colony". This movement of change from the Protectorate to a colony triggered a desire for the independence of Botswana.[1243]

However, it must be underlined that the Protectorate was unique in the British Empire. Strictly speaking, it had never been colonized in the traditional way.[1244] But the indirect rule or interference in the affairs of Batswana signaled some elements of colonialism.[1245] Native socialists did not wish to overthrow the traditional leaders' power but to have a substantive right in the country and to enjoy its fruits. The important traditional leaders had by no means been reduced to puppets of colonialism, as they had been in neighbouring Southern Rhodesia and *Apartheid* South Africa.[1246] Despite, the British interference in the affairs of traditional authorities, the struggle for the independence of Botswana continued.[1247]

[1243] Tlou *History of Botswana* 73.
[1244] See 6.1, 6.2, 6.2.1, 6.2.2, 6.2.3, 6.2.4, 6.2.5, 6.2.6, 6.2.7, 6.2.8 and 6.3 above.
[1245] See 6.1 and 6.2 above.
[1246] Parson and Crowder *Monarch of All* 36.
[1247] Parson and Crowder *Monarch of All* 36. For example during the tenure of office of Resident Commissioner Ray, the British administration developed a tendency to interfere in the affairs of traditional leaders and their communities. For instance, Ray interfered in the affairs of the Bangwato tribe. Bechuanaland's traditional leaders had always wanted to protect their power from the colonial government even though the logic of colonial rule dictated that they should rule according to the whims and wishes of the British government. This conflict was in many respects the root of the struggle for independence. As more and more proclamations were made to curtail the powers of traditional leaders, they in turn

The British government rejected demands claiming that the Protectorate was not yet ready for independence. In heated debate on the issue, Chief Bathoen II asked the RC: "Who will say the time is now ripe and who is it that will determine that we are now capable of ruling this country." Fortunately by the 1960s the "winds of change" were blowing in Africa and it became apparent that Britain would concede to demands for national independence.[1248]

The demand for a Legislative Council (LC) was conceded and the first elections were held in 1961.[1249] At the beginning of 1965, the Protectorate was endowed with a new *Constitution*.[1250] This *Constitution* provided for an Executive Council (EC) of officials, unofficial members and a Legislative

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became very outspoken in asserting their birthright to rule their tribes and manage their affairs. After the Second World War traditional leaders demanded not only national symbols like flags but also self-government. The matter became a subject of hot debates in the chambers of the AAC. See 6.3. above.

[1248] http:// www.gov.bw/gem/History of Democracy in html; 12 March 2003.

[1249] Tlou *Traditional Leadership* 14; Haipern *Recent History* 269. The 1961 elections preceded the formation of Botswana's present day political parties. The first political party was established in 1959, but this Bechuanaland Progressive Federal Party (BPFP) proved to be short-lived. In the following year, the Bechuanaland People Party (BPP) was founded by one of the Protectorate's few University's graduates KT Motsete. First Secretary-General Motsamai Mpho of BPP had been a member of African National Congress of South Africa. A relatively rapid spread of political consciousness and certainly of functionalism was stimulated by an influx of political experienced refugees from South Africa. Within a short time, the BPP split into two factions, one of which led by Mpho, was now small Botswana Independent Party (BIP). The rival faction subsequently became the more important Botswana People's Party (BPP). Partly in reaction to the militant stance of the original BPP, Seretse Khama, after his ban was lifted by the administration, formed a more moderate Bechuanaland Democratic Party (BDP). In 1961 Khama gained a seat on the Legislative Council and was appointed to the Executive Council. Khama recruited 10 of the 12 African members of the Legislative Council to his party. Thus, at one stroke, made the BDP a strong force. Alarmed by the militancy of the rural BPP, a number of whites gave support to Khama's BDP as the lesser of the available evils and the British administration officially prepare him to assume office as the first Prime Minister. Khama became the Prime Minister in March 1965 when the BDP won the territory's first direct election, gaining 28 of the 31 seats in a new Legislative Assembly, chosen on the basis of universal adult suffrage in accordance with the provisions of a pre-independence *Constitution* which granted internal self-government. Independence was achieved on 30 September 1966, when Bechuanaland became the Republic of Botswana with Sir Seretse Khama as President. The Vice President was an eloquent master farmer and former journalist, Sir Quitte Masire (Botswana's second President). The BDP enjoyed widespread support of traditional leaders, the moderate, the wealthy and the educated. The Botswana National Front (BNF) was formed in 1967 led by Dr Koma a widely socialist intellectual. BNF was the official opposition party.

[1250] See *Bechuanaland Protectorate* (*Constitution*) *Order* 134 of 1965. Hereafter referred to as the 1965 *Constitution*.

Council (LC) consisting of colonial officials elected and nominated members and traditional leaders of the eight principal tribes.[1251]

There was however, considerable disappointment about the 1965 *Constitution.* Only ten of the thirty-four members of the LC were Batswana and another ten were elected members of the white community in Bechuanaland Protectorate. The Bechuanaland's whites, however, comprised less than 10% of the total population.

Neither the tribal nor the combined white settlers and colonial administrative opinion could have performed the appropriate psychological leap to a common electoral roll. There was practically no political organization or even public awareness, an atmosphere, which could have enabled local elections to take the form of a conventional general public polling. A multi-tribal electoral college - a new African Council - was established to elect black members of the LC, as this indirect system was readily understood by and acceptable to the vast majority of the black inhabitants of the territory. The tribal Council system contrived the best of the traditional *kgotla* system with more democratic processes and was being developed among the tribes of the territory.[1252]

Economic and administrative changes were slow to come to the country. However, the constitutional changes assumed satisfactory proportions of progress. Indeed, there was no doubt that Bechuanaland was on its way to achieve full independence. Domestically, the long-term effect of colonial administration was the reinforcement of autocratic rule and legitimacy of the hereditary principle. In transition to independence, Fawcus, the Queen's Commissioner, attempted to enjoin the traditional leaders along the path of constitutional change. Seretse Khama and the Botswana Democratic Party (BDP) intended to establish the internal validity of a system of government

[1251] Mzilethi *Modern Political Institutions* 14. For many African countries, the 1960s were the years in which they attained independence. Bechuanaland too, took an important step towards self-government in 1961. See also Chapters III and IV of the 1965 *Constitution.*

[1252] Haipern *Recent History* 269. An African Council was set up to replace the old African Advisory Council of Traditional Leaders and this body elected from among its own members the black members of Legislative Council.

that was no longer to be based on the hereditary principle and regional separation.[1253]

The fact that Seretse gained the upper hand was clearly seen in the following extract from a letter sent by four traditional leaders to the Queen's Commissioner early in the days of self-government: [1254]

> We believed and hoped that the position of Seretse Khama as Chief by tradition would enable him to understand the need for gradual transformation of our traditional customs and ways. We now realize that the confidence we placed on Seretse Khama seems to be misplaced confidence, and we would request Her Majesty's Commissioner to organize a constitutional conference, which will go through stages.

The opposition parties also felt cheated out of the possibility of independence but even those sympathetic to the aims of the traditional leaders at that time, such as Mitchison herself, felt that the latter looked like the complaints of a bunch of "reactionary so and so". It also appeared that many traditional leaders were suspicious about the ways Seretse Khama and his BDP negotiated the route to independence. The majority felt that political independence in a context of a modern state would disintegrate their traditional autonomy and sovereignty. Therefore, a question of independence negotiated by Seretse was rejected in some quarters of Tswana traditional life.[1255]

6.5 CONCLUSION

Throughout the administrative processes and phases of the British rule in Bechuanaland, the determination and enthusiasm of the Batswana, especially of their traditional leaders were accountable to a greater extent for the existence of today's independent state of Botswana. Coupled with this was

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[1253] Henderson *Seretse Khama* 224.
[1254] As quoted by Henderson *Seretse Khama* 224.
[1255] Henderson *Seretse Khama* 224.

the fact that the Batswana, through their traditional leaders had actively supported British involvement to block expansion by the TVL Boers and were campaigning for the idea some years before the British accepted it. Traditional leaders and their subjects participated in this process through the institutions such as the African Council, *kgotla*, traditional councils and regiments among others. These institutions played an important role to prevent the encroachment of the Boers into the land of the Tswana people long before protection.

What was vividly clear at the end of this era was the manner in which the traditional rule was fundamentally changed. In the 1960s, the picture of the institution of traditional leaders was totally different in form and structure from the one inherited by the British government in 1885. The traditional leaders' roles, powers and functions were greatly altered to the extent that the traditional integrity and governance of what is now Botswana hung perilously close to destruction.

British rule encouraged traditional leaders to make "progressive" innovations and this greatly changed their powers. At the end of the 19th century, Tswana traditional leaders unilaterally swept away many of the Tswana customs and practices.[1256] The traditional leaders, although modified or even transformed, in many ways had resisted attempts by the colonial administration to abolish the institution of traditional leadership and the cultural aspect of the traditional leaders also persisted.

This cultural dimension is important in understanding the politics of the 1930s, when the heroic style of rule remained an important inspiration for the traditional leaders and was taken up in a more bombastic and robust way by the British administration especially RC Ray. The traditional style of hero became overlaid, too, with that of the Victorian patriarch-paternal autocrat and

[1256] Wylie *Little God* 51. Even today some of the Bangwato men or any man from elsewhere, do not pay lobola when they marry Bangwato women. At the end of the British rule most of the traditional leaders were Christians. The fact, which accounted for the reason why many Tswana traditional leaders were Christians, was that when the Christian missionaries came into Bechuanaland, most traditional leaders rather quickly moved to ally themselves with a particular denomination.

moralists leader and, to an extent, with that of progressive entrepreneur. Traditional leaders like Chief Tshekedi and Isang combined these facets in their attempts to seek resources from the administration and to resist undue resistance from it. Throughout the British rule, the traditional leaders became a rallying point for all those activities of the administration intended to obliterate their sovereignty. They also paved a way for the democratic independence of the present Botswana.[1257]

[1257] Peters *Restatement* 46.

CHAPTER 7: POST-COLONIAL REGIME

7.1 BACKGROUND OF THE MODERN STATE OF BOTSWANA

For many African countries the year 1960 was the *annus mirabilis* in which most of them attained independence. Botswana also took an important step towards self-government in the early sixties. In 1959 a Committee of the Joint Advisory Council (JAC) presented a report recommending that this Council should be reconstituted as Legislative Council. As highlighted above[1258] the report was accepted and at the end of 1965 the Protectorate was endowed with a new *Constitution*[1259] to ensure self rule.[1260] The 1965 *Constitution* provided for a Legislative Council[1261] which consisted of thirty-one to thirty-five members, presided over by the RC, and made up of three *ex officio* members (namely the Government Secretary, the Secretary for Finance[1262] and the Legal Secretary), twenty-one elected members (10 Europeans, 10 Africans and one Asian), 7 nominated official members and up to four unofficial members nominated by the HC drawn equally from the Africans and Europeans.[1263]

[1258] See 6.4 above.

[1259] See the 1965 *Constitution of Bechuanaland Protectorate*. Chapter I of 1965 *Constitution* provided for the protection of fundamental rights and freedoms of the individual. Section 10 of the 1965 *Constitution* further provided for the Elected Members of House of Chiefs. This section also made provision for the holding of an election of the Elected Members of House of Chiefs.

[1260] Sillery *Botswana* 155.

[1261] See section 44 of Chapter IV of the 1965 *Constitution*, which provided inter alia for the establishment of the Legislature of Bechuanaland, which consisted of Her Majesty and a Legislative Assembly. Sections 46 to 50 dealt with the Speaker, Deputy Speaker of the Legislative Assembly, qualifications for membership of Legislative Assembly, disqualifications for membership of Legislative Assembly and constituencies.

[1262] Section 12 of the 1965 *Constitution* provided for the office of a Financial Secretary, whose office was a public office. The Financial Secretary was a member of the Legislative Assembly. This section also provided for the office of the Minister of Finance who was responsible to conduct the business of the government of Bechuanaland relating to financial matters and for the administration of the departments of government dealing with those matters. In this section 'financial matters' meant the financial and economic policy of the government of Bechuanaland, the appropriation of public money, taxation and the administration of public funds.

[1263] Doxey *High Commission Territory* 19.

The new *Constitution* also provided for a Judiciary[1264] with a High Court comprising of a Chief Justice and a Puisne judge was also established. The HC and RC were required to consult the EC although they were not bound by the Council's decisions. The HC acting on the advice and consent of the LC made laws. The RC, however, reserved the right to enact or enforce any bill or motion not passed by the LC if he considered it necessary in the interests of public order, public faith or good governance. The AAC was to act as an electoral college, electing local candidates to the LC and advising the RC on matters affecting the tribes of Bechuanaland.[1265]

European voters in ten constituencies (and the Asian member by voters of his own race) elected the European members. The African Council sitting as an electoral college elected the African members. There was also an Executive Council,[1266] presided over by the Resident Commissioner[1267] consisting of five other senior officials and four members nominated by the HC from the unofficial members of the Legislative Council, two Africans and two Europeans. In selecting those unofficial members, the HC had regard to the views of the unofficial members of the Legislative Council. The first elections were held in June 1961 and the first Legislative Council was inaugurated at the end of the same month.

Seretse Khama, the leader of Bechuanaland Democratic Party (later called Botswana Democratic Party (BDP)), received the largest number of votes and

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[1264] Sections 72 to 77 of Chapter V of 1965 *Constitution* provided for the establishment of High Court, appointment of Judges of High Court, tenure of office of Judges of High Court, Oaths to be taken by Judges of High Court, reference to High Court in cases involving interpretation of *Constitution*.

[1265] http://www.gov.bw/gem/Botswana History of Democracy hmtl; 20 February 2004.

[1266] Section 25 of Chapter III of 1965 *Constitution* provided for the executive authority of Bechuanaland. The executive authority of Bechuanaland vested in Her Majesty. Sections 26 to 30 of Chapter III of 1965 *Constitution* dealt with Ministers of government of Bechuanaland, tenure of office of Ministers, Cabinet, exercise of Prime Minister's functions during absence or illness and allocation of portfolios to Ministers.

[1267] Section 17 of Chapter II of 1965 *Constitution* made provision for the Commissioner and Deputy Commissioners. For more information in this regard, see section 31 of Chapter III of 1965 *Constitution*, which provided for the special responsibilities of the Commissioner. These responsibilities included *inter alia* matters pertaining to: (a) external affairs (b) defence including the armed forces (c) internal security including the organisation, use and operational control of the police.

took his place in the LC with other Africans.[1268] He was also elected to sit in the EC as one of the two African members. The BDP captured 81% of the vote and 28 seats in the LC. The only other party to win 3 seats was the Bechuanaland People's Party (later called Botswana People's Party (BPP)) led by Phillip Matante, a South African refugee who was anti-*apartheid*, anti-colonial and anti-European. His strength was in the urban center of Francistown where he gained support of the African labouring class and in one rural constituency where the BPP had the backing of the local traditional leaders. The BPP captured 14% of the total vote and the Bechuanaland Independence Party (later called Botswana Independence Party) vote amounted to 4.5% of the total.[1269]

In the eyes of the mass of Tswana people, Seretse Khama was still a traditional leader, there is a saying that "Once a Chief, always a Chief". It has been said that by voting for Khama the Batswana were endorsing him as the first Paramount Chief of the Bechuanaland. The important point here is that Khama as far as Batswana were concerned, was elected because of his traditionalism. In the eyes of the people legitimacy was still derived from traditional authority. There was further evidence that "democratic" balloting in Bechuanaland was based in large part upon traditionalism.[1270]

From the granting of self-government in 1965 events moved swiftly. The election manifesto of the BDP declared that the party favoured independence as soon as possible. The new government accordingly lost no time in asking Great Britain to declare a date for this next important step. In October 1965 the British replied that independence would be granted on 30 September 1966.[1271] Unlike in other African countries, for example, South Africa,[1272] and Zimbabwe, the independence and freedom of the state of Botswana did not evolve from an armed struggle spearheaded by military wings. The colonial government willingly gave political power to BDP, which had been a co-

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[1268] Doxey *High Commission Territory* 20.
[1269] Gunderson *Nation Building* 283.
[1270] Gunderson *Nation Building* 283.
[1271] Sillery *Botswana* 159.
[1272] See 3.1, 3.2, 3.3, 3.4 and 3.5 above.

operating partner all along. Seretse won the colonial government to his side and peacefully pushed the idea of the independence of Botswana. Batswana always say: "*Ntwa kgolo ke ya molomo, ga se ya tlhobolo*" loosely translated to mean that "war is the one of dialogue and not guns". Botswana gained its independence through negotiations.[1273]

Originally, a constitutional Committee drawn from the Legislative Council drafted a *Constitution* for independent Botswana. The next step was to present the *Constitution* to the Legislative Assembly which approved the Draft Document. However there was little opportunity for the public, outside of those actually involved in the construction of the *Constitution* to voice their opinions. There was no claim, however, that the proposal had actually received public approval but only that they were explained to the people and traditional leaders were encouraged to hold *kgotlas* to discuss the proposals with their subjects. All in all, the emphasis lies in the fact that the traditional leaders, rural masses and the general populace of Botswana were not given an opportunity to take an active part in the *Constitution* making processes.[1274]

The Draft *Constitution* was subsequently debated and approved at an independence Conference held in London on 21 February 1966. There were four Africans from Bechuanaland represented at the Conference: the Prime Minister and leader of the Legislative Assembly, Seretse Khama, headed the delegation. He also invited his deputy Prime Minister Quett Masire, Bathoen, representing the House of Chiefs and PG Matante, leader of the opposition, to attend the Conference. There were also four colonial administrative officers from the Bechuanaland Protectorate in attendance as well as 15 representatives from the United Kingdom. The Africans were outnumbered

[1273] When Botswana gained independence in 1966, Seretse Khama, the first President of Botswana confirmed the peaceful nature of Batswana when his said that : " Our role is not one of violence. We will achieve our independence without it. Our mission for Africa will be to demonstrate for our neighbour South Africa that we have a stable African government in which no man is discriminated against on racial grounds and in which the living standards of all are being raised." See in this regard Munger *Bechuanaland* 2.

[1274] Gunderson *Nation Building* 278-279.

nineteen to four by Europeans in that Conference which was to design the structure of government for independent Botswana.[1275]

A document was finally agreed upon. However, both Bathoen and Matante had reservations on various aspects of the proposed *Constitution.* The BDP representatives (Seretse and Masire) agreed to the final Draft, but Bathoen and Matante walked out of the Conference and were not present at the final meeting. Since Bathoen was invited to represent the House of Chiefs (HC) in the constitutional Conference, it turned out to imply that the traditional leaders were not represented in the final draft of the Botswana *Constitution.* Bathoen's withdrawal could be seen as his failure to carry out the mandate of the House of Chiefs. Therefore Chief Bathoen himself silenced the voice of the traditional leaders. Matante explained their withdrawal from the Conference as follows:[1276]

> There had been inadequate consultation with the people of Bechuanaland on the proposals, which had been put forward for the independence *Constitution*, and ... that the (Seretse's) government had no mandate to carry the country into independence.

After the *Constitution* had been negotiated, the British government decided to grant independence to the Bechuanaland Protectorate. The party elected to rule during the period of self-government, namely BDP party became the Botswana Democratic party (BDP) and carried the country into full self-rule. It ought to be emphasized that there were no new elections at independence in 1966. There were no alterations in the party alignment in the Legislative Assembly, which became the National Assembly (NA). The House of Chiefs remained as it was during the self-government and the Bechuanaland civil service changed its name to the Botswana civil service. President Seretse Khama (the country's first president) uttered the following words at the first independent ceremony: [1277]

[1275] Gunderson *Nation Building* 279.
[1276] Gunderson *Nation Building* 280.
[1277] Sillery *Botswana* 161.

> It would be wrong of me ... not at the outset to state again as I have done so frequently before to express the great gratitude of my people for the protection and assistance, which have been given to Botswana by the United Kingdom during the long period of our independence ... though we are very proud that we ourselves are now independent and politically free to make our own way in the world, it should not therefore be thought that past affections and regard have been immediately erased. We look forward to a continuing association of pleasant friendliness in which the ties of past may in some sense be preserved.

The structure of government designed for independent Botswana as embodied in the *Constitution of the Republic of Botswana*[1278] followed with minor exceptions the model of British parliamentary democracy. At independence Botswana became a unitary form of government with the central government at the apex of the structure. The next level of government was local government and public enterprise, which enjoyed a modicum of autonomy in operational matters. The *Constitution* of Botswana vested all executive powers with the President who was the head of the State and government. In addition, Botswana adopted both a British model of government, which stressed political accountability to parliament as the supreme legislative body and the presidential system, which provided for an executive president who exercise all executive powers.[1279]

After the new government had been installed, it transformed monarchical politics into republican politics. The hereditary rule of traditional leaders was confined to the House of Chiefs. At independence, the *kgotla* was declared an apolitical place and traditional leaders were unilaterally declared politically neutral by the government. Both were thus shielded and excluded from party

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[1278] 1966 *Constitution.*

[1279] The President and his Ministers were members of the National Assembly – the former by virtue of his position as the President of Botswana but the latter as elected representatives of their respective constituencies. Some Ministers could be specially elected members of parliament who were elected by the house at its first session after a general election.

politics and politics in general.[1280] It was however, feared that the institution of traditional leadership could be jeopardized if subjected to open attacks inherent in political debates. It was quite fair to argue that if traditional leaders were to enter parliament, some of their subjects would vote for them. Therefore traditional leaders were barred from entering the parliament in their capacities as traditional rulers. They were required by the law to renounce their traditional leadership before they could join politics. This political arrangement still prevails today.[1281]

One of the major problems and challenges facing those involved in the task of nation building in post-colonial Botswana was finding a place in the modern political setting for traditional leaders that would be acceptable to them and yet conform with the new political order. The inevitability of the controversial tension between the new political order and the institution of traditional leadership became common and obvious. These were not the only challenges which faced Botswana but factors which gripped many post-colonial African countries. Before the advent of colonialism in 1885, traditional leadership was the centre of political life for the various Tswana ethnic groups or tribes.[1282] This institution of traditional leadership underwent some changes during the colonial period.[1283] When independence was finally granted in 1966, new changes and accommodation had to be made to fit the institution of traditional leaders in the new system of government and post-colonial administration.[1284]

The BDP government's transformation process was met with heavy opposition from some of the traditional leaders. Chief Bathoen II of

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[1280] Maundeni *Struggle* 131.

[1281] In the present Botswana, traditional leaders are not allowed to participate in politics unless they renounce their traditional leadership positions. In other words they cannot become Cabinet Ministers and members of the parliament if they still hold their traditional leadership positions.

[1282] See 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7, 5.8 and 5.9 above.

[1283] See 6.1, 6.2 and 6.3, above.

[1284] Somolekae and Lekorwe *Chieftaincy system* 186–190. In some of the African countries, like Tanzania and Guinea the institutions of traditional leadership were abolished after independence mainly because they were considered unnecessary. In Guinea, for example, it was considered unnecessary to keep an institution that represented nothing at all. This had not been the case in Botswana. The institution has been retained. New legislation further limiting the powers of traditional leaders and almost reducing this institution to nothing have been introduced. See 7.3 below.

Bangwaketse tribe was the strongest traditional leader among his peers and had often clashed with the new government over the issues of changes and transformation of traditional rule. Bathoen II was completely reactionary towards change. For a time Bathoen II and his fellow traditional leaders staged away from modern politics and used their considerable power to run affairs their own way. They formed the right wing of the BDP and clashes continued with the new President, Seretse Khama, over the pace at which tribal traditions should be adjusted to modern conditions.[1285]

The BNF set about the task of building a united front among the opposition parties and other dissatisfied elements including young traditional leaders who were upset at their loss of power following the constitutional reforms. Dr Koma educated in South Africa, Britain, Czechoslovakia and Moscow returned to Botswana just before the 1965 election and brought together the Motsete wing of the BPP traditionalists led by Chief Bathoen II of the Bangwaketse, civil servants and organized labour groups to provide a nationalist opposition. This was the first opposition party to attempt to unite the relatively mobilized town-dwelling residents with the rural tribesmen by promoting socialist programs while defending the prerogative of the traditional authorities.[1286]

[1285] Munger *Bechuanaland* 25.

[1286] Osei-Hwedie 2001 *Transformation* 58. The BNF has since independence been a strong opposition party which attempted to unite all Batswana across the ethnic lines. According to Osei-Hwedie Botswana had 12 political parties which had no seats in parliament in 2001. These political parties were: The Independence Freedom Party (IFP), the Botswana People's Party (BPP), the Botswana Progressive Union (BPU), the Botswana Labour Party (BLP), the Marxist-Lennist, Engel and Stalinists Party (MLES), the United Socialist Party (USP) and the United Action Party (UAP). UAP was also known as Bosele. Other political parties such as Lesedi La Botswana (LCB) and Botswana Liberal Party (BLP) have been deregistered because of their political inactivity. The largest of all these parties was the BDP. The BNF and BCP were the most important opposition parties. Osei-Hwedie explained that although Botswana had long experience of multipartyism, in reality the country's politics had since independence been dominated by BDP. It is submitted that the political success of BDP was attributed to the fact that the BDP used the *kgotla* made up of the traditional leaders and rural masses to mobilize the support. Another reason is that the BDP is always cohesive without splinter groups and fought the elections as the united force. The BDP also utilized its ideology known as *kagisano* to articulate the aspiration of all the citizens. The BDP's slogan of *Kagisano* promotes the key values of peace, unity, harmony and sense of community.

By nominating Chief Bathoen II as its presidential candidate, the BNF hoped to win a tribal base to supplement its anticipated victories in the towns.[1287] In fact it was the BNF that avowedly stood as a spokesperson for traditional leaders. It promised the latter a house of representatives with law-making powers, which they would share with other interest groups. With these new developments, traditional leaders developed a new perspective of party politics and for the first time became interested. Traditionalists seized the opportunity offered by the party, elected Chief Bathoen II as BNF leader and for the first time a real chance existed for traditional leaders to regain their lost powers.[1288]

Unfortunately, the BNF was not a popular party. If traditional leaders threw their lot with the party, most risked staying out of power for a long time and this was not a risk they were prepared to take. They therefore grudgingly accepted it as an alternative to the House of Chiefs. What has always been confusing about BDP political practice towards traditional leaders was that its founding leader, Seretse Khama, was himself the supposedly heir apparent and Chief-elect to the Bangwato tribal throne. Seretse's BDP established a House of Chiefs where the eight traditional leaders of the Tswana speaking communities were given automatic status and became its permanent members. Other minority ethnic groups such as Bakalaka, the San, Bayeyi and Bakgalagadi, which were not represented in the House of Chiefs, viewed this constitutional arrangement as a way of institutionalising tribal supremacy. The traditional leader's authority was not only greatly reduced but was under threat too as Kgosinkwe Moesi put it: [1289]

> The choice faced by the government was whether to meet Chiefs head-on or to neutralize them quietly. So Seretse, a calm, shrewd tactician, ate the young Chief raw ...

[1287] Vengroff *Botswana* 86-67.
[1288] Maundeni *Struggle* 127.
[1289] Maundeni *Struggle* 127-128; Khunou *Land and Property Rights* 10.

Masire, Seretse's deputy and Seretse himself attached great significance to the political transformation and the building of both economic and social pillars of the state of Botswana.[1290] To them nation building and real transformation were impossible without making some inroads and changes in the institution of traditional leadership which was viewed in some quarters as conservative and anti-development. The BDP leaders were aware of the fact that changes would stir opposition among certain traditional leaders since they feared to lose their sovereignty and power.[1291]

7.2 CONSTITUTIONAL IMPERATIVES AND TRADITIONAL LEADERSHIP

The Republic of Botswana became independent on September 1966. The Botswana *Constitution* established a non-racial democracy, which maintains freedom of speech, freedom of press and freedom of association and affords all citizens equal rights.[1292] According to Crowder, Botswana is the only

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[1290] Maundeni *Struggle* 127-128. Khama, Masire and Bathoen were all key figures in the Botswana Legislature. BDP leader, Seretse Khama was a man of outstanding ability and dealt with the opposition in a very smooth and brilliant way. There was a mantle around Seretse from his famous grandfather, Chief Khama the Great and from his even more able if not hard headed, uncle Tshekedi Khama, with whom Seretse had a bitter struggle. Seretse was one of the most progressive men in independent Botswana and was popular with African teachers and businessmen. His birth, experience and sense of responsible leadership made him attractive to the traditionalists. But it would be a mistake to assume that Seretse Khama was the most active politician in the Botswana Democratic Party's government. That description fitted his highly intelligent and effective number two man, Quett Masire. It was Masire who had visited Kenya, Ethiopia, Ghana and elsewhere for political discussions with African leaders. John Banda, parliamentary Secretary for Education in Northern Rhodesia (now Zambia) described Masire as bright and a brilliant scholar.

[1291] The reason why some of the traditional leaders opposed the new BDP led government was because they lost their powers through new constitutional arrangements. See 7.1 above and 7.3 below.

[1292] http://www.gov.bw/government index:htm, 25 October 2004. Section 3 of the 1966 Constitution provides that: Whereas every person in Botswana is entitled to the Fundamental Rights and freedom of the individual, that is to say, the right to his race, place of origin, political opinion or colour, creed or sex but subject to respect for the rights and freedom of others and for the following, namely: (a) Life, liberty, security of person and the protection of law (b) Freedom of conscience, of expression and of assembly and association (c) Protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this Chapter shall have effect for the purpose of affording protection of those rights and freedoms subject to such limitations of that protection as contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by an individual does not prejudice the rights and freedoms of others or the public interest. In *Kamanakao and Others v The Attorney-General and Another* 2001 (2) BLR 654, the court held that fundamental rights and freedoms exist only as contained in the Constitution and only to the extent mentioned in that Constitution. The court in *Unity Dow v Attorney General* 1992 BLR 119,

country in Africa, which has maintained the *Constitution* inherited from its colonial masters. Crowder further maintained that this *Constitution* is not subject to threats of radical changes.[1293]

The Botswana government adhered strictly to the letter and the spirit of the *Constitution* by ensuring freedom to all its inhabitants. Crowder suggested emphatically that the character of the Republic of Botswana was shaped by the personality of Seretse Khama. Unlike other African countries, which gained independence in the sixties, Seretse Khama never abused his power to manipulate the *Constitution* to suite his personal needs and interests. It is also worth stating that Seretse never used his position to change the *Constitution* to claim his chieftainship of Bangwato, which he was forced to renounce by Britain. To do so he would have basically identified himself with one section of the country and that possibly would have been a dividing line of the nation he strove to unite.[1294]

The British government bequeathed to Botswana a written *Constitution* as the framework of institutions, powers, procedures and rights, which have become invested with an accepted authority.[1295] What the British government forgot to

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raised important questions of the commitment of Botswana to protect human rights. It touched in particular on the protection of women's rights and showed how little progress has been achieved in this area by the government of Botswana to develop the rights of women in particular and human rights in general. In the *Dow* case the High Court of Botswana dealt with a matter concerning the provision of the *Citizenship Act* of 1984 that denied citizenship to children born in Botswana of a female citizen married to a non-citizen. It was argued that such a provision violated the *Constitution*. The court ruled in favour of the applicant and nullified the provision of the *Citizenship Act* as *ultra vires* the *Constitution*. The court in the *Dow* case demonstrated its willingness to protect human rights. However, in the *Kamanakao* case the court seemed to have abdicated its role as a guardian of human rights.

[1293] Crowder *Botswana and the Survival* 461.

[1294] Crowder *Botswana and the Survival* 461.

[1295] In *Attorney-General v Dow* 1992 BLR 119, the court stated that the *Constitution* of Botswana is the legislation or compact, which establishes the state itself. "It paints in broad strokes on a large canvass the institutions of that state, allocating powers, defining relations between such institutions and between the institutions and the people within the jurisdictions of the state and between the people themselves." The court further stated that the *Constitution* provides for the protection of the rights and freedoms of the people, which rights and freedoms have thus to be respected in all future state actions. No person can claim to be above the *Constitution of Botswana*. See also *Attorney-General v Moagi* 1982 (2) BLR 124, where the court held that the *Constitution* such as *Constitution of Botswana*, embodying fundamental rights should as far as its language permits be given a broad construction. Constitutional rights and freedoms conferred without express limitation should

do for Botswana was to make the *Constitution* "the supreme law of the land".[1296] It is traditionally accepted that Botswana inherited a Westminster model of government. The so-called Westminster model presupposes the existence of certain features, such as the partial fusion of the organs of government and the responsibility of the executive to the legislature. What is also commonly overlooked is the bicameral nature of the legislature.[1297]

Throughout the history of the system in Britain, no written *Constitution* has ever been adopted. The imported model was just a modified version of the system. It is therefore not totally correct to refer to Botswana system as Westminster model.[1298] It is therefore true that some of its features are rooted in that system, while others are imported from other systems. The Westminister model is not based on a written *Constitution*. The *Constitution of Botswana* provides the institution of traditional leadership with a judicial, ceremonial and developmental role. The *Constitution* further provides for the establishment of a House of Chiefs[1299] that is an advisory body to the National Assembly and the Executive.

The establishment of the House of Chiefs is not the first attempt to get the various Botswana traditional leaders to advice a government. As it has already been indicated above,[1300] during the colonial period in 1920, the ADC was formed, providing a forum at which traditional leaders could advice the colonial government. The traditional leaders, however, were unhappy about that colonial arrangement because the HC in Mafikeng still had overriding authority over them. This kind of unhappiness continued into the post-colonial Botswana era because advice from the House of Chiefs is not binding on

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not be cut down by reading implicit restrictions into them so as to bring them into line with the common law.

[1296] Otlhogile *Constitutional Development* 153.

[1297] Otlhogile *Constitutional Development* 153. The 1966 independence *Constitution* which is of the Westminster type, contains a justiciably and entrenched Bill of Rights in the liberal mould. See in this regard Sanders Bill of Rights Issue 20. Since independence Botswana developed a reputation for political stability. Of all the countries of Southern Africa, Botswana is by far the most democratic and peaceful.

[1298] Otlhogile *Constitutional Development* 153.

[1299] See in this regard sections 77, 78 and 79 of 1966 *Constitution of Botswana*. See also section 12(2) of *Constitution (Amendment) Act* of 2005.

[1300] See 6.1, 6.2, 6.3 and 6.4 above.

government. Some of the traditional leaders never hid their displeasure about the formation and role of such a House. They preferred a house with law-making authority, which Proctor succinctly calls a "house of lords" solution.[1301]

Politicians, however, were opposed to the formation of such a " House of Lords" because they feared that: [1302]

> A chiefly chamber in a bicameral legislature of chieftainship would seriously impede the modernization, which was seriously needed ... and that Chiefs were too conservative, too interested in preserving their autocratic position and too committed to the interests of their tribes than those of the nation.

The *Constitution* of Botswana provides for the establishment of the House of Chiefs in Botswana.[1303] The *Constitution* (before 2005 amendment) further outlined the composition of House of Chiefs as follows:[1304]

- Eight *Ex officio* Members
- Four Elected Members; and
- Three Specially Elected Members.

The *Constitution* of Botswana (prior to the amendment of 2005) stated that the *ex officio* members of the House of Chiefs shall be persons performing the functions of the office of Chief in respect of the Bakgatla, Bakwena, Bamalete,

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[1301] Somolekae and Lekorwe *Chieftaincy System* 194

[1302] Somolekae and Lekorwe *Chieftaincy System*194.

[1303] Section 77(1) of 1966 *Constitution of Botswana*. Section 83 of the 1966 *Constitution*, which deals with the rules of procedures of House of Chiefs. The House of Chiefs may subject to the approval of the President make rules regarding its own procedure for all or any of the following matters: (a) The appointment or election and tenure of office of a Chairperson of the House. (b) The time and place at which the House shall meet. (c) The manner in which the views of the House shall be recorded and if necessary expressed to the Minister, the National Assembly or to any other person or body. (d) The regulation and orderly conduct of the proceedings of the House. (e) The manner in which the Elected Members and Specially Elected Members of the House shall be elected. See also *Rules and Procedures of the House of Chiefs Act* 27 of 1965 which deals with matters pertaining to meetings and sittings of the House, business of the House, process of debate, rules of debate, rules of procedure of the House of Chiefs, decisions and Bills. Furthermore the *House of Chiefs* (*Salaries and Allowances*) *Act* 5 of 1987 makes provision for the salary of a Chairperson of the House of Chiefs, salary of members of the House, allowances of a Chairperson and members allowances exempt from income tax, subsistence allowance, transport allowance, duty allowance and termination allowance.

[1304] Section 77(2) of 1966 *Constitution of Botswana*.

Bamangwato, Bangwaketsi, Barolong, Batawana and Batlokwa tribes.[1305] This kind of constitutional setup excluded other tribes such as Bakalaka, Bakgalagadi and Basarwa from the House of Chiefs. The traditional leaders of those members were unhappy about their exclusion from the House and made calls and demands for their participation in the House of Chiefs and the amendment of sections 77, 78 and 79 of the *Constitution.*[1306]

The composition of the House of Chiefs was affected by the amendment of section 77, 78 and 79 of the *Constitution of Botswana*, which was passed by Parliament. In 2005, the parliament of Botswana amended the *Constitution* with regard to the establishment and representation of traditional leaders of all tribes in the House of Chiefs in Botswana. In terms of the amendment, a new House of traditional leaders called *Ntlo ya Dikgosi* was established. This new constitutional arrangement also replaced the word 'Chief' with *'kgosi'*.[1307] This

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[1305] Section 78 of 1966 *Constitution of Botswana.* The *Constitution of Botswana* recognizes only these tribal Communities.

[1306] See the 1966 *Constitution of Botswana*. One of the key demands of the traditional leaders was the amendment of sections of the *Constitution* to cater for the participation of the minority tribes in the House of Chiefs. See *Kamanakao and Others v The Attorney-General and Another* 2001 (2) BLR 654. The issue in this case was whether the failure of *Constitution* and *Chieftainship Act* (Cap: 41:01) of 1968 to acknowledge the Wayeyi tribe and to allow them to have their members sit as members of the House of Chiefs discriminated unfairly against such tribe. The appellants on behalf of the Wayeyi tribe argued that sections 77 to 79 of the *Constitution* were inconsistent with the fundamental rights provisions of sections 3 and 15 of the *Constitution* and hence they were null and void. It was further argued that sections 77 to 79 of the *Constitution* did not treat the Wayeyi tribe and appellants as equal with the eight tribes who have Chiefs that have automatic membership of the House of Chiefs as *ex officio* members. It was further argued that the effect made by these sections (77 to 79) is unduly discriminatory and the court must so pronounce. The court stated that there is no doubt that under the wide definition of the expression 'discriminatory' the treatment given to the Wayeyi and other tribes by omitting their tribes from having an *ex officio* members in the House of Chiefs amounted to unfairness and discrimination, which is not justified and is intolerable. The court acknowledged that the Wayeyi tribe are subjected to disability, which the eight tribes do not suffer. However, the court concluded that distinctions or differentiation were sanctioned by the *Constitution* itself and anything that is authorised by the *Constitution* cannot be subsequently declared to be illegal.

[1307] Ethnic groups who were not mentioned in the *Constitution of Botswana* had a strong case to contend that the *Constitution* discriminate against them. The *Botswana Constitution* seemed to be at a crossroad. However President Festus Mogae announced government's intention and commitment to amend the sections which discriminated against other tribes. He made this encouraging announcement on 31 September 2003, at the 37th Independence Day of Botswana. The move to recognize the existence of other tribes besides the eight tribes in the House of Chiefs is a constitutional requirement necessary for nation building, tolerance and harmonious relationship between tribes. See in this regard section 2 of the *Constitiution* (*Amendment*) *Act* 9 of 2005. The *Constitution* (*Amendment*) *Act* substituted the words 'House of Chiefs' with the words *'Ntlo ya Dikgosi'*. The word 'he' was replaced with the words 'he' or 'she'. This constitutional amendment promotes gender

amendment was intended to make the *Constitution* tribally neutral and to be more representative and democratic.[1308]

The *Constitution of Botswana* also provides that Elected Members of the *Ntlo ya Dikgosi* shall be elected from among their own number by the persons for the time being performing the functions of the office of sub-Chief in the Chobe, North-East, Ghanzi and Kgalagadi districts.[1309] The Specially Elected Members of the House of Chiefs are elected by *ex officio* and Elected Members of the House of Chiefs (now *Ntlo ya Dikgosi*) in accordance with the provisions of the *Constitution*.[1310]

Four Elected Members are elected every five years or when a vacancy occurs. Rules provide that at any time when a vacancy exists among the Specially Elected Members an election shall be held as soon as practicable to fill the vacancy in accordance with the provision of these rules. Unlike the *ex officio* members and elected members, the specially elected members should have English as a requirement.[1311]

Every officer of the *Ntlo ya Dikgosi* has in the exercise of the power conferred and duties imposed on him all powers and enjoy all the privileges of a

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justice. It also creates an arrangement, which prohibits tribal discrimination with regard to the representation of traditional leaders in the *Ntlo ya Dikgosi*. See also section 77(1) of the *Constitution (Amendment) Act* 9 of 2005. *Ntlo ya Dikgosi* consists of not less than thirty-three or more than thirty-five members. These members are persons who perfomed functions of the office of the kgosi in respect of the following areas: (i) Barolong Farms in the Southern District (ii) Chobe in the North West District (iii) Ga-Malete in the South East District (iv) Ga-Mmangwato in the Central District (v) Ghanzi District (vi) Goo-Tawana in the North West District (vii) Kgalagadi District (viii) Kgatleng District (ix) Kweneng District (x) Ngwaketse in the Southern District (xi) North East District and (xii) Tlokweng in the South East District. In addition to these members in the *Ntlo ya Dikgosi* there are also five persons who are appointed by the President. It is also important note that the word "*kgosi*", which has replaced "Chief" in the constitional amendment has always been used by the Tswana to refer to a traditional leader. This has been the case long before the *Constitution* could be amended.

[1308] The fact that the *Constitution of Botswana* prior to amendment recognized eight tribes and not others had divided the country along the ethnical lines. This had in many instances caused hostility and disunity among the Tswana people. Members of those eight tribes regarded themselves as the first citizens while members of the minority groups were regarded as the secondary citizens.

[1309] Section 78 of 1966 *Constitution of Botswana*. See also section 12(2) of *Constitution (Amendment) Act* 19 of 2005.

[1310] Section 79 of 1966 *Constitution of Botswana*.

[1311] See sections 77, 78 and 79 of 1966 *Constitution*.

member of the Botswana Police Force[1312] under the provisions of the Criminal law.[1313] An officer of the *Ntlo ya Dikgosi* may arrest without warrant any person who commits an offence and any person within the precinct of the House whom he or she reasonably suspects of having committed or being about to commit an offence.[1314]

Other qualifications for membership are:[1315]

- Members of the *Ntlo ya Dikgosi* must not be politicians;
- Must not have been involved in active politics in the past;
- Must not be civil servants;
- Must be Batswana; and
- Age 21 or above.

The *Ntlo ya Dikgosi* in Botswana does not have legislative powers. As elaborated before, it was created purely to advice Parliament on customary matters and on the interests of the traditional leaders' respective tribes. Since its inception, the *Ntlo ya Dikgosi* suggested amendments to some Bills. Some of its advice has been accepted and some of it has been rejected. However, the following specific Bills cannot be passed by Parliament without consulting the *Ntlo ya Dikgosi*:[1316]

- Any bill that would alter any provision of the *Constitution*;

[1312] For more information regarding the statutory powers of the Police Force in Botswana, see the *Police Act* (Cap:21:01) of 1979. Section 6 of the *Police Act* of Botswana makes provision for duties, functions and administration of the Police Force which include powers to protect life and property, prevent and detect crime, repress internal disturbances, maintain security and public tranquillity, apprehend offenders, bring offenders to justice and generally maintain peace. Traditional leaders are directed to discharge the duties of the Police Force in Botswana. This statutory dispensation makes traditional leaders police officers.

[1313] For more information regarding the statutory regime of criminal law in Botswana, see the *Penal Code* (Cap: 08:01) of 1964.

[1314] *House of Chiefs* (*Election of Elected Members*) *Regulations* under section 83(e) of the *Constitution of the Republic of Botswana*.

[1315] See section 79 of 1966 *Constitution*. See also section 13 of *Constitution* (*Amendment*) *Act* 19 of 2005.

[1316] Mijiga *Role of Traditional Leaders* 13. See also section 85 of the 1966 *Constitution of Botswana* which *inter alia* states that the House of Chiefs is entitled to discuss any matter within the Executive and Legislative authority of Botswana of which it considers it as desirable to take cognisance in the interests of tribes it represents.

- Any bill that would affect the designation, recognition or removal of powers of Chiefs, sub-chiefs or Headmen;
- Any bill that would affect the organization, power or administration of customary laws; and
- Any bill that would affect tribal organization or tribal property.

The National Assembly is required to refer the above Bills to the *Ntlo ya Dikgosi* 30 days before the National Assembly can pass them. The House has also concentrated on asking the Minister of Local Government (the Minister responsible for the affairs of the traditional leaders) questions and thus seeking clarification on several issues of importance to it. The *Ntlo ya Dikgosi* has been hampered in its operations by the lack of expertise of its members:[1317]

> Almost all the amendments were suggested by Chief Bathoen and the debate was generally little more than a dialogue between him and the Minister ... the only others who contributed significantly to the discussion were Chiefs Linchwe ... and Leapetswe Khama. Some members made occasional comments, which were often confused, ill informed, and irrelevant and a few never said a word.

Despite the inactivity of some of the members, the House still continues to suggest amendments to bills and requests clarification from Ministers on several issues. The complaints that the House had no law-making powers were partly the reason for Bathoen II's resignation from chieftainship to join politics. Members of the House complained that they had not been consulted before the *National Security Act* of 1986[1318] was passed. It is an indication

[1317] As quoted by Somolekae and Lerokwe *Chieftaincy System* 195.

[1318] The *National Security Act* (Cap: 23: 01) of 1986 makes provision for national security and other activities prejudicial to the interests of the nation. Sections 3 to 8 of the Act (Cap: 23: 01) of 1986, deals *inter alia* with wrongful communication of certain information, protection of classified information, unauthorised use of uniforms, passes, interfering with persons on guard at prohibited places, harbouring fugitives.

that government sometimes did not take the House seriously where matters of policy were concerned.[1319]

At both national and local government levels, traditional leaders, particularly those in the *Ntlo ya Dikgosi*, District Councils and Land Boards have assumed the role of public servants. Clearly, they owe their allegiance to their employer who is of course the government of Botswana. Their formal impact is limited to the virtually powerless *Ntlo ya Dikgosi*. But as a potential competitor in the political arena, the traditional leaders pose a considerable challenge to the central government.[1320] The post-colonial government in Botswana also subjected the traditional leaders to almost severe, if not more severe, controls than the colonial administration.[1321]

The 1966 independence of Botswana resulted in a situation in which the traditional leaders were viewed as being directly responsible to government. However, this situation is not peculiar to Botswana as illustrated by Mzilethi:[1322]

> The fact that (the post colonial) African governments have tended to use traditional leaders ... as agents of central government has reduced their power base and most important of all, began to alienate them from their people. African governments have treated loyal traditional leaders with consideration ... Disloyal and unco-operative traditional leaders have suffered fates of marginalization and oppression.

[1319] One of the reasons why the government did not allow traditional leaders to marshal their inputs on the *National Security Act* (Cap: 23: 01) of 1986 may be attributed to the fact that the Act deals with secret state matters and information.

[1320] Despite the weak political position of traditional leaders in these structures, some of the traditional leaders have a considerable support in rural areas. Traditional leaders in District Councils, Village Development Committees and Land Boards are always out numbered by the government officials and politically elected councillors. Often these officials and politicians dominated traditional leaders.

[1321] Mzilethi *Modern Political Institutions* 31. However, after independence the trend of the development of a traditional leader vis-á-vis central government relations became clearer. The initial period of the Protectorate, the British government felt constrained, legally and morally to support the authority of the traditional leaders as long as the minimal level of order was maintained, non-interference in tribal matters and acceptance of indirect rule were cornerstones of its policy. This relationship was modified as tax collection duties and the performance of certain local administrative functions expanded. See 6.2 and 6.3 above.

[1322] As quoted by Mzilethi *Modern Political Institutions* 31.

It would seem therefore that whilst the Botswana government sees the system of traditional leadership as a potential hindrance to progress towards democracy and socio-economic development, they also see its value in binding the society together for a common purpose. Provided, therefore, that the traditional leaders carry out the programme of the government, government, like the British before them, are content to see the institution remains and even prosper. However, the retention and prosperity of the institution of the traditional leaders are to be directed and trimmed in accordance with the dictates and directives of the government.[1323]

Traditional leadership remains significant to a great many Batswana, especially in rural areas. The government is quite aware of this fact, hence it allocated them roles and functions in the *Ntlo ya Dikgosi* and other government institutions. Indeed, part of the BDP's success in the past elections such as the 1990, 1994, 1999 and 2004 elections and the prevailing political stability is the result of the government's attempts at giving traditional leaders a semblance of power. Although the *Ntlo ya Dikgosi* is not a central institution especially in terms of law-making, there is surely an impression on the part of many that the institution still exists and that it has a contribution to make in the running of national affairs.[1324]

7.3 LOCAL-CENTRAL GOVERNMENT STRUCTURE

7.3.1 BACKGROUND

There are two levels where governance takes place, namely the national and district levels. In terms of the *Local Government (District Councils) Act,*[1325] there are four institutions at district level, three local authorities and a Department of District Administration. The local authorities comprised of the

[1323] In view of the above, it appears that the central government of Botswana dictates the agenda of the politics of the traditional leaders. Therefore traditional leaders have no choice but to follow ways paved by the government.

[1324] Somolekae and Lekorwe *Chieftaincy System* 196. These past elections also included the 1965, 1970, 1975 and 1980 elections. In 1965 Seretse Khama won the majority of the election simply because of his character and position as a traditional leader.

[1325] Act 35 of 1965.

Tribal Administration, District Council and the Tribal Land Board. Of the four levels of local institutions, tribal administration is the oldest. During the colonial days the tribal administration worked closely with district administrators.[1326] Before Botswana attained its independent rule in 1966, Tribal Administration was responsible for primary health care, provision of primary education, settlement of disputes, water supply and road maintenance.[1327] Government departments are currently co-ordinating these functions (for instance Department of Local Government, Lands and Housing and the Office of the President and so on) in collaboration with the tribal administration.[1328]

As already stated above,[1329] the colonial government created Tribal Councils (TC) and traditional leaders were given the role of presiding over such Councils. The introduction of democratic governance altered the powers and functions of traditional leaders to accommodate specialized central government structures such as ministries and departments. The tribal administration consists of a hierarchy of traditional leaders, regents, deputy Chiefs, Chief's representatives, senior and subordinate Chiefs and headmen. The tribal administration covers customary officials, tribal police and any other general administration personnel who assist the traditional leaders in carrying out their duties. As it will be discussed below,[1330] the main functions of the traditional leaders are to administer justice through Customary Courts, carry out ceremonial duties and settle disputes. Traditional leaders lost the bulk of their customary powers with the passing of the *Local Government (District Councils) Act* and the *Tribal Land Act.*[1331]

[1326] See 6.2 above.
[1327] See 6.2 above.
[1328] Mjiga *Role of Traditional Leaders* 12.
[1329] See 6.2 above.
[1330] See 7.3.10 below.
[1331] Act 54 of 1968. Lekorwe *Local Government* 175.

7.3.2 POST-COLONIAL DISTRICT COUNCILS

The District Councils were established under the *Local Government (District Council) Act* of 1965, in order to take over the powers and functions of the tribal administration.[1332] These District Councils evolved from the tribal administration of the colonial period. All traditional leaders were to be *ex officio* members of the District Councils, but all other members were to be elected on the basis of political party sponsorship or nominated with the final approval of the Minister of Local Government, Lands and Housing.[1333] Before independence, many of the activities, which were performed by District Councils, were the responsibility of the tribal administration. The post-colonial District and Town Councils were democratically elected bodies and structured as follows: [1334]

> Democratically elected [bodies] with important local government functions and a vested interest in local government, able to contribute towards the general progress of the country by [their] ability to mobilize self-help in its various forms and to administer local projects of economic and social betterment.

Since independence, councillors were elected on the principles of universal adult franchise. Their elections are held simultaneously with general elections. The Councils have statutory responsibilities. They are responsible for provision and operation of primary health care and primary education, for non-gazette roads, village water supply and for community development and social welfare. This 1966 system of local government, controlled by the representatives of the people elected at a general election was seen as a positive development. In some cases, traditional leaders continued to play a significant role as chairpersons of District Councils until this role of

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[1332] The Minister of Local Government, Lands and Housing was given the right to establish District Councils in the tribal and urban areas (that is, Central, Ngwaketse, Kweneng, North East, Kgatleng, Northwest, South East, Kgalagadi, Ghanzi and Town Councils in Lobatse and Francistown). Sections 29, 30, 31 and 32 of *Local Government (District Councils) Act* 54 of 1968, *inter alia* deal with the powers and functions of District Councils. The Council is required to secure and promote the health, order and good government of the area for which it has been established. See also 6 above.

[1333] Gunderson *Nation Building* 287

[1334] Vengroff *Botswana* 169.

chairpersonship was eventually in some Councils given to the popular elected leaders.

Elected or government appointed councillors operate in accordance with regulations and by a system of majority decision that almost entirely eliminates the personal autocratic character of the traditional leaders. An active traditional leader may, for an example, as chairperson of the District Council, still exercise powers he formally enjoyed as traditional leader but he or she must carry the majority of elected members with him and if he is unable to do so or is merely inactive, the Council will carry on business without him and eventually ensure that he is removed from office.[1335] In other words, the traditional leaders in the District Councils are expected to operate in line with the guiding principles of the statutes and elected councillors.[1336]

The new representative form of district or local government reduces the powers of the traditional leaders in Botswana. The relationship of the traditional leaders and elected councillors is characterized by conflicts. Within each ward, rivalry between councillors and traditional authorities takes a variety of forms. These relationships range from alliance to open hostility. The main aim of councillors appeared to have been designed to obtain a position of dominance in the local hierarchy. The superior resources available to councillors because of their near monopoly over information flow to the central government enabled them to obtain a partial victory. This has brought about a situation in which the prime goal of the councillors is the institutionalisation of the Council.[1337]

In the light of local development, changes imposed by the central government are that the District Council with the majority of its members elected took over

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[1335] Gillet *Survival of Chieftainship* 181-182.

[1336] As a result of this political arrangement there is always conflict between the traditional leaders and political elites to a point in time where the former feel that its existence is threatened. District administration would like to view traditional leaders as agents of the central government. This should not be the case because traditional leaders are not dependent upon the government for their positions in the same way that civil servants are. Seen in this regard Picard *Bureaucrats* 185.

[1337] Vengroff *Botswana* 170.

local decision-making from the traditional leaders and *kgotlas*. It is an appointed official, the Council Secretary (CS), who is the Chief executive officer of the District Council. The Council Secretary replaces the traditional leader as the head executive and the District Council replaces the *kgotla* as the prime decision-making bodies on local government level. Traditional leaders became a symbolic element in the new local government Councils and committees. Ultimately the whole mechanism for local decision-making is controlled by the Ministry of Local Government, Lands and Housing. The centralized Legislative Assembly creates "democratic" local organs to rule, which in turn, are controlled by the centralised government. These institutions modelled on alien cultures seek to control and modify indigenous forms of authority.[1338]

Some traditional leaders have negative attitude towards the District Councils. The reason seems to be that the vast majority of people in rural areas, more especially the old generation, still pledge their support to traditional leaders rather than to the councillors. This is another way of saying that, at the base of the political system in Botswana, legitimacy tends to adhere to traditional rather than to modern local government institutions. However, the reality of the matter is that all the public institutions, the traditional authorities and District Councils at the local level play an important role. They contribute a delicately balance system of power distribution. This fragility (delegacy) of the system demands that any change will have to be carefully analysed before carried into effect. For example, further disintegration of the traditional administration would probably challenge the local government contact with the grass roots and the historical and cultural heritage of the society. For government to undermine the efforts of traditional leadership outright, it would involve too great a political risk, given the strong attachment of the people to this institution.[1339]

The analysis of the economic development of Botswana calls for the participation and meaningful contribution of both the traditional leaders and

[1338] Gunderson *Nation Building* 292
[1339] Tordoff *Local Administration* 179-1980.

the elected councillors. In addition, much needed human resources and capital are also of great significance for the entire economic progress of rural Botswana. In order to achieve this goal, the central government made statutory provisions to improve and sustain the revenue of District Councils. This revenue is intended to assist District Councils in their endeavours to carry out developmental projects. In terms of the law, the revenue of the District Council consists of:[1340]

- Such tax as the Council is authorized by law to collect from the inhabitants of the area in respect of which the Council has been established;
- Such rates as the Council is authorized by law to improve;
- Rents from property owned or administered by the Council;
- All moneys derived from licenses or permits issued by the Council and all taxes, dues, and fees imposed under lawful authority by the Council;
- Interest on investments;
- Such royalties as may by law be payable to or receivable by the Council;
- Donations, contributions and endowments;
- Such grants as the government may make to the Council; and
- Any other moneys, which may by law be paid to or received by the Council.

As it has already been highlighted earlier,[1341] traditional leaders were tax collectors under the British administration. Part of the tax base was utilized to fund developmental projects in traditional authority areas. The new dispensation of local government and the District Council usurped the functions of the traditional leaders as tax collectors in their rural areas. This statutory move marked a reduction of the powers of traditional leaders in the

[1340] Section 40 of the *Local Government (District Council) Act* of 1965.
[1341] See 6.2.7 above.

sphere of local governance.[1342] In view of the above, it becomes immediately evident that since independence the government extended democracy and participation to local government. There was need for traditional leaders to change and adapt to changing circumstances in order to play a meaningful role in local government.[1343]

7.3.3 DISTRICT DEVELOPMENT COMMITTEES

Although the tribal administration and connected institutions formally play a role in local government, they have great informal influence. The traditional leaders are informally represented in District Development Committees (DDC). The traditional *kgotla* is an institution that is well understood and respected by the majority of the people and is maintained through the traditional leader or headman. A higher percentage of people have contact with the *kgotla* than with any other institution in the district.[1344]

However in terms of the *Local Government (District Councils) Act*, the DDC has usurped many functions and responsibilities of the *kgotla*. The DDC through the District Development Officer (DDO) plays a very important and critical role in the development of the district. The DDOs are the planning officers for the districts because they plan and co-ordinate the work of different structures and institutions of central and local governments. Their primary functions centre around the preparation and supervision of district development plans. They also monitor the implementation of these plans.[1345]

[1342] Nengwekhulu *Local Government Policy* 21. Nongwenkhulu quoted Chief Lentswe stating that: "The institution of chieftaincy, which is intertwined with that of kgotla, has undergone major changes since Botswana's independence in the 1960s. From tense and sometimes antagonistic relationships with newly established, local institutions of District Council, Land Board and District administration, the chieftaincy has been articulated into a blend of mutually respecting and coordinated systems with modern institutions of local government. Current developments, however, show that as District Council grows stronger, Tribal Administration tend to decline in influence".

[1343] Nengwekhulu *Local Government Policy* 21.

[1344] Karlsson *et al Shifting the Balance* 16; Odell *Local Government* 70–83. Botswana is largely a rural society where the majority live in rural areas. In these rural areas traditional institutions are the only institutions, which are better known and understood by the people. Therefore the *kgotla* remains an important development agency in these rural settlements.

[1345] Nengwekhulu *Local Government Policy* 18.

Before the establishment of the DDCs matters of development of the villages and districts were the main functions of traditional leaders. The DDOs took over the functions originally performed by traditional leaders. Since the DDOs are the agents of the central government in the management of local government projects, the obvious consequence is that projects are managed from central to local government. As a result the people on the ground are not adequately consulted. What the DDOs usually do, are to tell people what to do and not to do and not what people want. Since the DDOs are employees of government, bureaucratisation is the main cause of delayed project implementation and failure to meet development targets.[1346] Traditional leaders are however not satisfied with this bureaucratic control.

7.3.4 VILLAGE DEVELOPMENT COMMITTEES

Another important forum, which is the only grass roots organization, is the Village Development Committee (VDC). This committee provides an opportunity for direct expression and satisfaction of local demands. There are four basic types of leadership associated with Village Development Committees (VDCs) in Botswana. First are those large villages or wards in which both an established tribal authority (traditional leader or headman) and elected councillors are residents and participate in the VDC. A second group of villages has a resident councillor but not a tribal authority. In the third type, there is a resident tribal authority but not a councillor. The fourth type, usually the smallest and least accessible villages have neither a resident councillor nor a tribal authority. These villages are expected to make do with whatever community leadership emerges.[1347]

The VDC is seen as the primary institution geared towards the promotion and co-ordination of development at the village level. This Committee is a development sub-Committee of the *kgotla* and could be seen as a co-ordinating body in other village level communities. There are approximately 500 Village Development Committees in Botswana. Some are more active

[1346] Nengwekhulu *Local Government Policy* 21.
[1347] Vengroff *Botswana* 151-171

and effective than others, depending on the resources available. Through these committees, the villages have contributed to social infrastructure and improved the standard of services available. The government recognizes the committees as basic instruments of popular participation in national development. The VDCs operate in close co-operation with the traditional leaders and their *kgotlas*. Due to the high status of *kgotla*, such co-operation facilitates the consultation process.

The main objectives of the VDC can be summarised up as follows: [1348]

- To initiate plan and implement village development projects;
- To raise funds for the general development and benefit of the people;
- To channel the views of the people to the District Development Committee which is the main co-ordinating body for district Development; and
- To consult and co-operate with the traditional authorities on matters concerning village development projects.

If leadership is an important factor in determining the success of local development efforts, then it is expected that there would be significant differences in the success of VDCs with different types of leaders. This is specially the case since government policy in Botswana is intended to replace traditional elites with more "reliable" political cadres.[1349] It can be mentioned that the VDC's led by elected modern authorities are likely to be more successful in promoting local developmental efforts than those led by traditional authorities or others. This is solely so because some of the traditional leaders appear to be anti-modernists. With regard to local development, the post-colonial government of Botswana was convinced that some of the traditional leaders impeded projects by not allowing the flow of

[1348] Karlsson *et al Shifting the Balance* 16.

[1349] The government of Botswana labours under the impression that the replacement of traditional leaders with politically elected representatives and officials will hasten and ameliorate service delivery.

constructive criticisms and difference in the meetings of VDC and other local institutions.[1350]

In some cases the institution of the traditional leaders impedes progress by not allowing the flow of constructive criticism and differences in the meetings of the Councils. This attitude, which is inherent in the institution of traditional leaders, derailed both social and economic development in many parts of Botswana where there are traditional leaders. Political elites blamed traditional authorities for derailing both social and economic development at local level. Nengwekhulu stated that during the independence negotiation the then president Masire contented with the roles of traditional leaders at local level that:[1351]

> The role of Chiefs was almost nothing. If anything, it was inclined to be on the negative side. They were ambivalent. In the first place they envisaged that when we became independent we would only be reverting to the old times when each one would be boss in his area. Now we as politicians felt of course, greatly opposed to this relegation of what had become a nation into tribal groups ... they became obviously opposed to political parties.

Such analysis and remarks with regard to the roles of traditional leaders by Masire delivered a strong message that the authority and sovereignty of traditional leaders in their tribal areas would significantly be diminished in the post-colonial Botswana.

7.3.5 LOCAL-CENTRAL GOVERNMENT FIGURE

Various institutions were created by legislation in order to curtail the position of traditional leaders. Mfudisi illustrates the local-central government structure as follows:[1352]

[1350] Karlsson *et al Shifting the Balance* 16. In some meetings petty squabbles between traditional leaders and councillors led to heated debates and exchange of blows.
[1351] As quoted by Nengwekhulu *Local Government Policy* 6.
[1352] Mfundisi *Formation and Structure* 169.

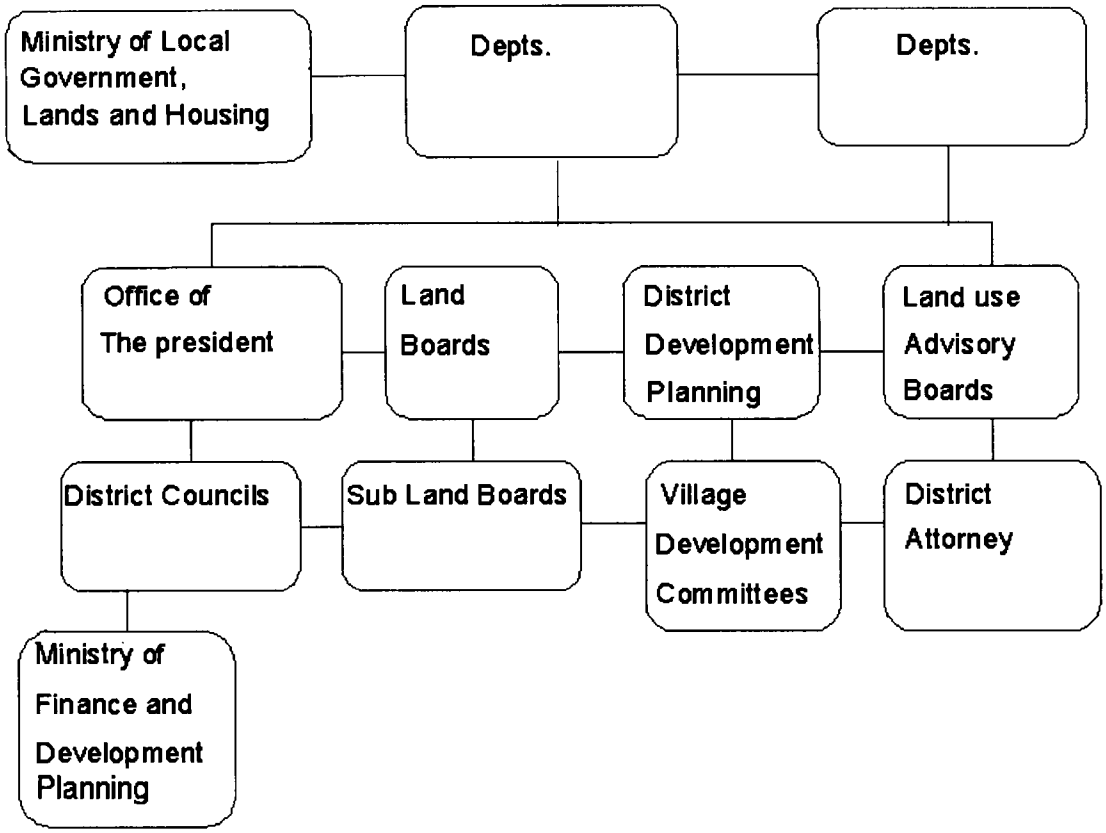


Figure 1. LOCAL-CENTRAL GOVERNMENT STRUCTURE

7.3.6 *MATIMELA ACT* OF 1968

Another onslaught by the central government to neutralize traditional institutions and to control local decision-making processes is evident in the sphere of the control of *Matimela*.[1353] Here once again the traditional authorities lost much of their former powers as they no longer control *Matimela*,[1354] a prime financial resource. In 1968 the *Matimela Act*[1355] abridged a traditional prerogative of control of *Matimela* by handing over the jurisdiction of such animals to the District Councils.[1356]

[1353] The word *Matimela* is used in Tswana to refer to domestic animals such donkeys, cattle, sheep, goats etc which have gone astray.

[1354] During the pre-colonial and colonial eras, when these animals were not claimed they became property of the tribe concerned. But in many cases (if not all) they were taken by a traditional leader who looked after them on behalf of the tribe. In some tribes such as Bakgatla-ba-Kgafela in Mochudi village (Kgatleng District) such animals were slaughtered at the kgotla and fed to members of the tribe. Under the new local government dispensation, *Matimela* are sold and the proceeds thereof go to the District Council concerned.

[1355] *Matimela Act* (Cap : 36: 06) of 1968

[1356] Section 5(1) of *Matimela Act* (Cap: 36:06) 1968.

The *Matimela Act* provides that a Council may at any time and shall at least twice every year, make arrangements for the collection of *Matimela*[1357] and may, for that purpose, employ persons whose remuneration is paid out of moneys available in the *Matimela* fund as general revenue of the Council.[1358] The *Matimela Act* further continues to state that any Chief or sub-Chief or headman who receives a report about *Matimela* shall pass on such report to the *Matimela* Master or Assistant *Matimela* Master within 30 days of receiving such *Matimela.*[1359]

The passage of *Matimela Act* had serious implications for the traditional leaders' key sources of wealth. They were no longer empowered to do matters of taxation, and as a result they have forfeited the 10% commission they used to get when they were still assisting the British colonial administration. It must be stressed that cattle have always been a major source of wealth and prestige in traditional Tswana society. This is still the case in the present Botswana even though there are other sources of wealth such as shops, bars and restaurants. As a result of changes in the roles and powers of traditional leaders at local level, future traditional leaders are likely to be less rich than their predecessors.[1360]

7.3.7 *TRIBAL LAND ACT* OF 1968

Other radical changes are seen in respect of traditional land rights. These changes were introduced in 1968 through the passage of the *Tribal Land Act.*[1361] According to Khunou the reason why this Act was promulgated was that the post-colonial government of Botswana was of the view that the existing system of customary land administration could not readily

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[1357] *Matimela Regulations* 70 of 1969 provides for driving fees of a person who delivers *matimela* to a person responsible for collection, declaration to be made by person delivering *matimela*, manner of claiming *matimela* (animals) from *matimela* Kraal.
[1358] Section 5(1) of *Matimela Act* (Cap: 36: 06) 1968.
[1359] Section 6 (2) of *Matimela Act* (Cap: 36: 06) 1968.
[1360] Somolekae and Lekorwe *Chieftaincy System* 194.
[1361] Act 54 of 1968. For more information regarding the statutory regulation and administration of tribal land, see *Tribal Land Act* 48 of 1969, *Tribal Land Act* 62 of 1970, *Tribal Land Act* 24 of 1980 and *Tribal Land Act* 15 of 1987.

accommodate the concept and practices in land use. Furthermore, the government also noted that the existing customary systems cannot assure all Batswana access to the land. Therefore democratisation of land control and administration is extremely necessary.[1362]

Ng'ong'olo explains that the new government labours under the impression that its political control over land allocation and administration can strengthen its powers of governance.[1363] Therefore the *Tribal Land Act* is mainly introduced to bring modernisation[1364] of tenure and substantial changes to the dominant Tswana tribal system of land tenure. To the government of Botswana, these changes are to be achieved through the empowerment of the government officials to allocate land.[1365]

Land Boards have 12 members. The composition is as follows:[1366]

- The tribal authority *ex officio* or his deputy;[1367]

[1362] Khunou *Land and Property Rights* 9.

[1363] Ng'ong'olo 1996 *SAPR/PL* 18.

[1364] In *Spanadokisi v Ngwato Land Board* 1994 BLR 297, the court held that the Certificate of Customary Land Grant provides prima facie an establishment of title. The court went further to say that the respondent in holding such certificate has proved her right to undisturbed possession and occupation of the land. The decision of this case marked a shift from the mode of allocation of land under customary law. See also the *Tribal Land (Amendment) Act* 14 of 1993. The Act provides amongst other things that any person who acquires or takes occupation of any tribal land without having the appropriate lease or certificate issued by Land Board shall be guilty of an offence and shall be liable to inter alia, a fine of P10 000.00 and to imprisonment for one year. The *Tribal Land (Amendment) Act* 14 of 1993 has modernised the Tswana customary land tenure thereby introducing a system of title deeds or certificates for ownership of the tribal land. The decision of Spanadokisi also confirmed modernisation of customary land tenure.

[1365] Ng'ong'olo 1997 *JAL* 14. Under Tswana customary law for everyday management of the land, the paramount traditional leader appoints trustee to manage each of the arable and grazing areas. These are mostly senior heads of wards that are attached to certain arable and grazing. In principle a ward head may be approached by an adult tribesperson to be allocated a piece of land for the purposes of residence, ploughing and grazing. In the present Botswana, these powers and functions of traditional leaders are now vested in the Land Boards.

[1366] Smit *Resources and Development* 42. The Ministry of Local Government, Lands and Housing appoints five of them, five are chosen by the people at *kgotla* and the other two are ex officio members representing the Ministry of Agriculture and the Ministry of Commerce and Industry. The composition of the Land Boards and in particular the position of the traditional leaders as the persons holding land in trust for members of their tribes is interesting. Although there are minor differences, the composition of the Ngwato Land Board for the Bangwato tribal area serves as a good example. The composition of the Land Boards excludes traditional leaders and tribal authorities. However, the traditional leaders retain their right to have one nominee.

- One member appointed by the tribal authority;[1368]
- Two members elected in the prescribed manner by an electoral college; and
- Two members appointed by the Minister.

There is also a Lands Tribunal, which is made up of three members. Its "President" is a qualified lawyer and a civil servant. The Minister of Local Government, Lands and Housing appoints two other members. The main function of the tribunal is to adjudicate appeals against a Land Board decision. Given the judicial powers of this judicial arm, it is clear that traditional leaders no longer possess the judicial powers to adjudicate on land issues. The attitude of the Botswana government towards the traditional land tenure system was summarized as follows in the National Development plan of 1968-73: [1369]

> In the township and large village it is essential to grant a form of title, which offers complete security and enables land to be regarded as a fully negotiable asset ... In tribal areas, the present system of concession provides an insufficient basis for the encouragement of investment, and changes in the present law are envisaged, the details of which have still to be decided. On agricultural land progressive farmers must be encouraged to develop their holdings by offering more clearly defined security than that available under customary law.

Under the *Tribal Land Act* all the rights and titles of the traditional leaders and tribe to land are vested in the Land Boards.[1370] It is argued that these new

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[1367] In most cases a traditional leader is an *ex officio* member.

[1368] In the case of the Batawana, Bakwena, etc, one member is appointed by a traditional leader.

[1369] As quoted by Smit *Resources and Development* 41.

[1370] In *De Graaf v Ramokwena and Others* 2000 BLR 224-235, the court held that all members of a tribe or citizens of Botswana within a given tribal land area do hold land for their use on lease, as lessees while the Land Board stands in the position of lessor and therefore the legal owner of the land. See also section 13 of the *Tribal Land Act* (Cap:32:02) of 1968, where the powers of Land Board are provided as follows: to grant rights to use of any tribal land, to cancel the grant of any rights to use of any tribal land, to hear appeals from, to confirm or set aside any decision of any subordinate Land Board, to impose any restrictions or conditions on the use of tribal land, to authorise any change of user of tribal land and to authorise any transfer of tribal land. See also the *Establishment of Subordinate Land Boards Order* 47 of 1973. Section 2 of Order 47 of 1973 provides for the establishment of Subordinate Land Boards within the district. Subordinate Land Boards have powers to hear, grant or refuse applications to use of land for: (a) building residences

arrangements are to the benefit and advantage of the tribesmen and women for the purpose of promoting economic and social development of all peoples of Botswana. According to the *Tribal Land Act*, the Land District Council in the formulation of policy and the State President are empowered to give any Land Board directions of a general or specific character.[1371]

A further radical provision of the Land Act is that land may be utilized for public purposes. If the President determines that it is in the public interest that any land, the ownership of which is vested in a Land Board, should be acquired by the state, the Minister shall serve notice thereof on the Land Board and the District Council, and request that such land be granted to the state.[1372] The *Tribal Land Act* which deprived traditional leaders in Botswana of their powers in respect of the ownership and allocation of land. This statutory arrangement changed the traditional structure of authority.[1373] Under Tswana customary law, there is a close correlation between control over land rights, political authority and social order. This inherent correlation presupposes that customary land tenure cannot be regarded as an isolated economic issue. The breakdown of this correlation or chain results into the

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(b) ploughing (c) grazing cattle or stock (d) communal uses in village. The establishment of *Subordinate Land Boards (Amendment) Order* 45 of 1992 and the *Tribal Land Regulations* 7 of 1970 deal inter alia with the procedure for the appointment of elected members to the Land Board, grant of customary land rights and grant of common law rights.

[1371] Gulbrandsen *Access to Agriculture* 4; Hitchcock *Water, Land and Livestock* 115; Nengwekhulu *Local Government* 6. See also section 32(1) of Act 54 of 1968. Section 32(2) of Act 54 of 1968 further states that when the Land Board declines to grant land in accordance with the request the Minister, he or she may direct that an inquiry be held by a Commission. Section 32(3) of Act 54 of 1968 provides that on the conclusion of an inquiry the Commission shall report to the Minister who may give direction in the matter as he shall think fit being a direction not inconsistent with the findings of the Commission and shall be the duty of the Land Board to comply. The Land Boards have replaced traditional leaders with regard to the system of land allocation and administration. Hitchcock explained that this new statutory land system of allocation diminishes the authority of traditional leaders over matters of land and transfers their powers to elected and appointed representatives. Traditional leaders become *ex officio* members without any voting rights at all. Nengwekhulu noted that these new statutory changes over the land matters take away the rights of traditional leaders to allocate land. The right to allocate land is one of the essential rights enjoyed by traditional leaders in both pre-colonial and colonial periods. This right gives traditional leaders political leverage with regard to their subjects. Land is important for the survival of traditional authority and individuals. See 5.4 above.

[1372] See section 32 of Act 54 of 1968.

[1373] Section 10 (8) of Act 54 of 1968.

decline of the political, social and economic institutions of traditional community: [1374]

> The replacement of a system of community land-holding by one of exclusive proprietary tenures, which may involve in turn the creation of the relation of landlord and tenant, must inevitably lead to a serious disintegration of tribal life and its existing institutions.

The interaction of the District Council, Land Boards, Ministry of Local Government, Office of the President and Ministry of Finance leads to the formation of the new local-central government structure. This relationship between local and central governments is like a "game" in which the players manoeuvre for advantage, deploying the resources they possess to maximize their influence over outcomes and trying to avoid becoming dependent on the other players. However, it may be argued that dependency and reliance of one player on the other is inevitable. For instance the District Councils may solicit money from the Ministry of Finance and Development Planning in order to carry out its developmental projects.[1375]

The Ministries of Agriculture and Commerce are also important players in the local-central governments game. For example the Minister of Agriculture is responsible for the appointment of certain members of the Land Boards as his representatives.

[1374] Smit *Resources and Development* 42. See 5.2 and 5.4 above.

[1375] Smit *Resources and Development* 42. The District Councils are financially dependent on central government. This funding enables the Councils to carry out their local development projects.

7. 3.7.1 Land, Women and Traditional Leadership

The *Married Persons Act*[1376] *and the Deeds Registry Act*[1377] were amended to provide for a non-segregatory approach to land. This applies to both the common law and tribal land. Persons may be allocated land irrespective of their marital regime. Here Botswana should be commended for its non-discriminatory approach in respect of the allocation of land. This liberal approach abolished the characteristics of deeply rooted customary rule of intestate succession, which excludes woman from the ownership of property. Before the colonial regime in the present Botswana, the position of a traditional leader was strictly hereditary and only in the main line usually passing from the father to the eldest son. However, it must be noted that long before the independence of Botswana women could rule only under exceptional circumstances.[1378] For example, in Ngwaketse between 1923-28, a woman acted as a regent. This is still a practice in the present Botswana. There are also areas in Botswana where women have been installed as traditional leaders.[1379]

7.3.7.2 Critique of Communal Land Tenure

It has already been demonstrated how the *Tribal Land Act* altered the system of communal land tenure. The critics of the communal ownership argue that individual ownership is preferred to communal ownership. This argument seems to be correct in terms of the totality of rights that individual ownership confers on the individual. A sole owner has greater rights than a joint owner. However, experience in Botswana does not show that individual ownership

[1376] Act (Cap 29:03) of 1971.

[1377] Act (Cap 33:02) of 1960. This Act deals among many other things with deeds to specify allocation of property, registration of instruments or notorial deeds and proprietary consequences of marriages of persons subject to customary law. Section 19 of the *Deed Registry Act* further provides that where a husband married in community of property desires to deal with land registered in the name of his wife, the wife is required to give consent in writing. This provision is a remarkable departure from the customary law position that married women are minors under the tutelage of their husbands. Husbands in this context can only use their property with their consent.

[1378] See 5.3 above.

[1379] For example, in Botswana, Batawana and Balete tribes are under the leadership of women. The Batawana are under Kgosi Moremi while Balete are under the leadership of Kgosi Seboko. This was the position at the time of writing this thesis.

had the effect of accelerating development. Hence the traditional leaders who are retentionists of communal land tenure argue that any changes made must be able to carry people along the path of development. The lesson to be learnt is that it is an impossible task to remove community ownership by the stroke of a pen.[1380]

In 1986 Chief Seepapitso IV moved in the *Ntlo ya Dikgosi* that the House asked the Minister of Local Government, Lands and Housing to suspend the operation of some Land Boards because of their inefficiency. Chief Linchwe II moved that Customary Courts try all stock theft cases without option of a trial by Magistrates' Courts. All these motions indicated that traditional leaders were not satisfied with the operations of some of the institutions, which took over some of their responsibilities. Traditional leaders still believe that they can perform some of these duties better than institutions which took over from them. It must also be pointed out with great emphasis that the passage of the *Tribal Land Act* should be seen in a broad context as a direct attempt on the part of the central government to alter the traditional system of land tenure within the tribal areas. It appears to be in line with the government policy to bring about rapid development not only in the rural areas but also throughout the country.[1381]

Such development has to come through participation of all Batswana and through the modernization of the land tenure system. It is correct to intimate that if the land is left in the hands of only traditional leaders the beneficiaries will be tribesmen under the customary system of land tenure. This parochial and normally subsistence form of land utilization lacks the driving force to generate any economic or social change as has been exemplified by the fact that no financial and lending institutions in Botswana have been willing to

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[1380] The argument of traditional leaders is that democratisation and control of land by the government through its statutory bodies such as Land Boards have failed to bring sustainable development to the rural Batswana in general. Hence they argue in favour of retention of the communal land system where land is allocated and controlled by traditional leaders.

[1381] Since the promulgation and implementation of *Tribal Land Act*, it seems that the system of land tenure in Botswana has brought development in both rural and urban areas. See also in this regard Kwame *Administration* 73.

provide capital where a customary interest in land is offered as collateral. Communal land or property does not attract security since the land belongs to the tribe. This renders communal land useless for the purpose of development.[1382]

7.3.8 DISTRICT COMMISSIONERS

When the representative system of local government was created in 1966 under the general control of the Minister of Local Government, Lands and Housing, District Commissioners[1383] remained in all districts as the senior representatives of central government. A District Commissioner is a senior

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[1382] Kwame *Administration* 73.

[1383] The District Commissioner is not a statutory officer. He or she is an administrative officer. However, some of his or her judicial functions are implied in the *Magistrates' Court Act* 20 of 1974, which provides that any area prescribed as an administrative district is deemed to be magisterial district. In terms of section 8 of *Magistrates' Court Act* 20 of 1974, the President acting in accordance with the advice of the Judicial Service Commission may appoint administrative officers (District Commissioners) as magistrates. This statutory arrangement gives the District Commissioner, in his capacity as a district administrative officer judicial powers. Section 38 of *Customary Courts Act* provides inter alia that any administrative officer in his capacity as a magistrate may have at all times access to any customary court within his jurisdiction and to the records thereof. There are other Acts which imply the role and functions of District Commissioners in Botswana namely: (a) The *Inquest Act* (Cap.07:01) of 1954, which provides a District Commissioner with, powers to direct exhumation and examination of a dead body of a person. Section 5 of the *Inquest Act* places a duty on a Chief or sub-Chief to report any information about a dead body of a person to an administrative officer (District Commissioner). Any Chief or sub-Chief who fails to comply with or contravenes any provision of section 4 is guilty of an offence and liable to a fine not exceeding P220.00 or to imprisonement for a term not exceeding twelve months or to both. Section 7 of this Act further provides inter alia that it shall be the duty of an administrative officer to direct an examination of the body by a medical practitioner, if he considers such examination necessary. (b) The *Mental Disorders Act* (Cap.63:02) of 1971 which deals with reception orders of persons who are mentally ill. Section 5 of the *Mental Disorders Act* provides that any person who requires to obtain a reception order for a patient may make application to the District Commissioner. See also sections 6 to 7 of the Act, which inter alia state that upon receipt of such application the District Commissioner may order an apprehension in certain cases. The District Commissioner may also issue a reception order in the prescribed form authorising the patient to be detained in an institution or place of detention to be named in the order. A Disctrict Commissioner is required to sign these orders. (c) The *Local Council Elections Act* (Cap.40:03) of 1966 which directs a District Commissioner to play a role when it comes to elections of local Councils. (d) The *Township Act* (Cap.40:02) of 1955. Section 5 of the *Township Act* implies the functions of the District Commissioner with regard to matters relating to health, order and good government of cities and townships. Section 3 of the *Local Government (District Council) Act* 35 of 1965 makes provision for a District Commissioner holding office within the area for which a Council is established; an *ex officio* member of the Council without voting rights but with all other rights enjoyed by members of the Council. See also the *Administrative District Proclamation* 61 of 1954. This statutory measure provides for the establishment of administrative districts within Botswana, namely Central, North East, North West, Kgalagadi, Kgatleng, Kweneng, Southern District, South East, Ghanzi, Gaborone Township, Francistown and Selebi-Phikwe Townships. The District Commissioner is the highest political and administrative authority in a district concerned.

public servant in a district. His or her duties include among other things, the issuing of business licenses, the confirmation of sentences passed by the traditional courts and both solemnization and dissolution of customary marriages. He also guides and directs the traditional leaders in his district. In short the central government controls the traditional leaders through the office of the District Commissioner. Furthermore, he or she has an obligation to keep registry of death and birth certificates. Central government may overrule the decision of the Land Boards, District Councils, District Commissioner and traditional authority in a particular district.

7.3.9 JUDICIAL POWERS

During the colonial period the British government curtailed the judicial powers of the traditional leaders in the Bechuanaland Protectorate.[1384] It seems that this curtailment became more severe in the post-independence period. Under customary law, the legitimacy of the *kgotla* as a legal institution is based on traditional practice and respect for *molao* (law). Uncodified historical precedent, as recollected by senior headmen, provides the basis for the fine line separating custom from law. The hierarchy of traditional courts runs from the Paramount Chief's *kgotla* in each district down through the sub-chiefs and chief's representative *kgotlas*, the ward headmen and finally heads of families. The jurisdiction of the Chief's *kgotla* extended over all civil and many criminal offences.[1385]

A traditional leader had unlimited jurisdiction and powers to try all types of cases and to determine sentence he is obliged to pass. With the passage of the *Customary Courts Act*,[1386] these judicial powers of the traditional leaders

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[1384] See 6.1, 6.2 and 6.3 above.

[1385] Vengroff *Botswana* 60. See also Act 57 of 1968.

[1386] Act 57 of 1968. See *Customary Courts (Procedure Rules)* 74 of 1971. This Act makes provisions for rules which deal *inter alia* with the identification of number of cases, entry of criminal cases in registers, entry of civil cases in registers, refusal to enter cases, date of hearings, particulars to be entered, summons to witnesses and dates of hearing, witness fees, contents and service of summons, failures to obey summons and recordings of evidence. The *Customary Court of Appeal Rules* 3 of 1986 deals with the registers of court, dates of hearing, delivery of judgments, noting appeals, petitions to appeal out of time, transmissions of petition to appeal, transmissions of court records, setting down dates of hearing, default judgments and dismissals of appeal etc. See also 3.4.4.1, 5.2 and 5.3 above.

are reduced. The *Customary Courts Act* stipulates all the mandatory powers of traditional leaders.[1387] Should a traditional leader exceed these powers, the law may take its course. Since independence in Botswana, the tribal administration falls under the Minister of Local Government. The Minister concerned deals with the problems and affairs of the traditional leaders who in turn refer the matter to the Office of the President. The President may dismiss a traditional leader in case of misconduct.[1388]

The Minister derives his or her powers from the *Customary Courts Act* which provides for the establishment and recognition of customary courts, constitution of courts, suspension and dismissal of the members (traditional leaders) who appeared to have abused their powers or to be unworthy or incapable of exercising the same justly or for the sufficient reasons. The *Customary Court Act* further empowers a customary court to sentence a convicted person to a fine, imprisonment, corporal punishment or any combination of such punishments but may not exceed its powers. No customary court may sentence any female or any person over the age of 40 years to corporal punishment.[1389]

[1387] In *S v Molomo* 1984 BLR 108, the question was whether customary court jurisdiction to try cases arising from contraventions of laws relating to conservation of fauna and flora. The court held that section 14 of the *Customary Courts Act* 57 of 1968 was a general provision dealing with the administration by a Customary Court of laws generally and did not have the effect of limiting its jurisdiction provided the charge laid was not an offence created by the *Penal Code* (Cap. 08:01) of 1964 or some other enactments. See also section 10 of *Customary Court Act* 57 of 1968 which provides that Customary Court may exercise civil jurisdiction over causes and matters in the matter which is justiciable under any law administered by the court and all parties are tribesmen and the defendant consents in writing to the jurisdiction of the court. Section 11 of *Customary Court Act* 57 of 1968 further provides that Customary Courts may exercise criminal jurisdiction in connection with criminal charges and matters in which the accused is tribesman or consent in writing to the jurisdiction of the court and the charge relates to the commission of an offence committed either wholly or partly within the area of jurisdiction of the court. See also *Keomantse v Teisa* 1998 BLR 470, where the court held that a Customary Court is empowered to make compensation orders in criminal cases coming before it. In *Kweneng Land Board v Madisakwane and Others* 2001 (1) BLR 480, the court held that the eviction and demolition order made by the Customary Court was competent. However, there are statutory limitations impose on the powers and competency of Customary Courts. See in this regard section 12 of *Customary Courts Act* which states that Customary Courts has no jurisdiction to try matters dealing inter alia with the following: treason, riot or any offence involving the security or safety of the state, an offence in consequence of which murder is alleged to have occurred, bigamy, robbery, an offence concerning counterfeit currency, extortion by means of threats, an offence against insolvency law or company law and rape.

[1388] Mfundisi *Formation and Structure* 192.

[1389] Section 17(1) of Act 57 of 1968.

In the present Botswana the courts of traditional leaders have powers to impose a maximum term of 10 years imprisonment. In terms of *Establishment and Jurisdiction of Customary Courts (Amendment) Order* of 1997, the criminal jurisdiction of traditional leaders under stock-theft in the Central District is as follows:[1390]

Customary Court	Maximum Fine	Maximum term of Imprisonment
1. Tribal authority	**P5000.00**	**10yrs**
2. Senior sub-tribal authority	**P4000.00**	**9yrs**
3. Subordinate tribal authority	**P3000.00**	**8yrs**
4. Headman	**P2000.00**	**7yrs**

Table 3: Customary courts system

The traditional leaders in Botswana discharge their daily court duties and responsibilities with the assistance of the tribal police who have the powers to arrest the offenders for 48 hours, to enforce courts orders, execute summons (both civil and criminal), investigate criminal and civil cases and executes subpoenas from the High and Magistrate Courts. Although traditional leaders have a measure of judicial power under the new legislative dispensation, it would suffice to emphasize that the judicial powers of traditional leaders in the traditional Botswana are restricted. For instance, traditional leaders have no powers to settle such matters as rape and murder. They are bound to conform to their new duties created by the statute, which in this case is the *Customary Courts Act.*[1391]

[1390] Act 57 of 1968.

[1391] The *Customary Courts Act* 57 of 1968 authorizes the Minister to establish Customary Courts in accordance with customary law, on the recommendation of the Chiefs who advise on the recognition, establishment, abolition or variation in jurisdiction of Customary Courts. The Minister exercises the authority to appoint, suspend or dismiss members of the Customary Courts. See also in this regard section 8 of Act 57 of 1968 which provides that Minister may dismiss or suspend any member of the Customary Courts. On such dismissal or suspension the member will automatically be disqualified from exercising his functions. There is also Customary Court of Appeal division. South and North regions. These courts preside over appeals.

As it has been highlighted,[1392] traditional leaders played a pivotal judicial role before and during the colonial period when there were no modern courts and various Batswana existed independently until the modern state of Botswana with its legislative apparatus and law enforcement institution came into place. The need for certainty and uniformity in Customary Courts is inevitable. Chief Linchwe II who is the President of the Customary Court of Appeal also shares the same view and believes that the present (non-traditional) judicial system is suitable. He says it is better than the arbitrary system, which existed, in the traditional era. He is also not in favour of the existence of the Customary Court of Appeal and recommended that the High Court should hear appeals from Customary Courts, sitting with assessors, to advise on customary law. He says that traditional leaders do not have the ability to adjudicate technical cases such as murder, rape, treason, insolvency matters and offences concerning counterfeit currency.[1393]

In spite of the weaknesses and omissions inherent in the traditional judicial system, Customary Courts handle almost 80% of all criminal cases in the country, applying statutes such as the *Penal Code*[1394] and the *Stock Theft Act*.[1395] The Customary Court system is popular in Botswana for several reasons amongst others: its free application (no fees), its use of indigenous languages, the populace's familiarity with the applicable laws and the atmosphere of the court is not intimidating.[1396]

[1392] See 5.2.5.3 above.

[1393] Mfundisi *Formation and Structure* 196.

[1394] See *Penal Code* (Cap:08:01) of 1964. Customary Courts may apply the *Penal Code* of 1964 regarding corporal punishment matters. For example, the Customary Court may not impose corporal punishment upon females and males over 40 years. These Courts may also be guided by *Penal Code* with regard to cases pertaining to assaults, theft and so forth.

[1395] See the *Stock Theft Act* (Cap:09:01) of 1935. In terms of section 8 of the *Stock Theft Act* any person including a traditional leader may arrest without warrant any other person upon responsible suspicion that such other person found in possession of stock and produce has stolen them. See also sections 3, 4 and 5 of the *Stock Theft Act*, which deal generally with the regime of stock theft activities.

[1396] Mijiga *Role of Traditional Leaders* 6.

7.3.10 STATUTORY FRAMEWORK OF CHIEFTAINSHIP

7.3.10.1 Chieftainship Law of 1965

Shortly before the independence of Botswana, the Legislative Assembly of Bechuanaland Protectorate promulgated the *Chieftainship Law*[1397] in 1965. In 1966 the *Chieftainship Law* came into operation. The introduction of this law changed the status, powers and functions of the traditional leaders in Botswana.[1398] As a consequence, the enactment of this Act added to the uneasiness on the part of the traditional leadership. Part of the *Chieftainship Law* reads as follows:[1399]

> No person shall hold or assume the chieftainship of any tribe or exercise or perform any of the powers or duties pertaining thereto unless he has been recognised as Chief of such tribe under the provision of this law. Her Majesty's Commissioner (later Minister of Local Government, Lands and Housing) shall by notice in the Gazette, recognise the person so designated as Chief of such a tribe.

According to the *Chieftainship Law*, the government appointed traditional leaders in Botswana. This means in legal terms that a traditional leader was not born but appointed. This is so even if such appointment is based on the designation by the tribe meeting at the *kgotla* in accordance with the

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[1397] See *Chieftainship Law* 29 of 1965.

[1398] Sections 20 and 21 of *Chieftainship Law* of 1965 directed Chiefs to performed the following functions: (a) To allocate land to the members of the tribe for customary purposes. (b) To make grants of tribal land or of interests in tribal land: (i) To the District Council; (ii) to the government; (iii) to act in accordance with the advice of the District Commissioner with regard to the membership of the tribe; (c) to arrange tribal ceremonies. The Act further placed a duty upon a Chief to prevent the commission of any offence within his tribal territory, to arrest any person who has committed an offence within his tribal territory and cause such person to be taken before a court having jurisdiction over him.

[1399] Nengwekhulu *Local Government Policy* 7. See sections 4 to 5 of *Chieftainship Law*. The *Chieftainship Law* further required Her Majesty's Commissioner (Minister of Local Government, Lands and Housing) to recognise a person as a Chief on condition that the tribe assembled in *kgotla* under the chairmanship of the senior member of the tribe and designated the rightful successor to the chieftainship according to customary law. Section 6 of the *Chieftainship Law* also provided that if the person so designated is below the age of 20 or is undergoing a full time course of education approved by Her Majesty's Commissioner such person shall not for time being be recognised as Chief and it shall be the duty of the tribe so assembled to designate a Regent of the tribe according to customary law.

customary laws of succession.[1400] The fact of the matter is that the Act introduced new changes into the Tswana customary procedure of appointing a traditional leader. These new changes, which gave the Minister concerned powers to appoint a traditional leader, undermined the Tswana customs in respect of the appointment of traditional leaders.

However, it needs to be emphasized that these alterations were not totally new elements in the institution of traditional leadership. The 1934 proclamations issued by the High Commissioner modified the powers of the traditional leaders to a large extent.[1401] This situation continued to prevail in post-colonial Botswana. In terms of the *Chieftainship Law*, the Minister might choose for whatever reason, whether or not to recognize a traditional leader. If a traditional leader was recalcitrant towards the central government he might not be recognized or simply the Minister could marginalize him. The whole legislative framework gave the Minister arbitrary powers to abuse traditional leadership. The Minister also had the power to suspend or depose a traditional leader.[1402] In 1970 the *Chieftainship Amendment Act*[1403] further subjected the traditional leaders to more strict government control. It empowers the President to remove a traditional leader from the office without even waiting for complaints from the tribe.

[1400] Sections 4 and 5 of *Chieftainship Law* of 1965.

[1401] See 6.1, 6.2 and 6.3 above.

[1402] Sections 13 and 14 of *Chieftainship Law* 29 of 1965. If any tribe lodged with Her Majesty's Commissioner (later Minister of Local Government, Lands and Housing) a complaint or complaints that the Chief of the tribe has abused his power or was incapable of exercising the same justly or was for other reasons unworthy to be Chief, Her Majesty's Commissioner (later Minister of Local Government, Lands and Housing) would communicated such charges to the Chief. After giving the Chief sufficient opportunity to be heard Her Majesty's Commissioner might appoint Judicial Commission to enquire into the matter. If the Commissioner considered the report of the Commission to be expedient in the interests of peace, order and good government that the Chief should be deposed he would depose such Chief and thereupon such Chief would cease to hold office and exercise duties and functions of a Chief under the *Chieftainship Law* or any other law. Section 14 of *Chieftainship Law* went further to provide that Her Majesty's Commissioner might suspend the Chief from exercising the powers and duties of his office pending receipt and consideration by Her Majesty's Commissioner of the report of the Judicial Commission. Mfundisi *Formation and Structure* 192. See also 6.2.1, 6.2.2, 6.2.3, 6.2.4, 6.2.5. 6.2.6 and 6.2.7 above.

[1403] See *Chieftainship Amendment Act* 18 of 1970. See also *Chieftainship Act* 11 of 1973 and *Chieftainship Act* (*Amendment*) 33 of 1977.

7.3.10.2 Chieftainship Act of 1987

Another development regarding the status of the traditional leaders came into place with the *Chieftainship Act* of 1987.[1404] This Act places the traditional leaders under the Minister of Local Government, Lands and Housing.[1405] The Minister has a power to recognise or withdraw the recognition of any person as a traditional leader after consultation with the *kgotla* of any tribal community.[1406] In terms of this Act the Minister may also suspend and depose

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[1404] Act 19 of 1987. This Act is intended to re-enact with amendments the provisions relating to Chiefs, Deputy Chiefs, sub-Chiefs and Headmen. The Act deals inter alia with the following matters: definitions of a Chief and chieftainship, termination of regency, Judicial Commission to be appointed in case of doubt, temporary absence or incapacity of Chiefs, removal of Chiefs, appeal against the decision of the Minister, appointment of a person to act in place of suspended Chief. See in this regard sections 3 to 15 of Act 19 of 1987.

[1405] Section 26 of Act 19 of 1987. The Minister is empowered to make regulations to prescribe the following conditions in respect of the traditional leaders: (a) The general conditions of service. (b) The procedure for taking disciplinary actions. (c) The punishment, which may be awarded for breaches of discipline by the traditional leaders in Botswana. In terms of section 15 of the Act traditional leaders are required to perform the following functions: (a) To promote the welfare of members of their tribes. (b) To carry out any instructions given to them by the Minister. (c) To ensure that their tribe are informed of any development projects in the areas, which affect tribes. (d) To convene kgotla meetings to obtain advice as to the exercise of their functions. (e) To perform such other functions as may be conferred on them by this Act or any other law. In addition to these functions, traditional leaders have powers to determine questions of tribal memberships and admit persons to memberships of their tribes and to arrange tribal ceremonies. Traditional leaders are further required to the best of their abilities to prevent the commission of any offences within their tribal territories. See in this regard sections 16 and 17 of Act 19 of 1987.

[1406] Section 19 of Act 19 of 1987. In *Leipego v Moapare and Others* 1993 BLR 229, the court dealt with a chieftainship matter. The court stated that section 19 of the *Chieftainship Act* 1987 gave the Minister the right to recognise a person as Chief after causing to be held such consultation as may deemed fit with the *kgotla*. The kind or manner of consultation had been left to the Minister as long as it was with the *kgotla*. Where there is a deep division in the body to be consulted, in the last resort the issue would be settled by a count of heads to determine which side had the most support. The court further stated that the Minister acted within his statutory powers and made due consultation with the *kgotla* in recognising the respondent as a Chief. For more information regarding the appointment and recognition of a Chief by the Minster, see in this regard *Kgosikwena v The Attorney-General* 2001 (2) BLR 513, where the court dealt with an order on an urgent basis to set aside the appointment of a Chief. The court stated that it is when the tribe expresses some misgivings about the designation of any person as a Chief that the Minister may appoint a Judicial Commission to make an enquiry about a particular designation of a Chief. Clearly the designation of a person by a tribe in a *kgotla* is a proper procedure to be followed under the Tswana law. See also section 4 of the *Chieftainship Act* of 1987, which deals with the recognition of a Chief in Botswana. Section 5 of the *Chieftainship Act* also provides that upon the occurance of a vacancy in the chieftainship of the tribe it shall be the duty of the tribe assembled in *kgotla* under the chairmanship of the senior member of the tribe to designate the rightful successor to the chieftainship according to customary law. The President shall by notice in the Gazette recognise the person so designated as Chief of the tribe. Once a Chief is appointed he or she shall be paid from monies appropriated by law for

a traditional leader in case of misconduct.[1407] He or she is also empowered by the Act to suspend a traditional leader from his office.[1408] For instance, in 1994 the Minister of Local Government, Lands and Housing exercised his powers and suspended Chief Seepapitso of the Bangwaketse from office. In view of the Minister, Chief Seepapitso did not co-operate with the government when the former President of Zambia, Frederick Chiluba visited Kanye, Botswana. This illustrates the fact that the recognition of the traditional leaders is determined and dictated by both political reasons and convictions. It seems only those who are loyal and co-operative to the central government will be saved from the sharp axe of suspension and dismissal.[1409]

7.4 CONCLUSION

Currently traditional leaders in Botswana find themselves in the terrain of public service where they render services as public servants and are accountable to both the Minister of Local Government and the President. In view of the post-colonial statutes such as *Customary Courts Act* and *Chieftainship Act* it appears that traditional leaders and their subordinate headmen are now much more closely controlled by government than before independence. To some an extent this control is due to the greater readiness

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such purpose and a Chief is required to perform his duties according to the *Chieftainship Act*.

[1407] Section 12 of Act 19 of 1987.

[1408] See section 12 of Act 19 of 1987 which inter alia provides that if the Minister has a reasonable cause to believe that the Chief of any tribe is incapable of exercising his power, has abuse his powers or is for any reason not a fit and proper person to be a Chief he shall suspend the Chief and inform him of the facts in writing of the reason for his suspension. Where a Chief has been suspended the Minister shall make an enquiry and consider any representations made to him by the Chief. If after the enquiry the Minister is of the opinion that the allegations made against the Chief have been proved he may if he considers it to be expedient and in the interests of peace, good order and good governance depose such Chief or suspend him from chieftainship for a period not exceeding 5 five years. In *Gaseitsiwe v Attorney-General* 1996 BLR 54-55, the court dealt with a matter concerning the suspension of a Chief of Bangwaketse tribe by the Minister in terms of section 12 of the *Chieftainship Act*. The court stated that what was intended by section 12(1) of *Chieftainship Act* was that the Minister was obliged to communicate to the Chief in question the grounds or allegations on which his belief that the Chief was not a fit and a proper person was based and in the present case this obligation had been complied with. The court went further to state that the Minister had acted conscientiously and with scrupulous fairness and was fully entitled to rely on allegations for his belief that the Chief of Bangwaketse tribe was not a fit and proper person to be Chief and therefore he had not failed to exercise a proper discretion in terms of section 12(1).

[1409] Mfundisi *Formation and Structure* 191-192.

of tribesmen to appeal against decisions of traditional leaders whose political powers have been diminished. This institution has experienced a long history of slow death since 1885 when the British government declared Bechuanaland a Protectorate territory.

Traditional leaders have lost almost all their powers and privileges. They however, are still very influential among their communities. Unlike many independent African states, the Batswana still attach a lot of respect and trust to the institution of traditional leadership. Therefore, it will suffice to say that despite all these changes and the reduction of their powers and status, all is not lost on their side. At least for now the central government still needs the traditional leaders to mobilize rural masses for national development. The traditional leaders serve as intermediaries between the central government and their rural communities.

There is no doubt that traditional leaders play an important leadership role in traditional communities just as elected representatives play a vital role in a democratic dispensation. However, in Botswana where the functions and duties of elected representatives and traditional leaders are combined (mixed) and not harmonized, the conflicts seem inevitable and detrimental to the local communities. To address this issue, it is perhaps appropriate to harmonize the roles of the traditional leaders and elected representative because both authorities have distinct and specialized roles that must co-exist.[1410] It should be appreciated that the landscape of social, economic and political conditions have drastically changed in Botswana. These changes indicate that the institution of the traditional leaders will generally not be counted among the institutions, which hold a bright future in Botswana.[1411] Modern societies and systems of government are constantly changing and these new trends and development put traditional authorities under pressure to change. Pressure to change may lead to the ultimate death of the traditional authorities.

[1410] Mijiga *Role of Traditional Leaders* 6.
[1411] Somolekae and Lekorwe *Chieftaincy System* 196-197.

SECTION C: LESOTHO*

CHAPTER 8: PRE-COLONIAL SYSTEMS OF BASOTHO

8.1 EARLY *SETTLEMENT AND CULTURE*

8.1.1 GENERAL

It is said that the first people to occupy the country known today as Lesotho[1412] were the San or "Bushman" who inhabited the area for hundreds or maybe thousands of years. However the term "Bushman" or as it is in Sesotho "*Barwa*" bears a contemptuous meaning. Minnie described "Bushmen" as:[1413]

> Funny stunted creatures, very yellow in colour, with high cheekbones, small bright eyes and a meagre quantity of hair on their heads, each woolly curl being quite separate and apart from the next with the scalp plainly visible all round.

Eloff explained that by the end of the 17th century these groups of nomadic tribes of hunters were living in the eastern parts of what is now the Free State Province, especially in the present districts of Zastron, Wepener, Ficksburg, Ladybrand and Fouriesburg. The San were later harassed by the Khoi who executed raids on them. Eventually the Khoi settled in the precincts of the Vet,

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* I wish to thank Dr NL Mahao, Executive Dean-Law Faculty (North-West University: Mafikeng Campus) for his comments concerning the section dealing with Lesotho. However, I take full responsibility for omissions inherent in this discourse.

[1412] Bosko *Why Basotho Wear Blankets* 23. The inhabitants of Lesotho are called Basotho. These people speak Sesotho language. The word Sotho is a collective term for people speaking the Sesotho language. Some Basotho people live in Botswana and others in South Africa. Basotho are people who are preoccupied with blankets, which they wear over their clothes. Basotho can be observed wearing one sometimes two blankets at the height of summer when the heat is oppressive. To cloth a person with blankets, ho apesa motho ka likobo may mean to dress a person or to extend sexual favours to him depending on the context. Basotho say "woman is the blanket of a man", *mosadi ke kobo ea monna.* A mosotho woman who refuses her husband's sexual advances is said literally to refuse to part with the blankets or to refuse to give the blankets to him, *ho hana ka likobo or ho motima likobo* respectively.

[1413] Minnie *Basutoland* 22. See 3.1.1, 5.1 and 6.1 above.

Modder and Vaal rivers while other groups penetrated the Caledon river valley in the present districts of Ladybrand, Clocalan and Ficksburg.[1414]

The San were primarily hunters and gatherers, using stone tools.[1415] Bardill and Cobbe held the view that by the sixteenth century, if not much earlier, the San were joined in the area by groups of iron-working cultivators and herders.[1416] These newcomers were the affiliates of the two main branches, namely Sotho and Nguni. It also transpired that by the late eighteenth century, Sotho groups predominated throughout most of this area, except for its southeastern fringes, where the Nguni speakers, namely the Cape Nguni-Xhosa, Pondos and Thembu were dominating. The presence of the Sotho and Nguni groups put the San, the original owners under constant pressure.[1417] This pressure forced the San into local extinction by the late nineteenth century. Today, one could still trace the survivors of the San race in the present Lesotho.[1418]

Clans characterized the social and cultural composition of both the Sotho and Nguni. The Sotho groups were divided into clans such as the Fokeng, Koena and Tlokoa while the Nguni group was made up of the Phuti and Polane clans. Each clan traced its common descent from a distant ancestor and preserved its distinctiveness or uniqueness through reverence for a common totem, the *seboko*.[1419] For example, the followers of Mokhachane, Moshoeshoe's father were known as "Ba ha Mokhachane"[1420] and the Bakoena were named after the crocodile.[1421] This was the animal, which they

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[1414] Eloff *Lesotho* 112.
[1415] Eloff *Lesotho* 112. Their rock paintings are to be found throughout modern Lesotho. See also 5.1 above.
[1416] Bardill and Cobbe *Lesotho* 7.
[1417] Bardill and Cobbe *Lesotho* 7.
[1418] Minnie *Basutoland* 22; Sheddick *Southern Africa* 14. Although one could still see or trace the San in the present Lesotho, such people had changed their ways of life and lived in accordance with the cultural norms and values of Basotho. Perhaps it is appropriate to call them "the San-Basotho". The San were also represented in Botswana and Namibia. In Botswana, they were found in large numbers in the district of Kgalagadi, for instance in places such as Xade, Xanegas, Central Kalahari Game Reserve etc. See 5.1 above.
[1419] *Seboko* identifies cultural origin and history of a particular clan or tribe. It also refers to the name of a particular clan or tribe. For instance *seboko* of Bakgatla-Ba-kgafela is *kgabo* (monkey).
[1420] *Ba ha Mokhachane* means the people of Mokhachane.
[1421] Bakoena refers to people of the crocodile.

revered as their totem. Most totems were species of wild animals and plants. People were not supposed to kill or eat their totem. If they did so they had to undergo purification to avoid illness and misfortune.[1422]

8.1.2 RULES OF SUCCESSION

The early Sotho clans were sub-divided into lineage groups, frequently named after a recent ancestor. Politically those groups were organised into chiefdoms. The people who came from the same lineage group but also included some non-kin members as well made up those chiefdoms. Chiefly succession was patriarchal.[1423] Traditional leadership was based on the principle of male primogeniture. A Sotho traditional leader was born and not necessarily elected. Similar to Botswana[1424] and South Africa,[1425] the Basotho also observed the principle of *"Morena ke Morena ka tsoalo".*[1426]

In case of the polygamous marriages,[1427] the general principle was that the eldest son of the first wife of traditional leader succeeded to the office of

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[1422] Lye and Murray *Transformation on the Highveld* 88–91. Mohapeloa *Tentative British Imperialism* 5. The Basotho regarded such animals as their protectors. A clan also believed that its *seboko* made it different and particular from other clans. The clan also attached elements of superiority to the *seboko*. People tend to believe that the *seboko* endowed them with qualities, which made them superior to other clans. Out of the *seboko* derived the *poko* (poem), which described the background and historical origins of a particular traditional authority or clan. For instance the following poko written by Lesoro was cited in Becker and gave traditional description of the *kgotla* of Moshoeshoe as follows: "*Kgotla La Moshoeshoe* (Moshoeshoe's *Kgotla*) *A kga mahlo, diala, Mokwena* Cast thy far-seeing eyes, on Crocodile *O a akgele morao Maswetso*, Back into the deep abysm of time *Nakong tsa hae Phiri ya Matlama*, During his days-the Hyena of *Matlama Namane ya Khudu*, *Mora Mokhachane*. *Khudu*'s child the son of *Mokhachane Motlolo wa Peete*, *Sefate-seholo*, The progeny of Peete, the big genealogical tree *Qheku le soto la ho fepa Madimo*, The ill-fated old man who fed the cannibals, Le hara Madimo ke bolela boRakotswane, And I'm referring to the cannibals among Rakotswane's people *Sheba morao, o bone Basotho*, Look back and behold *the Basotho Kgotla La Moshesh wa Mokhachaba*!" See in this regard Becker Destiny 50.

[1423] Bardill and Cobbe *Lesotho* 7.

[1424] See 5.2 and 5.3 above.

[1425] See 2.1 above.

[1426] Rugege *Chieftaincy and Society* 80. Literally translated to mean that a traditional leader is traditional leader by virtue of birth. See 2.1 above.

[1427] Poulter *Family Law and Litigation* 37. Basotho polygamous families were made up of houses. Each house consisted of a wife, her children and in some cases members of the extended families. Houses were independent of each other. There were also rules in place to prevent one from taking the property of another house. These rules are captured well in the Sotho maxim which says "*malapa ha a jane*" literally translated to mean that "houses do not eat each other".

traditional leadership upon the death of his father. If there was no male issue in the house of the first wife, succession shifted to the second house and so on.[1428] Rugege pronounced that in line with the Sotho tradition, a traditional leader did not depend on his ascribed status alone to secure the allegiance of his subjects and to succeed to his traditional position.[1429] A traditional leader had to be wealthy and willing to part with some of his wealth to feed the indigent persons in his community. The traditional leader was also required or at least expected to have military skill and political clout to defend his followers. The term *Morena*[1430] was formed of the verb "*rena*" which meant to be prosperous and of course to be tranquil. In this view, *morena* presupposed he who watched over the public safety and welfare.[1431]

Of great importance to note is the fact that the rights of male primogeniture could have been limited under certain circumstances. For instance, sometimes a young brother would assume traditional leadership in his brother's place because of his own reputation for justice, generosity and skill. Rugege illustrated this example by making reference to Mokhachane, the father of Moshoeshoe, and the founding father of Basotho nation. Mokhachne took over from his brother Lebe because the latter did not command respect and good rapport among his subjects while the former had a good reputation for justice and generosity.[1432]

8.1.3 NOMADIC LIFE AND MOVEMENTS

Initially, the majority of Sotho chiefdoms were small, with approximately three hundred or four hundred people at most. As a result of the abundance of land and intra-tribal conflicts some individual members of the royal family developed a tendency to pull out of the chiefdom with their followers and established independent traditional authorities of their own. Over a period of time these disjointed and fragmented chiefdoms amalgamated. It was that

[1428] See 2.1 and 5.3 above.
[1429] Rugege *Chieftaincy and Society* 80.
[1430] Rugege *Chieftaincy and Society* 80. *Morena* is a Sotho word that refers to a traditional leader.
[1431] Rugege *Chieftaincy and Society* 80.
[1432] Rugege *Chieftaincy and Society* 80.

process of unification which eventually led to the creation of the present Basotho nation. In explaining, the dynamics and patterns of the Sotho nation-building process, credit should be given to the efforts and outstanding abilities of Moshoeshoe.[1433] The Sotho were descendants of many different groups that remained independent of each other until the 1820s.[1434] Even before that time when these groups had their own names, outsiders generally refer to them as Sotho. The Sotho groups followed very much the same way of life. According to tradition, the two parent stems of the Sotho were the Rolong and the Fokeng.[1435]

By the end of the eighteenth century the villages in what is known today as Lesotho and the Free State Province were intermingled with those of the Fokeng as far as south of Caledon Valley. A Nguni group moved into what is known as present day Lesotho.[1436] Originally the Basotho were often described as nomadic but in fact it appeared as if they were not naturally nomadic like the San. They settled in one place and utilised their surroundings. Their nomadic character could be inferred from the fact that under certain conditions the Basotho did not make permanent homes as they

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[1433] Bardill and Cobbe *Lesotho* 7. See 8.2 below.

[1434] Austin *Basotholand* 7. The black people of Southern Africa of whom the Basotho were a branch possessed many characteristics and indications of common origin. These people used different languages to sing and talk. It was said that these groups of people at one time inhabited a region further north and moved southwards. Austin proclaimed that the Basotho could be considered alone but they must not be thought of alone. They were a set of variations. These variations are confirmed in an old Basotho circumcision song: "I am the elder, the first man of Him who bound up the wound. I did not clothe myself but I have been clothed". As stated above the word Sotho is a generic term and refers to the Tswana, Pedi or Northern Sotho and Basotho or Southern Sotho. Therefore it is important to note that the type of Sotho group or nation discussed in this section refers to the Southern Sotho. This is a group or nation which was created by Moshoeshoe. See also 1.1.1 above.

[1435] Sanders *Chief of the Sotho* 3. Subsequently the Fokeng divided into two groups. One united group went into the North West and Limpopo Provinces of South Africa, while the other split into innumerable little chiefdoms, which settled southwards and eastwards, as far as the Caledon valley. Sanders highlighted that the Rolong meanwhile stayed in what is now Botswana, and it was from then that the Koena, Taung, Tlokoa, Sia, and Khoakhoa and many others traced their origin. See 7.1.1 above.

[1436] Sanders *Chief of the Sotho* 3. The groups also came into contact with the Petla, the Polane and the Phuti. According to Sanders, the blacks who entered the territory now known as Lesotho were believed to be the Nguni, a small band of Zizi later to become known as the Phetla or Pioneers crossed over the Drakensberg. Around 1600 they moved down the Caledon Valley. Two other Zizi bands followed the Polane and the Phuti. Those three groups gradually expanded and dispersed over much of the south and east of the country. See also 1.1.1 above.

moved around to look for better grazing zones and established other settlements temporarily.[1437]

Sometimes the Sotho were also forced to move to another area by pressures from other tribes. Another important reason for their movement was rooted in a tradition that the eldest son of a traditional leader could not live in the same area as his father. The eldest son would normally establish his own chiefdom together with his followers, usually those who attended the same circumcision lodge with him. Due to those shifts and movements, the headquarters of the tribe changed its position from generation to generation. As indicated above, the trend of this movement was southward.[1438]

Consequently, the Basotho were divided into countless little chiefdoms, which tended to become even more divided as sons broke away from their fathers and younger brothers from their elder brothers. Such movement had to happen as the Sotho were cattle-herders and the number of cattle increased in a village. As a result, it became a well-established practice for ambitious sons and younger brothers to move away to assert their independence.[1439]

8.1.4 SOTHO CHIEFDOMS

The Sotho's basic community was the village. Normally the village contained between 50 and 100 inhabitants. A traditional leader ruled those inhabitants and they were politically identified as his people. This community or village was termed a chiefdom. A traditional leader and members of the royal family formed the nucleus of such chiefdom. People who had no royal blood or family links with a traditional leader were also welcomed in this ruling class. According to Sanders it would be misleading to describe this group as a clan. His contention was that in most cases a traditional leader was independent

[1437] Sanders *Chief of the Sotho* 3.
[1438] Austin *Basutoland* 8-9.
[1439] Sanders *Chief of the Sotho* 1.

and had subordinate traditional leaders in nearby villages usually junior relatives who acknowledged him as their overlord.[1440]

In other instances such a traditional leader of a village might be subordinate to another overlord who was usually a senior relative. This overlord would probably hear appeals from his court, summon his followers to assemblies, to work parties and war. In view of that traditional arrangement, those people would then be politically identified not only as his subjects, but also as their subjects of his overlord. Moreover that overlord might himself be subordinate to another traditional leader. In this case they would be known as the subjects of that traditional leader too.[1441] Therefore it would suffice to mention that in pre-colonial Lesotho, there were independent chiefdoms and subordinate chiefdoms. These chiefdoms were of course accompanied by grades of subordinations.[1442]

8.1.5 CULTURE, BELIEFS AND RITUALS

The beliefs of the Basotho were dominated by an absolute sense of the omnipotence of the spirit world and medicine. The Basotho believed that in order to help man in his state of powerlessness, assistance was to be sought from the spirits of the *Balimo.*[1443] Beyond them laid a more powerful being: the ancestor of old, between whom and human beings the "young" ancestors were intermediates.[1444]

Another form of assistance was sought from medicine to increase individual power of life in men and things. This was the responsibility of the traditional doctors who mixed herbs and the flesh of animals to prepare medicines

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[1440] Sanders *Chief of the Sotho* 4.
[1441] Sanders *Chief of the Sotho* 4
[1442] Sanders *Chief of the Sotho* 4.
[1443] *Balimo* is a Sotho term, which is used to refer to the ancestors, that is the living dead. Sometimes these *Balimo* were referred to as "gods " from the African traditional religious point of view.
[1444] Austin *Basotholand* 12-13.

through their professional secret. To increase the strength of a person, the so-called *seriti*,[1445] the most powerful medicine was required.[1446]

Cattle were the wealth of the tribe and traditional leaders.[1447] As a result, care had to be taken to safeguard cattle.[1448] The pre-colonial Basotho had no knowledge of cotton and other textiles. They clothed themselves with painted grass and the skins of animals. Food consisted of porridge and a leathery kind of dough made from millet, cow's milk and vegetables. They also possessed knowledge of agriculture, thatching and pottery and had flocks of sheep and goats. The Basotho were pastoral.[1449]

Basotho men could enter into polygamous marriages,[1450] but in general many men had one wife. It seemed only wealthy men could afford to marry as many wives as they could support. For Basotho traditional leaders, polygamous marriages were the norm. The underlying and most fundamental requirement

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[1445] A Sotho word used to refer to a dignified status and the greatness of the position of a person. When the Mosotho talks of someone as having *seriti*, in fact he or she wants to say that, that particular person has power, commands respect and has integrity in the community.

[1446] Austin *Basutoland* 12-13. This normally consisted of human flesh preferably taken from a living body, the most potent parts of the body in this respect being those mostly connected with life - the tongue and the throat, the eyes, the sex organs and the entrails, which were the seat of life. Those particularly in need of this kind of medicine were traditional leaders because they had to act as individuals and stood most in need of power to influence the course of things. In case of war, bodies of fallen enemies were appropriately dealt with, while in times of peace, a victim was chosen from the tribe. The human remains thus gathered were handed to the tribal doctor, who from them compounded the medicine, which was squeezed into a horn and sealed with dust and animal fats. According to Austin for a successful traditional leader the possession of a strong medicine and the doctors who were connected with both dominated the religious life of the tribe.

[1447] Hammett *Chieftainship* 87. Traditionally the Basotho associated cattle with traditional leadership. According to Hammett, a traditional greeting to a traditional leader was simply "those cattle" (*khomo tseo*) and indeed Basotho traditional leaders had almost a monopoly of owning them. See also 5.2 and 5.3 above.

[1448] Austin *Basutoland* 12-13. No woman was permitted to enter the gate of the cattle kraal covered by medicine for the fertility of the cows. Should a woman enter, it was believed she would break the efficacy of the medicine due to a woman's female seriti being stronger than that of a cow. For much the same reason no woman was permitted to pass through a herd in a field.

[1449] Austin *Basutoland* 12-13. Austin proclaimed that the Basotho of the old times had no name for any star or constellation. As for time, the Basotho had only one clear concept, the division of night and day.

[1450] In *Masupha v Masupha* (1977) LLR 283, the court stated that in Lesotho a man having vividly married according to custom is free to marry as many wives thereafter as he chooses. The very nature of the marriage allows him to do that. This situation is only applicable to a man and not to a woman. The court further stated that in Lesotho polyandry is therefore not recognised in Sesotho custom.

of such marriages (and of course monogamous ones) was *lobola* or *bohali*.[1451]

8.1.6 RISE OF MOSHOESHOE

During the second half of the 18th century, the Chief of Koena, Moshoeshoe was born at his father's village of Menkhoaneng. His father, Mokhachane was merely the leading traditional leader of the Mokoteli, a small and junior branch of the Koena. He appeared to have ruled over one subordinate traditional leader, Ntseke.[1452] Lebe was still alive and should by virtue of his seniority have ruled over him.[1453] Mokhachane however, had the support of the people, while Lebe despised them.[1454]

Mokhachane, the son of Peete, did much to raise his chiefdom from the obscurity into which it had fallen under his father's regime. However, as it will be shown below,[1455] credit should be given to Moshoeshoe for the creation and the unification of several chiefdoms into a supra-tribal nation of Basotho. Moshoeshoe started his task of nation building while he was still under his father's tutelage. He increased the power of Bamokoteli clan when he brought the Sekake group, Fokeng clans, including the Mokara and Ratsiu groups

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[1451] *Bohali* in Sesotho means bride wealth. *Bohali* presupposed cattle, which a man had to give to his wife's family at marriage. During pre-colonial times, *Bohali* was paid in a form of cattle. Nowadays *Bohali* is mostly paid in the form of cash. This practice does not necessarily imply that there are no people who pay *Bohali* with cattle. Marriages may be nullified in certain circumstances, if they are repugnant to Basotho law. This was confirmed in *'M'amothibe Molofatsane v 'M'aselemeng Mpho* (1959) HCTLR 16. The matter concerned a form of marriage purported to be entered into whereby a woman who was married had previously given birth to a still-born child. The court held that such a marriage was repugnant to the Basotho law and customs. The court went on to say that such a marriage was also contrary to morality. This decision implies that a woman who gave birth to a still-born child was excluded from entering into marriage.

[1452] Sanders *Chief of the Sotho* 22. The date of the birth of Moshoeshoe could not be determined with precision, since, the Sotho kept no strict account of their age but Sanders estimated to be in or around 1786.

[1453] Austin *Basutoland* 17. Lebe was tactless and not generous to the common people. He used to refer to them as flies, which gathered around pail when a drop of milk was poured out, deserted it as soon as it was empty. Mokhachane won his brother's following through lavish display of hospitability and Lebe who was known as *Radintsintsi* (the Father of Flies) remained out of the leadership race.

[1454] It must also be noted that Mokhachane himself was subordinate to some degree, to Mpiti, Chief of the Sekake.

[1455] See 8.2.1, 8.2.2, 8.2.3, 8.2.4, 8.2.5, 8.2.6, 8.2.7 and 8.2.8 below.

under his father's control. Moshoeshoe was advised by Chief Mohlomi, who foretold the day when he would be a ruler of men.[1456]

Chief Mohlomi stated that power was not dependent on medicine but on the clarity of mind, goodness of heart and service to one's fellow men. He advised Moshoeshoe never to trust traditional doctors, whose works according to him were fraudulent. He directed and ordered him to rule with love and justice to all and to be a man of peace. According to Sanders, Moshoeshoe confirmed the advice he got from Mohlomi when he accounted for his power: [1457]

> When I was a young man, I had a great desire to become a Chief. I longed that my chieftainship should grow and rise and with this I wish I went to (Chief) Mohlomi, whose chieftainship had been a great success ... I asked him to advise me on how I could become a Chief. Could it be by a charm?

Moshoeshoe's original name was Lepoqo.[1458] He was born during a time of strife but afterwards assumed the name of Moshoeshoe. Moshoeshoe became the founder of the Basotho nation, a guide and lawgiver to his people. By virtue and by way of comparison, history pointed out that among the early black traditional leaders of southern Africa, Moshoeshoe stood out prominently as the most intelligent and most humane. As indicated earlier,[1459] perhaps it would suffice to state that like King Shaka, he managed to build up a great power by his own ability. His achievements, however, were scored without vast sacrifice of human life.[1460]

[1456] As quoted by Austin *Basutoland* 17. Mohlomi fastened long ear-rings to the ears of Moshoeshoe and said: "This is the ring of power. Power is not acquired by medicine. The heart is medicine."
[1457] Sanders *Chief of the Sotho* 22.
[1458] The name *Lipoqo* literally means quarrel in Sesotho.
[1459] See 3.2 above.
[1460] Theal *Fragment of Basuto* 1.See 2.2 and 3.2.1 above.

8.2 CREATION OF THE SOTHO NATION

8.2.1 THE OPPORTUNITIES OF LIFAQANE

The successful creation and building of the Sotho Kingdom was attributed to complex and different personal relationships, especially the one between Moshoeshoe and his kinsmen and allies. The most important kinsmen of Moshoeshoe who played a critical role in the creation of the Sotho kingdom were Mokhachane, his father and Chief Masopha and Majara, his younger sons by Mmamohato. Of all the Moshoeshoe kinsmen, Chief Masopha, played an impressive role in building the Sotho nation. Sanders explained that he resisted Cape rule successfully and avoided becoming part of the Republic of South Africa.[1461]

The construction of the Basotho as a nation occurred around 1818 when Moshoeshoe formed an alliance with the clans and chiefdoms of southern Sotho people who occupied the area which is presently the northern and eastern Free State and western Lesotho.[1462] Shaka had a profound influence in the 18th century. He conquered large parts of South Africa and driven tribes from their areas.[1463] To the Sotho, those troubled years were known as *Lifaqane.*[1464]

During the *Lifaqane* almost every one of the Sotho chiefdoms was defeated and dispersed. Yet it was during that period that Moshoeshoe rose to power and used the opportunities availed by *Lifaqane* to establish the Sotho nation. During the *Lifaqane*, individuals, families and communities migrated to Moshoeshoe because they were homeless and submitted themselves to his authority. An immigrant traditional leader would ask Moshoeshoe permission to settle on his land. If such a traditional leader satisfied Moshoeshoe, his councillors and members of the Sotho nation at a *Pitso*, then the leader and

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[1461] Sanders *Black Leaders* 102. See 2, 3, 4 and 5 above.
[1462] http://www.lesotho.gov.ls/governview.htm, 05 May 2004.
[1463] See 3.2.1 above.
[1464] *Lifaqane* in Sotho is a term, which refers to the turmoil or wars of calamity, which swept the whole of Southern Africa. *Lifaqane* was also referred to as *Difaqane*. See 3.2.1 above.

his followers were given a piece of land to reside upon. The immigrant traditional leader would give Moshoeshoe a few head of cattle as *Peho,*[1465] that is a token that he recognized his sovereignty over the land and would respect his wishes in all matters concerning the country as a whole.[1466]

Sometimes *Peho* could be given to Moshoeshoe as an indication of peaceful intentions and relations and not that a particular traditional leader and his community wanted to be under his control and leadership. According to Sanders, Chief Moroka of ThabaNchu took steps to establish friendly relations with Moshoeshoe and in the course of negotiations, gave him some cattle not as *Peho* but as sign of friendly relations. Chief Moroka acted as an independent neighbour of Moshoeshoe and claimed the land around ThabaNchu on the grounds that he found it unoccupied. Moroka never submitted himself to the authority of Moshoeshoe.[1467]

Moshoeshoe united several chiefdoms into a nation and used the turmoil to become a strong leader. During the reign of Shaka a number of tribes were destroyed.[1468] The new Basotho nation was a political rather than an ethnic or linguistic entity. All the incorporated segments whether of Koena, Khatla or Nguni origin shared a common desire for security and accepted Moshoeshoe as a legitimate leader because of his ability to accept every man and women under his skilful leadership. Moshoeshoe was the provider for the nascent nation and was also responsible for safety and welfare to all irrespective of

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[1465] Sanders *Life and Times* 128. *Peho* is a Sotho word, which presupposes a token that was given to Moshoeshoe by traditional leaders of tribes, which joined him during Lifaqane. Such a token was recognition to Moshoeshoe's leadership and acceptance of his supremacy over such traditional leader and his subjects.

[1466] Sanders *Life and Times* 128.

[1467] Sanders *Life and Times* 134.

[1468] Burman *Chiefdom Politics* 6-7; Zuzman *Moshoeshoe the Statesman* 5. The Basotho nation emerged and consolidated in a dramatic and dangerous environment created by Lifaqane. Given this fact, it is an accurate analysis to expound that the founding of the Basotho as a unified nation took place seemingly miraculously, as Zuzman asserted, at a time when devastation and bloody conflict were the order of the day. In view of Zuzman it was during the *Lifaqane* that Moshoeshoe's superior military and political talent came to the fore. During that chaotic move of tribal disintegration, Moshoeshoe managed to build and consolidate many of the scattered tribes into a new nation and acquired for himself the status of a great traditional leader. Thousands of people starved to death and out of this unprecedented famine, *Malimo ba ja batho* emerged.

their individual origin. Through that approach Moshoeshoe was able to forge a sense of unity and togetherness among his people.[1469]

Moshoeshoe used negotiation and diplomatic tactics to build the Sotho nation. He successfully avoided the risks inherent in overt military confrontations. His ability to restore peace and prosperity increased the size and capacity of his following. Soon after Moshoeshoe had incorporated many other chiefdoms into his authority, the Basotho were referred to as *Sechaba*[1470] or a nation. The foundation of such a nation was peace and diplomacy engendered by Moshoeshoe.[1471]

It has been recorded that Moshoeshoe sought enemies where necessary and conciliated them where possible. According to Burman, there were two main motives for individuals and other chiefdoms to join Moshoeshoe. Firstly, to sought protection from Moshoeshoe and secondly, they joined him for material benefits. In order to achieve the former he humbled himself before defeated enemies in an attempt to prevent their return or speeding their departure.[1472]

Moshoeshoe's marked talent for diplomacy and timely payment of tribute to the Ndebele was a shrewd gesture that freed him from another attack by the Zulus. Burman explained that the Ndebele resolved never to attack him again and indeed they never did. To secure material benefits for his followers, Moshoeshoe entertained his visitors and provided food and drink to them at large meetings and celebrations. He also looked after the poor by providing

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[1469] Weifelder *Defining National Purpose* 10.

[1470] When Basotho speak about *Sechaba* they actually refer to a nation.

[1471] Zuzman *Moshoeshoe the Statesman* 6. As Zuzman explained in her Moshoeshoe Memorial Lecture: "The trouble of these days gave the great opportunity above all to one of the most sagacious and statesmanlike of Bantu Chiefs, one who was no mere bloody-thirsty warrior".

[1472] As quoted by Burman *Chiefdom Politics* 10. Burman cited in one of her sources an example whereby Moshoeshoe after an abortive attack on Thaba Bosiu by the Ndebele retreated with the following conciliating message: "Moshoeshoe salutes you. Supposing that hunger has brought you in the country, (I) send you these cattle, that you may eat".

the livestock under the *mafisa*[1473] system, whereby cattle and other livestock were given on long loan.

8.2.2 MOUNTAIN OF THE NIGHT

As stated above,[1474] Moshoeshoe created the Basotho nation through the application and observance of the principles of conciliation and peace. In 1824 Moshoeshoe led his followers to the natural fortress of Thaba Bosiu.[1475] Before they inhabited Thaba Bosiu, Moshoeshoe and his tribe of Basotho (between 2000 to 3000 people) occupied Butha-Buthe. Moshoeshoe became Chief in his own right although by then he was just a minor Chief.[1476] Due to the pressures of attacks from the Batlokwa tribe under Chief Sekonyela, Moshoeshoe sent a team of able-bodied men to look for a place of refugee.

[1473] Sanders *Moshoeshoe of Lesotho* 51; Nathan *Farming Out* 61. Mafisa is a kind of contract between cattle-owners and the destitute. What happened was that the rich would normally give the poor, cattle to look after. In return the poor would benefit from their labour by getting milk of such cows. The poor did not necessarily own such livestock. They were merely bona fide possessors. At the centre of the unification process of Basotho nation, credit should be given to the Basotho people themselves, more especially the rich cattle owners. These people used the patronage system of *mafisa*, in which a rich cattle owner borrowed one or more cattle to the poor. Moshoeshoe used the system of *mafisa* to attract followers. The Basotho were not the only people who used *mafisa* to build their kingdom. The system was also known and used by the Batswana. For example, the Bangwato used the system of *mafisa* to build a strong chiefdom of Bangwato in Botswana during 19th century. See 2.2 and 5.3 above. In 2.2 above, the word *ngoma* was used instead of *mafisa*. The loan of the cattle was perceived as a loan done in the spirit of generosity and poverty alleviation. It had never been interpreted as a form of human exploitation. Instead it was seen as a powerful tool to sustain the social welfare of the poor and eliminate poverty. However, it would be an incorrect analogy to conclude that the system of *mafisa* totally eliminated the economic imbalances and inequalities between the Basotho and Batswana. The inequalities remained and sustainable distribution of wealth was minimized. It would suffice to mention that through the *mafisa* arrangements, Moshoeshoe brought many people especially the destitute under his control and authority. This was the case during the Post-*Lifaqane* era since many people were left without property. Moshoeshoe liked to think of his people as his children and he gave his orders as naturally and easily as father within the family.

[1474] See 8.2.1 above.

[1475] Thaba Bosiu is a Sotho name, which in a loose model of speech refers to a Mountain of Night where Moshoshoe established his headquarters and took the refugee from chaos and disruption of the *Lifaqane*. In fact Thaba Bosiu is a mountainous place where Moshoeshoe built his fortress to protect his nation from the attacks propelled by the *Lifaqane*. Moshoeshoe was buried on the summit of Thaba Bosiu. Almost all the principal traditional leaders and the Kings of Basotho were buried in the graveyard summit of Thaba Bosiu. This is still the position even today.

[1476] See 8.2.1 above.

The advance party returned having found the hill, known then as Qiloane and later as Thaba Bosiu.[1477]

On his arrival on Thaba Bosiu, Moshoeshoe built his own village just above the main or *Khubele* pass, where he was also close to the back entrance of the *Ramaseli* path. Moshoeshoe located his father, Mokhachane at the southwest corner of the fortress and his brother Job occupied the fort of the mountain. Moshoeshoe also called the "Chief of the Mountain" was tolerant and farseeing, rare in many traditional leaders of Southern Africa. By 1827 there were about 3000 people on and around Thaba Bosiu and in 1828 there were approximately twenty-two villages around the foot, many of them victims of the *Lifaqane*.[1478] Moshoeshoe incorporated the Ntsane who lived on Thaba Bosiu into the Basotho tribe. He also gained access to their crops.[1479]

8.2.3 TRIBAL COMPONENTS OF THE BASOTHO NATION

As has been stated[1480] the Basotho nation was not homogenous. The following diagram of Sheddick represents the tribal structure of the Basotho at the time of nation building.[1481]

[1477] Tylden *History of Thaba Bosiu* 5–6. The name Thaba Bosiu took a legendary meaning. It was exaggerated that when night fell the mountain became bigger and more inaccessible. Tylden pointed out that this was practical propaganda of considerable value to the small tribe of Moshoeshoe who had just suffered severe setbacks. When attack after attack failed the legend became more and real, until superstition came to play no small part in the defence of the place. According to Tylden the name Thaba Bosiu or the Mountain of Night, was given because Moshoeshoe and his tribe arrived on the mountain after dark.

[1478] Tylden *History of Thaba Bosiu* 8. Those Basotho people of the mountain (Thaba Bosiu) were called the Rock Rabbits.

[1479] Sanders *Moshoeshoe* 9.

[1480] See 8.1.1 above.

[1481] Sheddick *Southern Africa* 14. Koena of Molepolole also represented the Koena group in the present Botswana. As already indicated, there were also various Koena tribes in the North West Province of South Africa. For an example, those groups are found in Bethanie (near Brits) Phokeng (near Rustenburg) and Mmatau (near Madikwe township). As discussed above that the Kgatla are most strongly represented in the North West Province of South Africa, particularly in the region of Saulsport near Rustenburg, there are also numerous representatives in Botswana. For example, Bakgatla-Ba-kgafela in Mochudi and Bakgatla-Ba-Mmanaana in Mosope. See 6.1 above. The Nguni included the Phuti, the Natal Nguni. This group was also represented in Kwazulu-Natal Province of South Africa. They are also found in large numbers in the Gauteng Province. In as far as the Cape Nguni are concerned, they also have representatives in Eastern Province, Gauteng, Western and North West Provinces of South Africa. For instance, in the North West Province, the Cape Nguni, commonly known as Xhosa are found in villages such as Khayakhulu, Kameelboom and Taung. In as far as the original settlers were concerned it was important to make

TRIBAL STRUCTURE OF THE BASOTHO NATION

SOTHO	**KOENA GROUP**	**-Koena (various)** **-Hlakoena** **-Khoakhoa** **-Fokeng**
	KHATLA GROUP	**-Khatla (various)** **-Kholokoe** **-Sia** **Tlokoa**
	TAUNG GROUP	**-Taung (various)** **-Hlalele** **-Taung of Moletsane** **-Kubung**
ORIGINAL SETTLERS		**-Phetla-Dinake (Matzatza)** **-Phuti-Polane** **-San**
NGUNI	**LATE NGUNI**	**-Natal Nguni-Bashoane's Tebele** **-Hlakoene** **-Hlubi**
	IMMIGRANTS	**-Cape Nguni-Thembu (various)** **-Vova's Vundle**

Table 4: Tribal Structure of the Basotho Nation

According to Sheddick, the tribes that contributed to the foundation of the Basotho were not only Sotho in origin but also Koena. The Koena group predominantly was numerically and politically dominant in the land of Basotho.

reference to the San as stated above. This group was absorbed into the Sotho nation, which led to the disintegration of the social, economic and political institutions of the San society in Lesotho.

This was a branch of the old Batlhakoana tribe.[1482] It appeared that the majority of the fragments constituting the Basotho nation were related segments of a broader Sotho cultural and linguistic group. However, as it was shown above, it is important to appreciate that other groups of Natal Nguni (Zulus) and Cape Nguni (Xhosas) as well as the San were incorporated.[1483]

8.2.4 DIPLOMACY, PEACE AND SECURITY

The traditional land tenure system of the pre-colonial Lesotho made provision for special fields called in Sesotho *masimo a lira*.[1484] Only traditional leaders held those fields. Members of the community were required and expected to provide labour in those fields free of charge. Moshoeshoe justified that system of *letsema* or tribute labour on a number of reasons. Firstly, tribute labour was regarded as a sign of appreciation and gratitude for the protection and provision of the means of subsistence provided by Moshoeshoe to individual members of the community. Secondly, the produce of *masimo a lira* was important food materials intended to feed the traditional army of Moshoeshoe during war. Moshoeshoe and traditional leaders also used the produce from *masimo a lira* to feed widows, orphans and the destitute in his nation. The institution of *letsema* was also important in political terms in that it was used as another brick to build the Sotho nation. The Basotho chiefdom used the institution of *letsema* to feed the nation from the *lira* lands.[1485]

However, as already stated above,[1486] many historical records refer to Moshoeshoe as a man of peace. Although Moshoeshoe was loved and respected, Sanders explained that he was also feared especially in those

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[1482] Macgregor *Basotho Traditional Native* 9. MacGregor who researched the traditional Basotho nation declared that the Bakoena came from Bapedi in what is today known as the Limpopo Province of South Africa, where they lived under Chief Mosito in the 17th century.

[1483] Weisfelder *Defining National Purpose* 9.

[1484] Rugege 1992 *LLJ* 44. In English the phrase *masimo a lira* refers to fields of the enemy. What it really meant by the Basotho was that those fields were supposed to feed the traditional army or regiments at the time of wars when their enemies attacked the tribe. In the absence of war *masimo a lira* were used to feed the nation.

[1485] Rugege 1992 *LLJ* 44. Many traditional leaders abused the system of *letsema* more especially during the colonial era. They turned the Basotho into a nation of slaves by making them plough lands of traditional leaders without food or payment.

[1486] See 8.2.1 above.

years before old age had begun to soften him.[1487] According to Thompson, Moshoeshoe once replied a letter of the Governor of the Cape Colony, Sir George Cotheart with the following words: [1488]

> For peace is like the rain, which makes the grass grow, while war is like the wind which dries it up.

Burman reported: [1489]

> Humanity, mildness and justice have always characterized his government, he has never been known to eat up his subjects, he forbade the punishment of death for witchcraft and has uniformly endeavoured to suppress the bloody feuds so common among African tribes.

8.2.5 DEMOCRATIC TRADITION OF THE BASOTHO

The systems of traditional government of Basotho were closer to confederacy of various clans, within which regional traditional leaders, owing allegiance to Moshoeshoe, enjoyed considerable independence. Members of the tribes also owed allegiance to their respective traditional leaders.[1490] Major decisions were taken after full consultation. The democratic tradition of the Basotho derived from the *Pitso*[1491] and was embedded in the Sotho proverb, –

[1487] Sanders *Chief of the Sotho* 51. According to Sanders when he was angry the people ran away and hid behind their houses. His French missionary and confidante, Casalias pointed out that the lion, Moshoeshoe had claws and although he used them less as he grew older, his followers still knew that they were there.

[1488] As quoted by Thompson *Survival in Two Worlds* (unnumbered page).

[1489] Burman *Chiefdom Politics* 11.

[1490] In *Makalasane Nomo v Chieftainess 'Mathebe Peete* (1967-1970) LLR 163-166, the court stated that the question of allegiance to the Chief is paramount amongst the Basotho and traditional leaders. That is why a Chief has power to reject subjects of bad character or known to be hostile to him and it is immaterial whether the headman has accepted them or not.

[1491] Burman *Chiefdom Politics* 11. *Pitso* was a Sotho general assembly in which every man or woman could express his or her views. In fact it was a sort of traditional parliament where men and women of major age were allowed to attend and participate in the proceedings of the assembly in respect of the affairs of the Sotho nation.

Morena-ke Morena ka Batho.[1492] Basotho political tradition was essentially democratic. Weisfelder explained this political democracy as follows:[1493]

> In Sesotho...(there is a) saying that a Chief is a Chief because of the people. In other words it means that he remains Chief so long as he protects the interests of his people, and rules them according to their wishes and not his whims and idiosyncrasies. This saying express a very great fundamental truth and explained the nature of chieftainship in a manner that was accepted by all democratic countries the world over. It means that chieftainship was the product of the wills, the desires, the sympathies and the thought of men over whom it ruled. It was constituted by comradeship in work by fellowship in purpose and in hope, by a general desire for and a general willingness to submit to constituted authority that would be the protector of the interests of the ruled and not of a privileged section. Take away this desire, this willingness, this sympathy, and there is no chieftainship.

Prince Seeso Seeso of Lesotho, the younger brother of King Letsie III correctly uttered in line with traditional leadership that a traditional leader had to be in the same camp as his people and be visible and accessible. To emphasize this point, the Prince quoted the Basotho saying, "the Chief is a bucket of shit!" He stressed the fact that with this expression the people under traditional leadership should go to a traditional leader and empty all their excrement on him as if he is a toilet and he should not protest and should be ready the next time when needed again. The access of the people to the traditional leader was a very important element for good traditional governance.[1494] Zuzman likened the Basotho concept of democracy with the Greek model.[1495]

[1492] The Sotho phrase *Morena ke Morena ka batho* literally means that a Chief is a Chief by the grace of people. See also 2.1, 2.2 and 2.5 above.

[1493] Weisfelder *Political Contention* 9. Weisfelder concluded: "An unresponsive chieftainship must beware lest it be superseded and sent to join the mesozoic reptiles upon the evolutionary scrap-heap of discarded political experiments."

[1494] www.afrol.com/features/,05 May 2004.

[1495] Zuzman *Moshoeshoe the Statesman* 11. According to Zuzman, *Pitso* or general Assembly reminded Lord Bryce of the *Agora* or Assembly of Freeman described in the Homeric Poems. Zuzman stated that Lord Bryce was struck by the freedom and intelligence with speakers in Pitso declared their views. There was a Sotho proverb, which says that: "A

Freedom of speech was guaranteed in the *pitsos*. Usually male members of the community were offered an opportunity to debate public issues without fear or under any duress. This role enhanced their participation in traditional government. It was that freedom of speech, which was accorded, to the Basotho, which formed a strong foundation of the customary constitutional right of the Basotho. This right was guaranteed to every member of the community irrespective of his station in life, status and position in society. According to Mahao, this traditional constitutional right of the Basotho was expressed in Sotho maxim "*Mooa khotla ha tsekisoe.*"[1496] This right to allow people to express themselves and constructively criticize the authority was viewed by Mahao as the most important democratic aspect of traditional society.[1497]

People also played a critical role in judicial matters at the *lekhotla.*[1498] People shared with traditional leaders the work of hearing complaints and trying cases. A typical *lekhotla* was made up of the traditional leader and his councillors but other men were allowed to participate in the proceedings. Procedures in the proceedings were democratic and flexible to the extent that attendees were in charge of the process to lead evidence and to cross-examine witnesses. Of equal importance was the fact that persons in attendance were all free to question witnesses and had right to give evidence as well. This system, as Mahao alluded to was characterised by popular participation in the process of justice distribution. However it must be noted

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man who makes a mistake in public assembly cannot be killed". Zuzman cited Lord Bryce wondering if in this proverb was not to be found the germ of the English "privilege of parliament". Zuzman further expressed the view that such a comparison by Lord Bryce was an exciting and interesting analysis.

[1496] Mahao 1993 *LLJ* 163. The above Sotho proverb is literally translated to mean that criticisms at a public meeting could not be visited with sanctions. It was a common phenomenon among the Basotho to express themselves in the general assembly without being prejudiced or victimised.

[1497] Mahao 1993 *LLJ* 163. Mahao observed that speakers at the *Pitso* always referred to the above-mentioned Sotho idiom as a reminder to the rulers that freedom of speech was a constitutional right. It was said no retaliation could be visited on a subject who exercised his right to freedom of speech to rebuke conduct of his traditional leader. Mahao justified that practice when he said that freedom of thought and freedom of speech were the foundations and guarantee of the national rights of subjects. They were allowed to express their opinion on the Chief's conduct quite openly, if they disapproved of it, they said so with a virile and eloquent boldness that a fiery Roman tribune would have envied.

[1498] *Lekhotla* is a Sotho institution of a traditional court where a traditional leader, his councillors and adult men and women tried cases under Sotho law. See 5.2 and 5.3 above.

that although adult members of the community were allowed to participate in the judicial process, the traditional leader normally pronounced judgement.[1499]

Those proceedings were informed and consequently constituted what Mohapelo termed "a tournament of wits"[1500] in which everyone participated. The hearing would normally come to a conclusion when the *"Banna ba lekhotla"*,[1501] (men of the court) gave and summed up their opinions and finally the traditional leader pronounced his judgement.[1502]

Another important institution that traditional authority used to deepen the Basotho tradition of democracy was known as *Lekhotla La Baeletsi.*[1503] In Tswana there were also those advisers who are called *Dikala tsa kgosi.*[1504] This institution played a crucial role in advising the traditional leader in all matters of traditional administration. Strictly speaking, it was difficult to talk of chiefdom or a traditional leader without reference to his advisers. Mahao noted that:[1505]

> In order to get anything done the Chief must first gain the co-operation of his advisers and headmen, who play an important part in restraining his more arbitrary impulses. Any attempt to act without them is not only regarded as unconstitutional but will also generally fail.

Moshoeshoe used his Council as a decision-making body and also as an advisory institution. Moshoeshoe ruled his people wisely and with justice and skill and was looked upon as the *Ntate Moholo*[1506] of his people and the most

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[1499] Mahao 1993 *LLJ* 162.
[1500] Mohapeloa *Tentative British Imperialism* 8.
[1501] Mohapeloa *Tentative British Imperialism* 8. In Sesotho the phrase *Banna ba lekhotla* is loosely translated to mean men of a traditional court who took part during the proceedings of the court.
[1502] Mohapeloa *Tentative British Imperialism* 8. See also 5.3 above.
[1503] This special institution refers to the Council of advisers of the Paramount Chief.
[1504] Mahao 1993 *LLJ* 105. *Dikala tsa Kgosi* refered to the right hand men of traditional leaders. Those men needed not necessarily be members of the royal family. See 5.3 above.
[1505] Mahao 1993 *LLJ* 105.
[1506] *Ntate Moholo* literally means an old man. Sometimes the term might be used to refer to the great father. That is someone who is not an ordinary father but who commands high

sacred form of oath was that which swore "truly by Moshoeshoe". Veneration of and respect for Moshoeshoe's chieftainship had a pragmatic base, for those traditional leaders under his patronage had the responsibility to extend his respect to their subjects.

8.2.6 CHRISTIAN MISSION AND CIVILIZATION

Another important dimension that was added on the process of Basotho's nation-building was the role and the contribution of the French missionaries. The missionaries influenced and changed the landscape of traditional leadership and the life styles of traditional communities. Various tribes and traditional leaders including Moshoeshoe benefited materially from the missionaries. Many traditional leaders and Moshoeshoe in particular obtained guns and horses from the missionaries for the protection of their communities.[1507]

Burman gave a brief description of Moshoeshoe's character and human qualities as alluded to by the French Missionary, Anbousset:[1508]

> In everything this African prince has shown a tact, which, I admire extremely. His affability has not

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respect in a family and the entire community. This was of course the case with Moshoeshoe.

[1507] http://www.lesotho.gov.is/governview.htm, 05 May 2004. In his desperate need for protection, Moshoeshoe after hearing that tribes benefitted materially from the missionaries sent cattle to induce a missionary to stay with him. Moshoeshoe's main aim to stay with the missionaries was to obtain guns and horses for his people. As a result three missionaries of the Paris Evangelical Missionary Society, Thomas Arbousset, Eugene Casalis and Constant Gosselin came to Thaba Bosiu in 1833. Adam Krotz, a Coloured Christian, introduced these important influential men to the Moshoeshoe. The arrival of the French missionaries in Basotholand began an impressive road and honourable task of civilizing the Basotho. Two of the missionaries were settled at Morija and Casalis was allowed to establish a mission at Thaba Bosiu. Within a short space of time, Casalis was a close friend and confidant of the Great Chief, Moshoeshoe, and also acted as the foreign secretary for him. Other missionaries who were welcomed in Basotholand by Moshoeshoe included among others, Bishop Grey of the England Mission and the Christian forces of the two members of the Oblates of Mary Immaculate, a French Roman Catholic Church. The latter found a new settlement known to Basotho as Roma. It was that Roman Catholic Church that played a vital and pivotal role in the establishment of the present National University of Lesotho at Roma.

[1508] As quoted by Burman *Chiefdom Politics* 8. Burman wrote: "At once fearless and cautious, very wary of entering upon a quarrel but having once embraced upon one, he carried it through with an intrepidity with nothing could doubt. He could see farther ahead than most men and no matter what checks he encountered, he never lost sight of the end in view."

> flagged for a single moment. Vivacity, gaiety, nothing is lacking, in him. He speaks to everyone without regard to age or rank. He even amuses himself with the children, even more astonishing, his memory is so good that he seems to know the home and history of each of his subjects. I leave to the imagination whether with such qualities, he is popular among them.

His unique abilities and leadership qualities impressed not only his people but also white officials of the Orange Free State who negotiated a question of Basotho land at the Convention of Aliwal North. He also impressed both his friends and missionaries alike.[1509]

Elaborating on the welcome note of Moshoeshoe to the missionaries, Thompson quoted Moshoeshoe's pronouncements as follows: [1510]

> My heart is white with joy. Your words are great and good. It is enough for me to see your clothing, your arms and the rolling horses in which you travel, to understand how much intelligence and strength you have. You see our desolation. This country was full of inhabitants. Wars have devastated it. Multitudes have perished, others are refugees in foreign lands. I remain almost alone on this rock. I have been told that you can help us. You promise to do it. That is enough. It is all I want to know. Remain with us. You shall instruct us. We will do all you wish. The country is at your disposal.

The French missionaries were deeply surprised by the appalling socio-economic conditions they found in Basotholand. They referred to Basuto culture as savage.[1511] Casalis and his colleagues were optimistic about the

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[1509] Burman *Chiefdom Politics* 9.

[1510] Thompson *Survival in two Worlds* 75.

[1511] Eldredge *South African Kingdom* 75. Eldredge quoted one of the French missionaries as saying: "All that I have heard and said about (Basotho) in France, I believed it. The indigenous people dressed in a fashion extremely primitive, the routes still more primitive, studded with high steep crags, often perpendicular except very vaguely, the pagan villages, without any trace of civilisation. In general, I would never have believed Southern Africa still so savage."

success of their evangelising and their civilizing of Basotho.[1512] Traditional leaders encouraged thier followers to accept the teachings of the missionaries.[1513]

Sanders maintained that many traditional leaders were not Christians but they allowed the missionaries entrance and encouraged their teachings. For example, Moshoeshoe himself was not a Christian and not even baptised into the church. Although some of the traditional leaders were baptised into the church, contact with the missionaries influenced them to make at least a number of considerable changes in their personal lives and Basotho customs. Converts were generally seen as lost to the chiefdom and were also regarded as non-Sothos. There was the belief that if Moshoeshoe would have been converted, he could have been lost to the chiefdom and in turn the chiefdom would have been lost to him. Moshoeshoe allowed Christianity with one foot but the other foot was still strongly rooted in his traditions.[1514]

The contact of the Basotho with the missionaries had far reaching socio-economic and political effects on their life. The missionaries introduced vegetables such as potatoes, wheat, fruit trees and domestic animals such as cats and pigs. They also opened schools and printed books in the Sesotho language.[1515]

The Paris Evangelical Mission society had an uncompromising attitude towards the Sotho customs of polygamous marriages and initiation schools.[1516] These attitudes induced fear among the most conservative

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[1512] See 3.2.4 and 6.2.8 above.

[1513] Thompson *Survival in Two Worlds* 79-80. According to Thompson in 1842 Moshoeshoe told the cannibals that: "It is the Gospel that is the source of the prosperity and the peace which you enjoy and I am perfectly satisfied that any nation that does not enjoy the instructions of religion is lost."

[1514] Sanders *Moshoeshoe of Lesotho* 26-27. According to Sanders, Moshoeshoe died two days before he could have been baptized. Although he was not a Christian, he agreed with his missionaries that Christianity was the truth despite the fact mentioned above that he was never baptized into the church. He had strong attachments with the old Sotho ways of life and had a great veneration for his ancestors. He knew that once he became a Christian many of his people would reject him as their traditional leader.

[1515] http://www.Lesotho.gov.is/goverview.htm, 05 May 2004.

[1516] Initiation schools were those institutions which taught young men the principles of manhood and family responsibilities. Young girls also attended the initiation schools for a

elements in the country. Traditional leaders permitted those changes because they did not want a sour relationship between them and the missionaries. Moshoeshoe banned initiation schools to which Basotho attached the utmost importance. A considerable number of his sons did not attend initiation schools. He also made it clear that women who have converted to Christianity should not be forced to enter into a polygamous marriage. According to Burman, he granted letters of divorce to many of his wives who had converted since they would not be admitted to church membership unless they separated from him.[1517] Burman explained: [1518]

> His decision to separate from those women was not a private arrangement simply between himself and the women but it was proclaimed in a Great Assembly of the people in 1840. Some of the heathen present raised their voice in the meeting to oppose the introduction of the new customs and even threatened one of the counsellors of Moshoeshoe with instant death for advising the Chief to divorce his wives. But Moshoeshoe was firm.

Even though traditional leaders as well as Moshoeshoe were careful not to exceed the limits of his people's tolerance to new Christian ideas and standards of western civilization, such foreign ideas fragmented some of the precious traditions of the Basotho and their ways of life. Although the missionaries helped Moshoeshoe to build the Sotho nation, it was equally true to mention that they also played a critical role to some an extent to disintegrate the Sotho culture and traditions. From the beginning of their contact with the Basotho, the missionaries used their influence and material power to change their customs.[1519]

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similar reason of teaching them the responsibilities attached to womanhood. See also 5.3 above.

[1517] Burman *Chiefdom Politics* 12-13.

[1518] Burman *Chiefdom Politics* 13.

[1519] Throughout Africa, the missionaries used their influence to Christianise and civilize the Africans. In the course of their mission they introduced the European values into the lives of the Africans. Hence Basotho customs and traditions were also altered during their contact with the missionaries. See 3.2.4 and 6.2.8 above.

8.2.7 SOTHO LAND TENURE AND BOER INVASION

Moshoeshoe's creation of the new nation was also compounded with threats imposed by the Voortrekkers who reached the Caledon valley in 1836 where protracted conflicts over the land began. The conflict was made worse by the fact that both the Boers and Basotho had two systems of land ownership and use. The concept of individual land tenure was foreign to the Basotho. According to them the land belonged to the nation with the Paramount Chief (Moshoeshoe) as 'trustee' for the nation. Therefore, rights given to the Boers to use the land for grazing or residence were seen as a temporary ownership of land that had nothing to do with permanent ownership.[1520]

In pre-colonial Lesotho one of the crucial roles played by traditional leaders was that they controlled access to land for purpose of residence, cultivation and grazing. It must be emphasized that traditional leaders were not necessarily owners of land.[1521] In practical sense, Moshoeshoe and his subordinate traditional leaders only had the power of control and allocation and not the right to own property. The underlying principle of land ownership was that the people and not individuals owned the land collectively. This implied that what was given to the family was not ownership of the land, but the right of use of the land. The power of the traditional leadership in the allocation of land rights was also found in the laws of Lerotholi,[1522] where it was laid down that all traditional leaders and headmen must by law provide people living under them with lands to cultivate. Hence, Rugege gave the description of communal land as follows:[1523]

[1520] Zuzman *Moshoeshoe the Statesman* 6-7.

[1521] See 2.2 and 5.4 above.

[1522] Witzsch 1998 *LLJ* 417. The Laws of Lerotholi are a collection of rules in part of Sotho customary law. They have been so called after the Paramount Chief Lerotholi who confirmed a number of laws approved by the Basotholand Council established in 1903. According to Witzsch the Laws of Lerotholi are divided into three categories namely: Part I which contained the "Declaration of Basotho Law and Customs, Part II which refers to "Rules Issued by the Paramount Chief Lerotholi with the approval of the High Commissioner and Part III containing "Orders Issued by the Paramount Chief Lerotholi'. See 9.2 below.

[1523] Rugege *Chieftaincy and Society* 89. Land in Basotholand traditionally belonged to the Basotho nation. Every member of the Sotho nation had certain vested rights to the land. See in this regard Perry *Land and Politics in Lesotho* 58.

> The sale or transfer of land is unknown to these people. The country is understood to belong to the whole community and no one has the right to dispose of the soil. The sovereign Chiefs assign to their vassals the parts they are to occupy and these latter grant to every father of a family a portion of arable land proportionate to his wants. If he goes to settle elsewhere he must restore the fields to the Chief under whom he holds them in order that the latter may dispose of them to some other persons.

The pre-colonial Basotho traditional authorities firmly laid down the rule that the land belonged to the people and not to any individual - that the land was held in trust for the whole nation by the Paramount Chief and that it was inalienable. For example the traditional leaders and Moshoeshoe made that law very clear throughout land negotiations with the Boers and traders alike. According to traditional leaders Basotholand was an African territory reserved exclusively for the Basotho. The most important question which arouse in relation to Moshoeshoe's claims to land was: What was the extent of the territory which Moshoeshoe could rightfully lay claim? As Sanders elaborated that question could not be answered by reference to any clearly defined boundaries because such boundaries were unknown.[1524]

Moshoeshoe was not always consistent with his land claims. He sometimes claimed land not because his people occupied it but because people had lived there either before or after the *Lifaqane*. White traders were welcomed subject to the traditional leader's permission to open their business on land but they were not granted title of the land they occupied.[1525] Traders were not allowed to sell liquor in Basotholand. Moshoeshoe followed a custom that a traditional leader should never drink liquor since this might hinder him in his work.[1526]

[1524] As quoted by Sanders *Life and Times of Moshoeshoe* 130. For example when certain immigrants asked Moshoeshoe in 1833 if a particular area belonged to him, he replied: "Yes and you see by my people wherever they are, that is my land". According to Sanders when he was pressed by the Boer leader, Potgieter to define the extent of his country, he commented: "It extends as far as ...(my) foot had trodden and ... (my) people are living."

[1525] Suzman *Moshoeshoe the Statesman* 11. Moshoeshoe expounded his Law of Trade when he declared that there was no place belonging to the whites in his land and he had granted no white man a place either by word or by writing.

[1526] Sanders *Moshweshwe* 8. The Great Chief Moshoeshoe was once noted as saying that "If I were to drink, I should be talking folly before my people."

Of much importance was the fact that during the formative period of the Basotho nation the relationship between the traditional leader and land was vital. Those two variables were inseparably connected and they were important instruments that provided and promoted resistance against the invaders and Boer farmers. Traditional leaders were expected to defend their people together with their property, particularly land, cattle and houses. A traditional leader was responsible for the maintenance of law and order in his chiefdom. For the purpose of defence of property (land), the traditional leader was required to be military prepared. In pre-colonial Lesotho such military forces were organized into *Mabotho*.[1527] Each traditional leader had his own regiment built by his initiation mates, *Lithaka*.[1528]

The new Basotho nation struggled and fought with the Boers,[1529] the British and the Orange Free State burgers to preserve and sustain itself.[1530] When the missionaries arrived in Basotholand the Sotho population was trapped in a cocoon of famine and local war. Drought was coupled with food insecurity and various diseases such as typical fever, small pox and influenza. The Boers who raided Basotho cattle and crops in 1865 and pursued a policy of total destruction deliberately fostered famine and diseases that prevailed in Basotholand.[1531]

[1527] The regiments were military institutions where able-bodied men were organised as traditional troops to defend the tribe in times of wars. They were also used to carry out the public works such as building dams, ploughing the fields of the tribe and so on. See 2.3, 5.3 and 8.2.4 above.

[1528] *Lithaka* is a word that has two meanings in Sotho. Firstly it presupposes the initiation mates. Secondly it refers to the members of the same age group.

[1529] Patrick *Economic Conditions* 1.

[1530] Patrick *Economic Conditions* 1.

[1531] Eldredge *Southern Africa Kingdom* 79. Eldredge explained that the nature of famine and its causes in Basotholand when he stated that it must be remembered that the Boers had burnt all the villages and carried off the maize and mabele, burning that which they could not take away with them. The cattle of the Basotho had been seized. Thus began a long time of suffering which lasted for over three years. Famine made terrible ravages among them. These wretches dug up the bones of the cattle that had thrown themselves from the rocks at the time of the siege, to try to find yet some remains of tendon or skin. In the early morning at dawn, girls and women were seen leaving for the fields to try to gather some grains of grass or some roots. They came back at night with tiny handful of these seeds that they made into broth for their little children.

It was under those desolating circumstances that Basotho signed the Treaty of Thaba Bosiu with the Boers. Through the signing of that Treaty, the Basotho were forced to grant vast agricultural land to the Boers. According to Eldredge the Treaty of Thaba Bosiu was called "The Peace of Sorghum". In light of the pressing famine and the Boer invasion on the Basotho land, traditional authorities had no choice but to ask for the protection from British Crown.[1532]

According to Pheko, Moshoeshoe spoke about his stolen country in 1856 and said:[1533]

> It may be (that) you, White people do not steal cattle, but you steal (the) whole country and if you had your wish you would send us to pasture our cattle in the clouds.

When the Boers annexed more and more land, Moshoeshoe appealed to the British for the protection of his lands. This resulted in the Napier Treaty which made Moshoeshoe "a friend and ally" of the Cape Colony and a soldier of the Queen.[1534] It is argued that even though Basotho lost large tracts of land to the Boers, Moshoeshoe succeeded in his assignment of nation creation because his enemies (the Boers) also assisted him. Technically it is implied

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[1532] Eldredge *Southern Africa Kingdom* 79; Joubert and Brits *History for Standard 9* 117; Patrick *Economic Conditions* 1; Pheko 1987 *LLJ* 151-152. It was during that time that Mabotho were needed for the protection of land. During that struggle for the preservation of land, the Basotho forfeited vast tracks of their land through the peace Treaty of Thaba Bosiu. Among other things, the Treaty of Thaba Bosiu laid down the following demands to Basotho, namely, Moshoeshoe was ordered to pay 3000 head of cattle as compensation, he also agreed to the annexation of the conquered territory to the west of the Caledon by the Free State and furthermore Moshoeshoe was to see to it that his subjects vacate the conquered territory. The present day boundaries of Lesotho were fixed by the two Treaties of Aliwal North of 1858 and 12 February 1869, in terms of which most of the rich agriculture lands were ceded to the Orange Free State. As a result, Moshoeshoe wrote to the leader of the Boer trekkers, "when the Basotho said Whites crossed the Orange River they wondered at it. They crossed by lots. They begged from the Blacks for pastures one by one, in good, soft manner and Basotho did not know that they would appropriate the land to themselves". Pheko further explained that Moshoeshoe wrote to Sir George Grey and said among other things that "he gave the Whites permission of living in his country and they never obtained any right to property to the soil from him. Had he granted that, such a right should have been contrary to the law of the nation that allows no such alienation of land."

[1533] As quoted by Pheko 1987 *LLJ* 152.

[1534] Suzman *Moshoeshoe the Statesman* 6-7.

that without the Boers and the architects of *Lifaqane,* Moshoeshoe would have not created the Sotho nation.[1535]

8.8 CONCLUSION

What follows from the above discussion is the fact that traditional leadership played a pivotal role in the creation of the Sotho nation. It is through intelligence, diplomatic skills and bravery of Moshoeshoe that traditional leaders were united and influenced the process of nation-building. Moshoeshoe expanded his territory through *peho*[1536] (the system of placing) where he placed his senior family members as the traditional leaders over other tribes. He created a kind of confederacy, which acknowledged his superiority.

The arrival of the missionaries also influenced and to some extent changed the traditional set up of the Sotho traditional communities. The socio-cultural and economic patterns of the traditional life of Basotho were greatly affected by the activities of the missionaries.[1537] In the area of diplomacy Moshoeshoe used missionaries effectively. He used them a lot in terms of teaching his people. The encroachment of the Boers in the land of Basotho also played a mayor role in the alteration of the traditional boundaries of the Sotho communities.[1538] The period characterized by internecine wars and treaties were used by the Boers to take land from Basotho. The arrival of the Boers on the highveld also consolidated nation-building. When the Boers arrived chiefdoms which were not strong joined Moshoeshoe where they came under his jurisdiction. There is no doubt that Moshoeshoe and the Sotho traditional leaders played an important role within the Sotho traditional communities.

[1535] In as far as the Boers were concerned, it seemed that the Great Trek had also added value to Moshoeshoe's efforts to build the Sotho nation. The Boers occupied much of the land around the Sotho and this made it impossible for his subordinate traditional leaders to migrate and break away from him. The Sothos had to unite in order to resist the Boers. War, famine and other factors of human suffering availed those opportunities for nation-building.

[1536] See 8.2.1 above.

[1537] See 8.2.6 above.

[1538] See 8.2.7 above.

CHAPTER 9: COLONIAL RULE

9.1 BASOTHO AND CAPE COLONIAL RULE

Due to the continuing conflicts between Basotho and the Free State Boers over a question of land,[1539] Moshoeshoe realised his precarious position and asked British protection from Sir Wodehouse, the then new High Commissioner who arrived at the Cape in 1861.[1540] At that time, the Basotho experienced regular attacks and invasions by the Boers. Those encroachments threatened the existence of the Basotho as a nation. For instance, in 1865 the Seqiti war erupted in which Thaba Bosiu was besieged and a Boer commander Wepener was killed. In 1867 Free State Boers conquered almost every lowland of the Paramount Chief Moshoeshoe and his traditional leaders except Thaba Bosiu. At the centre of this crisis, Sir Wodehouse secured the British permission to annex the country of Basotho.[1541]

[1539] Ferguson *Anti-Politics Machine* 38. Land has not been abundant in Basotholand since much of it was lost to the Boers.

[1540] Stevens *Lesotho, Botswana and Zwaziland* 22; Zuzman *Moshoeshoe the Statesman* 13; Schwager and Schwager *Lesotho* 79 In 1860, Moshoeshoe reiterated his request to be restored as one of the Queen subjects. At that time he was growing old and was unable to deal with rival traditional leaders and the Boers who wanted more land to increase their power and territories. In view of that protracted conflict with the Boers, Moshoeshoe sought protection from the Queen as a matter of extreme urgency. He took advantage of one of the new Cape Colony Governors and High Commissioners, Sir Wodehouse. See 8.2.7 above. Moshoeshoe wrote to Wodehouse and declared that while he was not altogether unable to defend his country, he could not keep it from constant threat of attack. Security could be had only if the Basotho were recognised as the Queen's subjects. Should the Queen be willing to appoint an agent to live with him and be her eyes and ears, he would gladly receive him. Moshoeshoe's appeals, for British protection were couched in circumscribed terms. He also approached Sir George Grey and remarked, "if only you will rule my people through me there will be no trouble. They will follow me and I will follow you." Moshoeshoe went on to plead for protection to a British Agent. He categorically stated that: "he would be under the Queen as her subject and his people would be her subjects but under his control so that the Queen ruled his people only through him. He wished to govern his people by native law, by his own laws, but if the Queen wished after this to introduce other laws into his country he would be willing and wished such laws to be submitted to the Council of Basutos and when they were accepted by his Council, he would send them to the Queen and informed her that they became law." See also in this regard Burman Chiefdom Politics 17. Burman argued that Basotho asked for British rule and protection out of military necessity and not because they desired it for itself. On the other hand the British government accepted the request for protection because they feared the Boer activities. As a result they received the Sotho as their subjects.

[1541] http://www.Lesotho.gov.ls/goverview.htm, 05 May 2004. Weisfelder *Defining National Purpose* 4. It is argued that it was a moot question whether the Basotho nation could have survived in the absence of the protection provided by the British colonial rule. The Boer

Basotholand was placed under the British rule in order to prevent encroachment by the Boers of TVL and OFS. Basotholand was annexed in 1868 and incorporated in Cape Colony for a short period and later restored to direct British rule under the High Commissioner of South Africa in 1884.[1542] Sheddick was of the view that since the incorporation into Cape Colonial administration, Basotholand had experienced three different systems of external government. The first external administration manifested itself when the Basotholand was placed under the control of the Colony of Cape of Good Hope in 1871. The second external authority of Basotholand was under the rule of the magistrates. According to Sheddick this administration was not effective and efficient. The third external government was the Crown administration where the territory had been administered through a representative in the office of the High Commissioner.[1543]

The British protection sought by Chief Moshoeshoe and other Basotho traditional leaders from the Cape Colony was not without problems. When the

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invasion over the farmlands of Basotho and series of confrontations diminished their ability to resist. Therefore, those confrontations and wars with the Boers forced the Basotho to sought protection from Britain. Weisfelder stressed that if Britain could have not declared Basotholand a Protectorate with the primary aim to reduce and curtail the Boer invasion of the Sotho land, the entire nation would have been conquered.

[1542] Taylor *Doctor to Basuto, Boer and Briton* 55; Rosenthal *African Switzerland* 11. When the Cape Colony annexed the country of Moshoeshoe to the British Crown, it was officially called Basotholand. It became a British Colony on 12 March 1868. In 1871 the territory was formally annexed to the Cape Colony. In 1883 the British government again took over control of Basotholand and administered it as one of the High Commission Territories together with Swaziland and Bechuanaland until independence in 1966. Basotholand was termed the African Switzerland by some historians. Rosenthal maintained that to call Basotholand the "African Switzerland" was something more than a figure of speech. He asserted that both Basotholand and Switzerland are mountain commonwealths that had succeeded after many wars, conflicts and strife in preserving their identities against big neighbours that surrounded them. It was evident that both the Basotho and Swiss were warrior nations who fought tooth and nail to preserve and protect their nationhood. In size the two regions did not differ greatly. Switzerland had an area of 15,944 square miles, while that of Basotholand was 11,716 square miles. The uninhabitable part of Switzerland covered roughly the same proportion of the total, as did that of Basotholand. Both countries served as the most important watershed and source of rivers. For instance, Switzerland, the "home" of Rhine, the Rhone and the Po while Basotholand fathered the Orange River, the Tugela and a host of streams upon which depended the welfare of Southern Africa. Despite these similarities, there are also differences between the two that might be observed. Switzerland is one of the most civilized countries in the world with a transportation system, great power stations, highly developed industries and so on. Basotholand is one of the poorest and wildest countries in Africa.

[1543] Sheddick *Southern Africa* 44.

Cape Colony annexed Basotholand, the Cape authorities applied to Basotholand the same laws and methods, which it found convenient for administrating other areas annexed by force. Matters became worse when the Cape administration imposed the *Disarmament Act*[1544] on the Basotho in terms of which all the firearms were to be surrendered by the Basotho to the magistrates.[1545]

9.2 REGULATION OF INSTITUTION OF TRADITIONAL LEADERS

The colonial officials issued various policies and regulations to deal with traditional leaders.[1546] The Cape colonial administration adopted laws to dominate Africans within the Cape colonial region and extended them to Basotholand. The High Commissioner of the Cape Colony displayed his conscious effort to destroy the power of the traditional leaders, when he wrote to Griffith, the governor's Agent in Basotholand in 1871 that: [1547]

> To the policy of keeping the Chiefs on bad terms with a view to play off one against another, however successful in Kaffaria where different tribes are to be found, it strikes me as scarcely applicable to Basotholand which is principally inhabited by a homogeneous race long under the sway of one family race.

The first step the Cape administration took to disintegrate the powers of traditional leaders in Basotholand was when the authorities replaced traditional courts with those of the magistrates and reduced the judicial powers of traditional leaders. The traditional leaders opposed the Cape colonial authorities to reduce their powers.[1548] Despite the administrative

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[1544] Act of 1871.
[1545] Sheddick *Southern Africa* 44.
[1546] Eldredge *South African Kingdom* 167.
[1547] As quoted by Eldredge *South African Kingdom* 167.
[1548] Saunders *Black Leaders* 105. Chief Masopa was in a vanguard of opposition against the administration. Saunders cited one magistrate who stationed with Chief Masopa saying that "Chief Masopa, while professing loyalty before anyone favourable towards the Government, does, I regret to say, all he dares is to keep his followers from becoming acquainted with

efforts to avoid confrontation with Chief Masopa, Masopa continued to defy and oppose the laws of the administration.[1549] Chief Letsie I was reluctant to support Chief Masopa as he was under the control of the governor's agent and the missionaries.[1550]

The Cape colonial government was concerned with the law enforcement rather than development of the Basotholand. It seems the British endeavours to prevent the Basotho to develop were political rather than economic. The Basotho fiercely objected that they had no say in colonial policies or use of funds derived from their taxes. Twenty-three Basotho traditional leaders including Paramount Chief Letsie I wrote a petition to the Governor of Cape Colony to highlight their concerns: [1551]

> It appears also fitting that since Basothos pay taxes they should be represented where the disposal of these is discussed. That it is therefore the humble prayer of your Excellency's humble petitioner that such steps may be taken as may be deemed fitting to procure Basothos some representation in the Council of government, of which their country now forms an integral part.

The Cape colonial authorities wanted the Basotholand Colony to pay for itself. The Basotho had always provided tribute labour as a form of taxation benefiting their traditional leaders. When the colonial government introduced a system of taxation in Basotholand, the authorities abolished *letsema* because they feared that this interfered with the Basotho ability to work in their own fields to obtain money to pay colonial taxes. By abolishing the system of *letsema,* the colonial administration destroyed the backbone of the traditional leaders' power and wealth.[1552]

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and obeying the instructions and laws of the Government and to uphold the continuance of their heathenish customs."

[1549] Saunders *Black Leaders* 105. According to Saunders, it was Chief Masopa who spoke openly at a *Pitso* against the administration's policy of depriving traditional leaders of their judicial powers.

[1550] Saunders *Black Leaders* 105. As Saunders observed, another contributing factor was that Chief Letsie was too old, fat, sick and had a vacillating personality.

[1551] As quoted by Eldredge *South African Kingdom* 168.

[1552] Eldredge *South Africa Kingdom* 173

The 1878-9 Zulu war, which marked the early British defeats at the Battle of Isandlwana and the effects of Moorosi rebellion,[1553] had a negative impact on the Basotho.[1554] It changed colonial rule and the attitude of blacks towards whites. Some tribes took up arms against the colonial government,[1555] which led to the introduction of the *Disarmament Act*.[1556] The Act provided that no native would be allowed to arms of any kind, guns or *assegais*. Those who were already in possession of such arms were instructed to deliver them to the magistrates within a given time. Owners were to be paid out cash in comparison to the value of their weapons.[1557]

The loyalty of Basotho to their new Cape colonial government was put to test when the armed forces in Basotholand were used to quell Moorosi rebellion in 1880. The Cape government became more unpopular when it introduced measures designed to divide the Quthing District into white farms.[1558] The Basotho felt that since 1844 they had been unjustly deprived of their land, for example the Matatiele District by the British and Cape government. The confiscation of Quthing was another step by the Cape Government to alienate Sotho land for white farms.

The *Disarmament Act* caused division among the Basothos. While a few remained loyal to the colonial government, the majority refused to hand over

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[1553] Chief Moorosi, the veteran chief of Baphuting, a subject of Moshoeshoe since 1825, became independent when he migrated South across the Orange River in 1846. Moorosi built a great chiefdom of Sotho, Nguni and San. When the British annexed his area which was known as Wittebergen Native Reserve and later Herschel Reserve without his permission, Moorosi moved to Tele River. As a result strong distrust developed between Moorosi and the Cape authorities, which led to the Moorosi rebellion.

[1554] See 3.2.2 above.

[1555] Taylor *Doctor to Basuto, Boer and Briton* 55. At that time there was a deep desire for every black man in South Africa to drive a white man out of the country. The flames of rebellions and conflicts between black and white were so pervasive. Black people generally became disrespectful to the whites. According to Taylor black people became sullen to the whites, their greetings were half contemptuous, and one could see by their general attitude that all was not well.

[1556] See 9.1 above.

[1557] Taylor *Doctor to Basuto, Boer and Briton* 168; Eldredge *South Africa Kingdom* 173. Eldredge maintained the view that Basotho co-operated with the colonial government because they feared to lose the Quthing District. Although Basotho troops defeated Moorosi, the colonial government thanked them with a number of punitive measures.

[1558] This plan to take land of Basotho was contrary to the undertakings of the British Governor to Moshoeshoe never to alienate any land of Basotho. In view of the fact that the Basotho nation supported the Cape Government against Moorosi's rebels, they certainly did not deserve such unfair treatment.

their guns. Traditional leaders refused to obey the government orders. They made all sorts of excuses. To the Sothos, the idea of disarmament was an anathema. The Basotho regarded guns as important instruments to defend their land[1559] and as an important symbol of manhood. The idea of disarmament was viewed by the Sotho people as equivalent to being reduced to the status of children. The Basotho also interpreted the policy of disarmament as a sign that the Cape administration distrusted them. Hence Chief Lerotholi opposed disarmament policy with these words: [1560]

> We regret we cannot part with (our guns), if we have done anything wrong we must be told so – we were not annexed to Natal because we did not want our guns to be taken from us. It is hard for me to give up my gun.

The government lost patience and sent a force to Basotholand to force the Basotho to surrender their guns. Basotho warriors under the command of Chief Lerotholi attacked that force.[1561] The Gun War marked the end of the magistrates' carefully constructed network of trust and interests. The Cape authority was unable to control Basotholand again in the same way. Another onslaught on Basotho nation occurred when the Cape government increased hut tax to £1.[1562] The introduction of a hut tax influenced the landscape of traditional authorities and traditional life in many ways. Firstly Basotho men were forced to leave their communities and seek employment in white farms and mines of South Africa so that they would be able to pay tax. Secondly traditional leaders were stripped off men in institutions such as regiments.

[1559] Basotho regarded guns as indispensable tools for protection and defence. As Chief Moorosi remarked: "When a bull goes to pasture, he does not leave his horns in the kraal, he goes out with them, that he may defend himself by them from his assailant and gore it also."

[1560] As quoted by Burman *Chiefdom Politics* 140.

[1561] Taylor *Doctor to Basuto, Boer and Briton* 57-58.

[1562] Burman *Chiefdom Politics* 137. Burman viewed that move as unjustifiable as the Cape authorities announced to appropriate about £12,000 from the Basotholand coffers to pay for Cape expenses. That step was contrary to the original agreement that all monies raised in Basotholand would be spent for the needs and interests of the Basotho. The Basotho were aware of the injustice of the tax increase, disarmament policy and confiscation of the land of Quthing. These policies resulted into protests and a considerable number of petitions were sent to the Cape Parliament and the Queen of England.

In view of the sour relationships between the Cape authorities and Basotho, Moshoeshoe sought the protection and administration of Queen Victoria and the British Government. Moshoeshoe asked for protection after the Gun War. Tyrelle quoted the Basotho declaring themselves as close to the Queen "as the lice in her blanket."[1563] The Gun War of 1880-81 was expensive for the Cape government in terms of both human and financial resources.[1564] Therefore, the Cape authorities negotiated with traditional leaders under Chief Lerotholi. The Cape Governor acted as arbitrator. Consequently the Basotho accepted the terms of the arbitrator's award, which eventually paved way for the end of the Gun war.[1565] Although the award provided for disarmament, in practice disarmament remained a hypothetical issue.[1566]

The war created serious administrative problems and in 1883 the Cape government was forced to request Britain to resolve direct rule over Basotholand. As a result of the Gun War the Basotho won their right to have their country governed separately from other parts of Southern Africa as one of the High Commission Territories. In 1884 British rule was resumed which eventually led to the granting of the independence of Lesotho in 1966.[1567]

9.3 ROAD MAP TOWARDS PROTECTION

On 18 March 1884, Basotholand became a Crown Colony and the administration was placed in the hands of a Resident Commissioner, Sir Marshall Clarke, responsible to the Governor of the Cape in his capacity as High Commissioner. The main aim of Chief Moshoeshoe and other traditional leaders was to prevent their country from annexation by the independent OFS and ruled by the Dutch settlers or by Britain's own Colony. Newlon held the view that the protection was not free of charge. The British government in

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[1563] Tyrrelle *Tribal Peoples* 91.
[1564] Saunders *Black Leaders* 107. According to Saunders by that time the expenses of the Gun War had reached approximately 3,000 000 pounds.
[1565] Saunders *Black Leaders* 107. Saunders asserted that in as far as the issue of disarmament was concerned, Chiefs Masopa and Lerotholi emerged victors.
[1566] Saunders *Black Leaders* 107.
[1567] http://www.lesotho.gov.ls/government.htm, 05 May 2004.

return drove a hard bargain by subtracting from the then Basotholand some of its better grazing land for the Cape Colony. According to Newlon, that part of bargain is still even today bitterly rejected by the Basotho. Moshoeshoe in return extracted a provision that no white should ever be allowed to hold title to land in his country, a provision that still stands in the present day Lesotho.[1568]

9.4 BRITISH ADMINISTRATION

When the British government assumed its role as the protector of Basotholand, the first step was to abandon the system of local rule adopted by the Cape Colony government.[1569] Initially the British government did not want to interfere with the daily lives of the Basotho and was also careful not to incur any extra expense.[1570] In view of these circumstances the British government resolved to leave the Sotho to rule themselves so far "as the mid-victorian Christian conscience could allow". Burman argued that the original British attitude towards the Basotho ran contrary to the civilization policy in Britain and South Africa that "it was a duty of a Christian to civilize the Africans". This civilization in question was that of Victorian England based on the principles of Christianity and a profit-seeking economy deeply rooted in a strong belief of the superior virtue of a way of life.[1571]

According to Stevens, Lord Hailey said that the British authorities chose to dismantle the policy of direct rule introduced by the Cape colonial government

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[1568] Newlon *Southern Africa* 200. When the British government took over Basutoland as a Protectorate, Moshoeshoe remarked that: "he had become old and was glad that his people should have been allowed to rest and lie under the large folds of the flag of England before he died." And to the Queen he said that: "his country was her blanket, and his people the lice in it." Indeed it was not an exaggeration to ascribe 20th century vision to Moshoeshoe. If Moshoeshoe did not apply for British protection, the country would have been either under South Africa, a Province thereof or waiting for independence.

[1569] Maqutu *Contemporary Problems* 193. When Basotholand was declared a British Protectorate it was to be administered by the Governor of the Cape. The Basotho accepted whatever changes the Cape Governor brought about. They wanted peace above everything.

[1570] Due to limited financial resources the British government intended to keep the cost of Basotholand to a minimum. As a result, the authorities left the administrative responsibilities to traditional leaders and decided to limit the energies of the government local officials to maintain law and order.

[1571] Burman *Chiefdom Politics* 17.

and maintained the authority of traditional leaders by way of indirect rule.[1572] When the British colonial government was established its major political challenge was lack of personnel and infrastructure to impose its will. The government therefore decided to place the administration of Basotholand in the hands of the Paramount Chief and subordinate traditional leaders.[1573]

A system of dual government evolved under the British Resident Commissioners, Sir Marshall Clarke and Sir Godfrey Lagden, together with the Paramount Chief, Letsie I and his son Lerotholi thus confirming indirect regime. The British government was concerned with external relations, tax collection, the punishment of serious crimes and the settlement of boundary disputes between rival traditional leaders.[1574]

The traditional leaders performed most of their administrative duties at the local level, in most instances with missionaries and traders.[1575] The High Commissioner was bestowed with the law-making powers while the bulk of the administration was left to the Paramount Chief to govern the Basotholand Protectorate.[1576] Like in Bachuanaland Protectorate,[1577] traditional leaders in Basotholand served the colonial power and represented it. Ström described the British policy in Basotholand as *laissez-faire*. The Basotho people welcomed this system of laissez-faire because it was seen as an approach,

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[1572] Stevens *Lesotho, Botswana and Swaziland* 28; Maddox and Welliver *Colonialism and Nationalism* 6. Maddox and Welliver described the policy of indirect rule as the type of rule founded on the conception that the most important duty of government is to train and develop the African inhabitants of a country, so that their ancient tribal civilization may be modernised and adopted by them in such a manner as to serve the present and the future as they have served the past. The government's duty was not to facilitate the europeanization of exceptional individual's but the civilization of the mass.

[1573] Lye and Murray *Transformation on the Highveld* 82.

[1574] Maddox and Welliver *Colonialism and Nationalism* 6. The British policy was to let Basotho to rule themselves through their traditional leaders. Thus emphasizing a clear policy of indirect regime. In Basotholand as in the Bechunaland Protectorate, the British approach to protection was to delegate most of the administration and decision-making processes to the Paramount Chief and his subordinate traditional leaders. The Resident Commissioner was put in charge of the Protectorate and was assisted by various officials. The government instructed Sir Marshall Clarke that nothing more could be attempted at first than the protection of life and property and the maintenance of order on the border. The Basotho were to be encouraged to establish internal self-government sufficient to suppress crime and settle inter-tribal disputes.

[1575] Ström *Migration and Development* 31-32.

[1576] Stevens *Lesotho, Botswana and Swaziland* 30. See also 6.2.8 and 8.2.6 above.

[1577] See 6.1, 6.2, 6.3 and 6.4 above.

which was in line with the idea of trusteeship formulated by Moshoeshoe. However, it must be noted that that approach did not last long since the British authorities wanted to reform the system of traditional administration.[1578] With the new administrative arrangements, the roles and functions of traditional leaders changed. The colonizers made traditional leaders tax collectors in addition to their traditional roles of serving as judges and distributors of land. It would suffice to mention that traditional leaders became colonial employees.[1579]

The Resident Commissioner occupied the in-between position between the Paramount Chief and High Commissioner. He acted as advisor to both British authorities and traditional authorities. His main duty was to come to the assistance of the Paramount Chief should the latter find himself in administrative difficulties. Among the key challenges which the British administration encountered during the early days of British rule were:[1580]

- The consolidation of the Paramount Chieftainship;
- The implications of British sovereignty for non-Basotho residents of the country; and
- The development of representative government.

The British administration regarded the consolidation of the traditional institution along the lines envisaged by Moshoeshoe as an important step towards the promotion of national unity. The task of administration was made much more easier by the Basotho self-government, as embedded in the tribal Council or *Pitso*. The Basotho Paramount Chief was guided and bound by the will of the people as expressed in the saying *Morena ke Morena ka Batho*.[1581]

[1578] Ström *Migration and Development* 31-32. Ström believed that such British policy gave traditional leaders and Basotho a room to manoeuvre.
[1579] Ström *Migration and Development* 31-32. See also 6.2.7 above.
[1580] Stevens *Lesotho, Botswana and Swaziland* 31.
[1581] The above expression denotes the essence of Sotho democracy, which implies that traditional leader is not a dictator. His leadership is based on the will of the people. See also 8.2.5 above.

9.5 *NATIONAL FORA AND REPRESENTATION*

One of the early changes introduced by the British government was the idea that *Pitsos* be held annually. Later the British authorities argued that due to population growth, it was impossible to hold the *Pitso* annually, therefore the Resident Commissioner proposed an alternative body to the national *Pitso.* The Resident Commissioner, Sir Marshall Clarke took the necessary steps in 1886, which eventually led to the formation of the National Council in 1903. He made a proposal in writing to the Paramount Chief Letsie I: [1582]

> I send a proposal for the making and work of a Council. This is my own suggestion and is not from the government. As I wish you to look well into it and tell me openly your opinion after consulting your brothers, sons and councillors, you can tell me what you think but the matter is of importance and should be carefully considered. The Council would consider any fresh laws, which are submitted to it, so far as such laws purely affected the Basotho, it would consider all questions connected with local affairs of the manner in which hut tax was spent.

After careful consideration of the letter of the Resident Commissioner, Paramount Chief Letsie I replied on December 25, 1889. The following were some of the extracts from his reply: [1583]

> Today I say that I consent to this Council being in this country and that the nation and myself elect the members of this Council. This is my request. As for you, Chief, you have a right in this Council because we will find it on you so that you may advise us in all things and you too can choose whom you will be in Council. But they are to be people with whom we will understand and those with whom we will be able to work with for the good of this country.

[1582] As quoted by Stevens *Lesotho, Botswana and Swaziland* 34. One of the early changes introduced by the British government was the idea that Pitsos be held annually contrary to the pre-colonial era where *Pitsos* were held regularly. The people were no longer meeting regularly to discuss matters of concern, thus disintegrating the Basotho political democratic tradition. Secondly the character of the national *Pitsos* changed. They became ceremonial occasions for making announcements and receiving distinguished government visitors. In the light of these changes, it would suffice to say that the British government changed and weakened the system of national *Pitsos.*

[1583] As quoted by Stevens *Lesotho, Botswana and Swaziland* 34.

As a result of the commitment of the Paramount Chief and Resident Commissioner, the National Council (NC) of the Basotho was finally accepted and implemented by Chief Lerotholi in 1903. The National Council, which was dominated by traditional leaders, continued with its work and met annually from 1908. The Council's main aim was to serve as the sole custodian of the Basotho traditions. The Council adopted a Code of rules known as the *Laws of Lerotholi*, based on the customs and traditions of Basotho. The *Laws of Lerotholi* were designed to consolidate the powers of the Paramount Chiefs.[1584]

On 3 March 1910, a proclamation providing for the establishment of the Basutoland Council was issued. The Council discussed the domestic affairs of the Protectorate. The new Council consisted of the President, who was the Resident Commissioner and at the most hundred members. The Paramount Chief was a member under the title of Chief Councillor. He was empowered to nominate ninety-four persons who were traditional leaders of Basotho tribes. If the Resident Commissioner confirmed the nominees, he appointed them. In addition to these appointees the Resident Commissioner appointed five members.[1585]

The Council was established as an advisory body to the Paramount Chief. It should be noted that the Council did not *per se* replace the traditional *Pitso*, developed by Moshoeshoe, a gathering of all the people where more or less all were free to express opinions and voice grievances. It could also be argued that the new Council was not the people's forum where all men and women of major age were free to discuss the affairs of Basotho. Council sidelined the ordinary Basotho from decision-making processes. Unlike the

[1584] Chief Lerotholi was the son of Chief Letsie I. He later succeeded his father and became the Paramount Chief of Basotho. During his regime, Sotho customary laws were codified and referred to as the "Laws of Lerotholi". The death of Chief Lerotholi also marked the end of strong and respected traditional leadership. His son Letsie II allowed the Paramountcy to drift and also showed little interest in traditional government.
[1585] Schwager and Schwager *Lesotho* 80.

old national *Pitso*, the Moshoeshoe's sons also dominated the Basotholand Council.[1586]

However, it must be appreciated that despite the fatal flaws inherent in the Council, one of the impressive successes scored by the Council was opposition to the incorporation of Basotholand into the Union of South Africa.[1587] Britain had also promised Basotho traditional leaders that a move to incorporate them without consultation would not be possible.[1588]

9.6. BRITISH ADMINISTRATIVE REFORMS

9.6.1 BACKGROUND

One of the reasons which necessitated the reforms within the realm of traditional administration was due to the conservatism of the majority of traditional leaders. This trend was a cause of concern to both white administrators and progressive class of black elites. Opposition from civil society emerged because of the unwarranted dominance of the Moshoeshoe family, which became a ruling elite over the traditional clan heads. Succession disputes and conflicts between Moshoeshoe's sons also compounded the problem. For instance, Masopa, younger son of Moshoeshoe's great wife rebelled against Lerotholi, claiming the paramountcy. All these factors and more particularly the conservative nature of the traditional leadership became matters of great concern for change.[1589]

[1586] In fact the new national *Pitso* consolidated the powers of the royal family more than ever before. The reason for this proposition was that the new national Council was dominated by members of the royal family. The majority of the ordinary people was excluded from participating in the Council.

[1587] See 6.3.1 above.

[1588] Lye and Murray *Transformation on the Highveld* 82.

[1589] Lye and Murray *Transformation on the Highveld* 82.

In 1935, the representative of Basutoland Progressive Association[1590] (BPA) moved in the Basotholand National Council (BNC) for abolition of *Lerotholi's Law* No 4, which read as follows: [1591]

> That the Paramount Chief or any Chief has the right to call the Chiefs and sub-Chiefs under their jurisdiction and the people under their control, to plough their lands.

The representative of BPA argued that such law was outdated and might have had a reason for existence in the olden days when the Royal House was able to feed its subjects. Rosenthal argued that the same kind of conservatism was responsible for the failure of tree planting in Basutoland. Rosenthal further observed that if men were to plant trees, the traditional leaders protested that trees would grow slowly and that the land would be out of their hands for thirty years until they could be harvested. The Basotho always contended that when they planted trees their traditional leaders would take the land from them. The same principle of land utilization led to traditional leaders to oppose fencing. In their views these barriers were something unpleasant because fencing would help the occupants to establish title over land.[1592]

During the colonial rule, the authorities also discovered that some of the traditional leaders used arbitrary powers. In some sections of the traditional society, traditional leaders oppressed their subjects and treated them like *malata*.[1593] As a result, traditional leaders were held in great veneration and were respected because their subjects loved them. In some instances the traditional leaders were respected because people feared and hated them. Some enjoyed high esteem because they were of the true blood of

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[1590] The Basutoland Progressive Association was not necessarily a political party. It was a pressure group which was made up of intellectual elites. It was the same Association, which originally fought for the rights of the ordinary tribesmen before party politics could be introduced in Basutoland. Its leaders lobbied for the eradication of the exploitative rules and measures practised by the traditional leaders and the Sons of Moshoeshoe.

[1591] As quoted by Rosenthal *African Switzerland* 202.

[1592] Rosenthal *African Switzerland* 203.

[1593] The word *malata* was used by the Basotho people to refer to those members of the community who were treated by their masters like serfs or slaves. Normally what happened were that such people rendered their services to their masters without adequate or no payment at all. They were only given food and piece of land for residential purpose and without ownership of such land. See 5.3 above.

Moshoeshoe. One of those traditional leaders who enjoyed high esteem was Chief Sekonyela, who had forty-five wives.[1594]

The British administration in Basotholand changed chiefdom policies and administration. These changes affected the functioning of traditional authorities in many ways. For instance, traditional leaders forfeited to some an extent, an opportunity to sustain their dominance and support internally. Britain itself wielded power internally. Basotho traditional leaders had to pay the prize for the protection offered by Britain. This protection benefited the ordinary Basotho because the British authorities minimized exploitation that they normally experienced at the hands of their traditional leaders. This exploitation was rife in rural areas. Eldredge cited Chief Molapo:[1595]

> We (traditional leaders) are depriving the people of their property and we have no law to protect the people's property. Yes, I myself, if I am pleased with another man's ox, and if I see it is a big one, I can take it, and I know that no one will take it away from me... Yes, the other Chiefs are also guilty of the same as myself.

Many Basotho were discouraged to accumulate property and to invest in their lands because they feared that traditional leaders would confiscate their property as punishment. The British government therefore introduced reforms to reduce the political and judicial powers of traditional leaders. These reforms or changes created two categories of traditional leaders, namely collaborators and the opposers. The latter was marginalized. The colonial rule therefore introduced a policy of divide and rule.[1596]

Generally speaking the entire traditional administration and system of traditional courts were inherently flawed. Mohapeloa argued that flaws and weaknesses in the Basotho administration and courts were caused by the low quality of chieftainship. He further suggested that the quality of the

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[1594] Rosenthal *African Switzerland* 203.
[1595] As quoted by Eldredge *South African Kingdom* 171.
[1596] Eldredge *South African Kingdom* 171.

administration remained low because the system of governance was influenced and characterized by a lack of education. Most traditional leaders and their sons (successors in waiting) were illiterate or semi-illiterate. Most of the commoners were educated and became critics of the roles played by traditional leaders. Those educated commoners pressed for reforms and reconstruction of the Basotho traditional administration.[1597]

The British authority went ahead with reforms of the traditional administration and courts. The British authorities also persuaded the Paramount Chief to accept the fact that changes and reforms were essential ingredients for the development and prosperity of the Basotho. Chief Griffth (Paramount Chief) supported the reforms. Consequently, the reform measures were promulgated as the *Native Administration Proclamation*[1598] and the *Native Courts Proclamation.*[1599] These two proclamations were designed to effect reforms in the entire Basotho administration and the systems of traditional courts.[1600]

9.6.2 NATIVE ADMINISTRATION PROCLAMATION OF 1938

The main aim of *Native Administration Proclamation*[1601] was to control the system of administration and helped members of the chieftaincy to maintain order and good government and to promote the welfare of the entire Basotho nation. However the *proclamation* was intended to reduce the powers of traditional leaders in making appointments.[1602] The government reformed the

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[1597] Mohapeloa *Tentative British Imperialism* 399. It was this demand, which led to the appointment of the Pim Commission. As a result of the Pim Report the British government found it prudent to go ahead with reforms.

[1598] *Proclamation* 61 of 1938.

[1599] *Proclamation* 62 of 1938.

[1600] Stevens *Lesotho, Botswana and Swaziland* 43. Stevens explained that these proclamations were to a considerable extent, resemblances of the Ordinances of Nigeria and Tanganyika which were passed to fit traditional institutions into a new pattern of colonial administration. However, it is important to underline that Stevens did not attempt to suggest that the 1938 proclamations were exact copies of the ones followed in the East and West Africa.

[1601] *Proclamation* 61 of 1938.

[1602] The Commissioner was amongst other things responsible for the appointment and recognition of traditional leaders in Lesotho. He was empowered by section 3 of the Native Administration Proclamation 61 of 1968. In *Mahala Molapo v Joang Molapo* (1926-1953) NCLTR, the court stated that the appointment and recognition of Chiefs, sub-Chiefs and headmen are vested in the High Commissioner. The High Commissioner had to exercise a discretion in respect of the appointment of Chiefs. This was entirely an administrative

placing system and it became official policy that every placing had to be approved by central government. The British government established an official gazette of recognized traditional leaders and headmen.[1603]

The *Native Administration Proclamation* recognised the Paramount Chief[1604] as the Native Authority of Basotholand and defined the method of his appointment and powers. According to Rugege, traditional leaders were reduced to police agents as they were to maintain order[1605] and to prevent to the best of their ability the commission of offences by black persons.[1606] It was made an offence on the part of any traditional leader who failed to carry out these duties.[1607] Traditional leaders looked upon the colonial government as their patron. The relations between traditional leaders and their subjects were undermined.[1608]

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matter. The court went further to say that under *Native Administration Proclamation* 61 of 1938 no person has any inherent right to be declared a Chief. In *Bereng Griffith v Mantsebo Seeiso Griffith* (1926–1958) 411, the plaintiff disputed the appointment of the defendant as Regent or acting Paramount Chief and claimed that he himself should have been appointed on the following grounds: (a) That being a woman, the defendant is by Basotho law and custom incompetent to succeed to a chieftainship or to hold the office of Regent or acting Paramount Chief. (b) That for the same reason she is incompetent to be the guardian of a child or administer any estate. The court held that all legal forms and requisites necessary for the appointment of a Paramount Chief have been followed by the Commissioner in terms of section 3 of the *Native Administration Proclamation* 61 of 1938. The court went further to say that in the case of the appointment of a Regent or acting Paramount Chief on the evidence of compliance with the provision of proclamation concerned, the plaintiff contention should fail. The court further held that where the eldest son is not yet a man to administer the family estate, a woman is under obligation to hold and administer it for the benefit of the eventual heir and that though by Basotho custom she should consult the adult members of her late husband family, such consultation did not place her under guardianship. See also *Mampa Nkhasi v Shophane Nkhasi* (1955) HCTLR 16, where the respondent, Shophane Nkhasi was declared to be headman of a certain area by the High Commissioner under section 3 of the *Native Administration Proclamation* 61 of 1938 and the respondent's appointment as such was promulgated in the Official Gazette. The appellant, Mampa Nkhasi, sought a declaration from the court that he was a customary headman of part of the area over which the respondent had been declared headman. The court held that an appointment of headman is vested in the High Commissioner by virtue of section 3 of the *Native Administration Proclamation* and accordingly the court had no jurisdiction to make the declaration sought by the appellant.

[1603] Murray *Families Divided* 67. In other words, the government took steps to control and approve the placing of traditional leaders. The reforms further normalised the placing system and curtailed the discretionary powers of traditional leaders in making appointments.

[1604] Normally the phrase Paramount Chief is used to describe the position of the principal or main traditional leader. The Basotho usually use the phrase Principal Chief.

[1605] Section 4 of *Proclamation* 61 of 1938.

[1606] Section 6(2) of *Proclamation* 61 of 1938.

[1607] Section 14 of *Proclamation* 61 of 1938.

[1608] Rugege 1987 *LLJ* 177-178.

These reforms impacted negatively on the institution of traditional leadership in Basutoland. Firstly, the reforms induced widespread insecurity in the lower levels of the hierarchy of traditional leadership. Senior traditional leadership was no longer able to accommodate the political aspirations of junior kinsmen. The system of official gazetting or appointing a traditional leader also led to a situation where many lower traditional leaders were displaced and some forfeited their traditional leadership. On the other hand the tax gratuities received by those who were gazetted were arbitrary assessed but it did not compensate them for the loss of previous revenues.[1609]

To some extent these administrative reforms undermined the accountability of traditional leaders to their subjects, which was traditionally expressed in the Sotho maxim that *Morena ke morena ka batho.*[1610] It seems that a new breed of officially gazetted employees were now accountable to the new paymaster, the British government. The recognised traditional leaders were paid salaries by the authorities and became the government officials. The colonial government had the power to dismiss[1611] them when not even the Paramount Chief had the power to dismiss them.[1612] After the reforms, traditional leaders were no longer tax collectors. These functions were taken over by educated Basotho commoners and British employees, such as magistrates.[1613] According to Ström the Administrative Reform Committee (ARC) recommended that there were too many traditional leaders in Basotholand. Consequently between 1938 and 1946 the number of traditional leaders was reduced from about 1300 to 120. This policy of restructuring the placing system hit traditional leaders hard.[1614]

The Committee further recommended a revision of the remuneration system. It seems that those dismissed together with their advisors and families

[1609] Murray *Families Divided* 67.
[1610] See 5.3 and 8.2.5 above.
[1611] See 3.4.4.2, 3.5.2, 3.5.3, 3.5.3.2 and 6.2 above.
[1612] These powers of the colonial government were taken over by the Lesotho government after independence.
[1613] Ström *Migration and Development* 33.
[1614] Ström *Migration and Development* 33.

emerged as a frustrated social group that laid a basis for anti-colonial mobilization.[1615] Because of the political power struggle for recognition, many of the traditional leaders resorted to the practice of *liretlo*[1616] in order to deepen and strengthen their positions. According to Murray, the wave of medicine murders, which swept Basotholand in the 1940s was attributed largely to the insecurity induced by the reforms. Many lower and traditional leaders adopted sinister ways of resisting their official eclipse.[1617]

9.6.3 NATIVE COURTS PROCLAMATION OF 1938

The *Native Courts Proclamation's*[1618] main aim was to reconstruct the pillars of the administration of justice and to reduce the number of traditional courts. It was noted that the operation of such courts was cumbersome and inefficient. Therefore, the British authorities took steps to curtail the judicial functions of traditional leaders. The British authorities also introduced statutory functions for the traditional leaders within the realm of maintenance of law and order.[1619]

[1615] Ström *Migration and Development* 33; Doxey *High Commission Territories* 3.

[1616] Murray *Families Divided* 67. The word *liretlo* was used by Basotho to refer to medicine murders. In other words people were secretively killed and the flesh of their bodies and private parts were used to make medicine. There was a belief that such human medicine would boost power and dignity of an individual in a community.

[1617] Murray *Families Divided* 67.

[1618] *Proclamation* 62 of 1938

[1619] Rugege *Chieftaincy and Society in Lesotho* 223-224. The *Native Courts Proclamation* provided that only traditional courts issued with warrants by the Resident Commissioner could exercise judicial powers and enforce their decisions. These traditional courts were called Basotho courts to differentiate them from other courts in Basotholand. See in this regard Poulter *Legal Dualism In Lesotho* 17-18. With regard to the maintenance of law and order, the court in *Nkau Majara v The Queen* (1954) HCTLR, dealt with a matter, which concerned a gazetted native headman in Basotholand whom it was alleged that contrary to his duty such a headman refrained from arresting a murderer on his arrival at the scene of a ritual murder. It was argued that since he was a gazetted headman there was legal duty upon him to arrest any native he knew or had information against, that such native had committed an offence for which an arrest would be made without a warrant. See also *R v Leteketa Rantletse* (1926-1953) HCTLR 27, where the accused disobeyed an order of his Chief that he should remove his hut and reside in another village. There upon the Chief sent a headman and 30 messengers to demolish the accused's hut. The accused resisted them and in the ensuing struggle the accused killed one of the messengers with an assegai. The court held that every Chief is empowered to order any habitual thief whose hut or huts are situated in his village to remove such huts and reside in any other village. The court went further to say that a Chief derived these powers from the proclamation.

Before reforms were introduced within the realm of administration of justice, traditional courts became institutions of intense political struggle because disputes settlements were a source of income for traditional leaders. Traditional leaders as judges and adjudicators in those courts appropriated the fines levied and shared in the damages awarded against defendant in their courts. Since fines were paid in stock in traditional courts, some of the traditional leaders used exploitative methods to accumulate wealth. Some of them soon became corrupt and abused their powers. By then stock was a most important source of wealth. Traditional leaders therefore dispensed justice according to the ability of the defendants to pay rather than in relation to the merits of the case.[1620]

As a result of the growing political consciousness of Basotho, the struggle to transform the administration of justice accelerated. Calls were made in the National Council for the transformation of the administration of justice in traditional courts. According to Rugege, the most serious accusation against the traditional leaders in their judicial function was that a number of them encouraged crime and litigation in order to collect fines and share in compensation. The BPA representative in the National Council accused some of the traditional leaders of inciting their men to violence so that they could fine them and collect their cattle. [1621]

In view of the above, the reforms initiated by the authorities had positive results for the country. The colonial government introduced some reforms for instance various levels of traditional leadership were demarcated and traditional courts were reduced from 1340 in 1938 to 106 in 1949. The move to reduce the number of traditional courts was a recommendation of the Native Courts Reform Committee. Furthermore, the traditional judicial system was altered when the salaried court presidents in the new tribunals replaced

[1620] Rugege *Chieftaincy and Society in Lesotho* 223-224.

[1621] Rugege *Chieftaincy and Society in Lesotho* 231. The BPA representative stated that cases of theft had increased and the reason was that the thieves were Chiefs. There was nothing to stop that because the Chiefs stole property of their subjects.

traditional leaders. This new arrangement left traditional leaders with limited jurisdiction.[1622]

The colonial administration supported by progressive elements such as the BPA and Lekhotla-La-Bafu (LLB) worked *in tandem* to remove or control the traditional right of every traditional leader to hold a court in his administrative area and the right to appropriate fines and fees levied in the course of the administration of justice. Many of the traditional leaders lost not only wealth but also power and prestige. As a result, the colonial administration exercised control over traditional leaders. The restructuring of traditional courts was met with strong opposition from the traditional leaders, as manifested in speeches in the Basutoland National Council (BNC), newspaper articles, letters to colonial officials and meetings of political movements.[1623]

The reforms in the sphere of courts instilled a sense of insecurity among certain traditional leaders who lost their status when their courts were diminished. The reforms left some of the traditional leaders without jobs. Those affected argued that they were traditional leaders by birth and did not have to be recognised and declared traditional leaders by the British authorities, particularly the High Commissioner. They strongly felt that they were treated like traditional leaders in South Africa who were then appointed and deposed by the government at its will.[1624] The reforms made traditional leaders in Basotholand, particularly minor ones vulnerable and insecure.[1625]

[1622] Doxey *High Commission Territories* 9.
[1623] Rugege 1987 *LLJ* 159-199.
[1624] Mohapeloa *Tentative British Imperialism* 400.
[1625] Rugege 1987 *LLJ* 181-182. As a result of their high senses of insecurity, the traditional leaders resorted to the so-called liretlo to secure their positions. Some of the higher traditional leaders and their supporters as well as any other people maintained that those liretlo killings had been committed by or for the benefit of those lesser traditional leaders. Their argument was that the higher traditional leaders had nothing to gain from them. They were well off and their positions were assured. With the lesser Chiefs and headmen it was different, their positions were much more insecure and so regrettable but not surprising that so many of them had turned to strong medicine to safeguard their positions or to advance their political claims.

9.6.4 NATIONAL TREASURY INITIATIVE

Another fundamental change was made when a National Treasury was established under the management and supervision of the High Commissioner in 1946. The Treasury was responsible for the assessment and collection of tax paid by the Basotho. There was a basic tax of 34 shilling[1626] per adult male, plus 25 shilling each for a second and third wife. These kinds of tax discouraged Basotho men to marry more than one wive. Critically speaking, it appeared that the British authorities used this kind of tax system as a machinery to disintegrate the institution of polygamous marriage. It also appeared that only Basotho men who could afford to pay such a tax could marry more than one wife.[1627] Many traditional leaders were involved in polygamous marriages and the system of taxation affected traditional leadership as many traditional leaders were discouraged from polygamous marriages.[1628] The traditional leaders who married many wives had to pay more tax.

There was also a graded tax levied on Basotho adults' male and female in respect of income and holdings of stock. The non-Basotho paid a poll tax of £3 per year and were liable to income tax based on rates in force in the Republic of South Africa. The Treasury received one third of tax receipts and paid salaries of traditional leaders and court officials. Only those traditional leaders who were recognised and appointed by the government were paid from the Treasury.[1629] What generally emerged out of this reform initiative was the fact that the dominant status and powers of traditional leaders, particularly the sons of Moshoeshoe were greatly reduced.[1630]

[1626] Shilling was an amount of money in use in Britain and its colonies and Protectorates until 1971.Those Protectorates included Basotholand, Swaziland and Bechunaland. Shilling was also a unit of money used in Kenya, Uganda, Tanzania, Somalia and South Africa.

[1627] Coxey *High Commission Territories* 9.

[1628] Many traditional leaders particularly those who were not paid by the authorities were unable to pay the required tax. As a consequence they refrained from polygamous marriages.

[1629] In other words the treasury did not pay the unrecognised traditional leaders. In fact they were rendered unemployed hence there was no need for payment. Those disgruntled traditional leaders became suspicious of the British administration and developed negative attitudes towards the regime.

[1630] Lye and Murray *Transformation on the Highveld* 3.

9.6.5 DISTRICT COUNCILS

The British authorities introduced an important innovation at the local level. This initiative was the introduction of a system of District Councils, presided over by the District Commissioner. These Councils had advisory powers. District Councils were formed in order to enable the people to make their wishes known to councillors. All principal traditional leaders[1631] and members of the Basotholand Council were *ex officio* members of their respective District Councils. Other members were elected directly by the people.[1632] The District Council had two main tasks, namely to prepare motions for consideration by the Basotholand Council and make the Basotholand Council more representative. Each District was to have one member nominated by the Paramount Chief in the Basotholand Council.[1633]

The people on the ground were not satisfied about the genuine role of the Councillors in the central government and Basotholand Council. The dissatisfaction was exacerbated by the fact that the District Council had advising capacities and their advices were not binding on the government. Later the government introduced a system of secret voting and to its surprise

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[1631] The words principal traditional leaders refer to senior traditional leaders. These leaders excluded headmen who in most cases were referred to as junior traditional leaders. In many instances principal traditional leaders were called Paramount Chiefs.

[1632] Bardill and Cobbe *Lesotho* 36. Elections to the District Council were held in January 1960. The BCP gained control of six of the nine District Councils. Bardill and Cobbe captured the results of the 1960 District Council Elections as follows:

Political Party	**No. Of votes**	**% Of voters**	**District Council seats**
BCP	12,787	36	73
BNP	7,002	20	22
MTFP	3,043	9	16
Independents	12,470	35	51
Total	**35,302**	**100**	**162**

After winning the District Council elections, the BCP pressed for a rapid transition from representative to responsible government. Other parties also supported the idea of responsible government. As a result in 1962 a Constitutional Commission was established by the Legislative Council to design a map for self-government.

[1633] The establishment of the District Council was an attempt to democratise local governance. The system of District Council encouraged grass roots participatory democracy. Local people were allowed to elect their representatives to voice their concerns and grievances in the Basotholand Council.

the government found that the people's choice ran contrary to the wishes of traditional leaders.[1634]

9.6.6 GENERAL CONSEQUENCES OF REFORMS

In general, the reforms introduced over the period 1935-55 brought about a closer integration of Basotho tribal organisations and the administration machines more than anything else. Basotho political institutions and the institution of traditional leadership in particular were subjected to major changes and pressures. It seemed that the force in the Basotho society seeking genuine reform were much stronger than was realised by the administration of the time. British administration brought fundamental changes on the institution of traditional leadership of the Basotho in a various number of ways. Some traditional leaders were strengthened others weakened. Gradually those traditional leaders who were strengthened by the administration became agents of the colonial administration dealing with their people rather than as representatives of their people dealing with the colonial administration.[1635]

As a result their authority was disintegrated and the British administration was the ultimate political authority while traditional leaders ran the functions of an agent between their people and the colonial administration. However, it is important to note that despite all these changes brought on the regime of traditional leaders in Basotholand, the influence of the institutions of traditional leadership did not diminish.

9.7 ROAD MAP TO POLITICAL AUTONOMY

This discussion analyses the relationship between the institution of traditional leaders and political parties in Lesotho. It will be demonstrated how different political parties manipulated the King and traditional leaders for their own

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[1634] There was a tension between District Councillors and traditional leaders. The reason being that the councillors enjoyed legitimacy in the eyes of the public since they were the people's choice. The institution of traditional leaders was often regarded by the people as undemocratic since the traditional leaders were not elected.

[1635] Rich and Wallerstein *Africa and Change* 274-275.

political gains and benefits. The constitutional debates and negotiations leading to the independence of Lesotho will also be discussed whereafter the role of the traditional leaders in the constitutional debates will be highlighted.

9.7.1 TRADITIONAL LEADERSHIP AND POLITICAL PARTIES

The political complications in Basotholand exceeded those of Bechuanaland,[1636] primarily because of the dominance of the family of Moshoeshoe. This dominance was not left unchallenged by progressive people from the ranks of the public servants and business community. Consequently, Basotholand Progressive Association (BPA) launched an opposition to the sons of Moshoeshoe and other appointed traditional leaders.[1637]

As discussed earlier,[1638] both LLB and BPA represented the interests and aspirations of the commoners. They kept political discussions on opposition to the colonial regime and high ranking traditional leaders who abused their powers. They regarded traditional leaders and church representatives as traitors because of their roles as the employees and representatives of the colonial exploiters. The *Constitution* of the LLB revealed their critical policy towards the institution of traditional leadership. [1639]

[1636] See 6.1, 6.2 and 6.3. above.

[1637] Lye and Murray *Transformation on the Highveld* 83. In 1950, the BPA had one representative in the National Council established in the 1920s. It had political relations with the Communist Party of South Africa (SACP). This organization covered the support of the commoners and villagers from western Lesotho.

[1638] See 9.5.3 above.

[1639] Ström *Migration and Development* 54-55. The LLB's *Constitution* included inter alia: "that whereas the late Chief Moshoeshoe I and his successors in his office did not satisfy the people in their government by the established and sustenance of a national assembly known as *Pitso* and held at Thuta-Ea-Moli and whereas the said *Pitso* was in the year 1903 established the present Basotholand National Council constituted and composed of the Chiefs and their advisors and whereas the present composition of the National Council is not in the best interests and good government of the territory by reason of the exclusion from membership persons and associations other than the Chiefs and their advisors it is resolved to form an association to safeguard, promote and protect the best interests and welfare of its members and persons other than the Chiefs and their advisors and to seek recognition and representation of commoners in the National Council and the Constitution."

Ström maintained that the LLB accused traditional leaders as hirelings of the British government that had helped British agents such as the Resident Commissioner to undermine the democratic institutions of Basotholand and also disregarded the interests of the common man. Towards the establishment of self-government, a considerable number of the political parties emerged. Major changes in the political party structure in Basotholand took place when the Basotholand Congress Party (BCP) was formed under the leadership of Ntsu Mokhetle. Most of the citizens who were politically literate and conscious joined the BCP. The BCP expressed attitudes, which were not only anti-colonial but also anti-traditional leaders, anti-traders and anti-churches.[1640]

Its leadership often talked about the right of the unfavoured and exploited sections of the population to the same opportunities as the traditional leaders. The BCP leadership criticized traditional leaders for being an arm of a conservative colonial government. The BCP supported the idea of national self-determination as majority rule and the right to have a say individually and not through traditional leaders or heads of families.[1641]

In 1957 a period before BNP was formed, Marema-Tlou Party (MTP) was formed. The MTP supported the status of the Paramount Chief and the principal traditional leaders. The MTP was formed as a reaction to BCP's negative attitudes towards traditional leaders. Despite their support of traditional leadership, the MTP failed to gather the support of the rural people and lesser traditional leaders. In 1962 MTP amalgamated with Freedom Party (FP) and formed Marema-Tlou Freedom Party (MTFP). The FP was under the

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[1640] Ström *Migration and Development* 39. Iniatially the BCP was called the Basotholand African Congress Party (BACP). The BCP stressed a question of real liberation in Basotholand. It was also influenced by the philosophies of liberation movements such as ANC and PAC of South Africa. When the BCP was formed it co-opted the LLB and also absorbed the BPA, which was formed mainly by the commoners. Both the LLB and the BPA were not political parties but acted as pressure groups. Now the BCP with the support and coalition with BPA and LLB formed a strong alliance against colonialism and traditional leadership.

[1641] BCP advocated and championed the concept of individual freedom and autonomy based on the philosophy of individual rights. In short the BCP wanted the government of the people by the people where the people chose their leaders and framed their destiny to the exclusion of what they saw as an undemocratic institution of traditional leadership and families guided by the rules of patriarchy.

leadership of the former Deputy President of the BCP, Khaketla. Khaketla left the BCP together with some of the BCP members who protested against BCP's negative attitude towards the institution of traditional leadership in Basotholand.[1642]

The MTFP gathered a huge support in the areas around the royal village of Matsieng. They also enjoyed support of the Paramount Chief, Bereng Seeiso (later named Moshoeshoe II), who had just returned from Oxford University and took over the traditional leadership from the regent Mmantsebo.[1643] Both the BNP and MTFP were supported by ex-traditional leaders who were disgruntled about the colonial power. On the other hand the MTFP also favoured the high ranking traditional leaders particularly the Paramount Chief. These two political parties were always in conflict with each other because of their different approaches towards traditional leaders. Ström explained these conflicting views and why Chief Leabua formed his own party:[1644]

> Chief Jonathan's interests in encouraging the chieftainship hierarchy to acknowledge the voice of the people's resulted in several clashes between himself and ultra-conservative elements of the chieftainship. This led to his final break with these elements to find the National Party, which eventually carried Lesotho to final independence.

In 1958 a group of traditional leaders and their advisers as well as Catholic teachers broke away from BCP and formed the Basotholand National Party (BNP) under the leadership of Chief Leabua Jonathan. Initially the BNP supported the course of traditional leaders.[1645] The BNP pledged support for the hereditary chieftainship in Basotholand on the understanding that

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[1642] Ström *Migration and Development* 40-41.
[1643] Mantsebo acted as a Regent at the time when Bereng Seeiso was in London studying his university degree. She was the most important and influential person in shaping the history and development of the institution of monarchy in Lesotho.
[1644] Ström *Migration and Development* 65.
[1645] Ström *Migration and Development* 39.

traditional leaders must rule according to the wishes of the people. In support of chieftainship, Chief Leabua Jonathan remarked:[1646]

> We may adapt ourselves to modern ways but in doing so there was no need to destroy sound traditions, culture and customs of our nation because there was so many good things to be found in them.

The BNP mentioned in its *Constitution* the idea of chieftainship as an expression of the people's will. According to BNP, the view of a good traditional leader was an important element in the belief of traditional leadership as an expression of the people's will. As already mentioned, this concept had been framed and worked out by traditional leaders who had been sacked by the colonial government and those traditional leaders who were not favoured by the 1938 reforms supported the BNP. It was therefore, not surprising that all leaders were restored to their traditional positions, when the BNP took over the government in 1965.[1647]

The colonial administration preferred the moderate and responsible stance of the BNP to the radical and reckless policies of the BCP. Weisfelder explained the British involvement in covert campaign:[1648]

> One high ranking official in a speech made to a closed audience in South Africa, referred to the "strident voices" of (Basotholand) Congress Party, as against the 'saner voices' of the more conservative BNP. The secretariat in Maseru kept copies of Mohlahani and circulated them among the more important officials. Articles, which were anti-Chiefs, were marked annotated with anti-BCP remarks. At least one of the more radical of these articles was especially passed to the Paramount Chieftainess.

These efforts of the British authority to make traditional leaders aware of the BCP position might have mobilized otherwise inert traditional elements for the

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[1646] As cited by Weisfelder *Defining National Purpose* 19.
[1647] Ström *Migration and Development* 65.
[1648] Weistelder *Political Contention* 30.

BNP. In the light of the British involvement, the 1965 victory of the BNP national elections should not be seen as a surprise. A second source of the strength of BNP came from the traditional leaders whose natural sympathies for its policies could be reinforced by the subtle pressures from the Paramount Chief, Catholic Church or the colonial bureaucracy. The Roman Catholic Church also supported the BNP.[1649] The Catholics strongly believed that government without Catholics would permit unprincipled men to wield their nefarious influence with impunity. Many Basotho were bound to perceive the militant BCP as a reason for encouraging the Catholics to support BNP and not the Communists.[1650]

9.7.2 CONSTITUTIONAL DEBATE AND POLITICAL ELECTIONS

The Basotholand political landscape of the 1940s and 1950s was characterized by calls and demands for greater representation in the organs of government. In 1956 the British government showed its eagerness to entertain proposals for a representative government. It was again in the very same year that the Basotholand Council established a constitutional Committee. The Committee's report of 1958 advocated changes at both the local and central levels. As illustrated above,[1651] greater powers were devoted to the District Council in 1959. The District Councils were to be elected by all taxpayers in the District. Women were not allowed to partake in the District Council's elections.[1652]

In 1958 a new *Constitution* was negotiated at the so-called London conference. The 1958 *Constitution,* which came into effect in 1960 brought fundamental political changes at both central and traditional government levels. In 1960 a new *Constitution,* which was introduced was a triumph for

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[1649] Weistelder *Political Contention* 30. Catholic bishop wrote:"Certain political parties are good, others (including BCP) are bad, that is to say they do not seek the common good and often draw up laws contrary to justice, to charity, to the law of God and to Christian doctrine. These unsuitable parties often make use of questions and even dishonest tactics."

[1650] Weistelder *Political Contention* 30.

[1651] See 9.6.5 above.

[1652] Bardill and Cobbe *Lesotho* 35.

the National Council and political parties. The *Constitution* introduced the following with regard to traditional leaders: [1653]

- Paramount chieftaincy was still recognised;[1654]
- The National Treasury was disbanded;
- Reduction of Paramount Chief's influence on chieftainship;
- College of Chiefs consisting of Principal and Ward traditional leaders were introduced and shared powers with the Paramount Chief to discipline subordinate traditional leaders, adjudicate jurisdictional conflicts and arbitrate over succession disputes;
- Paramount Chief only resumed presiding role; and
- Institution of a Legislative Council.[1655]

In 1961 the *Constitution* was reviewed. A Commission for constitutional review proposed that the Paramount Chief should have the following executive powers: [1656]

- Executive functions only in the field of land tenure.
- Discipline with regard to traditional leaders.

However, despite all these mentioned disappointments, Moshoeshoe II had reason to be optimistic when the Report of the Constitutional Commission was amended. The amendments included the entrenchment of the institution of

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[1653] Weisfelder *Political Contention* 46-47.

[1654] History of Basotho was recorded when Bereng Seeiso was installed as Paramount Chief. Until his death in 1996, Bereng Seeiso, who was permitted to assume the name of Moshoeshoe II struggled to convert popular enthusiasm for the office of Kingship into an effective political mechanism promoting his objectives. This history was due to the 1960 Constitution, which embodied a triumph for the National Council and political parties over royal prerogatives and served as an obstacle to Moshoeshoe II's dream of playing and performing an executive role and functions.

[1655] Weisfelder *Political Contention* 48. The 1960 *Constitution* provided for the establishment of the Legislative Council. Forty of its eighty members were to be indirectly elected by the District Council. The remaining forty including the twenty-two principal and ward traditional leaders and fourteen members were appointed by the High Commissioner while four *ex officio* members were appointed from the administration. The new Legislative Council had law-making powers over all internal matters. Executive Council with four British and four Basotho representatives was also formed to advice the government.

[1656] Weisfelder *Political Contention* 48.

chieftainship and increased executive responsibility to the Paramountcy.[1657] In 1964 the second constitutional Conference was held in London to discuss and frame the proposals for the self-government.[1658] The political product of this Conference was the self-government and the *Constitution*, which was implemented in 1965.

The new *Constitution* provided for a bicameral legislative, namely the Senate and the National Assembly. The Senate consisted of twenty-two Principal and Ward traditional leaders and eleven members nominated by the Paramount Chief. The National Assembly consisted of sixty members elected by universal suffrage in single member constituencies. The new *Constitution* also provided for the establishment of the Executive Cabinet drawn from members of the Senate or National Assembly. The leader of the majority party in the National Assembly became the Prime Minister and head of the Executive Cabinet.[1659]

Shortly before the national elections took place in Basotholand, when Ntsu Mokhetle was requested by Drum Magazine to explain his party policy towards traditional leadership his answer was that if his party win they would do away with traditional leaders. Ntsu Mokhetle further commented that:[1660]

> We remove the British today and the next hurdle will be the Chiefs and the Paramount Chief who would only be tolerated as long as he abided by the *Constitution*.

[1657] These amendments were championed by BNP and MTFP and opposed by BCP.
[1658] Bardill and Cobbe *Lesotho* 32; Weisfelder *Political Contention* 49. According to Weisfelder, constitutional negotiations held in London throughout April and May 1964 produced controversy and deadlock between the British and Basotho delegation regarding both the timing of independence and the extent of British control in such areas as foreign affairs, internal security and the civil service.
[1659] Bardill and Cobbe *London* 36.
[1660] Cited by Khaketla *Lesotho-1970* 65.

This attitude of the BCP leadership towards the institution of traditional leadership and the Paramount Chief encouraged its supporters to treat chieftainship with contempt.[1661]

9.7.3 1965 GENERAL ELECTIONS

The 1965 General Elections for the National Assembly were held and resulted in a victory of the BNP. Mokhetle of the BCP failed to get majority and Chief Leabua Jonathan became the Prime Minister of Basotholand. Initially Chief Sekhonyane Maseribane, deputy leader, temporarily led the new government because Chief Leabua lost his seat. Later a seat was won after a by-election victory in July 1965 and Chief Leabua assumed his position as Prime Minister of the new government.[1662] The BNP won the 1965 elections by expressing the fears of lesser traditional leaders and headmen that the BCP would disintegrate their privileges when it came to power.[1663]

Given the overall assessment of the history and manifesto of the BCP, there were a number of factors why the BCP could not win the 1965 General Elections. Its communist manifesto, which championed anti-traditional leaders

[1661] Khaketla *Lesotho-1970* 65. The supporters of BCP did not regard the Paramount Chief as anything. As a result they ridiculed Paramount Chief in their party organ, Makatolle. It was in Makotolle where the BCP supporters and leadership cast aspersion on Paramount Chief when they parodied the initial P.C. to mean a "Polecat" whose "smell the nation could not stand". It was obvious that if Ntsu Mokhetle became the Prime Minister the Paramount Chief would be relegated to such a position of inferiority. Ntsu Mokhetle was determined to hold the Sotho Paramouncy with its horns and destroy its neck. He was only waiting for the Sotho nation to vote for him so as to accomplish his mission.

[1662] The results of the General Elections for the National Assembly in 1965 were as follows:

Political party	**No of votes**	**% of Total votes**	**No of seats**
BNP	108,162	41,6	31
BCP	103,050	39,67	25
MFP	42,837	16,5	4
MTP	5,697	2,2	0
Independents	79	0,03	0
Total	**259,825**	**100**	**60**

[1663] Southall 2003 *J of Contemporary African Studies* 254. The BNP also attracted a lot of support from the Catholic Church through the inability of the large majority of migrant workers to return to Basotholand to vote. It seemed, according to Southall that majority of the migrant workers were inclined to the BCP. In addition the BNP gained more advantage than the BCP because it was favoured by the colonial authorities and by the South African *apartheid* government, which in 1970 elections supplied food aid to BNP key constituencies.

and anti-church, were among the factors which weakened BCP and resulted to its loss of many seats. On the other hand, Bardill and Cobbe explained that BNP victory occurred as a result of support it got from the constituencies of traditional leaders, its anti-communist propaganda, the extension of franchise to women and strong financial support from the Catholic Church, South African government and white traders.[1664]

The BCP, which had initially demanded a monarch with no executive powers, changed its political colours and supported the Royalist MTFP in demanding that the Paramount Chief should be given control of the Police Force and the armed forces. Meanwhile, after the election, the BNP turned against the monarchy and changed its original stance on the role of the King in the post-independence Lesotho. The BNP favoured the *Constitution* that reduced the Paramount Chief to a ceremonial monarch.[1665]

9.7.4 FINAL PREPARATION FOR INDEPENDENCE

After the 1965 elections, Chief Leabua presented to both Houses of the Basotholand Parliament a *White paper on Proposals of the Basotholand Government Concerning the Advent of Independence.* The *White Paper* dealt with a wide range of matters such as Head of State, the chieftainship, Privy Council, citizenship, the prerogative of mercy, the Public Service Commission, the date of the independence and financial matters. Khaketla explained that the Legislative Council at its 1963/4 meeting highlighted its wish that the

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[1664] Khaketla *Lesotho-1970* 67. Marema Tlou Party (MTP) performance should be attributed to Paramount Chief. The party attracted a great support from the constituencies of the Paramount Chief. The 1965 election, which delivered the Mountain Kingdom of Lesotho to independence from Great Britain, had far reaching political implications. Firstly, the 1965 elections reflected the gaping political divisions in Basotholand. The election caused more instability than anything else. The competing political parties never had a force of national unity or mutual accommodation. They always distrusted each other and suspected that the winner would use state power to secure victory. These beliefs and speculations manifested themselves in a bitter inter-party wrangling over the role of the Paramount Chief and who should control police and the armed forces in post-independence Lesotho.

[1665] Makoa *Elections* 3. Makoa shared the same sentiment with Bardill and Cobbe that Lesotho's political parties had always been "prepared when necessary to trade principles for votes."

future King of Lesotho should exercise certain powers in respect of the police and the armed forces to ensure that democracy would not be destroyed.[1666]

In 1966 the third and final constitutional Conference was held in London to negotiate the *Constitution* for the independence of Basotholand. Three political parties namely, BNP, MFP and BCP were represented in the Conference. The BCP wanted the critical issue of reserve powers of the Paramount Chief to be put to the test through a new election or referendum before independence. The British government rejected this proposal and that move led into the withdrawal of BCP from the Conference. The constitutional talks held in London in 1964 bred a number of political disagreements and controversies between the British authorities and Basotho delegations.[1667]

According to Bardill and Cobbe the Paramount Chief, who attended as an observer, refused to sign the final document of the *Constitution.* However, it appeared that he later accepted independence because as Bardill and Cobbe observed, on 4 October 1966, the Paramount Chief presided at the country's independence celebrations as King Moshoeshoe II. He also formally accepted the Instruments of Independence from the Queen's representatives.[1668]

[1666] Bardill and Cobbe *Lesotho* 39. Weisfelder *Political Contention* 49.

[1667] Bardill and Cobbe *Lesotho* 39. In 1966 negotiations for independence took place. negotiations resulted in the 1966 *Constitution.* This *Constitution* recognised the institutions of traditional leadership and monarchy in Lesotho. See also 10.2 below.

[1668] Bardill and Cobbe *Lesotho* 39. Bardill and Cobbe noted that many Basotho attended the celebrations of the Independence Day. However, it further came to their notice that both the Basotho who attended and remained home were uncertain about the future after independence. As a result they held a considerable number of reservations about the independence of Lesotho. Matters were made worse by the fact that a few weeks before independence the BNP led government passed legislation to entrench their powers. These legislative measures gave BNP government-sweeping powers over matters concerning the state of emergency, the holding of public meetings, restrictions on media and so forth. Of much importance was the fact that despite numerous controversies produced by constitutional debates and discussions, which led to the independence and the reservation held by many Basotho towards the independence, the BNP succeeded in securing independence and an agreement on the symbolic issue of Moshoeshoe II's right to precedence over the British colonial representative.

CHAPTER 10: POST COLONIAL LESOTHO

10.1 MOUNTAIN KINGDOM AND ITS TERRITORY

In 1964 when the constitutional talks and discussions hotly unfolded in London, Paramount Chief Moshoeshoe announced that the country, Basotholand, would soon become independent and would no longer be called Basotholand but instead would be known as the Kingdom of Lesotho.[1669] Indeed within a short space of two years, the British parliament enacted *Lesotho Independence Order*[1670] which among other things provided that on the 4 October 1966 the territory which immediately before that day constituted the Colony of Basotholand shall cease to form part of Her Majesty's dominions and shall become an independent Kingdom under the name of Lesotho.[1671]

[1669] Patrick *Economic Conditions in Lesotho*. 1-2; Newlon *Southern Africa* 1; Doxey *High Commission Territory* 4; http://www.lesotho.gov.ls/goverview.htm,05 May 2004. According to Newlon the Kingdom of Lesotho is the only country in the world, which is entirely surrounded by another namely South Africa. It is one of the highest countries in the world, ranking with Tibet in Asia and Sikkim in India. In view of the fact that Lesotho has been singled out as one of the highest mountainous countries, Newlon referred to Lesotho as "The Roof of Africa." It is treeless country of about the size of Belgium. The present boundaries of Lesotho follow in part a series of rivers, the Tele, the Senqu, the Makhaleng and Mohakare. The Kingdom of Lesotho is landlocked mountainous country of 30 352 km^2. From a physiographic point of view, Lesotho is divided into the low lands, namely, the Senqu valley, the foothills and the highlands. According to Kumar and Kulundu-Bitonye, the low lands is made up of two sub-regions that is, a narrow strip varying in width from 3 to 48 kms along the country's western border and the Senqu River basin which at an elevation of 1830m, divides the highlands of the south east and drains the entire country.

[1670] Section 1 of 1966 *Constitution*. See also 9.7.4 above.

[1671] Moshoeshoe II 1988 *LLJ* 1. The country known as Lesotho is an independent hereditary monarchy within the Commonwealth. In his address to the State President of the Republic of South Africa, His majesty King Moshoeshoe II gave a succinct description of the geographic and economic relationship between Lesotho and South Africa when he said that: "the world over, it is a well-known fact, that Basotho and South Africans share a unique history between them. Lesotho and South Africa are two countries geographically locked in each other's arms – for better or for worse. It is in a sense, a siamic relationship: each has a life of her own and yet irrevocably interdependent – each cannot get away from the other. It is remarkable that the history of the Basotho should have become so interwoven with that of South Africa, and yet, for all that, love of independence is deeply noted in each of the two independent sovereign states, each has her own temperament, and her own set of values, each has her Achilles heel. Both are charged by providence, to protect their noble values of nationhood and their territorial sovereignty, integrity, and dignity". King Moshoeshoe II concluded that: "Moshoeshoe The Great's diplomatic legacy remains the generic source of independent foreign policy: His original policy has all the imprints of Moshoeshoe's legacy. In relationship with our neighbour we have consistently pursued a policy of good neighbourliness and mutual and reciprocal respect of each other's human dignity, of non-interference of each other's internal affairs and external relationship of respect for sovereignty and independence."

10.2 CONSTITUTIONAL FRAMEWORK

10.2.1 1966 CONSTITUTION

When Lesotho gained its independence from Great Britain, the *Lesotho Independence Order* of 1966, *a British Act*, became the *Constitution* of the Kingdom of Lesotho.[1672] The 1966 *Constitution* of Lesotho:[1673]

- Created a liberal democratic framework of government;[1674]
- Established a sovereign democratic Kingdom;[1675]
- Elaborated on the political role of a King and Chieftainship;[1676]
- Articulated separation of powers;[1677]
- Included Fundamental Rights and Freedoms;[1678]
- Provided for an elected parliament that elected a Prime Minister;[1679]

[1672] Mahao 1989 *LLJ* 2. The 1966 *Constitution* was a product of great task carried out by the Stanford Commission. The Stanford Commission was duly appointed at the behest and directives of the BNP. The terms of references included *inter alia*, the collection and synthesis of the nations views into the principles of government.

[1673] See also Mahao 1989 *LLJ* 2.

[1674] Section 75 of 1966 *Constitution*. This section dealt with the executive authority of the government of Lesotho, Ministers of government, allocations of portfolios to Ministers, exercise of Prime Minister's functions during absence and illness.

[1675] Section 1 of 1966 *Constitution*. The *Constitution* provided that Lesotho would be a sovereign democratic kingdom. Section 2 of the 1966 *Constitution* further provided that the *Constitution* of Lesotho was the supreme law and any law which was inconsistent with the *Constitution* would to the extent of such inconsistency be void.

[1676] Sections 32, 88 and 89 of 1966 *Constitution*. Section 32 established the office of King of Lesotho. The person holding the office of Paramount Chief (styled Motletlehi) was given recognition and confirmed as the holder of the office of King. See also sections 76 and 77 of 1966 *Constitution* which directed the King to perform *inter alia* the following functions: (a) To appoint the senators. (b) To dissolve parliament. (c) To appoint the Prime Minister. (d) To remove the Prime Minister from office. (e) To designate members of the National Planning Board. (f) To exercise disciplinary control of Chiefs. With regard to the appointment of the Prime Minister by the King, see also Lesotho Order 13 of 1973. Section 28 of Lesotho Order made provision for the King to appoint the Prime Minister. The King also had a power to appoint Ministers of State of the government of Lesotho acting in accordance with the advice of the Prime Minister.

[1677] Sections 40, 71 and 110 of 1966 *Constitution* established Parliament, Senate and Judiciary in Lesotho. The Judiciary consisted of the High Courts, Appeal Court, Subordinate Courts and Martial Courts.

[1678] Sections 4 to 22 of Chapter II of 1966 *Constitution* made provisions for human rights and freedoms. These rights included inter alia the right to life, right to personal liberty, freedom of movement, freedom from inhuman treatment, freedom from slavery and forced labour, freedom from arbitrary search and entry, right to fair trial, freedom from discrimination, freedom of expression, right to equality before the law, right to respect for private and family life, freedom of assembly and association.

- Regulated that the Prime Minister advised the King on appointment of Ministers;[1680]
- Established the House of Assembly and Senate constituted with 22 Traditional Leaders;[1681]
- Established the parliament with powers to override customary law;[1682]
- Provided for the King as Head of State;[1683]
- Provided that the Prime Minister was head of the government;[1684]
- Regulated land vested in Basotho nation; and[1685]
- Established College of Chiefs.[1686]

From the time of the *Constitution*'s adoption, the general feeling of the public and the opposition parties was that the Leabua[1687] government and Britain offered a *Constitution*, which was imposed upon the people. The public felt

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[1679] For more information regarding the parliament, see sections 40 and 41 of 1966 *Constitution*. These sections dealt with matters pertaining to: the establishment of parliament, composition of National Assembly, election of National Assembly, qualifications and disqualifications for the membership of parliament, tenure of seats of members of parliament, constituencies.

[1680] Maqutu *Contemporary Constitutional History* 11-12. According to Maqutu the Prime Minister was the King's Chief adviser who carried on government in the King's name. In other words the Prime Minister was supposed to be the King's agent who performed the government duties for and on behalf of the King. But ironically the King became an agent of the Prime Minister and not vice versa. See also section 74 of 1966 *Constitution*.

[1681] Sections 41 and 42 of 1966 *Constitution*. These sections provided for the National Assembly with 60 members and Senate with 22 Principal or Ward Chiefs respectively. Technically speaking, it suffices therefore to term the Senate the House of Chiefs. This constitutional arrangement removed these 22 principal traditional leaders from their constituencies. The 1966 constitutional dispensation made them politicians. They lost touch with their people on the ground. Being, Senators, they were now obliged to serve the parliament and government of Lesotho. They were turned into a class of political bureaucrats.

[1682] The fact that Sotho customary law was subject to the *Constitution* implied that even the institutions of traditional leadership and monarchy were subject to the *Constitution*. See also section 2 of 1966 *Constitution*.

[1683] Sections 32, 33, 34, 35, 36, 37, 38 and 39 of 1966 *Constitution*.

[1684] Sections 72, 73, 74 and 75 of 1966 *Constitution*.

[1685] Sections 91 to 101 of Chapter VIII of 1966 *Constitution* dealt with matters pertaining to land. These matters included: power to allocate land vested in the King in trust for Basotho nation and exercisable by King and Chiefs, laws regulating principles on which land was to be allocated, the primary authority of Chiefs regarding land in rural areas and levels of appeals pertaining to land in rural areas.

[1686] Section 89 of 1966 *Constitution*. This section established a College of Chiefs, which consisted of 22 Principal or Ward Chiefs.

[1687] Leabua Jonathan was the first Prime Minister of the independent Kingdom of Lesotho. He led a delegation which negotiated the 1966 *Constitution of Lesotho* in London.

that the *Constitution* turned their king into a rubber-stamp monarch and most importantly they argued that the *Constitution* did not take into account the customs and traditions of the Basotho people.[1688] It seems people wanted a *Constitution* that would clearly define the powers of the Paramount Chief (King).[1689]

As Mahao rightly observed, Paramount Chief Lerotholi was correct to argue that the Westminster model coupled with the introduction of the Office of Prime Minister had a profound and far-reaching impact on the political institutions of traditional leadership in Lesotho.[1690] The critics of the Westminster constitutional model of government introduced in 1966 in Lesotho advocated a form of government based on the values of the pre-colonial Basotho political system. They argued that:[1691]

[1688] Khaketle *Lesotho 1970* 87. However, the 1966 *Constitution* did not last five years after its adoption. The 1966 *Constitution* was suspended in 1970 by the then Prime Minister, Leabua Jonathan after his party lost the elections. Since then Lesotho never had another *Constitution* called by that name. It should be noted that the 1966 *Constitution* was not suspended because Leabua wanted to satisfy *sechaba* (people), monarchy and traditional leadership, but rather he did so to secure his power.

[1689] http://www.afrol.com/features, 05 May 2004. As Prince Seeiso correctly put it: "The people (*sechaba*) were cheated because the politicians tricked the people by saying that the Paramount Chief would become King like the Queen of Britain, which was over glorified and they did not say he would be cut-off from the people." Paramount Chief Lerotholi further condemned the Westminster system when he said that: "According to this European wrought concept of the nation elects 'representatives' who will be its spokespersons and are called 'parliamentarians' and they, not the nation, become the source of sovereign authority. The executive 'repositories' of this sovereign authority is the Cabinet constituted by 'Ministers' appointed from among the parliamentarians and they must be members of a particular party and to the exclusion of others. Their leader who becomes the ultimate authority in whom executive powers are concentrated is styled the 'Prime Minister' to pass him as if he were another Minister in order to disguise the reality that *de facto* he has taken the place of the King of the Basotho who is relegated to a status of a 'constitutional monarch' and has no say in government except merely 'to assent' whatever the Prime minister presents as decisions of the government to him."

[1690] Mahao 1993 *LLJ* 151. With the dawn of independence and constitutional dispensation, the powers and roles of the King were usurped and undermined by the introduction of the office of the Prime Minister and Westminster government. It seems the *Constitution* was manipulated by the BNP government to undermine the powers of the King. The Constitution clearly articulated the powers of the King and placed him above the office of the Prime Minister. However, the position and status of the King seemed to be the other way round. During the pre-colonial era, the Basotho monarchy was respected and had political power with more authority, extensive esteem and responsibility. That glory and image of the monarchy and traditional leadership was gradually diminished during the colonial and post-colonial eras.

[1691] Mahao 1993 *LLJ* 158. Despite all those sorts of criticisms which have been levelled against Westminster constitutional model which was rooted in a premise that the people choose from the competing politicians, the BNP government and Britain conceded the idea of independence and adopted the 1966 *Constitution* as the highest legal document framed to guide and govern Lesotho.

> It is important, therefore, for the Basotho people to make a *Constitution* which has its roots in their history, a *Constitution* which is not cast in a foreign mould, such a *Constitution* will always allow the ordinary man and woman to participate meaningfully in the making of the laws in the traditional democratic manner.

10.2.2 REACTION TO THE 1966 CONSTITUTION

10.2.2.1 Thaba Bosiu Crisis

The political arrangements in the independent Lesotho gave birth to the institutions of traditional leadership and monarchy, which were totally different and foreign to the original traditional patterns of the Sotho nation. A new House of monarchy was re-created by the letter of law, thus making monarchy a creature of statute.[1692] Monarchy was viewed by some political leaders of the independent Lesotho as just another contestant for political power. Because of the perception that the King was one of the forces looking for political power, it suffered a great deal of esteem and integrity in post-colonial Lesotho.[1693]

As alluded above, after the 1965 General Elections[1694] which were won by the BNP, Chief Leabua and his new government were expected by the King to make some constitutional alignments on the critical issues of monarchy and traditional leadership. Instead the government tabled a motion, which reduced the powers of the King. It was this political move, which exposed the vulnerability of the institution of monarchy. It also came out as a surprise when the senators who were traditional leaders supported the motion that was intended to weaken the power of the King. The BNP's decision drew an angry

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[1692] For example, section 2 of *Chieftainship Act* 22 of 1968. In terms of this section person holding the position of the King was no longer regarded as a Chief. The *Chieftainship Act* created a new office of the King, which was totally different from chieftainship. The King of Lesotho is no longer a Paramount Chief. In other words the King has been removed from his or her traditional position and the ambit of traditional leadership.

[1693] Mahao 1997 *LLJ* 165.

[1694] See 9.7.3 above.

reaction from the King and MFP. As a result, the King dismissed five pro-government senators who supported the motion that denied him the right to control the armed forces.[1695]

In December 1966 the King in tandem with the opposition parties organized rallies across the country whereby they led a milestone crusade to have the 1966 *Constitution* changed. To the surprise of many political parties even the BCP that ridiculed the King and chieftainship before the 1965 General Elections supported the King in his campaign to demand some constitutional adjustments in respect of his executive powers. As elaborated above,[1696] the BCP made a considerable number of anti-monarch statements before it lost in the 1965 Elections. For instance, Mahao quoted, Khaketla, one time Deputy Leader of BCP and later King's supporter and Privy Councillor commenting about rhetoric against the King and Chieftainship:[1697]

> It was quite obvious that if and when [Ntsu] Mokhetle ... became the Prime Minister of Lesotho, the King would be regulated to such a position of inferiority that he would be as good as not there at all.

This King-BCP-MFP alliance did not recognise the BNP government and Leabua as the true winners of the 1965 General Elections. Maqutu explained that in despair, the BNP composed songs such as: "Leabua ke mmuso ngoanaka u rata u sa rate" literally translated to mean that "Leabua is government my child. Whether you like it or not my child".[1698]

The BNP government viewed the BCP-King alliance with great deal of suspicion. As a result, the government became fully alert and tightened its security for brute repression. Indeed such an alliance was just a political marriage of convenience. The BCP was opportunistic and used the King and traditional leaders as pawns to further its political interests. As clearly

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[1695] Mahao 1997 *LLJ*; Makoa *Elections* 4.
[1696] See 9.7.2, 9.7.3 above.
[1697] Mahao 1997 *LLJ* 6.
[1698] Mahao 1991 *LLJ* 5. Maqutu *Contemporary Constitutional History* 6.

expounded above,[1699] the BCP did not have the welfare of the King and chieftainship at heart. It was argued that the BCP was only interested in political power and wanted the King's support to discredit the Leabua government. In view of this analysis, it will suffice to state that the BCP-King alliance was motivated by the political motives rather than genuine realities of nation building.[1700]

The King and opposition parties protested against the terms of independence and the BNP government. Another reason for a rally at Thaba Bosiu in December 1966 was to protest the government's stance in order to reduce the powers of the King. The anti-government protest culminated in what Mahao termed "Thaba-Bosiu débâcle". The police violently dispersed the rally and about 10 people were killed at Thaba Bosiu.[1701]

It was at Thaba Bosiu where the Basotho continued to fight each other. The whole event became tragic. The then *Apartheid* South African government exploited the political chaos in Lesotho for its own political gains.[1702] As if the killings were not enough, the BNP government added another painful dimension in the whole event when it forced the King to sign away most of his remaining powers. For example, the King was forced by the BNP government to sign a declaration in which he accepted that he would abide by the *Constitution* and his continued participation in politics would be interpreted as an automatic act of abdication.[1703]

The Thaba Bosiu episode brought with it a number of developments and lessons to be learnt in connection with the character of the monarchy and traditional leadership in post-colonial Lesotho. Firstly, the BNP government sent a clear message to the King and traditional leaders that in practice the

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[1699] See 9.7.2 and 9.7.3 above.
[1700] Mahao 1991 *LLJ* 165; Makoa *Elections* 4-6.
[1701] Mahao 1991 *LLJ* 165; Makoa *Elections* 4.
[1702] Mahao 1991 *LLJ* 165; Makoa *Elections* 4.
[1703] Mahao 1991 *LLJ* 5; Makoa *Elections* 4. The BNP government sent the King into involuntary exile. This move deepened the gap between the ruling party, BNP and its political rivals including the King. Makoa has observed that the relegation of the King to the status of a titular Head of State without executive powers was the root cause of Lesotho's persistent political and constitutional crisis that haunted Lesotho for many years.

Prime Minister was government and Head of State and not the King as stated on paper. The prohibition and subsequent disruption of the Thaba Bosiu meeting interfered unduly with the right to freedom of assembly and association of the citizens of Lesotho.[1704] Such disruptions and prohibitions illustrated the extent to which the BNP government undermined the *Constitution*, which it framed and supported as a valid document in the London Conference of 1966. The BNP government justified its hostility towards its own peoples' meeting hosted by the King and declared that the opposition leaders in such meetings were used as springboards to overthrow the government and the *Constitution*.[1705]

The reality was that the Thaba Bosiu crisis was not so much that the King and the opposition parties wanted to overthrow the *Constitution* and the government, but that the people had never accepted the 1966 *Constitution*. In as far as it rendered the King powerless, it lacked legitimacy in the eyes of the King and his supporters.[1706]

10.2.2.2 1970 General Elections

In 1969 the parliament of Lesotho was dissolved and the first ever general elections of independent Lesotho were held on 27 January 1970. There were three main contenders namely, the BNP, BCP and MFP. When the results were counted, it became evident that the BCP was leading and would definitely win the elections while the BNP was supposed to lose.[1707]

[1704] Section 15 of 1966 *Constitution*. This section provided that every person was (and except with his own consent) not to be hindered in his enjoyment of freedom of assembly and association, that is to say freedom to assemble and associate with other persons and in particular to form or belong to trade unions and other associations for the protection of his interests. Nothing contained in or done under the authority of any law was held to be inconsistent with or contravention of this section to the extent that the law in question made provision for: (a) the interests of defence, public safety, public order, public morality or public health (b) the purpose of protecting the rights and freedoms of other persons or (c) for the purpose of imposing restrictions upon public officers. A person was entitled to rely in any judicial proceedings on the protection of this right.

[1705] Mahao 1991 *LLJ* 5-6.

[1706] Mahao 1991 *LLJ* 8; http://biblionline.nisc.com/scripts/login d11? 05 May 2004. It seemed that the inauguration of Moshoeshoe II in 1960 did not augur well for the BNP leadership under Leabua Jonathan and stretched the muscles of the political tug of war between the two figures. Therefore it came as no surprise that the BNP government came with the suicide clause of 1967 that rendered the King politically inactive in Lesotho's affairs.

[1707] Mamashela 1993 *LLJ* 172.

Matlosa observed that:[1708]

> Although early returns revealed important swings to the ruling in BNP's former strong holds in the Northwest, there were soon countered by even more dramatic swings to the BCP in the previously BNP dominated mountain regions. By Thursday evening the BCP had clearly won by a comfortable margin. The full results were never released officially but reliable estimates gave the BCP 36 seats, the BNP 23 and MFP 1.

The BNP government nullified the results and refused to hand power to the BCP, claiming that the elections had been marred by violence and South Africa's interference. Lesotho political analysts and observers explained that the BNP refused the results because they feared that the BCP would retaliate and took some of its members to prison.[1709]

The BNP government institutionalised its political monopoly through the following actions:[1710]

- A declaration of the state of emergency;[1711]
- The passage of an *Internal Security Act* in 1969;[1712]
- The introduction of the *Anti-communist Act* of 1970 which banned the 1962 Communist party in Lesotho;[1713]

[1708] Matlosa 1990 *LLJ* 15.
[1709] Murray *Families Divided* 5
[1710] Mahao 1991 *LLJ* 12.
[1711] Order 3 of 1970. This Order gave the Prime Minister powers to make regulations for the detention, removal and exclusion of persons from Lesotho. The Order authorised members of the Security Forces to enter and search any person, apprehend and punish persons acting in contravention to the regulations. See also the Continuation of the State of *Emergency Order* 5 of 1970. This Order provided inter alia that no suit or action for damages, prosecution or other legal proceedings would lie against any person or authority for anything done in good faith or ordered to be done in pursuant to the *Emergency Regulations*.
[1712] Act 37 of 1969. See also *Internal Security (Public Meetings and Processions) Act* of 1973. This Act generally regulated and controlled meetings and processions in public places, to prevent danger or harm to public safety and public order. Section 4 gave public security officers powers to direct that a meeting or procession in a public place to disperse, assemble at some place, vary its route and to avoid a specific place. Any person who was not acting in pursuance of lawful authority or acted in a disorderly manner was quilty of an offence and liable to a fine not exceeding R500.00 or imprisonment for a period not exceeding one year. See also in this regard sections 5 and 14 of Act 37 of 1969.

- Suspension of the 1966 *Constitution* due to the alleged defects of Westminster democracy;[1714]
- The strengthening of the security apparatus as the repressive arm of the post-colonial state; and
- The institutionalisation of political control over local government through the 1969 *Local Government Act.*[1715]

The government entrenched its political power by passing the *Lesotho Order* of 1970 that vested the executive authority in the Prime Minister whom it styled *Tona Kholo.*[1716] It also established a Council of Ministers that included the Prime Minister and such Council was clothed with legislative authority. This political arrangement dealt a heavy blow to all the institutions of democracy in Lesotho. The new system of government that was introduced was neither cabinet, parliamentary nor party based. As Mahao correctly pointed out it was a careful cultivation of personal rule of the prime ministerial type.[1717]

Under the new system of personal rule, the King was initially placed under the house arrest. The traditional leaders who supported him were also harassed and sidelined. The King was denied his right to freedom of movement and

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[1713] See the *Suppression of Communism (Affirmation) Order* 6 of 1970, which affirmed the suppression of communisim in Lesotho. See also *Legal Notice* 7 of 1970, which provided inter alia that no person would advocate, advice, defend or encourage the achievement of any object or act of communism. The Notice further prohibited printing, publishing, imparting any periodical or other publication or any document that professed or serve as a means of expressing views or conveying information or the publication of which was calculated to further the achievement of any of the objects of communism.

[1714] For more information in this regard see the *Constitution (Suspension) Order* 2 of 1970. This Order commenced on 14 February 1970. The primary objective of this Order was to affirm the suspension of the *Lesotho Independence Order* 1172 of 1966.

[1715] The *Local Administration Act* 13 of 1969 gave the Prime Minister absolute powers to control local government. For example, section 4 of Act 13 of 1969 gave the Prime Minister powers to make regulations and procedures for the administration of the local government. The Prime Minister was empowered to prohibit, restrict or regulate the grazing of livestock on agricultural land and pastures, to prohibit, restrict or regulate the movement of livestock in or through the government Reserve Areas of Maseru, Butha-Buthe, Leribe, Peka, Teyateyaneng, Mateteng, Mohale's Hoek, Quthing, Qacha's Nek and Mokhotlong. The Prime Minister also had powers to restrict, regulate and prohibit the erection of buildings and to provide for buildings lines and the lay-out of buildings.

[1716] The words *Tona Kholo* refer to a Sotho expression, which means Chief or Prime Minister. However, it was used in the above context to refer to someone who declared himself both the Head of State and government. It was Leabua Jonathan who was referred to as *Tona Kholo* in this regard.

[1717] Mahao 1991 *LLJ* 12.

association. This terrible step by the BNP government did a lot of damage on the image and the status of the monarchy. Subsequent to house arrest, King Moshoeshoe was exiled to Holland. Few months later the government decreed the *Office of King Order*.[1718]

The *Office of King Order* of 1970 laid down procedures for accession to the throne. The Order also demanded the King to take an oath before he could be restored to his throne. The main aim of the Oath was to ensure that the King did under any circumstances involve himself in partisan politics. The King was also required by the Oath to abstain from aligning the Monarchy with any political party or group.[1719] The BNP was keen to retain power. The Prime Minister, Leabua arrested leaders of opposition political parties. The BNP ruled the country by fiat. Violence flared up and hundreds of people were killed in various parts of the country.[1720] The BNP government sponsored organizations like the *Lebotho La Khotso* (cops of peace) and the terror group of Shapa-Shapa[1721] that tortured and tormented all those who were anti-government. Members of the opposition parties, especially BCP and supporters of the King, were severely harassed.[1722]

In 1974 Ntsu Mokhetle and BCP attempted to topple the BNP government. A bungled coup attempt by BCP was put down in blood and violence and Mokhetle and leading supporters fled into exile. The BCP resorted to an armed struggle and established Lesotho Liberation Army (LLA). The BCP received support from Pan Africanist Congress (PAC) of South Africa which regarded the BCP as its ally and source of recruits for its own military wing.[1723] Pherudi observed that the armed struggle launched by BCP escalated miseries and hardships for the Basotho. The LLA and the Lesotho

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[1718] 51 of 1970.
[1719] Mahao 1991 *LLJ* 12.
[1720] Southall 2003 *J of Contemporary African Studies* 256.
[1721] This was a political wing that was formed by BNP to eliminate the opposition. In so doing the BNP entrenched its powers without transparency and freedom of speech.
[1722] http://www.lesotho.gov.is/goverview.htm, 05 May 2004. *Lebotho la Khotso* traumatized many Basotho to an extent that very few people in Lesotho were brave to talk about their experiences in relation to that organisation. Pherudi talked sadly that Lebotho La Khotso stripped Basotho of self-respect, free political association, dignity and human integrity.
[1723] Southall 2003 *J of Contemporary African Studies* 256.

Defence Force took up arms against each other. Both armies were Basotho. As it was correctly proved: *Go ne go loa bana ba Moshoeshoe.*[1724]

However, later in 1973 the *Lesotho Order* was decreed to provide the framework within which the political impasse could be unlocked. The government established the Interim National Assembly (INA) that was rested with legislative powers.[1725] The King appointed members of this political structure. Elements of the opposition parties were co-opted into the BNP government. As many members of the opposition parties were co-opted in the BNP government because they were disorganised and split their ranks. The BCP leadership, for example, split apart. P Ramoreboli, the Deputy Leader headed a faction which joined the INA. While Ntsu Mokhetle went into exile and formed LLA, all those steps to co-opt the members of opposition parties into the BNP government were taken by Leabua Jonathan in the spirit of *Poelano.*[1726]

10.2.2.3 1985 Mockery Elections

In 1985 the government swing back to its anti-democratic style when it passed two anti-democratic laws to facilitate succession in the National Assembly without reference to the public. Those were the *Parliament Act* of 1983, which was framed to operate as the *Constitution* for the country and the *Electoral Act* of 1983, which was framed to regulate the conduct of elections. It seems the BNP government was serious about its mission to entrench its power.

[1724] http://www.lesotho.gov.is/goverview.htm, 05 May 2004. The phrase denotes that children of Moshoeshoe were fighting each other. That was an in-fight among the same cultural group. They were not fighting an external enemy.

[1725] See *Lesotho Order* 13 of 1973. Section 2 made provision for the establishment of an Interim National Assembly. The Assembly consisted of 22 Principal or Ward Chiefs. Section 18 stated *inter alia* that when the Assembly has passed a Bill it would be presented to the King for assent whereupon the King would signify that he assented or that he withheld assent. This Order further made provision for any prosecution of any offence to be instituted in the High Court and be so instituted by the Director of Prosecution.

[1726] The word *Poelano* is a Sotho term that in English means reconciliation. Through the policy of reconciliation, Leabua's government re-employed civil servants who were dismissed in the early 1970s. Prominent members of the opposition parties were offered cabinet posts. For example, in 1975 Ramoreboli of the BCP, Patrick Lehloenya of the MFP and CD Molefi of the United Democratic Party (UDP) were offered ministerial posts in the government. See in this regard Southall 2003 J of Contemporary African Studies 256.

Therefore it deemed it necessary to put harsh laws in place in order to guarantee its retention of power.[1727]

Amongst other things, these laws removed the secret ballot and imposed a condition for any candidate to present 500 people who supported him or her to the electoral officer and the law required him or her to deposit M1000,00. When Leabua announced a date for the 1985 elections almost all political parties opposed the idea of participating in the elections. Joel Moitse, leader of a new left wing political alliance was quoted by Sejanamane that:[1728]

> The electorate had no constitutional protection. No responsible leader would expose 500 people to the danger of such an exposure...(what) Jonathan seemed to be looking for was merely a Cabinet reshuffle, not an election.

As a result of the fact that the opposition boycotted the elections, all the sixty BNP candidates were duly declared elected without contest. Through the mockery election, Leabua declared unopposed victory for his party that culminated into antagonism against his government. This deep hatred was internal and made worse the already complex political situation in Lesotho.[1729] According to Maqutu, Lesotho seemed to have developed a rather strange *Constitution* since 1970. Authority and constitutional order rested on guns and brute repression.[1730]

Maqutu explained that in all those constitutional changes, which came through the use of guns, the name King Moshoeshoe II was used to legitimise the then government. These dictators needed a formal legitimacy vested in the King and traditional leadership. All those political trends showed clearly how the politicians used the monarchy and the institution of traditional leaders to

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[1727] Sejanamane 1998 *LLJ* 12.
[1728] Sejanamne 1998 *LLJ* 173.
[1729] http://biblionline.nisc.com/scripts/login d11. 05 May 2004.
[1730] Maqutu *Contemporary Constitutional History* 1. The most important question, which Maqutu asked was should the *Constitution* and authority of Lesotho be barrels of guns? Certainly this form of constitutionalism was unaccepted in a civilized world. Such models of constitutional order and authority were primordial and incompatible with the civilized norms.

advance their political gains. As a result, the integrity and dignity of the monarchy were severely disintegrated throughout the regime of the BNP government.[1731]

Almost every Mosotho was discontent about the BNP government. For instance, there was already dissatisfaction in the army, which kept Leabua in power for almost 15 years. There were also dissatisfaction around a number of issues, including the threats posed by the BNP youth league, the Republic of South Africa-Lesotho border blockade, the failure of the Basotho ruling politicians to sustain clean and good governance and the negative attitude of the government towards the monarchy and chieftainship. The BNP government literally controlled the King and the entire institution of traditional leadership. There was also a competition between the Cabinet and the King. In certain circumstances the King was barred from representing Lesotho at important occasions abroad due to jealousy. The King could not go anywhere and talk to the people. According to Prince Seeiso Seeiso,[1732] the King had to go through the Prime Minister and Cabinet to get an approval before he could consult his people. When Prince Seeiso Seeiso commented on Basotho politics he said:[1733]

> We are still going through the teething phase of democracy and we still do not know who should do what.

In view of the landscape of the politics of Lesotho, another dimension of crisis emerged in 1986 in respect of border conflicts. *Apartheid* South African government tightened border controls because they wanted Lesotho to sign with them non-aggression pact similar to Nkomati accord they signed with Mozambique. Lesotho openly opposed *Apartheid* and refused to sign a pact with South Africa. In view of all these sorts of multitudes of political problems and crisis the Lesotho Army staged a *coup détat* on 20 of January 1986. It

[1731] Maqutu *Contemporary Constitutional History* 2.
[1732] Seeiso Seeiso refers to both name and surname.
[1733] http://www.afrol.com/features, 05 May 2004.

appeared that the South African government played a clandestine role in the 1986 *coup détat.*[1734]

10.3 MILITARY RULE

When the government of Chief Leabua was toppled in 1986 by the army under the overall leadership of General Metsing Lekhanya, the military government was still called his Majesty's government. The Lesotho Defence Force was renamed the Royal Lesotho Defence Force.[1735] At first, the 1986 military government created political circumstances favourable to the Monarchy and the rest of the traditional elite. The Military Junta vested both executive and legislative authority in the King.[1736] The military government wanted to promote the perception that the King was *de facto* and *de jure* the ultimate source of executive and legislative decisions. In practice that arrangement did not exist. The executive powers were vested in the Cabinet while the legislative powers were given to the Military Council. The King was just a mere agent of the Military Council. Therefore, the military government pretended at first that the King had power, indeed the military regime never allowed the King to exercise much power.[1737]

Differences between the military government and the monarchy opened a number of questions in relation to the legal relationship between the King and the Military Council. This occurred when General Lekhanya, the chairman of the Military Council passed a law to extend his powers and reduced those of the King. The military government repealed the *Lesotho Order* of 1986 and vested both legislative and executive powers in the Military Council. In April 1990, General Metsing Lekhanya sent the King into an involuntary exile in England. The *Lesotho Order* also pushed the traditional leaders into a

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[1734] http://biblionline.nisc.com/scripts/login d11, 05 May 2004. There had been two phases of military *coup de'tat* in Lesotho. The first one was ushered by Colonel Sekhobe Letsie under the overall leadership of General Metsing Lekhanya. The second phase was brought about in 1990 by the captains under the directives of colonel Ramaema.

[1735] Like the BNP government, the Military government used the monarchy to pursue their political interests. Monarchy was used as a legitimising factor of undemocratic governments and political institutions. See http://biblionline.nisc.com/scripts/login d11, 05 May 2004.

[1736] *Lesotho Order* 1 and 2 of 1986.

[1737] Mahao 1997 *LLJ* 177-178.

periphery, silence and submission. Both the royal family and the traditional leaders were subjected to a state of subservience.[1738]

Four months later Lekhanya promulgated a decree deposing the King. The *Office of the King Order* provided that:[1739]

> The person holding the office of King immediately before the coming into operation of this order shall cease to be King and Head of State on coming into operation of this order.

His son was sworn in as puppet King Letsie III. The dawn of military rule did not improve the political situation in Lesotho. Instead the military regime exacerbated the political crisis by literally eliminating opponents. As Pherudi correctly pointed:[1740]

> Lesotho politics were crucial sources of political feud, political vendetta, power, greed, lack of compromise among the politicians, lack of openness, absence of give and take attitudes, suspicions, mistrusts and jealousy. The horizons of deep conflicts involved dynamic and traditional rivalries, namely traditional leaders versus commoners, senior traditional leaders versus lesser traditional leaders, hereditary prerogatives versus elected authority, the army versus the politicians, politicians versus monarchists, conservatives versus progressives.

The military government of Justin Lekhanya failed to provide political solutions to Lesotho's political problems and the dispute with the traditional leaders. Like the BNP government, the military regime was also oppressive and corrupt. Demonstrations were launched in the whole country of Lesotho, demanding a democratic government. In 1991, General Lekhanya was toppled in another *coup détat* led by Colonel Elias Tatsoane Ramaema. The military government of Ramaema allowed the political parties to come back home and operated freely. King Moshoeshoe, the deposed King was allowed

[1738] See *Lesotho Order* 4 of 1990. Mahao 1995 *LLJ* 177-178.
[1739] See *Lesotho Order* 4 of 1990.
[1740] http://biblionline.nisc.com/scripts/login d11, 05 May 2004

to return home from exile in 1992 as a tribal traditional leader and not a King.[1741]

10.4 1993 CONSTITUTION

In the 1993 General Elections, the BCP secured a comprehensive victory over its rivals, the BNP. At long last Ntsu Mokhetle took his position as the Prime Minister of Lesotho. It appeared that the BCP victory occurred as a result of a widespread popular rejection of the BNP's post-1970 dictatorship. The BNP failed to get even a single seat. This means that the BNP was left without representation in the parliament. The elections seemed to be fair and peaceful. The constitutional rule was restored however, the BNP rejected them as a fraud and claimed that the elections were rigged.[1742] However, a *Constitution* was drafted.

The democratic changes that swept South Africa in the 1990s had a profound impact on Lesotho. There was a growing demand for free political activity. Political pressure resulted in the formation of a National Constituent Assembly (NCS) that was responsible to draft a new *Constitution.*[1743] Consequently, in 1993, the 1966 *Constitution of Lesotho* was revised and enacted into the 1993 *Constitution.*[1744]

There are differences and similarities in the drafting of the 1993 *Constitution* and the 1966 *Constitution.* In 1966 the King was an active participant in the drafting process and he was consulted and advised by his representatives on a regular basis and looked after his interests in the constitutional commission. As a result, the 1966 *Constitution* was to some extent more sensitive to the

[1741] http://www.tiscali.co.uk.mish.printnow, 05 May 2004. The exiled BCP was also allowed to come back home. The BCP abandoned armed struggle and disbanded its military wing namely the Lesotho Liberation Army (LBA).
[1742] Southall 2003 *J of Contemporary African Studies* 258-259.
[1743] Makoa *Elections* 5.
[1744] *Lesotho Constitution Order* 5 of 1993.

interests of the King than the 1993 *Constitution*, which was drafted when the King was in exile and dethroned.[1745]

The 1993 constitutional provisions included *inter alia* the following legal framework:[1746]

- Provision for a sovereign democratic kingdom;[1747]
- The inclusion of the doctrine of constitutional supremacy;[1748]
- Any other law or act incompatible with the *Constitution* shall be invalidated;[1749]
- Traditional law and its institutions are subjected to the *Constitution*;[1750]
- Fundamental human rights and freedoms are included;[1751]
- The inclusion of a National Assembly and Senate with 22 Principal or Ward Chiefs; and [1752]
- Provision for the College of Chiefs.[1753]

[1745] Makoa *Elections* 179-180. As a result Moshoeshoe II was unable to participate and influence the constitution-making process. Even his son Letsie III who had been foisted into throne by the military government was also unable to make a mark on the drafting of the 1993 *Constitution*. The *Constitution* was tailored and designed by BCP's K Maope in his capacity as Minister of Constitutional and Parliamentary Affairs. For this reason, Makoa correctly argued that the 1993 *Constitution* reflected his own vision.

[1746] *Lesotho Constitution Order* 16 of 1993.

[1747] Section 1 of 1993 *Constitution*.

[1748] Section 2 of 1993 *Constitution*. The 1993 *Constitution* of the mountain Kingdom of Lesotho is the highest statute of the country. The *Constitution* specifically provides that this *Constitution* is the supreme law of Lesotho and if any other law is inconsistent with this *Constitution* that other law shall to the extent of the inconsistency be void.

[1749] Section 2 of 1993 *Constitution* "Any other law" may broadly be interpreted to include traditional law. In other words traditional law and its institutions are subject to the 1993 *Constitution* similar to the 1966 *Constitution*.

[1750] The traditional institutions referred to in the text included the institution of monarchy. This expression implied that the institution of traditional leaders and King were subject to the *Constitution*. See also sections 44, 104 and 105 of 1993 *Constitution*.

[1751] Chapter II of 1993 *Constitution*; section 4(1) of 1993 *Constitution*. These rights and freedoms are in respect to the right to life, the right to personal liberty, freedom of movement and association, freedom from inhuman treatment, freedom of expression and so forth. However, it is worth noting that these constitutional rights and freedoms are not absolute. They are subject to a limitation clause and encapsulated in section 2 of 1993 *Constitution*.

[1752] Sections 55, 56 and 57 of 1993 *Constitution*. Sections 103(1), (2) and (3) of 1993 *Constitution* recognises 22 offices of Principal or Ward Chiefs and other offices of Chiefs recognised under the law in force before the commencement of *Constitution*. Parliament may make provision for the regulation of offices of Chiefs. Chiefs have functions as are conferred on them by the *Constitution* or under any other law.

[1753] Section 104 of 1993 *Constitution*. This College of Chiefs consists of 22 Principal Chiefs. The functions of the College of Chiefs are conferred on it by sections 45 and 46 of the 1993 *Constitution*. Section 45 empowers the College of Chiefs to designate in accordance with

The *Constitution*[1754] recognises traditional institutions, the monarchy and traditional leaders.[1755] However the 1993 *Constitution* does not clearly define the role and functions of the traditional leaders. Instead it mandates the parliament of Lesotho to make provision for the regulation of the offices of traditional leaders. Furthermore the *Constitution* makes provision for the recognition of the Subordinate Courts of Lesotho. These Subordinate Courts include *inter alia* traditional courts that are presided over by traditional leaders. They also function subject to the *Constitution*. This constitutional arrangement relegates traditional courts to the lowest position of the judicial system of Lesotho. Hence it is argued that the 1993 *Constitution* has denigrated the judicial authorities of traditional leaders.[1756]

Like its predecessor, the 1993 *Constitution* also recognises the King of Lesotho as the constitutional monarch and Head of State. The King is required to perform duties of his office in accordance with the provisions of the *Constitution* and other laws. These constitutional clauses have recreated the institutions of traditional leaders and the monarchy. The *Constitution* is deemed to be above the monarchy. The King is required to comply with the terms of the Oath of the office of King.[1757]

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the customary law of Lesotho the person who is entitled to succeed to the office of the King upon the death of the holder or the occurrance of any vacancy. Section 46 directs the College of Chiefs to designate in accordance with customary law of Lesotho a person who may be a Regent.

[1754] Section 44(1) and (2) of 1993 *Constitution*.

[1755] Section 103 of 1993 *Constitution*. Schedule 2 of 1993 *Constitution of Lesotho* recognises the following 22 Principal Chiefs namely, the Principal Chief of Botha-Bothe, the Principal Chief of Makhoakhoeng, the Principal Chief of Leribe, the Principal Chief of Tsikoane and Kolbere, the Principal Chief of Ha 'M'amathe, Thupa-Kubu, Tejatejaneng and Jordan, the Principal Chief of Ha Majara, the Principal Chief of Koeneng and Mapoteng, the Principal Chief of Matsieng, the Principal Chief of Ha Ramabanta and Kubake, the Principal Chief of Rothe, Masite, Serooeng, Lets'eng, Kolo Ha Mohlalefi and Thaba-Tseka Ha Ntaote, the Principal Chief of Thaba-Bosiu, the Principal Chief of Ha Maama, the Principal Chief of Tebang, Ts'akholo and Ha Seleso, the Principal Chief of Tajane, Ha Ramoetsana and Ha Mohale, the Principal Chief of Matelile, the Principal Chief of Likhoele, the Principal Chief of Phamong, the Principal Chief of Taung, the Principal Chief of Quthing, the Principal Chief of Qacha's Nek, the Principal Chief of Mokhotlong and the Principal Chief of Malingoaneng.

[1756] Section 127 of 1993 *Constitution*.

[1757] Schedule I of 1993 *Constitution*. The *Constitution* stipulates the Oath of office of King or Regent as follows: "In the presence of Almighty God and in the full realization of the responsibilities and duties of the high office of King (or Regent) and of the nature and binding force of this Oath, ...I do swear that I will obey and observe the provisions of the *Constitution* and all other laws of Lesotho, that I will discharge my duties in such manner as

The King is required to nominate all members of the Senate. Members of the National Assembly are elected. Under this arrangement, it is difficult for the King to be apolitical when he is in fact constitutionally driven to the centre of politics. The *Constitution*[1758] also recognises the existence of traditional leaders in Lesotho. Parliament is also empowered to pass law for the purpose of the regulation of the offices of traditional leaders. Traditional leaders are required to perform the functions conferred on them by the *Constitution*. The *Constitution*[1759] further provides for the establishment of a College of Chiefs that consists of 22 Principal or Ward Chiefs. This constitutional institution deals with matters relating to the succession of the King or Regent to the throne of Lesotho.[1760]

This body functions more like a royal family. It has been given powers that were traditionally performed by the royal family during the pre-colonial times. Traditionally, the royal family designates a King and the nation confirmed his appointment in accordance with customary law of Basotho. However, according to the 1993 *Constitution,*[1761] the College of Chiefs designates a person who is to succeed to the Office of the King upon the death of the holder or the occurrence of any vacancy in that office. This constitutional clause exposes the monarch to the possibility of political manipulation.

As already indicated earlier,[1762] in terms of the 1966 *Constitution* the King had residual powers to step in and directly exercise the rights of power in his own

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to preserve the character of the monarchy as a symbol of the unity of the Basotho nation, and that I will accordingly abstain from involving the monarchy in anyway in politics or with any political party or group." This Constitutional Oath is an attempt to make the King the creature and the servant of the *Constitution*. Furthermore it specifically excluded the King from the mainstream of politics. Yet and paradoxically it recognises the King as the Head of State.

[1758] Section 103 (1), (2) and (3) of 1993 *Constitution*.

[1759] Section 104 (1) of 1993 *Constitution*.

[1760] Sections 45 and 46 of 1993 *Constitution*.

[1761] Section 45 (1) of 1993 *Constitution*. For example, in 1990 when Moshoeshoe was in exile the government designated and appointed his son David Mohato as King of Basotho. In so doing the government persuaded the College of Chiefs to designate him as King of Lesotho. The government relied on the *Office of King Order* 4 of 1990. Although the 1993 *Constitution* was not yet in existence in 1990, it is important to note that the government of Lesotho had a tendency to undermine the authority of the King.

[1762] See 10.2.1 above.

right in special circumstances when there was no government and this could normally occurred when the office of Prime Minister was vacated.[1763] However, in terms of the 1993 *Constitution*, these residual powers of the king to exercise executive powers in the absence of a Prime Minister were transferred to the Council of State. The Council of State substituted the King's opinion and discretion. The King was stripped off all his residual powers by the 1993 *Constitution*.[1764]

The two houses of parliament may instruct the King to vacate his office if in the opinion of the Prime Minister, the King is unable to perform his functions. The post-colonial Lesotho government marginalized the role of the King to a mere ceremonial figurehead. Furthermore, the 1993 *Constitution* had tended to hurt the monarchy's self esteem more than the colonial government or even the 1966 *Constitution of Lesotho*.[1765]

According to Prince Seeiso, the 1993 *Constitution* of Lesotho should be looked at because it is ridiculous to have a Head of State who is unable to interact with his people when there is a crisis. He argued that under these political and constitutional circumstances, it seems as if there is no reason for having a Head of State. This argument of Prince Seeiso Seeiso reveals a lack of confidence by the King and generally the traditional leaders on political leadership.[1766]

[1763] Such possibility was envisaged by section 68(4)(c) of 1966 *Constitution*.

[1764] Mahao 1995 *LLJ* 180-181. Section 95 of 1993 *Constitution*. Mahao maintained that in many respects the Council of State was *de facto* appointed successor to that power whittled away from the King. The 1993 *Constitution* extended the role of the Prime Minister who was the member of Council of State and reduced the powers of the King. According to Mahao, the 1993 *Constitution* re-affirmed and confirmed the King's forced abdication and also subjected the monarchy to severe political humiliation and exploitation.

[1765] Mahao 1997 *LLJ* 189-190. Given this scenario, the 1993 *Constitution* placed the King at the mercy of Parliament and the Prime Minister. Individual monarchs would occupy the throne at the grace of Prime Minister who always controls the majority of the members of parliament. After independence Lesotho became a political chaos. Since then the Basotho Royal House kept out of policy. Even in 1998 when SADC armed forces invaded Lesotho, King Letsie III kept quiet. A popular demand for him to mediate in the crisis was not met. King Letsie III cited the *Constitution* for his powerlessness and said that: "the King could not help." One find it quite difficult to understand why the King, who is the Head of State could not mediate when other leaders of South Africa and Botswana such as Nelson Mandela and Festus Mogae could mediate by sending troops to Lesotho.

[1766] http://www.afrol.com/features 05 May 2004.

10.5 DISRUPTION OF LESOTHO DEMOCRACY

In 1994, the BNP abused the House of Monarchy and supported King Letsie III to dismiss Mokhetle government. It seems that the King was provoked by Mokhetle to establish a Commission of Inquiry into various aspects of the Monarchy. The King dissolved the Assembly and dismissed Mokhetle, he also promised to return the throne to his father, Moshoeshoe II. Southall captured the King's action with these words namely, "Palace *coup détat.*" Neighbouring countries, including South Africa, Botswana and Zimbabwe put pressure on King Letsie III to restate Mokhetle and he finally did so. In January 1995 King Letsie abdicated and King Moshoeshoe II was restored to the throne. In January 1996 Moshoeshoe II was killed in car crash. After a brief period during which Queen Mamohato assumed the role of Acting Regent, Letsie III was again inaugurated as King.[1767]

Worse disruption of Lesotho democracy occurred in 1998 when Lesotho Congress for Democracy (LCD) won the election under the leadership of Mosisili. Again the BNP could not accept the outcome of the elections. This time it was joined by rump BCP. Opposition alliance flooded Maseru, the capital of Lesotho and disturbances followed. Lesotho Defence Force and the Police chose to be on the sideline and consequently the country was brought to a standstill.[1768] Army mutiny made it impossible for the LCD to rule. Eventually the LCD government called for assistance from the Southern African Development Community (SADC). This resulted into the military intervention by the Botswana Defence Force (BDF) and South African Defence Force (SADF). Its opponents and international commentators accused the SADC force for undermining Lesotho sovereignty and independence. They also claimed that such a military intervention undermined the LCD by inviting what they called South African "invasion".[1769]

[1767] Southall 2003 *J of Contemporary African Studies* 258-259.

[1768] Southall 2003 *J of Contemporary African Studies* 258-259. It is important to note that the LCD was the offshoot of the BCP.

[1769] Southall 2003 *J of Contemporary African Studies* 258-259. The rebels were forced by SADC to retire to the mountains. About eight South African soldiers and 60 rebels were killed. In October 1998 talks between the LCD government and opposition parties made little progress and there was more violence in Lesotho.

In December 1998, an Interim Political Authority (IPA) was established. The IPA was made of 24 members representing the majority and opposition parties and was given a task of making electoral and institutional proposals. It was also mandated to prepare for new elections within 18 months.[1770] South Africa and Botswana armies withdrew in April and May 1999. As Makoa observed the elections in Lesotho were not about choosing the rulers but were used to fight political battles. This entrenched political culture undermined their ability to address the real national issues such as poverty, unemployment or destitution. Political contenders in Lesotho were not ready to accept the election results. The legitimacy of the results was always questioned. Consequently they used the unconstitutional means and violence to unseat the ruling party.[1771]

However in May 2002 the political parties of Lesotho appeared to appreciate defeats and worked *in tandem* with the winning camp. This idea, which encouraged parties to work together, was succinctly elaborated by Makoa as follows:[1772]

> Mutual appreciation of opposing views must be accepted and the conviction that losers lose everything while winners take it all can longer be the norm. It must be recognised that in a democracy winners and losers are partners and not enemies who must destroy each other.

In May 2002, the LCD, led by Prime Minister Pakalitha Mosilili won a 79 to 41 seat victory over the BNP.[1773] As Southall pointed out, the road to reach this point of political stability and maturity had been hard and clouded with obstacles mainly of Basotho politicians' own making and their reluctance and

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[1770] http://w.w.w.tiscali.co.uk/misz 05 May 2004 2.
[1771] Southall 2003 *J of Contemporary African Studies* 257-258.
[1772] Makoa *Elections* 11.
[1773] Southall 2003 *J of Contemporary African Studies* 257-258. The LCD with challenged power in 2002 reduced the support for Mokhetle party from 75% in 1993 to just over 55% in 2002. This was via new Mixed Member Proportional Representation (MMPP) that provided the country with a modicum of badly needed political stability.

sense of arrogance to work with the Monarch for the purpose of national and political stability.[1774]

It is quite interesting to note that the LCD ruling party in Lesotho had attempted to stabilise the House of Monarchy and chieftainship. Thus stability had also produced positive results and benefits for democracy in Lesotho. When Prince Seeiso Seeiso was asked whether King Letsie could be considered a prisoner of the LCD government, he remarked:[1775]

> The problem is that the Royal House and politicians are not confident with each other but that with present Prime Minister Pakalitha Mosilili, personal relations are thawing.

10.6 LEGISLATIVE FRAMEWORK OF TRADITIONAL LEADERSHIP

10.6.1 CHIEFTAINSHIP ACT OF 1968

The legal status and powers of traditional leaders and other matters relating to chieftainship assumed different proportions in 1968 when the BNP government introduced the *Chieftainship Act.*[1776] The Act was passed specifically to regulate and control the institution of traditional leadership in Lesotho. Like its colonial predecessor, the *Native Administration Proclamation,*[1777] the *Chieftainship Act* brought a number of changes and reforms on the institution of traditional leaders.[1778]

[1774] Southall 2003 *J of Contemporary African Studies* 257-258

[1775] http://w.w.w.afrol.com/features, 05 May 2004. In 2004 when this thesis was written there were peace and political stability in Lesotho and the relationship between the King and the ruling LCD government was on cordial and sound footing.

[1776] Act 22 of 1968. This Act introduced fundamental changes on the landscape of the institution of traditional leaders in Lesotho. For example, as indicated above, section 2 of Act 22 of 1968 states that Chief does not include the King but includes a Principal or Ward Chiefs and Headmen. The Act has declared a Paramount Chief of Basotho not a Chief. His status as a Chief was diminished. The Principal or Ward Chiefs have authority over headmen and sub-Chiefs who fall in their jurisdiction.

[1777] See 9.6.2 above.

[1778] For example, sections 6 and 7 of Act 22 of 1968 deals with the general functions of the office of the traditional leaders in Lesotho. These functions include the duty of a Chief to serve the people in the area of his authority, to promote their welfare and lawful interest, to maintain public safety and public order among them, to perform all lawful powers and duties

Traditional leaders in Lesotho had been made police agents. The *Chieftainship Act* required a traditional leader to report commission of crime within his area of authority to the nearest member of the police force.[1779] While in principle traditional leaders were expected to prevent crime, viewed in the context of their new roles as police agents, there was a reason to believe that the Act made them subordinate members of the police force of Lesotho.

The Act provided for the establishment of a special Disciplinary Committee for the purpose of investigating matters of discipline affecting traditional leaders.[1780] The Disciplinary Committee consisted of not less than two members namely the Minister or a person nominated by him who acted as a chairperson in all the proceedings of the Committee and such additional member as the Minister might think fit to appoint.[1781] Members might also be appointed on an *ad hoc* basis. The Act further empowered the Minister to appoint a public officer to be the Secretary of the Disciplinary Committee. Such a Secretary is not necessarily a member of the Disciplinary Committee.[1782]

As already indicated above,[1783] traditional leadership was hereditary in a sense that a traditional leader was not elected but is born to the throne. A traditional leader succeeded to the throne according to the customary rules of succession.[1784] Accoding to this principle a traditional leader normally held

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of his office impartially, efficiently and quickly according to law, to interpose for the purposes of preventing and to the best of his ability to prevent the commission of any offence by any person within his area of authority.

[1779] Section 7(1) of Act 22 of 1968.

[1780] Section 15(1) of Act 22 of 1968.

[1781] Section 2(a) and (b) of Act 22 of 1968.

[1782] Section 4(a) and (b) of Act 22 of 1968.

[1783] See 8.1.2 above.

[1784] Section 10 of Act 22 of 1968 provides that a reference to the eldest son of a person is a reference to a legitimate son of that person. In *Pita v Pita* (1971-1973) LLR 280, the applicant applied for an order declaring that he had a better claim to succeed to the office of headman of Tlametlu, Ha Pita than did the respondent. The office became vacant in September 1970 with the death of one Neo Pita. The applicant was Neo Pita's brother whereas the respondent was a descendent in another branch of the deceased's family. Just before the death of Neo Pita the family convened and nominated the successor on the basis that the deceased was by reason of infirmity of body or mental incapacity incapable of

office for life except in certain circumstances where for instance, he was unable to rule due to ill-health, insanity and so forth. However, under the *Chieftainship Act*, a traditional leader is appointed[1785] by the government and might be dismissed or deprived of all or some of his powers and duties.[1786]

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nominating his successor. At the family gathering the respondent was nominated as the successor. The court held that in nominating a successor to headmanship the family gathering had no discretion to go outside the order of succession laid down in customary law and section 10 of the *Chieftainship Act* 22 of 1968. In *Chief 'Meli Ntsoele v Chieftainess 'Mamolomong Ramokhele* (1974-1975) LLR 130, the court stated that where a family nominated a person as successor to the headmanship, the family gathering is obliged not to depart from the customary rules of succession to the *Chieftainship Act*. However, the court had slightly different view in *Leihlo v Lenono* 1976 LLR 171, where the court held that where the deceased was appointed headman in his own right and did not inherit the office from the family his first born son succeed him to the office of his death and succession is not determined in the context of the whole family. The court view was that since the provision of a headman was not hereditary the customary nomination by the family gathering was not necessary. See also section 10 of *Chieftainship Act* 22 of 1968, which provides that a reference to the eldest son of a person is a reference to a legitimate son of that person. A question of legitimacy was taken further in *Molapo v Molapo* (1971-1973) LLR 289, where it was contended that all children born of a woman during the subsistence of a marriage and even after her husband's death, if the bohali cattle had not been refused such children are regarded in customary law as legitimate and that it is in that sense that the words "legitimate sons" are used in section 10(1) of *Chieftainship Act*. The court concluded that to allow an illigetimate adulterine child rejected by the mother's husband to succeed the husband as Chief is repugnant to justice, morality and the spirit of section 10 of the *Chieftainship Act* of 1968.

[1785] Section 14 of Act 22 of 1968. In *Chief Slowly Molapo v Chieftainess 'Mateketsi Teketsi* (1971-1973) LLR 217, the appellant contended that the *Chieftainship Act* of 1968 has changed the law (*Native Tribunal Proclamation* of 1938) in that "gazettement" of Chiefs was no longer the basis of rights of chieftainship and section 14 of the Act of 1968 gave court jurisdiction to make orders relating to the offices of Chiefs and place appointment of Chiefs on government. The court went further to state that the provisions of sections 14(3) and 14(4) of the *Chieftainship Act* merely acknowledged jurisdiction of the courts to make orders relating to the appointment or succession of a person to the office of Chiefs and could not possibly be interpreted to mean that the courts were given power to recognise an office of Chief not already established. The court concluded that a person not proclaimed in the Gazette as Chief or Headman cannot become "Chief" or "Caretaker" of the area with power to discharge duties of the tribe. A person can only become a Chief if he or she has been appointed and recognised by the government. See also *Seeiso v Seeiso* (1996) LLR 13, where it was argued that since the appointment has been gazetted and approved by the Minister of Interior and since the Minister's advice is decisive that was the end of the matter and the court is not competent to interfere. However, in *Motsarapane v Motsarapane* (1979) LLR 112, the court stated that the position of the ungazetted or unrecognised Chief is a placing which is internal or a friendly or a family arrangement between the individual and the senior Chief. This arrangement must be confined and will only be effective in respect of the area over which the senior Chief of the area has a recognised and undisputed boundary. However, the court went further to state that under the *Chieftainship Act* placing in the old customary law sense is dead and buried. In *Thukhube Lisene v Mopeli Mohale* (1971-1973) LLR 245-250, the court held that the office of the Principal Chief or Ward Chief has authority over the other offices of Chiefs in its area and that authority is exercised through the other offices of Chief that are subordinate to that office of Principal Chief or Ward Chief. Therefore the Principal Chief or Ward Chief has authority to recognise and appoint a person as a subordinate Chief in his area.

[1786] Section 18(a) of Act 22 of 1968.

The Act provided that a traditional leader was guilty of a disciplinary offence and liable to the deprivation or the reprimand if he:[1787]

- Failed or refused to exercise any power or perform any duty of that office under this Act or any other law;
- Failed or refused to carry out a lawful order or direction of a Minister of the Government of Lesotho or of a traditional leader exercising the powers and performing the duties of an office of traditional leader having superior authority over that office;
- Failed or refused to observe in relation to the powers and duties of that office, refused to support, aid and maintain the king in His government of Lesotho, according to the *Constitution* and the other laws of Lesotho;
- Took up or engaged in any employment;
- Was absent from the area of authority of his office without written notice to a person or Chief superior to him;
- Associated with or participated in the activities of a person or persons of bad character;
- Had been found by a medical practitioner to be addicted to alcohol or drugs;
- Misused any of the powers or duties of that office;
- Behaved in any manner that was prejudicial to public safety or to public order, or to the dignity, status and reputation of that office or the office of a traditional leader generally; and
- Had been found guilty of a criminal offence.

In view of all the above instances, the Act made provisions for a hearing before action could be taken against a traditional leader in question. However since 1990, a traditional leader could be removed from his office without any hearing. For instance, if in the opinion of the Minister concerned he was unfit for his duties or that he was incapable of carrying out his duties efficiently or in

[1787] Section 17 of Act 22 of 1968.

accordance with public interest.[1788] The Act was amended to deny them *audi alteram partem*. This was a move that trampled upon the rule of natural justice.[1789]

10.7 LAND REFORM AND ADMINISTRATION

All land both rural and urban in Lesotho is vested in the King on behalf of the Basotho nation.[1790] Traditional leaders no longer administer land for and on behalf of their tribes. Their pre-colonial roles of land administration have lost a great deal of importance.[1791] Land administration is the responsibility of the Minister of Interior. The powers to grant titles are vested in the office of the King as Head of state.[1792] In rural areas Land Committees grant titles. In other words, Basotho citizens requiring land must apply to the chairpersons of the Land Committees. Applications are no longer forwarded to the traditional leaders in their respective traditional areas. Franklin argued that the introduction of the Land Committees was to democratise the whole regime of decision-making processes around land issues in Lesotho.[1793]

The idea of democratising land administration in Lesotho started long before independence in 1966. The 1965 *Constitution* created Land Boards and required that traditional leaders should be members of Land Boards in allocating, granting or revoking land rights in the rural areas. Seven members of the Land Boards were to be elected at a *Pitso*,[1794] two were to be nominated by the principal traditional leader and the other two by the Minister. These constitutional provisions were important steps towards the process of democratisation of land administration.[1795]

[1788] See part 6 that was added to the *Chieftainship Act* 22 of 1968 under *Lesotho Order* 16 of 1990.
[1789] It seems the Act was designed and framed to disregard the basic principles of natural justice, equity and fairness.
[1790] Sections 107 and 108 of 1993 *Constitution*.
[1791] See 9.1 and 9.2 above.
[1792] Section 18 of 1993 *Constitution*.
[1793] Franklin *Land Law in Lesotho* 106.
[1794] See 8.2.5 above.
[1795] Franklin *Land Law in Lesotho* 106.

Despite what the 1965 *Constitution* demanded, traditional leaders continued to act without consulting the Land Boards. Williams maintained that these Boards appeared to generate more trouble than they were worth.[1796] For example, the elections of these boards were sometimes turned into political tussles. There were no cordial relationships between members of these boards and traditional leaders. Moreover, traditional leaders had a tendency of not consulting them at all.[1797] As a result, the BNP government was forced to remind traditional leaders that the practice of land allocation and administration was unsatisfactory. Leabua emphasised the need for the passage of legislation for land reform and administration in both rural and urban areas.[1798]

The 1966 democratic dispensation and arrangements were initiated by the fact that during the colonial era there had been complaints that some traditional leaders abused their power in the field of land allocation. The grantee became liable for payments in cash and sometimes for rendering labour services to a traditional leader in question. According to Harold the tendency to allocate land for labour services was too exploitative in nature.[1799] As explained above,[1800] after independence, the government's intervention on matters of land allocation and control was to democratise all the structures responsible for land distribution and to curtail the abuse of powers by some of the traditional leaders. As a result, the Lesotho parliament made legislative provisions to prescribe the allocation and administration of land.[1801]

Generally speaking, the criteria applied for the allocation of land in Lesotho were citizenship, sex and marital status. The first important condition was membership of the community defined in terms of traditional leader's area of jurisdiction. A second condition was that the applicant be a married male. Williams explained that the limitation of land to married men originated from the idea that land was granted only to provide for the subsistence of the family

[1796] Williams *Lesotho Land Tenure* 5.
[1797] Williams *Lesotho Land Tenure* 5.
[1798] Williams *Lesotho Land Tenure* 5.
[1799] However the labour services were commuted in 1930.
[1800] See 9.7.4 and 10.1 above.
[1801] Harold *Basotholand Economy* 17

group. Until a man was married, he would remain an integral part of his father's household and would be expected to provide sustenance from that source.[1802] Single women held usufruct titles in their own right. However, in terms of the 1993 *Constitution* women have a constitutional right to freedom from discrimination. Under the 1993 constitutional dispensation, women in Lesotho have the right to own property including land.[1803]

10.7.1 LAND HUSBANDRY ACT OF 1969 *AND ADMINISTRATION OF LAND ACT* OF 1973

The *Land Husbandry Act*[1804] was passed in 1969 after independence as an attempt on the part of the government to ensure soil conservation. The *Land Husbandry Act* gave the Minister power to make regulations to ensure that land is used beneficially. These regulations may apply in respect of agricultural management.[1805]

The *Land Husbandry Act* and the *Administration of Land Act*[1806] established greater government control over land through the Ministries of Interior and Agriculture. The *Land Husbandry Act* was designed *inter alia* to facilitate soil conservation, protect water resources and prevent harmful agricultural practices among rural procedures. The Ministry of Agriculture had the right to lay down regulations concerning the control and regulation of grazing, the limitation on the number of grazing animals in a grazing area. Traditional leaders in both pre-colonial and colonial Lesotho performed all these functions.[1807] Under the post-colonial dispensation, the government officials in the Ministry of Agriculture now perform them.[1808] This new settlement of the administration and allocation of land eroded the powers of traditional leaders.

[1802] During the pre-colonial era of Lesotho, married women and widows were expected to derive sustenance from their husband's fields. As a result land was allocated to men for the provision of sustenance. See also 8.1.2, 8.1.5 and 8.2.7 above.
[1803] Sections 17 and 18 of 1993 *Constitution*.
[1804] Act 22 of 1969.
[1805] Witzsch 1989 *LLJ* 422.
[1806] Act 16 of 1973.
[1807] See 8.2.7 and 9.6.2 above.
[1808] Franklin *Land Law in Lesotho* 102

The *Administration of Land Act* also gave broad powers to the Ministry of Interior. The Act introduced a system of leases and licences and allowed rent to be charged with the revenue to be used for public purposes. This rent did not benefit traditional leaders of a particular agricultural land.[1809]

10.7.2 LAND PROCEDURE ACT OF 1973

Since independence in Lesotho, land was governed by the 1966 *Constitution*. When the *Constitution* was suspended in 1970 by the BNP government, that move created a vacuum in land law. The *Land Procedure Act* of 1967[1810] was however, still in operation. In 1973 the *Land Procedure Act*[1811] was enacted to fill the gap left by the 1966 *Constitution* in connection with land issues. Although the L*and Procedure Act of* 1973 mainly dealt with land procedures, it vested the right to allocate land in the King and traditional leaders who served under him.[1812]

The Act established Development Committees. Traditional leaders were required by the Act to allocate land in consultation with the members of Development Committees. The Minister was given extensive powers to direct traditional leaders in the exercise of their powers of land allocation. The Act marked the beginning of the control of land by the central government. The duty of land control and allocation was taken slowly but surely from the hands of traditional leaders. Thus the 1973 Act reduced the powers of traditional leaders to allocate land.[1813]

[1809] Franklin *Land Law in Lesotho* 102.
[1810] Act 24 of 1967.
[1811] Act 16 of 1973. See *Land Act* 20 of 1973, which makes provision for the procedure relating to applications for allocation of land or for the granting of any interest or right in or over land. The Act also deals *inter alia* with matters involving the authority of a traditional leader in respect of land in rural areas and appeals in rural areas in respect of the decision of a traditional leader regarding the allocation of land. See also the *Administration of Lands Act* 16 of 1973. Sections 2 to 4 of this Act provide that the ownership of land is irrevocably vested in the nation represented by the state of Lesotho. Grants to persons and use of land for public purposes have to be in the name of the King.
[1812] Sections 3 and 4 of Act 16 of 1973.
[1813] Maqutu *Contemporary Constitutional History* 121-122.

Leabua was convinced that government's failure to attract investment was caused by the traditional modes of land tenure. There was a growing belief in government circles that if government and not traditional leaders could control land, the move would attract foreign investment and stimulated economic development. As Maqutu rightly pointed out, it never occurred to the Leabua government that the fact that it seized power did not guarantee stability and peace that the investors always wanted. Maqutu observed that it seemed that changing Lesotho tenure and reducing the powers of the traditional leaders was not the solution to all the political and economic problems created by the BNP government.[1814] As it clearly transpired, lack of foreign investment and poor economic development were caused by political instability in Lesotho.[1815]

10.7.3 LAND ACT OF 1979

The *Land Act* of 1979[1816] is the most important piece of legislation in Lesotho, which impact directly on land administration and allocation of rights in land. The Act provided that land in Lesotho should be vested absolutely and irrevocably in the Basotho nation and should be held by the state, as representative of the nation.[1817] According to Maqutu, the word "state" implied that civil servants and government bureaucracy have taken the place of the nation or people of Lesotho.[1818] In other words the state meant bureaucracy in this regard and traditional leaders became ordinary officials of a bureaucratic state. In terms of the Act, land allocation depended on civil servants under the authority of the Minister in charge of land administration.[1819]

Similar to the *Land Procedure Act* discussed above,[1820] the introduction of the *Land Act* failed to change the attitudes of the investors. All what the Act achieved was to give the central government greater powers in the allocation and use of land. The Minister of Interior and the Commissioner of Lands were

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[1814] See 10.3.1, 10.3.2 and 10.3.3 above.
[1815] Maqutu *Contemporary Constitutional History* 122.
[1816] Act 17 of 1979. This Act was the work of British expatriate servants.
[1817] Sections 3(1) of *Land Act* of 1979.
[1818] Maqutu *Contemporary Constitutional History* 123.
[1819] Maqutu *Contemporary Constitutional History* 123.
[1820] See 10.7.2 above.

made the key figures in land administration. This arrangement sidelined traditional leaders in matters of land administration. The belief that the Minister and civil servants could do better in land administration than traditional leaders was a leap in the dark. Traditional leaders were replaced by civil servants simply because they had been accused of poor administration and favouritism. There were also allegations of corruption. [1821]

As Maqutu correctly observed, the introduction of the *Land Act of* 1979 shocked many people. Cases of delays and corruption within the institution of civil servants and bureaucracy were rife. These delays were disturbing particularly where business sites in both rural and urban areas were involved. To a large extent, such an introduction of bureaucracy in the country's land administration was one of the reasons for the strangling of the country's economy.[1822]

The *Land Act* also made provision for a three-member Land Tribunal. This institution was made up of the Chair that was a High Court Judge or Magistrate and two assessors. One assessor was a principal traditional leader and the other one was a lawyer or land economist. There were also structures of appeal within the Land Committee hierarchy to settle disputes. With the introduction of the Land Tribunal and Committees, it seems traditional leaders in Lesotho no longer settled land disputes. Only the Land Tribunal as a statutory body has the right to hear appeals.[1823]

As corollary to the basic principle that the land was vested in the Basotho nation, the Act further provided that no person, other than the state should hold any title to land except as provided for under customary law.[1824] However, the Act made it clear that where the customary law was inconsistent with the Act, the Act should prevail. In this case, the Act took precedence over customary law in all matters relating to land administration, allocation, granting and revocation. To put it short, the Act took over all powers of

[1821] Section 75 (1) and (2) Act 16 of 1973.
[1822] Maqutu *Contemporary Constitutional History* 126.
[1823] Franklin *Land Law in Lesotho* 110. Section 64(1) and (2)(a)-(c) of Act 17 of 1979.
[1824] Section 3(2) of Act 17 of 1979.

traditional leaders over matters of land administration, thereby undermining their customary law duties on matters pertaining to land.[1825]

10.6.6 VILLAGE DEVELOPMENT COUNCILS AND LAND REFORM

According to the *Land Act*, the power to allocate land was exercised by the Village Development Committee (VDC). The VDCs were established in Lesotho in each area, which falls under the jurisdiction of a traditional leader in terms of the *Development Councils Order*,[1826] which came into effect on 2 December 1991. VDCs were Councils that operated in areas which were controlled by traditional leaders. The VDC had 7 members who were elected by the adult inhabitants of the area. The traditional leader was an *ex officio* member of the VDC, half of the total eight members of the VDC constituted a quorum. Initially, a traditional leader of the area of the VDC was the Chairperson of the VDC but since 9 December 1994 he was no longer the Chairperson. The members elected the chairperson of the VDC.[1827]

VDCs were vested with a duty to allocate land in the rural areas. Land allocation was effected by majority decision of the relevant VDC of the area. Allocation of land in rural areas by VDCs was for agricultural purpose only. According to Kumar and Kulundu-Bitonye, agricultural purposes include use of land mainly for pasture, grazing, orchard, and forestry.[1828] Most allocations of land for agricultural purposes were in the form of non-registerable title. This policy of not giving the allotees titles to land disadvantaged them because they did not receive financial support or credit from the banks.[1829]

The VDCs had powers to revoke the allocation of land, for example, where an allocation has been made for the purpose of agriculture and the VDC found that the land has been abused by the allotee through over-grazing, refusal or inability to combat soil erosion or a lack of cultivation of any arable land for a

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[1825] Kumar and Kulundu-Bitonye 1993 *LLJ* 127.
[1826] Order 18 of 1991.
[1827] Kumar and Kulundu-Bitonye 1993 *LLJ* 127.
[1828] Kumar and Kulundu-Bitonye 1993 *LLJ* 127-128.
[1829] Kumar and Kulundu-Bitonye 1993 *LLJ* 127-128.

period in excess of three years. The VDCs had wide powers and had also usurped functions of traditional leaders in all matters relating to land allocation.[1830] Besides VDCs, different Development Councils had been established at the village, ward and district levels. These Development Councils were responsible for implementation and maintenance of development activities. These Councils were expected to work with traditional leaders in their areas for the purpose of development projects.[1831]

10.7 *CONCLUSION*

In view of the preceding discussion it is evident that the post-colonial settlement diminished role and status of the King and the traditional leaders in Lesotho. The process of constitutional reconstruction of monarchy and traditional leadership introduced roles, which are foreign to these institutions. The post-colonial legislative framework drove traditional leaders to the centre of government with regard to the land administration and matters of traditional governance. In so doing the post-colonial government of the kingdom of Lesotho minimised the independence and sovereignty of traditional rule. Traditional authorities had to work side by side with democratic structures such as District Councils, VDCs and various Ministries of government. These post-colonial arrangements usurped the functions of traditional leaders at local government level because their pre-1996 functions were taken by these democratic structures.

It is also important to highlight that even though the land in Lesotho is vested in the King and generally presumed to be administered by traditional leaders, the practical effect of land use is that land is controlled and allocated by democratic structures and various departments concerned. The result is that traditional leaders no longer exercised their pre-independence functions with regard to land allocation and administration.

[1830] Kumar and Kulundu-Bitonye 1993 *LLJ* 127-128.
[1831] These Councils were regulated by the *Development Council Order* 18 of 1991

Given the statutory roles and powers of traditional leaders in Lesotho, it is important to underline the fact that both 1966 and 1993 *Constitutions* and the legislation dealing with the traditional leaders impacted negatively on the landscape of traditional governance and institutions. Traditional leaders were the employees and agents of the government. They owed their allegiance to the Minister of Government of Lesotho who was empowered to dismiss them if they failed to carry out his or her instructions. In the light of this statutory development, the institution of traditional leadership had been exposed to government's manipulation and exploitation.[1832]

Much the same as the colonial government was ready to deal the institution of traditional leaders a mortal blow, the post-colonial government did not hesitate to take the idea forward. Despite the fact that the BNP promised traditional leaders bread and butter before the 1965 elections, as noted above,[1833] it was the same political party which eroded and altered their powers in 1968 through the passage of *Chieftainship Act*. The BNP pretended to promote traditional leadership while in practice it exploited them to the fullest. The post-colonial legislative framework undermined traditional leadership in all respects.

It completely destroyed the foundation upon which traditional leadership was founded and established. For instance, the *Chieftainship Act* of 1968 and other legislation, which had bearing on land administration and local governance was a comprehensive and far-reaching result on the powers and privileges of traditional leaders in the independent Kingdom of Lesotho.[1834] The Act also incorporated traditional leaders into the civil service. As state officials or public servants, traditional leaders were required to work from an office. As a result, they were limited in the execution of their duties by the conditions of service and other laws.

[1832] The *Chieftainship Act* has made traditional leaders a cheap source of labour in the field of administration. They serve as public relation officers of the government of Lesotho.
[1833] See 9.7.3 above.
[1834] Maqutu *Contemporary Constitutional History* 23.

The military government from 1966 to 1993 interrupted traditional leadership. Like the Leabua government, when the military regime took over the reigns of Lesotho, the military government cajoled traditional leaders by promising them that it would strengthen traditional leadership. But once the military junta anchored its power it had no time for the institution of traditional leadership. Whether or not the ruling LCD government under the premiership of Mosisili would take bold steps to restore the glory of traditional leadership in Lesotho was a lesson still to be learnt.[1835]

[1835] Maqutu *Contemporary Constitutional History* 23

CHAPTER 11: CONCLUSION AND RECOMMENDATIONS

The institution of traditional leadership resides on the notion that the power of traditional rule was from time immemorial informed and maintained by the ancestors. This institution centres on the hereditary traditional leader who is assisted by various categories of minor traditional leaders and headmen acting as his representatives in the different areas into which his traditional authority area is sub-divided.[1836] The legitimacy of traditional leaders and traditional legal rules are based on traditions and customs.[1837] The traditional leaders exercise their functions and powers in accordance with traditional rules and standards of behaviour. The idea of a long history of traditional leaders in South Africa, Botswana and Lesotho support the belief that the traditional authority can be traced back to the ancestors who made the life of the African people of these three countries. The aim of this study[1838] was to investigate and discuss the history of traditional leaders and demonstrates the role of law in the disintegration of traditional leadership in South Africa, Botswana and Lesotho.

The term traditional leadership or authority encapsulates different connotations depending on its historical circumstances. The first connotation refers to traditional leadership as an institution of tradition associated with communal systems of life in pre-colonial times. The other connotation describes traditional leadership as an administrative institution according to the statutes and policies of the colonial, *apartheid* (in case of South Africa) and post-colonial governments in these three countries.[1839]

[1836] Olivier *Indigenous law* 4.
[1837] Vorster *Traditional Leadership* 127.
[1838] See 1.2 above.
[1839] TARG *Legal Position* 6.

11.1 COLONIAL INFLUENCE ON PRE-COLONIAL TRADITIONAL INSTITUTIONS

The general conclusion of the study is that the pre-colonial status and image of traditional leaders had been greatly diminished in South Africa, Botswana and Lesotho. It is evident that the pristine and original nature of the pre-modern traditional authorities in these countries had been radically changed. The reason for this drastic metamorphosis is that throughout colonial epoch, legislation and political institutions had been successfully used to obliterate the stature of traditional leadership. However, colonial initiatives to completely diminish traditional authorities were without much success. In these three countries, traditional institutions demonstrated resilience and much concerted efforts to resist the onslaught of colonial administrators.

11.2 COLONIAL IMPACT

Although there were resistance by traditional authorities and traditional communities in South Africa,[1840] Lesotho[1841] and Botswana,[1842] traditional rule did not escape the colonial contact and impact unaffected. However, the colonial nature, methods and approaches of colonial administration in these countries engendered different and sometimes similar results. For instance, in both Lesotho and Botswana, Britain initially reposed herself with the task of protecting these countries and left traditional administrations entirely in the hands of the traditional leaders. However, this attitude changed when the British government modified the system of indirect rule and directly altered the roles of the traditional leaders and put them firmly under her control.

These approaches gradually led to the process of colonisation even though unintended. The introduction of the British system of administration by her officials known as Commissioners made enormous inroads in the institutions

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[1840] See 2.3.4 above.
[1841] See 8, 9 and 10 above.
[1842] See 5, 6 and 7 above.

of traditional leadership in both Lesotho[1843] and Botswana.[1844] These Commissioners usurped the functions of traditional leaders and where the powers of traditional leaders were not taken, such powers were greatly modified and tailored to be in line with the vision of the colonisers. Traditional leaders were channelled to serve the interests of the British government and no longer their subjects.

With regard to South Africa, the colonial rule took more or less the same route as in Lesotho and Botswana but traditional authorities and their people experienced a different type of colonialism. This ranged from Dutch to British colonialism.[1845] These forms of colonialism were said to be external in the sense that the colonial masters were outside the country. The other form of colonialism was internal because both the colonised and the colonisers lived side by side. This type of colonialism was known as *apartheid*[1846] or separate development. However, common to all three countries is the fact that the colonial administrators crushed the resistance of traditional leaders through brutality and violence. The colonisers sustained their power and rule over traditional leaders by conquest and wars.

The British had a tendency of deploying traditional leaders who displayed signs of rigorous resistance and opposition. In some severe cases, the use of titles of the traditional leaders was discouraged and subsequently fell into disuse. For instance, in South Africa and Botswana, titles such as Kings and Queens were discontinued except in the present KwaZulu-Natal Province[1847] of South Africa where the colonial government failed to expunge or excise them from traditional practice and use.

In South Africa, both the British and the Boers in TVL and OFS Republics[1848] had a long list of depositions. This approach was equally applied and practiced by the *apartheid* government and its homeland administrations. The

[1843] See 9.4, 9.5, 9.6, 9.7, 9.8, 9.9 and 9,10 above.
[1844] See 6.1, 6.2 and 6.3 above.
[1845] See 3.1.1, 3.1.2, 3.1.3 and 3.1.4 above.
[1846] See 3.1, 3.5.1, 3.5,2 and 3.5.3 above.
[1847] See 3.5.4.1.6 above.
[1848] See 3.3.1 and 3.3.4 above.

introduction of colonial rule in South Africa, Lesotho and Botswana produced two categories of traditional leaders namely those leaders who rejected the system and those who accepted it. The second category was found in the ranks of collaborators and sell-outs. This was a group of men who became beneficiaries of the colonial systems at the expense of their traditional authorities and subjects.

In South Africa, there were traditional leaders who opted for the independence of the homelands[1849] and self-government[1850] of their territories and jumped on the bandwagon of *apartheid*. As a consequence, this arrangement produced a class of elites who supported the colonial and *apartheid* systems. *Apartheid* was strengthened through these traditional leaders, who were partly responsible for the dilatory tactics of black liberation in South Africa. The *apartheid* regime in South Africa manipulated traditional leaders to entrench its power and authority. Similarly, in both Lesotho and Botswana, the colonial governments were not prepared to accept defeat by the hands of the traditional leaders. British rule, however, also divided traditional leaders in Lesotho, Botswana and South Africa.

By way of comparison, the extent to which the institution of traditional leaders disintegrated in South Africa was much more severe than in Lesotho and Botswana. The colonial governments in these countries used different political, economic, constitutional and legal practices and methods to achieve this disintegration. The historical developments and trends, which marked the dislocations of traditional systems in South Africa, Lesotho and Botswana, also differed.

However, what appeared to be common in these countries is the fact that colonisers' attempts to totally phase out the systems of traditional leaders were not a complete success. Faced with no choice, colonial governments retained traditional authorities but altered their roles and functions by making them, for example, tax collectors. The gradual disintegration of the linkages of

[1849] See 3.5.3.1, 3.5.3.2.1, 3.5.3.2.2, 3.5.3.2.3 and 3.5.3.2.4 above.
[1850] See 3.5.4.1, 3.5.4.1.2, 3.5.4.1.3, 3.5.4.1.4, 3.5.4.1.5 and 3.5.4.1.6 above

networks of institutions of traditional leaders led to the loss of valuable knowledge of the essence and relevance of these institutions. The gradual erasure of knowledge about how these institutions of traditional leaders functioned differed from one country to another. For example, it seems that in South Africa there had been a radical departure from traditionalism. Many traditional communities have adopted western modes of life whereas generally, in Botswana the lives of Batswana still revolve and are centred on the *kgotla*.

One of the main colonial strategies used to break the backbone of traditional authorities was the colonial governments' policy of land dispossession. Traditional leaders were the custodians of land and their sovereignty rested on land. Land was the most important part in the lives of the traditional people in these countries, as subsistence economy was usually practised. When the colonial masters seized land from them through conquest and wars, traditional leaders and their communities were dangerously exposed.

Although the colonial masters did not interfere with the allocation of land in rural areas, they used various methods to take land from traditional communities. South Africa serves as a typical example, to clearly explain the peril of land dispossession. In South Africa, some traditional communities were forcefully removed from their traditional areas. In Lesotho and Botswana there was no systematic or massive land dispossession except through conquest in Lesotho, where the Boers took land and the British took grazing land.[1851]

As it has been recorded in this study that in Lesotho, King Moshoeshoe I discouraged the notion of individual ownership of land, he vested all the land in the nation. Chief Khama in Botswana applied the same strategy. However the sovereignties and land of the Batswana and Basotho were not left unchallenged nor without disruption. The Boers from TVL and OFS interfered with the land of the traditional communities in Lesotho and Botswana. Even

[1851] See 8.2.7 above.

today the governments of these two countries still argue that they have legitimate claims to some of the areas of South Africa.

Despite the colonial influence, the institutions of traditional leadership in South Africa, Botswana and Lesotho survived, albeit in a different format than pre-colonial institutions. Traditional institutions survived some political, legal and social challenges despite their critics.

11.3 OTHER FACTORS DISINTEGRATING THE INSTITUTION OF TRADITIONAL LEADERSHIP

There are also various other reasons for the disintegration of traditional institutions in these three countries, one example being labour migration. Migration tampered with the essence and nature of traditional institutions. Migrations occurred with varying degrees in South Africa, Lesotho and Botswana. As a consequence the impact of migration on traditional institutions also differed. For example Lesotho had been a labour dormitory for South Africa more than any other country in Africa. This phenomenon disrupted traditional communities and institutions in Lesotho.

Similarly but with varying tempo, Batswana rural men had also been recruited to South African mines and factories. In South Africa, rural patterns of life and traditional institutions were shaken when rural people flocked to cities and towns.[1852] Labour migrations in these countries should be seen as a contributory factor towards the alteration of traditional authorities and the entire spectrum of traditional life.

Another external factor was the work of the missionaries that affected the institutions of traditional authorities in the three countries. These missionaries enjoyed the protection of the colonial governments and with the influence and support of the colonial masters they gradually interfered in traditional politics of the Batswana, Basotho and black South Africans. Firstly they perpetuated

[1852] See 3.2.5, 3.3.2 and 3.4.2 above.

and nurtured the division between traditional leaders. They achieved that by generally supporting Christian traditional leaders against non-Christian leaders. For example, it has been discovered that the London Mission Society clandestinely supported Chief Khama III in his dispute with his father, Sekgoma, who was not a Christian.

The missionaries also interfered with the cultural and traditional infrastructures of the traditional communities in these three countries; tribesmen and women were encouraged to abandon their traditional religions and customs. Traditional religions were equated to heathenism or paganism. It was further noted that most of the missionaries undermined and disliked traditional institutions such as *bogadi*, polygamy, and male and female initiation schools. This attitude towards the customs of the Batswana, led to the partial destruction of the indigenous people's culture and customs.

Some cultural practices survived the missionaries and colonial masters in South Africa, Botswana and Lesotho. Even in Botswana Chief Khama was unable to eliminate all the Ngwato customs, which the missionaries encouraged him to extinct. Chief Khama through the influence of the missionaries outlawed the institution of *bogadi* among the Ngwato. Despite this action one could today still find some of the Ngwato people who support the institution of *bogadi*. What is necessary to explain is the fact that the role, which the missionaries played, provided a pattern of erosion on traditional systems and institutions. The missionaries altered traditional institutions and introduced the principles of European civilisation in these countries. The missionaries also supported traditional communities who sided with them materially and politically. For instance in Botswana and Lesotho the missionaries helped traditional leaders to secure protection from Britain against the Boer invasion from the former Transvaal and Orange Free State.

11.4 POST-COLONIAL INFLUENCE

The institutions of traditional leaders in South Africa, Botswana and Lesotho had not only suffered a great deal of changes during the colonial period but

also during post-colonial times. These changes are unique and different depending on periods, times and the type of regimes and also differ from changes brought about by the colonial governments. Although traditional institutions did not disappear in a democratic dispensation in these countries, it seems they are faced with the new challenges. In South Africa, the post-1994 era marked the demise of *apartheid* for traditional leaders and the beginning of a new struggle for the freedom of the traditional authorities. The post-*apartheid* government still stigmatises traditional leaders and ignores the contribution and sacrifices some of them made during the *apartheid* era. There are some of the politicians who strongly feel that the institution of traditional leaders is unnecessary and inconsequential in the new South Africa. As is the case in Lesotho and Botswana, traditional leaders in South Africa were required to re-define their roles within the framework of a democratic dispensation. This transformation of traditional institutions had been articulated in the *Constitutions* and subsequent legislation of these countries.

For instance, the 1993 and 1996 *Constitutions* of South Africa, the 1966 *Constitution* of Botswana and the 1966 and 1993 *Constitutions* of Lesotho outlined guidelines along which the institutions of traditional leadership have to be directed and shaped. The 1996 *Constitution* of South Africa recognises the status and roles of traditional leadership within the ambit of the constitutional provisions. What is to be considered, as a positive step of this constitutional settlement is that it provides for the establishment of both National and Provincial Houses of Traditional Leaders to ensure maximum participation and involvement of traditional leaders on matters of governance.

The *Constitution* of Botswana recognises the status, roles and powers of the traditional leaders. It further articulates in clear terms the functions and powers of the traditional leaders in a democratic state of Botswana. Initially, this constitutional recognition of the status of traditional leaders was only afforded to the principal tribes and did not recognise the status and roles of the traditional leaders of minority groups such as the San, Bayeyi, Bakgalagadi and Bakalanga. However, in 2005 the parliament of Botswana

amended the *Constitution* to recognise the status and roles of the traditional leaders of minority groups in the House of Chiefs.

Flowing from these *Constitutions*, the national governments of these countries enacted a host of legislation, which further redefine the roles of traditional institutions. These new roles are to be performed by traditional leaders at both local and central government. In South Africa, traditional leaders have an added role to play at provincial level. This study also identified that the role of traditional leaders at local, district or provincial and central governments in these countries is shrouded with problems and daunting challenges. In South Africa, Botswana and Lesotho, government officials and politicians play a dominant role over traditional leaders. They provide legitimacy and direction for programmes or issues of service delivery on policy articulation. In most cases it is the government officials who decide how a particular issue should be solved. This study, however, revealed that traditional leaders in South Africa, Botswana and Lesotho lost much of their pre-colonial authority at the local level due to increased bureaucratisation and politization.

The relationship between traditional authorities and central government in a democratic South Africa, Botswana and Lesotho was investigated. It seems that central governments in these countries made traditional leaders their agents. Traditional leaders are responsible to these governments for their actions. Legislation had been proclaimed to define and regulate the framework within which traditional leaders should operate. In all these countries various departments or ministries were established to regulate traditional authorities and make them accountable to the Ministers concerned.

Traditional leaders may also be deposed or suspended by the relevant Ministers. In South Africa, the traditional leaders are accountable to both provincial and national governments. The Premier of a Province subjects traditional leaders to regulation and has legislative power to recognise and appoint them. This arrangement inevitably creates conflict between traditional authorities and the national elite. The reason being that the traditional leadership feels that their existence was being threatened by democracy. For

example, in Botswana in 1969 Chief Bathoen II and traditional elites broke away from Botswana Democratic Party, as they were not content with the treatment, which the central government accorded to them in general.

In South Africa, the National House of Traditional leaders under Chief Mzimela engaged central government in a hot debate on issues such as land, constitutional powers and functions of traditional leaders and the roles of traditional leaders at local government level. It is generally accepted and acknowledged that the relationship between traditional leaders and national government is sometimes tense. Even though the South African government would always appear in public with a tone, which suggests that, the relationship is cordial, those inside the National House of Traditional Leaders have different views.

Traditional leadership and the central government of Lesotho were also in a conflict situation. In Lesotho the King had been subjected to indignity and contempt by the central government. There is also conflict between traditional leaders and the national elite. King Moshoeshoe II was harassed and forced into exile. The rays of hope occurred when the LCD's government took power and the relationship between the government and the Kingdom was normalised and stabilised.

11.5 POWERS AND FUNCTIONS OF TRADITIONAL LEADERS

The powers and functions of traditional leaders in South Africa, Botswana and Lesotho may be compared as follows:

Comparative Table

POWERS/FUNCTIONS	RSA	BOTSWANA	LESOTHO
Pre-Colonial era			
❑ Determination of questions of tribal membership;	√	√	√
❑ Allocation and administration of land;	√	√	√
❑ Arrangement of tribal ceremonies;	√	√	√
❑ Promotion of the general welfare of the tribe;	√	√	√
❑ Administration of justice;	√	√	√

❑ Religious functions;	√	√	√
❑ Military functions;	√	√	√
❑ Traditional rituals such as rain-making;	√	√	√
❑ Promotion of initiation school;	√	√	√
❑ Support and guidance; and	√	√	√
❑ Enhancement of tradition and culture.	√	√	√
Colonialism			
❑ Administration of Justice;	√	√	√
❑ Maintenance of law and order;	√	√	√
❑ Responsible for development at local level;	√	√	√
❑ Leadership of Homelands;	√	x	x
❑ Accountable to *apartheid* regime;	√	x	x
❑ Served and led self-governing territories;	√	x	x
❑ Tax collection;	√	√	√
❑ Service and representation to colonial government;	√	√	√
❑ Safety and security; and	√	√	√
❑ Local government functions.	√	√	√
Post-Colonial epoch			
❑ Participation at local level;	√	√	√
❑ Advisory role at national level;	√	√	√
❑ Advisory role at provincial level;	√	x	x
❑ Implementation of government policies;	√	√	√
❑ Deal with statutes regarding customary law;	√	√	√
❑ Promote nation-building;	√	√	√
❑ Disaster management;	√	√	√
❑ Dissermination of information;	√	√	√
❑ Management of natural resources;	√	√	√
❑ Promotion of human dignity and equality;	√	√	√
❑ Participation in municipalities; and	√	x	x
❑ Role in District Councils.	x	√	√

Table 5: Comparative Table

In view of the above roles and functions of traditional leaders in South Africa, Botswana and Lesotho, it appears that they perfom more or less the same functions.

11.6 INDEPENDENCE OF SUPPORT FOR TRADITIONAL LEADERSHIP

Traditional leaders in South Africa, Botswana and Lesotho did not depend on central government for their positions even though their positions were to be recognised by central authorities. Although traditional leaders received stipends from central government their positions were not treated in the same way as public servants. These leaders have their rural constituencies and considerable support, which are independent from central government. As a consequence, the post-colonial governments in these countries were unable to extinct traditional authorities.

For instance, in Botswana traditional leaders controll the *kgotla*, which provides a strong link between traditional government and the people. It is through the system of *kgotla* that traditional leaders in Botswana are able to sustain their existence. The system of *kgotla*[1853] is an authentic voice of the Batswana in the rural areas. It is a voice, which articulate and translate the aspirations and interests of the Batswana on matters of rural development process and traditional governance.

In Lesotho, the kingdom serves as a bulwark between the life of traditional institutions and the threats of the central government. In South Africa the majority of the black South Africans who reside in the rural areas still have a high regard for the traditional leaders. Therefore rural support for traditional leaders affirms and confirms the relevance and existence of these institutions.

[1853] See 2.4, 5.2 and 5.3 above.

11.7 ROLE OF WOMEN AND YOUTH

While traditional leaders retained their modified form in the post-colonial epoch in these three countries, they lost their claim to exert primary political authority over their subjects and to serve as greatest patrons of them. The post-colonial national governments in these three countries have subjected traditional authorities and institutions into a democratic process of transformation.[1854] What this study elucidated however is that the consequences of this transformation were enormous. The political structures through which the transformation took place were such that traditional authorities were subordinated to all spheres of governments. As a consequence, the nature and form of traditional authorities were more drastically changed than during the colonial era.

In South Africa, under the new constitutional dispensation women may become traditional leaders in their traditional communities contrary to the old and long observed African rule of male intestate succession, which excluded women. The legislative changes on the landscape of traditional leadership were part of the transformation intended to promote gender equality. Although the *Constitution* of Botswana and Lesotho are silent on the issues of gender equality, women in these countries also act as traditional leaders and Regents in their communities. One of the remarkable features of transformation of traditional leadership in Botswana and Lesotho therefore that gender equality has been progressively advanced even without legislation.

The inclusion and participation of women and youth in some traditional government structures should be encouraged in order to add democratic value and credibility to this institution, which for many years remained essentially male dominated. Problems relating to women such as discrimination, prejudices, equality, participation and equal access to opportunities and resources are still encountered in these countries. Although

[1854] See 4.1, 4.2, 4.3, 4.4, 4.5, 4.6, 6.2, 10.1 and 10.2 above.

South Africa has made a remarkable progress in this area it cannot be said that South Africa has dealt successful with these problems. However, this study has established that changes in the composition of traditional authorities to include women has taken place in these three countries, sometimes without government's initiatives. This development is the illustration of the fact that a number of traditional leaders who realised the importance of change was growing, albeit at a slow pace. In some cases changes in the institution of traditional leaders are perceived as necessary tools to ensure the political relevance of the institution in a rapidly changing social and economic environment. In some cases more especially in the South African community, pressures and political influences accounted for these changes.

11.8 RECOMMENDATIONS

As it has been observed in this study, the relevance of the institution of traditional leadership in a democracy has been a controversial issue in South Africa, Botswana and Lesotho, since the attainment of independence and freedoms. Although these issues still constitute a hot debate in political circles, the institution of traditional leadership is retained in South Africa, Botswana and Lesotho after independence. In short traditional leadership won recognition in post-colonial dispensation.

But what seems to be lacking is how traditional leaders should play their new democratic roles within the framework of post-colonial era. It is often argued that in order to receive development and progress in rural governance, traditional communities must give up all their traditional institutions including the powers and functions of traditional leaders. The proponents of this line of reasoning believe that traditional institutions are intrinsically regressive and undemocratic, and that development could only be achieved by substituting communal land ownership with individual ownership and traditional leadership with local government on the basis of municipalities.

In the light of what has been discussed above, it is clear that the institution of traditional leaders has also been challenged in the post-colonial dispensation.

For example, over the years of democracy in South Africa, traditional leaders demonstrated concerted efforts to cajole the government to strenghten their powers at the local government level. Consequently, they pushed for the amendment of the *Local Government: Municipal Structures Act,* which gave them 20% representation in the Municipal Council. It is suggested that the representation be increased to 50% in order to give traditional leaders an equal representation with the politically elected councillors. It is also recommended that the *Traditional Leadership and Governance Framework Act* should be re-amended to give traditional leaders more specific and direct powers at the local government level. Although traditional leaders in South Africa, Botswana and Lesotho have suffered a considerable amount of attacks and contempt during the colonial epoch, they attempted in post-colonial times to reconcile their institution with new political, social and economic systems of the post-colonial times which had reduced and whittled down their roles, functions and powers.

Nevertheless, traditional leaders in these countries had maintained and sustained their cultural, social and judicial responsibilities at local and village levels. It is for this reason among many, that a conducive atmosphere and space should be created in these countries to allow traditional leaders to play an active role in transforming social and economic lives of their people. Good and harmonious relationship should be cultivated between traditional leaders and national governments in these countries. This relationship should transcend right through all levels of governments where traditional leaders exist and are present.

The modern *Constitutions* of South Africa, Botswana and Lesotho should provide for a type of traditional leadership structure that will make an impetus into human development and democratic building processes. For example, the traditional leaders in South Africa implored the government to amend the *Constitution* and define and articulate in no ambiguous terms their roles, functions and powers in a new democratic South Africa. This move is necessary because once the *Constitution* spells their roles and functions, it

will no longer be a question of whether traditional leaders have a role to play in the governance but rather how they should play that role.

The sooner the post-colonial government of South Africa take cognisance of this fact, the better relationship between traditional leaders and government will be for democratic governance. The *Constitution* of Botswana provides for the recognition and roles of traditional leaders. The traditional leaders in South Africa argue that South Africa should learn from Botswana and incorporate in its *Constitution* the functions and roles of traditional leaders. Lesotho, too serves as a good example to be considered with regard to the incorporation of roles and functions of the King and traditional leaders in the *Constitution*. This should be encouraged in South Africa.

The reason why the *Constitution* of South Africa should be amended is because traditional leaders fear that their powers especially at local government might be regarded as being inconsistent with the *Constitution*. Further to this argument, constitutional amendment is necessary for another considerable number of reasons. Firstly, the 1996 *Constitution* should be amended in order to qualify and give traditional leaders functions and duties. Equal partnerships between municipalities and traditional leaders are a viable solution to ensure that sound local government is maintained. The 1996 *Constitution* does not give traditional leaders an equal role with that of municipalities.

Secondly, it is argued that the 1996 *Constitution* is eurocentric and the horizontal application of the Bill of Rights has the potential of declaring null and void well-established customs such as *bogadi* and succession, including succession to traditional leadership. Over and above, it is submitted that the 1996 *Constitution* be amended to avoid the possible obliteration of powers vested in traditional institutions in terms of customary law. It is suggested that the *Constitution* should deal with the role of traditional leaders with regard to their customary functions.

Traditional leaders should not be seen by the national governments of South Africa, Botswana and Lesotho as political competitors but rather as leaders who should complement the activities of government. The importance of allowing participation of traditional leaders in rural development and governance and giving them optimum opportunity to play their role is extremely crucial in modern times. Traditional leaders in the three countries have observed that people in rural areas cannot develop without their history, cultural guidance and direction. As a consequence, they argue that people without history and culture possess a hazy map for the future. It is in line with this argument among others, that traditional leaders still have a crucial role to play in post-colonial dispensations.

11.9 AN AFTERWORD

This study pronounces by way of conclusion that modern governments in South Africa, Botswana and Lesotho should provide traditional leaders with an institutional walking stick with a hope of assisting them to recover from the colonial epoch and *apartheid* and stand on their own and finally walk on the path of democracy to run their own policy course. While it is acknowledged that the institution of traditional leadership cannot be completely reversed to the pre-colonial era, what is of great value from the past should be sustained. It however, appears throughout this study that post-colonial governments of South Africa, Lesotho and Botswana adopted policies and legal frameworks, which confined traditional leaders to a "wheelchair" and made them institutional "paraplegics".

It has also been discovered in this study that the present structures of the institutions of traditional leadership in South Africa, Botswana and Lesotho are deeply rounded and shaped by the colonial past. Many traditional authorities in these countries have still not reconstructed themselves from the immoral attitudes and approaches embedded in the old colonial regimes. In many instances these authorities do not see the need for reconstruction. For example, in South Africa during the years of struggle against *apartheid*, South

Africa was a fragmented country and the majority of its people were subjected to a politically, socially, economically and morally corrupt regime.

Therefore, the reconstruction of the traditional authorities in the post-*apartheid* is inevitable for the benefit of all people. Since it is impossible to totally revert to the pre-colonial times, it is important to reconstruct and develop traditional authorities in such a manner that they could be in a position to overcome the legacies created by the colonial and *apartheid* regimes such as the prevalence of corruption and poor service delivery.

It is further suggested that traditional authorities should be allowed to develop according to their cultures, traditions, customs and historical perspectives and experience. These leaders should not be placed at the periphery of the state and governance. Further marginalization and stigmatisation of these leaders by the democratic states of South Africa, Lesotho and Botswana could definitely undermine the course of African democracy. It is impossible for African democracy to thrive in these countries where both the moral and traditional infrastructures of traditional authorities and communities are presumptuously undermined.

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