

# Traditional Authorities and State Functions in South Africa: A Complex Relationship of Private Participation?

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## Abstract

This contribution explores the relationship between traditional authorities and state functions in South Africa. The authors argue that traditional leaders, while not organs of the state, have functions similar to state functions, especially on a local government level. The authors suggest that this relationship can be characterised as a form of private participation in exercising state functions, although it does not amount to full privatisation. The recognition of traditional law systems in the Constitution and relevant legislation provides a legal basis for this relationship. The authors also examine the role of public-private agreements in enhancing legal certainty and clarity. Finally, the authors consider the potential benefits of transforming traditional authorities into state organs, aiming to promote the development of traditional communities and enhance the delivery of essential services.

## Keywords

Traditional leaders; customary law; state functions; private participation; public-private partnerships; democratisation.

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## 1 Introduction

The former Minister of Tourism, Lindiwe Sisulu, sparked controversy a year ago with her strong criticism of the judiciary's role (or, according to her, its failure) in improving the lives of disadvantaged people in South Africa, particularly by black justices.<sup>1</sup> In her argument, she questioned the dominance of Roman-Dutch law in economic and property matters, asking where indigenous law and African value systems and customs of land, wealth, and property have gone.<sup>2</sup> The altercations that followed between the former Minister, the then Acting Chief Justice Justice Zondo, and the President of the Republic, Mr Cyril Ramaphosa, unintentionally brought back into focus the debate on the legal status of traditional leadership. They are the custodians of African values and traditions, ensuring that they are respected and upheld in their communities. They do this through a combination of legal and cultural means, and their role is recognised and protected by the South African Constitution.<sup>3</sup>

In the 1990s the authors were members of the Traditional Authorities Research Group (TARG), which investigated the role and status of traditional authorities shortly after the commencement of South Africa's new constitutional dispensation. The research project, titled "The Administrative and Legal Position of Traditional Authorities in South Africa and their Contribution to the Implementation of the Reconstruction and Development

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<sup>1</sup> Sisulu 2022 <https://www.iol.co.za/dailynews/opinion/lindiwe-sisulu-hi-mzansi-have-we-seen-justice-d9b151e5-e5db-4293-aa21-dcccd52a36d3>.

<sup>2</sup> "When it comes to crucial economic issues and property matters, the same Africans cosies up with their elitist colleagues to sing from the same hymn book, spouting the Roman-Dutch law of property. But where is the indigenous law? It has been reduced to a footnote in your law schools. Where are the African value systems and customs of land, wealth, and property?" She reiterated her viewpoint in a speech delivered to the College of Law at the University of South Africa's Youth Day celebrations in June 2022. See Haffejee 2022 <https://www.dailymaverick.co.za/article/2022-06-21-in-a-spitfire-speech-to-unisa-lindiwe-sisulu-repeats-her-january-attack-on-judiciary-and-sa-constitution/>.

<sup>3</sup> *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution).

Programme", was a collaboration between five South African universities<sup>4</sup> and one university from the Netherlands.<sup>5</sup> Willemien du Plessis, to whom this contribution is dedicated, played a crucial leadership role in leading the research project. Her research expertise in the field of traditional authorities made her a prominent figure among the TARG members, including seasoned and emerging researchers from various universities and institutions worldwide. The collective efforts of the team resulted in several publications.<sup>6</sup> The project was completed in 1996, but it served as a valuable educational opportunity to especially the younger academic members of the research team as to how to plan, fund and manage an empirical research project, produce the research results in a systematic and coherent report, and subsequently disseminate the knowledge so gathered in the form of articles in legal journals, all a testament to Willemien's successful leadership and impact. Her dedication and mentorship towards advancing scholars' research profiles in South Africa and beyond are inspiring. We hope that more individuals like her continue to motivate and guide future generations of researchers to achieve their goals and positively impact society.

TARG also addressed the question of whether traditional authorities could be classified as "organs of state" as defined in the 1993 Constitution.<sup>7</sup> This was a significant question at the time because the Constitution bound "all legislative and executive organs of state at all levels of government".<sup>8</sup> The definition of an "organ of state" was limited, including "any statutory body or

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<sup>4</sup> The former University of the North in Polokwane (renamed the University of Limpopo), the former University of the North West in Mahikeng (now one of the three campuses of the North-West University), the former Potchefstroom University of Christian Higher Education (PUCHE) (one of the other campuses of the North-West University), the former University of Natal in Pietermaritzburg (now one of the campuses of the University of KwaZulu-Natal), and the former University of Zululand in KwaDlangezwa (now one of two campuses of the University of Zululand).

<sup>5</sup> The University of Leiden in the Netherlands.

<sup>6</sup> In 1996 a lengthy report with 14 volumes was published, titled *The Administrative and Legal Position of Traditional Authorities in South Africa and Their Contribution to the Implementation of the Reconstruction and Development Programme*. The report is not in the public domain, but a copy is in possession of the authors. An electronic copy of the report is available at <https://law.nwu.ac.za/vulnerable-societies/project-targ-1996> but the page numbers may differ from the hard copy, see Project TARG 1996 | [law.nwu.ac.za](https://law.nwu.ac.za). Other publications include Scheepers et al 1998 *Obiter* 61-95; and TARG 1999 *Koers* 295-324.

<sup>7</sup> *Constitution of the Republic of South Africa* 200 of 1993 (hereafter the 1993 Constitution). The question came to the fore in the theme group on legislation. The group consisted of Beryl de Wet, Reginald Ndou, Gerrit Ferreira, Christa Rautenbach and Jenni Williams with Willemien du Plessis a theme co-ordinator. The group's findings were reported in TARG *Administrative and Legal Position of Traditional Authorities* (Vol VII) 1.

<sup>8</sup> 1993 Constitution, s 7(1).

functionary".<sup>9</sup> However, there were indications in the Constitution suggesting that traditional authorities could be viewed as organs of state, as they were recognised by law as "an authority" that performs "powers and functions vested in it per the applicable laws and customs".<sup>10</sup> Additionally, they were *ex officio* entitled to be members of local government.<sup>11</sup>

The current Constitution contains a more detailed definition of "organ of state" as either a state department or administration at the national, provincial, or local level of government or any other entity or individual. The latter category includes those that exercise public power or perform a public function according to the Constitution, a provincial constitution, or any legislation.<sup>12</sup> Due to this definition, the TARG theme group on legislation presumed that traditional leaders and other customary institutions established according to the law are all state organs because they seemed to comply with the requirements, at least concerning those administrative functions they were authorised to perform.<sup>13</sup> Other well-known scholars hold a similar viewpoint based on their understanding of the meaning of organ of state as contained in the Constitution.<sup>14</sup>

In the case of *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996*<sup>15</sup> the Constitutional Court, acknowledged that Constitutional Principle XIII<sup>16</sup> of the 1993 Constitution recognised the cultural relevance of institutions of traditional leadership, customary law, and traditional monarchy as part of South African society. However, the court also emphasised that in a purely republican democracy without the differentiation of status based on birth, there is no constitutional basis for the official recognition of traditional leaders or monarchs. Moreover, without explicit authorisation to recognise indigenous law, the principle of equality before the law suggests a uniform legal system for all South Africans, with no scope for customary law.

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<sup>9</sup> 1993 Constitution, s 233(1)(ix).

<sup>10</sup> 1993 Constitution, s 181(1).

<sup>11</sup> 1993 Constitution, s 182.

<sup>12</sup> Constitution, s 239(1). It is important to note that the term "organ of state" does not include courts or judicial officers.

<sup>13</sup> TARG *Administrative and Legal Position of Traditional Authorities* (Vol VII) 60-61.

<sup>14</sup> See Olivier "Traditional Leadership and Institutions" para 39; Bennett and Murray "Traditional Leaders" 26-2.

<sup>15</sup> *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC).

<sup>16</sup> Constitutional Principle XIII of the 1993 Constitution stipulated: "The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith."

Therefore, Constitutional Principle XIII was included in the 1993 Constitution to recognise cultural pluralism, but this recognition does not necessarily imply governmental recognition of traditional authorities as state organs.<sup>17</sup>

This also seems to be the viewpoint taken by the government. Accordingly, it does not recognise traditional authorities as "government" akin to the South African government, but rather as "customary" organisations with specific functions under customary law complementing the "role of government in rural areas"; but this recognition cannot lead to any dispute over authority between traditional leadership and the state.<sup>18</sup>

Bekink<sup>19</sup> acknowledges that although institutions of traditional leadership may be regarded as organs of state under the Constitution, they cannot necessarily be classified as organs of state in a specific sphere of government. However, he also disagrees with the government's *White Paper*,<sup>20</sup> which suggests that the collaboration between municipalities and traditional councils should follow the principles of cooperative governance, as these principles should apply only to state organs.<sup>21</sup>

At the time of the promulgation of the 1993 Constitution traditional authorities retained their broad "governmental powers" under customary law and prior legislation largely unaltered.<sup>22</sup> However, the final Constitution and subsequent legislation have significantly curtailed these powers, limiting their functions to providing support and advice, and participating in the activities of municipalities and other government bodies.<sup>23</sup> Traditional

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<sup>17</sup> *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) para 195. Furthermore, the court determined that recognition of the institution of traditional leadership alone was adequate and that the details of how such leadership should operate in a wider democratic society which is complex, diverse, and constantly evolving should be addressed separately. See para 197.

<sup>18</sup> *White Paper on Traditional Leadership and Governance* (GN 2336 in GG 25438 of 10 September 2000) (hereafter the *White Paper*).

<sup>19</sup> Bekink *Restructuring (Systemization) of Local Government* 288.

<sup>20</sup> Also see the discussion at 3 below.

<sup>21</sup> Bekink *Restructuring (Systemization) of Local Government* 287-288.

<sup>22</sup> Bennett and Murray "Traditional Leaders" 26-2.

<sup>23</sup> Rautenbach "Mapping Traditional Leadership and Authority" 498. The prior framework for traditional leadership was established by the *Traditional Leadership and Governance Framework Act* 41 of 2003. This Act was revoked on 1 April 2021 with the enactment of the *Traditional and Khoi-San Leadership Act* 3 of 2019, primarily aimed at incorporating Khoi-San leadership. Subsequently, the latter Act was declared unconstitutional in the case of *Mogale v Speaker of the National Assembly* (CCT 73/22) [2023] ZACC 14 (30 May 2023), a development that occurred after our research for this paper was concluded. Nonetheless, its unconstitutionality has been suspended for a period of 24 months, thus making our research still

authorities possesses a unique position that makes them particularly suitable for aiding local governments in addressing the developmental requirements of rural populations. Regrettably, the legislative framework designed to facilitate such collaboration is intricate and often challenging to execute effectively. Consequently, the valuable input of traditional leaders remains underutilised, leading to adverse consequences for rural communities. Knoetze aptly encapsulates the prevailing situation as follows: The legislation this scenario as follows:<sup>24</sup>

Legislation dealing with the developmental functions of traditional leadership is varied and various structures are involved with the discharge thereof. The interaction between these various structures seems not only complex and overlapping, but also merely consultative in many respects. The loose terms of 'assisting', 'supporting', 'facilitating', 'recommending', 'participating' and 'promoting' need to be systematised into functional institutional mechanisms to maximise the contribution of traditional leadership to development in local governance. This is necessitated by the principle of co-operative governance, in order to promote cohesion and prevent conflict between traditional leadership and municipal councils.

In this regard it is important to note that public perceptions rate the performance of traditional leaders unfavourably. A recent survey indicates this, revealing only 14% of respondents having contacted a traditional leader in the past year, with merely 31% expressing trust in them. It's important to note that this survey spanned both rural and urban areas.<sup>25</sup> It is understandable that urban inhabitants are more likely to have lost contact with their rural roots compared to respondents living in rural areas under the governance of a traditional leader. This difference in exposure could lead urban inhabitants to hold more negative views on the institution than their rural counterparts. However, it is believed that a comprehensive legal review of the institution, particularly its potential formal inclusion into the state structure as organs of state at the local government level, along with the associated powers and functions, has the potential to fundamentally shift these public perceptions.

Several statutes outline the participation of traditional authorities in local government activities. For instance, the *Spatial Planning and Land Use Management Act* mandates municipalities to facilitate the "participation" of traditional authorities.<sup>26</sup> However, the Act primarily focuses on cooperative

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pertinent at present. Furthermore, while the subject of Khoi-San leadership is significant, it is not addressed within the scope of this contribution.

<sup>24</sup> Knoetze 2014 *Speculum Juris* 195.

<sup>25</sup> See Nkomo and Kambule 2023 <https://www.afrobarometer.org/publication/ad621-traditional-leaders-have-a-weak-hold-on-south-africans/> 2.

<sup>26</sup> *Spatial Planning and Land Use Management Act* 16 of 2013.

government among national, provincial, and local spheres, lacking explicit mention of traditional leadership. Therefore, the performance of cooperative government does not inherently include traditional leadership.<sup>27</sup> Interestingly, the Act's regulations allow "traditional councils" to engage in service-level agreements with municipalities, as long as they do not involve land development or use decisions.<sup>28</sup>

In light of the above, it becomes evident that comprehensive legislative review is necessary to explicitly delineate the position and role of traditional leaders as "partners" in cooperative government, especially at the local government level. The simplification and optimisation of structures and processes are equally crucial to ensure effective cooperative government between local governments and traditional authorities, ultimately benefiting rural communities. As the presence and influence of traditional authorities in rural areas are substantial, their significance in cooperative government cannot be underestimated.

The current policy of the South African government reflects an increasing focus on bolstering traditional and Khoi-San leadership institutions, with the intention of assigning them more defined roles within local government structures. Traditional authorities are continually evolving, primarily guided by the department responsible for regulating and overseeing traditional affairs. The government's medium-term objectives, as outlined in the South Africa Yearbook of 2021/2022, provide insight into its goals concerning traditional authorities.<sup>29</sup> The government's official website enumerates several key objectives.<sup>30</sup> For instance, within the framework of the *Traditional and Khoi-San Leadership Act*, it is stated that the department of traditional affair's primary focus will be on monitoring partnerships and agreements between the government and traditional and Khoi-San leadership. For the Khoisan community, specific efforts will be made to engage and incorporate them into formal government structures. Moreover, the department will engage in investigations and research related to applications for the recognition of Khoi-San leaders and communities. Traditional royal families will receive support in documenting customary laws and genealogies to prevent ongoing disputes arising from traditional

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<sup>27</sup> See Rautenbach "Mapping Traditional Leadership and Authority" 504.

<sup>28</sup> See *Spatial Planning and Land Use Management Regulations: Land Use Management and General Matters* (GN R239 in GG 38594 of 23 March 2015), reg 19.

<sup>29</sup> See Government Communications *South Africa Yearbook 2021/22* 114.

<sup>30</sup> See South African Government Date unknown <https://www.gov.za/about-government/government-system/traditional-leadership>.

leadership claims. Additionally, the department will take measures to regulate the initiation environment, ensuring the safe practice of customary initiation. To this end, plans are underway to establish a national oversight committee for initiation practices and a dedicated database to gather information on customary initiation activities. It is also stated that the department of traditional affairs is dedicated to the regulation and standardisation of traditional leadership by finalising the *Traditional Leadership Handbook*, thereby establishing uniform norms and standards for traditional affairs across different provinces. The government duly acknowledges the pivotal role played by traditional leadership institutions within South Africa's constitutional democracy and local communities, especially in their contributions to rural development.<sup>31</sup>

Turning to traditional councils, the department's commitment remains steadfast in its efforts to democratise the composition of these councils through legislative measures. The legislation stipulates that a minimum of 40% of council members must be elected, and at least one-third of them must be women. The government recognises traditional councils as significant stakeholders in rural development. Hence, the department will persist in fostering collaborative governance between traditional councils and municipal bodies, primarily by facilitating the establishment of partnership and service delivery agreements.<sup>32</sup>

However, it is important to highlight that the outlined policy and objectives do not unequivocally clarify whether the South African government aims to convert traditional and Khoi-San authorities into formal organs of state at the local government level. The government's avoidance of the term "organ of state", its ongoing reference to traditional institutions, and its consideration of service delivery agreements as the mechanism for transferring specific state functions to traditional councils collectively suggest that formalising traditional authorities as organs of state might not align with the government's intent. Concurrently, the government's policy strives to enhance the engagement of traditional authorities within cooperative governance efforts. This approach, however, poses a challenge, as it raises questions about how one partner in a cooperative governance relationship can be deemed an organ of state while the other is

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<sup>31</sup> See South African Government Date unknown <https://www.gov.za/about-government/government-system/traditional-leadership>.

<sup>32</sup> See South African Government Date unknown <https://www.gov.za/about-government/government-system/traditional-leadership>.

essentially a private institution. Cooperative governance inherently involves the participation of two organs of state within the partnership.

Traditional leaders have a participatory and advisory role in municipal councils under the *Local Government: Municipal Structures Act*.<sup>33</sup> However, it is essential to note that while traditional leaders have the right to participate in municipal council proceedings, they are not entitled to vote in any municipal council or council committee meeting. Also, they cannot be included in forming a municipal council or council committee quorum.<sup>34</sup>

The assertion is made that the functions and roles of traditional leaders could be regarded as a form of privatisation, given their operation outside formal democratic frameworks and reliance on traditional authority and customary law over administrative law. While traditional leaders may hold advisory and participatory positions, it is posited that their institutions are not governed by administrative law. However, the recent case of *Bafokeng Land Buyers Association v Royal Bafokeng Nation*<sup>35</sup> seems to present a contradictory stance. Nonetheless, a closer examination of the case does not unmistakably endorse the view that traditional institutions should be subjected to administrative law as organs of state. In this instance, the Court determined that the resolution taken by the Royal Bafokeng Nation (RBN) to initiate legal action against a decision made by the Supreme Council of the RBN, authorising an individual to represent the RBN, should have been preceded by proper public consultation in line with customary law. The Court also briefly added the following assertion, without further elaboration:<sup>36</sup>

The right to be consulted is also an incident of the right to procedurally fair administration in terms of Section 33 of the Constitution. The decision to institute these proceedings constituted administrative action and is subject both to Section 33 of the Constitution and *Promotion of Administrative Justice Act 3 of 2000* (PAJA).

This ruling introduced uncertainty about the exact nature of the RBN and traditional institutions in general. PAJA encompasses a comprehensive definition of administrative action.<sup>37</sup> Yet, the Court did not delve into the legal

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<sup>33</sup> *Local Government: Municipal Structures Act* 117 of 1998, s 81.

<sup>34</sup> *Local Government: Municipal Structures Act* 117 of 1998, s 81(4)(e).

<sup>35</sup> *Bafokeng Land Buyers Association v Royal Bafokeng Nation* 2018 5 SA 566 (NWM).

<sup>36</sup> *Bafokeng Land Buyers Association v Royal Bafokeng Nation* 2018 5 SA 566 (NWM) para 42.

<sup>37</sup> See "administrative action" in s 1 of the *Promotion of Administrative Justice Act* 3 of 2000 (PAJA). In essence it means "any decision taken, or any failure to take a decision, by an organ of state ...". And, "an organ of state" has the meaning "assigned to it under s 239 of the Constitution".

status of the RBN (specifically whether it could be classified as an organ of state), apart from acknowledging that<sup>38</sup>

[t]he RBN is a tribal community ..., a *universitas personarum* and a traditional community recognized in terms of Section 28(3) of the *Traditional Leadership and Governance Framework Act 41 of 2003*.

Furthermore, PAJA's definition of administrative action excludes "a decision to institute or continue a prosecution".<sup>39</sup> The extent of this exclusion remains unclear – whether it strictly covers prosecution decisions by the national prosecuting authority or extends to institutions like the RBN. The latter interpretation is deemed more appropriate for this discussion. Even if one assumes the RBN is an organ of state, its litigation decision cannot be categorised as administrative action, as this type of decision is explicitly excluded from the definition of administrative action.

The Court's succinct reference to PAJA created additional ambiguity regarding the distinction between the *audi alteram partem* rule and public consultation. It is established jurisprudence that PAJA mandates adherence to the *audi alteram partem* rule for fair administrative action.<sup>40</sup> The Bafokeng case appears to conflate the obligation to consult the public in accordance with customary law and adhering to the *audi alteram partem* rule as stipulated by PAJA. This raises queries about any disparity between public consultation and the *audi alteram partem* rule. For this analysis, it is acknowledged that both concepts aim to provide those affected by a decision an opportunity to express their views, which are then considered before making a final determination. One might suggest that the *audi alteram partem* rule holds a more individual and personal character, considering that PAJA requires hearing the perspectives of smaller groups, as opposed to customary law which mandates hearing the viewpoints of the public or a substantial group.

In light of the above analysis of the *Bafokeng* case, it is apparent that the case does not unequivocally endorse the stance that traditional authorities function as organs of state performing administrative actions. Thus, this contribution adopts the viewpoint that traditional authorities essentially function as private institutions, albeit capable of undertaking specific state functions through agreements with local governments.

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<sup>38</sup> *Bafokeng Land Buyers Association v Royal Bafokeng Nation* 2018 5 SA 566 (NWM) para 3.

<sup>39</sup> See s 1(b)(ff) of PAJA under "administrative action".

<sup>40</sup> Section 3(2)(b)(ii) of PAJA.

Traditional leaders do not undergo a democratic selection process; rather, they are appointed based on lineage and cultural traditions.<sup>41</sup> Consequently, traditional leaders may not be subject to the same level of accountability to the wider public as elected officials. The frameworks governing their decision-making and governance lack the same degree of public scrutiny and oversight found in democratic systems. While traditional authorities are mandated to operate within the boundaries of the Constitution and pertinent legislation,<sup>42</sup> this alone does not confer state authority upon them or convert them into organs of state. It is noteworthy that the Constitution does not label traditional leaders as organs of state, but instead refers to the institution of traditional leadership and traditional leadership itself as an entity at the local level.<sup>43</sup> Notably, the Constitution does not solely bind the state and its entities; it occasionally extends its applicability to private individuals and entities (especially concerning the observance of fundamental rights) without necessarily transforming them into organs of state.<sup>44</sup>

Traditional authorities participate in their "private" capacity in all spheres of government, as will be illustrated. They can even enter into partnerships and agreements with one another, third parties, government departments and municipalities.<sup>45</sup> If, for example, traditional leaders were to enter into a service agreement with a municipality, this would raise questions about whether they were acting as private or public institutions. Therefore, it is vital to understand the nature and implications of such partnerships, including the accountability and transparency of the decision-making and governance structures involved.

Against this background, the research question aims to investigate to what extent partnerships between traditional leaders and public institutions, particularly municipalities, constitute a form of privatisation in South Africa. While we have briefly discussed the question of whether or not traditional authorities can be considered organs of the state, this paper will begin with a more in-depth examination of the current views on their status. We will then provide a historical overview of the legal provisions that have granted traditional leaders the power to perform state functions on behalf of the government. Next, we will focus on the issue of public participation by

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<sup>41</sup> See Gouws *et al* "Traditional and Khoi-San Leadership and Governance" 223.

<sup>42</sup> Sections 211(1) and 211(2) of the Constitution.

<sup>43</sup> Section 211(1) and s 212(1) respectively of the Constitution.

<sup>44</sup> For example, s 8(2) of the Constitution in terms of which a natural or a juristic person is bound by the Bill of Rights.

<sup>45</sup> *Traditional and Khoi-San Leadership Act* 3 of 2019, s 24.

traditional authorities in the performance of state functions through public-private agreements and partnerships. Finally, we will make concluding remarks on the future role of traditional leaders as organs of state in South Africa's governance structure.

To ensure clarity and avoid confusion, the terminology we use in this contribution must be clearly understood. The South African Constitution recognises the institution of "traditional leadership"<sup>46</sup> and "traditional authority" that operates within a system of customary law and is subject to relevant legislation and customs.<sup>47</sup> The Constitution also acknowledges the role of "traditional leadership" at the local level.<sup>48</sup>

The term "traditional authority" generally refers to the traditional and customary systems of governance in a community or society where power is vested in specific individuals or groups based on customary norms and practices.<sup>49</sup> However, in South Africa "traditional authority" could also refer to an administrative institution recognised by the central government to establish a structure for entering into agreements with it.<sup>50</sup> It is worth noting that the *Traditional Leadership and Governance Framework Act*<sup>51</sup> used the term "traditional authority", whereas the subsequent *Traditional and Khoi-San Leadership Act*<sup>52</sup> no longer does. This may or may not be significant, but it is worth considering that the term "authority" is no longer employed in the latter. In this context, it is important to highlight the recent case of *Mogale v Speaker of the National Assembly*,<sup>53</sup> in which the Constitutional Court declared the *Traditional and Khoi-San Leadership Act* unconstitutional due to a procedural flaw. Specifically, Parliament failed to fulfil its obligation to facilitate public consultation before passing the Act. Despite this finding, the court opted to suspend the declaration of unconstitutionality for a two-year period, slated to conclude on 30 May 2025. This suspension allows parliament the opportunity to rectify the Act's unconstitutionality within the given timeframe. As of the writing of this contribution, the Act remains valid and will be addressed accordingly.

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<sup>46</sup> Constitution; s 211(1).

<sup>47</sup> Constitution; s 211(2). Emphasis added.

<sup>48</sup> Constitution; s 212(1). Emphasis added.

<sup>49</sup> TARG *Administrative and Legal Position of Traditional Authorities* (Vol II) 54-56.

<sup>50</sup> TARG *Administrative and Legal Position of Traditional Authorities* (Vol II) 56-58.

<sup>51</sup> *Traditional Leadership and Governance Framework Act* 41 of 2003.

<sup>52</sup> *Traditional and Khoi-San Leadership Act* 3 of 2019.

<sup>53</sup> *Mogale v Speaker of the National Assembly* (CCT 73/22) [2023] ZACC 14 (30 May 2023).

The *Traditional and Khoi-San Leadership Act* defines "traditional leadership" as the "institutions or structures established in terms of customary law or customs, or customary systems or procedures of governance, recognised, utilised, or practi[s]ed by traditional communities". The Act defines a "traditional leader" as "a person who has been recognised as a king or queen, principal traditional leader, senior traditional leader, or headman or headwoman ... and includes regents, acting traditional leaders, and deputy traditional leaders". While it is true that the statutory definition of "traditional leadership" provided in the Act may not fully capture the broader cultural and historical meanings of the term "traditional authority" as used in different contexts, we will argue that the two concepts have the same meaning. Therefore, they will be used interchangeably.

## **2 The current views on the status of traditional authorities or leadership**

Our argument is that the institution of traditional leadership constitutes a form of private participation because it is granted certain state powers and functions typically associated with state authority although it is not an organ of state.<sup>54</sup> Although this view may be controversial, the aim is to provide a comprehensive explanation and compelling argument to support such a view. The literature on the institution of traditional leadership focusses primarily on whether the customs applied by these institutions, specifically customary law, can be considered legal rules. Even before the current constitutional dispensation that recognises individual fundamental rights, the prevailing opinion was that these rules are indeed legal.<sup>55</sup> The South African Constitution further affirms this viewpoint by referring to customary law (not just customs) when addressing the norms applied by traditional authorities, as mentioned earlier.<sup>56</sup>

In the light of this one may be inclined to view the institution of traditional leadership as an organ of the state. However, as mentioned earlier in the introduction, the constitutional provisions refer to the institution as a traditional authority but offer no additional characterisation of its nature. Nonetheless, as we hinted earlier, the Constitution of 1993 provided a very narrow definition of an organ of state, a state of affairs that was to a large

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<sup>54</sup> Private participation in the context of this contribution broadly refers to the involvement of private actors in the provision of public goods or services.

<sup>55</sup> Rautenbach 2019 *PELJ* 5-6.

<sup>56</sup> See ss 39 and 211 of the Constitution.

extent rectified by a more extensive definition in the Constitution of 1996 which reads as follows:<sup>57</sup>

In the Constitution, unless the context indicates otherwise ... organ of state" means –

- (a) any department of state or administration in the national, provincial or local sphere of government; or
  - (b) any other functionary or institution –
    - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
    - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer
- ...

However, it's important to highlight that this definition lacks explicit exclusions. It would have been beneficial if the constitutional definition explicitly specified, for instance, that institutions (whether private or not) engaged in public/private agreements with the state—where the state transfers certain state functions to the institution—do not thereby fall under the organ of state definition and consequently become bearers of state authority.

It is important to keep in mind that the definition of "organ of state" in the Constitution applies to the concept only when and where it is used in the Constitution itself. As noted earlier, the constitutional provisions related to the recognition of traditional leaders and their indigenous law systems do not refer to the concept of "organ of state" in any way.

Mapping out the legal position of traditional authorities within the framework of democratic government is a challenging endeavour.<sup>58</sup> Upon scrutinising the relevant legal framework, it becomes evident that traditional leadership, while distinct from contemporary government structures, possesses several characteristics inherent to a state. These characteristics include organised governance, a defined territorial jurisdiction, and a legal framework.<sup>59</sup>

However, it is crucial to emphasise that traditional leaders do not fully align with the principles of modern governance, particularly concerning constitutionalism. Justice Albie Sachs suggests that chieftainship cannot

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<sup>57</sup> Section 239 of the Constitution.

<sup>58</sup> Rautenbach "Mapping Traditional Leadership and Authority" 514.

<sup>59</sup> Rautenbach "Mapping Traditional Leadership and Authority" 484.

inherently be democratic, as it operates in a different sphere altogether.<sup>60</sup> This distinction becomes particularly apparent when considering the concept of the separation of powers, a fundamental requirement of a constitutional state. Traditional leadership consolidates legislative, executive, and judicial authority within the persona of the traditional leader.<sup>61</sup> Nonetheless, when addressing matters of public significance, the imperative of public consultation becomes a mandatory prerequisite before any decision can be reached.<sup>62</sup> This requirement ensures that even though traditional leaders may consolidate authority, they must engage with the broader community to make decisions that affect the community.

An examination of the institution indicates that the legal status of traditional leadership is complex and uncertain, occupying a unique position in the South African state architecture. While there are similarities between traditional leadership and states or governments, there are also significant differences, particularly concerning constitutionalism and the separation of powers. Despite this, there is no apparent reason why traditional leaders cannot participate in state power and functions. Moreover, the close relationship between traditional communities and their leaders suggests there may be collaboration opportunities with local government.<sup>63</sup>

However, it should be noted that the institution of traditional leadership does not constitutionally form part of local government as the *Local Government: Municipal Structures Act*<sup>64</sup> determines only that traditional authorities may participate through their leaders in the proceedings of a municipality.<sup>65</sup> It can be concluded that the recognition of traditional leadership, while strange in relation to modern notions of constitutional law, is not necessarily incompatible with the principles of the Constitution:<sup>66</sup>

Taken at face value, the recognition of traditional leadership subject to the Constitution is an anomaly. Modern notions of constitutional law presuppose the rule of law, the separation of powers, and the limitation of state power under a bill of rights. By contrast, traditional leadership is grounded in the idea that the word of the traditional leader is paramount, subject only to flexible traditional norms based on cultural practices ... .

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<sup>60</sup> Sachs *Advancing Human Rights* 78.

<sup>61</sup> Rautenbach "Mapping Traditional Leadership and Authority" 485.

<sup>62</sup> See for example *Bafokeng Land Buyers Association v Royal Bafokeng Nation* 2018 5 SA 566 (NWM) paras 47-49.

<sup>63</sup> Rautenbach "Mapping Traditional Leadership and Authority" 508.

<sup>64</sup> See *Local Government: Municipal Structures Act* 117 of 1998, s 81(1).

<sup>65</sup> Rautenbach "Mapping Traditional Leadership and Authority" 509.

<sup>66</sup> Rautenbach "Mapping Traditional Leadership and Authority" 512.

Even in cases where traditional authorities have obtained authorisation to engage in municipal proceedings, this situation is deemed unsatisfactory by certain commentators, including Matehenjwa and Makama.<sup>67</sup> They advocate for a thorough review of this arrangement, particularly to acknowledge the significance of traditional authorities within local government contexts. Additionally, this revision is essential to avert any perception of traditional authorities as being subordinate to other council members.<sup>68</sup>

The recognition of traditional leaders should not be merely symbolic in South Africa. The bestowing of esteem on traditional leaders, without enabling the institution of traditional leadership to take its lawful space in local government, does not help to improve the unhealthy relationship between traditional leaders and councillors nor to strengthen democracy in local government. Democracy could be further strengthened by allowing different voices from different segments of the community in local government. Furthermore, the participation of traditional leaders in municipal councils without the power to vote might create further division between councillors and traditional leaders in that councillors may be perceived to be big brothers who have the final authority while traditional leaders as seen as being subservient to councillors capable only of influencing councillors to take decisions while they themselves cannot participate in the decision making. If the value of traditional leaders were not crucial in local government they could easily have been excluded completely from participating in municipal councils. It is their inclusion, while holding from them the power to vote in the deliberations of municipal councils, that impacts negatively on the status of traditional leaders.

Commentators like Ramalobe express particular concern regarding the strained relationship existing between traditional leaders and fellow councillors within municipal councils, suggesting potential adverse impacts on service delivery.<sup>69</sup> Normalising this relationship becomes imperative for effective service provision in rural areas. Addressing one of the primary causes for the perceived subordination of some traditional leaders in relation to their municipal council counterparts revolves around their inability to cast votes during council proceedings. Rectifying this evident inequity would significantly contribute to achieving parity among all councillors.

This unfortunate predicament seems to emerge from the integration of two inherently disparate systems: that of a traditional leader living under customary law and the framework of a predominantly Western-style municipal council. This integration is further complicated by the absence of genuine voting influence for traditional leaders, unlike their empowered council counterparts. Proposals made throughout this contribution,

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<sup>67</sup> See Mathenjwa and Makama 2016 *Law, Democracy and Development* 200-214.

<sup>68</sup> See Mathenjwa and Makama 2016 *Law, Democracy and Development* 200.

<sup>69</sup> Ramalobe 2023 *Journal of Local Government Research and Innovation*.

advocating for traditional leaders to attain the status of municipal organs of state, could potentially mitigate this issue. As municipal organs of state situated in rural areas, traditional leaders could serve as intermediaries between the local municipality and rural communities. Their involvement could span activities such as identifying developmental challenges within their communities, suggesting viable solutions, overseeing their implementation, and providing progress reports.

Relying solely on municipal officials who have lost touch with traditional leaders and their communities could prove counterproductive and detrimental to rural service delivery. These officials may lack the necessary communication skills and understanding of rural communities' unique needs.

Traditional leaders, in a general sense, often fall short of meeting the criteria expected of a modern government. Nevertheless, it can be posited that they align with the constitutional definition of an "organ of state" to the extent that they wield public power or execute certain "public" functions as defined by legislation. Despite this alignment, they do not enjoy a special status that parallels that of governmental organs. Rather, they are regarded as private individuals, albeit recognised in the Constitution as holding the authority to govern those who willingly opt to reside under indigenous law within a particular rural region.

The existence of a traditional council as a governing body for the traditional community, with its functions and powers outlined in the *Traditional and Khoi-San Leadership Act*, adds another layer of complexity to the debate over the role and status of traditional leaders in modern South Africa. It is worth noting that the *Traditional and Khoi-San Leadership Act* requires the establishment of a traditional council for each recognised leader or community, which serves as the governing body for the respective traditional community.<sup>70</sup> The Act outlines the functions and powers of the traditional council, which include administering the affairs of the traditional community, assisting traditional leaders, supporting municipalities, and participating in policy and legislation development at a municipal level.<sup>71</sup>

It is important to note that the functions of a traditional council concerning municipalities are much broader than those of a traditional leader under the *Local Government: Municipal Structures Act*, which only allows for the

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<sup>70</sup> *Traditional and Khoi-San Leadership Act* 3 of 2019, ss 1, 16 and 17.

<sup>71</sup> *Traditional and Khoi-San Leadership Act* 3 of 2019, s 20.

participation of the traditional leader.<sup>72</sup> This seems to be an anomaly between the two Acts highlighting the need for further clarification and alignment of legislation governing traditional leadership and its relationship with municipalities.

### **3 Legal provisions granting traditional authorities state functions: a historical overview**

Given the limitations of space, providing an exhaustive discussion of all the legal provisions related to traditional leaders is impractical. Thus, this article will concentrate on the provisions most relevant to the central question: whether traditional leaders' powers, functions and duties can be considered a form of private participation in performing state functions. Specifically, the focus will be on legal provisions concerning their functions that are closely aligned with the duties of governmental authorities.

In pre-colonial times traditional leaders' powers, functions, and duties were determined by the traditional rules of the particular group they presided over.<sup>73</sup> Mawere *et al* describe the wide-ranging role of traditional leaders during this time based on various commentators' accounts.<sup>74</sup>

Traditional leaders were responsible for enacting Laws of justice, settling disputes between community members, allocating land to community members, leading warfare, collecting taxes/tributes and lastly but not least, organising community and festive activities ... . [T]raditional leaders had the responsibility to provide safety and security, preserving tribal sovereignty, allocating and distributing land, settling land disputes, spiritual leadership and administration of justice. In other words, they were endowed with social, political, welfare and economic power and responsibilities. ... [B]efore colonisation, traditional leaders enjoyed seemingly unlimited and undefined supremacy over communities. ... [T]he valuables and taxes collected by the traditional leaders were used for the upkeep and benefit of the traditional leaders' family, his army as well as community projects, ranging from community meeting squares, purchasing weaponry or land from other communities *inter alia*.

Mawere *et al*'s research shed light on the extensive powers of traditional leaders in pre-colonial times, including the ability to collect taxes from subordinates—a function typically associated with a state. This historical precedent demonstrates that the levying of taxes was one of the strongest indications of emerging statehood, indicating that traditional leaders may

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<sup>72</sup> *Local Government: Municipal Structures Act* 117 of 1998, s 81(1).

<sup>73</sup> Pre-colonial roughly refers to the period before 1652.

<sup>74</sup> Mawere *et al* "Role and Significance of Traditional Leadership" 254.

have functioned as quasi-states.<sup>75</sup> In line with this, Gouws *et al* discuss the concepts of a kingdom or tribal state, highlighting the historical importance and power of traditional authorities in Africa. They observe as follows:<sup>76</sup>

[I]n pre-colonial times various forms of government existed, ranging from empires to tribal states. Power was hierarchical and consultative. The head of the kingdom or tribal state was at the apex of the power hierarchy with subordinate leaders ...

It can be inferred that traditional communities in pre-colonial times performed functions analogous to those of a modern state, suggesting the possibility of some of these communities developing into embryonic states had it not been for legislative intervention. Gouws *et al* support this idea, noting that the pre-colonial relationship between traditional authorities and their followers was a dynamic mediation process.<sup>77</sup>

In the historical context of South Africa and other African countries, particularly those under British colonial rule, the role of traditional authorities underwent significant changes due to government intervention during colonial and post-colonial times.<sup>78</sup> The colonial authorities recognised and appointed traditional leaders, entrusting them with specific statutory powers and functions allowing them to participate in government functions as functionaries on behalf of state authorities. This system, known as indirect rule, involved the central government exercising some of its authority through these appointed traditional leaders.<sup>79</sup> As a consequence of this arrangement, it became apparent that traditional leaders could exercise their traditional powers and functions only within the confines of the law.

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<sup>75</sup> Kiser and Karceski 2017 *Annual Review of Political Science* 76 remark as follows: "Taxation has always been a central issue in political economy because it is one of the main activities of all states and a necessary condition for everything else states do. It is the core feature of state capacity."

<sup>76</sup> Gouws *et al* "Traditional and Khoi-San Leadership and Governance" 222.

<sup>77</sup> Gouws *et al* "Traditional and Khoi-San Leadership and Governance" 222.

<sup>78</sup> The colonial period in South Africa refers to the time when various European powers, including the Dutch and later the British, established colonies in different parts of what is now South Africa. This period began in the 17th century with the Dutch settlement at Cape of Good Hope and continued into the 19th and early 20th centuries as various European powers expanded their control over the region. The post-colonial period in South Africa refers to the time after South Africa gained independence from colonial rule. South Africa's colonial era formally ended with the establishment of the Union of South Africa in 1910 when the British colonies of the Cape, Natal, Transvaal, and the Orange Free State united to form a single self-governing dominion within the British Empire. However, true independence from British colonial rule was achieved in 1961 when South Africa became a republic and left the British Commonwealth.

<sup>79</sup> Gouws *et al* "Traditional and Khoi-San Leadership and Governance" 231.

Their authority was, in essence, governed by the legal framework established by the colonial governments.

During the post-colonial era, the government officially recognised the position of traditional leaders by enacting legislation that codified and expanded their functions.<sup>80</sup> Traditional leaders were appointed as functionaries to perform various government duties on behalf of state authorities. The *Black Administration Act*<sup>81</sup> was a key piece of legislation during this period that listed traditional leaders' powers, functions, and duties in Proclamation 110.<sup>82</sup>

A general survey of the powers, functions, and duties outlined in the preceding paragraphs confirms two key aspects. Firstly, traditional leaders appointed by the government of the day carried out numerous functions and duties similar to those of the ruling government. However, they were not recognised as organs of the state. Secondly, the government retained complete control over the actions of traditional leaders, who existed and functioned with the special permission of the government in power. Proclamation 110 listed several important powers, functions and duties of traditional leaders. Among them were the requirements to promote the interests of the community, support measures for the well-being of the people, take measures to develop or improve the land, maintain law and order, and enforce all laws, orders, instructions or requirements of the government relating to various matters such as public health, the collection of taxes, the registration of births and deaths, the conducting of a census, and more. In addition, traditional leaders had powers like those of peace officers to arrest and take into custody any offender and to search without a warrant any person or homestead if reasonable grounds existed for suspecting that intoxicating liquor, arms or ammunition were hidden.

However, traditional leaders were not empowered to punish anyone in their area who had committed an offence or to hear and determine any civil claim brought before them unless the necessary jurisdiction had been conferred on them. Such jurisdiction was and still is derived from the *Black*

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<sup>80</sup> In 1961, South Africa became independent from the United Kingdom and became the Republic of South Africa.

<sup>81</sup> *Black Administration Act* 38 of 1927.

<sup>82</sup> Promulgated under s 25 of the *Black Administration Act* 38 of 1927. See *Regulations Prescribing the Duties, Powers, Privileges and Conditions of Service of Chiefs and Headmen* (Proc 110 in GG 5854 of 18 April 1957). S 25 was repealed by the *Abolition of Racially Based Land Measures Act* 108 of 1991.

*Administration Act*.<sup>83</sup> They were also required to disperse any assembly of armed persons held without authority or any riotous meeting where a state of lawlessness existed in their area.

The powers, functions and duties granted to traditional leaders in terms of the *Black Administration Act* and its regulations were essentially the same as those of the government in the so-called white areas. Therefore, it can be argued that traditional authorities acted on behalf of the government and thus participated in the performance of state functions. This viewpoint is confirmed by Gouws *et al*, who observe that "the colonial policy of indirect rule transformed traditional rulers into governmental functionaries".<sup>84</sup> It is not surprising, therefore, that the government of the day exercised stringent control over the actions of traditional authorities during this time. Proclamation 110, promulgated in terms of the Act, provided for the dismissal, suspension or fining of any appointed traditional leader who neglected or refused to comply with the regulations describing their powers, functions and duties, or who disobeyed any lawful command directed at them by any authorised officer of the government, or who misconducted themselves in any way whatsoever, or who abused their powers.<sup>85</sup>

During the apartheid era<sup>86</sup> there were substantial changes to the legal position of traditional authorities.<sup>87</sup> The apartheid government relied on traditional authorities to implement its policies as set out in the *Black Authorities Act*.<sup>88</sup> The Act dealt with the recognition of traditional authorities as organs of authority and granted them broad powers. However, it was not very specific about those exact powers, duties and functions. Section 4 of the Act only generally described these powers, functions and duties. This section stipulated the following tasks to be performed by the traditional authorities:

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<sup>83</sup> Section 12 provides for the settlement of civil disputes by traditional leaders and s 20 empowers traditional leaders to try certain offences. Although most other parts of the *Black Administration Act* have been repealed, these two remain intact.

<sup>84</sup> Gouws *et al* "Traditional and Khoi-San Leadership and Governance" 222.

<sup>85</sup> Clause 30(1) of the *Regulations Prescribing the Duties, Powers, Privileges and Conditions of Service of Chiefs and Headmen* (Proc 110 in GG 5854 of 18 April 1957).

<sup>86</sup> The apartheid era in South Africa officially began in 1948 when the National Party came to power in the country's general elections. It implemented a series of policies of laws and policies that institutionalised racial segregation and discrimination, which were in place until the early 1990s.

<sup>87</sup> Gouws *et al* "Traditional and Khoi-San Leadership and Governance" 232-233.

<sup>88</sup> *Black Authorities Act* 68 of 1951.

- a) In general to administer the affairs of the community.<sup>89</sup>
- b) To render assistance and guidance to its chief or headman in connection with the performance of his functions.<sup>90</sup>
- c) To advise and assist the government in connection with matters relating to the material, moral and social well-being of black residents in the area under their jurisdiction.<sup>91</sup>
- d) In general to exercise such powers and perform such functions and duties as in the opinion of the Governor-General (subsequently the President) fall within the sphere of administration and may be assigned to that traditional authority.<sup>92</sup>

The white minority government's ultimate goal during apartheid was to establish a politically and constitutionally independent state known as a homeland for each of the ten black ethnic groups. By the time of the democratic elections on 27 April 1994, some nominal independent states, such as Bophuthatswana, Transkei, Ciskei, and Venda, had been constituted.<sup>93</sup> However, most of the leaders of the remaining six homelands had refused to accept independence from the white minority government.<sup>94</sup> Nonetheless, they were considered by the minority government as self-governing states.<sup>95</sup> After the final democratic Constitution had been adopted all the homelands, including those that had accepted nominal independence became an integral part of a united South Africa.

The impact of the *Black Authorities Act* on traditional leadership and governance in South Africa can be best summarised by a comment on the website of South African History Online:<sup>96</sup>

This was the first piece of legislation introduced to support the government's policy of separate development. It made provision for the establishment of Regional and Territorial Authorities for each specific ethnic group in the 'reserves'. Tribal Authorities were set up and positions were given to Chiefs and Headman who became responsible for the allocation of land, the welfare and pension system and development. The Traditional leadership of the African population had to some extent become representatives of the White

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<sup>89</sup> Section 4(1)(a) of the *Black Authorities Act* 68 of 1951.

<sup>90</sup> Section 4(1)(b) of the *Black Authorities Act* 68 of 1951.

<sup>91</sup> Section 4(1)(c) of the *Black Authorities Act* 68 of 1951.

<sup>92</sup> Section 4(1)(d) of the *Black Authorities Act* 68 of 1951.

<sup>93</sup> Butler, Rotberg and Adams *Black Homelands of South Africa* 1.

<sup>94</sup> Butler, Rotberg and Adams *Black Homelands of South Africa* 220.

<sup>95</sup> See South African History Online 2019 <https://sahistory.org.za/article/homelands>.

<sup>96</sup> See South African History Online 2019 <https://sahistory.org.za/archive/bantu-authorities-act-1951>.

government. Uncooperative traditional leaders were faced with harsh penalties and were often deposed. For example, Chief Albert Luthuli was deposed from his position as chief when he refused to resign from the African National Congress.

The introduction of a fully democratic state with a majority government, a democratic constitution with a bill of fundamental rights, and a Constitutional Court in 1994 did not result in the abolition of the institution of traditional authorities. In fact, the new democratic Constitution explicitly recognises the role and status of traditional leadership, subject to the Constitution. The Constitution stipulates that a traditional authority following a system of customary law may function according to any applicable legislation and customs, including any amendments to or repeal of that legislation or those customs.<sup>97</sup> Additionally, the Constitution provides that customary law must be applied by the courts when relevant, subject to the Constitution and any legislation that specifically deals with customary law.<sup>98</sup> Moreover, the Constitution recognises the potential role of traditional leaders in local government. National legislation may provide for traditional leadership as an institution at the local level on matters affecting local communities.<sup>99</sup> The Constitution also grants national and provincial legislative authorities the discretion to establish houses of traditional leaders and a council of traditional leaders.<sup>100</sup>

The constitutional provisions above represent the Constitution's recognition and regulation of traditional leadership. While they are comprehensive, they are also vague and do not clarify the legal nature of this institution, particularly concerning its role in government. As already explained in the introduction, the government published the *White Paper* in 2003 to introduce a policy that led to the creation of the *Traditional Leadership and Governance Framework Act* in 2004.<sup>101</sup> The *White Paper* explicitly stated that the new legislation would define the place and role of traditional leadership in democratic government, transform the institution to comply with the Constitution, and restore its legitimacy and integrity in accordance with customary law and practices.<sup>102</sup>

On 31 December 2017 the *Traditional Leadership and Governance Framework Act* underwent a significant transformation, being replaced by

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<sup>97</sup> Section 211(1) of the Constitution.

<sup>98</sup> Section 211(2) of the Constitution.

<sup>99</sup> Section 212(1) of the Constitution.

<sup>100</sup> Section 212(2) of the Constitution.

<sup>101</sup> *Traditional Leadership and Governance Framework Act* 41 of 2003. The Act commenced on 24 September 2004.

<sup>102</sup> The *White Paper* 11.

the *Traditional and Khoi-San Leadership Act*.<sup>103</sup> This new Act recognised Khoi-San communities and their leaders and aimed to address their unique status within the broader framework. However, as indicated, the journey of the Act is marked by initial challenges as it faced a constitutional setback when it was declared unconstitutional on 30 May 2023 in the case of *Mogale v Speaker of the National Assembly*.<sup>104</sup> Its unconstitutionality has been suspended for a period of 24 months to allow government "to re-enact the statute in a manner that is consistent with the Constitution or to pass another statute in a manner that is consistent with the Constitution".<sup>105</sup>

Considering that the *Traditional Leadership and Governance Framework Act* served as the foundational framework for traditional leadership for over a decade, we revisit a selection of its notable provisions outlining the functions and responsibilities of traditional leaders, primarily for historical reference. The Act aimed to establish a comprehensive framework for the functioning of the institution of traditional leadership, which included recognising traditional communities, establishing traditional councils, providing a statutory framework for leadership positions, recognising traditional leaders and outlining the conditions for their removal from office, establishing houses of traditional leaders, defining the functions and roles of traditional leaders, creating mechanisms for dispute resolution, establishing the Commission on Traditional Leadership Disputes and Claims, and drafting a code of conduct for traditional leaders.<sup>106</sup>

The *Traditional Leadership and Governance Framework Act* also identified the areas in which traditional leaders could participate if the national or provincial government granted the necessary powers through legislation.<sup>107</sup> These areas included arts and culture, land administration, agriculture, health, welfare, the administration of justice, safety and security, the registration of births, deaths, and customary marriages, economic development, the environment, tourism, disaster management, the management of natural resources, the dissemination of information relating to government policies and programmes, and education. The Act explicitly stated that when allocating these roles to traditional authorities, the ideals

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<sup>103</sup> *Traditional and Khoi-San Leadership Act* 3 of 2019.

<sup>104</sup> *Mogale v Speaker of the National Assembly* CCT 73/22 [2023] ZACC 14 (30 May 2023).

<sup>105</sup> *Mogale v Speaker of the National Assembly* CCT 73/22 [2023] ZACC 14 (30 May 2023) para 87.

<sup>106</sup> See the long title to the *Traditional Leadership and Governance Framework Act* 41 of 2003.

<sup>107</sup> Section 20(1) of the *Traditional Leadership and Governance Framework Act* 41 of 2003.

of cooperative governance, integrated development planning, sustainable development and service delivery should be promoted.<sup>108</sup> If a role or function was allocated to a traditional leader, its execution had to be monitored to ensure compliance with the Constitution. If these roles and functions were not performed correctly or satisfactorily, the resources provided for their execution could be withdrawn.<sup>109</sup>

The *Traditional Leadership and Governance Framework Act* clearly demonstrated that traditional authorities were expected to perform specific functions and duties on behalf of the national and provincial governments. As previously stated, the Act authorised them to execute duties and perform functions in several areas that are typically the exclusive responsibility of the national or provincial governments. Nevertheless, despite possessing these characteristics, it is important to clarify that traditional leaders cannot be categorised as government organs. In the subsequent paragraphs, we will delve into and elucidate the reasons for this distinction.

As previously outlined, the *Traditional Leadership and Governance Framework Act* was succeeded by the *Traditional and Khoi-San Leadership Act*. This Act not only addresses the recognition and appointment of traditional authorities but also extends recognition to Khoi-San leaders. It additionally establishes comprehensive operational structures for both groups. While the Constitutional Court did declare the Act unconstitutional in the case of *Mogale v Speaker of the National Assembly*,<sup>110</sup> it is crucial to emphasise that the basis for this decision was rooted in procedural matters, rather than any scrutiny of the Act's substantive content. Therefore, relevant provisions of the Act will still be briefly referenced in this discussion as they pertain to the topic at hand.

The *Traditional and Khoi-San Leadership Act* is somewhat vague regarding traditional leaders' roles and functions. It states that they perform the functions provided for in terms of customary law and customs of the traditional community concerned and any applicable national or provincial legislation.<sup>111</sup> The Act also establishes a traditional council for each traditional community, with a senior traditional leader serving as an *ex officio*

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<sup>108</sup> Section 20(2) and (3) of the *Traditional Leadership and Governance Framework Act* 41 of 2003.

<sup>109</sup> Section 20(4) of the *Traditional Leadership and Governance Framework Act* 41 of 2003.

<sup>110</sup> *Mogale v Speaker of the National Assembly* (CCT 73/22) [2023] ZACC 14 (30 May 2023).

<sup>111</sup> Section 15(1) of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

member and chairperson.<sup>112</sup> The functions of traditional councils include supporting municipalities in identifying community needs, recommending appropriate interventions to government, participating in policy and legislation development at a municipal level, engaging in development programmes across all levels of government, promoting cooperative governance, planning integrated development, sustainable development and service delivery, promoting indigenous knowledge systems, and contributing to disaster management efforts by alerting relevant municipalities and aiding in disaster management.<sup>113</sup>

Since the 1920s the legislative arrangements for traditional authorities have demonstrated a clear trend toward involving traditional authorities in governmental functions and duties. This involvement is legitimised through formal agreements between provincial governments and traditional councils established by the *Traditional and Khoi-San Leadership Act*. The following discussion will delve into this issue further.

#### **4 Traditional authorities' involvement in state functions through public-private agreements and public participation**

This contribution maintains that, although traditional leaders may exercise public powers and perform public functions, they cannot be classified as organs of the state. As demonstrated in the following section, the reasoning for adopting this stance is not based on the constitutional definition of an organ of state but rather on the concept of private participation in exercising state powers and functions.

The constitutional recognition of traditional leadership involves authorising these institutions' continued existence, status and role. Parliamentary legislation also contributes to the development of the role of traditional authorities beyond constitutional recognition. This authorisation allows traditional authorities to exercise state powers and perform state functions on behalf of state authorities, effectively privatising certain state powers and functions. However, the state authorities retain an essential measure of control in this process. As shown earlier, traditional authorities exercise these powers and functions subject to the Constitution, and the applicable legislation and customs may be amended or repealed.

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<sup>112</sup> Section 16 of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

<sup>113</sup> Section 20(1) of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

The role of traditional leaders in local government is mainly supportive and advisory, as stated in the *White Paper*.<sup>114</sup> However, the policy in the *White Paper* does not explicitly exclude the idea of private participation in state powers and functions. In fact, one could argue that the policy, at least by implication, allows private participation. This interpretation is based on the government's position that the institution of traditional leadership can play a crucial role in supporting government efforts to improve the quality of life of people in rural areas.<sup>115</sup> The roles identified for traditional authorities include promoting socio-economic development, service delivery, and the social well-being and welfare of communities. The *White Paper* also allows traditional leadership institutions to form cooperative relations and partnerships with the government at all development and service delivery levels.

These partnerships could be interpreted to imply formal public-private agreements in which specific governmental powers and functions are transferred to traditional authorities to be exercised on behalf of and under the control of applicable governmental authorities. The *Traditional and Khoi-San Leadership Act* strongly promotes partnerships between traditional councils of traditional communities<sup>116</sup> and municipalities,<sup>117</sup> guided by the principles of cooperative governance.<sup>118</sup> These partnerships may take the form of a service delivery agreement in accordance with the *Local Government: Municipal Systems Act*.<sup>119</sup>

In the context of local government in South Africa, where traditional authorities may be well-suited for certain government functions,<sup>120</sup> a public-private agreement is a commercial transaction between a municipality and a private entity. Under this agreement the private entity assumes substantial financial, technical, and operational risks in performing a municipal function for or on behalf of the municipality or in acquiring the management or use

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<sup>114</sup> Rautenbach "Mapping Traditional Leadership and Authority" 508.

<sup>115</sup> The *White Paper* para 3.2.

<sup>116</sup> Traditional councils are established and recognised in terms of ss 16 and 17 of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

<sup>117</sup> Sections 20(3)(a) and 24 of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

<sup>118</sup> Section 24(4)(b) of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

<sup>119</sup> Section 24(5) of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

<sup>120</sup> De Visser, Steytler and Chigwata Date unknown <https://dulahomarinstitute.org.za/multilevel-govt/publications/doi-factsheets-9.pdf>, observe as follows in this regard: "Whether or not their roles have been formally acknowledged, traditional leaders often continue to serve as an important link between the state, particularly local government, and the citizens. They provide services such as dispute resolution, land management and the coordination of response to natural disasters, which the modern state often fails to do due to its limited capacity. In short, in the absence of the state, they effectively become the state."

of the municipal property for its own commercial purposes. The private entity benefits from this arrangement through a consideration paid by the municipality or a municipal entity under the municipality's sole or shared control or through charges or fees collected from users or customers of a service provided by the private entity. Sometimes the private entity may receive a combination of these benefits.<sup>121</sup>

This description of a public-private agreement in South Africa is quite broad. It does not explicitly prohibit using such agreements as a form of private participation or "privatisation" in performing official functions on behalf of a municipality. Some commentators consider it a low-key form of privatisation, but others argue it should not be equated with privatisation. One key difference between public-private partnerships and privatisation is that in the latter the private sector assumes responsibility for both the delivery and funding of a particular service. At the same time, in the former the state retains the responsibility for providing services. Additionally, ownership rights under privatisation are sold to the private sector, along with the associated benefits and costs. Contrary to public-private partnerships, the state may retain the legal ownership of assets in the public sector.<sup>122</sup>

Those who support public-private agreements distinguish them from privatisation by limiting the latter concept to the transfer of state entities to the private sector without any further state control. In contrast, public-private agreements imply a partnership between the public and private sectors, where the state maintains significant control over the private sector's functions under the agreement.<sup>123</sup> Therefore, public-private agreements are of limited duration and subject to review and renewal. Although not equivalent to full privatisation, public-private agreements still represent a form of private participation in state functions.

From the perspective of administrative law, public-private agreements constitute a form of decentralisation. This is because the state delegates certain functions to the private sector while retaining significant control over the delegate's actions. In contrast, full privatisation represents a form of

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<sup>121</sup> The legislature introduced the concept of public-private partnerships in s 120 of the *Local Government: Municipal Finance Management Act 56 of 2003* and defined it in clause 1 of the *Municipal Public-Private Partnerships Regulations* (GN R309 in GG 27431 of 1 April 2005) promulgated in terms of s 168 of the said Act. For a discussion of this description see Van der Berg 2015 *PELJ* 1006.

<sup>122</sup> For example see Anon 2017 <https://2thepoint.in/difference-public-private-partnership-ppp-privatisation/>.

<sup>123</sup> Farlam *Working Together* 3.

deconcentration, as the state and private sector act independently, with the state having little control over the latter's actions.<sup>124</sup>

The *Traditional and Khoi-San Leadership Act* places great importance on partnerships and agreements by allowing traditional councils to enter into such agreements with municipalities, government departments and other bodies, persons or institutions.<sup>125</sup> This provision must be considered in conjunction with section 24(5), which grants traditional councils the power to enter into service delivery agreements with municipalities in accordance with the *Local Government: Municipal Systems Act*. As provided for in section 24, these partnerships and agreements are subject to regulation by the national and provincial governments through legislative or other means. In addition, the Act sets specific requirements to be met when entering such agreements.<sup>126</sup> These include the following:

- a) the agreement must be in writing;
- b) it must be beneficial to the community represented by the particular traditional council;
- c) it must contain clear provisions on the responsibilities of each party to the agreement and on the conditions of termination of such partnership or agreement;
- d) the conclusion of the agreement is subject to prior consultation with the community represented by the traditional council;
- e) the agreement so concluded is subject to ratification by the premier of the province in which the particular traditional council is situated, and it will have no effect until such ratification has taken place;
- f) the agreement may not bind the state or any person, body or institution that is not a party to such an agreement;
- g) the agreement contemplated must be based on the principles of mutual respect and recognition of the status and roles of the respective parties to the agreement; and

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<sup>124</sup> For the distinction between deconcentration and decentralisation as forms of delegation from an economic point of view see Khambule 2021 *Local Economy*.

<sup>125</sup> Section 24(2) of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

<sup>126</sup> Section 24(3) and (4) of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

- h) the agreement must be guided and based on the principles of cooperative government.

The last condition may give the impression that a traditional council is granted the status of an organ of state by implication. It is difficult to envisage an agreement based on the principles of cooperative government if one of the parties to the agreement is not part of governmental structures. The principles of cooperative government are listed in the Constitution under the heading "Principles of cooperative government and intergovernmental relations".<sup>127</sup> According to the relevant provision, these principles must be applied in all spheres of government and by all organs of state. However, the language the provision uses relates explicitly to the relationship between the spheres of government and between organs of state, without mentioning private institutions being bound by them. Therefore, it is unclear how these principles could be applied to an entity that we regard as a private institution, in its relationship with an organ of state. They are not designed to regulate such a relationship. It is uncertain what role and function these principles will have and how they will be applied in the relationship between an organ of state and a traditional council in terms of an agreement or partnership between them. However, it is essential to emphasise that any attempt to apply these principles in the relationship between a traditional council and an organ of state does not transform the former into a governmental body with state authority.

The premier in whose province the traditional council with whom the agreement or partnership has been concluded is situated must monitor the partnership or agreement and may take the necessary steps to ensure effective and efficient implementation or termination thereof if deemed necessary.<sup>128</sup> Suppose a premier is of the opinion that a partnership or agreement does not comply with the prescribed requirements. In that case, such a partnership or agreement must be referred to the parties who entered into it, together with their reasons for not ratifying the partnership or agreement, and they must be requested to rectify any shortcomings as referred to in his or her statement of reasons.<sup>129</sup> In addition, the premier must provide copies of all agreements and partnerships to the Minister to be kept in an appropriate database.<sup>130</sup>

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<sup>127</sup> Section 41(1) of the *Traditional and Khoi-San Leadership Act 3 of 2019*.

<sup>128</sup> Section 24(6)(a) of the *Traditional and Khoi-San Leadership Act 3 of 2019*.

<sup>129</sup> Section 24(6)(b) of the *Traditional and Khoi-San Leadership Act 3 of 2019*.

<sup>130</sup> Section 24(7)(b) of the *Traditional and Khoi-San Leadership Act 3 of 2019*.

The *Traditional and Khoi-San Leadership Act* contains a rather peculiar provision concerning the role a traditional council could play. A department in the national or provincial sphere of government may, through legislative or other measures, provide a role for a traditional council in respect of any functional area of such a department, provided that such a role may not include any decision-making power.<sup>131</sup> Where a department has made provision for a role for any council, such a department must monitor the execution of the role to ensure that its execution is consistent with the Constitution and is performed efficiently and effectively.<sup>132</sup>

The Act and the relevant section, in particular, do not clarify the nature of the role contemplated for the traditional council to fulfil. However, what can be gathered from the said section is that the government would probably typically fulfil the role - in other words, a governmental role. As the role does not imply the exercise of any decision-making power on the part of the traditional council, the council would be responsible only for the execution of the decision taken by the government. It would thus seem that the traditional council would in this instance act in an executive capacity only, under the supervision of the government department that allocated the role to the particular traditional council.

## 5 Conclusion

Traditional leaders have historically performed functions that are similar to modern state functions, albeit in a primitive way. This may have contributed to the South African government's ability to employ traditional leaders to implement apartheid policies. The legislative formalisation of the relationship between traditional leaders and the government began with the *Black Administration Act* of 1927. This relationship has continued to evolve, particularly in relation to local government functions. Public-private agreements have played an important role in this process.

Regarding the current situation, we argue that traditional leaders are not part of the state as organs of state, but private citizens assigned or elected by their communities to function according to indigenous law in a specific area. The Constitution and relevant legislation recognise this choice. Traditional leaders are granted certain functions that resemble state functions at the local government level. As the Constitution recognises customary law, these functions could be seen as a form of private

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<sup>131</sup> Section 25(1) of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

<sup>132</sup> Section 25(3) of the *Traditional and Khoi-San Leadership Act* 3 of 2019.

participation in exercising state functions. However, the state retains extensive control over the actions of traditional leaders. Therefore, this form of private participation should not be viewed as full privatisation. Private participation can take place variously, ranging from consultation with the private sector by state authorities while retaining control, to full privatisation where the private sector takes full responsibility for state functions. Public-private partnerships are included on this spectrum.

Concerning traditional leaders, a public-private agreement serves to formalise the existing partnership between the state and the private sector, stemming from the constitutional acknowledgement of traditional authorities and their laws. Since systems of traditional law are unwritten, these agreements enhance legal certainty and clarity. In these instances the agreements do not create private participation between the parties, as it already exists in terms of constitutional recognition, but limited to the powers of traditional leaders in terms of customary law. However, if the agreements venture beyond the traditional functions of the leaders, it introduces the concept of private participation within that specific context. However, it's proposed that, for the sake of legal lucidity and certainty, a more coherent approach would involve transforming traditional authorities into integral components of the state's framework as organs of state, endowed with well-defined functions and authorities. This stands in contrast to the sporadic approach of using private participation agreements to confer relevant powers and functions aimed at enhancing the well-being of rural communities under their purview. To maintain standards, it may be prudent for the state to exercise appropriate oversight over these activities of traditional authorities.

In conclusion, traditional leaders play a significant role in developing and providing services to their communities in rural areas. Despite their historical misuse during apartheid to further the nationalist government's segregation policies, the constitutional recognition of traditional authorities and their legal systems has provided a legal framework for their continued involvement in local government functions with the potential to enhance the delivery of services to traditional communities through public-private agreements. However, given traditional leaders' vital role in their communities, it may be advantageous to transform them into organs of state on the local government level. The current legal position, wherein traditional leaders can only function as municipal councillors without voting rights, is unsatisfactory. This arrangement may foster contentious dynamics within the council and thus necessitates reform. It is advisable to revise this setup by also affording traditional leaders the ability to cast votes within council.

It is suggested that the institution of traditional authorities is in need of radical changes, particularly in terms of democratisation. Such a transformation would only be to the benefit of traditional communities, especially as far as the delivery of essential services is concerned.<sup>133</sup> The road to achieving this transformation may not be easy, but it is worth exploring for the betterment of traditional communities and their leaders.<sup>134</sup> If traditional authorities agree to be granted greater authority and powers as organs of state, several prerequisites must be met. The institution should undergo democratisation, and traditional leaders should be willing to engage in the requisite training facilitated by responsible state authorities to adequately prepare them for their expanded role. However, whether traditional authorities would be willing to take this path remains to be seen.

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<sup>133</sup> De Visser, Steytler and Chigwata Date unknown <https://dulahomarinstitute.org.za/multilevel-govt/publications/doi-factsheets-9.pdf>, observe as follows in this regard: "There is no doubt that there are several challenges associated with traditional authorities. However, traditional forms of governance cannot simply be wished away, given their continued relevance in modern day Africa. Traditional authorities have been around for millennia and are likely to stay in place well into the future. Thus, it is important that decentralisation laws and policies include ways of accommodating traditional leaders – particularly at local level – for the benefit of communities."

<sup>134</sup> Ngcobo *Role of Traditional Leaders* 114-115 confirms in his recommendations "that in an attempt of creating a functioning local government, it is crucial to ensure genuine and authentic local participation" of traditional leaders. At the same time, it is imperative that "effective transformative endeavours be undertaken within the institution itself", especially with regard to the democratisation of the institution.

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PAJA	Promotion of Administrative Justice Act 3 of 2000
PELJ	Potchefstroom Electronic Law Journal
RBN	Royal Bafokeng Nation
TARG	Traditional Authority Research Group