

# The failure of an arranged marriage: The traditional leadership/democracy amalgamation made worse by the Draft Traditional Affairs Bill\*

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## ***Abstract***

This article presents an analysis of the recently published Draft Traditional Affairs Bill, 2013 and, in particular, clause 25 thereof. Clause 25 ('[a]llocation of roles...') contemplates something akin to the delegation of legislative power – in an unguided and unfettered manner – to 'departments' in the national and provincial spheres of government and the concomitant subdelegation of 'roles' in respect of the functional areas of these spheres to unelected traditional councils and leaders. This provision threatens not only the rule of law, but also the delicate twofold constitutional division of power: the horizontal separation of powers between the three arms of state and the vertical division of government into three spheres (national, provincial and local). Against the backdrop of the constitutional framework governing traditional leaders, this article unpacks the elements of clause 25 of the Draft Bill by addressing several specific questions which illustrate how and why clause 25 will fail to pass constitutional muster. Amongst other things, the notion of a 'role' is considered and compared with that of a 'function' and 'power' respectively. Similarly, the meaning of 'allocation' is considered and insofar as it amounts to delegation, the limits to the delegation of

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\*I am grateful to Professor Hugh Corder for his comments on the administrative law aspects of this article, for encouraging me to publish my ideas and for being a wonderful mentor and colleague. I must also thank the Centre for Law and Society (UCT) and the Legal Resources Centre for instructing me to advise on this topic, thereby stimulating my research in this field. I am indebted to Dr Aninka Claassens and Monica de Souza of the Centre for Law and Society for their invaluable comments on a draft of this article, as well as Professor Tom Bennett for his feedback and encouragement.

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legislative and discretionary powers – as carved out by the Constitutional Court – are applied to the provisions of clause 25. Finally, it is determined that although customary law may be a source of administrative power for traditional leaders, these leaders may not exercise quintessential governmental power and insofar as clause 25 purports to confer such governmental powers on traditional leaders and councils, the Draft Bill impermissibly seeks to render traditional leaders a fourth sphere of government in breach of the twofold separation of powers and in violation of the explicit provisions of section 212(1) of the Constitution.

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## 1 Introduction

Writing in 2004, Christina Murray made the following observation:

It may be possible to marry the idealised notions of an older, different democratic order eulogised as an intrinsic part of an original, untainted, form of pre-colonial traditional leadership with the requirements of a democratic state. But such an amalgamation should not be the product of either short-term horse trading or transparently sectional interests for whom tradition is little more than a shield from the demands of democratic accountability.<sup>1</sup>

Ten years later, the awkward amalgamation between traditional leadership and the prescripts of our constitutional democracy is just as Murray predicted: the product of short-term horse trading aimed at appeasing traditional leaders hungry for powers – not mere ‘roles’ – while purportedly remaining true to our constitutional ethos, but falling horribly short of the mark. This ‘horse trading’ has occurred through inept and disconcerting legislative efforts which have satisfied neither traditional leaders nor those who argue that to survive, the institution of traditional leadership needs a remodelling to ensure constitutional congruity. The latest ‘effort’ takes the form of the Draft Traditional Affairs Bill, 2013<sup>2</sup> – an unfortunate manifestation of poor legislative drafting and the use of substantive measures that hark back to the apartheid government’s strategic doling out of powers to traditional authorities as part of its policy of indirect rule.<sup>3</sup> On this score,

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<sup>1</sup>Murray ‘South Africa’s troubled royalty: Traditional leaders after democracy’ *Law and Policy Paper* 23, Centre for International and Public Law, Australian National University (2004) 23.

<sup>2</sup>The Draft Traditional Affairs Bill, 2013 was published in *Government Gazette* No. 36856 of 20 September 2013 by the Department of Traditional Affairs (‘the Draft Bill’).

<sup>3</sup>Regarding this policy of indirect rule see, for example, Rugege ‘Traditional leadership and its future role in local governance’ 2003 *Law, Democracy & Development* 171 at 173, who notes that, ‘traditional institutions were transformed into agencies (tribal authorities) of the alien state and more powers were given to these tribal authorities to control the African population in order to better serve colonial/apartheid interests’.

a particularly dubious clause in the Draft Bill – and thus the focus of this article – is clause 25 which provides for the '[a]llocation of roles to kingship or queenship council, principal traditional council, traditional council, Khoi-San council, traditional sub-council and traditional and Khoi-San leaders'.<sup>4</sup> In this article, I consider the constitutionality of this clause by answering several specific questions from an administrative and constitutional law perspective.

First, I consider the meaning of the terms 'role' and 'allocation' in clause 25. I seek to determine whether the notion of a 'role' differs from that of a power or function and whether 'allocation' differs from assignment and delegation respectively as legal mechanisms to transfer power. Secondly, I canvass the legal limits of the delegation of legislative and broad discretionary powers, as formulated by the Constitutional Court. Thirdly, against the background of these 'limits', I then consider whether, insofar as clause 25 purports to be an empowering provision for the (sub/)delegation of powers and/or functions from organs of state in national and/or provincial departments to traditional councils or leaders, it complies with these limits. I conclude that it does not and is thus unconstitutional insofar as this vague and poorly-drafted provision purports to empower officials in the formal governance structures to delegate governmental functions to traditional councils and leaders, absent adequate legislative guidance in breach of the rule of law.

Fourthly, I consider whether customary law can be a source of administrative power for traditional councils and leaders and if so, whether it is subject to the constraints of administrative law. Finally, I show that although traditional leaders may indeed exercise administrative power, customary law cannot be a source of quintessential governmental power for traditional leaders more generally – our Constitution<sup>5</sup> does not give any explicit powers to traditional leaders to exercise law-making, policy-making and adjudicative functions in the formal South African governance system. In light of my finding on this score, I conclude that clause 25 unconstitutionally seeks to confer governmental powers on traditional councils and leaders in such a way as to render them an impermissible fourth sphere of government. This is in direct breach of the delicate two-fold constitutional division of power to ensure limited government; namely the horizontal separation of powers (accompanied by checks and balances) – a fundamental, albeit implied,<sup>6</sup> component of our constitutional architecture – and multi-sphere government (national, provincial and local).<sup>7</sup> In particular, I illustrate that clause 25 is not compliant with section 212(1) of the Constitution insofar as the impugned

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<sup>4</sup>Hereinafter referred to as 'traditional councils and leaders'.

<sup>5</sup>Constitution of the Republic of South Africa, 1996 (the Constitution).

<sup>6</sup>*South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) para 19.

<sup>7</sup>Section 40(1) of the Constitution provides that, 'in the Republic, government is constituted as national, provincial and local spheres of government'.

provision contemplates the allocation of *governmental* roles to traditional councils and leaders at *national and provincial* (rather than local) government level and by measures other than via national legislation. Before turning to address the specific questions that lead me to reach this conclusion, I proceed to outline the constitutional framework governing traditional leaders, summarise the main objects of the Draft Bill and consider the provisions of clause 25 against the backdrop of its predecessor (namely s 20 of the Traditional Leadership and Governance Framework Act, 2003).<sup>8</sup>

## 2 The constitutional framework governing traditional leaders

Bennett and Murray have noted that, '[t]he Final Constitution deals with traditional leaders in two short sections, a terseness which reflects the dominant view in the Constitutional Assembly that democracy, not traditional leadership was to take precedence in South Africa.'<sup>9</sup> The sections read as follows:

### 211 Recognition

(1) The institution, status and role of traditional leadership, according to customary law, are recognised, *subject to the Constitution*.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, *subject to the Constitution* and any legislation that specifically deals with customary law.

### 212 Role of traditional leaders

(1) *National* legislation may provide for a role for traditional leadership as an institution *at local level* on matters affecting local communities.

(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law –

(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and

(b) national legislation may establish a council of traditional leaders.<sup>10</sup>

These sections make their appearance near the end of the Constitution in chapter 12 (which is markedly separated from the chapters dealing with the legislative, executive and judicial authority of the Republic) and reflect the tenuous

<sup>8</sup>Traditional Leadership and Governance Framework Act 41 of 2003 ('The Framework Act').

<sup>9</sup>Bennett and Murray 'Traditional Leaders' (ch 26) in Woolman *et al* (eds) *Constitutional law of South Africa* (2008).

<sup>10</sup>Emphasis added.

compromise adopted by the Constitutional Assembly in ensuring the recognition of 'a degree of cultural pluralism with legal and cultural, but not necessarily governmental consequences'.<sup>11</sup> Chapter 12 of the Constitution thus guarantees no more than a symbolic or ceremonial role for traditional leaders. Their role can be no more than this given that they 'are hereditary leaders ... [who] are unrepresentative',<sup>12</sup> and their powers are all-inclusive and undifferentiated<sup>13</sup> – there is no separation of powers<sup>14</sup> insofar as the business of traditional government is 'neither differentiated according to the western notions of executive, judicial and legislative functions nor allocated to separate institutions'.<sup>15</sup> These features of the institution of traditional leadership are at odds with the fundamentals of our constitutional order as encapsulated in the founding provisions of the Constitution. Section 1 states that:

The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness.

These founding values, together with the horizontal and vertical separation of powers, can be described as the democratic infrastructure of the South African governance system. The institution of traditional leadership is inherently incompatible<sup>16</sup> with this infrastructure and is thus an awkward addition to our constitutional framework which aims to 'separate culture and politics'.<sup>17</sup> It is for this reason that the Constitutional Court stressed the following in the *Certification Judgment*:

In a purely republican democracy, in which no differentiation of status on grounds of birth is recognised, no constitutional space exists for the official recognition of

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<sup>11</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.

<sup>12</sup>Ntsebeza 'Democracy compromised: Chiefs and the politics of land in South Africa' ch 8 in *Democracy compromised: Post-1994 retribalisation* (2005) 256-294 at 259.

<sup>13</sup>Bennett and Murray (n 9) at 26.1.

<sup>14</sup>For an overview of the separation of powers doctrine see Kohn 'The burgeoning constitutional requirement of rationality and the separation of powers: Has rationality review gone too far?' 2013 (130) *SALJ* 810.

<sup>15</sup>Bennett and Murray (n 9) at 26.1.

<sup>16</sup>Ntsebeza (n 12) at 256 describes our Constitution's simultaneous recognition of the hereditary institution of traditional leadership and liberal democratic principles based on representative government as a 'fundamental contradiction'.

<sup>17</sup>Murray (n 1) 2.

any traditional leaders, let alone a monarch. Similarly, absent an express authorisation for the recognition of indigenous law, the principle of equality before the law in CP [Constitutional Principle] VI could be read as presupposing a single and undifferentiated regime for all South Africans.<sup>18</sup>

This judgment contains a lucid statement of the friction between the claims of traditional leadership and the values of the Constitution. Given this tension, the explicit protection of the role of traditional leadership in the Constitutional Principles was necessary for its survival.<sup>19</sup> The two brief sections in chapter 12 of the Constitution which ensure this survival equally ensure that it is contingent upon constitutional consistency. The repetitious reminder in the sections that customary law and traditional leadership are subject to the Constitution and future legislative control serves as recognition of the fact that the role of this institution cannot be governmental in nature – rather it must be purely symbolic or nominal. As Murray aptly puts it ‘to reign but not to rule must be the appropriate role for South Africa’s royalty ... as in the long run hereditary leaders cannot exercise public power in a constitutional democracy’.<sup>20</sup> This has been recognised by the government which continually assures us that ‘traditional leadership and South Africa’s present democratic order are not mutually exclusive’<sup>21</sup> given that the role of this institution is ‘highly symbolic and ceremonial ... not political or administrative’.<sup>22</sup> Despite continually trotting out this rhetoric, it is quite apparent that what is said and what is done do not align: the string of recent legislative

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<sup>18</sup>The *Certification Judgment* (n 11) para 195.

<sup>19</sup>Constitutional Principle XIII stated at 1 that, ‘[t]he 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’. Constitutional Principle XVII in turn required that, ‘[a]t each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII’.

<sup>20</sup>Murray (n 1) at 23.

<sup>21</sup>Draft White Paper on Traditional Leadership and Governance published in *Government Gazette* No. 23984 of 29 October 2002 by the Department of Provincial and Local Government 19 (‘the Draft White Paper’).

<sup>22</sup>*Id* 10.

interventions<sup>23</sup> dealing with traditional leadership evidences a patent attempt to afford traditional leaders a role that is *ultra vires* the constitutional vision.

The question we now face is thus whether the current demands of traditional leaders and these legislative attempts to accommodate them threaten the reign-but-not-rule model. Writing in 2008, Bennett and Murray highlighted the ‘deeply problematic’<sup>24</sup> nature of the ‘emerging framework of national and provincial laws [which] establishes them as organs of state with governmental responsibilities’.<sup>25</sup> I turn now to consider the problematic aspects of the latest ‘emerging framework’ – the Draft Bill. Before doing so, I summarise the main objects of the Draft Bill and consider the provisions of clause 25 against the back-drop of the clause’s predecessor (namely section 20 of the Framework Act).

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<sup>23</sup>The notorious Communal Land Rights Act 11 of 2004 (‘CLARA’) – declared to be unconstitutional in its entirety by the Constitutional Court in *Tongoane v Minister for Agriculture and Land Affairs* 2010 6 SA 214 (CC) para 110 & 116 – is one such example. The main controversy sparked at the enactment of CLARA arose pursuant to section 21(1) which read, ‘[i]f a community has a recognised traditional council, the powers and duties of the land administration committee may be exercised and performed by such council’. The practical implication of this institutional feature would, in effect, be the ‘transfer’ of community ownership rights in the land to a traditional council. According to Ntsebeza (n 12) at 296 this would in turn result in, ‘rural people [becoming] “subjects” in the sense that decisions are taken by traditional councils which are ... dominated by unelected traditional authorities and their appointees. This raises critical questions about citizenship and the nature of democracy in South Africa.’ The other legislative intervention met with fierce opposition was the Traditional Courts Bill [B1-2012] (TCB), which failed to achieve the required support of the majority of provinces in the National Council of Provinces and so ‘lapsed’ in Parliament in February this year – a direct consequence of the incessant and wide-ranging public resistance to it. The TCB was criticised for perpetuating the colonial and apartheid warping of customary law and undermining the rights of those who live under it. In particular, Thipe and Buthelezi *Democracy in action: The demise of the Traditional Courts Bill and its implications* 2014 (30) SAJHR 196 note that criticism of the TCB included the fact that: ‘it adopted Bantustan boundaries to define the jurisdiction of traditional courts; that it centralised power in senior traditional leaders at the expense of all other forums for dispute management under customary law; and that it failed to protect the rights of women and other marginalised groups in traditional courts’. See also Weeks ‘The Traditional Courts Bill: Controversy around process, substance and implications’ 2011 SA *Crime Quarterly* 7.

<sup>24</sup>Bennett and Murray (n 9) ch 26.7.

<sup>25</sup>*Id* ch 26.5.

### 3 The Draft Bill exacerbates the dubious aspects of the existing statutory framework of traditional leadership

#### 3.1 *The main objects of the Draft Bill and the provisions of clause 25*

One of the main objects of the Draft Bill – and its ostensibly primary objective – is the recognition of Khoi-San communities and leaders and their inclusion in the official hierarchy of traditional leadership structures. Flowing from this objective is the second main object of the Draft Bill: '[t]o consolidate existing national legislation dealing with traditional leadership and as a result thereof, to repeal the National House of Traditional Leaders Act, 2009, and the Traditional Leadership and Governance Framework Act, 2003'.

The Draft Bill, like the TCB, relies upon the controversial tribal boundaries established under the Bantu Authorities Act, 1951<sup>26</sup> and entrenched by the Framework Act as the geographical areas enclosing a 'traditional community' and over which a traditional council, headed by a traditional leader, has some kind of authority. As a result, the Draft Bill reinforces 'many of the same colonial and apartheid spatial dynamics that were rejected in the TCB process'.<sup>27</sup> An especially questionable provision in the Draft Bill is clause 25 which provides for the 'allocation of roles' to traditional councils and leaders. It must be read with clauses 15, 19 and 20 which provide separately for the 'functions' of traditional councils and leaders. Clause 25 reads as follows:

- (1) A *department* within the *national or provincial* sphere of government, as the case may be, may, through *legislative or other measures provide a role* for a kingship or queenship council, principal traditional council, traditional council, Khoi-San council, traditional sub-council and traditional and Khoi-San leaders *in respect of any functional area* of such department.
- (2) The *process and procedure* to be followed for the provision of a role contemplated in subsection (1) to any of the councils or leaders contemplated in that subsection, as well as the extent of and conditions attached to any such provision, *may be determined by the department concerned*.
- (3) Where a department has made provision for a role for any council or leader contemplated in subsection (1), such department must monitor the execution of the role and ensure that –
  - (a) the execution of the role is consistent with the Constitution; and
  - (b) the role is being executed efficiently and effectively.

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<sup>26</sup>The Bantu Authorities Act 68 of 1951.

<sup>27</sup>Thipe and Buthelezi (n 23) 204.



- (4) Where any of the councils or leaders contemplated in subsection (1) does not execute a role as envisaged in subsection (3), any resources provided to such a council or leader to perform that role may be withdrawn by the department concerned.<sup>28</sup>

### 3.2 *Clause 25 of the Draft Bill versus section 20 of the Framework Act*

Under the Framework Act the roles and functions of traditional leaders are dealt with together in chapter 5. Section 19 states that '[a] traditional leader performs the functions provided for in terms of customary law and customs of the traditional community concerned, and in applicable legislation'. Section 20 of the Act specifies 'guiding principles for allocation of roles and functions' of traditional leadership and a few aspects of this section are worth highlighting and distinguishing from the provisions of clause 25 of the Draft Bill.

First, unlike clause 25 of the Draft Bill, the Act does not use the broad and ambiguous umbrella term, 'department', but refers rather to 'national or provincial government' – equally dubious given that traditional leaders are meant to play a role merely as 'an institution at *local level* on matters affecting local communities',<sup>29</sup> but somehow less offensive than the vague term 'department'. Secondly, section 20(1) of the Act explicitly delineates several functional areas of national and provincial competence<sup>30</sup> in respect of which traditional councils or leaders may be 'allocated roles'. These include, for example, the areas of arts and culture; land administration; environment and tourism. In comparison, clause 25 of the Draft Bill states simply that roles may be allocated 'in respect of any functional area of such department'. The breadth of this latter provision is problematic and begs the question why the legislature has seen fit to whittle down the more detailed provisions of section 20 of the Act. Thirdly, section 20(2) of the Act mandates any organ of state in national or provincial government that allocates a role to traditional councils or leaders, to obtain the prior approval of the relevant Minister or MEC, as the case may be. The section further requires prior consultation with 'the relevant structures of traditional leadership'<sup>31</sup> and 'the South African Local Government Association'.<sup>32</sup> These consultation requirements fail to make an appearance in clause 25 of the Draft Bill.

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<sup>28</sup>Emphasis added.

<sup>29</sup>S 212(1) of the Constitution.

<sup>30</sup>Namely the functional competencies of the respective spheres of government as set out in Schedules 4 and 5 of the Constitution.

<sup>31</sup>Section 20(2)(b)(i) of the Framework Act.

<sup>32</sup>*Id* s 20(2)(b)(ii).

Fourthly, section 20 of the Act does not contain a provision akin to clause 25(2) of the Draft Bill – a patently dubious addition to the new legislative framework by virtue of its vagueness and extensive breadth. Clause 25(2) leaves the determination of the process for the ‘provision of a role’ in the exclusive and unguided discretion of ‘the department concerned’. Fifthly, while section 20(2) of the Framework Act couples a requirement to ‘strive to ensure that the allocation of a role or function is accompanied by resources’<sup>33</sup> with provision for the withdrawal of any such resources,<sup>34</sup> clause 25(4) of the Draft Bill contains only the latter – an odd omission. Finally, clause 25 of the Draft Bill further whittles down the framework established in section 20 of the Framework Act by failing to specify the requirements of uniformity and cooperative governance: sections 20(2)(f)-(g) of the Framework Act require (respectively) that in allocating a role, the relevant organ of state must ‘strive to ensure, to the extent that it is possible, that the allocation of roles or functions is implemented uniformly in areas where the institution of traditional leadership exists’ and ‘promote the ideals of co-operative governance, integrated development planning, sustainable development and service delivery’. These requirements do not make an appearance in clause 25 of the Draft Bill.

The Framework Act has been met with much criticism since its enactment over ten years ago. Murray, for example, has highlighted the core objection to it, namely that it ‘bolster[s] a system of unaccountable government’.<sup>35</sup> She furthermore notes that the Act reflects ‘too much bargaining on details – the government’s approach seems to be “how little can we give them and still keep them on board?” and that of the chiefs “how much can we hold out for?”’. This outcome is, as she notes, ‘an unpromising start for transformation’.<sup>36</sup> In this sense, the Act has failed to satisfy both the traditional leaders with their desire for more power, and those who argue that the institution of traditional leadership requires radical transformation to serve our constitutional democracy.<sup>37</sup> The government’s ‘strategy of pragmatic accommodation’<sup>38</sup> thus seems to be failing and things are not looking up: as Thipe and Buthelezi note, ‘[t]he post-apartheid state has introduced and is continuing to introduce legislation that relies on colonial and apartheid understandings of customary law that force rural citizens back towards recognition as tribes’.<sup>39</sup>

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<sup>33</sup>*Id* section 20(2)(e).

<sup>34</sup>*Id* section 20(4).

<sup>35</sup>Murray (n 20) at 18.

<sup>36</sup>*Id* 22.

<sup>37</sup>Bennett and Murray (n 9) at ch 26.7

<sup>38</sup>Murray (n 20) 19.

<sup>39</sup>Thipe and Buthelezi (n 23) 204.

The Draft Bill is no exception. It aggravates the system of ‘unaccountable government’ established under the Framework Act and fails to transform meaningfully the institution of traditional leadership – instead perpetuating the colonial and apartheid distortions of ‘living customary law’. The Draft Bill is furthermore another (failed) effort at ensuring the ‘pragmatic accommodation’ of the competing interests of traditional leaders and those who support more democratic and transformative interpretations of customary law. Provisions such as clause 25 evidence the use of political language dressed up in legal instruments in an attempt to persuade traditional leaders that they have meaningful authority in our democratic state, without this authority being sustainable in law. The provisions are poorly drafted, and the vagueness of those, such as clause 25, which purport to give much and nothing at all at the same time, creates the possibility for practical abuse. I turn now to address the specific questions regarding the Draft Bill and in so doing, highlight why the Draft Bill in its current guise will fail to pass constitutional muster.

## 4 Specific questions

### 4.1 *What is the meaning of the term ‘role’ in clause 25 and how (if at all) does it differ from the term ‘function’ (as referred to in, for example, clauses 19 and 20 of the Draft Bill) and ‘power’?*

Consistent with the terminology employed in sections 211 and 212 of the Constitution, as well as section 20 of the Framework Act, clause 25 of the Draft Bill makes provision for the allocation of ‘roles’ to traditional councils and leaders. No definition for the term ‘role’ is provided in the Draft Bill – a *lacuna* that has remained glaring since the enactment of the Constitution which equally does not spell out what is meant by the term ‘role’.<sup>40</sup> The Constitutional Court in the *Certification Judgment* decision did however highlight what the term ‘role’ does *not* encompass. In addressing the argument that the word ‘role’ suggests ‘that a constitutionally entrenched *function* is called for’,<sup>41</sup> the court had this to say:

We do not feel that the objectors’ interpretation of either the CPs [Constitutional Principles in the Interim Constitution] or the NT [New Text of the Final

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<sup>40</sup>In the *Discussion Document Towards a White Paper on Traditional Leadership and Institutions* published on 2000-04-11 by the Department of Provincial and Local Government on 11 April 2000 at 11, it is noted that, ‘the Constitution falls short of providing for their specific role’ (11)

<sup>41</sup>*Certification Judgment* (n 11) para 189. Emphasis added.

Constitution] is correct. Had the framers intended to guarantee and require express institutionalisation of *governmental powers and functions* for traditional leaders, they could easily have included the words “*powers and functions*” in the first sentence of CP [Constitutional Principle] XIII ... [A]uthority is *not* included in those features of traditional leadership which have to be recognised and protected.<sup>42</sup>

It is therefore clear that the intended roles of traditional councils and leaders must fall short of governmental powers and functions. Bennett and Murray thus note that, ‘the Constitution is clear on the powers of traditional leaders. It does not grant them powers beyond those contained in their status as guardians of traditional culture. In every sphere of government, their constitutional role has been reduced from that granted under the Interim Constitution’.<sup>43</sup> Government has paid lip service to this position, endorsing it in, for example, the Draft White Paper: ‘the Constitution entrusted to the three spheres of government all powers and functions which are governmental in nature, and assigned to traditional leadership those functions which are customary in nature’.<sup>44</sup> And furthermore: ‘[t]raditional leaders should be custodians of culture and customs. Their role in respect of governance should be advisory, supportive and promotional in nature’.<sup>45</sup> The constitutionally entrenched role for traditional leaders is thus intended to be purely nominal, symbolic or ceremonial – not governmental. Thus, the roles contemplated in the Framework Act and the Draft Bill can be no more than this and insofar as more is contemplated, the Act and the Draft Bill fall foul of the Constitution.

The term ‘role’ therefore connotes something short of both a ‘function’ and a ‘power’ (or ‘authority’) which terms are used throughout the Constitution to elucidate by whom and how governmental functions – quintessentially law- and policy-making – are to be exercised. The term ‘authority’ is used to describe the law-making power of the legislature,<sup>46</sup> the policy-making function of the executive<sup>47</sup> and the adjudicative function of the judiciary<sup>48</sup> respectively – this threefold division of state authority being a manifestation of the separation of powers which is ‘a characteristic element of modern constitutionalism ... [and

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<sup>42</sup>*Id* para 190. Emphasis added.

<sup>43</sup>Bennett and Murray (n 9) ch 26.4.

<sup>44</sup>The Draft White Paper (n 21) 23.

<sup>45</sup>*Id* 59.

<sup>46</sup>Section 44 of the Constitution vests the ‘national legislative authority’ in Parliament. Emphasis added.

<sup>47</sup>Section 85 of the Constitution vests the ‘executive authority of the Republic’ in the President, who exercises it ‘together with the other members of the Cabinet’.

<sup>48</sup>Section 165 of the Constitution vests the ‘judicial authority of the Republic’ in the courts.

which] infuses our Constitution'.<sup>49</sup> The terms 'powers' and 'functions' are used interchangeably to describe the job description of the three spheres of government on the vertical plane: national, provincial and local. Thus, for example, section 156 of the Constitution delineates the 'powers and functions of municipalities'. The division of power provided for in the Constitution aims to strike an appropriate balance between the functions of the respective spheres in the name of cooperative governance. Schedules 4 and 5 elucidate these specific areas of legislative (and by implication, administrative) competence. Thus, for example, Schedule 4 lists 'housing' as an area of 'concurrent national and provincial competence'. An umbrella term for the powers exercised by the three branches of government (the legislature, executive and judiciary) as well as those powers of the public administration – 'the organs and functionaries of the executive branch of the state that are concerned with the day-to-day business of implementing law and administering policy'<sup>50</sup> which term covers 'all the government departments'<sup>51</sup> – can be described as 'public power'. In our constitutional democracy, 'all public power is subject to constitutional control'.<sup>52</sup> The exercise of public power is regulated by the principle of legality<sup>53</sup> – an aspect of the rule of law which is a foundational value of our constitutional order<sup>54</sup> and/or the principles of administrative law insofar as the power or function in question amounts to 'administrative action' within the meaning of the Promotion of Administrative Justice Act.<sup>55</sup>

The *role* of traditional leaders within the meaning of the Constitution and the relevant legislation therefore may not involve the exercise of *quintessential* public power – the power to make laws, to implement them and to adjudicate upon them – and insofar as it involves the exercise of that subset of *public power more broadly*, namely administrative action, it will be subject to review on administrative law grounds.<sup>56</sup> Similarly, the *functions* given to traditional leaders under the legislative framework are essentially 'soft' in nature and operate primarily in the

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<sup>49</sup>Hoexter *Administrative law in South Africa* (2012) 24.

<sup>50</sup>*Id* 6.

<sup>51</sup>*Id* 7.

<sup>52</sup>*International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 4 SA 618 (CC) paras 92-3.

<sup>53</sup>See Kohn (n 14) for an analysis of the development of this principle and its implications for the separation of powers.

<sup>54</sup>In the case of *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1990 1 SA 374 (CC) para 58, the Constitutional Court emphasised that, '[it is] central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'.

<sup>55</sup>The Promotion of Administrative Justice Act 3 of 2000, (the PAJA).

<sup>56</sup>See the discussion below.

local government sphere given that ‘traditional rulers have always operated as a *species* of local authority’.<sup>57</sup> Under the Draft Bill, they involve, for example, ‘supporting municipalities in the identification of community needs’;<sup>58</sup> ‘recommending, after consultation with the relevant local and provincial houses, appropriate interventions to government that will contribute to development and service delivery ...’<sup>59</sup> *etcetera*. Notably, the function of ‘participating in the development of policy and legislation at municipal level’<sup>60</sup> does not afford traditional leaders a vote. Thus, Bennett and Murray emphasise that, ‘the role of traditional leadership can be advisory only, although in many municipalities traditional leaders will doubtless be very influential’. Traditional leaders themselves are acutely aware of their roles falling short of governmental functions. This is epitomised by a statement of a chief in a parliamentary hearing: frustrated by the indirect role he saw for traditional leadership in the Framework Act he remarked, ‘[e]nough of roles ... we want powers’.<sup>61</sup>

Although it is clear that the Constitutional Assembly’s deliberate choice of the word ‘role’ as opposed to ‘function’ or ‘power’ connotes something non-governmental in nature, it is unfortunate that precisely what this entails has not been spelled out. Traditional leaders are equally frustrated by this arguing that, ‘the provision is too vague and that the role needs to be clearly spelled out as has been done with elected local government’.<sup>62</sup> A problematic aspect of the use of the term ‘role’ in clause 25 of the Draft Bill – aside from the fact that it remains undefined – is that it is in effect qualified by the phrase, ‘in respect of any functional area’. This seems to suggest that governmental functions (for example, implementing laws and policies in a particular functional area such as ‘health’ or ‘agriculture’) may be interpreted to fall within the purview of a ‘role’ within the meaning of clause 25 – a dubious outcome indeed.

Some specifics can arguably be gleaned from the reference to ‘roles’ in clause 67 of the Draft Bill (‘Regulations’). It is a presumption of statutory interpretation that the same words and phrases in a statute bear the same meaning.<sup>63</sup> Clause 67(1)(b) of the Draft Bill empowers the Minister to make regulations regarding, ‘the *traditional, ceremonial and any other roles* and functions of a king or queen, or principal traditional leader ...’.<sup>64</sup> The reference to ‘traditional’ and ‘ceremonial’ qualifies the term ‘role’ and thus arguably sheds

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<sup>57</sup>Bennett and Murray (n 9) ch 26.5.

<sup>58</sup>Clause 20(1)(c) of the Draft Bill.

<sup>59</sup>Clause 20(1)(e) of the Draft Bill.

<sup>60</sup>Clause 20(1)(f) of the Draft Bill.

<sup>61</sup>Quoted in Murray (n 20) 21.

<sup>62</sup>Rugege (n 3) 178.

<sup>63</sup>See du Plessis *Re-Interpretation of statutes* (2002) at 194 and the cases cited at fn 399.

<sup>64</sup>Emphasis added.

some light on what the legislature has in mind regarding the nature of the role of traditional councils and leaders under the Draft Bill. The *eiusdem-generis* rule of statutory interpretation entails 'the meaning possibilities of the general phrase ... [being] restricted to the narrower, generic meaning possibilities of the preceding words'.<sup>65</sup> The Constitutional Court has endorsed this rule on a number of occasions, emphasising that, "a general provision ... would not normally prevail over the specific and unambiguous provisions". The specific provision must be construed as limiting the scope of the application of the more general provision'.<sup>66</sup> The specific reference to 'traditional' and 'ceremonial' can thus be argued to qualify the scope of the term 'role' throughout the Draft Bill. Greater legislative guidance in the form of a formal definition of 'role' in clause 1 would, however, do much to mitigate the uncertainty and prevent abuse of clause 25 in the future.

#### ***4.2 What is the meaning of 'allocation' in clause 25 of the Draft Bill and how (if at all) does it differ from assignment and delegation respectively as legal mechanisms to transfer power?***

Like the term 'role', the term 'allocation' is also undefined in the Draft Bill. It is thus unclear *how*, in legal terms, the granting of a role to a traditional council or leader might take place. An earlier version of the Draft Bill provided that, 'these roles could be given by means of administrative delegation, which would have circumvented the important consultative processes that are required when Parliament makes laws, and made it very difficult to discover which powers have been delegated and to whom'.<sup>67</sup> It is unclear how, other than by way of delegation, roles may be provided to traditional councils and leaders and insofar as the process of 'allocation' differs from that of delegation, a definition of this term should be provided and the manner in which this process may be implemented should certainly not be left within the unguided discretion of the 'department concerned' as clause 25(2) contemplates.

Given that the term 'allocation' appears solely in the heading of clause 25 – the term 'provision' (an equally ambiguous term) is instead used in the body of the section – it may be argued that it does not have binding interpretive power. Clarification is nonetheless required regarding the meaning of these terms. It may be that 'allocation' is intended to connote a mechanism to hand out a soft advisory, nominal and/or ceremonial role in relation to the various functional

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<sup>65</sup>Du Plessis (n63) 234.

<sup>66</sup>*Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 49.

<sup>67</sup>Thipe and Buthelezi (n 23) 204.

competencies of national and provincial government, but just how these roles might be 'handed out' is unclear. What is clear however, is that the use of the term 'allocation' rather than 'delegation' will not free the relevant organ of state from the prescripts of administrative justice – thus, for example, the requirements of procedural fairness will have to be complied with whenever a 'role' is 'allocated'. Insofar as an allocation under clause 25 of the Draft Bill amounts to a delegation in practice, it is important to understand what this latter process entails. I thus turn to highlight briefly what amounts to 'delegation' and how it differs from 'assignment'.

Hoexter succinctly summarises the difference between the assignment of power and the delegation thereof: '[w]hile the assignment of power is usually both complete and irrevocable, delegation connotes a transfer of power that is revocable and less than complete'.<sup>68</sup> Kriegler J explained the nature of delegation in *Executive Council, Western Cape Legislature v President of the Republic of South Africa*<sup>69</sup> as follows: '[it] postulates revocable transmission of subsidiary authority'. The delegator thus retains control over the exercise of the power in question and the kind of control depends on the specific terms of the empowering statute. Thus, in the case of *Justice Alliance of South Africa v President of the Republic of South Africa*,<sup>70</sup> the Constitutional Court noted:

Delegation is the conferral of a power for a specific reason, often a pragmatic grant of a power to fill in the detail of a policy laid down by primary legislation. It is not a power which has been transferred to the final decision-maker to be used as they see fit, or alienated by them in turn.

When original legislators (namely Parliament, provincial legislatures and municipal councils) confer authority on administrators, they are said to *delegate* power. The general rule is that such delegated power can be exercised solely by the administrator on whom it is conferred.<sup>71</sup> This rule flows from the Latin maxim, *delegatus delegare non potest*, in terms of which a person performing a delegated function may not him/herself delegate the performance of that function to another person or institution unless authorised by the empowering provision.<sup>72</sup> This rule is, however, subject to limitation in that it is recognised that in the modern bureaucratic state, delegation (or, sub-delegation if done not by an original legislator, but by an administrator with delegated power – so, for example, the Minister of Housing may sub-delegate to the relevant Director-General) is

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<sup>68</sup>Hoexter (n 49) 262.

<sup>69</sup>1995 4 SA 877 (CC) para 173.

<sup>70</sup>2011 ZACC 23 (29 July 2011) para 61, fn 61.

<sup>71</sup>Hoexter (n 49) 265.

<sup>72</sup>*Attorney-General, OFS v Cyril Anderson Investments (Pty) Ltd* 1965 4 SA 628 (A) at 639C-D.



necessary for the 'daily practice of governance'.<sup>73</sup> Section 238 of the Constitution amounts to constitutional recognition of the inevitability of sub-delegation in contemporary government:

An executive organ of state in any sphere of government may delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function performed.<sup>74</sup>

This section imposes a key limitation on subdelegation: it must be authorised by the relevant empowering legislation either expressly or by implication. I turn now to canvass the factors that a court will consider in determining whether or not to approve a subdelegation of power. But first it is necessary to unpack the overarching constitutional limits on the ability to delegate power.

### ***4.3 What are the legal limits to the delegation of legislative and broad discretionary powers?***

As always, the starting point is the Constitution. As Ngcobo J remarked in *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development*:<sup>75</sup>

The enquiry is whether the Constitution authorises the delegation of the power in question. Whether there is constitutional authority to delegate is therefore a matter of constitutional interpretation. The language used in the Constitution and the context in which the provisions being construed occur are important considerations in that process.

This is because the delegation of power – be it law-making power, the power to adjudicate, or broad discretionary power – undermines the doctrine of separation of powers and, in particular, its principle of separation of functions in terms of which each of the three branches of state is tasked with separate core functions; namely making the law, executing and enforcing the law, and adjudicating on questions of law, respectively. Delegation flies in the face of this principle insofar as it enables, for example, the law-making function to be carried out by that branch of government tasked with the separate function of enforcing the law. To pass muster, delegation must thus be permitted by the constitutional

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<sup>73</sup>*Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 54.

<sup>74</sup>Note that traditional leaders are not *executive* organs of state and thus this section would not apply to them.

<sup>75</sup>2000 1 SA 661 (CC) para 124.

framework. As Sachs J has noted, '[d]elegation takes place within, not outside, the constitutional framework'.<sup>76</sup> The delegation in question therefore may not violate the 'protected spheres' of authority, carefully crafted by our Constitution.

The broad question to be asked in considering whether the purported delegation of a power is constitutionally compliant is whether it involves a 'shuffling-off of responsibilities which, in the nature of the particular case and its special circumstances, and bearing in mind the specific role, responsibility and function that ... [the duly empowered organ of state] has, should not be entrusted to any other agency'.<sup>77</sup> In order to answer this question, the following open-list of factors<sup>78</sup> (which were posited in the context of the delegation of law-making power) should be considered: (i) The extent to which the discretion of the delegated authority (delegate) is structured and guided by the enabling Act; (ii) the public importance and constitutional significance of the measure being delegated – the more it touches on questions of broad public importance and controversy, the greater the need for scrutiny; (iii) the shortness of the time period involved; (iv) the degree to which Parliament continues to exercise control as a public forum in which issues can be properly debated and decisions democratically made; (v) the extent to which the subject-matter necessitates the use of forms of rapid intervention which the slow procedures of Parliament would inhibit; and (vi) any indications in the Constitution itself as to whether such delegation was expressly or impliedly contemplated.

In relation to sub-delegation in particular, where no express authority to subdelegate is evident in the empowering statute, a court will be slow to infer such authority. The case of *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council*,<sup>79</sup> is the leading case on sub-delegation and Langa CJ's dissenting judgment<sup>80</sup> provides a useful summary of the factors a court will use to guide its determination of whether or not the power to sub-delegate can be implied into legislation:

- (i) *The nature of the power* – 'Powers that have far-reaching impact or that involve the exercise of a large degree of discretion or are legislative in nature are less likely to allow for sub-delegation than less important administrative or executive powers that can be mechanically applied'.<sup>81</sup>
- (ii) *The extent to which the power is transferred* – 'The total delegation of a power is less likely to be permitted than its partial delegation ... [T]he level of control maintained by the original functionary over the delegated power is

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<sup>76</sup>*Executive Council, Western Cape Legislature* (n 69) para 207.

<sup>77</sup>*Id* para 206.

<sup>78</sup>*Ibid.*

<sup>79</sup>2007 1 SA 343 (CC).

<sup>80</sup>See also O'Regan's enumeration of the factors from para 127.

<sup>81</sup>*Id* para 86.

very important – the greater the control, the lesser the extent of the delegation'.<sup>82</sup> In *AAA Investments*, Langa CJ noted that although the Council had to report to the Minister this amounted to mere indirect control in that there was 'no direct supervision or immediate oversight over the Council and no ability to overrule individual decisions'.

- (iii) *The nature and importance of the institutions by whom and to whom power is delegated* – Where the duly authorised person to whom power has been delegated has been chosen for his/her unique position, special skills or expertise, it is less likely that subdelegation to another will be allowed. Langa CJ emphasised the following on this score: 'courts should be slow to infer the delegation of power to bodies that cannot be held directly accountable through ordinary political processes'.<sup>83</sup> For him, the fact that the Council in *AAA Investments* was 'not elected nor ... directly accountable to the public' was problematic and indirect accountability through the 'very limited control of the Minister' could not suffice to countenance the sub-delegation.<sup>84</sup> Also noteworthy is the case of *Aluchem v Minister of Mineral and Energy Affairs*,<sup>85</sup> in which the court took account of the fact that the sub-delegation had the effect of transferring the power from one government department (Economic Affairs) to another (Mineral and Energy Affairs) and held that this further militated against the sub-delegation.
- (iv) *Considerations of practicality and effectiveness must be weighed in the balance* – Where it is practically impossible for the delegate to exercise the power personally, a court will more readily assume an implied power to sub-delegate.

When it comes to the delegation (or sub-delegation) of broad discretionary powers (as opposed to legislative powers) – which, given their abuse during apartheid, need to be curtailed – the courts have been particularly wary. This is especially the case where the exercise of such powers is not circumscribed by appropriate legislative guidance. In the leading case in point, *Dawood v Minister of Home Affairs*, O'Regan J noted the following:

It is therefore *not ordinarily sufficient for the Legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution* in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of

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<sup>82</sup>*Id* para 87.

<sup>83</sup>*Id* para 89.

<sup>84</sup>*Id* para 90.

<sup>85</sup>1985 3 SA 626 (T) 631H-632D.

Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given.<sup>86</sup>

The absence of such guidance, coupled with an extensive breadth of discretion conferred upon the (sub/)-delegate in question, will render the purported (sub/)-delegation in question problematic and unlikely to pass constitutional muster. Hoexter thus notes that, 'whenever it confers a wide administrative power, the legislature ought to provide, or at least mandate, appropriate guidelines to limit the risk that rights [including the administrative justice rights] might be violated when the discretion is exercised'.<sup>87</sup> In light of this outline of the constitutional limits on the ability to delegate power, I turn now to consider the provisions of clause 25 of the Draft Bill.

#### ***4.4 Insofar as clause 25 purports to be an empowering provision for the delegation of powers, does it comply with these limits?***

Clause 25 of the Draft Bill appears to contemplate the following: through this section, Parliament is seemingly (if perhaps not transparently) delegating the power, *inter alia*, to legislate to 'a department within the national or provincial sphere of government', which 'department' may then in turn by virtue of this power, sub-delegate a role 'in respect of any functional area of such department' to a traditional council or leader. Given the odd use of terminology in clause 25, as well as the fact that this provision is poorly drafted, it is difficult to assess with certainty its compliance with the specific limits to the *delegation of power*. It is not, however, difficult to reach the overall conclusion that as it stands, the clause will fail to pass constitutional muster. A simple reading of the provisions of clause 25<sup>88</sup> makes this evident.

First, it is worth stating the obvious: a department may not legislate. A Minister (or other organ of state) within a particular department may have the express or implied authority to do so by virtue of the relevant empowering Act, but an unspecified person in an unspecified 'department' certainly does not. This bizarre provision offends the separation of powers. Furthermore, clause 25 will in all likelihood be found by a court to be void on the basis of vagueness. As Hoexter notes, 'original legislation, which does not qualify as administrative action ... and which has never been under the control of administrative law, is now

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<sup>86</sup>Dawood (n 73) para 54. Emphasis added.

<sup>87</sup>Hoexter (n 49) 265.

<sup>88</sup>See above clause 25 quoted in full.

subject to the rule against vagueness'.<sup>89</sup> This rule flows from the foundational principle of the rule of law, which requires that laws be clear and precise, of general application, accessible and capable of furthering certainty in the daily dealings of the government and the citizenry.<sup>90</sup> Langa DP thus noted in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd*,<sup>91</sup> that the legislature 'is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them'. Clause 25 of the Draft Bill patently fails to meet this standard. It constitutes a breach of the rule against vagueness and it offends the rule of law insofar as it is unclear *who* may allocate a role to traditional councils and leaders, and *how* exactly this might be done.

A further reason why clause 25 offends the rule of law is because clause 25(1), read with clause 25(2), confers an unfettered and unguided discretion on an unspecified person in 'the department concerned' for the purposes of allocating (or providing) a role. This offends the principle enunciated in *Dawood* that the conferral of broad discretionary powers must be coupled with legislative guidance for their exercise. This principle flows from the rule of law – a founding value of our constitutional order.<sup>92</sup> As O'Regan noted in *Dawood*, 'if broad discretionary powers contain no express constraints, those who are affected by [their] exercise ... will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision'.<sup>93</sup> The reference in clause 25(3)(a) to the need to 'ensure that the execution of the role is consistent with the Constitution' will not, given the explicit warning in *Dawood*,<sup>94</sup> save this provision from constitutional invalidity.

Applying the specific factors canvassed above that guide the courts in determining the constitutionality (or otherwise) of a (sub/)-delegation to the provisions of clause 25, the following observations can be made. First, the discretion of the delegate (the department), as well as that of the sub-delegate (the traditional council or leader concerned) is, on a reading of clause 25, extremely broad and in no way structured or guided by the enabling Act. Secondly, the 'measure' in question – namely the allocation of roles to traditional councils and leaders outside the three spheres of government – is of significant public importance and touches on issues of public controversy. Thirdly, the degree to which the relevant 'department' concerned will retain oversight over the

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<sup>89</sup>Hoexter (n 49) 356.

<sup>90</sup>See *Dawood* (n 73) para 47 and *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 102.

<sup>91</sup>2001 1 SA 545 (CC) para 24.

<sup>92</sup>Section 1(c) of the Constitution (n 5).

<sup>93</sup>*Dawood* (n 73) para 47

<sup>94</sup>*Id* para 54.

execution of such roles by traditional councils and leaders is insufficient – mere ‘monitoring’ is all that is required. Fourthly, the ‘roles’ in question may in practice necessitate the exercise of wide discretionary powers with far-reaching impacts on the lives of the citizens affected. Finally, neither a state ‘department’, nor traditional councils and leaders, are directly accountable to the public and, to reiterate, ‘courts should be slow to infer the delegation of power to bodies that cannot be held directly accountable through ordinary political processes’.<sup>95</sup>

Given all of the foregoing, it can be concluded that clause 25 of the Draft Bill will not pass constitutional scrutiny. Insofar as it postulates the delegation of law-making power to ‘departments’ and the concomitant sub-delegation of powers in relation to the carefully circumscribed functional competencies of national and provincial government to traditional leadership (which operates outside the threefold constitutional division of government authority into national, provincial and local spheres), the delegation does not take place within the constitutional framework. It involves a ‘shuffling-off of responsibilities which, in the nature of the particular case and its special circumstances, and bearing in mind the specific role, responsibility and function that Parliament [and the executive in each of the three spheres of government] has, should not be entrusted to any other agency’.<sup>96</sup> Our Constitution ensures that government cannot avoid its rule of law and human rights obligations by employing a strategy of delegating its functions to other entities.<sup>97</sup>

#### ***4.5 Can customary law be a source of administrative power for traditional leaders and if so, is it subject to the constraints of administrative law?***

Traditional leaders are organs of state within the meaning of section 239 of the Constitution:<sup>98</sup> ‘organ of state means ... (b) any other functionary or institution ... (ii) exercising a public power or performing a public function in terms of any legislation’. Traditional leaders must thus comply with the provisions of the Constitution. They are equally bound by the requirements of administrative justice to the extent that their conduct in question falls within the definition of ‘administrative action’. This term is defined in section 1 of the PAJA to mean, *inter alia*, ‘any decision taken, or any failure to take a decision, by an organ of state when exercising a public power or performing a public function in terms of any

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<sup>95</sup> *AAA Investments* (n 79) para 89.

<sup>96</sup> *Executive Council, Western Cape Legislature* (n 69) para 206.

<sup>97</sup> *AAA Investments* (n 79) para 40.

<sup>98</sup> *Bennett and Murray* (n 9) ch 26.1. See further *Pilane v Pilane* 2013 4 BCLR 431 (CC) para 44.

legislation'.<sup>99</sup> Insofar as clause 25 of the Draft Bill empowers traditional councils and leaders to exercise public powers or functions<sup>100</sup> pursuant to 'legislative measures', they will be required to comply with the requirements of lawfulness, reasonableness, procedural fairness and, where applicable, reason-giving.

Where traditional leaders exercise roles and functions not under any legislation but rather pursuant to customary law, they will similarly be bound by the requirements of administrative justice. This is because the PAJA's definition of 'empowering provision' is very broad and explicitly includes 'customary law'. The second leg of the 'administrative action' definition encompasses, 'any decision taken, or any failure to take a decision by a natural or juristic person ... when exercising a public power or performing a public function in terms of an empowering provision'.<sup>101</sup> Provided, in both cases, the additional threshold requirements of the definition are met – the PAJA requires the decision, or failure to take the decision, to 'adversely affect ... the rights of any person' and have a 'direct external legal effect'<sup>102</sup> – the conduct of the traditional council or leader concerned will stand to be regulated by the PAJA. Customary law can thus be a source of administrative (or public) power for traditional leaders, and to the extent that it is, it will be subject to the requirements of administrative law.<sup>103</sup>

#### ***4.6 Can customary law be a source of governmental power for traditional leaders and if not, does clause 25 unconstitutionally seek to confer governmental powers on traditional councils and leaders in such a way as to render them an impermissible fourth sphere of government?***

As discussed above, the constitutional provisions which provide for the recognition of the institution of traditional leadership, as interpreted by the Constitutional Court in the *Certification Judgment*, accord this institution a role that falls short of being 'governmental' in nature. The Constitution instead

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<sup>99</sup>Section 1(a)(ii) of the PAJA (n 55).

<sup>100</sup>See generally Hoexter (n 49) 185ff on the nature of public powers and *AAA Investments* (n 79) para 119 where O'Regan identifies the following criteria for guiding the determination of whether rules are of a public character: whether they apply generally to the public or a mere section thereof; whether they are coercive in character and effect; and whether they are related to a clear legislative framework and purpose.

<sup>101</sup>Section 1(b) of the PAJA (n 55).

<sup>102</sup>See Hoexter (n 49) at 197ff regarding what these particular elements of the definition entail.

<sup>103</sup>See Bennett 'Administrative-law controls over chiefs' customary powers of removal' 1993 110 SALJ 276.

recognises traditional leaders in their residual, customary roles and customary law cannot be employed to elevate these roles to something quintessentially governmental in nature within the formal South African government structures. In this sense, the Constitution is clear: traditional leaders have no formal role to play in the South African governance system insofar as they cannot, in this system, *inter alia*: make policy, make law and adjudicate on questions of law.

The delicate constitutional compromise implicit in the carefully circumscribed role of traditional leaders has, however, been undercut by the legislative framework governing traditional leadership. As Bennett and Murray have noted in relation to the Framework Act, it establishes them 'as organs of state with governmental responsibilities'.<sup>104</sup> Section 20 of the Framework Act affords traditional leaders broad powers which encroach upon those reserved for the three spheres of government. By linking the 'roles' of traditional leaders to those powers which are of a public, governmental character and fall within the fields of legislative and executive competence in the national and provincial spheres of government, the Framework Act has taken things too far. As if things could not get worse, the broad and vague provisions of clause 25 of the Draft Bill aggravate the delicate balance even further – these open-ended provisions will no doubt be abused in practice to provide traditional councils and leaders with governmental roles in relation to the various functional competencies of the national and provincial spheres of government. To this extent, the provision is unconstitutional.

It is furthermore unconstitutional insofar as it breaches the explicit terms of section 212(1) of the Constitution. It is worth quoting this section again: '[n]ational legislation may provide for a role for traditional leadership as an institution at *local level* on matters affecting local communities'.<sup>105</sup> Given the plain meaning of this section, the impugned provisions of clause 25 of the Draft Bill are patently unconstitutional insofar as they contemplate the provision of *governmental* roles to traditional councils and leaders in the *national and provincial* (rather than local) government spheres and by measures *other than* via national legislation, thereby impermissibly rendering traditional leaders a fourth sphere of government.

## 5 Conclusion

The discussion of the constitutional framework governing the institution of traditional leadership evidences a clear intention on the part of our constitutional architects to ensure that traditional leaders reign but do not rule. The 'marriage' between traditional leadership and democracy was arranged on this basis. It may have been doomed to fail from the outset, but this failure has been rendered all

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<sup>104</sup>Bennett and Murray (n 9) ch 26.5.

<sup>105</sup>Emphasis added.



the more glaring in the wake of the string of unsuccessful legislative efforts to revive this doomed union. Ten years ago, Bennett and Murray remarked that,

It seems that the new laws, rather than allowing for the dynamic development of customary practice, in fact introduce a rigidity. They offer no framework for the gradual democratization of traditional communities. Instead there is a real danger that the Acts will maintain the dependence of leaders on government, which was the hallmark of colonial rule and apartheid.<sup>106</sup>

The latest effort in the string of legislative interventions – the Draft Bill – makes this danger all the more apparent. The legislative framework established under the Framework Act has been exacerbated under the Draft Bill. This framework flies in the face of the reign-but-not-rule constitutional model for traditional leaders and it undercuts the delicate two-fold division of power: it offends both the horizontal separation of powers and the vertical division of government authority into national, provincial and local spheres. The provisions of clause 25 of the Draft Bill are particularly offensive to our constitutional democracy. Amongst other things, these provisions contemplate something akin to the *delegation* of legislative power to ‘departments’ in the national and provincial spheres and the concomitant subdelegation of ‘roles’ in respect of the functional areas of these spheres to unelected traditional councils and leaders. This process is left within the unguided and unfettered discretion of the department concerned – a patent affront to the rule of law and the related requirement that the delegation of broad discretionary powers be coupled with adequate legislative guidance for their exercise. As it stands, the Draft Bill will therefore fail to pass constitutional muster. And so, we are left wondering: where to from here? Perhaps it is time to accept that some marriages require serious work, and it would seem that in the case of the arranged marriage between traditional leadership and democracy, our law-makers still have their work cut out for them.

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<sup>106</sup>Bennett and Murray (n 9) ch 26.7.