

## **Traditional Water Governance and South Africa’s “National Water Act” – Tension or Cooperation?**

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In its first part this paper discusses the rationale for the recognition of traditional water management structures in the light of the realities of water management and supply in South Africa’s rural areas. Based on the findings of two case studies it is argued that customary arrangements form part of the social adaptive capacity of communities and can aid integrated water resource management. In the second part, the relationship between traditional water governance structures and South Africa’s new National Water Act is explored and the case is made that South Africa’s law and policy framework supports the recognition of traditional water governance structures as part of the overall water management strategy. Based on these arguments, in its final part, the paper debates the role for traditional leadership in water management in the cross-over zone between traditional rural customs and the new democratic governance and service delivery structures in South Africa.

**Key words:** traditional water management structures, public participation, legal pluralism, social adaptive capacity, service delivery, national water law and policy

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### **Introduction**

*Flexibility to address different situations is a key requirement for successful management. However, the limits of self-regulation should be recognised. Water is too valuable a commodity for its management to be handed over to its users and there remains a vital role for external monitoring and enforcement.*

White Paper on a National Water Policy for South Africa (DWAF,1997)

The above statement portrays the complex trajectory that is part of South Africa’s water law and policy reforms in recent years. The new water governance vision is in line with the country’s development approach in this and other sectors and, aims at promoting widespread stakeholder participation in water management. However, strong emphasis is placed on formalised<sup>1</sup> water governance structures with a strong state maintaining centralised control over the management of water. Whilst participatory governance and formalised government structures based on statutory law do not necessarily contradict each other, in many rural areas formalised water management institutions do not promote widespread stakeholder participation and in some instances contradict the central premise of widespread stakeholder participation by excluding the rural poor. The problem in these areas is that weak government structures are not replaced by alternative forms of water tenure and consequent mismanagement of the resource can have negative consequences for sustainable resource management. In some regions of South Africa, customary<sup>2</sup> water management structures that operate outside the framework of statutory law are able to fill the void caused by inefficient government structures.

Despite the government’s vision for a comprehensive formalised system of water governance, water management in South Africa, and in particular in rural South Africa, tends towards plural legal systems. But, this feature of plurality is itself precarious as rapidly changing patterns of social behaviour and the intervention of modern structures lead, in some cases, to the erosion of traditional values and traditional knowledge systems. This paper argues that customary water management structures do play an important role in the overall water management framework in South Africa and that these structures can provide a vehicle to ensure sustainable water resource management at grass-roots level. The paper explores the relationship between the different legal systems and examines synergies between the statutory and traditional systems of water management that further the objectives of integrated water resource management.

## **Customary water management structures as part of the social adaptive capacity of communities**

The majority of South Africa's rural poor continue today to live in former homeland areas that were recognised by the Apartheid regime as independent governing states. The provision of services and infrastructure, advantages of the strong centralised regime, did not benefit residents of the 'homelands' or 'independent states' and traditional authorities, whose rule was based on customary law, played a strong governance role in these areas of the country. Post 1994 these homeland areas were re-integrated into post apartheid South Africa. Today, in accordance with Section 40 of the South African Constitution (Act 108 of 1996), government functions are exercised by the three government spheres, national, provincial and local government. Under the statutory laws of the country, the rationale for recognising and revitalising customary law as part of the overall water management framework, remains questionable. The ability of the state to effectively manage and control water resources by the state remains problematic. According to Schreiner et al (2002), millions of South Africans are still dependent on water from open streams, boreholes or stagnant sources. In particular, water delivery to the former homelands as the poorest areas of the country remains inadequate. Despite strong government efforts to improve water supply to the rural poor and to implement a comprehensive formal water management and supply system as stipulated by the National Water Act (36 of 1998) (hereafter NWA) and the Water Services Act (1997), the inability of the state to provide adequate water and sanitation to all South African in the near future, is cause for concern. Certainly, evidence suggests that the fledgling democracy faces very real institutional and financial constraints that challenge its ability to achieve integrated water resource management. In the light of these problems with formal water management systems, traditional or customary forms of water management might well provide an attractive and practical alternative.

The importance of traditional or customary responses to inadequate water supply is highly relevant to the concept of social adaptive capacity. Social adaptive capacity is the ability of a society to adapt its patterns of (water) resource use to increasingly scarce supplies and achieve a sustainable measure of social stability (Turton & Ohlsson, 1999; Ashton & Haasbroek 2002). A detailed analysis of the concept of social adaptive capacity is beyond the scope of this paper, but, in brief, social adaptive capacity is the development of second-order resources in response to first-order resource (water) scarcity. Turton & Ohlsson (1999) define second-order resources as a set of potential adaptive behaviours and strategies. This paper proposes that customary and traditional management structures are an integral part of the second-order response by a specific community to the form and level of water scarcity experienced by its members. Within this context, the implementation of effective water demand management strategies manifests effective social adaptive capacity (Turton, 2002).

The following case study, based on the findings of a short field trip to some regions of the Limpopo Province, presents the example of an effective water demand strategy operational under customary law. Legal pluralism is a response to inadequate new institutions that are not yet able to replace traditional and customary ways of coping with water scarcity. Until such a time that 'modern' institutional structures become viable mechanisms with which to respond to water scarcity, customary law performs a much needed governance structure that is able to respond effectively to water scarcity.

## **Case examples – Tshikombani village and rural villages in Tzaneen Municipality**

Residents in the small rural village of Tshikombani in the former homeland of Venda are supposedly beneficiaries of government water supplies, but government water supplies remain inadequate. Tshikombani is in close vicinity to a pristine mountain stream that provides its residents with a secure supply of clean water. Although the younger and more educated people in the village believe that it is the responsibility of the government to deliver clean water to all citizens, the villagers have installed a self-financed and self-regulated water supply system that is managed by the local traditional leader. This system ensures a regular supply of water to the village. The reticulation system that has been constructed by the villagers is an intriguing system of hose pipes that divert water from the mountain stream into the village gardens and that

supply water to the dwellings. Because the stream flows above the village, water is transported by means of gravity and no pump is required.

### **Maintenance and decision-making**

The construction and maintenance of the system has always been financed by the villagers themselves and funds were collected from each household in Tshikombani by the traditional leader, if and where residents were both willing and able to contribute. The funds that were collected were used to purchase the raw materials necessary to maintain the system in working order. The traditional leader is the person responsible for operating and managing this water system. Decision-making around operational issues that might arise or how the collective funds will be spent, is shared by the community members who have made financial contributions to the water reticulation system. Interestingly, many of those who are part of this decision-making body no longer reside in the village but nonetheless continue to contribute financially to the maintenance of the water system. In fact, a substantial part of the funds are provided by villagers who are working outside the village because jobs opportunities in Tshikombani are few and far between. As is to be expected, this arrangement does have severe logistical constraints. Decision-making, in particular when there are urgent decisions that need to be made concerning repairs to the water system that occur because of bursting pipes and so forth, is therefore invested in the traditional leader. For instance, when there is a burst pipe, the traditional leader appoints villagers to make the necessary repairs. Remuneration for these repair jobs comes from the communal fund which is administered and accounted for by the traditional leader.

### **Weak state versus strong traditional leadership**

The traditional leader's authority over water issues is extensive and includes conflict resolution in water matters and the allocation, management and control of water resources in the area. In the case of Tshikombani the role of the traditional leaders is to settle disputes not only amongst villagers but also between villages. An example of intra village conflict arose when an adjacent village, claimed equal access to water from a shared stream and argued that because the source was shared they too should be beneficiaries of the water scheme. Residents from Tshikombani rejected the claim and the traditional authorities from the two villages were unable to resolve the water dispute. As a result, the case was referred to the local Magistrates court, which was also unable to reach a resolution, arguing that the problem should be resolved by local leaders and insisting that the onus was on the traditional leaders to resolve any disputes that might arise concerning the allocation of water. In this particular case, the traditional leaders did find an amicable solution – ruling that the adjacent village could qualify as equal beneficiaries of the resource on condition that they contribute equally to the finances required to maintain the water scheme.

Interestingly, the younger members in the village were more hostile towards the neighbouring claimants than their older counterparts and in fact, reportedly, there were even incidences of violence. In the absence of an “official” political solution, and because, the state court declined to take judgment, traditional leaders had to step in and they deployed traditional mechanisms of conflict resolution. However, this case raises concerns because, in the absence of strong traditional leadership and in the absence of either the ability or the desire to resolve conflict over shared water a dispute of this nature could well escalate into animosity.

### **Weak state and weak traditional leadership**

In the villages that fall under the jurisdiction of the Tzaneen Municipality, there are no customary water management systems in place. The town of Tzaneen (approximately 100 000 inhabitants) is the commercial centre for the surrounding farming communities and services numerous rural villages. Most villages that fall within the Tzaneen Municipality are connected to the municipal water supply. But the water provided by the municipality is for household consumption and the water consumption needs of small-scale agriculture and livestock are not yet met. Because there is no effective alternative solution of water supply for non domestic consumption, consumers vandalise municipal pipelines and divert water for the purpose of irrigation systems, using a make do hose pipe system. The hose pipes tend to be loosely connected to municipal pipelines and can be easily disconnected by stray livestock. Water that is not lost is used for the irrigation of home vegetable gardens and as drinking water for domestic animals, however large volumes of water leak undetected for days on end. According to municipal sources, ad hoc illegal connections result in large volumes of unaccounted water, as high as 50%-70% in some areas. The financial consequences of illegal

water connections of this nature weigh heavily on the coffers of the local municipality because water, purified at considerable costs to the tax payer, is wasted.

### **The consequences of non government intervention in service delivery**

In both Tshikombani and Tzaneen government's management and control of water is lacking but in each case, the problems that face government differ considerably. The villages under the Tzaneen Municipality respond to inadequate first-order resource supply through illegal connections that result in loss of revenue and misuse of the municipalities scarce first order water resource. In Tshikombani, water consumers deal with non response from the state by accessing themselves the first order resource directly from source. The absence of state supply of water to villagers has resulted in remarkable adaptive capacity at a grassroots level and a customary water management system is fully functional. But it is unclear exactly how the traditional response articulates with the statutory institutional framework provided for by the NWA of 1998 and the relationship between the two systems requires more clarity. The following section of this paper provides a broad outline of the legal water resource management framework provided for by the Act and highlights ways in which the formal statutory framework articulates, or fails to, with customary structures.

## **Discussion: the legal relationship between South Africa's new water law and traditional water governance structures**

The management of the country's water resources and the ongoing transformation of the South African state and civil state has found its most profound expression in the National Water Act that was promulgated in 1998. The NWA manifests a fundamental step in the evolution of South African water law. Historically, under the rule of the Dutch East India Company between 1652 and 1795, water use was governed by Roman Dutch Law and the Dutch East India Company assumed *dominus fluminis* (the overall right of control) over the water resources. Individuals held temporary and revocable rights to water only where such rights did not undermine company access to water (Tewari, 2001). After 1795, under British rule, water rights were linked to land tenure. Private (riparian) water rights had precedence over public water rights (Tewari, 2001). After the formation of the Union of South Africa in 1910, the Union Irrigation and Conservation of Water Act No. 8 of 1912 was promulgated. This law did not provide for any government control over public water resources. The allocation of water between riparian owners was the responsibility of Water Courts (Turton et. al., 2004). The Water Act (54 of 1956) upheld the distinction between "public water" and "private water" (Stein 1999, Stein 2002) and the latter category was determined by the riparian principle.

Under the NWA the distinction between private and public water has been removed, a consequence of the fundamental shift in resource ownership where water is considered as a resource common to all. The NWA mandates the State, acting through the Minister, as the trustee of the nation's water resources. The concept of water as a public good is not new and had long been established as a legal principle in various societies and legal systems, ranging from Roman law to African customary law. Today this is an internationally accepted concept (Stein, 1999). South Africa's shift from a private rights system to a public rights system is in line with the values of the new Constitution. Section 27(1) (b) of the Constitution guarantees every South African the right to access to sufficient water and Section 24 stipulates that everyone has the right "to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (Section 24 (b)) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development" (Section 24 (c) iii). In Section 7 (2) of the Constitution the obligation is conferred on the state to "respect, protect, promote and fulfil the rights in the Bill of Rights" (of which Sections 24 and 27 are a part of). In other words, Section 7 (2) of the Constitution forms a progression, from the "traditional" application of the rights enshrined in the Bill of Rights as a protection of the freedom of individuals from interference by the state (and to some extent other individuals), towards an obligation for the State to proactively create conditions that ensure the realisation of these rights for all. Within this context Section 3 (1) of the NWA stipulates that the government "must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate".

### **The catchment management approach**

The values inherent in the Constitution, the NWA, the 1997 White Paper on a National Water Policy for South Africa (hereafter the Water Policy White Paper) as well as the National Water Resource Strategy, established in terms of Section (5) NWA, form the backdrop to water management in South Africa and the new law and policy framework promotes Integrated Water Resource Management (Ashton, 1999). In line with international theory, that naturally occurring water can only be effectively and efficiently managed within a river basin or catchment area, the principle that water management is at a catchment (or regional) level, is at the core of the new water management approach. The NWA provides for the establishment of Catchment Management Agencies (CMAs) in 19 delineated Water Management Areas (WMAs)<sup>3</sup>. Each agency must draw up a management strategy for the catchment and will have to perform core functions to implement the Act, functions that include the active promotion of community participation (Hamann & O’Riordan, 2000).

### **The Catchment Management Agencies - a platform for customary water management?**

In what ways will customary water management structures articulate with CMAs in the future? Has this interaction been provided for by the NWA? The NWA does not explicitly recognise customary water management structures and in fact, customary water management structures are not mentioned at all in the NWA. Any possible recognition of traditional arrangements can only result from interpreting the NWA and the water policies that offer practical guidelines for the implementation of the catchment management strategy within the legal framework of the NWA. Customary water management structures have a role to play in both water resource management and water service delivery. In other words, these structures can be used to interlock with both water services (at the municipal level) and enhance water service delivery and water resource management (at the catchment level) and enhance integrated water resource management.

Public participation is one of the principles that is designed to ensure efficient and effective catchment management, a vague enough concept but one that does make provision for the involvement of a wide range of stakeholders in decision-making processes. Principle 23 of the Water Policy White Paper states that the “responsibility for the development, apportionment and management of available water resources shall, where possible and appropriate, be delegated to a catchment or regional level *in such a manner as to enable interested parties to participate*” (italics added). Although this principle recognises public participation, it leaves a number of questions unanswered. Firstly, interestingly the Act makes allowances by noting that the principle should be implemented “where possible and appropriate” giving latitude for discretion as to whether and how public participation is implemented in practice. Principle 23 also speaks of enabling “interested parties” to participate in decision-making, but how such interest is defined remains vague. It is unclear whether and in what ways the state (represented by the statutory CMAs) would be expected to bring aboard stakeholders that are unable to participate. Neither is there any definition of how that process of participation will happen and practical mechanisms for a process of integration are absent. Disconcertedly, notions of participation remain vague.

Despite this vagueness, the NWA clearly recognises that stakeholder participation is a prerequisite in the CMA process. In Section 80 (e) of the NWA it is stipulated that one of the functions of a CMA is “to promote community participation in the protection, use, development, conservation, management and control of the water resources...”. Section 81 (1) of the NWA notes that the governing board of a CMA must be appointed “with the object of achieving a balance among the interests of water users, potential water users, local and provincial government and environmental interest groups”. Additional members may be appointed to “achieve representation of disadvantaged persons or communities which have been prejudiced by past racial and gender discrimination in relation to access to water;...” (Section 81 (10) (e)). Some substance has been added to these principles by the guidelines of the national policy for the implementation of catchment management (DWAF, 2001) and, in these guidelines, the principle of local participation by stakeholders has been emphasised where it is stated that “representivity and inclusivity of all stakeholder interests, needs and values are considered as part of the catchment management process, particularly of marginalised communities such as women and the rural poor”.

Over and above policy rhetoric, the DWAF in Limpopo has embarked on a mission to identify the widest possible range of stakeholders for participation in the CMA process. DWAF officials consult with a wide range of stakeholders in the region in an endeavour to ensure that not only the formally recognised institutionalised bodies such as irrigation boards, but importantly, the more loosely associated rural communities, participate in governance structures to ensure integrated water management.

*Recognition through formation of WUAs?*

Whilst these steps are encouraging, consultation of rural communities does not in itself mean the recognition of traditional water management structures which could be integrated into the water management structures through the formation of Water User Associations (WUAs), statutory bodies, defined by the NWA as co-operative associations of individual water users who wish to undertake water-related activities for their mutual benefit. At the time of designing the NWA, it is likely that these bodies were considered as a way to include farmer associations or irrigation boards but WUA could well be used to incorporate customary water supply and management system, such as those operational in Tshikombani. One problematic is that the establishment of a WUA is subject to highly formalised procedures and that these procedures are not in fact compatible to traditional systems whose modus operandi is more fluid. In fact, the very success of the traditional systems is that they remain flexible and responsive, allowing for cost-effective dispute resolution. Furthermore, the establishment and management of WUAs is highly bureaucratic and costly and for many rural communities, the financial and institutional capacity to run a WUA does not present a viable solution. Effectively then, WUAs are not the solution and would be unable to provide the suitable vehicle for the integration of customary arrangements into the overall water management framework. How then could customary law and ‘modern’ legal systems best be integrated into the formal water management systems?

*Three arguments for the recognition of traditional water tenure structures in their existing form*

In closely examining the guiding principles of the national implementation policy, there does seem to be a place for traditional structures to play a role in catchment management. The purpose of the policy is to provide clarity on the “responsibilities and functioning of the statutory water management institutions..., as well as their relationship with other statutory *and non-statutory institutions*” (italics added). The reference to the relationship between statutory and non-statutory institutions indicates that the national policy guidelines do take non-statutory institutions into consideration, providing thus for customary water management systems to form part of the overall catchment management strategy. This is confirmed when looking at three further objectives that are stated in both the implementation policy and the White Paper on Traditional Leadership and Governance (DPLG, 2003).

*Argument One - Considering community values*

In reporting their findings on research on a project that aimed at promoting stakeholder participation in water management, van Wilgen et al. (2003) note that new means of dealing with water needs must incorporate the values of people on the ground, a principle recognised in the implementation policy for catchment management. What appears in the guidelines of the implementation policy is that the interests, needs and values of all stakeholder groups must be considered in the catchment management process. Whilst there is the rhetoric within the institutional framework provided for by the NWA that provides for these interests and needs of local water users, the actual inclusion of ordinary water users and integration of their value systems and local knowledge of water matters, remains questionable. The norms and values of any particular community are manifest in the rules that govern that community and traditional water governance structures are themselves a manifestation of the intrinsic value system that binds the community. Reciprocal norms and values, the networks and relationships of people within a community, also referred to as the social capital of a community, guide and inform the way in which critical resources are consumed, managed, protected, conserved and used. The scope of this paper does not allow for a detailed investigation into the norms and values of the Tshikombani villagers but it is apparent that there is a well ordered and well tested local knowledge regime that operates. Local responses to scarcity in water show high levels of cooperation and well ordered social activity to maintain and preserve the resource. However, the responses of local villages have not been documented and they have not been recognized as part of a formal water management system in the Limpopo catchment. Despite emphasis in the law that local norms and values should be part of integrated water resource management, these norms and values have not been formally recognised. Social

adaptivity is apparent but this principle needs to be more carefully documented and reconciled with the guiding principles of the NWA.

*Argument Two - The principle of subsidiarity and self-regulation*

The case for the recognition of traditional water tenure structures can be strengthened by taking a closer look at the principle of “subsidiarity and self-regulation” that “requires the DWAF to promote the devolution of responsibilities to the lowest level consistent with effective functioning of the system”. The principle does not state that the lowest level is limited to DWAF-internal structures or any other structure provided for in the NWA, such as the CMAs or WUAs. The lowest level could well be the village level where water management is based on a customary system, provided that this system is effective and is in line with the principles of integrated water resource management. In the case of Tshikombani, water provision in the village is indeed based on an effective and well functioning customary system. Tshikombani village, in juxtaposition to the villages in the Tzaneen Municipality, where there are no customary water tenure structures in place, makes it clear that a customary system can not only be consistent with the overall management system, but that such a system can provide major benefits to water resource management in the catchment.

An examination of yet another aspect of the Tshikombani case study drives this important point home. A high ranking DWAF employee operating from the regional office in Polokwane and responsible for water resource management in that region acknowledged the tension between his responsibilities as a regional resource manager at DWAF and his experiences as a local inhabitant of the village. The tensions between modernity - with its manifestation in the promulgation of the NWA - and traditional norms and values that sit more or less comfortably alongside one another, are evident. As a DWAF official, allegiances are to carry out the principles outlined in the NWA but there are also local norms and values that form part of the officials ‘social capital’ and that are not explicit in the Act. In other words, the public and private sphere are not easily reconciled and there is some irony that a DWAF official, adhering to local rule and norms, contributes to a customary water management system because the State has not provided for the consumption needs of local residents. The fact that there is an informal system of exchange without which consumers would not benefit from adequate water, is not formally acknowledged by DWAF and there is some irony in the fact that a DWAF official himself makes such contributions. With the failure of the state to effectively supply water to local residents, private and informal systems of exchange (money) ensure the supply of water.

DWAF (responsible for water resource management) and local government (responsible for household water provision) are able to fulfill their mandate in some areas but there are a number of areas, such as Venda, where the reliable delivery of water is unlikely to be achieved in the near future. Auerbach (1997) is of the opinion that there will always be a limited capacity in DWAF because of the magnitude of the problem of managing water throughout the country. It is unlikely that DWAF and local municipalities will be able to control abstractions, for instance, and according to the Limpopo regional DWAF official, it would be a great benefit to DWAF to recognize the capacity of local residents to manage and supply water as is the case in Tshikombani and that such examples of social adaptivity would be of great benefit to integrated water resource management in a given area. According to Turton (2002) the recognition of local water regimes offers a solution to scarcity of second level resources and provides a bridge between traditional and state institutions. In this way, traditional systems become ‘legitimate’ organs of water supply and management and become part of the solution to protect, use, conserve, manage and supply water.

*Argument three - The national policy on traditional leadership*

There is another argument derived from the White Paper on Traditional Leadership and Governance (DPLG, 2003), the official national policy on the role of traditional leaders, that favours traditional water tenure structures. The White Paper requires national and provincial government to provide for the involvement of traditional leaders (through legislation and other means). This White Paper makes provision for traditional leadership to promote sustainable water resource management. The Traditional Leadership White Paper was adopted in 2003, five years after the promulgation of the NWA, and indicates that the promotion of sustainable traditional approaches to water resource management by traditional leaders has been seen by policy makers as

being within the legal framework of the NWA. The adoption of this White Paper makes a strong case for integrating these ‘alternative’ systems into existing legal frameworks as proclaimed by the NWA.

### **Traditional dispute settlement versus Water Tribunals**

Despite these arguments, there is concern that the integration of customary water management structures into the existing legal framework makes allowance for the settlement of local water related disputes in traditional courts. The current reality in rural South Africa is that the administration of justice is predominantly carried out by chief’s courts (South African Law Commission, 2003). The Law Commission report on the judicial functions of traditional leaders, which forms the basis for the upcoming Act regulating the matter, indicates that this practice will continue to be officially recognised by law and that customary courts are to be given the status of courts of law (South African Law Commission, 2003).

The example of Tshikombani village shows that traditional means of dispute settlement can be very effective with regard to disputes over water and, in the Tshikombani case; this was also recognised by the local Magistrates court. The recognition of traditional water governance structures requires, for it to be fully effective, the acceptance that water disputes would be settled through traditional leaders. However, traditional means of settling disputes over water could conflict with the Water Tribunals that are established by Section 146 of the NWA. The Water Tribunals have been established to hear appeals against decisions made by a responsible authority, catchment management agency or water management institution as defined by the Act. If it is argued, as it is done on this paper, that customary arrangements should be recognised by the NWA, customary arrangements could fall under a, then wider, definition of “institution under the Act”. Even if this wider definition would be recognised, the jurisdiction of traditional courts and the Water Tribunals does not overlap. Section 148 of the Act lists the decisions against which an appeal can be lodged. Water usage, as regulated by customary norms, would typically be recognised as a Schedule I usage, which is water for domestic use, small gardening not for commercial purposes and the watering of animals - if not excessive in relation to the capacity of the water resource - or alternatively usage under a general authorisation in terms of Section 39 of the NWA. As these uses do not require a license and as they are not subject to cost recovery, Section 148 does not provide for the eventuality of bringing disputes over these small-scale water uses before a Water Tribunal. This is important for it means that traditional water governance structures are not in any conflict with the means of adjudication provided for in the NWA.

### **The case for recognition confirmed**

Although the NWA itself does not make explicit the recognition of traditional and customary systems of water management, there is sufficient backing from the Constitution itself, the Implementation Policy for catchment management and the White Paper on Traditional Leadership, to make a strong case that traditional systems be recognised as viable and valid water management structures. Integrating traditional and ‘modern’ systems of water supply fills a gap – the lack of capacity and inability of the state to fulfil its mandate of water delivery to all citizens – particularly to those in isolated rural areas of the country. At the same time it offers an opportunity for local consumers to enter into dialogue with public officials who have technical expertise. The articulation of the traditional and the ‘modern’ enhances second level resource and promotes social adaptivity.

### **The role of traditional leadership in the cross-over zone between rural customs and the new democratic system**

As has been outlined above, the NWA makes provision for broad based stakeholder participation. The integration of traditional water management systems provides an opportunity space for this ‘ideal’ to be realised in practice. At the same time, it is critical that traditional leadership does not usurp other forms of community participation that exist already or that might exist in the future and this critical inquiry into the role of traditional leaders is an ongoing and important project. The following section provides a brief overview of the extent and nature of traditional leadership in South Africa.



### **The institution of traditional leadership in the constitutional context**

To date, approximately 18 million people in South Africa (about 40 % of the population) are subject to traditional rule exercised by approximately 800 chiefs and 13 000 headmen (Bennett 2004). Against the background of these figures it comes as no surprise that the matter of traditional leadership is dealt with in the Constitution as the highest law of the land. Provisions that deal with traditional leadership can be found in Chapter 12 of the South African Constitution and Section 211 of the Constitution explicitly recognises the institution, status and role of traditional leadership according to customary law (subject to the Constitution). Section 211 (2) of the Constitution stipulates that 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”. Whilst recognising the institution of traditional leadership and the plurality of legal systems, this principle effectively establishes the superiority of statutory law over customary law. In other words, customary law is tolerated only when it does not contradict statutory law. Furthermore, in terms of Section 211 (2) of the Constitution, the legislature is entitled to repeal existing customary law, amend it or replace it by statutory legislation. Experience in other areas of law indicates that legislatures tend to make extensive use of such “inroad-provisions”. It can be expected therefore that ongoing legislative activity will, over time, restrict and inhibit customary law and will curtail the influence of traditional leaders in the process. Thus, whilst there is no doubt that traditional leadership as an institution is protected by the South African Constitution, the degree to which traditional leadership will play a role in the overall governance system in the future might be subject to change.

### **The legitimacy question**

The constitutional recognition and protection of the institution of traditional leadership, does not address the question of the legitimacy of individual traditional leaders. Traditional arrangements only aid the overall management of the resource if they are handled efficiently and effectively on a sustainable basis. As they are not based on written policy and in the absence of a governing board with powers to elect or replace managers, customary arrangements rely heavily on the individual vision for water and management of the resource by a traditional and legitimised leader. Because the legitimacy of a traditional leader is crucial for the endorsement of decisions that are taken by such a leader, there might at times be a problem in placing a traditional leader at the helm of water management structures. Despite concerns in ensuring legitimacy of traditional leaders, Turton (2002) suggests that traditional institutions tend to have greater legitimacy than government structures in some developing countries in Africa.

A multitude of critical arguments are frequently cited to dispute the legitimacy of traditional leadership for various reasons but in many areas traditional leaders continue to enjoy a high level of support from the local population and are still an important governance factor at the local level. Any assessment as to whether and what role traditional leadership could play in water management needs to be considered against the background of this reality.

#### *Historical allegiances*

The legitimacy of traditional leadership is controversial because of the historical allegiances of traditional leaders under the apartheid regime. Traditional leaders, which until then were perceived to be legitimate rulers by the local population, have collaborated with the former Apartheid government and formed the core of the “independent” homeland governments, collaborating with the structures and programmes of the Apartheid state. Many “legitimate” traditional leaders that rejected collaboration with the old South African government were replaced with less critical leaders, who, in turn, were not perceived to be legitimate leaders by the majority of the people they ruled. As a legacy of the apartheid regime, traditional leadership in some areas suffer a severe lack of trust, which impacts negatively on their perceived legitimacy. As a result of the replacement of traditional leaders by the Apartheid government many rural areas are now experiencing succession disputes between the families of the incumbent ‘legitimate’ traditional leader and the families of the leaders that were given authority by the former government. The ongoing succession debate in some areas undermines the reputation of traditional leadership as a whole and has in some instances lead to the erosion in support for traditional leaders, weakening their position in the governance framework in the process.

### *Constitutional arguments*

One argument that is presented concerning traditional leaders is that the current nature of traditional leadership violates the constitutional principle of separation of powers. Traditional leaders perform executive, judicative and sometimes also legislative functions and the rule of traditional leaders is not subject to the doctrine of separation of powers, upon which the modern democratic state depends. The institution of traditional leadership is protected by the Constitution despite the absence of the separation of powers. The fusion of powers is seen as a core component of the traditional African system of governance and is therefore protected within the institution of traditional leadership itself. Wherever it is seen as being a problem for the functioning of the democratic state and its institutions, Section 211 (2) of the Constitution can be invoked and the question addressed through statutory legislation.

Based on the Constitution there are two further arguments against a prominent role for traditional leadership in South Africa's governance framework: the hereditary nature of traditional leadership and the inherent discrimination of women.

Ntsebeza (2002) argues that in so far as traditional leadership is based on hereditary rule, the possibility of rural residents having the freedom to choose which institution and individuals should rule them is automatically excluded, making traditional leadership irreconcilable with the values of the South African Constitution. Whilst this argument cannot easily be dismissed, it needs to be considered in the light of governance reality in rural areas. Oomen (2002) has established during her intensive field work that the people in rural areas feel a strong need for some form of governance to maintain order and ensure peaceful co-existence, a need often expressed in the phrase "no herd of cattle can look after itself". The weakness of elected government institutions often means a failure of these institutions to deliver even the most basic service and despite arguments against the hereditary nature of traditional leadership; people will look for a solution in the traditional form of governance. In the light of constitutional values, this purely practical argument is supported by the fact, as Ntsebeza (2002) concedes, that traditional rule can be democratic in one important respect, the involvement of rural residents in decision-making processes. In other words, in the field of public participation, itself a constitutional value, traditional rule might well be ahead of elected, formal government structures. Ultimately, the continuous acceptance of traditional leadership, and this despite its hereditary nature, will depend on the real availability of governance alternatives. As long as elected structures are not perceived by rural people to present an alternative, the legitimacy of traditional leadership should not be disputed on an abstract constitutional notion, because traditional rule has, itself, the potential for incorporating constitutional values.

The second argument noted above, is the inherent bias of traditional rule against women (Lahiff, 1997). A gender bias is not tolerated for in the South African Constitution but, despite the seriousness of such a bias, the marginalisation of women in decision-making processes is not a feature unique to traditional leadership. It is a characteristic of a wide range of institutions where women often play a subordinate role and do not participate in decision-making on an equal level. Hemson's (2002) research shows that this is the case in other, non-traditional water management structures in South Africa. The problem of gender inequality is not addressed by disputing the role of traditional leadership on the ground that it marginalises women. Efforts to promote gender equality need to be made in all areas of society, including traditional leadership. Suggestions have been made, and to some extent implemented, that enhance women participation in traditional structures. The future will show whether and to what extent traditional leadership has succeeded in achieving gender equality.

### **Erosion of traditional values**

The role of traditional leadership in the governance framework might be threatened by movements that are taking place in society due to globalisation processes and trends of modernity that contribute to the overall erosion of traditional values. Whilst this is a much researched phenomenon an in-depth discussion is well beyond the scope of this paper, but suffice to say, particularly among the younger generation and the more educated factions of society, traditional values are increasingly disregarded and the role of traditional leadership is being seriously challenged. Another short case example from the Tzaneen area, the example of the Rain Queen Modjadji, serves to illustrate some of the complexities of traditional leadership. Modjadji was historically recognised as queen over the area between the Great and Little Letaba and the Molototsi Rivers. After the demarcation of territorial boundaries by Paul Kruger's government in 1892 her kingdom shrunk to

179 square kilometres, limited to the Duiwelskloof area near Tzaneen. Even today, the supremacy of Queen Modjadji is acknowledged by chiefs far beyond the small area where she rules. As the name suggests the Queen Modjadji is associated with rain-making and is viewed as the most powerful rainmaker in Southern Africa (Krige & Krige, 1943). Her rainmaking powers, whose exact details even today remain a mystery to the wider public, are exercised through a complicated and intriguing system of interaction between Modjadji and her ancestors. Her subordinates pay their respect to the queen in an annual pole dance ceremony, in which each village under her rule symbolically contributes to the maintenance of the royal kraal by delivering a new pole for repairs on the kraal. This ritual was traditionally accompanied by a monetary contribution that ensured the ongoing survival of the monarchy. Today, the tradition is disappearing as most villages have stopped making monetary contributions, and argue that the queen, like all traditional leaders, receives a State salary. The queen herself, as tradition has it, is not supposed to be seen during the entire time of her rule but the current, new and very young queen, is breaking away from tradition, as one interviewee put it with some expression of disapproval, “by attending the sale at Woolworth where she bumps into her commons”.

The increasing acceptance of and reliance on elected governance structures by the younger and more educated factions of society exacerbates the erosion of support for traditional leadership. As is the case in the villages that are under the jurisdiction of the Tzaneen municipality, there is a vacuum in governance and this vacuum has an adverse effect on the management of water resources. There are exceptions, such as the Tshikombani case presented in this paper, where traditional leadership enjoys strong support and plays an important role in the overall governance systems.

The paper indicates the complex set of changing realities and makes it difficult to access exactly what role traditional leadership can play in governance as a whole and in contributing to integrated water resource management in particular. On a case to case basis, where, traditional governance models are able to play an efficient and effective role, the paper has argued that there is place in the South African water law and policy framework for their recognition and incorporation in integrated water resource management.

## **Conclusion and way forward**

Both statutory and traditional governance structures are unstable during this time of deep change in the country and South Africa is, as Derman (2000) notes in the midst of ‘massive social, economic and environmental change’ that according to the author form a ‘mixed balance sheet between difficulties and opportunities (ibid). The paper has argued that traditional leaders have an important role to play in narrowing the gap between policy and its practice and that there is sufficient evidence on the ground to suggest integrating traditional systems of control and management of water into formal structures that are provided for by the NWA. The paper has presented a coherent case that the legislation provides an opportunity for traditional systems to operate comfortably alongside the newly created statutory systems, such as the CMA and the WUAs that have been ordained in the NWA and to play a significant role in creating sustainable and effective solutions for integrated water resource management. At the same time, well functioning traditional structures could ensure effective and efficient water services and contribute to water service delivery. The paper has presented an argument showing that existing water policy does not have to be changed and that legislature makes provision for traditional leaders to play a role in integrated water resource management. The way in which ‘informal’ systems fit into ‘formal’ statutory bodies, such as the WUA needs to be designed on a case-to-case basis and one size does not fit all. In some areas, such as Tshikombani, organised water management systems are already in place and these systems address scarcity of first order resources and show remarkable evidence of social adaptivity. In other cases, there are no such systems in place and DWAF officials need to step in and fill the gap where local knowledge systems fail to respond to water scarcity. There are constraints that exist in integrating traditional systems with existing statutory laws: the inability of government officials to understand the informal ‘hidden’ norms and values that operate under customary structures, the tensions that exist between youth and older members with the well recognized ‘clash of cultures’ that occur as old meets new, the lack of monitoring and evaluation devices to ensure inclusivity and equal access of all members to public goods such as water, challenges in empowering women and enhancing gender equality and so forth. Many of the existing problems that face traditional authorities

are not particular to systems of traditional rule but are general problems that are part of shifting societies and transitions that are manifest both within and outside the formal state structures. Clearly, where there are coherent responses to water scarcity, these need to be nurtured.

An audit in specific regions would go a long way in establishing strengths and weaknesses in local knowledge regimes and could reduce costs and efforts required by the state to respond to gaps in delivery of water. As part of this audit, it would be useful to better understand the potential for DWAF officials to understand and maximise the strengths of traditional leaders, in other words their ability to understand not only technical issues around water matters but the complex set of social configurations that exist. Schizoid responses, experienced by some DWAF officials who find themselves operating in two quite different paradigms, indicate that there are parallel 'legal' systems that exist today and that need to be recognised and carefully considered. The paper proposes the integration of traditional structures, on a case to case basis, as a long term solution to both service delivery in those places where municipal structures are unable alone to offer clean drinking water to all consumers that fall under its jurisdiction, and as a long term solution to sustainable and effective integrated water resource management at the catchment level. The paper in particular draws a cautionary note against overriding existing structures that are able to respond efficiently and effectively to the management of the resource as well as the supply of water.

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<sup>1</sup> Although customary water tenure structures can also be considered as formalised in their given context, the term formalised in the context of this paper refers to institutional structures legislated for in statutory law.

<sup>2</sup> In the context of this paper the term customary (as well as the interchangeably used terms indigenous and traditional) refers to rules, norms and their enforcement of –

- rural groupings whose livelihoods are predominantly based on small-scale agriculture (cropping, livestock, fisheries, hunting/gathering), and
- whose socio-political cohesion is based on a sense of ethnicity, besides residence, and
- for whom tribal authority plays a role in some or many domains of life, besides ‘modern’ local government and state-induced or private water management institutions.

<sup>3</sup> The Water Management Areas were established by Government Notice No. 1160 (DWAF, 2004).