# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>PART A</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTRODUCTION</td>
<td>3</td>
</tr>
<tr>
<td>PART B</td>
<td>4</td>
</tr>
<tr>
<td>CONSTITUTIONAL ANALYSIS</td>
<td>6</td>
</tr>
<tr>
<td>PART C</td>
<td></td>
</tr>
<tr>
<td>GAP ANALYSIS</td>
<td></td>
</tr>
<tr>
<td>PART D</td>
<td>19</td>
</tr>
<tr>
<td>CONCLUSION</td>
<td></td>
</tr>
<tr>
<td>References</td>
<td>20</td>
</tr>
</tbody>
</table>
PART A
INTRODUCTION
The new Constitution of Zimbabwe brought with it a raft of provisions set out in Chapter 15, regulating the establishment and functions of traditional leadership. It also introduced an expansive Bill of Rights anchored on certain constitutional values. The Traditional Leaders Act [Chapter 29:17] is the principal legislation which is supposed to give effect to the new constitutional framework on traditional leadership and governance. As set out in section 2, the Constitution is supreme and all other laws must conform to it. Therefore, the Traditional Leaders Act must be realigned in order to give effect to Chapter 15 of the Constitution, the relevant provisions in the Bill of Rights and the spirit and object of the Constitution.

However, the alignment of this Act must also take into account the historical background of traditional leadership legislation in Zimbabwe and contemporary challenges associated with traditional governance in the country. The Traditional Leaders Act [Chapter 29:17] was passed in 1998, became effective in 2000 and restored the jurisdiction of the traditional leaders over rural communities. The traditional authority is the custodian of the land, responsible for the distribution and conservation of land in rural areas. Although the principal Act governing rural local governance is the Rural District Councils Act [Chapter 29:13], rural local governance is equally impacted by the Traditional Leaders Act and other Acts such as the Communal Lands Act [Chapter 20:04].

This has resulted in a dual leadership system in rural communities, thus the amendment of the Traditional Leaders Act should therefore be crafted in a manner which takes into account sources of conflict emanating from this dual leadership system. Further, the alignment of the Traditional Leaders Act ought to seek to achieve harmonization of the Act with other relevant legislation.

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1 See section 3 of the Constitution of Zimbabwe, 2013
2 Chapter 29:17
3 Chapter 29:17
4 Chapter 20:04
such as the Rural District Councils Act and Communal Lands Act; which have a bearing on rural local governance.

PART B
CONSTITUTIONAL ANALYSIS

1. General
Section 2 of the Constitution affirms the supremacy of the Constitution in that “any practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.” The jurisdiction of this Constitution is national and it applies to all persons without discrimination. This is encapsulated under section 2 (2) which declares that: “[t]he obligations imposed by this Constitution are binding on every person…”

The Constitution also recognizes traditional leadership as an institution under customary law with prescribed roles and functions. In addition, it should be noted that there are other constitutional provisions which are equally relevant to traditional leaders and can serve as a guide on the development of the Amendment Act.

One of the founding values and principles maintained in the Constitution is respect for “the nation’s diverse cultural, religious and traditional values”. This is relevant for continued discourse on amendments to the Traditional Leaders Act because traditional leaders remain the custodians of cultural and traditional values in rural communities. In furtherance of this, the Constitution imposes an obligation on the State and all institutions and agencies of government to “promote and preserve cultural values and practices which enhance the dignity, well-being and equality of Zimbabweans” and to “preserve and protect Zimbabwe’s heritage”.

5 Section 2 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013.
6 Section 2(2) of the Constitution of Zimbabwe Amendment (No. 20), Act, 2013.
7 Chapter 15 of the Constitution of Zimbabwe
8 Section 3 Constitution Founding values and Principles.
9 Section 16 (1) and (2) of the constitution Culture
The Traditional Leaders Act\textsuperscript{10} imposes a duty to promote and uphold cultural values amongst members of the community and such a duty can find support in the Constitution which guarantees every person the “right to participate in the cultural life of their choice\textsuperscript{11}” as long as the exercise of such a right is not “inconsistent with the Constitution”. Section 33 of the Constitution also provides for the preservation of traditional knowledge especially with regards to “medicinal and other properties of animal and plant life possessed by local communities and people”\textsuperscript{12}. This is a role that traditional leaders ought to actively implement as overseers and custodians of traditional practices and should receive recognition in legislation pertaining to traditional leaders.

1.1. Implications for law reform
The Traditional Leaders Act must be crafted in such a way as to reflect the spirit and purpose of the Constitution. In other words, constitutional values and principles must be incorporated into the Act and anything inconsistent with such constitutional values and principles must be expunged from the Act.

1.2. Recommendations

- Provisions that relate to the appointment of chiefs, village heads and head persons should be done in consideration of the gender needs of the community and the prevailing culture, customs, traditions and practices of the community where the appointed person resides.
- Provisions referring to chairman and headman should be gender neutral and read as chairperson or head person.
- One of the duties of the chiefs should include enhancing the dignity, well-being and equality of all its community members.
- Principles of succession should remain integral to appointment cycles.
- The non-partisan nature of chiefs should be emphasized.

\textsuperscript{10} Section 5 (1) (b)

\textsuperscript{11} Section 63 Language and Culture

\textsuperscript{12} Section 33 Preservation of Traditional Knowledge
2. Chapter 15 of the Constitution

Sections 280, 281, 282, and 283 of the Constitution recognize traditional institutions and lays down the principles to be observed by traditional leaders, their functions, appointment and removal and remuneration. They also establish the creation and function of the National Council and Provincial Assemblies of Chiefs as well as an Integrity and Ethics Committee of Chiefs which is to be established by an Act of Parliament.

2.1. Implications for law reform

The role and function of traditional leaders is now entrenched and specifically recognized in the Constitution giving traditional institutions the constitutional right to exist and to exercise authority within their areas of jurisdiction. The Constitution creates the Integrity and Ethics Committee to assist in the achievement of constitutional values and principles relating to traditional leadership.

2.2. Recommendations

• There is need to incorporate provisions relating to the National Council of Chiefs and Provincial assemblies of chiefs.
• There is need to incorporate provisions relating to the establishment of an Integrity and Ethics Committee.

PART C

GAP ANALYSIS OF THE TRADITIONAL LEADERS ACT

1. The Preamble

The preamble of the Act explains the purpose of the Act as being:

‘to provide for the appointment of, village heads, headmen and chiefs; to provide for the establishment of a Council of Chiefs and village, ward and provincial assemblies and to define their functions; to provide for the issue of village registration certificates and settlement permits; to repeal the Chiefs and Headmen Act[Chapter 29:01]; to amend the Criminal Procedure and Evidence Act[Chapter 9:07], the Communal Land Act[Chapter 20:04] and the Rural District Councils Act[Chapter 29:13]; and to provide for matters incidental to or connected with the foregoing.’
1.1. Implications for law reform
It is submitted that in light of the prevailing new constitutional dispensation the preamble should be redrafted to reflect the democratic and human rights values which underpin the Constitution of Zimbabwe. The preamble highlights the purpose of the Act and the main purpose of the Act should not be so much of the appointment of traditional leaders but more related to ensuring that on appointment, traditional leadership is exercised in a manner that portrays the constitutionally endorsed democratic principles of transparency accountability and good governance. That traditional leaders are subject to the rule of law and the constitution is clearly articulated in section 281 of the Constitution and this must also come out clearly in the preamble.

1.2. Recommendations
Three proposed additions may be considered for incorporation in the preamble. These are outlined as follows - An Act to provide for:

- The regulation of conduct of traditional leaders through the establishment of an integrity and Ethics Committee
- The promotion of traditional values and cultures of communities in so as far as they are consistent with the Constitution.
- The facilitation of development and equitable administration of natural resources in a fair, impartial and transparent manner

2. Traditional Leaders and elected leaders
There exist two structures of local government authority in Zimbabwe, namely that of the elected local government councils and the appointed traditional leaders. The coexistence of these two parallel structures of government, which has been described as a collision between the modern and traditional, stems from the fact that traditional leaders derive their authority from customary law (now entrenched in the constitution) while local councilors derive their authority from the people via the electoral process (also entrenched in the constitution).

Areas and sources of conflict between traditional and elected structures have mainly revolved around issues of authority over management of land and natural resources. Rural local
government is the level that is most affected by traditional leaders because traditional leaders exercise their judicial, administrative and legislative functions in rural settings. For example, the Constitution empowers traditional leaders to “facilitate development”\(^{13}\) “resolve disputes”\(^{14}\) and to “administer communal land and protect the environment”\(^{15}\). However, it is worth noting that the function of administering communal land is subject to an Act of Parliament.

The Communal Lands Act vests control over land in the President and devolves land administration to rural district councils and district administrators. Rural district councils therefore become the lawful land authorities. However, irrespective of these provisions, village heads continue to administer land leading to a communal leadership crisis which portrays councilors and traditional leaders as seemingly existing for the same roles and responsibilities.

The Traditional Leaders Act provides the duties of a traditional leader as:

‘...( f ) overseeing the collection by village heads of levies, taxes, rates and charges payable in terms of the Rural District Councils Act [Chapter 29:13]; and ( g ) ensuring that Communal Land is allocated in accordance with Part III of the Communal Land Act [Chapter 20:04] and ensure that the requirements of any enactment in force for the use and occupation of communal or resettlement land are observed; and ( h ) liaising with and assisting development committees established in terms of the Rural District Councils Act [Chapter 29:13] in all matters relating to the planning and implementation of local development programmes; and…’\(^{16}\)

\(^{13}\) Section 282 (c)

\(^{14}\) Section 282 (e)

\(^{15}\) Section 282 (d)

\(^{16}\) Section 5, Traditional Leaders Act
The Rural District Councils Act provides for duties of the council as follows:

‘...A council shall have power to undertake or carry out any or all of the matters and things set out in the First Schedule ...’

The First schedule lists the areas where such powers are to be exercised. These include *inter alia*: Acquisition, maintenance, development and disposal of property; Trees; Conservation of natural resources; Bush fires; Clearing of land; Cultivation and farming; Grazing; Agricultural and other services; Fisheries; Markets and agricultural and other produce; Water; Obstruction of water flow; and Pollution.

A comparison of the two sections clearly highlights that whereas the duties of a traditional leader are clearly highlighted in Chapter 15, they also fall into the responsibilities of the councilors who according to section 71 of the Rural District Councils Act are allowed to do anything necessary to further the interests of the council area and this might mean rescinding or overlooking the authority of the traditional leader or even playing the same function, thus inducing conflict.

It would seems that the Rural District Councils Act and the Traditional Leaders Act put both the traditional leaders and the elected leaders in control of land in that the traditional leaders are the custodians of the land responsible for the allocation, and management of their areas, while elected leaders are the planning authority and control the land use as they are responsible for the implementation of development programmes. Each one should work with the knowledge of the other and the challenge therefore seems to lie in the question of who has more control and influence over the other.

Seeing as land allocation by traditional leaders is subject to an Act of Parliament, in a proposed amendment Bill, it could be argued that traditional leaders can only exercise the administration of land under the authorization of rural district councils. Nevertheless, s282 (2) of the Constitution stipulates that “Except as provided in an Act of Parliament, traditional leaders have authority, jurisdiction and control over the Communal or other areas for which they have been appointed and over persons within those communal lands or areas”.

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17 Section 71, Rural District Councils Act [Chapter 29:13];
The traditional and elected structures do have some areas that are distinctive and specialized. For example, elected councilors cannot take an active role in the promotion and preservation of cultural values, traditions and the heritage of communities as that is the prerogative of traditional leaders. Traditional leaders, on the other hand are not empowered to make by-laws, regulations, or rules, neither can they have any powers to levy rates and taxes. They can only oversee “the collection by village heads of levies, taxes, rates and charges payable in terms of the Rural District Councils Act”. Furthermore, traditional leaders are prohibited in terms of the constitution from being members of or participating on political parties or furthering the interests of any political party, whereas local authorities are political representatives elected in political processes by the various constituencies. What is therefore required is policy development to ensure a harmonious working relationship between traditional and elected structures and strengthening these institutions in the areas of transparency, accountability and public participation in decision making processes.

2.1. Implications for law reform
Rural local governance legislation as it currently stands fails to unify the roles and duties of traditional leaders and councilors so that they are compelled to work together. There is therefore need to limit the possibility of community leadership conflicts through legislation.

2.2. Recommendations
• The roles and functions of Traditional Leaders should be clearly defined and the extent to which traditional leaders is subject to the authority of rural district councilors if at all, especially regarding the administration of natural resources for the communities.
• Traditional Leaders should be allowed to participate in rural district council processes so that their views are reflected at the planning and decision making stages.
• Traditional Leaders should be consulted in the formulation of council policies

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18 Section 276 Constitution Functions of Local Authorities
19 Section 5 (1) (F) Traditional Leaders Act
20 Section 281 (2)
• Developmental issues should incorporate the roles and functions of both traditional and elected leaders to ensure harmonization

3. Appointment of Traditional Leaders
Traditional Leaders are defined in the Traditional Leaders Act to mean chiefs, headmen and village heads.

3.1. Appointment of chiefs
The Act provides that Chiefs are appointed by the President guided by the customary principles of succession and will ordinarily appoint a person nominated by appropriate persons in the community concerned. The President may also appoint an acting Chief pending the appointment of a substantive Chief.

3.2. Implications for law reform
The Constitution has altered the procedure of appointment of a Chief by the President. The President ought to appoint a Chief on the recommendation of the Provincial Assembly of Chiefs through the National Council of Chiefs and Minister.

3.1.2 Recommendations
• The section on appointment of Chiefs must be aligned with the Constitution as observed above.

3.3. Appointment of headmen and village heads
The Traditional Leaders Act empowers the Minister to appoint headmen who are nominated by the Chief and such appointed headmen are installed in office by the Chief. The Secretary of the Ministry is empowered by the Act to appoint village heads who are nominated by the headmen with the concurrence of the chief who when so appointed are installed in office by the headmen.
3.2.1 Implications for law reform
Provisions related to the appointment of head persons and village heads can be retained save for the nomination by the Chief, which should be done in consultation with the Provincial assembly of Chiefs. This will help to avoid arbitrary nominations influenced by other factors outside the customs and practices of the community.

3.2.2 Recommendations
• Sections relating to the appointment of head person and village heads should incorporate an additional provision requiring consultation with the Provincial assembly of Chiefs.

4. Duties of traditional leaders
4.1 Duties of chiefs, head men and village heads
Section 5 of the Act outlines the duties of the Chief by first identifying the Chief as the traditional head of the community. In that capacity the Chief must in addition to other functions, promote and uphold the cultural values, participate in provincial assemblies and council, supervise headmen and village heads, perform judicial functions under the Customary Law and Local Courts Act. Furthermore, the Chief is empowered to ensure that communal land is allocated in accordance with Part III of the Communal Land Act [Chapter 20:04] and ensure that the requirements of any enactment in force for the use and occupation of communal or resettlement land are observed. The Chief is also empowered to prevent any unauthorised settlement or use of any land.

There are also various duties laid down in the Act for the headmen who should assist the Chief in the performance of his / her duties, chair ward assembly, etc. The other duties are to report to the police any suspicion of the commission of an offence, and judicial functions. The Village Head assists the Chief and Headmen, leads the community in cultural matters, and chairs village assemblies and Village Development Committees.
4.1.1 Implications for law reform

There is a potential conflict in the duties of traditional leaders regarding the management of land under the Traditional Leaders Act and the provisions of the Communal Land Act. According to the Traditional Leaders Act, traditional leaders are required to ensure that allocation of land is done in accordance with the Communal Land Act. On the other hand, the power to allocate land under the Communal Land Act is vested with the rural district council. Furthermore, the rural district council is, in turn, required in terms of the Communal Land Act, to have regard to customary law relating to the allocation, occupation and use of land in the area concerned and to consult and co-operate with the chief appointed to preside over the community concerned in terms of the Traditional Leaders Act [Chapter 29:17].

4.1.2 Recommendations

- The duties of traditional leaders in relation to the allocation of land should be harmonized with the same powers bestowed upon rural district councils by the Communal Lands Act. The harmonization should have the effect of avoiding duplication of roles and functions of these two institutions

5. Disciplinary action against traditional leaders

The Act empowers the Minister to suspend any traditional leader pending criminal charges and/or disciplinary action preferred against them. The Minister also has the power to impose any punishment as outlined in the Act which includes the removal of the traditional leader with the exception that the Chief can only be removed by the President on the recommendation of the Minister.

5.1 Implications for law reform

There is need to introduce a section establishing the Integrity and Ethics Committee as envisaged under section 287 of the Constitution. The Committee will enforce discipline among traditional leaders, resolve disputes between them and deal with complaints against traditional leaders.
5.2 Recommendations

- The amendment Bill should establish an Integrity and Ethics Committee which should set out a code of conduct for traditional leaders in consultation with the provincial assemblies and National Council of Chiefs.
- The code must be guided by, but not be limited to, the principles set out in section 281 of the Constitution.
- The committee must have the power to investigate any complaint or allegation of misconduct or breach of the code by a traditional leader.
- The committee should be empowered to take appropriate action against such traditional leader in terms of this Act and regulations made there under.
- Committee members should have non-renewable five year tenure of office.
- There must be a minimum of at least 3 women in the committee.
- The committee should afford a fair hearing to any traditional leader accused of misconduct.
- A Chief who is facing disciplinary proceedings before the Committee should have a right to be represented by any person of their choice.
- The committee should have the power to recommend suspension or removal of a traditional leader, other than a traditional Chief.
- The committee should have the power to recommend removal of a traditional leader.

6. Structures created by the Act for traditional leaders’ functions

6.1. Village assembly /village development committee

6.1.1. Composition

Inhabitants of a village who are above 18 years are members of the village assembly whose meetings are chaired by the village head. Meetings are held once every three months and proceedings of such meetings are sent to the ward assembly.

6.1.2. Functions

The village assembly deals with governance issues of the village which include, *inter alia*, issues relating to land, water and other natural resources. The village assembly appoints a village development committee that works under its supervision. The committee also meets once every three months and is presided over by the village head.
6.2. Ward assembly and ward development committee

6.2.1. Composition
The ward assembly draws its membership from headmen, village heads and the councilor of the ward. The assembly elects headmen to chair its meetings. The assembly covers communal and resettlement areas.

6.2.2. Functions
The ward assembly supervises village assemblies; consider plans by the village assembly which are meant for incorporation into the rural district development plan. The assembly meets once every three months. There is also a ward development committee chaired by a councilor under the direction of a ward assembly.

6.3. Traditional leaders Provincial assembly

6.3.1. Composition
A traditional leader’s Provincial Assembly is a preserve for all the Chiefs in the province. It sits twice a year with one of the Chiefs elected to chair its meetings.

6.3.2. Functions
The Provincial Assembly elects members to the Council of Chiefs, deals with any matters referred to it by the Minister and reports to Council or Minister matters affecting the inhabitants.

6.4. Council of Chiefs

6.4.1. Composition and functions
The council is a preserve for Chiefs elected from the membership of Provincial Assemblies. They have 5 year tenure of office concurrent with the life of Parliament. In the event of any vacancy being created in the council the Provincial Assembly which voted the Chief whose vacancy exists will elect another chief to Council unless there is less than 6 months to the next elections in which case the vacancy will be filled in the next election. The Council members elect a President and Vice President. The Council will operate through meetings which are held twice a year chaired by the President of the Council.
6.4.2 Implications for law reform

A councilor chairs a ward development committee and is a member of the ward assembly which is chaired by a headman. The ward development committee is responsible for reviewing and integrating village development plans in accordance with the directions of the ward assembly. The only elected member of the ward assembly is the councilor, the rest being head persons and village heads.

Traditional leaders are supposed to lead guided by customary and cultural norms and values. A ward development committee is elected and yet it is answerable to the traditional body. An elected village development committee is also subjected to the authority and directions of a Village Assembly.

The relationship between traditional and elected authorities is the key to good local governance. Both groups have an interest in developing the local community. Failure to harmonize their functions and duties may lead to conflicts and overlapping of activities which can be detrimental to local governance. Some other African countries have either, non-regulated dualism or parallelism or subordination or integration or harmonization. However, most African countries do not follow non-regulated dualism where the two structures exist side by side with no comprehensive legislation to govern them. In Zimbabwe the position changed with the enactment of the 1982 Communal Land Act.

In Botswana, for example, there is an autonomous Tribal Administration which controls its own budget headed by a Paramount Chief with full staff compliment and runs its own local Police. This too has not worked very well to the extent that they have now integrated the Tribal Administration Police into the regular State Police.

Namibia enacted the Traditional Authorities Act in 1995, that defines the functions, duties and powers of traditional leaders in general and in relation to local authority institutions. The Council of Chiefs in Zimbabwe has been given powers to superintend the activities of the ward and village assemblies to the extent of giving them directions. This has the effect of a non-elected body altering decisions of the elected development committees.
6.4.3 Recommendations

- Decisions of the village and ward development committees should not be overridden by the village or ward assembly.

- There is need to remove the power of the Council of Chiefs to give directions to ward and village assemblies. Instead the National Council should be given powers to act in an advisory capacity at national level on matters which affect customary law or the Constitution.

- Village and ward assemblies should operate as advisory bodies and not a decision making bodies.

- Traditional leaders should be apolitical

- Aspects of the Traditional Leaders Act that relate to the role of traditional leaders in local government should be expunged from the Act and incorporated into the Rural District Councils Act. The Traditional Leaders Act should confine itself to issues strictly to do with the traditional functions and roles of the chiefs, headmen and village heads. In short, it is proposed that traditional leaders be treated not as part of the local government regime but that their roles within the local government structures be articulated and specified in the relevant legislation relating to this sector.

- The Rural District Councils Act should specify that Ward Assemblies and Village Assemblies shall have traditional leaders as ex officio members whose role is to represent the interest of the people under their jurisdiction in local government structures.

7. Settlement permits and occupation of communal land

Section 23 of the Act requires the Minister to have all villages surveyed and maps drawn with boundaries. Each village is required to be issued with a registration certificate. On the basis of the registration certificate, the Rural District Council is required to prepare a land use plan for each village and issue a settlement permit to the head of each household.

The Minister may also establish villages in irrigation schemes and indicate under which headpersons authority each village falls under. However, the rural district council is the overall authority for the allocation of land in the communal areas. The Communal Land Act specifically

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21 Section 25 (3)
states that “No land shall be allocated in terms of this Act except with the approval of the appropriate rural district council which shall be the administrative authority overall control over the use and allocations of all communal lands.”

**7.1 Implications for law reform**
While the provisions of the Communal Land Act are clear as to the role of rural district councils in the allocation of land, traditional leaders still maintain the practice of land allocation. There is need for a national policy on how villages must be set up in terms of resettlement, ploughing fields and grazing pastures.

**8. Inhabitants of resettlement land**
Resettlement land may be placed under the jurisdiction of a Chief by the Minister in consultation with the Chief and the Rural District Council concerned, but such resettlement land is not be part of the communal land.

**8.1 Implications for law reform**
Consultations should not be with the Minister, but must be with the National Council of Chiefs as required by the Constitution

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22 Part 111
PART D
CONCLUSION

Traditional leadership remains an integral part of the African Society, while elected structures are viewed as an integral part of a democratic system of governance. Under the new constitutional dispensation both structures should develop into democratically acceptable structures with clear mechanisms that encourage governance based on transparency, accountability and respect for fundamental rights.

The roles and functions of traditional leaders should be clearly defined in the amendment process and due recognition of the constitutional values and principles of the Constitution ought to be incorporated and reflect in particular the principles of transparency, accountability, public participation in any proposed activities to be conducted in rural communities and a heightened gender sensitivity to the needs of a community.

There should be further harmonization reached between the roles and functions of traditional and elected leaders that ensures that both structures are conducting community affairs in harmony and not in conflict.
REFERENCES

1. Constitution of Zimbabwe (Amendment No. 20) of 2013
2. Royal Charter (1889)
3. Order in Council (1898)
4. Constitution of Southern Rhodesia (1923)
6. Zimbabwe-Rhodesia Constitution
8. Traditional Leaders Act, (Chapter 29:17)
10. Communal Land Act, (Chapter 20:04)
11. Rural District Councils Act, (Chapter 29:13)
12. Chiefs and Headmen Act, (Chapter 29:01)
13. Customary Law and Local Courts Act, (Chapter 7:05)
15. Constitution of Botswana
16. Botswana’s Customary Courts Act,(Chapter 04:05)
17. Namibia’s Traditional Authorities Act, 1995