

## 2.5 CHAPTER 11-TRADITIONAL AUTHORITIES

*See Annexure 9*

**Clause 169** - Supported.

**Clause 170** - The Commission recommends that the draft text be reformulated as follows to differentiate between the names of the structures accommodating traditional leaders at national and provincial levels respectively:

*"170. National legislation may provide for the establishment a Council of Traditional Leaders and provincial legislation may provide for the establishment of houses of traditional leaders."*

**NOTE:** The Commission recommends that the new Constitution should make no additional provisions to accommodate traditional leaders. In particular, the Commission emphasises that traditional leaders should not be given *ex officio* membership of the legislatures at any level of Government.

### ANNEXURE 9

#### COMMISSION ON PROVINCIAL GOVERNMENT

#### RECOMMENDATIONS REGARDING TRADITIONAL AUTHORITIES

##### 1. INTRODUCTION

1.1 The Commission made the following preliminary recommendations in regard to constitutional or other statutory provisions to provide for the role of traditional authorities in government (Document 8 dated 18 May 1995):

- (a) Provisions to give effect to Constitutional Principle XIII (recognition of the institution, status and role of traditional leadership, according to indigenous law) should be incorporated in the Constitution (paragraph 3.3.1).
- (b) Limits should be placed on the number of traditional leaders who will be recognised for official purposes - to be dealt with in a co-ordinating Act of Parliament and provincial laws (paragraph 3.3.2).
- (c) If a traditional leader is elected to any legislature (or occupies any other official position) his/her recognition for official purposes should be terminated (as long as he/she remains so elected or holds such office) as it would be contrary to law to allow him/her to occupy two remunerated positions in government (paragraph 3.34 with words added in

brackets). This matter has been adequately addressed in clauses 192(f)(f), 192(2) and 193 of the draft text.

(d) The new Constitution should not confer any official roles or powers upon traditional leaders over and above those determined according to indigenous law (paragraph 3.4.2).

(e) Only the following provisions dealing specifically with traditional authorities should be incorporated in the Constitution -

(i) provisions to accommodate CP XIII (see (a) above);

(ii) provision for the establishment/continuation of Houses of Traditional Leaders in the relevant provinces, to be further dealt with in provincial laws; and

(iii) provision for the establishment/continuation of a Council of Traditional Leaders to be further dealt with in an Act of Parliament.

(f) Parliament must retain its power to legislate in regard to traditional authorities and indigenous law to the extent contained in section 126 (2A) and (3) of the interim Constitution (paragraph 3.7.2).

(g) The Commission on the Remuneration of Representatives provided for in section 207 of the interim Constitution should play a role in the determination of remuneration of recognised traditional leaders (paragraph 3.8.1.)

(h) The body of indigenous law regarding the institution, status and role of traditional leadership in South Africa needs to be codified as a matter of urgency.

1.2 The role of traditional authorities in local government is dealt with in Recommendations Document 9.

## **2. DRAFT CONSTITUTIONAL PROVISIONS**

2.1 The draft text deals only briefly with traditional authorities and notes that the subject is still under discussion. (A statement in this regard published in the official newsletter of the CA is annexed for your information).

2.2 Because it is so concise, the relevant draft text is quoted in full below:

### ***"RECOGNITION***

*169. (1) The institution, status and role of traditional authorities, according to indigenous law, are recognised.*

(2) *A traditional authority which observes a system of indigenous law and which was recognised in terms of legislation immediately before the Constitution took effect, may continue to function subject to any applicable legislation and customs.*

(3) *The courts must apply indigenous law when that law is applicable, subject to the Constitution and any relevant legislation.*

### ***COUNCILS OF TRADITIONAL AUTHORITIES***

*170. National or provincial legislation may provide for the establishment of councils of traditional authorities to deal with matters of common interest.*

*(Note: Traditional authorities are still under discussion.)"*

### **3. COMMENTS AND RECOMMENDATIONS**

The draft provisions satisfy the Commission's preliminary recommendations in regard to the matters relating to traditional authorities specifically which should be dealt with in the Constitution (see paragraph 1.1(a) above. The Commission is therefore of the opinion that the formulation contained in Chapter 11 of the working draft should be incorporated in the new Constitution. However, to distinguish the institutions representing traditional authorities at national level and at provincial level, the designations used in the interim Constitution should be retained, namely a Council at national level and Houses at provincial level. This can be achieved by adding the words "or houses" after the word "councils" in clause 170. The Commission recommends accordingly.