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**CONSTITUTIONAL ASSEMBLY  
THEME COMMITTEE 2  
STRUCTURE OF GOVERNMENT**

**COMMISSION ON PROVINCIAL  
GOVERNMENT**

**PRELIMINARY RECOMMENDATIONS ON  
TRADITIONAL AUTHORITIES**

**DOCUMENT 8**



# COMMISSION ON PROVINCIAL GOVERNMENT

*Established in terms of section 163 of Act 200, 1993*

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1995-05-29

The Executive Director  
Constitutional Assembly  
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Dear Mr Ebrahim

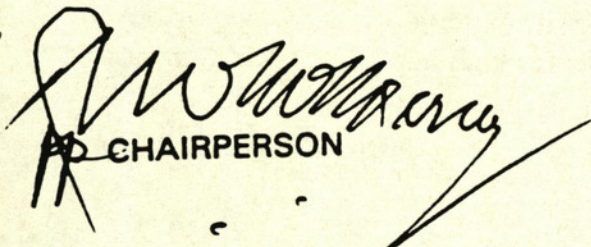
## PRELIMINARY SUBMISSIONS ON PROVINCIAL GOVERNMENT SYSTEMS

In compliance with the agreement between the managements of the CPG and CA, I enclose the undermentioned preliminary recommendations of the Commission for consideration by the relevant committees. I must emphasise that these recommendations contain only the interim views of the Commission as all the information required for the final recommendations has not yet been collected. The comments of the provinces have also not been obtained yet. Kindly inform the committees accordingly.

1. Preliminary recommendations on traditional leaders
2. Preliminary recommendations on local government

Further preliminary recommendations will be forwarded as soon as possible as per the Commission's programme which has been submitted to you.

Yours faithfully

  
CHAIRPERSON



18 May 1995

COMMISSION ON PROVINCIAL GOVERNMENT

PRELIMINARY RECOMMENDATIONS ON  
TRADITIONAL AUTHORITIES  
(RECOMMENDATIONS DOCUMENT 8)

1. INTRODUCTION

- 1.1 See introductory notes under recommendations on provincial legislative powers (Recommendation 2).
- 1.2 Indigenous law and custom have for centuries ordered the lives and activities of indigenous communities in South Africa. Today, it is still the system of law which is closest, best known and most accessible to millions of citizens especially in the rural areas. It is part of a culture which, while influenced to a certain extent by other cultures, continues to draw overwhelmingly on indigenous experience and serves as a strong communal bond. Even among many people who have since become urbanised, the link to their cultural heritage is still strong. The recognition and constructive use of this fact could assist any government not only in the maintenance of social stability but also in the execution of its obligation to deliver public goods and services to such communities.
- 1.3 Experience in South Africa as also in other African countries is that systems of indigenous law and custom are often abused for party-political purposes. There are numerous examples of such abuses. Unfortunately this has the effect of discrediting such systems. A system may become so contaminated by its abuse that it may ultimately be rejected by its adherents. If the system is to remain viable, it therefore needs to be protected from abuse for purposes which are not conducive to its retention and development.
- 1.4 It is also apparent that traditional leadership is inseparably interlinked with indigenous law and custom. If leaders are imposed on such a system in any other manner, it would amount to a contamination of the system. It is significant, therefore, that Constitutional Principle XIII entrenches the institution, status and role of traditional leadership according to indigenous law.
- 1.5 In order to ensure legal certainty, the body of indigenous law regarding the institution, status and role of traditional leadership in South Africa requires comprehensive codification.



- 1.6 It is recognised that indigenous law and custom have been adapting and will continue to adapt in accordance with changing circumstances. Voluntary or organic evolutionary changes are preferable. However, the interim Constitution contains guarantees in regard to certain basic human rights, which must also be incorporated in to the new Constitution, and which will take precedence over traditional law.
- 1.7 The constitutional protection of traditional leadership (CP XIII) must also be compatible with those other Constitutional Principles which prescribe that the system of government shall be democratic (CP VIII, XVII).
- 1.8 The Commission conducted a special workshop on traditional leadership in which relevant topics were discussed by local and foreign experts and representatives of a large number of organisations and bodies including the Constitutional Assembly and provincial governments and/or legislatures and Houses of Traditional Leaders (Invitations were extended to all Houses through the provincial Speakers.). Available literature on the subject was also studied. A Think Tank consisting of persons with expertise in various academic and other fields assisted the Commission in the discussion and formulation of recommendations in regard to the issue. The Commission's provisional recommendations contained in this document will be forwarded for comment to provincial governments, with a request to obtain also the comments of the Houses of Traditional Leaders and of traditional communities in so far as it may be practicable.

## 2. CONSTITUTIONAL PRINCIPLES AND PROVISIONS

- 2.1 The following Constitutional Principles relate to or have an effect on the application of indigenous laws and customs and traditional leaders:

II, III, IV, V, XI, XII, XIII, XVI, XVII.

The role of traditional leaders or traditional authorities in national, provincial and local government systems is not specifically addressed in the Principles.

- 2.2 Constitutional Principle XIII deals with the issue more specifically and provides that the institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.
- 2.3 The interim Constitution contains a number of provisions relating to traditional authorities, inter alia the following -



Section 126 read with Schedule 6 and section 144 (2) allocates indigenous law and customary law as well as traditional authorities as provincial legislative and executive competences, subject to parliamentary competence to make laws in regard to such matters under specific conditions (section 126 (2A) and (3)).

Section 181 provides for the continued recognition of previously recognised indigenous authorities and indigenous law, subject to amendment or repeal by a competent authority and regulation by law.

Section 182 provides for ex officio membership of local government for traditional leaders under certain circumstances.

Section 183 obliges a provincial legislature inter alia to establish a House of Traditional Leaders, where applicable, to advise and make proposals and to comment on Bills relating to traditional authorities and indigenous laws and customs.

Section 184 establishes a Council of Traditional Leaders with powers and functions inter alia to advise and make recommendations to the national government and the President and to comment on Bills relating to matters enumerated in the section.

### 3. DISCUSSION

- 3.1 There appears to be broad consensus in the documentation consulted by the Commission and the views expressed by participants in its workshop and think tank, that it would be politically and administratively prudent to involve traditional authorities in the system of government. However, the nature and extent of their involvement are at issue. In the Commission's view, the following questions need to be addressed:
- (a) Should the Constitution provide a basis for determining who are to be recognised as traditional leaders?
  - (b) What should be the role of traditional authorities; how should this role be reconciled with other elements in the constitutional system; and how should the Constitution deal with these matters?
  - (c) What should be the powers and functions of traditional leaders at each level of government? What provisions should be made for their accountability in regard to the exercising of such powers and functions? Should this be provided for in the Constitution?
  - (d) What should be the relationship between traditional authorities and elected structures at various levels?



- (e) Should provinces have exclusive powers with regard to traditional matters? If not, which matters should be subject to national regulation?
- (f) Should the Constitution provide a basis for determining the number and remuneration of traditional leaders, and the size of Houses of Traditional Leaders? What might that basis be?

3.2 The Commission takes, as its point of departure, the need to read Constitutional Principles XIII in conjunction with the principles and provisions concerning fundamental rights as set out in Constitutional Principles II and III and Chapter 3 of the interim Constitution, together with the provisions for democratic governance established by Constitutional Principles VIII and XVII. This is the basis for the Commission's recommendations regarding the provisions to be made in the new Constitution on the institution, status and role of traditional leaders. The CPG recognises that the accommodation of traditional leaders within the system of governance involves complex and delicate issues which will have to be resolved by processes and provisions other than those which need to be written into the new Constitution.

### 3.3 Recognition of traditional leaders

3.3.1 In terms of CP XIII the institution of traditional leadership according to indigenous law shall be recognised and protected in the new Constitution. The new Constitution therefore need not provide for recognition of leadership which is not in accordance with indigenous law. This is in itself a basis for determining who are and who are not to be recognized as traditional leaders. Leaders appointed by governments otherwise than in accordance with indigenous law need therefore not be recognized in terms of the Constitution. It also follows that the method or procedures for the vesting of traditional leadership will have to be in accordance with the laws of an indigenous community. It is apparent, however, that there could be a considerable degree of uncertainty about the content of such laws, where these have not been codified. The Commission recommends that provisions similar to CP XIII be incorporated into the new Constitution; and that the need to codify the body of indigenous law regarding the institution, status and role of traditional leadership in South Africa be addressed as a matter of urgency.

3.3.2 There is a possibility that the number of persons claiming to be traditional leaders could proliferate if left unregulated. This would not be of any official significance if their recognition does not incur state responsibility for providing for ex officio representation on official bodies or the payment of remuneration. However, limits should be placed on the number of leaders who will be recognized for official purposes. The detailed provisions for this should be dealt



with in provincial laws. Some co-ordination or regulation is required to ensure that significant disparities (in e.g. remuneration) do not arise between provinces, otherwise this may lead to dissatisfaction amongst traditional leaders of the various provinces. The Commission consequently recommends that such co-ordination or regulation be provided for in an Act of Parliament in terms of provisions similar to that contained in section 126 (3)(b) of the interim Constitution.

3.3.3 Particular care needs to be exercised to ensure that the recognition and remuneration of traditional leaders cannot be exploited for their own political ends by political parties which are in power at any time, either at national or provincial level. This is an additional reason why officially recognised traditional leaders should manifestly be seen and treated as authorities without connection to political parties. If this distinction cannot be implemented successfully, the continued official recognition of traditional leaders will need to be re-examined to determine whether this is justified in the interest of the communities they purport to serve.

3.3.4 If a traditional leader is elected to any legislature, his/her recognition for official purposes should be terminated as it would be contrary to law to allow him/her to occupy two positions in government for which he/she is remunerated by the state.

#### 3.4 Role of traditional leaders

3.4.1 It is apparent from CP XIII that the role of traditional leaders should be recognised according to indigenous law. The role assigned to traditional leaders by traditional law has, as far as the Commission is aware, not been fully documented. It is clear, however, that traditional leaders are not entitled as of right to perform any official roles other than those assigned by indigenous law. However, this does not preclude governments from assigning additional roles to them.

3.4.2 Additional roles have indeed been conferred upon traditional authorities in the interim Constitution, e.g. ex officio membership of a local government as provided for in section 182 and advisory and recommendatory roles in the Houses and Council of Traditional Leaders. Despite this, the Commission is of the opinion that the new Constitution should not confer any official roles or powers upon traditional leaders over and above those determined according to indigenous law. Such additional roles, powers or functions not vested in them according to indigenous law may be allocated more appropriately in parliamentary, provincial and local laws, particularly in regard to the provision of services to local communities, so as to adapt more easily to the changing nature of society and social needs.



### 3.5 Powers and functions

3.5.1 This question has to some extent been dealt with under paragraph 3.3 above. In view of the recommendations in that paragraph, only limited powers and functions should be provided in the new Constitution while more extensive provisions in regard to specific functions and the powers related to them, should be dealt with in national, provincial and local laws.

3.5.2 As far as the Constitution is concerned, the Commission recommends that only the following provisions in regard to traditional authorities be incorporated:

- (a) provisions for the protection of the institution, recognition and role of traditional leadership, as envisaged in CP XII;
- (b) provision for the establishment/continuation of Houses of Traditional Leaders in the relevant provinces to be dealt with in provincial laws; and
- (c) provision for the establishment/continuation of a Council of Traditional Leaders to be dealt with in a law of Parliament.

3.5.3 The principle of accountability is as much a feature of indigenous law as it is of modern governance. In as much as the Constitutional Principles require accountability in respect of all functions of government this should also pertain to traditional leaders. Such accountability should not only be in relation to their communities in terms of indigenous law, but also to those levels of government from which they receive public monies, e.g. in the form of remuneration or for the rendering of services. The Commission recommends that provision for such accounting should be made in ordinary laws dealing with traditional authorities.

### 3.6 Relationship with elected structures

3.6.1 It seems clear to the Commission that the primary role of traditional leaders is in regard to the maintenance and application of indigenous law. Specifically, traditional leaders also have traditional powers in respect of the use and allocation of traditional land. The relationship between those leaders and elected structures in regard to these matters is of such complexity and has such serious implications that it will require special investigations and negotiations in order to come to a generally acceptable solution. The Commission does not find itself in a position to make recommendation at this stage as to how such relationships should be dealt with.



- 3.6.2 In certain matters that do not fall within the category of indigenous law and land issues, traditional leaders will obviously be acting as agents for elected national, provincial and local governments in respect of functions or services entrusted to them for execution. The normal relationship as between principal and agent will therefore apply.
- 3.6.3 The question has been raised whether traditional leaders could be accommodated as ex officio members of elected structures of government, such as local government (including its legislative aspect), provincial legislatures, the Senate or even of the National Assembly. CP's XVII and XIII indeed seem to suggest that traditional leaders may represent traditional communities at each level of government, notwithstanding the fact that this may not be considered to be democratic representation in constitutional terms. At local government level, such representation has indeed been provided for in section 182 of the interim Constitution. Such representation in other elected structures at provincial and national levels would provide for a more meaningful role in national and provincial government for traditional leaders than that provided for in the interim Constitution. It could also make redundant the structures designed specially to accommodate them, namely the Houses of Traditional Leaders and the Council of Traditional Leaders.
- 3.6.4 Perhaps a case can be made for the ex officio representation of communities by traditional leaders at local government level, provided that the geographical areas in question can be excluded from areas in which elections on the basis prescribed by CP VIII must be conducted. This proviso is necessary in order to avoid double representation of the areas in question, which would itself be undemocratic. Such ex officio representation would not be undemocratic if the institution of traditional leadership is demonstrably based on popular support in the communities concerned. The matter will be dealt with more specifically in recommendations regarding that level of government. However, the Commission would be hesitant to recommend ex officio representation at national and provincial levels of government for the following reasons -
- (a) it could be contrary to the principle of proportional representation (CP VIII);
  - (b) because of the large number of traditional leaders, it would be difficult to determine rationally how many representatives should be provided for and how they should be nominated or elected;



- (c) the balance of power established by elections could be significantly changed by the introduction of persons who were not elected through the normal electoral process;
- (d) if the communities who are represented by such leaders are permitted to vote in normal elections, it would amount to double representation which would be contrary to the democratic concept of "one person, one vote";
- (e) because of their participation in political bodies (legislatures) the traditional leaders would themselves become politicised and this could give rise to the abuses which have tended to discredit the system in the past (par. 1.3 and 3.2.3 above).

3.6.5 The Commission draws attention to a view which has been expressed, that where traditional leaders are accommodated as ex officio members of any elected structure of government, this arrangement should be subject to periodic review.

3.6.6 The Commission recognises the need to accommodate traditional leaders in government and is of the opinion that the creation of provincial Houses and a Council of Traditional Leaders provides for this need. It is up to the respective governments and traditional leaders to ensure that these structures function effectively and that traditional leaders will consequently have a meaningful role in government.

### 3.7 Provincial powers

3.7.1 The interim Constitution empowers provinces to legislate and perform their executive powers in respect of indigenous law and customary law as well as in respect of traditional authorities. However, Parliament also has the power to legislate in respect of these functional areas, subject to conditions enumerated in section 126 (3). The powers of provinces in this respect can be enhanced in the new Constitution if the Constitutional Assembly so decides, but may not be substantially less or inferior to those provided for in interim Constitution.

3.7.2 A major portion of governmental powers and functions in regard to traditional authorities could be vested in the respective provincial governments. However, the Commission is of the opinion that the issues concerned are of such national importance, that not all relevant powers and functions should be assigned to the provinces. The national government needs the powers to intervene where



necessary in the national interest. The Commission therefore recommends that the national government retain its powers to legislate in regard to traditional authorities and indigenous law to the extent contained in section 126 (2A) and (3) of the interim Constitution.

### 3.8 Numbers

- 3.8.1 The last question to be addressed concerns the issue of establishing a basis for determining the number and remuneration of traditional leaders. The Commission has already recommended that a basis for the determination of the remuneration of traditional leaders should be provided for in an Act of Parliament, i.e. not in the Constitution. The Commission on Remuneration of Representatives provided for in Section 207 of the interim Constitution could perhaps also play a role in the determination of such remuneration. The Commission therefore recommends that no such basis be provided in the new Constitution.
- 3.8.2 The Commission has also recommended that the Constitution should contain only provisions providing that Houses of Traditional Leaders be established/continued in terms of provincial legislation. The interim Constitution does not limit the size of such Houses, nor should the new Constitution. If any problems are experienced with the size of the Houses in future, the national Parliament could provide for norms on standards in terms of section 126 (3)(b). The Commission so recommends.