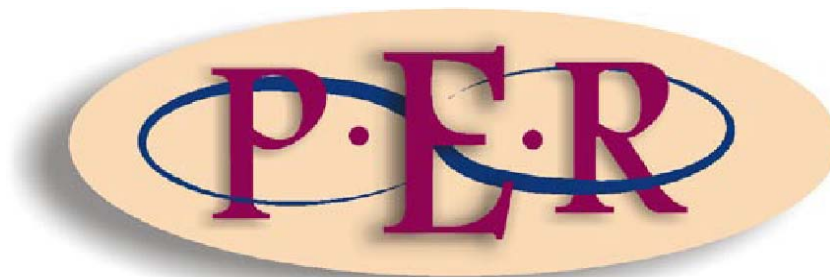

HOUSE OF TRADITIONAL LEADERS: ROLE, PROBLEMS AND FUTURE

ISSN 1727-3781



2000 VOLUME 3 No 1

House of Traditional Leaders: Role, problems and future[#]

Willemien du Plessis and Theo Scheepers

1. Introduction

In 1994 South Africa entered a new constitutional dispensation based on democracy, equality, fundamental rights, the promotion of national unity and reconstruction. Within this context the position of Traditional Leaders had to be re-evaluated. The role of traditional leaders was extensively dealt with in the 1993 Constitution.¹ A minimalistic approach was, however, followed in the 1996 Constitution.²

Section 211 of the 1996 Constitution makes provision for the recognition of the institution, role and status of traditional leadership according to customary law subject to the Constitution. Traditional leaders function subject to applicable legislation and customs which include amendments to and repeal of those legislation or customs. The courts must apply customary law when it is applicable as well as any legislation dealing with customary law.

The 1996 Constitution also states that national legislation must provide for the role of traditional leadership as an institution at local level on matters affecting local communities. Legislation may provide for the establishment of a national council of traditional leaders and provincial houses of traditional leaders.³ Provincial constitutions may also provide for the institution, role, authority and status of a traditional monarch.⁴ Provinces have concurrent legislative powers⁵ with parliament regarding traditional authorities and customary law.⁶

#

Paper delivered at the Colloquium: Constitution and the Law III November 1999 Potchefstroom.

1 S 181-183, Principle XIII, *Constitution of the Republic of South Africa* 200 of 1993 (hereafter the 1993 Constitution).

2 S 211 and 212 *Constitution of the Republic of South Africa*, 1996 (hereafter the 1996 Constitution).

3 S 212.

4 S 143(2).

5 National legislation that applies uniformly in the country as a whole prevails over provincial legislation if any of the following conditions are met: 22

Traditional courts as an institution also received Constitutional recognition in section 166, although indirectly, as "any other courts established or recognised by an Act of Parliament, which may include any court of a status similar to either the High Courts or the Magistrates' Courts". Traditional courts were recognised in the *Black Administration Act*⁷ as well as by former homelands' legislation.⁸ The Law Commission did an extensive study on the functioning of these courts and is in the process of formulating proposals in this regard.⁹

A *Kgosi*¹⁰ (or traditional leader) is a *kgosi ke kgosi ka batho* ("a leader which is a leader through his people"), the father of his people and a binding and spiritual factor that serves as symbol of the unity of the group. He or she is seen by most people as the embodiment of law and order, the upholder of values and as provider for the needs of the community and, in some instances, even as an institution created by God.¹¹ To say that the institution of traditional leadership is not democratic may be true from a western perspective of what is to be understood under democracy but outsiders often totally ignore the concepts of African democracy¹² and *ubuntu*.¹³

- the matter cannot be regulated effectively by legislation enacted by the provinces individually;
- the national legislation in order to ensure effectiveness and uniformity across the nation establishes norms and standards, frameworks or national policies;
- the national legislation is necessary for the maintenance of national security and economic unity, the protection of the common market, the promotion of economic activities across provincial boundaries and equal opportunity or equal access to government services and the protection of the environment;
- the national legislation is aimed at preventing unreasonable action by a province that is prejudicial to the economic, health or security interests of another province or the country as a whole or impedes the implementation of national economic policy - s 146(3).

6 S 104 read with schedule 4.

7 38 of 1927.

8 Cf e g Bophuthatswana Traditional Courts Act 29 of 1979; KwaNdebele Traditional Authorities Act 8 of 1984; KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1999; cf also Bekker "Outline of Constitution, jurisdiction and procedure of Traditional Authority Courts" Unpublished. Speech delivered at Workshop Customary Courts SA Law Commission 9 September 1999.

9 South African Law Commission The harmonisation of the common law and indigenous law: Traditional courts and the judicial function of Traditional leaders Project 90 Discussion Paper 82 (Pretoria 1999).

10 Tswana. 11 Traditional Authorities Research Group 1999 Koers 297-298. 12 Cf also Houston "Traditional leadership and the restructuring of rural local government" in Konrad Adenauer-Stiftung Traditional leadership in Southern Africa (1997) 80-81. The way in which democracy was experienced as "a participatory democratic style in the consensus-seeking traditional authorities; a command-style in some participatory traditional authorities and a

In several studies it has been indicated that traditional leaders have a role to play as an institution at local level.¹⁴ Their role at provincial and national level in the National House of Traditional Leaders and the Provincial Houses of Traditional Leaders has not yet been clearly defined.

The National and Provincial Houses of Traditional Leaders experience various problems that hamper their functioning. The purpose of this paper is to discuss the significant role of the National House of Traditional Leaders and the Provincial Houses of Traditional Leaders as Constitutional institutions at national and provincial levels and to make proposals regarding their future role and functioning.

In this paper a brief overview of the recognition of traditional institutions in the 1993 and 1996 Constitutions is first presented. This is followed by a discussion of the National House and Provincial Houses of Traditional Leaders in terms of their composition, role and the problems that they experience. This discussion is aimed at making recommendations with regard to the solution of the problems of traditional institutions and their future role.

2. 1993 and 1996 Constitutional provisions

Due to the strong participation of traditional leaders as a result of pressure by Contralesa (Congress of Traditional Leaders in South Africa) in the negotiations leading up to the 1993 Constitution (as well as the then forthcoming elections), all

command-style found in other traditional authorities" gave rise to either support or opposition to the institution of traditional leadership (82-83).

- 13 Justice Langa described ubuntu in *S v Makwanyane and Another* 1995 3 SA 391 (CC); 1995 2 SACR 1; 1995 (6) BCLR 665 as "a culture which places some emphasis on communality and on the interdependence of the members of the community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such persons happens to be part of." Cf also Sindane *The future of traditional leadership, ubuntu and nation-building* in Konrad Adenauer-Stiftung *Traditional leadership in Southern Africa* (1997)147-162.
- 14 Scheepers et al "Constitutional provisions on the role of traditional leaders and elected local councillors at rural level" 1998 *Obiter* 61-90; Traditional Authorities Research Group "Traditional leaders: role and future" 1999 *Koers* 295-324; Scheepers and Du Plessis "Traditional leaders and development: recognition and the road ahead" in Konrad Adenauer Stiftung *Constitution and Law* (1997 Johannesburg) 33-34.

existing traditional leaders were recognised in terms of the Constitution. But their position was subject to amendment and repeal. Customary law was to be regulated by statute. All existing legislation was recognised and this, in effect, meant that the legal chaos of the apartheid era was continued in the new dispensation.¹⁵

A Council of Traditional Leaders was established in terms of section 184 of the 1993 Constitution.¹⁶ It was to consist of nineteen representatives elected by the different Houses of Traditional Leaders. The Council of Traditional Leaders had to advise and make recommendations to national government on any matter pertaining to Traditional Authorities, indigenous law and the customs and traditions of traditional communities. It had to advise the President at his request on any matter of national interest and to comment on any parliamentary Bill pertaining to the matters referred to above. Notification of the approval or rejection of the Bill had to take place within thirty days. Parliament could not pass the Bill before a period of thirty days had elapsed. If no notification was given, parliament could proceed with the Bill. The

15 S 229.

16 The National House of Traditional Leaders was established as a result of the agreement entered into between Traditional Leaders and the political parties during the pre-1994 constitutional negotiations. Resolution 34 was adopted on 11 December 1993:
"There shall be a council of Traditional Leaders, composed of Traditional Leaders and elected by an Electoral College composed of the various Houses of Traditional Leaders at provincial level, which shall meet when necessary, for the purposes set out in the paragraph hereafter ..."
"Legislation and Constitutional amendments pertaining to Traditional Leadership, traditional authorities, indigenous law and custom, shall be referred to the Council for its consideration and comment. In its comment the Council shall not be withheld for a period longer than 30 days after date of receipt ..." "Passage of legislation through the National Assembly and Senate shall not be delayed when the proposed legislation is referred to the Council as set out above. To ensure that undue delay is avoided, proposed legislation shall be referred to the Council simultaneously with its submission to the Senate ..." "Should the Council in its comment express opposition to the legislation, such legislation, if passed at the National Assembly, shall be delayed for 30 days before final approval by the National Assembly ..." "The Council of Traditional Leaders will be entitled to advise Government from time to time on any matter which it considers to be relevant to the indigenous / customary law, traditions and customs ..." "The State president may seek the advice the Council of Traditional Leaders on matters of National interest ..." The Interim Constitution complied with resolution 34 but not the 1996 Constitution. Contralesa and the IFP raised their objections during the Certification case before the Constitutional Court. The Constitutional Court, however, found that section 211 and 212 of the 1996 Constitution did comply with the constitutional principles. Cf also *Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) 833A-834B.

Constitution was amended providing that this section would only apply once the Council of Traditional Leaders was established.¹⁷

Section 183 provided for the establishment of Houses of Traditional Leaders in the various Provinces. Their powers, duties and functions were to advise the provincial legislatures on matters dealing with Traditional Authorities, indigenous law and the customs and traditions of traditional communities. Bills also had to be referred to the Houses and they had to notify the provincial legislature of their approval or rejection of the Bill within thirty days. The legislature could, in any event, accept the Bill after thirty days without taking any proposals of the Houses into account.

The National Council (now the National House) was only established in April 1997 after the 1996 Constitution was adopted.¹⁸

Houses of Traditional leaders were instituted in North West,¹⁹ KwaZulu-Natal,²⁰ Mpumalanga²¹ and the Free State²² by 1997 but problems were experienced in the Northern Province²³ and Eastern Cape²⁴ due to the various tribal groupings who could at that time not come to an agreement on representation in the Houses.

The Khoisan are not represented in the National House of Traditional Leaders even though some groups allege that they have their own traditional leaders. The Khoisan formed an informal discussion body that still has to decide whether it wants to form part of the Constitutional structures or establish its own structure to discuss issues of common concern. Five Khoisan groups are represented in this informal body namely the Griqua, the Nama, the San, the Koranna and the Cape Heritage Council Group (Oudtshoorn area).

17 S 184(5)(aA) inserted by s 9 Constitution of the Republic of South Africa Second Amendment Act 44 of 1995.

18 National House of Traditional Leaders Act 10 of 1997 (previously Council of Traditional Leaders Act substituted by Council of Traditional Leaders Amendment Act 85 of 1998).

19 House of Traditional Leaders for the Province of the North West 12 of 1994.

20 KwaZulu-Natal Act on the House of Traditional Leaders 7 of 1994.

21 Mpumalanga House of Traditional Leaders Act 4 of 1994 as amended 1998.

22 House of Traditional Leaders Act 6 of 1994.

23 Northern Province House of Traditional Leaders Act 6 of 1994.

The 1996 Constitution provides that all legislation in force will continue to exist until repeal or amendment.²⁵ Consequently, all laws enacted in terms of the 1993 Constitution, dealing with the National House and Provincial Houses of Traditional Leaders, are still in force. This however does not prevent Parliament or the Provinces from repealing these Acts and therefore the institutions.

3. National House of Traditional Leaders

The National House of Traditional Leaders was established²⁶ and inaugurated on the 18th of April 1997 in Parliament, in terms of the *National House of Traditional Leaders Act* of 1997.²⁷ The House consists of 18 members. Each provincial House can nominate 3 members²⁸ who are not members of Parliament or members of the provincial legislature to be members of the House. Nominations are made by means of a resolution of a Provincial House.²⁹ At the first meeting of the National House a chairperson and deputy chairperson have to be elected.³⁰ At present the Chairperson of the National House is *Inkosi* MB Mzimela from KwaZulu-Natal and his deputy is *Morena* MF Mopeli from the Free State. The National House has its meetings at the Department of Constitutional Development in Pretoria.³¹ A secretary for the House is appointed by the Department to assist the National Council.³²

The objects of the National House are³³

- "to promote the role of traditional leadership within a democratic constitutional dispensation;
- to enhance unity and understanding among traditional communities; and to enhance co-operation between the National House and various Provincial Houses with a view to addressing matters of common interest."

24 Eastern Cape House of Traditional Leaders Act 1 of 1996.

25 Item 2 Schedule 6.

26 S 2.

27 10 of 1997. Previously National Council of Traditional Leaders – cf also Anon "Bill to change Council" *The Citizen* (1998-06-13) 14.

28 S 4(1).

29 S 4(2).

30 S 9(1). Election procedures are described in s 9(2)(b)-(c).

31 The National House should meet at least once a year during the sitting of Parliament – s 9(3).

32 S 14.

33 S 7(1).

The functions of the National House include the following:³⁴

- It may advise national government and make recommendations regarding
 - matters relating to traditional leadership;
 - the role of traditional leaders;
 - customary law; and
 - the customs of communities observing a system of customary law.
- It may investigate and disseminate information on the above-mentioned matters,
- At the request of the President, it has to advise him or her on any matter referred to it.
- It has to submit an annual report to Parliament.

The National House may make its own rules and orders to conduct its business and proceedings,³⁵ to establish committees and to describe its functions, order and proceedings.³⁶ Decisions are made by way of majority of votes of the members present.³⁷

The National House continues to exist for a period of five years after its establishment.³⁸ After its dissolution the existing members will continue to be members of the National House and the House will remain competent to exercise and perform its powers and functions until a new National House has been established.³⁹ The President will in the meantime be able to summon the National House of Traditional Leaders by way of proclamation in the *Government Gazette* to an extraordinary meeting in order to deal with urgent business.

34 S 7(2)

35 A majority of all members constitutes a quorum – s 11.

36 S 10. The following committees have been established: management committee, rules committee, constitutional development committee, internal arrangements committee, social development committee and the committee on traditions, customs and culture.

37 S 12

38 S 3 (1)

39 S 3 (2)(a)-(b)

A person has to vacate his or her office if he or she becomes a member of Parliament or of a provincial legislature or is absent from three consecutive meetings without having obtained leave of absence.⁴⁰

Although the National House of Traditional Leaders is a constitutional institution it has experienced some problems. According to the 1993 Constitution the National Council (now House) had to advise Parliament on matters affecting them. Neither the 1996 Constitution nor the *National House of Traditional Leaders Act* places an obligation on Parliament to refer any legislation to the National House. From the memorandums of Bills published since the establishment of the National House, it is apparent that only a few of these Bills were discussed in the House. It seems that these discussions were initiated by the South African Law Commission⁴¹ and not by Parliament itself. The Bills that were discussed with the National House were the Recognition of Customary Marriages Act 120 of 1998, the Intestate Succession Amendment Bill⁴² and legislation dealing with childcare.

Since the establishment of the National House various pieces of legislation directly or indirectly impacting on the institution of Traditional Leadership, customary law and customs of Traditional Communities were passed by Parliament.⁴³ A few examples are the *Extension of Security of Tenure Act* 62 of 1997, *Land Restitution and Reform Laws Amendment Act* 63 of 1997, *Housing Act* 107 of 1997, *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998, *Local Government: Municipal Demarcation Act* 27 of 1998, *National Water Act* 36 of 1998, *Animal Improvement Act* 62 of 1998, *National Environmental Management Act* 107 of 1998, *Local Government: Municipal Structures Act* 117 of 1998.

The question that must however be asked is whether the National House would have the time to discuss the Bills and to advise Parliament if all relevant Bills were referred to it. Even if advice is given, there is no guarantee that this will be considered or

40 S 6(1). A casual vacancy can be filled for the remaining period – the person has to be nominated in terms of s 4 – s 6(2).

41 Cf also Anon "Traditional leaders oppose merging of customary law" *Business Day* 15 January 1998 4.

42 B 109-98.

incorporated into legislation. Some Acts have a direct impact on communities as in the case of demarcation of local government boundaries. In the former KwaNdebele one community will, for example, fall under the jurisdiction of three local authorities and in two provinces. Legal and administrative chaos will be created that will be no different from the former "homeland system."⁴⁴ Had the *Local Government: Municipal Demarcation Act 27* of 1998 been discussed by the National House, they might have been able to prevent the absurdity mentioned above that may be created by this Act and to explain to Parliament what the effect and impact of this Act will, for example, be on development in their areas.⁴⁵

On the other hand, if all new bills are to be referred to the National House, they must have the administrative capacity to handle these matters. At this stage the Department of Constitutional Development provides a secretary for the House, a typist and a researcher. If the National House has to meet more regularly, this could also result in financial implications. Other ways of communication can of course also be created via computers and telephonic conferences. For the National House to function properly and effectively, it seems that more staff will be needed.

Members of the National House attend meetings of parliamentary committees in their personal capacity or in their capacity as chairpersons of one of the National House's committees and are not necessarily mandated by the National House to do so.

Ways and means have be found to improve the relationship between Parliament and the National House. Parliament must be informed of the needs and concerns of traditional communities.⁴⁶ This is of particular importance in the light of the address of the President to Parliament in 1999 where he stated that the poorest of the poor live in the rural areas and that the development of these areas is a priority of

43 CF also Anon "Chiefs demand more financial perks" *Business Day* 27 Junie 1997 6.

44 CF in this regard Olivier "Selfregerende gebiede: totstandkoming, bevoegdheid en probleem: onoplosbare juridiese chaos" 1990 *Journal of Juridical Science* 108 – 134; Du Plessis "integration of existing environmental legislation in the provinces" 1995 *South African Journal of Environmental Law and Policy* 23 – 36.

45 CF eg Eybers " Raad kry duisende insette oor nuwe grense" *Beeld* 1 February 2000 2.

46 CF also Fourie "Viljoen praat met kapteins" *Beeld* 19 May 1999 7.

government.⁴⁷ It is suggested that a more formal discussion forum between the President (or members of Cabinet) and members of the National House should be established where matters of national concern, such as the development of the rural areas or the position of women, can be discussed.⁴⁸

The national Act does specify that matters of common interest should be discussed by the National House and the Provincial Houses of Traditional Leaders. There are some complaints from Provincial Houses that they do not receive enough feedback from National House meetings. As some members of the provincial Houses are members of the National House, this may be a problem of internal communication rather than of legislation.

The Act makes no provision for the remuneration of members of the National House. At various workshops and conferences this has been noted as a serious problem.

4. Provincial Houses of Traditional Leaders

As has been stated above, all the provinces except the Western Cape, Gauteng and the Northern Cape have established Houses of Traditional Leaders. It is argued that there are no traditional communities in these areas, although the Griqua and Khoi also claim that they have traditional leaders.

The composition of the Houses differs from province to province. In terms of the Eastern Cape House of Traditional Leaders Act of 1996⁴⁹ the House is composed of 23 representatives of which 20 are male and 3 female.⁵⁰ The Department of Local

47 Mbeki "'n Nasie aan die werk vir 'n beter Suid-Afrika" *Beeld* 30 June 1999 13. 48 Cf also Anon "Traditional leaders' role stressed" *The Star* 28 May 1998 6. 49 1 of 1996 as amended by the House of Traditional Leaders Amendment Act (Eastern Cape) 7 of 1997.

50 Heads of traditional authorities have to convene a community meeting (imbizo) – the date of such meeting is to be determined by the Premier in the Provincial Gazette. The traditional leaders and members of the community present must elect two candidates (traditional leaders) to participate in the nomination of members of the House of Traditional Leaders. The procedure of such election is to be determined by the meeting. Cf reg 2 of Regulations issued in terms of the Act - 3 September 1996. The magistrate must then be notified of the nominations. The traditional leaders so elected constitute a single electoral college in respect of that region. Members of the

House have to nominated from this college according to the determined number; members must qualify in terms of the Act. Ciskei is deemed to be a single area. The nomination meetings are

Government and Traditional Affairs provides administrative support for the House. The Act provides that legislation must be referred from the provincial legislature to the House and also describes how advice from the House should be dealt with. The Legislature is, however, not obliged to accept recommendations from the House.

In the Free State the *House of Traditional Leaders Act*⁵¹ determines that the House consists of 15 members, mainly traditional leaders elected from the various districts as described in the schedule to the Act.⁵²

The KwaZulu-Natal House consists of 76 members and the executive committee has 5 members.⁵³ According to section 5 the House consists of three representatives from each of the regional authorities,⁵⁴ *Inkosi* of the Amangwana and Amazizi tribal authorities, one person nominated by the *Ingonyama*, the traditional prime minister to the *Ingonyama* or his representative and "not more than two representatives from the total number of tribes in the Province proclaimed under any other law"⁵⁵. The *KwaZulu-Natal Legislative Remuneration Act*⁵⁶ makes provision for the payment of salaries and allowances to members of the House of Traditional Leaders.

According to the *Mpumalanga House of Traditional Leaders Act*⁵⁷ the House consists of 21 members from all regions and all levels and of both genders. Members are elected by an electoral college consisting of all traditional leaders in Mpumalanga

open to the public but the public may not participate in the meeting. The regions and number of seats are: Umzimkulu region 1; Qaukeni region 2, Nyanda region 2, Maluti region 2, Emboland region 2, Tembuland region 2, Western Tembuland region 2, Gcaleka region 2, Fingoland region 2, Ciskei region 3 – which gives a total of 20 seats.

51 6 of 1994.

52 S 3(i). Bakwena ba Mopeli: 3 traditional leaders; Batlokwa Ba Mokotleng: 3; Barolong ba Seleka 3; Batlokwa ba Makgalong:1 traditional leader and 2 representatives; Makgolokwe: 1 traditional leader and 2 representatives.

53 *KwaZulu-Natal Act on the House of Traditional Leaders* 7 of 1994.

54 Elected by members of the regional authorities – s 5(2)(a).

55 Elected by an electoral body consisting of 2 members of each tribe – s 5(2)(b).

56 2 of 1994. The Act prescribe the basic salary (cf Schedule) as well as deductions from salaries for the non-attendance of meetings or the failure to attend until adjournment without a proper excuse (s 4-5).

57 4 of 1994. 22

sitting in a special meeting convened for this purpose by the speaker.⁵⁸ The House has various committees to help it achieve its purpose. These committees are:

- Executive Committee comprising 5 members.
- Standing Committee on Recognition, Appointments, Dispute Settlement, Removal/Reinstatement of *amakhozi* comprising 6 members.
- Standing Committee on the Rules of Procedure/Internal Arrangement and Local Government comprising 5 members
- Standing Committee on traditional Authorities' Accounts comprising 4 members
- Standing Committee on Traditional and Cultural Activities comprising 6 members.

In the Northern Province the house consists of 36 traditional leaders. Of this number two are women.⁵⁹ The Department of Local Government and Traditional Affairs assists the House in administrative matters. The House in turn assists the Department in, for example, solving chieftainship disputes.

The North West House of Traditional Leaders⁶⁰ consists of 24 members and includes⁶¹ two *dikgosi* or *dikgosigadi* elected by the *dikgosi* or *dikgosigadi* in each of the regions referred to in the Schedule to the Act.⁶² Four persons are appointed by the

58 Schedule 1. The procedure in the electoral college is also described. Nominations have to be sent to the House of Traditional leaders 30 days before the election. Only Traditional Leaders can nominate and second other Traditional Leaders. The nomination must be accompanied by a motivation. The names of the nominations must be made public 14 days before election.

59 *Northern Province House of Traditional Leaders Act 6 of 1994* as amended by the *Northern Transvaal House of Traditional Leaders Amendment Act 1 of 1995* and the *Northern Province House of Traditional Leaders Amendment Act 5 of 1996*. According to this section the total number of members may not exceed 36 – it is a prerequisite that the members must be fairly and reasonably representative of the districts established in terms of Proc 51 of 1995. Members are to be nominated and elected from the districts – the districts are describe in regulations that were issued in terms of the Act on 13 March 1997: Central district 3; Northern District 13; Lowveld District 8; Southern District 8; Western District 3 and Bosveld District 1. Provision is made that the Premier may increase or decrease the members of the House in case of vacancies (reg 3(2)).

60 *House of Traditional Leaders for the Province of the North West Act 12 of 1994*.

61 S 3(1).

62 (a) Bafokeng, consisting of the following districts— Bafokeng, Koster, Rustenburg 1[8], Rustenburg 2[9], Ventersdorp, Potchefstroom and Klerksdorp; (b) Mankwe, consisting of the district of Mankwe; (c) Taung, consisting of the following districts - Taung, Bloemhof, Christiana, Schweizer-Reneke and Wolmaranstad; (d) Odi, consisting of the following districts -Odi, Brits [1] and Pretoria [7]; (e) Ditsobotla, consisting of the following districts - Ditsobotla, Coligny, Delareyville [2] and Lichtenburg [4]; (f) Kudumane, consisting of the following districts

- Kudumane, Ganyesa, Kuruman [3] and Vryburg [1]; (g) Lehurutshe, consisting of the district of Lehurutshe and shall include for the purposes of this Schedule, Zeerust or Marico in principle if

Executive Council by virtue of their expertise, experience and knowledge of indigenous law and custom of the people. Presently one of the nominated members is a woman. The North West Act describe the regions that may nominate members to the House in the Schedule to the Act.⁶³ The Department of Local Government and Housing is responsible for administrative assistance to the House. The *Remuneration of Members of the House of Traditional Leaders for the North West Province of the North West Act 14 of 1995* provides for the payment of allowances to members of the North West House.⁶⁴

The functions of the provincial Houses of Traditional Leaders as described in the various pieces of legislation also differ. Five of the six houses explicitly make provision for studying legislation dealing with traditional law and customs referred to them by the speaker of the different Legislatures. Houses have 30 days to comment. Failure to comment may result in the Bill being passed. If objections are raised, the Bill may not be passed for a period of 30 days. There is, however, no indication of how objections raised by the House should be dealt with. There is no obligation on the Provincial Legislatures to take any of these comments or objections into account. This procedure is in line with the procedure prescribed in terms of the 1993 Constitution (s 183). The Free State only refers to the functions of the House as those described by the Constitution (at that stage the 1993 Constitution) or any other Act. The 1996 Constitution does not contain a similar provision. KwaZulu-Natal and North West give a more detailed exposition of the functions of the respective Houses. According to the KwaZulu Natal Act the House may make proposals to the provincial government and Cabinet on any draft Bill or executive action dealing with Traditional Authorities, indigenous and customary law or the status, powers, function and organization of tribal and traditional authorities, indigenous land tenure, Zulu tradition and customary law dealing with inheritance, marriage and family, tribal

Marico 1 or 2 is not Zeerust; (h) Madikwe, consisting of the following districts— Madikwe, Marico [6], Marico 2 and Swartruggens [10] with the exclusion of Zeerust; (i) Moretele, consisting of the following districts— Moretele and Warmbad [12]; (j) Molopo, consisting of the following districts— Molopo and Mafikeng [5].

63 S 3.

- 64 This includes a sitting allowance for each day, travelling and subsistence allowance or any other allowances that may arise from time to time – s 2(a)-(c). 22

courts and taxation levied by traditional authorities.⁶⁵ The North West Act refers to inter alia the establishment and recognition of tribes, the appointment, recognition, deposition and disciplining of traditional leaders, the delegation of powers to traditional leaders and the administration of justice.⁶⁶ The North West Act is the only one that refers to the co-ordination of developmental activities of provincial government.

Both the KwaZulu Natal Act and the North West Act state explicitly that all duties, powers and functions of Traditional Leaders (in KwaZulu Natal – *Ingonyama* and *Amakhosi*) that existed before the 1993 Constitution remain in force. In the case of KwaZulu-Natal these powers and functions may only be withdrawn by a resolution of the House based on a two-third majority.⁶⁷ In the North West Act it is further stated that "traditional leaders shall continue to enjoy the personal status they have hitherto enjoyed and shall in regard to ceremonial and traditional matters and at ceremonial occasions within their areas take precedence over any person."⁶⁸ None of the other provinces have similar provisions in their legislation.

All the Acts regulate meetings and the election of the chairperson and deputy chair as well as the qualifications and disqualification of members of the different Houses. All the Acts state that the elected member should be at least 21 years of age, of sound mind, solvent and should not have served a term of imprisonment (as described in the Acts). Four of the Acts specify that the elected members should be traditional leaders or at least heads of community authorities. The Free State Act does not contain any limitation in this regard and the North West Act makes provision for the appointment of non-traditional members (as mentioned above).

Rules and orders regulating the activities of the various Houses, as described in the different Acts, can be promulgated by the Premier.

65 S 3.

66 S 3(2).

67 S 2.

68 S 1(2).

In all legislation⁶⁹ provision is made for a quorum of one-third in the case of ordinary matters and a quorum of half of the House where Bill is voted on. Decisions are made by majority vote.

There are specific provisions for the remuneration of members of the different Houses. Remuneration has to be provided for in the various Provincial Revenue Funds. In some provinces the amount is determined by the Premier (e g Free State); in other instances it has to be determined by provincial legislation (e g Northern Province and KwaZulu-Natal).

Only the Mpumalanga Act makes provision for the taking of an oath by the members of the House when taking their seats in the House. The oath has to be administered by a judge of the High Court.⁷⁰

In the case of four Houses (Mpumalanga,⁷¹ Northern Province,⁷² Eastern Cape⁷³ and KwaZulu-Natal⁷⁴) the electoral process is described in either the Act or the regulations issued in terms of the Act. In the case of North West the election process is determined by the Premier from time to time.⁷⁵ The nomination process of the Free State House of Traditional Leaders⁷⁶ is not described.

The different Acts provide for the appointment of a secretary for each of the Houses. The appointment is made by the chair of the House in consultation with the Public Service Commission, the government or in, some instances, the Premier.

Definitions of inter alia traditional leaders, traditional authorities, *inkosi*, *amakhosi*, community authorities, *kgosi*, *kgosana* and *motshwaraledi* are included in the legislation.

69 Except the North West Province that has no provision in this regard.

70 S 15 read with schedule 2 of the Mpumalanga Act.

71 Schedule 1 of the Mpumalanga Act.

72 S 3(5) read with reg 5-7 of the regulations issued in terms of the Act on 13 March 1997

73 Regulations issued in terms of the Eastern Cape Act on 3 September 1996.

74 S 5 of the KwaZulu Natal Act.

75 S 3(3) of the North West Act.

In the Northern Province Act the powers, privileges and immunities of members of the house are described.⁷⁷ Members for example have freedom of speech and debate in the House. In the North West Act specific provisions regarding matters of immunity from legal proceedings,⁷⁸ freedom of arrest,⁷⁹ control of entry,⁸⁰ printing of minutes without authority⁸¹ and acceptance of bribes are included.⁸² The North West Act is the only one to do so.

The following problems exist regarding the proper functioning of the Houses of Traditional Leaders:⁸³

- The Houses of Traditional Leaders either do not have budgets or only have very limited budgets. Only in KwaZulu-Natal this does not seem to be a major problem.
- Infrastructure (lack of facilities, staff and funds) is a problem in some provinces. In this regard transport to and from the meetings is also mentioned. In some provinces this does not seem to be a problem (e g KwaZulu-Natal and Free State).
- In some provinces members of the House claim that they are not remunerated as provided for in legislation.
- Bills that have an impact on traditional leaders, indigenous or customary law and customs are not always referred to the House in some provinces.
- In cases where the Bills are referred, it could sometimes not be discussed properly due to a lack of time and expertise.
- If complaints or suggestions were raised with regard to the Bills, they were sometimes ignored, as there is no obligation on the provincial legislature to take them into account. No procedures are provided for in this regard in either the legislation or the rules. The Houses have no real power to influence legislation dealing with Traditional Authorities, customary law and customs. A

76 S3 of the Free State Act

77 S 15

78 S 10

79 S12

80 S13 and 14

81 S17

82 S16

83 These complaints were raised during discussion time at various workshops, training sessions, lectures and conferences attended or presented by the authors and by members of these Houses in the course of personal interviews.

good example is land and environmental legislation that impact on these communities to a large extent without giving them a change to comment.

- In some provinces there are still disputes regarding "legitimate" Traditional Leaders. It is felt that legitimate leaders are not formally appointed and that some of the appointed leaders (e g some headmen) are not legitimate. These allegations have a bearing on the composition of the House of Traditional Leaders in the Northern Province.
- There are still allegations that the composition of the Houses are not representative of all the regions in some provinces.
- The relationship between the National House of Traditional Leaders and the provincial Houses of Traditional Leaders are not dealt with in any of the provincial Acts.
- There is no description or definition in the legislation of the relationship between the House and other state departments or even, the provincial government (except with regard to the referral of legislation). It could hamper development in the rural areas if issues of common concern in these areas are not discussed by the relevant departments and the Houses of Traditional Leaders.
- It has been suggested by the Eastern Cape House that the status of the Houses should be higher and that it should perhaps be regarded as part of the National Council of Provinces.
- In more than one instance the need for training of Traditional Leaders has been stressed. According to the Traditional Leaders this will enable them to participate effectively in discussions on issues (such as development) that have an impact on their communities.
- The various Acts make provision that the Houses may comment on provincial legislation. Some Houses feel that they should also be able to comment on national legislation that has an impact on them, be it through the Houses itself or the National House. There is, however, no provision for such a procedure in any of the provincial Acts.

- The number of meetings differs from province to province. In all instances it is stated that the Houses should have at least one meeting a year. In some instances it is specified that this meeting should take place during the province's legislative session. The number of meetings also depends on the availability of funds and staff and in some instances on the Premier who calls these meetings.
- Some of the Acts still refer to the 1993 Constitution and have to be amended to bring it in line with the 1996 Constitution.
- The members of the House are not accountable to traditional leaders who elected or nominated them.
- There is no obligation on the members of the House to communicate findings of the House to their members.
- It was suggested that the functions of the Houses could be extended to play a role in dispute resolution regarding issues in traditional areas (e g disputes between local government and traditional authorities, succession of chieftaincy and developmental issues).
- There is no co-ordination between the different Houses of Traditional Leaders.

5. Conclusion

The National Council of Traditional Leaders and the provincial Houses of Traditional Leaders are Constitutional institutions. They came into existence in terms of the 1993 Constitution and were perpetuated in terms of the 1996 Constitution.

It may be expected of Constitutional institutions to function properly and effectively. That is, however, not the case with the National House and the various provincial Houses of Traditional Leaders. This is mainly due to a lack of infrastructure and the fact that budgets are inadequate for the proper performance of functions. These functions include their role in matters that concern their communities. Approximately 28 million people in South Africa live as members of traditional communities. There should be an effective way for them to express their views and to uphold their traditions and customs and also to ensure that they are not left behind in the development of the country. As has been stated by President Mbeki, people in the rural areas are the poorest of the poor. This is a result not only of the former apartheid policy but also of a lack of interest by former governments to invest in rural areas. Attention and investment were focused mostly on the development of urban areas. People in rural areas had no voice. It should be ensured that their comments on legislation are taken seriously and are not dismissed as a mere formality.

The 1996 Constitution gives them this voice, but for the intended institutions to function properly, they must be effective. It is proposed that in the case of the National House of Traditional Leaders the following should apply:

- All national Draft Bills dealing directly or indirectly with traditional and related issues should be referred to the National House of Traditional Leaders.
- Funds should be made available to the National House to debate (with the assistance of specialist advisors or those involved in the drafting of the Bill) the impact of the proposed legislation on the communities.
- The suggestions of these institutions should be discussed with them and, as far as possible, included in the Bills.
- The final Bill should be referred to the National House of Traditional Leaders for discussion during the parliamentary session. Members of the House could, for example, have a seat in the relevant parliamentary committee to express the concerns raised by the National House.
- In the event of the proposals of the National House not being accepted by the Parliamentary Committee, provision should be made for consultation and mediation between the parties.
- A forum should be established where members of the National House of Traditional Leaders could have discussions on a regular basis with the president or Cabinet on matters of common concern to traditional communities (e g violence, crime, poverty, development etc). These forum discussions should not be used to discuss issues such as remuneration and the administration of the House that could be solved on a different level. This forum should be used to discuss solutions for the rural areas in South Africa on a policy level making full use of the experience, wisdom and knowledge of the Leaders.
- The chairperson of the National House or his or her representative should be allowed to address Parliament at least once a year on issues that concern traditional communities. They could, for example, also present their annual report orally. Time should be allowed for questions.
- The budgetary and infra-structure problems should be solved making use of modern communication media. Traditional leaders should, where necessary, receive

training in the use of, for example e-mail, to facilitate communication.

- The National House should be able to disseminate information on matters of concern or interest to members of traditional communities. In order to do so proper communication channels should be put in place.
- Members of the National House should be made accountable to the House that nominated them. They should give a report back on matters discussed in the National House on a regular basis. This information should be disseminated further to the Traditional Authorities in the relevant province.
- • The *National House of Traditional Leaders Act* 10 of 1997 should be amended to include the above-mentioned proposals. With regard to the provincial Houses of Traditional Leaders the following is proposed:
 - All national draft bills as well as provincial draft bills dealing directly or indirectly with traditional and related matters should be referred to the provincial Houses of Traditional Leaders. The same procedure should be followed as proposed with regard to the National House.
 - A similar forum as proposed with regard to the National House should be established where members of the provincial Houses of Traditional Leaders could have discussions on a regular basis with the Premier or MEC's on matters of common concern as set out above. These forum discussions should also be used to formulate policy and not to discuss infrastructure and remuneration problems.
 - As is the case with the National House the chairperson of the provincial House or his or her representative should be allowed to address the provincial legislature at least once a year on issues that concern traditional communities. If necessary the Houses could be obliged to produce an annual report as is obligatory for the National House of Traditional Leaders.
 - • The chairpersons of each House should be allowed to address the National Council of Provinces (or the chairperson of a forum of Houses of Traditional Leaders – see below) at least once a year on matters of common concern. An obligation should be placed on the National House to present an annual report to the National Councils of Provinces.

- In accordance with the proposal of the Eastern Cape House of Traditional Leaders, the Houses of Traditional Leaders should be regarded as extensions of the National Council of Provinces or should at least have the same status.
- The budget, infra-structure and remuneration problems should be solved without further delay.
- Modern communication media can be used. Traditional leaders should, where necessary, receive training in the use of, for example e-mail, to facilitate communication.
- The provincial House should be able to disseminate information of concern or interest to members of traditional communities. In order to do so proper communication channels should be put in place.
- Members of the provincial House should be accountable to the regions or communities who nominated or elected them.
- A forum of chairpersons of the various Houses of Traditional Leaders could be established. Such a forum could meet once a year or more if necessary to discuss matters of common concern in the provinces. This forum could report the National Council of Provinces.
- The Department of Constitutional Development is busy with an audit on the legitimacy of appointed traditional leaders. This audit should address the concern expressed that some members of the Houses are not legitimate Traditional Leaders.
- It must be ensured that the composition of the Houses is representative of all regions in provinces. If necessary the provincial Acts should be amended in this regard or rules to the effect should be promulgated.
- The relationship between the National House of Traditional Leaders and the Provincial Houses of Traditional Leaders should be spelled out. An obligation to report annually to the National House could be placed on Provincial Houses and vice versa. The members of the Provincial Houses that also have seats in the National House should be obliged to report to the provincial House after each meeting of the National House.
- The relationship between the Provincial Houses and government departments

(e g agriculture, local government, land affairs), that affect life in rural areas, should also be spelled out. A forum could be established for regular feedback from the House to the relevant departments and vice versa.

- The Provincial Houses should within budgetary limitations be able to determine the frequency of their own meetings.
- The Provincial Houses should play a role in the mediation of disputes in the rural areas (e g disputes between traditional leaders and local government, succession of chieftaincy and developmental issues).
- Provincial legislation should be amended to provide for these proposals.
- The Khoisan should be accommodated in a more formal forum, either as part of the National House of Traditional Leaders or as a forum on their own. They should also be able to comment on legislation affecting them or the region in which they live and have discussion forums with national government from time to time. It is, however, for the Khoisan themselves to decide on the final structure that will accommodate their needs.

Although some problems exist, the National and Provincial Houses are regarded by the represented communities and Traditional Leaders as important. They serve as a binding factor in the various provinces and constitute a significant discussion forum. These Houses are repositories of much wisdom and serve as focal points of collective customary values. Once they are linked into the system of national and provincial departments they will play an important role in the protection and promotion of the Constitution and constitutional principles and values in South Africa.