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THEME COMMITTEE 2

MEETING: 14/08/95

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## THEME COMMITTEE 2 MEETING

14 AUGUST 1995

### TAPE 1

Chairperson

It appears that everybody receives the documents very late and I've had some discussions and suggest if you approve that we agenda for half an hour that we atleast read through the documents quickly and then we start at half past two.

Is that okay? Thank you.

27 (1) and together with that as a document the submissions of the IFP with regard to Constitutional amendments that goes with this document.

It went a bit over the half an hour but now never the less we are starting. There's an apology from Mr Eglin who is attending a Sub-Committee Meeting and Mr Coetzee Bester is sitting in for Mrs Badenhorst and we brought Mr. David Mahlangu along to participate in the traditional authorities if you've got no objection to that. I would just call on Mr Machlangu to give us a brief feedback with regard to our submissions to the Constitutional Committee that was discussed last Friday.

Mr Mahlangu

Chairperson I'll be very brief, I don't really have to take time in this dealing with that issue. Our report on the National Executive and the National Assembly and the Electoral System was tabled on Friday in the CC meeting and discussed at the same time and it was not only the report which was discussed as you are aware that all reports were accompanied by ready draft formulations all three of them and all the draft ... draft formulations were discussed in details clause by clause and let me say it went on very well. Mr Ackermann was also there, Peter was there .. Hendrickse and they assisted we assisted one another in discussing those reports and draft formulations together. All what I can say is that all the contentious issues and the issues which were not really clarified on Friday were then referred to the suitable committee to go and deal with those issues that were not referred back to us as a Theme Committee. But what will be happening in the suitable committees is that members of the Theme Committee will be required to go and clarified the position there so that the committee will be in a suitable position to take a discussion. The suitable committee is meeting right now at 2 o' clock today and some of us has got to be there.



But our issues are only coming as item number 6 on the agenda - The National Assembly and the National Executive, which will be discussed if they ever come there. Before that they'll be discussed in the public protector amendment formulations, the Human Rights, Courts and Systems Justice which is a very very long agenda and doubt that they will come to this to issue... our issues today but anyway we've requested that they .. that immediately they start dealing with that they should notify us here so that some of our people could be the be given a leave from this meeting and then attend that one of the suitable committee. So Chairperson briefly its that I'm not going to get into what was contentious and what was not contentious, and not where the issues were clarified, I think members are well accustomed to that. Thank you very much.

Chairperson I have just been informed that the National Assembly will not be discussed at all at the suitable committee this afternoon. Mr. Ackermann?

Mr Ackerman Mr Chairman I just may add that the Electoral Report was not discussed on Friday it was only the National Assembly and the Executive so that is still to be decided or discussed at the next meeting of the CC.

Chairperson Can I make an addition of that that Mr. Ackerman was out, he was introduced completely (laugh) it was completely introduced the system ... I mean we went through all the drafts of the CC because those drafts were automatically dealt when we dealt with when we dealt with the National Executive and the National umm the and the National Executive but all was said was that we'd revisit that because of the IEC still to be concluded by Theme Committee 6. So we need to revisit that in the next ...

Chairperson Thank you Mr Mahlangu. The next item is the report on Constitutional Amendment. We need to take certain decisions there on we haven't got draft formulations but the technical advisors assured me earlier on that they are meeting tomorrow and somehow or the other they will be able to start with the draft information for submission to the CC if we reach certain agreements this afternoon. I think the Constitutional Amendments will be dealt with by Professor Steytler and the Traditional Authorities by Professor Mthlapo?. Professor Steytler?

*Mthlapo*



Professor Steytler

Thank you Mr Chairperson. The report on Constitutional Amendments is fairly short so we can quickly go through it ... Mr Chairman the correct procedure is just to take the report then go through the tabular formulation of it and we'll probably deal with it section by section. The report deals with the parties submissions and also submissions received from the public. Only two political parties the ANC and the NP made separate submissions on the Constitutional Amendments the other parties refer to the amendment of the Constitution in there previous submissions. The relevant Constitutional principals we find in Constitutional principal 15 which provides for amendments to the Constitution but may require special procedures involving special majorities. We also point out in the report that at presently there are three distinct way in which the present Constitution is in fact entrenched. One there is an absolute entrenchment of the Constitutional Principals so that's one technique, the second one is a general provision that in any change or amendment of the Constitution two third atleast two thirds majority of all the members both houses required and thirdly where Provincial matters are dealt with and also pertaining to changing of boundaries a two thirds are required plus the involvement of the legislatures of those provinces. So there's examples of three different ways in which a Constitution may be entrenched. The draft report is then a number tabular form and then the positions of the political parties are reflected in the comments column as we note then very bold that there are no draft formulations provided for. The one reason is that there is two diversion views emerging between the ANC and the NP and the other is that the draft formulations are a fairly straight forward draft once those other problems in terms of is resolved, that is to say where the special and specific methods will should be adopted pertaining to particular provisions and one can deal with them as we go through. The just in terms of the submissions received and the public submissions just perhaps one comment there, there's one submission included under the in the package that we received regarding Constitutional Amendments which I think was wrongly inserted there. It is a submission by a big law firm in Johannesburg, Denuis Reise???, which addresses the problem of the problem which we dealt with pertaining to the National Executive namely the pres.. the power of the president to allocate the functions of one minister to another minister and I think we may just want to make a comment on this or prefer it to the correct committee or correct authority here. The argument or the suggestion by this law firm is that the present practise at the moment where the president may in fact change the allocation of powers from one minister to another



minister has led to problems in practise because people don't know how in fact it is who is now the responsible minister. They suggested therefore when they want to advise their clients so they would suggest then that simply added there that if such a change takes place that it be published in the Government Gazette. So one may just want to refer that to our earlier submissions or earlier views on the National Executive. They also suggest that it should be changed in the present Constitution. Mr Chairman if we then look at the tabular form of the report .... there on point 1 Special Majorities for Constitutional Amendment, most parties agree and that is simply reflecting the Constitutional principal. Then point 2, the Special procedures, parties again agree there but the nature of the procedures there are differences of view. The ANC broadly just describes that the procedures may are very broadly referred to the Constitution prescribed majority and procedures without defining what they should be. The IFP specifically suggests a cooling off period two separate legislative processes or a single legislative process and a referendum. And the NP suggests three different techniques or procedures. The one is where there is no possibility of amendment, secondly a special procedure a standard procedure two thirds adoption by both houses of parliament and thirdly for amendments relating to provincial matters that a different procedure be adopted there. Then on point 3, the question there is umm if it's agreed that a two thirds majority is required for Constitutional Amendment, then the question is what does that mean. Two thirds of who and the question really is the definition of parliament. If there's one house clearly two thirds of that one house the National Assembly. If it exists of two houses is it by joint session or does it mean two thirds in each of the two houses. Because the composition of parliament is not been clarified or haven't reached agreement on that its difficult to have any agreement on the definition of how the two thirds should be composed of. The extend of the majority here the it seems to be an agreement that two thirds should be the is at the adequate majority in general again there the exceptions to that in other for particular regions different procedures may be required than the two thirds majority.

Chairperson

Thank you Professor Steytler. Any comments on page one?

Dr Baard

Before you take that I want to make a point that what Professor Steytler raised in relation to the law firm is not relevant to this committee and I don't think we should discuss the matter and whatever they want they must go give it to the relevant committee.



We're not going to get involved whether or not first of all not involved in amending the present Constitution, there's a special select committee to do that and second the question of the relations of the powers of the present what the cabinet ministers we've dealt with. If there's anything else it must go there I don't think it's relevant to us here and especially not today. Certainly not relevant today.

Chairperson I think Professor mentioned that he's referring to the relevant committee.

Professor Steytler Mr Chairman I referred it because it was included in the in our package which is wrongly filed and I think therefore it was not submitted when we discussed that relevant issue.

Chairperson Can we then agree to this submission of page one to the CC?  
Thank you. I think we can because they are so inter-related we deal with two page two and three simultaneously. Any comments on that?

Dr Baard You see I'm not here discussing the submission of the National Party, but it does seem to me that the National Party submission is beyond procedures. I mean you've got it under nature of procedures here where it says that there are certain parts or aspects of the constitution should be beyond amendments. It's more than procedure. Because procedure only deals with how you are going to amend something. As I understand their position, their position is that there should be some parts of the Constitution which should be so entrenched that they are not capable of being amended. So it's not a matter of procedure. I'm just saying that you need to find a way to put that and ... and put that under contention because we haven't seriously discussed that issue about whether or not there should be those Constitutional entrenched provisions. So I'm just asking that you re-do it and put it under contention because it's more than procedure.

Chairperson Do you want to suggest a formulation?

??? Yes I basically agree with Dr Baard Mr Chairman to be handled separately.

Chairperson Any suggestion Professor Steytler?



- Professor Steytler Mr Chairman it's simple to ... to proceed the matter to say this report is on the amendment of the Constitution a even proceeding that is the question to whether certain provisions may be entrenched totally and therefore not subject to amendment at all. So it will simply be another column that we add in to set and there's no Constitutional issue pertaining to that but the obviously the ... the CA is open to certain provisions may not be amended at all so the ... I would just suggest a new cata a new column which simply says the total entrenchment of a particular provisions and then noted as a contentious matter.
- Chairperson Thank you. Anybody else? Well I didn't here I didn't see the person that asked the question.
- Dr Baard I can just inform the committee that we will submit a further submission on this on which issues you say that cannot be amended in due course. I think it will be after Thursday after our committee is sitting.
- Chairperson Well you must let the Chair see you then he can rule accordingly (laugh) Anybody else with page two and three? Can we then agree that this be submitted to the CC and that the necessary draft formulations be done? Thank you.
- Will it necessary to bring the drafts back to us?
- Mr Mahlangu I was just addressing that I think it should come.
- ??? Doesn't it go to the Core Group?
- Chairperson Only deal with that next Monday
- Mr Mahlangu Unless that meeting Monday its Core Group to finalise that and let it go to the CC.
- Chairperson Finalise it and then it can be submitted to the CC. Anybody in disagreement?
- ??? Mr Chairman, if .... is this thing working
- ?? Yes it's working



??? If there is no hurry for the report to be submitted to the CC then they'd be no problem in bringing it here first of all for us to peruse it before it's submitted. But if there is some hurry then perhaps we would think otherwise. When is this to be submitted to the CC? Perhaps I should never ask that question?

Chairperson It's not a question of is there a hurry or not but the CA has requested us to carry on with the job as speedily as possible and when we've dealt with matters that we submit it to them so that it can defer the process.

??? Right lets have a look a it next week Monday Mr Chairman before it's submitted

Chairperson Mrs S...

Mrs S.... I just want to slightly differ with my colleague here I think we have in principal agreement on this thing so I don't think really looking at the report formulative report in the view of amending it and so forth would be necessary. I think that it must just go however I think we always complain that we don't want to be disempowered and I think if we agree this one can go because we've actually discussed that it's just a formulation that needs to come.

Chairperson Mr Hendrickse and then Advocate Holomisa

Mr Hendrickse I wish to conquer with my colleague Mr Chairperson, to my right (laugh) That I think we there seems to be a bilateral two parties here but we are all represent on the Core Group that it is in principal decision that if the Core Group experiences any problems that they then refer it back to us if not then they refer it to the CC and we are all represented there.

Chairperson All right everybody? Thank You.

??? Sorry Mr Chairman,

Chairperson No he said he's all right



Professor Steytler Mr Chairman, sorry the required amendment would that simply be a formulation what you require about what the provision would look like because then it will simply be two thirds atleast two thirds of the members then footnote how parliament will ever be determined and then another footnote which says different procedures made for specific provisions be required depending on the expectancy of the National point of view. Is that what you would require?

Chairperson More or less but more specifically what will the actual wording in the New Constitution be? That with the footnotes as been done with the National Assembly and so forth. No it's over to Dr Mshlapu? to deal with the Traditional Authorities.

Dr Mshlapu? Thank you. Thank you Mr Chairman. I would like to start off with a something of an apology. I note that as an Adhoc committee this was our first step at producing a report and so there may be some items in it that reflect our inexperience as opposed to other committees that have produced reports before. In particular when we come to the tabular formulation, I think that perhaps we have since learnt that the difference between the matters of contention and matters that are only due for comment, a slightly technical one. But having said that I'd like to start off by pointing out the submissions received by the Theme Committee on this particular issue of Traditional Leaders .... Leadership were quiet substantial. A 104 in number relating to private individuals and organisations alone quiet apart from formal groupings in political and civil society. We shall you can check that in the appendix that are attached. The headings under which we dealt with the submissions taken from an analysis of the submissions are those that are listed on page 8. The issues relating to recognition of the institution, the role and function of traditional leaders aswell, how to accommodate traditional leadership at National level, at Provincial level and at Local level. And then issues that seem to appear at the public hearing and also amongst the submissions. The last two whether the whole question of Traditional Leadership and the underpinning law which is the indigenous law and it's practices and finally the interface between Traditional Leadership and the Bill of Rights. The Constitutional Principals that are relevant to this exercise were principal 11 - Protection Cultural diversity and language. Principal 13 of cause the main one - Recognition of Traditional Leadership Leadership and Indigenous law. 17 Question of Democratic representation at each level of government and 34 indirectly the question of self determination by communities sharing a common



cultural and language heritage. Of the submissions received the clearest guidance was on the first point where there was near unanimity on the fact that the Constitution should condense some language explicitly recognising the institution of Traditional Leadership and explicitly recognising Indigenous law. Even the wording of Constitutional principal number 13 came in for a general level of agreement because as presently framed all of the submissions felt that it was an adequate vehicle to formulate for formulating the recognition of this institution even in a future Constitution. There was a small but passionate group of submissions that did not like Traditional Leadership and where they did make submissions it was mainly to say the institution is expensive, is outdated and each individual contended that recognising the institution was raced given the reason that white people do not have chiefs. The question of recognition of Indigenous law within the constraints of the Constitution also raised no controversies, the only matter one would like to bring before the Committee perhaps is the fact that in the submissions both of the IFP and those of Contralesa??? in the latter case the supplementary submissions there was language that suggest that an Indigenous law quite apart from being constrained by the Constitution should in fact be seen as a separate entity and in its own sphere should be assessed on its own terms and not be subjected to any other law. The Committee may perhaps want to give some thought to that. There were two organisations which proposed the radically different situation of governance in the country. There was the House of Royal which suggested the Constitution for a United Kingdom of South Africa which would have a hierarchy of houses at the bottom which would be the House of Delegates followed by House of Representatives above of which would be House of Lords. All of the structures headed by a House of Majesty.

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What about the Americans?

Dr Mshlapu?

Mmmm, no the House of Royal is a home grown product. The Americans are something called the Free African Foundation from Washington DC who propose an Industrial Bill of Nation rights. The rows and functions of Traditional Leaderships there was agreement that these could await a later election and all of the matters that seem to be matters of contention are in fact about detail and not about Constitutionalized issues. Accommodating Traditional Leadership National level again submissions revealed wide spread



support for the principal that Traditional Leadership should be accommodated at National level. Alternative approaches that seemed to emerge from this particular level of the discussion was the to give effect to the Principal of accommodation. There could be the addition of house of Leaders in a tri-cameral parliament or accommodating Traditional Leaders in an expanded Senate or a expanded National Assembly. There were several others. There was also equal unanimity on the question of the notion of a Council of Traditional Leaders as found in the present Interim Constitution. Even by those parties who endorsed other approaches as to how to accommodate Traditional Leaders in a National level. They seem to be wide spread, there was wide spread support for the council to be put into place. At Provincial level there was a great deal, there was a number, there was a great deal of ... of view points expressed. But all of the parties seemed to share the belief that this is the level at which Traditional Leadership would probably its strongest row. The differences were about the question of the mechanisms. How the lateral could be played and what ways should be employed to accommodate Traditional Leadership at Provincial level, but there was agreement that this is the level which is the natural home for Traditional Leadership. Mixed views about Traditional Leadership and the Local Government level, but again these mixed views were mostly about matters of detail. there was agreement over the need to incorporate the institution into local government and then everybody sort of diverged from that point onwards. The question was really how you accommodate Traditional Leadership at that level as we shall see when we get to the tabular representation. The question of Traditional Leadership and Customary Law or Industrial Law and practices the point of agreement that emerged was the fact that there is a necessary link between the Institution and Industrial Law. In fact it is accepted that the Institution finds its legitimacy in that system of Law and that in turn Industrial Law itself thrives under the system of Traditional government and there was wide spread agreement about this. Contralesa, ANC, NP would be in agreement so also would be the Q??? party of South Africa. M?? Tribal Authority so on the whole idea of the package is that there is something necessary of a necessary link between Traditional Leadership and the maintenance of Industrial Law and Culture. There was one or the M?? Tribal Authority for instance, are said that that package the Traditional Leadership stroke Industrial Law package has been largely responsible for the relative stability for Botswana, Lesotho and Swaziland, our neighbours after independence as opposed to



Mozambique, Angola and Uganda where those Traditional systems did break down. And most of the people made submissions about Traditional Leadership in support of their retention gave as their reasons the fact of the cultural legitimacy of the Institution. I would like to bring the committees attention to a submission in the general submissions of the Inkata Freedom Party which seems to suggest while one recognises Traditional Leadership and Industrial Law , one cannot overlook the question of entrenching the type of land holding which is communal because as far as the IFP is concerned the three go together: Traditional Leadership, Industrial Law and communal land holding. It is because the idea is that without that sphere in which the subsistence of people can be of land held according to Tenga?? that they understand and on which Customary Law finds its greatest expression. Then one would be recognising Traditional Leadership and Industrial Law in something of a vacuum. The IFP also interestingly make the point that the acceptance and recognition of Industrial law should be arrived at after taking care to allow people to voluntarily subject themselves to Customary Law and the practices and the courts that are involved in that system. Finally the Traditional Leadership and the Bill of Rights. A controversial subject as we found out at the public hearing there was again a wide variety of views. I think the only agreement analysing the submissions was that the recognition of Industrial Law and Traditional Leadership based on such law should be constraint by the Bill of Rights in other words that it should be under the superintendents of the Bill of Rights and not outside it. But apart from that there was no clear unanimity of any other issue and the views were varied. So that one could say in conclusion, the enthusiastic nature of the submissions and the number suggestions that there was a great deal of public interest in the subject of Traditional Leadership. A lot of the submissions were matters of detail or were matters of personal experiences and were not something that is capable of being formulated in a Constitutional form but it might be important to just run through some of the recurring themes in some of the experiences encountered by the submittals. One was the theme of N??. It was felt by significant numbers of people that the naming of various levels in Traditional Leadership hierarchy should now move towards the use of Industrial names. I notice that a lot of Provincial Organisations and also the NP felt strongly that the move to Industrial names was now overdue. Second point that emerged was the linkage of Cultural Values and Religious Values. People talked a lot whenever they mentioned Cultural Values there was a tendency to link them



with Religious Values. In particular amongst those submissions where people were suggesting that these values should be taught in the schools then you found a very consistent linkage between Religious Values and Cult... and Cultural Values. A third point was the question of checks and balances against abuse of power by Traditional Leadership and this is apparently animated but it suggest some suspicion in some quarters that left unsupervised the Institution can tend towards autocracy. And if then we go back to the schematic representation which is on, well it says page 27. Here page 26, 27. The first point hopefully sets out the level of agreement and unanimity that was found on the question of recognition except for the people who didn't just want anything to do with Traditional Leadership. All of the submissions of organised Political Society are in favour of the recognition of the Institution on status and role of Traditional Leadership and of Industrial Law. There was also mentioned as you will see under comments that the question of authentic or legitimate Traditional Leaders should now be looked at as a matter of urgency because again as we have pointed out that there was no real serious challenge to the view of the NP, Sanco??, Cocolenga, CPG and other submissions that when recognised is conferred, it should be conferred only upon authentic or logistic Traditional Leadership. Page 27. On the issues of the roles and functions of the Traditional Leaders generally, the only agreement that seems to emerge was that questions of status, functions and roles should be spelt out to separate legislation and that's therefore they not necessarily Constitutional matters and the Fed accommodate Traditional Leadership at National level. Wide spread agreement across the political parties on the fact that some way of accommodating them at this level must be found. There was no agreement as to how this should be done generally speaking although there was great agreement at least about the establishment of the council of Traditional Leadership even without actually without any particular unanimity as to what his role would be. Accommodation that's page 28 Traditional Leadership at provincial level. Again we have set out there it seems to me upon advise those matters that I included on that page that contention should largely be under comment. It is a question of a particular interpretation. Particularly in Qua Zulu Natal about the role of Traditional Leadership at provincial level and the direct difference of opinion is currently between the views of the Royal house of Qua Zulu, that Traditional Leadership and the Monarchy cannot be divorced and that the relationship between the two is that Traditional Leadership springs or Chief ?? or other levels



of leadership spring from Kingship and if you interfere with that relationship you are putting the cart before the horse and then things upside down and that has a .... has been an on going matter for ... for discussion in that province. Page 29, Local government. Three points of agreement. Traditional Leadership must be part of local government. I think that agreement has been running right through all the other levels of government. The second agreement is that anybody who plays a role as a service provider must be an elected or accountable official. That under principal suggestive that if it is Traditional Leadership that is wanting the role of service provider then either they should be prepared to submit themselves to a popular election with all that it entails or else they cannot handle the funding and the responsibility required to provide services without being transparent and accountable. And finally the question that where elected Traditional Leadership must relinquish their Traditional position seems to me a great deal of approval even though there were different view points relating to how that ought to be done and in particular noting for instance the Contralesa view again perhaps wrongly put under contention that favours re-instatement of the community by the community after the elected period of office has expired if the community should so wish to do in relation to their Traditional Leader. The other issues relate more to detail than to any constitutionalized matter. And on the last page item 6 and item 7, Traditional Leadership and Industrial Law and Traditional Leaders and the Bill of Rights. There were really no matters of contention. Agreement around these areas centring around the issue of the acknowledgement of the importance of Industrial Law to the Institution of Traditional Leadership and the feeling that oath should be subject to the Constitution and in particular to the Bill of Rights. Thank you Mr Chairman.

Chairperson

Thank you Professor Mahlangu. Open for discussion. Lets start with page 26. Any comments or are we all satisfied with that? Be stipulated Coetzee Bester.

Mr Bester

Chairman thank you very much. Comment number 3. If it was agreed by all different parties I would like us to consider the possibility to put it under the point of agreement that we should make the process of identification the authentic and legitimate Traditional Leadership that is mentioned in this document to be transparent objective and neutral in this process of having some people still to be Traditional Leaders afterwards and others not, we are going to have a possibility of conflict even more that we had



up to now and I think that we should even in these documents thought its a lot of detail we should recognise what.... something like what the National Party put into their document as a body of experts or something like that to be ..... to be part of the process of identifying the real Traditional Leaders. The ... the, maybe 90% of them there will not be problems, but its the 10% which is going to create a lot of conflict between different groups. Where my Traditional Leader is recognised and yours is not and we must.... we must be very certain about the procedures that we want otherwise we're going to have a lot of tribal wars again. And that I think we do not need in South Africa at this stage.

Chairperson

Mr Holomisa

Mr Holomisa

I was going to address something else but I think I need to respond to what Mr Bester has just stated. I think that if point number 1 was stated as a whole. It should be saying something to the effect that the recognition is going to be in accordance with Industrial Law which would mean that any Traditional Leader who would have to be recognised, must be recognised in terms of Industrial Law of that particular community of which he is a Traditional Leader. Now in the view of the ANC there would have to be a commission that will be set up in order to look at the authenticity of the Traditional Leadership Leaders whose positions are being contended. It would seem that that would be

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Mr Holomisa

to be a matter for a separate legislation to set up that consti... that commission it doesn't seem it's necessary for it to be so stated in a constitution because if you say as I say it will be according to Indigenous law. Well then it means anyone who falls outside of that category then is not a Traditional Leader and should not be recognised as such. I was going to ask the Professor there on 2 under agreement. Indigenous law should be recognised and made



subject of the constitution and any other law. I would have thought it should be something like subject to the constitution like any other law. If that is not the position then what does this mean. What other law do they have in mind which is going to be above Indigenous law other than the constitution?

Dr Mshlapu?

Thank you Mr Chairman, can I answer that. The language seems to come directly from constitutional principal 13 atleast the language people submitting on this issue used and that language seems to be aimed at placing Indigenous Law not only under the Constitution but under any other legislation that is elected by parliament within the limits of the constitution. At least that has been my understanding.

Chairperson

Mr Holomisa

Mr Holomisa

.... to wipe my reading off because usually its going to be but in the end if we're talking about legislation then rather than saying any other law the interpreted could mean even common law would subject Indigenous law to its....

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Dr Baard

Dr Baard

Can I just point out that Constitutional principal 13 doesn't say what point 2 says. If I may just read it Professor. It says according to shall be recognised and protected by the constitution. Indeed this law like common law shall be recognised and applied by the courts subject to the fundamental rights contending the constitution and the legislation dealing specifically there with. Which rather separate from saying and I would go along with ... with Mr Holomisa. I think what we should say is like any other law because as it is put there it is as if we're agreeing on a one hand that Indigenous law should then join the same status as Roman Dutch law but yet the other laws are .... are superior and so I ... I think in terms of agreement whatever as might go into the final constitution is a separate matter for now we should say like any other law so that to applying the same general principal Indigenous law would be applying to other laws.

Chairperson

Professor saying he's got no other problem. Thank you. Page 27. Any comment? Everybody seems to be satisfied



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Except I'd like to Professor again to explain to us what contention number 1 in the first column on page 27 is about. What exactly is this ... does this mean.

Dr Mshlapu?

Mr Chairman may I? This appeared from some submissions and from the public hearings. The idea there perhaps it is expressed in doubled fashion is that the recognition of or the state task functions and roles of Traditional Leadership can either be the very powers, roles and functions that Traditional Leadership enjoys now under Indigenous law and that there should be no expansion of these powers. An example one can give comes from work which is outside of this committee. The work of theme committee 5 for instance whether in their powers as holders of courts, Traditional Leaders should have exactly the same distribution that they enjoy under Traditional under Indigenous law and any that they've encountered by statute in other words the present situation or should that jurisdiction be expanded to the level of the same jurisdiction as a magistrate and so on. I think that is the point that was been made here. That contention is spelt out in the body of the report one of the issues I did not highlight when I was reading the report, so perhaps there's an error there. It is point 3.2 on page 32 where we point out that while there was agreement that the status role and function were matters of detail and put away to legislation there was disagreement on the question whether or not constitutional principal 13 required the restriction of Traditional Leaders to their customary law roles. We pointed out that our region of the Contralesa submission for reasons showed a belief that in the nature of things dispensation will demand new inputs from Traditional Leaders if their participation is to be taken seriously. In other words Traditional Leaders under this view are going to have to have new roles. On the other hand the commission for Provincial government in their report on document 8 specifically pointed out that they favour no new grounds of competency to Traditional Leaders. At least in the constitution but also they accepted that legislation based on section 1(82) of the constitution could be a ground for conferring new powers. That was the debate that was sorted to be summarised in the box you asked about.

Dr Baard

Well in my reading of this then, of the whole column I think it confirms what you said but because this is the first report I'm making to the committee you might have decided on certain things



as contentious and they are really matters of comment. It appears to me that is a matter of comment, because we are saying as agreed that as parties that the status, functions and roles of Traditional Leaders should be spelt out in separate legislation clearly. Such legislation is not going to be customary law. Its going to be legislation that is going to dictate as to how the Traditional Leaders according to Indigenous law are supposed to operate. So I think it really falls be placed under comments rather than contentious matters because there's not even a party to identify as having presented this problem.

Chairperson Professor agrees?

Dr Mshlapu? Mr Chairperson yes I think that was the purpose I mentioned ?? at the beginning we are learning as we go along.

Chairperson Mr Bester

Mr Bester Mr Chairman thank you. I just want to make sure the agreement 1 on page 27, the state... status, function and role are to spelt out in separate legislation. Because we are recognising the role... accommodation of Traditional leaders on National, Provincial and Local level. Can we take for granted then that those status, function and roles in the separate legislation, should they also then be on National, Provincial and local level and if shouldn't we write it in there.

Chairperson Professor?

Dr Mshlapu? I didn't think there was any need, well we didn't read it as if there was any need to actually specify, it seems to us that parliament operation under a constitution that our recognising the institution in status and role can do anything basically as long as it is constitutionalised.

Chairperson Mr Bester

Mr Bester Thank you Mr Chairman. In otherwords then parliament can then in far for 10 years from now decide that Traditional Leaders will only have a role to play to local government level and recognised then and ... and but the legislation will then only be to give them powers in local government... on local government level.

?? So it can't



Dr Baard

But we're wasting time because it's quite clear in the Constitution that this kind won't apply both at National, Provincial and Local level and therefore any change to the Constitution would require constitutional amendment. Now... so it has to apply to all three. I thought that there's general agreement with the political parties leaving aside whatever individuals or other organisations may have said, that Traditional Leaders will have to play a role at National, Provincial and Local level and therefore it be written into the constitution. So there's no way legislation can say that this only applies to local level. I mean that's clear. Secondly, it's not possible to in my view specify in the constitution what your legislation may or may not say. Except to say your legislation must be consistent with the constitution. And whether it consistent with the constitution or not will then be decided in the end if there is a contention by the constitution court and not by parliament itself.

Chairperson

Any comment from you Professor?

Dr Mahlangu??

I think I agree with Mr Baard. I do not think restricting or moving from a position of more advantage to less advantage by ... by the act of the constitution by a parliamentary act of the constitution.

Mr Baard

Mr Chairman, thank you. As long as we all understand it that way I'm satisfied. Thank you.

Chairperson

Mr Holomisa

Mr Holomisa

I'd like some clarification on the part of by the Professor on the part of on the on the same question of status, function and role in terms of current... I'm sorry...in terms of the Interim Constitution. The extent to which the council of Traditional Leaders and the houses of Traditional Leaders can participate in legislation, in the legislative process is indicated. For instance what can feel they intervene in and what extend they can. Now in the final constitution there's nothing that seems to indicate that to deal with that here. Now would you be about to tell us as to what was demerits and merits of ... of making such a provision in the next constitution, because what I'm thinking what I have in mind is that if we're going to leave it only to separate legislation. Now I think let's stop there... let's stop there. Thank you. I hope you understand the point I'm trying to make.



Dr Mahlangu??

... sorry such separate legislation might diminish in the new constitution powers for instant that are already possessed in the interim constitution or given more. I have to confess we did not focus our minds on this matter. But it seems possible ... it seems possible. Tomorrow as the Chairperson pointed out, the full Adhoc committee is meeting to draft on the basis of guidance of this...of guidance to this committee. We could direct our attention to the matter. I could not on my own at this point think in a language that would strengthen that particular box.

Chairperson

Any further comment? Satisfied with page 27? Thank you. Agreed to page 28? Any comment? Everybody appears to be satisfied. Then we agree to that. Page 29?

Mr Baard

Just a question of clarify here Mr Chairman. Agreement one point 1. At least the leaders must be part of local government but third item says but where he's elected he must relinquish his Traditional Leadership. I have no problem with the third one. With the first one how is he, how must he participate in the local government. Is he to participate on the basis of being nominated or perhaps being appointed as a representative of that group he's representing. Can that position be clarified please.

Dr Mahlangu??

Thank you Mr Chairman. As we attempted to show or be it very briefly in comment number 3. We did not consider that the further questions of the detail of how this were to be accommodated were matters to the constitution. There are... there's a whole slew of suggested approaches. There are approaches that one finds in the document for Provincial government. The other was what one finds in party political submissions are those that one finds in the Contralesa document. It is election verses nomination verses appointment. There are a whole range of details which we didn't think were matters that were, that should be part of Constitution language. So what we're extracted was that there was a language that they must definitely be a role to play and try to point out that there was no unanimity as to how the role should be played.

Chairperson

Tea and coffee and juice is ready.

Mr Baard

Could I just suggest for the purpose of drafting that we try to follow a kind of set pattern which is that basically the contentious issues refers to the political parties submissions and contentions between the parties whether extra parliamentary organisations or individuals, we then put them under comment. Which I think is more accurate.



Otherwise you run into problems as to why one particular organisation point of view is ... receives more favourable treatment. It's just a point of style and so I suggest that both 28 and 29. Well it's just Contralesa envisages a more interventions role, that's fine. Its just to go under comment. And similarly where Contralesa favours re-instatement by community if it so wishes, that also goes under comment. So that when people are reading this thing, then they have a clear idea of what it is. Secondly, may I say that in 28 under 2, ANC and NP view Traditional Leaders participation in National Level advisory only. I don't think we need the word only. That... that sounds like no you're just saying well really it's very unimportant, whereas we actually think its unimportant. I think we should delete the word only. It's just unnecessary.

Chairperson Professor appears to agree?

Dr Mahlangu?? I have no problem with that.

Chairperson Just hold I think we've dealt with 28, we have approved it already. 29?

??? On the fact that Traditional Leaders must be part of local government previously where elected leaders must relinquish Traditional leaders. I don't understand what is meant here because the constitution the Interim Constitution must as presently stand, says that Traditional Leaders are ex-official members of Tradish... of local government and can be elected to any position within that institution. Must they now therefore abdicate their positions if their community believes that they are the rightful leaders in that community?

Dr Mahlangu?? Thank you. Perhaps this didn't come through as it should have. We were trying to record the overwhelming feel of the... we got to the submissions. I other words, the majority of people and organisations who made submissions on the issue when it came to the questions which is partly a question of principal and partly a question of detail. Whether that links to the second. In otherwords, that if Traditional Leadership well firstly Traditional leaders as citizens of South Africa have the right to be elected to any position, but there was always accompanying those views a subsidiary view that when they are so elected they cannot hold both. Perhaps a better way could of been found to show that it was an



overwhelming view coming from the submissions. I don't know how else we could have .... we could have put it without seeming inconsistent. Maybe the submissions itself are in consistent on the issue.

Chairperson

Mr Holomisa

Mr Holomisa

Well I think Mr Chairman, it could be improved because looks like when you say as elected as the Senator says it might be interpreted to mean that when he .. when you have an ex-official member as a Traditional Leader or a elected council now it gets elected to the official chairman or secretary or something like that. Now this would mean that he would then have to relinquish his position on as a Traditional Leader and that cannot be what it means. What this means is in fact applies generally at all three levels of government where a Traditional Leader becomes a political operative political party authority and he gets elected on that basis, then he cannot be elected to... to assume his position. I mean he cannot be expected to continue to operate as a Traditional Leader while at the same time working as a ..... as a elected political representative.

Chairperson

Everybody satisfied with that view point as an improvement? Thank you.

Mr Holomisa

Now on two on the same page. Several provision must be limited to elected on the account of law officials. We are saying here that Traditional Leaders will be part of local government and expect local government to provide services. And now how do you reconcile this. If Traditional Leaders being elected are going to be part of local government. Now at the same time we say services provisions will be limited only limited to elected count of law official. Isn't that some kind of a contradiction. The way of defining it I think.

Dr Mahlangu??

I agree. I think it can be defined. The idea was to say that in the lo... at the local Traditional Leadership should not expect to play a role as providers fro services with the competent responsibilities and accounting that implies without either submitting allowing or submitting themselves to some popular election or I guess it would also take into account working within a popular or elected structure. I think the language can be changed around a bit to reflect that as opposed to as it stands now.



- Chairperson           Everybody's agreed on page 29? The last page 30. Any comment there? Mr Holomisa
- Mr Holomisa           I was struggling to find out whether I should be directing this question. Under 5 page 29, or the next page. The question of Traditional Authorities. Has any attention been paid to the extensions of Traditional Authorities which are under the Interim Constitution recognising but ... which are recognised under the Interim Constitution in relation to the new constitution. Have any views come forward, say from the political parties or any other interested parties as to what has to be done about Traditional Authorities now as Traditional Authority.
- Dr Mahlangu??       Thank you Mr Chairman. The answer is no, not at all. Apparently from the very word go the question of ... the question that people thought was the question to be discussed was the question of Traditional Leadership in the sense in which we've been discussing it. One waited in vain for mention of the Traditional Authorities acts of Republic and the acts of the so called former.... the former... but nothing at all.
- Chairperson           Any further comment?
- Mr Holomisa           My comment would be that maybe, I don't know how this can be done. Either call on parties to address that issue or unless you have scrutinised all these issues and found that no mention has been made of that. If there is mention of that in way of the submissions then I suppose you can bring it forward. But if there is nothing, I don't know whether you don't want parties to indicate about the future of Traditional Authorities as they now exists as opposed to be.
- Mr Baard              Can I perhaps ask you a question. Would you regard the houses of Traditional Leaders as a Traditional Authority body? I didn't ask you, I'm asking Mr Holomisa.
- Mr Holomisa           In terms of the current law, Traditional Authorities exist as Traditional Authority. They have tribal authority where you have a chief and head man constitution the authority. So I think they, that is the authority that is understood generally. The others are other structures with appropriate names like councillor house.
- Mr Chairperson       Mr Molishi?



Mr Molatshi?

Chairperson I think this is important point in the sense that you cannot recognise the indigenous leaders without recognising the authority that goes with the institution itself and if we say we recognise the institution of Traditional Leaders why not call Industrial Leaders that should also give them the necessary capacity to have the structure that goes with that which is in this instance the Traditional Authorities. In the past dispensation was a tribal authority which delivered services to the community, but are going to have elected local government in the place of the Traditional Authorities or the Tribal Authority. We are therefore establishing a new institution of the new Industrial Leadership which in itself should be given enough capacity to can be able to render the services that are needed by the community. Which is not local government functions per say but would be something else that Tribal Authority of the past were expect to deliver. The Traditional Leaders should in this instance articulate themselves in a new dispensation where their role is going to differ to that of service rendering of the previous tribal authority were doing. Because they are now going to be ex-official members in a local government structure. And therefore the existing Tribal Authorities will have no jobs to do. As I see my own Tribal Authority now has not enough work to do because with the TLC in place and the Traditional Authority is ex-official in that TLC. So we should define the new role and give the Traditional Authority enough capacity in their positions as Traditional Authority. And further move I'd like to say Mr Chairman that we should come up with a common terminology. We should recommend common terminology. WE are having a very very confusing situation where now and then we refer to Industrial Leadership, Structural Leadership, Traditional Authority, Tribal Authority. I want to recommend that we come up with a recommendation that we resort to Industrial terminology.

Chairperson

Ms D???

Ms D??

I take it that the senate is Traditional Authority is in Tygerberg

(laugh)

??

On this particular issue I think the way to move forward is to note under comment because I haven't really discussed the matter that we're left with an outstanding problem which will have to be resolved by certainly by the Constitutional Committee that the question of the Traditional Authority would certainly have to be



addressed in one form or the other. Whatever is going to be said its quite right that once you say that certain things are going to exist you can't separate them from the structures that existed before. So I'm suggesting for the purposes of the report to the Constitutional Committee we should certainly have the comment that this particular issue needs to be addressed. And once it's addressed how would it then reflect in the Constitution some in the Constitutional Committee might want to apply it's minds to.

Chairperson

Senator Malachi? just before you go. You say we must revert to some Industrial Terminology. Assist the committee in to what you want us to report to the Constitutional Committee.

Mr Malachi?

Okay, thank you. In the past dispensation, you had a ... a parliament Chief, a Chief and a Headman and we now have a new terminology which is called Traditional Leader. And I mean my community and our community they would prefer that we should resort to an institution where we know what do they mean when you say somebody is a Parliament Chief. What is the Industrial Terminology for somebody who is referred to as a Parliamentary Chief. Because then you refer to Traditional Leaders you should be able to also recognise the seniority of their position. They are not all Traditional Leaders. They are Traditional Leaders but in different levels. We have in the government of National Unity, the President, the Minister, the Deputy Minister. The same applies for the institution of Industrial Leaders. You have the King, you have N??, you have all those levels. And I think that's something that we need to resort to rather than simply a mo... mound them into one mound where we say they are all Traditional Leaders.

Chairperson

Any difficulty with that suggestion? Now it's up to the Professor to .. to give it wording so to speak. Ja everybody seems to be agreed.

???

Mr Chairman, you must be careful here. If the senator is seeking a definition. Then that's what we should say and it therefore then appears as part of your definition of what you mean for some things. If the suggestion is that every time we talk about Traditional Leaders we then spell out the hierarchy. And there's going to be problems from the point of view of the Constitution. So again I think what we need to do, we'd need to ask the Professor to give serious consideration to what the senator has said. That quite clearly there is a hierarchy that exists in terms of Traditional Industrious Law in



terms of Traditional structures. How we can reflect it in the Constitution. I think would need to be examined because we can't then every time talk about this then spell out. So I'm saying you want to look at it in two ways. You might want to say that in terms of the definition, it might be possible to be able to find a definition that could... that could then cover that aspect of it.

Chairperson

Senator agrees? Do we approve page 29 and 30? Thank you. As long as it has to deal with Traditional Authority.

??

Of course it does. Well the current Constitution Professor through you Mr Chairman, talks of the recognition of the role of Traditional Monarch. I still need in future time to be told what a Traditional Monarch is opposed to a Monarch. But it talks of the recognition of (laugh) Traditional Monarch that in the province of Qua Zulu Natal. As Zulu King you must be I think something to the effect that you must be installed as the Constitution Monarch of the Province. Now in relation to other provinces, the provinces are given the right to install them as such if they wish to. Now has there been any input relating to what the new Constitution has to say in regard to... to that kind of thing. Or is till just left as it is in terms of the Constitution Principals. Have any submissions been made in that regard?

Dr M?

Mr Chairman through you. If you look at our conclusion, one of in fact right at the end, the very last paragraph of the ... the fuller text of the report on page 35, where we point out that submissions from individuals questions and organisations in Qua Zulu Natal show a significant pre-occupation with the present Qua Zulu King. Mainly they were about the position you mention relating to the Zulu King. And mainly about questions of remuneration and questions of the relationship between King's and other Traditional Leaders below Monarch level. To my recollection there was a handful of submissions, probably 3, 2 or 3 which referred in the same terms to the situation outside Qua Zulu Natal and basically the idea or in those there people who are saying let Monarchs be Constitution Heads of their provinces. Beyond that there was no....no further input.

???

Within that married some comments or something like that in the columns that some attention has been paid by one or two or a few of the people who made submissions to this effect. Because the



reason I'm saying this is because the view amongst Traditional Leaders as I know again as I interact with them is that the current position seems to create the impression that there's only one King in the country and that the others, the status of the others I think being undermined and that is resented by Traditional leaders. I thought maybe the Constitutional Assembly should pay some attention to that. I understand that it's in terms of the principals it is stated that the King of the Zulu's must be... as a matter of must be installed by would be others. There's nothing of the kind.

Chairperson Which principal are you referring to?

??? I'm not sure there's a principal on .... or that was one of those terms that we agreed to, it was the end of the negotiations process. It is a Principal.

Chairperson Lets check the principal, just wait a minute.

??? I don't see it anywhere Mr Chairman, where in the Constitutional principals, where they refer to any Traditional Leaders as a King or Monarch. I don't see it anywhere. Where? In the Constitutional Principals?

Dr M Mr Chairman I don't think there's too much of a problem in accommodating the view from.....

Chairperson Order.

Dr M ..... it certainly did appear in the submissions due as they were. I see no problem in putting in a mention for the consideration of the Constitutional Assembly.

Chairperson Okay, that be included in your report. Thank you. Can I hear from the technical experts more or less when will the draft be ready because we need to meet then as a Core Group so that we can recommend to the .....

Dr M Well can I start now that I'm warmed up. The... the members of my committee are arriving tomorrow for the purpose of sitting down to draft. What we do need as I pointed out earlier being new to this particular task is a rather more direct indication by the committee as to what is required and then we'll go off and do it tomorrow. We should be ready by Thursday.



- Chairperson I think basically Professor you should exchange some views and ideas with Professor Steytler. They've gone through the exercise already but basically it works like this, that jointly you sit down with a law advisor to draft the formal recommendation to the Constitutional Committee. There are examples already like the National Assembly and the Executive and the Presidency. So that it is not referred back to the legal experts by the Constitutional Committee. You've then consulted and once when submitted, they are in agreement with what is been done afterwards. ANC promised the CA a further submission on this and that was on the 31 July. None has been forthcoming thus far and the work of this committee is being delayed in that regard. Can we have a definite indication when will we receive that. I'm asking the ANC (laugh). I'm specifically addressing the ANC in this regard. (laugh) The last.... it is almost ready and it can be submitted during the course of this ...
- ??? Well Chairperson it's really not a question of delay. The further submission is ready. I've got it in front of me. But we need to go through it and finalise it correctly. The other parties will be able to understand.
- ???? But this delays the work of the theme committees not true Mr Chairperson? We're still sitting with the Volkstaad, which is ready.
- Chairperson I'm talking about the Senate which has been postponed for discussion.
- ??? But it's not delaying the work of this. This will be ready. You'll get it by next week. And we still have the Provincial report Provincial Structures as well that we need to deal with beside the Senate.
- Chairperson Can't I have it, it is in your hand now. Can't we have it this minute?
- ??? Our structure have got to finalise it first.
- Chairperson Oh the structure must finalise it first.
- ??? Yes and not for the first time the parties wrong (laugh)
- Chairperson Ladies and Gentlemen this brings us to the end... it brings us to the end of this meeting. Our next meeting will be next Monday but the Core Group will have to meet and just ascertain an agenda for next Monday. Thank you.