

1/12/2

**CONSTITUTIONAL ASSEMBLY**

**MINUTES**

**OF PUBLIC HEARING**

**ON**

**TRADITIONAL AUTHORITIES AND  
CUSTOMARY LAW & PRACTICES**

**VENUE: NATIONAL ASSEMBLY**

**DATES: 12 - 13 MAY 1995**

## TABLE OF CONTENTS

No.	Detail	Pg.
1.	Agenda	1 - 2
2.	Minutes of Public Hearing	3 - 9
3.	Annexure A:  Summary of First & Second Sessions: Prof T Nhlapo	10 - 11
4.	Annexure B:  Summary of Session Three: Ms L Gcabashe	12 - 15
5.	Annexure C:  Summary of Session Four: Prof R B Mqeke	16 - 17

# CONSTITUTIONAL ASSEMBLY

## PUBLIC HEARING

### *TRADITIONAL AUTHORITIES AND CUSTOMARY LAW AND PRACTICES*

**NEW ASSEMBLY CHAMBER, PARLIAMENT**

**FRIDAY & SATURDAY, 12 & 13 MAY 1995**

#### FRIDAY, 12 MAY 1995

14H15 - 15H00	Arrival and Registration Tea / Coffee	
15H00 - 15H15	Welcome	<i>Prof Bonganjalo Goba MPD National Director</i>
15H15 - 15H30	Opening Address	<i>Hon Mr Cyril Ramaphosa Chairperson of the Constitutional Assembly</i>

#### SESSION ONE

Chair : Mr Bulelani Ngcuka : Theme Committee 5

#### Constitutional Issue : Traditional Courts & Customary Law/Practices

15H30 - 15H45	Traditional Courts	<i>Mr Rajesh Chowdree</i>
15H45 - 16H00	Customary Law/Practices	<i>Prof Digby S Koyana</i>
16H00 - 16H45	Plenary Discussion	
16H45 - 17H00	Tea/Coffee	

#### SESSION TWO

Chair : Mr Sheppard Mdladlana: Theme Committee 4

#### Constitutional Issue : Customary Law and the Bill of Rights

17H00 - 17H15	Customary Law & Human Rights	<i>Prof B Fikile Ndaki</i>
17H15 - 18H00	Plenary Discussion	
18H00 - 18H15	Technical Adviser's Summary (Session 1 & 2)	<i>Prof Thandabantu Nhlapo</i>
18H15 - 18H30	Announcement of Arrangements for Accommodation	
18H30 - 20H00	Dinner at Parliament	
20H15	Transport from Parliament to hotels	

**SATURDAY, 13 MAY 1995**

07H00 - 08H15	Breakfast at hotels
08H30	Transport from hotels to Parliament
09H00 - 09H15	Arrangements for the day and Announcements

**SESSION THREE**

Chair: Senator D Malatsi

**Constitutional Issue: Role of Traditional Leadership - Executive and Legislative of the State**

09h15 - 09h30	Congress of Traditional Leaders of South Africa	Nkosi S C Mhinga
09h30 - 09h45	S.A. National Civics Organisation	Mr Penrose Ntlonti
09h45 - 10h00	House of Traditional Leaders: KwaZulu Natal	Inkosi MB Mzimela
10h00 - 10h45	Plenary Discussion	
10h45 - 11h00	Technical Advisors Summary	Ms Leah Gcabashe
11H00 - 11H15	Tea/Coffee	

**SESSION FOUR**

Chair : Ms Patricia De Lille : Theme Committee 3

**Constitutional Issue : Role of Traditional Leadership in various Levels of Government**

11H00 - 11H15	The role of Traditional Leadership in Local Government	<i>Ms Pelonomi Venson</i>
11H15 - 12H00	Plenary Discussion	
12H00 - 12H15	Technical Adviser's Summary	<i>Prof B R Mqoke</i>
12H15 - 12H30	Closing Address	<i>Mr Hassen Ebrahim Executive Director: Constitutional Assembly</i>
12H30 - 12H45	Vote of Thanks	
13H00 - 14H30	Lunch at Parliament	
14H30	Departure	

# **CONSTITUTIONAL ASSEMBLY**

## **MINUTES OF PUBLIC HEARING TRADITIONAL AUTHORITIES & CUSTOMARY LAW AND PRACTICES**

**NEW ASSEMBLY CHAMBER, PARLIAMENT  
FRIDAY & SATURDAY, 12 & 13 MAY 1995**

### **PRESENT:**

Delegates representing the House of Traditional Leaders, Contralesa, The Royal Council, Traditional Healers, SANCO, Women & Academics from the following regions:

Free State, Eastern Cape, Kwazulu-Natal, North West, Eastern Transvaal, Northern Transvaal and Gauteng.

### **1. WELCOME**

- 1.1** The meeting was opened by Prof Bonganjalo Goba, MPD National Director, who called for a minutes silence in respect of those who had died in their struggle for democracy.

He welcomed the esteemed Traditional Leaders and speakers and congratulated the C.A. for arranging such an exciting event which demonstrated their commitment to the process of democracy.

Prof Goba explained that the purpose of the Public Hearing was to provide an opportunity for all parties to present their submissions and was not a forum for debate. Translation facilities were available for 5 different languages.

### **2. OPENING ADDRESS**

- 2.1** The opening address was delivered by Mr. Cyril Ramaphosa, Chairperson of the Constitutional Assembly.

Mr. Ramaphosa stated that the writing of the Constitution, being the supreme law of the land, needed to be an inclusive process in order for it to be legitimate and binding. It was therefore important to call together Traditional Leaders on this historic occasion to put forward their views and aspirations.

The point was raised that Principle X111 of the Interim Constitution provides for the recognition, role, status and protection of Traditional

Leaders and that this provision, in addition to the arranging of this meeting, should dispel any fears that their institution might have had with regard to the new Constitution.

Mr. Ramaphosa thanked the participants for their enthusiastic response to the invitation and wished them well in their deliberations.

- 2.2 Prof. Goba thanked Mr. Ramaphosa for his opening address and handed over the chair to Mr. Bulelani Ngcuka for the first session.

### 3. SESSION ONE

**Chair: Mr. B. Ngcuka : Theme Committee 5**

**Constitutional Issue: Traditional Courts & Customary Law/Practices**

- 3.1 Mr. Ngcuka introduced the first speaker, Adv R Choudree, from the University of Durban-Westville, who focused his address on the subject of Traditional Courts.

Adv. Choudree cited the example of a Traditional Court in India known as a "Lok Adalat" which operates in India. Lok Adalats he claimed served an extremely useful purpose particularly as they are -

- i) accessible, particularly in the rural areas
- ii) quick in dispensing with matters,
- iii) informal and therefore less intimidating
- iv) conciliatory in that they involve the community and enjoy the support of the people.

A similar court system operates in the outbacks of Australia serving the Aborigine tribes with equal success.

Adv. Chowdree strongly motivated for the retention of Traditional courts in SA and suggested that indigenous law should be codified and that Traditional Leaders should become actively and directly involved in law reform.

- 3.2 The Chair thanked Adv Choudree for his input and introduced the next speaker, Prof DS Koyana, Dean of the Faculty of Law, University of Transkei.

Prof. Koyana gave the background to the indigenous constitutional system. He referred to Act 38 of 1927 which embodies the laws relating to the courts of chiefs and headmen, and which confers civil and criminal jurisdiction on them.

Referring to the future of Customary Courts, Prof Koyana expressed the view that the jurisdiction of these courts should be increased to the level of magistrates courts.

Prof Koyana also expressed the view that customary courts were more effective than western style courts, in that

- cases were dealt with speedily while facts were fresh in peoples minds, and
- they especially assisted people who were not educated enough to handle cross-examination in a conventional court.

#### **4 PLENARY DISCUSSION**

**4.1** Members from the CA were invited to ask questions of the two speakers whereupon representatives of the various delegations were asked to make their inputs.

**4.2** The main problems centred around two broad areas, ie

- i) human rights - the issues being gender (the participation of women); due process (legal representation etc) and corporal punishment, and
- ii) functioning of these courts - jurisdiction over persons, composition, legal representation, recording of proceedings, due process and corporal punishment.

**4.3** Further recommendations were made as follows:

- a) A national council of traditional leaders should be drawn up establishing a code of conduct and uniform guidelines;
- b) The powers of these courts should be spelled out in legislation;
- c) Customary courts should be upgraded to courts of record;
- d) Traditional leaders should be given more power;

#### **5. SESSION TWO**

**Chair: Mr. S. Mdladlana : Theme Committee 4**

**Constitutional Issue: Customary Law and the Bill of Rights**

**5.1** Mr Mdladlana introduced the speaker, Prof B Fikile Ndaki, who spoke

to his document (Refer to documentation pack on Traditional Authorities).

5.2 Mr Mdladlana thanked Prof Ndaki for his input and invited comments from the various delegations.

## 6. PLENARY DISCUSSION

6.1 The main issues which the delegates focused on were:

- i) The traditional leaders have played an important role in the fight against apartheid, continue to have an important role to play in the future and whose opinions should be listened to;
- ii) The right of women to be traditional leaders and be part of the process;
- iii) The role of traditional healers (irrespective of sex) as advisors to the traditional leaders;
- iv) The general misconception that traditional leaders are 'hidebound' and who are not prepared to undergo change; and
- v) The good relationship between CONTRALESA and the ANC.

6.2 Further recommendations were made as follows:

- i) The input from the traditional leaders would be very important and people should work together and avoid polarisation; and
- ii) The retention of traditional leaders especially with regard to advising the people of their rights and the interpretation of laws and legislation.

## 7. TECHNICAL ADVISOR'S SUMMARY

7.1 Prof Nhlapo restated the following:

- i) The need to protect women's rights;
- ii) Freedom of expression;
- iii) Retaining Traditional Courts;
- iv) Possible extension of the role of Traditional Courts;

- v) The need to address the composition of the Traditional Courts;  
and
- vi) The possible involvement of the traditional leaders in law reform.

## **8. SESSION THREE**

**Chair: Mr D Malatsi**

**Constitutional Issue: Role of Traditional Leadership in Respect of Executive and Legislative Functions of the State**

### **8.1 CONGRESS OF TRADITIONAL LEADERS OF SOUTH AFRICA (CONTRALESA) PAPER PRESENTED BY NKOSI SC MHINGA**

The paper entitled *The Role of Traditional Leadership in the Executive and Legislative Functions of the State* is contained in the documentation pack containing all the papers tabled at the Hearing.

### **8.2 SOUTH AFRICAN NATIONAL CIVICS ORGANISATION (SANCO) PAPER PRESENTED BY MR P NTLONTI**

The paper entitled *Input to Public Hearing on Traditional Authorities to the Constitutional Assembly* is contained on in the documentation pack containing all the papers tabled at the Hearing.

### **8.3 AMAKHOSI OF THE KINGDOM OF KWAZULU-NATAL PAPER PRESENTED BY INKOSI MB MZIMELA**

The paper entitled *Manifesto of Constitutional Proposals and Political Commitments for all Traditional Leaders of South Africa* is contained in the documentation pack containing all the papers tabled at the Hearing.

### **8.4 PLENARY DISCUSSION**

The chairperson invited brief responses from all delegations to the above three papers. The responses generally indicated support for the presentations of either the Contralesa or Amakhosi of the Kingdom of Natal-KwaZulu. A number of the delegations were critical of the Sanco positions.

### **8.5 TECHNICAL ADVISOR'S SUMMARY MS LEAH GCABASHE**

The *Technical Advisor's Summary* is attached.

## **9. SESSION FOUR**

**Chair: Mrs P de Lille : Theme Committee 3**

**Constitutional Issue: Role of Traditional Leadership  
in various Levels of Government**

**9.1** Mrs de Lille introduced the speaker Ms Pelonomi Venson from INLOGOV who focused on the role of chiefs as the central issue of governance.

The speaker clearly outlined the role of traditional leadership in local government issues.

She emphasized that when scrutinizing the concept of democracy the role of chiefs should be central.

It was admitted that the system of traditional authority has limitations, but that does not mean it should be discouraged.

She concluded by dealing with the myths about traditional leadership.

## **10. OPEN DISCUSSION**

**10.1** The participants were invited to make submission on the issues.

**10.2** The main challenges centred around:

- (a) The role of the Zulu King.
- (b) The formulation of the Local Government Transitional Act (LGTA).
- (c) Leadership skills of traditional authorities.
- (d) Role of traditional leaders at local government.

**10.3** The following recommendations were made.

- (a) The Zulu King should be a constitutional monarch, his representatives should not have executive powers.
- (b) Rural Local Councils should be established in consultation with traditional leaders.
- (c) Traditional Leaders should be local government administrators with exclusive competencies.

- (d) Territories under the jurisdiction of traditional authorities should not be divided into words.
- (e) Chiefs should be *ex officio* members in the Regional Council, they should have voting rights.
- (f) Chiefs should not be involved in party politics.
- (g) Traditional leadership should not be imposed on people.
- (h) Traditional healers should be consulted in local government issues.
- (i) The institution of traditional leadership should be gender sensitive.
- (j) Chiefs should have judicial powers and should be assisted financially by the government.
- (k) There is a need to strike a balance of the different needs of the various communities.

## 11 TECHNICAL ADVISORS' SUMMARIES

See Annexures A, B and C

**CONSTITUTIONAL ASSEMBLY**  
**PUBLIC HEARING**  
**TRADITIONAL AUTHORITIES AND CUSTOMARY LAW/PRACTICES**  
**SUMMARY OF FIRST AND SECOND SESSION : 12 MAY 1995**

**BY PROF THANDABANTU NHLAPO**

1. **TRADITIONAL COURTS AND CUSTOMARY LAW /PRACTICES**
2. **CUSTOMARY LAW AND THE BILL OF RIGHTS**

**Courts**

There was general consensus that courts should be retained. They serve a useful purpose particularly in rural areas in that they are:

- a) Quick
- b) Informal
- c) Accessible
- d) Conciliatory
- e) Legitimate (in a social sense)

The view was also expressed that they should be strengthened to the level of having the same jurisdiction as magistrates' courts.

**Problems**

Problems centred around two broad areas:

- a) Human Rights in general in the courts
- b) Functioning of these courts

<u>Human Rights</u>	<u>Functioning</u>
* Gender - participation of women	* Jurisdiction over persons ("opting out")
* Due process (legal representation etc)	* Composition (training?)
* Corporal punishment	* Legal representation
	* Recording of proceedings
	* Due process (legal representation etc.)
	* Corporal punishment

**Recommendations**

- a) Indigenous law should be codified;
- b) Traditional leaders should be directly involved in law reform

- c) Traditional leaders should be given more power;
- d) Customary courts should be upgraded to courts of record;
- e) The powers of these courts should be spelt out in legislation;
- f) A national council of traditional leaders should be drawn up establishing a code of conduct and uniform guidelines.

### **Bill of Rights**

The discussion centred around two classical positions:

- a) That the inclusion of a bill of rights in the constitution necessarily means that the institution of traditional leadership must get used to new rules based on accountability, democracy, and non discrimination;
- b) That the institution poses no threat to human rights because, like customary law itself, it is not static and is able to adjust to changed circumstances.

### **Gender**

Gender emerged as the single most contentious issue.

- \* Should women be traditional leaders in their own right (i.e not as regents or temporary substitutes)?
- \* Should they participate in public affairs in general?

Women's groups felt the answers to both questions should be resoundingly in the affirmative, though one counter view represented general satisfaction with the status quo. Traditional leaders themselves expressed dismay at the widespread perception that their institution was anti women. There was growing consensus over the notion of an evolving institution which might in future accommodate fully the needs of women.

There were some critical responses to the main presentation in respect of those sections which suggested that time had run out for the institution of traditional leadership. The point was made that the constitution draws inspiration from international human rights standards and that this was proper: however, international standards should sometimes be viewed with scepticism.

All in all it was recognised that what was involved here was a clash of value systems and that African values, like any other, are not static and that they are not necessarily incompatible with human rights as conceived in the bill of rights.

- \* International standards (criticized as foreign) should be viewed with suspicion.

There was general consensus that custom is not and cannot be static. The view was expressed that the bill of rights and traditional leaders are not incompatible.

## TECHNICAL ADVISOR

LEAH GCABASHE

### TECHNICAL ADVISORS SUMMARY OF SUBMISSIONS ON:

#### THE ROLE OF TRADITIONAL LEADERSHIP - EXECUTIVE AND LEGISLATIVE FUNCTIONS OF THE STATE

Various broad issues raised (not necessarily agreed).

1. To what extent should the institution of traditional leaders be protected in the Constitution

This issue was addressed in the context of the proposition: is there in fact a role for traditional leaders/the institution, and if so, how can this effectively be incorporated in the Constitution, as again leaving it to the Legislature to determine the institutions role and function, based on the Constitutional Principles underpinning the Interim Constitution.

#### CONTRIBUTIONS

##### CONTRALESA:

The institution is rooted in African soil and in the hearts and minds of its people who take pride in this system of government.

The institution is an integral inseparable part of the South African order, regulating the life experiences of communities via:

- the head - chief
- council - elders
- popular peoples assemblies (imbizo, kgotlas)

These structures, in concert, are local governments (in the past and presently), responsible for building schools, providing water etc.

All persons can attend these peoples assemblies, which deliberate on policy matters that the executive (chief and councillors) implement.

Thus in relation to the traditional leaders role, he is a legislator, adjudicator and executive officer, in concert and by authority of the popular assembly.

The extent of the influence of the popular assembly is illustrated by the assembly's ability to depose an unpopular leader.

The centrality of the institution to communities must therefore be strengthened and

preserved. Mechanisms for doing this are, eg:

- training for leaders, Councillors
- capacity building in respect of personnel, offices
- being above party politics in relation to their role and functions as traditional leaders
- being committed to the objectives of unity, accountable, transparent and responsible government.

Further, two major proposals put forward by Contralesa were that:

- there should be elected Councillors at local government level (not exclusively)
- the House of Traditional Leaders should be incorporated as a chamber of the Senate.

### **SANCO**

For this constituency, what will be incorporated in the constitution must be acceptable and legitimate. Shape and form must be given to the democratic practices people have fought and ensured were reflected in every facet of the Interim Constitution.

Flowing from this, SANCO cannot agree that the role of traditional leaders belongs in the Constitution. This role should be set out in legislation, they contend.

As an adjunct to this proposal, SANCO calls for a national referendum to assist in determining the inclusion in the Constitution of the institution, role and function of traditional leadership.

The role of traditional leadership should be rooted in accountability, they conclude.

Proposals from SANCO on the role of traditional leadership:

- they should be ex-officio members of local government structures as envisaged by the Local Government Transitional Act.
- traditional practices and policies should not conflict with national democratic objectives.
- there should be clear job descriptions for traditional leaders when executing their functions, and their output must be measurable.
- capacity building for those who are accepted by the communities must be

facilitated.

- in line with the last proposal, a mechanism should be found to distinguish appointed chiefs from hereditary chiefs and the acceptability of the former must be debated by the communities.
- traditional leadership has a ceremonial role to play.

On the issue of women and their ability to become chiefs/traditional leaders, further debate must take place on this issue, and communities must be invited to give clear guidance on this matter.

**Amakhosi - KwaZulu Natal: Inkosi Mzimela**

They submitted written proposals, arguing amongst other matters for:

1. Constitutional protection of the institution of traditional leadership.
2. Recognition and protection of the role function and powers of traditional leaders; the indigenous legal system, protection of communal property etc.
3. That Provinces should have exclusive competence in all matters relating to traditional authorities and indigenous and customary law.
4. Provinces should have residual powers in respect of property law, inheritance, etc.
5. Remuneration of traditional leaders should be through provinces and the traditional communities concerned.
6. Restoration of the Kingdom of KwaZulu Natal.

**SYNTHESIS OF THESE VIEWS:**

1. Constitutional protection of traditional leadership?

No specific agreement on this point, but the common factors that emerge is that at the very least, the acceptance of the institution should be acknowledged in line with the constitutional Principles, but the nature, role, function and powers of traditional leaders must be subject to the Constitution.

The general point that can be made at this stage is that the detail relating to this matter should be dealt with in legislation, and that traditional leaders should be part of that legislative process.

2. The extent to which there can be a separation of powers with regard to traditional leaders?

Contributors will have to make further submissions on this point. One view was that the traditional leader, acts in concert with the Councillors and communities. These structures provide the necessary checks and balances that are central to any democratic process.

The opposing view was that traditional practices are often, by their very nature, undemocratic, and as a result accountability means a separation of powers.

Finally, with respect to matters of both national and provincial competency, no general consensus was reached.

**AREAS OF CONFLICT RELATED IS:**

- remuneration of traditional leaders and their officials.
- whether the jurisdiction of traditional leaders (or structures such as SANCO) should be limited - urban/countryside argument.
- the extent to which land matters are Provincial or local government competencies.
- the extent to which legislation emanating from the Provinces can be limited by national government in respect of traditional roles, powers, legislative pronouncements etc.

## CONSTITUTIONAL ASSEMBLY

### SUMMARY OF SESSION 4: ROLE OF TRADITIONAL LEADERSHIP IN VARIOUS LEVELS OF GOVERNMENT

*Prof. R B Mqoke*

1. The contributions made in this session complement those made in the first session
  - the point of convergence being the role of chiefs is the central issue of governance.
  - the speakers clearly outlined the role of traditional leadership in local government issues.
  - these concepts of democracy should be centralised when the role of chiefs is scrutinized
  - the paper dealt with the myth about traditional leadership
  - the question of what role the traditional leadership should play in rural local government to be answered through consultation
  - Chiefs have a definite role in matters relating to rural land
  - local government is by its very nature is the government that is closest to the people and because of their closeness the chiefs should have an active role in rural local government
  - The constitution of the Zulu Royal family emphasized the need to work out mechanisms of accommodation of the views held by SANCO and those held by CONTRALESA;
  - The paper also outlined the role of the Zulu monarch in the Kwa Zulu Natal House of Chiefs
  - The hierarchial relationship of the king vis-a-vis the other chiefs or indunas;
  - The views of the Zulu Royal House on the issue of accommodation received support in the position articulated by the Eastern Cape delegation on the composition of the proposed constitutional traditional court to operate at rural level
  - The positions adopted by the various provincial delegations were by and large supportive of the general thrust of the first speaker

## WOMEN VIEW POINTS

- Stressed that the position of women in local government be improved.
- The latter relates to the question the speaker raised about some of the limitations of customary law;
- A final appeal from the floor was that we should strive to find one another;
- The question is really one of accommodation, synthesis and compromise;

## CA CONTRIBUTION

- CA views were made known
- The need to strike a balance of the different needs of the various communities

