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THEME COMMITTEE 6.3

01 FEBRUARY 1995

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CHAIRPERSON

God bless him ... he worked for the ... (not audible)...because unless you have a Constitutional right to restitution what would have happened is that the property right of the current owners in land would have overridden the restitution process.

So the good example of what would have happened is, where white came to own land, the black people were forcibly removed from in law which have been challenged by those white people as in conflict with their property rights, because the property clause in the Constitution says that expropriation of land can only be for public purpose. So in order to make restitution of land rights something that was guaranteed equal status with the property clause, it had to be included in the constitution and that's why it remains very important that in whatever new constitution we have, as long as there is a property clause guaranteeing the rights of current owners, that right has to be balanced by an equal constitutional right to restitution or else the restitution process would always be absolutely vulnerable as something that interferes with the rights of current owners. Speakers so what happens with a fairly late strong lobby is that the whole long term proposal that had always been that, the way to deal with forced removals was through a Land Claims Court and the Commission that, that got translated into proposal that must also be dealt with not just in legislation but in the constitution itself and then these provisions the current provisions in the interim constitution were introduced there has been a fair amount of controversy about these provisions and then there have been problems raised at a very technical level with some of the kinds of notions and phrases uses in the current chapter, but I will come back and just discuss some of the issues that have arisen as the process has begun to unfold some of the criticisms and controversies and problems that the theme

committee may want to consider in the future, but I think that just for information I should start by really going through what the process is and how it will operate how the actual land claims commission will actually operate and, in that regard there isn't all that much about the commission in the interim constitution most of the description of the commission's work and the land claims court's work and role and procedures are in the restitution of land rights act that was passed last year and that gives a lot more detail and a lot more content to the whole process. May be I should do that should I go through how the Commission is meant to function or are the people very familiar with how the Commission is meant to function and it's procedures roles and duties ? 1. I think it will be helpful for you to go through it because not all people who are here were participating in the debates. you know ... Around the acts¹ leading to the act 2. Okay ... well ... the Commission is a multi functional Commission, it's meant to be the body that all people who were dispossessed of land and go and lodge their claims with. Now people who qualify to lodge claims are people who were removed after 1913 and people who were removed in terms of racially discriminatory law. Those two entrance criteria were established in the Constitution so the act had to follow the Constitution so people who were removed before 1913 can't bring claims or people who were removed for any other reason than a racially discriminatory law and that that's already led to certain sort of anomalies but there is provision in the actual act which says that

where people who don't fall within those criteria can make a very valid sort of claim. The Commission will advise the Minister what alternative process should be used to deal with their problem. So people in that category who were removed after 1913 and who were removed in terms of racially discriminatory law will come to the Commission and lodge a claim and the Commission's job will be to assist them in formulating their claim. So in sensible takeover the job of the service organisation is to always assist at those kinds of communities before and in a way eh! provide a paralegal service to claimants helping them to collect all their documentation write out their oral history it's got wide powers to collect information other government departments and from other parties, and once it has collected all the information and helped the communities to motivate their claims it's job will be to try to reach settlement in each instance and that will involve notifying any other interested parties which would include current owners. If the land has now been eh! been bought or granted to a subsequent owner or in some instances neighbours to the land they will all be notified the claim has been lodged and the Commission's job will be to try and reach s settlement between all the affected parties which it can do through involving the services of mediation. If the parties reach a settlement the Commission will record that settlement and submit it to the land claim's court for ratification. So the Commission in most cases it is hoped will actually prepare the claims, help to mediate some kind of a solution, submit the claim submit the solution to the court and the court will then make that an order of court so that that is then the final award in relation to that land. But where the parties cannot reach an agreement or the issue is particularly complicated the Commission will simply refer the whole matter to the court for the court to consider it a proper court hearing and to make an award. And I said where claims come forward which in the ordinary sense are very similar to forced removal claims but for some reason a racially discriminatory law wasn't used or the claim was just before 1913 may be in 1911, the Commission can also recommend that the Minister make available relief to those of claimants so the is some kind of flexibility in that context. The Commission's job will further... it's got a further job of trying to ensure that whoever comes forward to represent the claimants is actually representative of the claimants because you often get one or two people coming forward for a community making a claim, where as in fact there may be a split in a community and there may be a lot of controversy between different factions of the community. So it will have to go on to consider other issues than just the dispute that everyone thinks about. Everyone thinks that the main dispute will be between the people who were forcibly removed and current owners, normally white owners. But there are also other kinds of complexities that will arise, for an example you sometimes get two communities who were subsequently removed from the same piece of land, so you get competing claims to the same pieces of land, or you get enormous divisions within one community and that's very common because in the process of forced removal, you often get a group that agreed to move and another group who resisted and a terrible warfare breaking out between those communities. So ... the Commission's job will also be to ensure that in whatever award is made, the award doesn't discriminate against original members of that community, and the legislation specifically mentions women and tenants in that regard. There is provision in the legislation that the commission will be able to draw quite heavily on the services of mediators or specialists other ad hock consultant type of people partly so that communities who've got a long process of putting forward claims, can continue to

use some of the organisations that they relied on in the past. I am sure you will have seen in the Constitution that restitution of land involved a certificate of feasibility from the Minister. Constitution provides that land will be given back to people where the Minister has certified that it is feasible to give the land, or alternative land would be given back where it is feasible for alternative land to be given back. And in the legislation it is set out that when a claim is been prepared and when it's been mediated at that point that the Commission goes to the court and says here is the solution we found will the court rectify it or here is the dispute that we were unable to resolve it must now come before the court. They will go to the Minister and ask for that certificate of feasibility is something which has been very controversial and in the context of the legislation. What it says is that the Commission will recommend to the Minister whether it is or isn't feasible, and that all other parties who are interested can also make representations to the minister but that nothing in this section shall be construed to mean that the minister shall be either be required or entitled to consider whether the restoration is just or desirable. Because there is a concern that the why... the Commission process and the court process are designed to decide whether restoration is just and desirable, but suddenly the Minister may come along and say well I don't want to have it that's not feasible. Where as it's quite clear that feasibility was designed as a protection in those difficult cases where people were removed from land which has now been developed into a hospital or developed into low income housing or developed in a very expensive way, so that it would be very difficult and not ... if economically viable to return it to its original owners. Once the Commission has made it's findings, and handed them over to the court, the court will have the power to make an award which determines the rights in land, the amounts in compensation that are payable and who will become the owners of the land. and that's a fairly complicated issue who will become the owners of the land because it's not going to be an individual person in many many cases. In many cases it's a group of people, and in determining who the owner is, the courts has got to very careful not to favour one faction over the other or open the way for sectors in that community to be discriminated against. As I understand it, the court isn't much the brief of of ... of this working group, but since it is dealt with in the same process and it's also an interim process and maybe I should just say the court is designed to be a court that will hear clearly flexible forms of evidence, expert anthropological evidence heresy evidence of ... what happened at the time of the removal because in many instances claimants because, because of their situation as rural people and in some instances people who haven't had access to education often don't have that much documentary proof and need to rely on being on the actual sequence of events in the stories and the history of those kinds of factors can be taken into account as the kind of evidence that will be considered in this court and in the courts powers will be to decide on the basis of the right to restitution and the desirability of remedying past violations of human rights. The requirements of equity and justice and the desirability of avoiding major social disruptions. Those four factors what award to make. It has the power to ..., it has the power to order expropriations and to set the amount of compensation that will be payable in the event of ... of an expropriation. That compensation would either be by agreement with the parties or it will be determined according to the formula in the property clause of the Constitution. There are various types of awards that are possible: people can either be awarded the land that they lost, alternative land,

compensation or other forms of redress and it is provided for in the act that they may, they may say ... that instead of specific ... kinds of compensation they would prefer to be the recipients of state subsidies in the urban areas or in any other land or housing type of scheme with the people the amount of compensation people will get and whether they will actually get their land back, will be limited by how much compensation they were paid at the time of removal. People who were fully compensated, cannot use this process and people who were not compensated at all would by the logic of this process, unless it involves major social disruptions, get their whole piece of land back. There would be complicated instances where people got some compensation but was ineffective and was far below market value, and that then would have to be set off against the award because otherwise this award ..., this process will be extremely expensive and then there are appeals, there can be appeals from the decisions of the land claims court, those go either to the appeal division in Bloemfontein or to the Constitutional court. So that's the basic structure of the Commission. Some people think of the Commission as operating like a normal commission with a panel of Commissioners who will sit and make recommendations. It is not designed to be like that at all. The Commissioners, and they were over 200 nominations from the public and the selection panel actually chose ... chose people and put them forward and the Minister appointed the Commissioners. Those Commissioners are going to be full time officials whose job will really be to manage the restitution process in each province and there is also Chief Commissioner based in Pretoria. They will... their job will really be to manage the staff who will have this enormous task of noting all the claims, collecting all the evidence, taking statements, collecting lost documents from the deeds registries and from other sources, serving notice on the neighbours and other interested parties, involving mediators trying to ... the settlements, referring everything to the court and in all of this in the legislation the commission's job is very specifically described and defined in the law so they to do certain things within certain time limits. So the Commissioners are not judges in a sense that they are not people who will sit in a panel and decide as the previous Commission under the previous government did. They are really the people who have the responsibility to ensure that all these process happen. They are full and they really have to manage this whole process. There is going to be Bloemfontein, one in Cape, one based in Cape Town where is Wallace Mqoki, one based in Durban where is Cheryl Walker, one based in the Transvaal where is Emma Mashinini and the chief Commissioner is Joe Seromane and I think I have forgotten one. Let me just try and remember... but it is envisaged that the whole Cape will be dealt with from Cape town, the whole of old Cape Province and Natal and I think that the free State it's envisaged it will be dealt with from Transvaal. So there is a massive area to be dealt with from each of those Commissioner's offices. Maybe I should just tell you some of the issues that have been controversial in relation to this process. The first is that in the actual interim Constitution, what it says is that a person in a community shall be entitled to claim restitution. There is no clear definition that there is a right to restitution. That's a very passive way of stating the right to restitution, and the sum total of all the parts including the legislation does create that right and there seems to be no doubt that it was intent of the people who drafted the constitution that this whole process will be based on that right. There has been deep dissatisfaction that it's very vaguely stated and not positively stated and then another controversial aspect of the whole thing has been the certificate of feasibility where ... a whole ... the claim goes

through a whole process of mediation in the commission can go through a whole court hearing but the Minister independently may decide whether the claim is feasible and the criticism has really been on the basis that by saying the Minister will issue a certificate of feasibility to say whether the land can be restored or alternative land can be expropriated, it could be interpreted that this wouldn't be feasible if there weren't the budget to do it and that would have enormous consequences. We know that in the... the example of the Mfengu in the Eastern Cape. The people from the Tsitsikamma, the white farmers whose land was expropriated to return to their land got compensation at an amount of over 35 millions, there's a lot of controversy about how that amount was reached and under the current formulations it wouldn't be that high, but what you could have is a situation where there are few major cases basically bankrupting the whole budget for restitution and then the other claimants coming forward and being told that it's not feasible to expropriate or it's not feasible to restore the land. Now that has been a major concern because if it works in that kind of way, what will happen if it's just the first people who come before ... who put their claims in first who are going to get the best deal and it could be first come first served and the other one's would basically be locked out. In terms of the legislation, this process is meant to be a very fast and limited process. People have to lodge their claims within three years and it is envisaged that the Commission won't last longer than about 5 years because you know those that are lodged in the 3rd may not be dealt with in that first year and it is envisaged that the court also will have a limited life and be over. The aim is because people who were forcibly removed have been pushing that they want the thing to be dealt with quickly and that was their great dissatisfaction with the previous Commission. But it is also very important for the stability of property rights that this issue be over and done with so that it doesn't hang over people, that sometime in the future there may be land claims. So from both the viewpoint of the claimants and of the current owners, it's been considered beneficial to have it over and done with quickly. The is just a concern that the people who get in first may use up the whole budgetary process and there will be nothing left for the others who then get locked out. The counter argument to that is that the feasibility provisions relate to land. The minister only gives a certificate to say that state ... it's feasible to restore state land or it's feasible to expropriate private land but doesn't have to give a certificate saying it's feasible to pay compensation. If people don't get their land back, don't get alternative land, then by implications they will get compensation. So there are people who say look, feasibility is not something that can ever be interpreted to mean whether there is a sufficient budget, but even so there is dissatisfaction that the two processes are duplicatory. That you've got a court process to decide this thing according to a very clear law, and yet you've also got the Minister deciding independently for whatever reasons you know may influence him or her. That has been circumventative in the act, but it's one of the things that people were unhappy with in the Constitution of formulation. Another issue that's been very controversial about this whole process whether the Constitution, interim constitution, whether the legislation is the whole question that the cut-off point is 1913. I think that is one of the reasons why it was opposed in parliament and perhaps I should just explain a little bit about the fact that this process was envisaged to be just one part of a package of land reform and there was a whole background process of studying land claims courts around the world and restitution processes around the world, and what came out of the study

particularly in South America was that, land claims court processes only work for people who are in position to prove their case quite well. And that for people whose claims go back a very long way, they generally fail in front of a land claims court because they don't have the kind of evidence even if it's oral that substantiate their claim because a court is designed to be something that looks at the interests of different parties and decides which interest is stronger and it has to do according to evidence. So it was in the light of the fact that people from more than a hundred years ago by international ... are bound to fail in this kind of a format that, that this court was always thought of as something that would be very limited to the victims of forced removal and it was always envisaged that the vast mass of people who were dispossessed through conquest, and through exclusion would be dealt with by a more direct... directly political redistribution types of policies that didn't require this intricate kind of proof, because proof is a very difficult onus to put on people who come in with a claim from 150 years ago. The other reservation about it was that, if you go back, the basis of the claim to be we, the such and such group or we, the such and such family owned this piece as defined here and that's the kind of stuff the court needs to hear. The only basis of those previous claims would have to be, we the Swazi nation owned this sea border and what came about then was that there be strongly ethnically based claims and very competing overlapping kind of claims. So those are some of the reasons why it was always envisaged that the land claims court would be a limited process for forced removals, but it was... it's also always been recognised that if there isn't complimentary, if there are aren't complimentary redistribution mechanisms to deal with the claims and needs of the vast majority of landless people who were dispossessed because they were black, then those people grab at this thing because it's the only mechanism that gives them a way and by right. They will flood this whole process and this process will become flooded, illegitimate and capsize. So the whole question of the 1913 debate is not really so much a sort of academic debate or shouldn't it have been a very practical issue which is still a great threat or probably too strong a word but it's a very major factor in whether this process is going to work because unless there are alternative places for those people to go that will work, then it's very likely that they will really conceptualise their claims which are basically claims based on political exclusion in the past. They will try and make into historical land claims and they will try and get them in through this court because they have no alternative. They are very likely to fail in this court because they want the necessary kind of proof and then they will say this court is you know is a ... So that issue remains a very contentious issue whichever way you look at it and then finally I just want to touch on this that there is some very sort of ... There have been some academic articles written, on this section of the interim constitution since it was introduced which highlight problems in the wording of certain pieces. They are not controversial issues, they are not issues where the meaning is in dispute but for example the provisions talk about land in a position of the state and various lawyers have written that in a position of the state means much more than land owned by the state and that's probably an unintended consequence. So that, that will have ramifications that weren't intended. There is another problem which is it talks about restitution for rights in land, Now many black people who were forcibly removed, even those people who got the land before 1913 often couldn't get it as a full freehold owners because even before 1913 there were provisions that prevented blacks from owning land in the Free State and other provinces. So if you

interpret rights and land a very strict legal service to be title deeds and lease agreements, you out some of the groups of people who were just the owners, everyone but it had to be in some other form than a title or whatever. So that's a controversial bit of wording which is probably just unfortunate wording. And then there is another problem with the fact that they refer to the expropriation act, whereas many of the issues to do with homeland consolidation and forced removals were done in terms of the development and in expropriations were done in terms of those other many instances people were never even expropriation but they may have got a bit of compensation here or there. So those are just issues that you know have turn to be problematic but they are very technical sort of issues. So that's just a brief run through the content of the process and of some of the issues that came up as controversial. At the moment the Commissioners have been appointed, I know the department has advertised for staff for the various commission offices. The judicial services commission's still hasn't called for nominations for the judges for the land claims court, so that's what is holding the process up a bit at the moment because until they start interviewing judges, the actual court can't be established and the judges have to be chosen before they can establish the rules of the court. But in any case, the commission can start operating in the meantime because it has to prepare a whole lot of staff before anything goes through to the court, but my understanding is that the Minister wants, you know the claims to be able to be lodged from the beginning of March.1. Thank you Annika ... I'll expect that there will be questions of clarification and perhaps comments that people would like to make, but could you also just take on board with the first round, we will take round of hands if there are. The question of whether beyond the three year period or five years if you stretch it to that point, you see a role and place for a commission on land restitution in the future because you see the question that is faced by this particular.... group is whether in the new constitution we need to make provision for such a commission. Is it something that you think could play a role even if it is somewhat of a different nature or slightly different nature beyond the three or at the most, five year period that you prefer to. Are there any hands for question 3?

Thank you

My question is about the course of the institution of claims, claims from the beginning of the claim up to when the claim comes to be constitutional what do you call it ? the rest... 3? No this court which... [Not audible]... claims court and up to the... Supreme Court. Who will bear the cost of these claims and the cost of these courts? Will it be the individuals, the communities or the State? Who will bear the cost of these claims? [not clear]... 4thwere removed. There were also some families that had properties in so called White areas and were removed with compensation decided by the municipality or whoever. Now when this time comes you know those people who are claiming are people who are like people who were removed from villages, from farms and things like that and the small owners who had maybe four acre plots or eight acre plots want to know whether they are or can they be part of this are they included in making claims ?

RESPONSE2

I just want to know whether you have any idea about how many claims or what is the amount of land that you are talking about. Do you have for....in terms of the costs, the reason that the commission was designed to be? A body that will actually help people prepare their claims? It's because then that whole cost of preparing the claim will be borne by the State because it will be done by the staff of the commission. So in that whole period while it's been mediated or whatever, the commission bears the cost when it goes to the court, because say it can't be settled and it's a very complicated case, then if the claimants cannot pay, the commission is bound cover the legal costs, either through the State legal aid system or through other monies set aside. So it's designed that poor claimants won't be stopped from being able to bring their cases just because they are poor and that's provided for in the legislation. In relation to the different kinds of claimants, the act treats everyone equally whether they were rural people, you know who had big farms or whether they were people in the cities like the Group Areas removals like in Newlands or whatever. So people who had those four or eight acre plots would be able to claim that. The basis of their claim would have to be ..(a) was that, that was done in terms of racially discriminatory law like the Group Areas or the Black Administration Act and (b) they would have to make the case that the compensation that they received at the time was not adequate. There is provision in the legislation that, instead of the Commission, you know, doing it case by case if there were a whole group of people in one town, than what they were. What the Commission could do is call for all claimants to come in at the same time so that they could try and do a survey of the market value of land at that time. What it sold for on the open market, and what the people actually got and that would then sort of set a formula and everyone who was, who lost their land would be able to come in terms of those figures that the Commission would be trying to establish historically, that it would just be cheaper to try. In those cases where it mainly depends on how much compensation they received, it would be much cheaper for the Commission to do the case for the whole group of people than case by case. There is one provisor which is that, there has always been a concern that the people who need restitution the most, are really the people who got nothing in compensation. And the people who are most likely to bring the first claims are the people in the cities who may not actually have suffered quite as terribly. So there is a provision which says that the Commission can prioritise cases which involved the largest number of people and the greatest suffering. That doesn't mean that they will be you know, that they will get a higher status than the other claims, it just means that the one's where people suffered the most will come first if there's a big log jam at the beginning of the process and then in terms of the scale. It's question that ...QUESTION 5? Just before you go on ... and then where will they have these Commissions ?Will they be ... you know there are small areas. These things happened and usually that is not the place where ... I am sorry that is not the place where this Commissions are located. Now how do ... does it mean that people from these small areas have to go to where the Commissions are .. or what happens?Two my understanding is that in each Province the Department of Land, the office of the Department of Land will have staff belonging to the Commission, so that there will be Commission offices in what Kimberly and you know, Gauteng and everything. Although there will only be one Commissioner for that vast area but will just be that Commissioner's role to

oversee those offices. So it's hoped that the thing will be as decentralised as possible and there's there ...it's intended that there will be advertisements through radio and television and all different languages that the process has opened for claims. The court itself is going to travel. In the legislation it says it has to travel to a point accessible to the claimants in each case. But some people have criticised the fact that so few Commissioners were appointed and that may make it an inaccessible process. I know the answer from the Minister is that there are only a few Commissioners to save money but in each office of the Department of land there will be a land claims commission section. In terms of the question about numbers, it's a very complicated issue. Obviously you know the surplus people's project estimated between 1960 and 1980. 3.5 million people were removed, but of those people almost 1.5 million are farm workers and people that would be in a very difficult position to bring claims. So the Black spots of about 850 000 those kind of people, are in a good position to bring claims and then there are the vast numbers of Group Areas claims. The other way around, one can try and look at it in terms of the claims that were lodged with the previous Government Commissioner and how many of those are outstanding, and I am afraid I don't know those figures. I think you would have to speak to the Ministry of land because I know they have been trying to collect figures. One...my QUESTION 2... it's absolutely imperative that this section be in the new Constitution because if the process... if the new Constitution is introduced before the process is finished then it is very likely that a case will be brought in the Constitutional Court saying that legislation is unconstitutional because it infringes property rights and it's highly possible that case may be won. Expropriation is for a constitutional purpose because it is provided for in the Constitution. Then there is n't that overpowering of restitution by the property clause. So it has to be there even if it isn't going to be a limited process, also to be quite honest and frank, no one really expects that all the claims will be in within the first three years, but it is considered important that should be in the legislation which will then be extended if they aren't, because that's the way to try and force it to be quicker, but you know it's likely that some people will hear about it later or come forward later and although it's advisable for it to be quick, one can't guarantee that it will be as quick as people are trying to make it to be. But it's terribly important that if this process is going to happen it must, not necessarily in the kind of detail. No one expected the kind of detail that there is in the Interim Constitution a page and a half and there are all these measures about feasibility etc. You know there's a big question mark about - will they need all that in the Constitution? Whether it's appropriate to have all that in the Constitution. But the right to restitution should be a constitutional right to balance the right to property and current owner to property and maybe one could achieve that in one line.

1... 5...question?

RESPONSE

Thanks chairperson. I wonder if I missed this one. If communities or individuals are to be compensated, who is going to determine the amount to be paid to those people. Is it the Commission itself or people will be given a chance to evaluate for themselves the amount to be paid or what? Two...

ANSWER

Well the commission will attempt with the people to reach agreement settlements with those people. These are the figures that we researched about what the value was. What you are paying is ... we think is reasonable. We do accept that and try and negotiate some settlement in that sort of context. The same with current white owners we try and reach a settlement, but where there is no settlement it goes to the court. The Land Claims Court and the court will then make an award which says this is the amount of compensation and the court will use the formula in the Constitution. The compensation formula which provides that various factors had to be taken into account- market value, the history of the acquisitioned land, the use to which it's been put. All those factors have to be balanced in determining the amount of compensation.1...Anymore hands ? 6...Pam, my question concerns the models that were used in determining this type of approach - you mentioned that you looked at the South American models. I just wondered as I listened to you why you did not look at some of the African models, for instance Kenya and Swaziland. These two have very interesting arrangements for opposed colonial situation such as for instance in Swaziland when they got their independence in 1968. They, the British government as a condition of their colonialism committed to buying land which was available for sale. It was not going to be forced upon the people, the white farmers so the ... but it will be willing seller, willing buyer. And then the British ... money for this [NOT CLEAR]... and the land will be bought for the people of Swaziland for the Swazi people, and infact I think today when Swaziland became independent, they had only about forty plus percent of land. Today they are fast reaching some.....

THEME COMMITTEE 6.3 1 FEBRUARY 1995 (TAPE 3)

Mr Ibrahim

The levels of government and again if we are to see the traditional authorities as a structure of government, it must have a relationship, and evidently there will be relationships in respect of financial and physical relationships, there will be authorities and competences, there would be judicial and other legislative authorities given to a traditional authority.the case theme committee three will also have to consider that, because it would look at traditional authorities in respect of its relationship with other structures as opposed to a structure in itself. Now those were the considerations that were applied when looking at how best this work programme could be organized. Chairperson may I just say that there are different ways in which one deals with overlapping matters.

Your first scenario is to allow everything committed to dealing with the matter to deal with it on its own, and to make allowances for different conclusions on the same matter.

That's your one scenario, allowing each Theme committee to deal with the same matter. Your second scenario is to say, let's deal with this matter jointly between all the Theme committees, and when we deal with traditional authorities, all those relevant Theme committees affected by the question of traditional authorities should deal with this matter on a joint fashion. The difficulty with that scenario is that, your Theme committee may be busy with something else, and another Theme committee has now got it on its agenda to deal with traditional Authorities and has to wait for you to finish your items for discussion so that you could deal with it, so it creates some problems there.

Your third scenario is to say, let none of the Theme committees deal with it, let's deal with it as a specialise in a commission or a specific group that will deal exclusively with Traditional Authorities which would mean we are creating another structure to attend to the question of Traditional Authorities. Your fourth scenario, which is generally the scenario that has been adopted, has been the argue and ask oneself let us apply greater legal definition to the issues on the agenda. What are we asking theme committees to do ? what are we asking them to discuss ? Now the argument was that very simply Traditional Authorities is not a specialised structure of government.

It is a structure of government full stop. It is not in the same category as a public service, an electoral commission or financial and physical commission, the Auditor general or the commission on Gender equality or any of these structures, it is not a specialised structure of government. It is not in the same category as the army or the police. It is not an institution of governance. As an institution of governance, which, ordinary citizens are affected by, it should be dealt with by the Theme committee properly dealing with it such that it can be placed in a proper context. Chairperson perhaps I should leave my explanation at that with one final word.

Nothing in what I have said should be understood to mean that we have now removed the question of Traditional Authorities from the Theme committees ambit and work programme, and that is the end of the day. If this Theme committee feels strongly enough about the matter, then

I would suggest that a recommendation be made to the management committee and the Constitutional committee that the question of Traditional Authorities be reinstated. However should this Theme committee decide to adopt that recommendation, then I believe an added recommendation would be necessary to come from the Theme committee and that the Theme committee should make a recommendation as to how the question of traditional authorities ought to be dealt with particularly in view of the fact that other Theme committees are dealing with the same matter, and with the general efficiency knowing the full work programme and work load of your Theme committee how do you intend to deal with it.

So if your Theme committee wants to deal with it by all means make that recommendation, I am sure that at the end of the day the Constitutional committee will have to look at what is most prudent and efficient and will attend to it on that basis. Chairperson if I may be allow to move on to the third aspect of the public participation programme, I must apologise if the public participation programme appears to be confusing, and if I may in the most simplest terms go about giving an overview of the public participation programme rather than going into its details which can perhaps be discussed in when if should there be questions.

What we have attempted to do in this public participation programme which from the administration we are arguing cannot be seen as separate from your work programme. In that the two are dialytically related, and infact interact with each other, because your work programme will determine what public participation activities you would like to carry out. Indeed the public service section of your theme committee felt it necessary to have a workshop as a start to define the perimeters of the work and to identify the issues. So your public participation activities are determined and affected by your work programme when and where you discuss matters. You can only call in, if you are to deal with the question of Traditional Authorities.

You can call in Traditional authorities only when you are dealing with traditional authorities. You can't call Traditional Authorities at another time, so your public participation programme and your legal programme as I refer to it, your agenda programme has to interact with each other.

You may very well find that arising out of your meeting with for instance women for the gender commission, it may give rise to another agenda item or further discussion, so your public participation programme will impact on your work itself. It may introduce new agenda items or remove agenda items. So the two programmes are interactive. What we have attempted, the objective of this programme has been to try and reach as many people in country as possible. Now our Country is made up of more than forty million people. You need to consult the most representative grouping and formations of those people such that when carrying out your work you feel confident that you have carried out adequate consultations in the process of making your draft in this constitution.

How have we attempted to do this ? we have seen the public participation programme as a campaign, infact we refer to it as the most important campaign this country has ever seen, and this most important campaign this country ...

(Tape not audible) the will ever have. Subsequent to the elections and the campaign for getting people to vote and so on. This is the most important campaign ever to involve the Country's population in the process of the Constitution making. being a campaign, we thought we needed to launch it publicly in proper way.

To launch it in a proper way, we have proposed a series of three launch rallies or briefings if you like, with large numbers of people. Starting off with the farm workers here in the Western cape, going to the rural areas and only one urban area allowing for the bias in favour of the rural people rather than the urban people. That would launch our campaign. What affects this Theme committee directly is what we refer to, people have this document.

2. Mm... which one ?

1. Ok this the public participation programme, yes, if I may refer to paragraph seven, which refers to theme committee requests and 7a hearings.

HOUSE

We don't have that document

1. You don't have this document ?

CHAIR

page 44 on this one

1. No, no, no, I am so ... I must apologise, Ok

CHAIR

You don't know you have this ?

HOUSE

No...Constitutional committee

1. Constitutional Committee ?

CHAIR

Oh! Is that Constitutional Committee ?

1. Mam Chairperson I must apologise for that and ask that as this matter should be properly for the discussion by the sub theme committee that you have actually the benefit of the document. I must apologise for giving an input before you've seen the document. I would rather you see the document and then I give the input so that you can ask informed questions.

FLOOR

NO... not today.... sometime.

CHAIR

No, it was actually only distributed to the Constitutional Committee.

1. It was distributed to the constitutional committee we were'nt able to distribute it. I must apologise for that and ask that snakes distributes that so that you have the benefit of it. In view of that I would be prepared to come back to this theme committee after you have had an opportunity to read it and to take what questions you have because then you'd be able to ask

questions on an informed basis. Perhaps I should just go through this brief overview to give you people a general conception of what are we referring to. What the fact should... directly is what is referred to as hearings.

What we have attempted to do is that we have identified key sectors in society which are of importance and which need to be consulted as a sector. What are these sectors or target groups ? the one is a business sector, the second is women, the third is traditional leaders, the fourth is labour, the fifth is religious groups and youth. Now our proposal generally which has as yet not been accepted by the constitution committee is as follows :-

We intend to deal with business in terms of the schedule in February, in the month of February this month. I've already got notice by some of the sectors, infact the Chamber of mines spoke to me yesterday and said to me that in terms of obtaining their mandate, they would like to defer it for a week or two, but discussions in that respect are ongoing. But the broad framework is this, that February is business, March we intend to approach women, April we intend to approach Traditional leaders as traditional leaders.

May we intend to approach the working class organisations. June we intend to approach the religious groupings and formations and also youth because we need to finalise by July. So we've identified those key formulations in society, sectors in society which need to be consulted as a sector rather in respect of a particular aspect on the constitution making process agenda. So in respect of each of these groupings we would invite them. In this instance the matter under discussion traditional leaders we would invite all the traditional leaders to come and talk across theme committees not with regard to particular theme committee or a particular subject, but whatever issues they have to say.

Now the point here is that we cannot afford to ask Traditional leaders to come in March to deal with Theme Committee two and April to deal with theme Committee three and May to deal with another theme Committee. it will just totally destabilise them. You can't call Traditional leaders and say, no, no, we are not interested in your legal aspects, we want to deal with structure government or no, no, we want to deal with structure of government and not this, it is not the in which I believe you could

effectively or efficiently deal with Traditional leaders, and so as to give them adequate opportunity to prepare themselves and to allow themselves to make a contribution with regard to any aspect relating to the Constitution. We intend to call them in one go. The same with women. Women will argue in respect of probably all the various sections of the constitution, the gender sensitivity of the entire constitution and particular aspects of it. So you cannot call women and say no, no, we don't want to hear about how you are affected by fundamental rights, we want to hear only about the gender commission, or no, no, we only want to hear about a particular aspect.

The point is to call women as women and say, what are your views with regard to the constitution ? so with Traditional leaders, so with workers, so with the youth, so with business, so that's one area. The second area is an aspect which your Theme Committee has so competently and set a very shining example to the rest of other Theme Committees. Your public service workshop that you organised, essentially workshops which help, educate, direct, identify the issues for debate the broad parameters call in the experts, tell us what is, what are the options, what are the models,

what are the different scenarios that we have available before us ? So you have occasions and opportunities for workshops and seminars which go into helping a theme Committee make its work much more effective and efficient.

Then we go into what we refer to as constitutional public meeting and for the month of February starting from the eighteenth, we have scheduled nine public meetings. One in each of the provinces with the sixty percent bias in favour of rural areas. Now a constitutional public meeting, when you are going out to meet communities and holding a public meeting, again you cannot say to the ordinary residents association or ordinary business people or ordinary civil society structure, no, no, I am coming here from Theme committee six I want to hear only on public service, I am not interested in other aspects, we will come back to you at a later time to hear about ... question of youth of whatever.

The point is that, when you go out to a community, you want to ask the community as to what their views are. So one, it will be across different Theme committee issues, two it will be across the agenda items. The point is that, no one theme committee will be assigned to one public hearing simply because we can't expect all thirty members of your Theme committee to be going to all public events every weekend, it's little impossible, you have other responsibilities, you have other standing committee responsibilities, constituency responsibilities, family responsibilities, other public activities which you have to engage in. How can we most effectively and efficiently utilize your time, to gain the maximum out of our public hearings ? The idea is that we need to organize delegations from each different theme committee, put them in to a public hearing so that not all members have to attend all hearings. So for instance on February 18, they scheduled four meetings on the same day

To take into consideration the concern of the religious people, we have cut out Sunday from our programme, so that there is no difficulty with regard to that. But having four meetings in different in different provinces on the same day would allow us to involve every theme committee in that provided you send a delegation of people to properly represent your theme committee to the public hearing, such that all theme committees can gain the maximum benefit out of every public hearing. If I may ... (Tape not clear) four throughout the Country?

1. No, I am saying on that one day ja, in that one day. For the month of February, we intend to touch on each of the nine provinces, therefore nine meetings, one in each province, but this will be repeated every month or every block and so on.

FLOOR 3

Could I ask you also about the, these meetings ? If you don't have people from every theme committee at the meetings, how will we know what people have brought up so that we can then return here and tell the theme or sub-theme you know what the concerns of our people in xy or z ?

ANSWER 1

Ok, two methods : one we hope that every theme committee will participate in this public activity so they would go as a delegate from you theme committee going to a particular public hearing.

They will come back and say ; with regard to our matters, for this sub-theme or theme committee, these were the issues raised by these sectors of society and so on.

The second way, and the way in which you'll be assisted is that we will produce transcripts, by and large going into ordinary public meetings, people will come with defined submissions or prepare them packaged and typed up nicely for you to consider at your leisure. People will come and talk their views. They don't have the luxury of typed out submissions. They are going to give oral submissions, and these oral submissions would have to be recorded, and they would have to be transcribed and the transcriptions would have to be made available so that people could identify those issues.

The importance of a theme committee being represented at these theme committee, these public meeting is that you could for purposes of your own theme committee if a member of the public or a civil society, raised questions with regard to, to use the example of the issue under discussion. Traditional leaders you could because you are dealing with that matter ask particular questions so as to inform your discussion and debate a little bit more effectively, because nobody else is going to if they are dealing with traditional leaders in passing.

So then it is important what we have done and as you will see from the document is that we provide members with three different options in terms of which theme committees could actively participate in this public meetings, and it will be up to members to determine how they wish to deal with it. We give a proposed agenda and programme and times and so on and without having to say so the logistics, the planning, the administration and the management of it all will be undertaken by the Administration and the Community Liaison department so it's not as if we are expecting you to get to a public meeting at your own cost or arrange your flight on your own. The Constitutional Assembly will through its administration organize those transport arrangements venue logistics, secretarial facilities and so on including security and local transport.

Chairperson, that is the basis of the programme, what we have as an aspect of it we raised the constitutional education programme which is essentially a series of workshops to organize in a community before you hold a public participation, a public meeting. Where we will run workshops with civil societies and structures and basically tell them that a public meeting will be held. This is the process of the constitution making. these are the issues we are dealing with so that we are able to empower people to ensure that they give proper submissions and the submissions are informed.

It must not be as if nobody told them about this public meeting, they didn't know exactly what you were going to deal with in this public meeting, and when you come to the public meeting people will deal with lack of clinics, schools and social services and lights and water where infact you want to deal with constitutional matters. So it will be the responsibility of this constitution education programme, to run facilitation workshops to give people basic reading materials or to, in areas where there are problems of literacy and so on, to run workshops and help people understand exactly what the nature of this public meetings are sot hat people don't think in the rural areas that you coming to give them all houses, because Politicians are coming to the rural areas perhaps we are going to get lights and water.

In the Northern Transvaal they want water, and they are all going to ask you about water, and you'll say to them : but I am sorry we are not dealing with water, we are dealing with traditional Authorities or something else. To facilitate that process we intend to run constitutional education programmes. Chairperson, what we have done with this public participation programme again is not a prescriptive thing, we are not telling your theme committee that this is where you are going to go, this is what you are going to discuss and this is how you are going to discuss it. we are providing you with a framework and we are giving you the freedom to identify in addition to what we have requested we are aren't in touch as closely with the issues that you dealing with as you are, and you would be best placed to identify the need to have a workshop as you have identified with the public service.

it worked out brilliantly. we couldn't have had a better meeting than that, but you would determine also in addition to this what other meetings or what other experts, what other events would you like to organize to facilitate the processing of your work. Chairperson, perhaps I should leave it at that. I don't mind taking discussion on the public participation programme but I believe it would be more efficient if members were given the opportunity of reading the document,

and if there is, need be they have no problems in answering questions where once people have had an opportunity to study that. Perhaps I should stop there and allow members to ask questions. I do want to apologise for the length that I have taken in my presentation.

CHAIR

Thank you Mr Ibrahim, miss

Miss... I would just like to Have you got any dates attached to those months ? if so and its written in the document, my question has been answered already. If not, can you give us any dates please.

CHAIR

4th Question

my question has to do with the structure of the various theme committees. We in the theme six, we have a special situation where we sub divided ourselves and as such we have a status of discussing definite themes as sub themes. How are you going to arrange that in relation to the delegation and so on.

5th Question

Thank you. My question is this programme here. traditional Authorities has been removed from sub theme committee six, which I believe it was in subs in theme committee six, it was in sub theme one. Now I realise that these item here is being juggled from one theme committee to another and I think when you want ... to like other themes, then it should be placed on one theme so that it because right now I am saying this because in that sub theme it was being worked on. For instance when we were developing these working programmes, something has been done already on this and now you are saying you are going to consult these formations in society and traditional leadership or authorities being one of them.

And I realise you have programme and we have a problem As apart of Government, the

government right now has no clear policy on Traditional authority and clear

The CEA right now is misdirecting itself by juggling that thing from one post to another, and you are saying Traditional authorities are the key formations in this. I think if you don't consider this, you are going to cause problems because right now let me tell you in South Africa traditional authority is very strong. I know this, and I know how influential they are in rural areas and I know this, I think you'd better put your house in order, come up with something clear otherwise this found democracy will.... to problems.

I am talking because traditional leadership has been part of a government. It was a government.... and its still influential.

6th Question

Yes... on the question of the hearings, the second part of the public participation programme, you are going to target key sectors, and you mentioned I think six, I was just surprised that you mention women as a key sector, because I think women exist in all that, even not excluding Traditional authority, so it seems to me a little bit odd that you know half the population should be dealt with in one hearing, and you know the rest of the hearing should deal with really quite small parts some of them quite smaller. And I wonder why you left out you know people that are disabled, people living in urban informal settlements, I mean you know why did you select those six ? because you know women are so different in this Country, there is such a range of ja that seems strange to us ?

Thanks Chairperson..... should add on what my colleague said. To some people this institution might mean nothing because they have lost the touch of their culture, they have lost it completely because the look at this as another structure , another institution to us it is life and death, we grew up in it, we live in it and we are breathing it everyday. We can only suggest that, those who are responsible or those who took that decision to remove it and put it nowhere, let them reconsider this issue and see where best can it be placed because it is no use saying it its overlapping everywhere.

Yes, its true but I mean there can be a place where it can be best suited ... it can be best handled, for example where they are dealing with structures of government, I think there is the suitable area where the issue can be discussed. It is very painful to learn that ja, we are just going to see if you can't get a workshop to look into it, ja to hear some evidence of some kind. It's painful as I am saying to some other people it means nothing because they regard themselves as no more Africans in such a way that, their culture is no more in them, hence I am saying this is very important to some of us. So we are ... that can't it be placed somewhere where those groupings will look into it and see if it can be somewhere somehow ... thanks.

Chairperson

Ok. Can I just from the issue that was just read by Khosi Mokoena perhaps just to iterate what was said by the executive Director that I don't think it is quite accurate to say it is nowhere because I think he is indicating to us that infact in their thinking, precisely what we are saying, structure the theme committee that's dealing with structure of Government is one of the places where it is, it is still, infact three theme committees are still having it in their programmes.

I think the question here is and I unfortunately has not consulted with sub theme group one that is dealing with public administration because the point about it was that it was put there with regards to theme committee six precisely as an issue that would be dealing with Governments, you know public administration and governments of the country you know an institution that will be performing that function. And I think perhaps it would be interesting to hear what sub theme group one have to say on this matter because that's where it was with regards to theme committee six.

So that we sort out this whole thing of whether or not it should still feature in theme committee six rather than perhaps the administration have taken it out. You want to say something, Snakes ?

SNAKES

Thank you Madam Chairperson. Infact I raised the issue and had an extensive discussion with the Executive Director, and the report is given was again to the sub theme committee on public administration of course the feelings are strong about the issue, but decision taken this afternoon is to the effect that they would approach the management committee, and request the management committee to clarify this issue once and for all. Whether does this subject of traditional authorities belong to sub theme committee six or not, and then if not they have got to come up with a political decision on this subject. And it is believed that way the matter will be settled once and for all. So that's really the attitude of sub theme committee one.

1, Ibrahim

Chairperson let me start off with an apology. it appears as if I owed two members an apology in that I may not have explained myself properly. I want to confirm that were not juggling about with Traditional authorities as if they mean nothing or that there's any dilution of the importance of Traditional authorities. I also want to confirm that there's no attempt to make Traditional authorities mean nothing or place it nowhere. And I just want to confirm with the Chairperson that infact we have given it the place, prior place that we thought it should have as a structure of government and not just as a structure that is equivalent to public service for the elections commission but as a structure of government as such.

So I would like to make an apology if I did not explain myself properly, but exactly the sentiments you are raising, both of you are raising are the sentiments that go into allocation of traditional authorities within committee two because it is a structure of government. Recognition of it as such. The issue that I ... is quite separate one is who should be dealing with it. Is theme committee six more competent or theme committee two more competent. That is a political decision which I think needs to be sorted out politically. Legally we attempted to define it as a structure of government, but if people believe it's not a structure of government, it must be dealt with like the public service or the Election's commission, by all means let seem sub theme one deal with it.

Is a political decision which I believe parties will deal with it in their representations to the management committee, but from the administration side, it should not go on record as being reflected as if we had ignored or relegated the question of traditional authorities to mean nothing. Can I start with the first point. The question of dates for the subsequent meetings. We have only allocated dates in respect of february, and the reason why we have allocated dates only for

February and merely given concepts for the others is that immediately after February, we want to carry out an evaluation with you.

To ask you and to ask ourselves whether we are effective in the programme that we are establishing. Can it be changed, can it be improved, is there need for variation, so that we use this as a *priorum*.

It may be very well be that politicians find it far too tiring even one weekend a month or two week ends a month, and that we need to reconsider that we need to reduce number of meetings or change the times of meetings or provide a greater security or whatever the reasons are, but we thought that the month of February should be a trial run and we should correct it in that sense with regard to the question of women, no doubt we thought that by allocating women to a particular sector I hope we didn't mean to represent ourselves to mean that business does not involve women or youth do not involve women or traditional authorities.

Evidently I think that would not stand to any argument but we've just had a gender meeting on gender which dealt with matters relating to the Constitution and the sense we pick up from women as women's organisations is that women would like to have an input into the constitution making process as women, but the question whether we placed them above the disabled is quite another question and we would most gladly put them on if you felt that you have enough week ends to ... I mean certainly if you want to meet the disabled and we'll organise that meeting if you think it is important. We thought we'd identify the most important. If you think our criteria are wrong and that women are not important enough then by all means that I mean if that's the wishes of the politicians and we'll remove that, but ...

Chairperson : No you must

Mr Ibrahim

We merely thought we didn't you know

6th I think with respect to you missed a point, and that is that you know when you have hearings, for all groups, you ought to make the point that you are inviting men and women.

FLOOR : Sure

6th - So that its representative because if you don't make the point, there you are almost likely to get vast majority of men at these meetings, thats the practice.

8th - Also if I add that the question of women is not only dealt with when you call this big thing on women, but that it must be dealt of in everyone of the hearings that will be called. Thank you.

Mr Ibrahim

Chairperson I think that is inevitable, but the point is that we felt there was a need. Women were important enough as women to be called into a meeting. It did not exclude or preclude the fact that you deal with women when it comes to Traditional authorities which I think is inevitable. You deal with women when I think is inevitable as well. I think that goes without saying. And

the way in which you deal with it is really a political matter and that would not be in terms of how we would invite would be at your instance and not at our instance.

So it would be a political decision which you would have to take. Then there was the last question tht I merely wnat to rais is the block times. We have allocated in terms of our document for theme committee six various blocks. I just wanted to clarify that if there were three blocks allocated to theme committees six, of its this document. ...

Chairperson

It will be for sub themes

Mr Ibrahim

... three, blocks allocated to public service we don not mean that exactly when the date of the third block ends and that is wehn your meeting and so on will disc end for public service and that you could not deal with anything else after that. Its again its not intended to be in a prescriptive form. So if public service is completed in two blocks, by all means deal with elections commission immediately after that, or if you people feel you want to deal with elections commission immediately, and then deal with the public service after that, that is your prerogative and how much time you wish to deal with it is entirely you prerogative.

And the reason why it is so unique, is that the question of gender commission or public service or electoral commission is not horizontally coherent or does not affect any of the other theme committees. The question of the public service is as an institutio, it doesn't overlap with any othr discussion in other any other theme committee. So when you deal with it, how long you deal with it and where in your programme you deal with it, I think is a matter that of latitude which your theme committee or sub theme committee should detrmine as is necessary for your purposes. Perhaps I want to I should leave at that. I hope I have answered peoples questions properly.

Chairperson

Sis Harriet you are not satisfied?

Harriet

I think my question was not answered. It was it concerned the representation at you mentioned that we shall send delegation to this ... and I was asking how are you going to arrange it because ...

Mr Ibrahim

Oh yes, yes, yes. I must apologise. The delegations would be we ask the core groups and the chairpersons should identify and allocate people now knowing that you have four sub themes, and if your theme committee per se or your core group believes that we need to find representatives from each of the four sub themes or as a theme committee in its entirety we will send a delegation. I think it is a decision which which you people need to take and I don't believe that the management committee will prescribe to you people that you must send six to eight people two from each sub theme or in whatever form. I think it will be a matter for decision to be adopted by your theme committee or your core group and your chaipersons how best you people wish to deal with that.

Chaiperson

Thank you, I think we've probably exhausted the discussion with regards to the presentation this

afternoon and how far can we take the discussion before people have actually read the document after it has been circulated to them.

So we'll just thank the Executive Director for having taken the time to come and talk to us, and to say that we'll be in touch you know for you to come back after people would have read the document. And perhaps to the members, perhaps we can just say indicate to you that infact we are sub theme group three and we have already finalized how we would like our own programme reworked in terms of the different blocks.. We did that yesterday and you'll get that from our Management secretary.

Then and therefore we would look forward to a situation whereby within the framework of the broader programme as will be adopted and endorsed by the Constitutional committee being you know involved in whatever delegations, because I think we are quite eager on the various matters dealing with lanf, dealing with human rights and so on to go out as part of the delegations for public participation so well thank you, you are welcome to sit we are not going to be much longer now

Mr Ibrahim
Can you please excuse me

Chair
You are excused

Mr Ibrahim
Thank you very much

Chair
Ladies and Gentlemen the only other items that are now left are on item five and item six really, unless there's any other business.

Floor 3 .2
Chair

Oh 3.2 definitely 3.2 Ja actually there maybe , let's go back to 3.2.3.2 is indicating that we have a seminar tomorrow, whereby we are going to be addressed by Judge Olivier, but at the same time as per demand from the different parties, the party caucus have been rescheduled from Friday afternoon which we recognise as something that was really going to be quite futile to think people were going to be here of Friday afternoon, to the regular party caucus time Thursday mornings. And just to say to members, this is a difficult situation we have and perhaps just ask members to excuse themselves from the caucus meeting if that is possible but perhaps lets open that issue for discussion.

9th...According to my programme we are ..., the meeting of this sub theme group or this theme group has been moved to Friday morning is not the case ?

10th ... That's my programme

Chair
When ?

10th

Madam Chair yesterday afternoon, it was put in the pigeon holes
chair

Can you explain that ... Snakes

Mr Snakes-

It's true the, but the problem with this seminar is that it was arranged before....., they've got a long schedule and what it means is this programme for the day has been disrupted and we cannot ... two days before the meeting, say we sorry the parties are holding their caucuses..., look it will really be to say that to him. So I think the point that is coming from the Chairperson is, owing to those circumstances, we have a situation where that meeting cannot be cancelled because it was arranged sometimes last year, and the only available alternative is that.

Speakers: ... members should request to be excused - from their party caucuses.

Chairperson: Sis Harriet

Harriet :

Could it be arranged that some of us who are not likely to come to the meeting tomorrow because of the caucus. As you see the imbalances you know as parties they have a number of people they can divide themselves. Some of us are, are ...

Tape 4 (Continuation of tape 3)

Harriet:

... could it be arranged that we get the programme as soon as possible ... it shall be delivered tomorrow ... Judge Olivier please.

Chairperson: Actually maybe we should deal with the question whether ... of the other charge ... as Judge Olivier .

3rd - ... he has reproduced that for us already, which he is going to bring with him tomorrow ...

Chairperson: So ... ok. Otherwise can we just take it that ... all members ... excuse ... excuse themselves.

4th - At what time?

Chairperson: Ten thirty

5th - Same venue?

Chairperson: Same venue

Harriet :

Madam Chair I am sorry ... on meeting Friday morning ... regarding ... Tuesday afternoon ... it was not ... now I am not even sure that they've got it.

Chairperson: ... I didn't ... come to that meeting

6th ... its up to members themselves to determine whether it suits their specific circumstances, ... as it seems is the case.

Chairperson: Can I just say again ... Friday morning meeting was being set precisely because the assumption was that ... cancel tomorrow's meeting, you see, you see the other theme groups' theme committees are - meeting tomorrow afternoon. So they ... be affected, that why ... on Friday, but we would have add this clash with the party caucuses, so the ... was - trying to propose that if we had not had the opportunity to meet on Thursday morning then we would meet on Friday. So because we are saying we can't cancel the meeting with the judge because he is already coming. In fact he is not even in Pretoria we discovered, he's in Kimberly he's going to come directly from Kimberly to Cape Town.

So there was no way, even when we try to get him on the phone just to see if he could come in the afternoon rather than ... we couldn't get hold of him. So we can't cancel that meeting and therefore there is no need to reschedule to Friday so Friday is off for us. So that's as far as we can take that issue and - pursue the - issue of articulating the paper. Then the other items are five and six, that is the list of experts for sub theme three and I would ask members to forward those names to our secretariat. Because we did so that members should be thinking overnight of experts that can ... be there and be approached in the - meantime ... so that they know that we would like to have them as people who are just loosely attached to us whom we can call on and approach for specific work on ... as we've talked about it. There are the last item which is ...

The only other thing I want to propose is that after having heard the input today and after having gone to the point where we realise commission and land restitution, perhaps we should spend a few minutes as the other item on our agenda tomorrow when we do come together on that issue as to how we want to take it forward. ... pull our heads together on that issue as well ... address, so that would be the one other item for tomorrow's agenda besides just the address by the judge. Is there any other business? Then we get on to item number eight and that is ...

6th ... More or less use the same type of thing. Even the question that there's a special function of access.

There is also the question of inequalities in this country which are absolutely so huge such as for instance you find that in this count is owned by 65 000 white farmers ... 63% of the whole of this country. And then how can one support the 13% which is confirmed which result of the colonial system the laws of 1913 onwards. How can one really justify as a democratic government, ... hoc can you justify such inequalities? And actually accept that in three years time it would be finished it would all be past, people cannot accept that I think ... gross injustices and ... we have internationally human rights, fundamental human rights ... people which was ... in July which definitely states that indigenous people have a right to land and this is denying the indigenous people the right to land. And as a result ... this democratic government.

And then it puts us as legislatives in a quandary how do we really handle this type of thing where there is such inequalities in such a very important item of life. there is no question.

..... individual. There is no evidence that this type of procedure will take into consideration all those things. These are one of the things some of the things that many of us particularly who happen to be part of the indigenous community in this country are ... concerned about. Thank you.

1st you are correct in that this process only will assist a very small number of people, to the vast number of people who are dispossessed because of racial measures. It's something, it's just the tip of an iceberg, and I think that its very important that you realise - that because I think that may people think that the land claims court will solve the land problem. the land claims court was never conceptualised to solve the land problem. The land claims court grew of the - demand b a whole lot of communities who were forcibly removed to get their land back. And their demand was that there must be a procedure and court process that would deal with this problem. So it's a specific process for those people who were lucky enough to have got land in the first place taken away from them, but most black people who would have got that land in the first place so deal ... genuine problem of conquest and nation exclusion.

... who had land and that land was taken away from thin in ... way.

..... past years when we were trying to get the previous government to introduce a court, that a court process only helps people who have very clear rights. it helps them very well. But ... other people ... either have to go through a redistribution mechanism like the ones you mentioned in Swaziland or Kenya, where there is actually a political intervention by the government in conjunction with whoever to say, we are making these measures - available to black people to have access to equitable amounts of land. Processes that ... If you look at some of the claims of indigenous people in New Zealand, America or Canada whatever court processes didn't help people who lost land at conquest two or three hundred years ago because

a much more flexible type of commission process and in that context it might be very - useful to have a commission based - process this commission just part of a court based process. It the court the way this commission is formulated. in the longer term you do need a directly, politically rather than legally based process. Because this is fundamentally a political legacy and you can't solve a massive political problem with a legal intervention because failure, because they won't have the proof that is necessary. And what to do is to say, sure these people were excluded politically political mechanism to right that.

Over emphasised as something that is a - solution to the land problem it's not it's a solution only to those people

but they can show that they had certain right to it before. So agree that

...

these people, and these people have been for this for years and years and years and when they didn't get some thing that worked, they just started all these land reoccupations, and that - caused massive tensions and there still is a terrible tension with land reoccupation continuing even now because people say - they are so fed-up with waiting to get back what was stolen from them., people say our land was stolen, people say our country was stolen access to land the people say I can lay claim as a member of this and this group to that piece there ...

designed to help them, its very limited. I agree completely, its very limited in that regard.

Chairperson

I think we have reached a point where we are recognising the limitations to the structures the socialised structure that we have in the interim constitution and the limited role it can play by way of addressing the situation - of a tiny minority of people who are landless, whose land has been taken away from them. we need to get on to the issue of how in terms of a structure of government can address the because I think at the end of the day that's what we would like to do. And as we look at the new constitution, what we ought to be looking at not to take as a problem in terms of the limitations that we've referred to but to look at maximum benefit from a structure a commission commission. And I think the question that you would like to raise is the extent to which we can have structure and but whose terms of reference limited like the one that is in the interim constitution. And perhaps today you can just sort of mechanism that possibility. But to what extent can this commission in terms of a new constitution become something else or be given big or larger powers so that in fact it can deal with a bigger problem. I think that's a question that we are now raising. to tackle and today and in future. Are there any more questions? I'll take those two hand and then I will address

7th Question (not clear)

8th Question (not clear)

1 Answer

..... question that I have probably in presenting this
..... advise because that's my experience but in fact this process is designed equally
for urban and rural areas and it's expected that there would be many more urban than rural claims
so ... JA so there - that's just how I sort of misled you, in fact it's designed to cover all the areas
all the urban - claims. But only restitution. Restitution is
very different from redistribution - restitution is getting something back for what you lost.
Redistribution is you know the bigger political process. People who never
specific pieces because they have lost the history perhaps and what you need

to such an extent that there was a major outcry from certain of the Provincial Governments and
Municipalities saying

in areas where restitution claims and those are going to ruin
their - housing scheme. For example Cator Manor in Natal, where that is an area that people were
forcibly - scheme which they have been struggling to set up. And they came along and said here
with this development that is designed for poor black people who were - excluded from getting
land rights and now you are going to those owners who black
people and put them back. And in fact you are doing something that's going to be against
development and that - argument quite often that restitution, restitution can do
is can undermine or destroy development because it's so strongly based in claims of people as
opposed to the government attempts to provide redistribution or whatever. So there's actually
..... because of that which says that in certain areas

Local Authorities and Provinces can come forward and say we want this specific area set aside
because

With this land, will be so beneficial to so - many people that restoration
they must prove that this would be more beneficial than restoration would have been. That means
that the people restoration, who could have claimed that land, have to get an
alternative piece of land or money. So there is a provision designed because of concern - from
the urban areas that this thing is gonna have an enormous impact in the urban areas. In relation
to Zimbabwe you know I think - that Zimbabwe has been a very clear precedent in ... to South
Africa. They didn't have the same policy, forced removals and the same scale of forced removals.
So this particular process is not something that we could we can learn from in Zimbabwe
and India they had measures that stopped the majority of people to own land. And then
they introduced ...

Bill of rights in an attempt to protect the current owners.
countries, what they have - meant is that people so furious that there wasn't any effective
redistribution because of the property clause that they started for question the legitimacy of the
whole government, and the legitimacy of

..... In India they started to - question the legitimacy of the whole constitution.
..... such confusion coming out of distorted claims for redistribution the people expected
the new government

The new government was constrained by the property clause. Then in fact you know their whole
constitution system was straightened and in the end they had to abolish their property clause in
India. a very similar thing in Zimbabwe where the government at independence
agreed to terms - which constrained its capacity to deliver this most fundamental thing and that

has led to a situation where people start to look for solutions like land grabbing because its so impatient that the law is held up and the constitution is held up defeats their land claims that in the end they say ... is that, well do it our way, ... terrible danger - ... If the Bill of rights or the constitution ... the realisation of a very ... mood ... people begin to question. ...

Chairperson

Well in the absence of any more hands ...

(Question from the floor not clear) 1 minute

Answer

Yes it is the case, but I think that sort of stuff happens when there aren't mechanisms that are available to people who can come forward and say this is the basis of my claim, this is the basis of ...

And if you add a system that could be based from those criteria and institutions that - people could go to then I think you'd see - redistribution to the whole population, but where you don't have those kinds of institutions available to channel the landless ...

Then what happens is that people just go and occupy ... and the deals that are done ... very corrupt deals between - individuals whether they are black or white. And I think that is a very serious problem and I've always ... of restitution. Because restitution is only for - ... people who were forcibly removed. ... because ... process for those people to go through ... because its not designed for the people who's claim is basically I could never own land because I was black. I can't ... the market now because I never was part of it and I ... and in relation to what you were saying earlier, maybe commission will start to look at institutions that can respond to those finds of claims. Because there are different kinds of claims, there are historical claims, there are claims of ..., there are claims of past exclusions. ... historical claims of dispossession, but you know if you could have something that opened up processes for claims of ... and past exclusion and set in place institutions that could respond to those claims ... system being dealt with the problems being dealt with in some kind of ordinary functional way, as opposed to ... invasion and you know and conflict. And there are ... of commissions like that in Canada which try and play a role ... strictly legal or strictly political and that looks at claims ... economically based claims.

Chairperson (Inaudible)

9th Mr ? ... there is some clause that is around ... How do you see the commission tackling that aspect?

Answer

That had to be in the act because in the interim constitution ... and that could have meant ... people who have title deed or whatever, so by defining rights in land, in the actual act, it opens it wider to not just possible ... but also people who were on land as the sort of beneficial owners that as the owners even if they weren't the legal owners but they were living there as the owners for ten years. And that's very very important because ... claimants,

you can be a claimant, not according to what documents you did or didn't have, but according to your actual history. Now labour tenants are ... people who were most terribly affected by forced removals, ... is the patron's question of rights in land that in many instances no racially discriminatory law was used to remove them. They were just removed by eviction by the farmers whatever. ... doesn't really guarantee them into this process. ... they can try and make that case it gives them a foot in the door, but it doesn't guarantee them a place in the system. But that's where we are going to see how this commission functions, whether it ... to push open those ... how it's really going to happen. But I think ... if you shut out people at the very beginning, they strongly believe they've got a claim.

Then you force them you know to act ... outside the law, you - open an opportunity ... factors how well they can use that opening space. ... every labour tenant who was removed in terms of a racially discriminatory law ... there were people who were moved in terms of the development trust ... there you have a claim in terms of this act. That current labour tenants haven't been removed, so they didn't have a claim in terms of this act, because you have to have been removed in terms of a racially discriminatory law. ... current labour tenant talks to all those labour tenants who were removed by the government as opposed to being evicted by the farmers.

Chairperson (Inaudible)

Question

10th - JA chairperson the emphasis here is on forced removals. What about a situation whereby those removals ... Having two communities, led by a Ngubane so ... and the other one led by a Mokoena ... and the state simply said, it is an area which is led by a Mokoena simply because it is dominated by Zulus, the state simply said you are no longer owning this land we are giving it to Ngubane. How are we going to solve that one because ... from Mokoena and giving it to Ngubane.

Answer

... one matter is only as in the other lot is non-owners. When the court has that power to establish who the owners are ... the Mokoenas would have to come along and say we were here as owners and we had to make a case that we can prove we were owners because we could control ... evidence and ... can't do the righteous things, it could divide the land and say this part is for the Ngubanes is for the Mokoenas or it can even ... certain rights ... in the land belonging to someone else belonging to others ... massive dispute it could look for alternative land for one of the parties. And it's envisaged that ... conflicting - claims, look at the Tsitsikama people. Their claim ... the Mfengu who were the white farmers ...

The Mfengu were given the land by the British for fighting for the British against the Xhosa and there are previous Xhosa people who were there before the Mfengu would like to claim as well. So we are going to find many situations are conflicting and competing claims there are already. And so ... going to be you know, the black community or white farmer or the government ... two or three communities and the town council whatever. So ... commission is to try and - involve all those parties ... from the Mokoena you'd have to go to the Ngubane people and say, the Mokoenas are saying this, what are you saying? ...

...

come forward now, ... those people together ... white farmer ... say what are possible solutions here? And if you can't manage bring in mediators and if you can't manage send your ... to the court; say this is the process we won't through, this is the position of all the different parties, this is our situation and then the parties can go and represent themselves before the court if they want to, if lawyers to represent them.

Chairperson

Is that it?

6th - ... the question ... for instance, a number of groups of people were moved not because of forced removal, because they were persuaded by the government even consolidation ... of the e Homelands and then they were moved from one part to the other ... and they were told to either to ... for that allocation. And quite a number of people are in this situation and ... programmes of mechanisation by the white farmers in fact those are the most distinguishing cause of concern because about ... of those people who call themselves tribes and ... millions of people and they are completely landless and they cannot according to this law establish that they were moved, forced removal, they are forced removal people. And then as a result ... law applies only to a very few people who can prove the ... such and such a law. But the majority of people were moved ... its not as if they don't know their history. They know exactly where they belong but ... for them was - not the same law ... the restitution bill requires.

1 - ... I should have mentioned ... about this wording in the interim constitution because ... people who were removed either in terms of ... or in terms of the policy of forced removals. Because you are absolutely correctly that many many people ... voluntary removals and it didn't come to a point where they said we were given an order in terms of the Black Administration ones who resisted to the bitter end where a racially discriminatory law was finally used. So its a big problem ... wording ... it says ... as opposed to the policy ... for example you know people ... coast who were owners of land ... Sol Kezner and they've got no claim back to that land because it wasn't in terms of a racially discriminatory law and ...

because its only because they were black and they were powerless that could have happened to their land rights. And trying to be around the problem of that unfortunate wording in the interim constitution, the act has this provision that the commission can make recommendations for people who don't fall exactly with those two criteria of 1913 and ... racially discriminatory legislation. But its not a satisfactory solution because if you've any exemption, then people are going to try and flood that exemption. ... to do with people who were removed in terms of the policy. It would be fairer, because its inequitable for a person just by luck to have been removed at the same time in the same way as all the other people around ... law wasn't used in their case ... the land was simply taken, confiscated ... there was no legal process involved because people began to think ... to do against the law and so they just gave in. ... and ... its very inequitable that people ...

Chairperson

On behalf of the sub theme group I would like to ... to address us this afternoon on this very very important issue, and would like to say without repeating what I've already said. I think the whole question of land is right at the basis of the struggle ... and therefore if in whatever we do as we try and crate the democratic order we want, we don't actually address this particular issue ... what

we set out to do. And then next ... sub theme group request that Anika ... should perhaps be working on some proposals as to what kind of structure should constitution have ...

that could go on looking at whatever outstanding issues that the commission ... but also take on board the whole question of redistribution ... satisfying the main hunger that ...

If you don't do that the ... you are just ... investing in problems down the line and perhaps the sub theme group could look at ... proposals because if for instance you come to the conclusion that the commission as existing in the interim constitution is not ...

Perhaps what we need to consider is something else and which it's up to us to say what else what do we propose. And with those few words I would again like to thank Anika and say that ...

Cassette not clear for the next 4 minutes

Ibrahim

Now with regard to your particular theme committee as well as the four sub theme committees

Cassette not clear for the next 9 minutes

Ibrahim

Chairperson I must, I must ... the on set perhaps the proper word to report this is to take it from the report of the constitutional committee and this document was presented or slightly more refined document and this was presented to the constitution committee. So the starting point would be what is the status of this document. ... document for the present purposes is no more than a discussion document. It is not a final document and therefore does not describe or to determine what items you will discuss or when you'll discuss them or how you will discuss them.

It is no more than a discussion document and for those members who attended the constitution committee will remember that it was the subject of some ... of discussion and debate. Now that being the case the document, the work programme is released to theme committees for them to subject it to their scrutiny and consideration ... to make the relevant adjustments to the various programmes. So the first point ... the status of this document is that it is no more than a discussion document. The second point is that the work programme is not intended to prescribe is not intended to be prescriptive, but is more a guide and a framework. The third point I wish to make in respect of this is that we attempted taking into consideration our tight time constraints, the work load of each of our theme committees and the need to bring this matter to finality within the agreed time frames.

There was a need to deal with matters in as efficient a manner as is possible. Now from an administration point of view taking on the mandate that we had ... the instruction that we were given on the 2nd of December with regard to the work - programme, ... ask to do is to look and think as we refer to it as the horizontal wherence and a vertical coherence. And by horizontal coherence I am referring to matters being dealt with a particular ... block between the ... theme committees. Chairperson the - important point ... while it purports to allow greater ... of efficiency we run the risk of a great amount of overlap, duplication and dealing with matters of common interest and common ground. Now there are number areas in respect of which there are those problems and I could identify them. There question which you pose is a particular case in point. ... traditional - authorities have been identified in theme committee six, has been identified

in theme committee four theme committee three, theme committee two or affects all four of those theme committees. In block two or block three of theme committee two we see the question of traditional authorities -

arising and it arises as in the theme committee dealing with structures of government. So traditional authorities arises in respect of the question of a structure of government. There also ... in theme committee three by virtue of the fact that theme committee three deals with different ... of government and whilst it may not be identified as a specific agenda item, but the need for a relationship between local government, traditional government is also an aspect which affects them. Traditional authorities has never been in a limbo and can never be in a limbo. And therefore affects theme committee three. Theme committee four is affected by the question of traditional authorities in respect of a number of different fundamental rights which theme committee four identified which affect theme committee four.

Theme committee five and ... in block three and the theme committee five deals with traditional authorities and customary law from the point of view of traditional law and as it affects the ordinary people not in terms of structures of government. So its a ... different aspect of traditional authorities are being dealt with by theme committee five. The way in which the matter came about in respect of theme committee six, was as a specialised structure of government. ... in respect of this present sub theme - transformation and monitoring theme committee sub theme three. ... we were instructed to look at the matters, agenda items of the different theme committees more carefully, the major ... applied in allocating this mor categorically to theme committee two was specifically the argument when providing an agenda item with greater legal definition. One would be able to allocate it more clearly to one or the other theme committee and argument that.

Are we looking at traditional authorities as any other structure such as a financial and physical ... of other ... structure or are we looking at traditional authorities as one of the structures of government? If it is one of those structures, of the governance of people then correctly it should be dealt with by people who are - dealing with structures of government. Failing which what would happen is that theme - committee two would deal with every other - structure of government and in law traditional leaders the result being that it would create some defuncti on in the sense that ... deal with tradition authorities ... have the ... status of a structure of government, ... interacted. The additional problem would come about with theme committee three in that it deals with the relationships between different ...