

NATIONAL PARTY

SUBMISSION: TRADITIONAL LEADERS

(INDIGENOUS AUTHORITIES)

THEME COMMITTEE 2 - BLOCK 4

TRADITIONAL DEMOCRACY

"While delegations of traditional leaders stressed the importance of their role as providers of services and keepers of peace, order and stability in many rural areas, there was acknowledgement that the best of the old ways could be married with new democratic ideals for the benefit of all the people."

Constitutional Talk

19/5/95

1. INTRODUCTION

The National Party recognises the existence and importance of the Indigenous Authorities in South Africa as well as their role and function as it must be defined in the Constitution which is presently being written.

The National Party assumes that Indigenous Leaders will not only be consulted in the process of writing the Constitution, but that it will also be expected from them to do structured research, make submissions and be actively involved in the process of constitution writing. Indigenous Leaders should accept joint responsibility for the establishment of the interests of Indigenous Authorities as well as for the detail and the manner in which it will be done.

In this submission the National Party proposes working methods and guidelines for handling the intricate and sensitive aspects of dealing with Indigenous Authority Systems without wishing to make decisions about their future on behalf of the Indigenous Authority Systems.

2. **TERMINOLOGY:**

In the existing literature there is a tendency to refer to tribal authorities as "traditional authorities". This is partly the result of an almost frantic denial or rejection of so-called "tribalism" and partly an attempt to portray these authorities as conservative, stagnant institutions which have no capacity to accommodate social and political change and which should be eliminated without delay or at the least be allowed to die out by themselves.

There is, however, ample evidence of not only the prevalence of such authorities on the African continent, but of an increasing tendency to reinstate them and to utilise their intrinsic qualities in the establishment of sound local government. These authorities are still an essential part of the social, economic and political fabric of the societies in which they exist and they symbolize political order and protection against injustice and against unseemly behaviour, evil, and calamity.

Indigenous terminology which appeals to the people should be a point of departure for the designation of the persons of authority, their offices, and the institutions which will form part of a new dispensation. These can then be translated into the other official languages.

The National Party itself avoids the concept "traditional authorities", and give preference to the terms "Indigenous Authorities" and "Indigenous Leaders" to identify the structures and leadership in the communities living in the rural communal areas of South Africa.

3. **POINTS OF DEPARTURE**

3.1 The National Party recognises the system of Indigenous Authorities, as well as the variety of traditions and practices which exist as an inherent part of different cultures. We endeavour to protect and maintain the Indigenous Authorities wherever the need exists.

- 3.2 The National Party accepts the Transitional Constitution as the point of departure for the recognition, protection and involvement of the Indigenous Authorities in future constitutional structures.
- 3.3 The National Party accepts the democratic principles contained in the Transitional Constitution as the basis of any future dispensation which also includes the Indigenous Authorities.
- 3.4 The National Party recognises that although not democratically elected Indigenous Leaders do not govern autocratically, but in-counsel as is the recognised custom in each community involved.
- 3.5 Indigenous Authorities and Leaders should be involved in the process to include them in future constitutional structures on a agreed democratic basis.

4. **CHAPTER 11 OF THE TRANSITIONAL CONSTITUTION**

- 4.1 Chapter 11 of the transitional constitution has two main purposes, firstly, **to provide formal constitutional recognition for indigenous authorities and indigenous law** and, secondly, **to establish constitutional links between indigenous authorities and systems and the constitutional structures at all levels.**
- 4.2 With regard to the first purpose, Chapter 11 of the transitional constitution provides as follows:
- (a) Indigenous authorities that observe indigenous law and that have been recognised by law previously shall **continue to exist** and to exercise and perform their powers and functions in terms of those laws (section 181(1)). This is not only a transitional provision that provides for their continued existence. It is also a **formal constitutional recognition** of indigenous authorities and indigenous law and must be regarded as the main purpose of Chapter 11
- (b) Indigenous law shall be **subject to the law** (section 181(2)). This means that indigenous law forms part of the South African legal and judicial system and does not enjoy higher status than other laws or authorities. Indigenous law can also be amended by parliamentary and provincial laws on the subject.

4.3 With regard to the second purpose of establishing constitutional links between indigenous authorities and the constitutional structures, Chapter 11 provides as follows:

- (a) An Indigenous Leader residing within the area of jurisdiction or a local government, is ex officio entitled to be a member of that **local authority** and to be elected to any office of that local authority (section 182). This must be read as a qualification of the provisions of section 179 in terms of which local governments must be elected democratically.
- (b) Each **province** must establish by law a **house of traditional leaders** that must advise that provincial legislature on matters and bills affecting indigenous communities, indigenous law and traditions and customs of Indigenous Leaders (section 183). Section 183 contains certain detail with regard to the way in which a law establishing such a house must be adopted and in which such a house must advise the provincial authorities.
- (c) At **national** level, a **council of traditional leaders** must be established which must be elected by an electoral college consisting of the members of the various houses of traditional leaders (section 184(2)). This council must advise the national government on matters pertaining to indigenous authorities, indigenous law, or the traditions and customs of indigenous communities, and must advise the President at his request on any matter of national interest (section 184(4)). Section 184 provides for details in respect of the necessary legislation to be adopted and for the way in which the council must advise the government.

4.4 The **Constitutional Principles** with which the final constitution must comply provides that the institution, status and role of indigenous leadership must also be recognised and protected in the final constitution and that indigenous law shall also be recognised and applied by the courts (CP XIII). **The Final constitution must, therefore, contain provisions in this regard.**

4.5 The National Party endorses and supports the provisions in the Transitional Constitution regarding the recognition of Indigenous Authorities. In principle the Party thus supports the following provisions in the Constitution:

Chapter 11 (section 181: recognition of indigenous authorities)
(section 182: indigenous authorities and local government)
(section 183: provincial Houses of Traditional Leaders)
(section 184: Council of Traditional Leaders)

Section 126(1) and (3): Provincial powers, read in conjunction with Schedule 6.

Section 229: Continuation of laws
Section 235: Transitional arrangements

Section 160(3)(b): Provincial recognition of a traditional monarch; in KwaZulu/Natal of the Zulu monarch.

Schedule 4, CP XIII and CP XVII

The National Party has taken note of the various Provincial Laws which have created, in accordance with the provisions of the Constitution, Provincial Houses of Traditional Leaders in KwaZulu/Natal, Free State; North West; Northern Transvaal and Eastern Transvaal.

5. **IDENTIFICATION OF INDIGENOUS LEADERS**

The National Party recognises that Indigenous Leaders are denoted by means of established and recognised practices which include inter alia:

- hereditary (genealogical position)
- family selection (family councils)
- recognised systems of ratification by the communities involved.

The Party also notes the claims of certain people to being Indigenous Leaders, but who are not recognised as such. The National Party suggests that a Body of Experts be appointed to support the Government in identifying the true Indigenous Leaders. The Body of Experts should include inter alia:

- Representatives of the Council of Traditional Leaders (to be called Indigenous Leaders)
- Representatives of the provincial Houses of Traditional Leaders (to be called Indigenous Leaders)
- Experts on the subject of Genealogy of the groups concerned
- Anthropologists

The National Party would further like to establish inter alia the following principles for the identification of Indigenous Leaders of:

- A ruling line of descent of at least 5 generations
- Historical recognition by other Indigenous Leaders and by people in a specified geographic area as well as the concerned families and tribes.

6. **THE STATURE AND FUNCTIONS OF INDIGENOUS LEADERS**

- 6.1 With the imposition of European political and administrative control over Indigenous Authorities, the influence of so-called Western civilization, and of the Christian religion, limited availability of land, coupled with the economic disruption (inter alia as a result of impoverishment and the introduction of a money economy) and other factors and controls, severe inroads were made into Indigenous Authorities and in the functions, powers and status of Indigenous Leaders. In many respects they became "officials" of the dominating "white" governments deriving their status and powers not from the tradition and cultural usages and concepts but from the fact that they were "appointed" or "recognized" by the government of the day.
- 6.2 The Indigenous Leaders played a pivotal role, not only in the political structure of society, but also in their economical and social life, their religious beliefs and rituals, the military organisation and the judicial structure. The details have been written up in a large number of textbooks and documents and need no elaboration on our part.
- 6.3 If the need occurs a distinction can be made between those functions which was traditionally executed in Indigenous Authorities and those Local Government services which were later allocated to Tribal Authorities by various forms of government over many years.
- 6.4 The traditional duties should be allocated to the relevant Indigenous Authority whilst the local government services could be allocated to the Regional Service Councils in their new form.

7. **RELATIONSHIP BETWEEN GOVERNMENT AND INDIGENOUS AUTHORITIES**

- 7.1 The National Party believes it to be imperative that the Council and Houses of Traditional Leaders should be able to participate in the constitution writing process. The Indigenous Authorities are seen by the National Party to be an important vehicle in the finalising of the detailed accommodation of the relevant communities in the final Constitution at National, Provincial and Local Government levels. The National Party is therefore of the opinion that

urgent attention must be given to the establishment of all the above-mentioned structures, as provided for in the Transitional Constitution.

7.2 The Council of Traditional Leaders must in the process of writing the final constitution, in consultation with the above-mentioned Body of Experts, advise the Constitutional Assembly on possible amendments of the provisions relevant to the Council.

7.3 The research and legislation of the various Provincial Legislatures which arise from the implementation of the Transitional Constitution must be evaluated and refined by the various Houses of Traditional Leaders in consultation with the above-mentioned Body of Experts. In the process of constitution writing, proposals for the detail description of the role and functions of Indigenous Authorities on local and provincial level must be submitted to the Constitutional Assembly by the Houses of Traditional Leaders.

7.4 The National Party is of the opinion that Indigenous Authorities should be accommodated as follows:

7.4.1 National Government:

The provisions of the Transitional Constitution as described in 4.3(c) and amended in the process described by 7.2 are to be adopted.

7.4.2 Provincial Government level:

The provisions of the Transitional Constitution as described in 4.3(b) and amended in the process described by 7.3 are to be adopted.

7.4.3 Local Government level:

The Indigenous Authorities are to be accommodated in the same way as the Rural Councils and should be called Rural Local Authorities.

The Indigenous Leaders residing in the area of the Rural Local Authority appoints half of the representatives in the Rural Local Authority. The other half of the representatives are to be democratically elected by the community.

In order to facilitate development at grass roots level within the area of jurisdiction of a Rural Local Authority consideration should be given to the creation of informal voluntary Settlement Advisory Forums (SAF's).

Settlement Advisory Forums could advise both the Rural Local Authority and the Regional Services Council personnel on matters pertaining to the development and administration of the particular settlement. Depending on the needs of the settlement, the Forum may request the presence of particular members of the RLA and/or relevant administrative personnel at its meetings.

- 7.4.4. Provision will have to be made for the training of figures of authority as well as the various categories of functionaries and civil servants who will be responsible for sound economic and administrative development at the local government level.