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NATIONAL ASSEMBLY PORTFOLIO COMMITTEE
ON PROVINCIAL AND LOCAL GOVERNMENT
HEARINGS ON
NATIONAL HOUSE OF TRADITIONAL LEADERS BILL (B56-2008)
AND
TRADITIONAL LEADERSHIP AND GOVERNANCE FRAMEWORK
AMENDMENT BILL (B57-2008)

SUBMISSION BY
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(KWAZULU NATAL)
PRESENTED BY
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(KWAZULU NATAL)
Cape Town: 30 July 2008

The Chairman of the House of Traditional Leaders of KwaZulu Natal, Inkosi Mangosuthu Buthelezi, would have liked to be here today to present and further expand on this submission. But he could not do so on account of a recent bereavement.

The House of Traditional Leaders of KwaZulu Natal, hereinafter referred to as the "Provincial House" has serious reservations on the National House of Traditional Leaders Bill, hereinafter referred to as the "National House Bill", and the Traditional Leadership and Governance Framework Amendment Bill, hereinafter referred to as the "Framework Bill", and collectively referred to as "the Bills".

A few words of background may better contextualise our concerns. Since the beginning of the national processes of policy formulation and legislative drafting relating to traditional leadership, traditional leaders have gained the distinct impression that they are the object of such policies and legislation, rather than their subject. We are often consulted after decisions have been taken and the inputs we have made have never substantially changed what was on the table. It is as if traditional leadership were a problem to be dealt with, so that consultation has the purpose of smoothing the ground for the implementation of a decision, rather than to elicit the views of traditional leadership so that policy and legislation may embody and reflect them.

This point could be supported by many examples during the past ten years, but I shall quote just a few. When the new system of local government was being designed, we expressed the concern that municipalities should not have encroached upon the powers of local governance or traditional authorities. In my then capacity as Chairman of the National House of Traditional Leaders, I received a letter from President Mbeki assuring traditional leaders that the powers and functions of traditional leaders would not be obliterated and, if

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adversely affected, would be restored. A few months later, the President reiterated this commitment when speaking to the NCOP.

Because traditional leaders were concerned that, in spite of the President's assurances, the local government process was clearly moving towards the obliteration of the powers of traditional authorities, they refused the lend their support in the 2000 local government electoral process. To address this situation. Cabinet appointed a committee consisting of all the relevant Ministers and chaired by the then Deputy President, Mr Jacob Zuma. On November 30, 2000, that committee on traditional leaders entered an agreement in terms of which traditional leaders would not oppose the local government elections and government committed itself to amend chapters 7 and 12 of the Constitution to ensure that traditional authorities would maintain their local government powers.

We had no further communication and Government failed to honour this process, while this Parliament proceeded to adopt one piece of legislation after another reducing the powers of traditional leadership into triviality and meaninglessness, while forcing them to play a subservient role to municipalities. Traditional leaders were not even given the option to opt out of the local government system, but had now been forced to participate in municipal councils and carry out the instruction of municipalities within their areas of jurisdiction.

The full description of the list of broken promises made to traditional leaders would require many hours and one does not wish to overlabour this Committee's attention. However, one more broken promise should be mentioned as it contextualises our comments. Since the beginning of discussions on matters of traditional leadership, it was recognised that more than in other fields of society, the reality of traditional leadership is diverse across the country. Traditional leadership has different features, pre-eminence and roles as one moves from one province to another. Therefore, it was promised that when dealing with traditional leadership, the constitutional framework would be respected rather than subverted.

As you may know, in terms of our Constitution, provinces have exactly the same amount of legislative competencies in respect of the field of traditional leadership as this Parliament has. The two legislative competencies are concurrent and identical in scope. In terms of the Constitution, if a conflict develops between provincial and national legislation, it is the provincial legislation which ordinarily prevails, which highlights that ordinarily these are matters to be handled by the provincial and not the national legislature. The national legislation only prevails over the provincial one in exceptional limited cases listed in section 146 of the Constitution, which are special situations in which national uniformity is necessary. Because in respect of traditional leadership there has never been national uniformity and there is no need to forcibly create uniformity, it should have followed that the regulation of traditional leadership be left to provinces.

In fact, the Framework Bill pretends to do so by purportedly setting up a framework to be implemented by provinces. However, when one looks at the details of the national legislation, it becomes clear that the provincial legislatures are left with no space to legislate and only with the option of following national dictates or defying national legislation with the foreseeable outcome of political conflict and possible Constitutional Court litigation, all of which is not likely. Therefore, our first submission is that Parliament should reconsider its role in this matter and accept that it has usurped a role which should have been exercised by provinces instead.

Our final preliminary submission is that traditional leadership is a *sui generis* institution, in that it is not - and ought not to be - part of the government of the country. It is an institution which stems out of traditional communities as a specific model of societal organisation and in that respect it is and it ought to be regarded much more as an organ of civil society than an organ of state. Therefore, when providing about traditional leadership, legislation must recognise to our institution a certain degree of autonomy, which means that whenever possible and appropriate, it must allow matters to be regulated by ourselves rather than dictating to us.

Against these premises, I can now submit our specific comments on the two Bills. Starting from the Framework Bill, one must note that this amendment bill and its principle bill are frameworks only in name, when in fact they subvert the constitutional scheme by taking over that which should have been regulated by provinces. In so doing, they impose a uniform scheme of regulation which may be appropriate in some provinces, but is inappropriate in others. Many of its provisions are utterly inappropriate and indeed are repugnant to the history, culture, traditions and laws of the institution of traditional leadership in KwaZulu Natal.

The provisions regarding kingship and the kingship council are foreign to our culture and traditions, and are bound to create long term conflicts within our provincial society. They are nothing short of a formula for disaster which may not erupt immediately, but will undoubtedly come to pass given enough time. The provisions on kingship and kingship councils proverbially storm in where angels fear to tread, not only imposing a system which is unknown and foreign to us, but also replacing flexibility with rigidity.

The flexibility of the dynamics surrounding the Zulu Royal House and monarchy has, over the centuries, prevented many conflicts and avoided much bloodshed. For this reason, a Zulu royal council has never been formalised and its existence, composition and functions have varied from time to time to adjust to the often intricate dynamics within the Zulu monarchy and our system of traditional leadership. Setting such dynamics within a fixed mould will either break the mould or make the dynamics explode within it.

Furthermore, there are provisions in the Framework Bill which are utterly inappropriate to our conditions and situation. It is preposterous, outrageous and foreign to our traditions that one would impose on us the prohibition that members of provincial and national legislatures cannot be members of the

kingship council. This fundamentally subverts the notion of leadership and heirarchy existing in our reality and traditions, for it would force an artificial split between those who hold political power through the electoral processes and those who hold the power of influence within our monarchy.

The other fundamental flaw of the Framework Bill, as it relates to the kingship council, which makes it totally foreign to our culture and traditions, is that it tends to provide for all that there is to be provided for, with the inescapable conclusion that what has not been provided for in this Bill and in other existing pieces of legislation would be placed beyond the law. In fact, this Bill is the final piece of legislation covering the entire field of that which there is to legislate about in respect of traditional leadership. This Bill doesn't provide for the institution of the traditional prime minister of the Zulu Nation, thereby forcing this institution to be placed beyond the law even though this institution exists and will continue to exist within our Zulu law, culture and traditions. This is another formula for conflicts and disaster.

Another element which is foreign and unacceptable to our traditions is the role which the Premier is called upon to exercise in terms of the Framework Bill in respect of the kingship council. This role can only belong to the Monarch and its Traditional Prime Minister. It is totally inappropriate within the context and history of KwaZulu. Like many other pieces of colonial and apartheid legislation, the Framework Bill is trying to rewrite our culture and foist foreign traditions on us.

The Framework Bill also constitutes a dishonourable breach of a fundamental promise entrenched in the process of constitutional negotiation from apartheid to democracy. In fact, the Interim Constitution was amended by Parliament which was specifically recalled for that purpose in March 1994 to add a new binding Constitutional Principle, which was added to the other pillars which constitute the framework of our present democracy. Constitutional Principle number xviii was amended to provide that the powers and functions of a provincial constitution should not be substantially diminished. This provision was to incorporate and include another provision adopted at the same time and for the same purpose, namely section 160(3)(b), which required that the "role, authority and status of... the Zulu monarch" shall be provided for in the Constitution of the Province of KwaZulu Natal.

This cornerstone of our constitutional settlement requires that matters relating to our monarchy be dealt with by the people of KwaZulu Natal only by means of a constitution which they are to adopt with the support of at least two thirds of their elected representatives. Instead, the Framework Bill deals with matters relating to the Zulu monarchy by simple majority of the elected representatives of the whole of South Africa and does so by completing a number of other pieces of legislation adopted in the same manner which leave no space for the provincial constitution or legislation to do, say or change anything.

The historical consequences of this final breach of trust cannot be underestimated. Effectively this means that KwaZulu Natal, as a province,

may claim in the future a role for its monarchy and for its provincial government which goes beyond anything provided for in the present Constitution and in our current legislation. In fact, there has never been any doubt in our minds that the cornerstone of the 1994 constitutional settlement was maintained in the final Constitution which, at section 143(1)(b) extended in respect of all other provinces the notion that monarchies are not to be dealt with by means of laws adopted by simple majority, whether national or provincial, but only by means of provincial constitutions adopted by a two thirds majority. Therefore, over and above the political and historical implications of this breach of trust, in all likelihood the provisions of the Framework Bill relating to the inner organisation of the monarchy and the so called kingship council, are unconstitutional.

There are other points of details of the Framework Bill which are unacceptable to us, but because its overall purpose and structure is so repugnant, it is not worthwhile to take this Committee's time to point them our individually. Therefore, I shall now move to the National House Bill to point out that the flaws we see in it flow from the failure to recognise to traditional leadership the degree of autonomy which this institution must necessarily have.

In terms of this Bill, the National House's autonomy is restricted instead of increased and this organ of state is given much less autonomy than that provided to other organs of state. We must stress that the National House was also part of the constitutional settlement as it was provided for in section 184 of the Interim Constitution, where it was given quasi legislative powers, including that of drafting legislation and keeping a watching brief on both this Parliament as well as the National Executive.

In terms of the Interim Constitution, by virtue of its functions, it can fairly be said that the National House was almost on the same level as this Parliament and the National Executive, albeit junior to both of them, and it was institutionally placed between the executive and the legislature, sharing characteristics of both. Even though all the details of that constitutional section have not been carried into section 212(2)(b) of the present Constitution, there is no reason to believe that the role of the National House has changed. In fact, the present Constitution merely states that this Parliament may establish the National House, but doesn't indicate that the National House ought to be anything different to what it was under the Interim Constitution and one must intend it to be broadly speaking the same type of institution.

Therefore, this means that this Parliament is under the constitutional obligation to use a certain amount of deference when legislating about the National House and limit as much as possible any interference with its functions and autonomy. For this reason, we find it untenable that the House be given less autonomy, own resources, latitude and – broadly speaking - respect than the many other organs of state directly and indirectly provided for in the Constitution and even the more numerous ones that are not mentioned in the Constitution. The National House is treated like the Cinderella within the plethora of organs of state. It is not given the power to present to Parliament

its own proposed budget, even though through the good offices of the competent Minister. It is not given any entitlement to own resources, leaving the matter within the discretion of the national government. If the National House is to play its role between the national executive and legislature, it should not be beholden to either and should share in the features of both.

For this reason, it is totally unacceptable that this national legislature should dictate to the National House matters relating to its composition and qualifications, which ought to be dealt with by the National House through its own rules and autonomy. It is not acceptable that provision be made for the disqualification of members who also serve as members of national and provincial legislatures, as the National House needs this type of cross pollination to be able to exercise its functions efficiently and effectively.

Also in this respect, there are many other problems we have with the National House Bill which, for brevity sake, I do not wish to belabour. As with the Framework Bill, the National House Bill must also go back to the drawing board in a process in which legislation is no longer written about traditional leaders, but rather with traditional leaders, for traditional leaders and through traditional leaders. Let the National House redraft these Bills to contemplate the role which the Interim Constitution envisaged it to play and which the present Constitution implicitly requires. Let us not conclude the long process of policy formulation and legislation on traditional leadership with yet another act of betrayal.

I hope that this Parliament will rather seize this opportunity to turn the page and begin a new process which will be reflective of a new attitude towards traditional leadership. We hope this will also characterise the actions and policies of the next government after the 2009 elections.

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