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LEGAL OPINION

[Confidential]

TO : Mr BA Mnguni and Adv SP Holomisa
Co-Chairpersons of the Constitutional Review
Committee

COPY : Acting Secretary to Parliament

DATE : 17 October 2012

SUBJECT : Constitutional Review of sections 41(2), 166, 190(1)(a),
211, 212, of the Constitution

LEGAL ADVISER : P Ngema

REFERENCE NUMBER : 194 / 2012 (CR 12/12)

*Vanava spoke
afterwards.*



"Democracy means freedom to choose"

INKATHA

Inkatha Freedom Party
IQembu leNkatha Yenkululeko

CR12 - 12

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Ref. C-con-120531

31 May 2012

Ms Pat Jayiya
Committee Secretary
Constitutional Review Committee
Parliament
via email pjayiya@parliament.gov.za

Dear Ms Jayiya,

SUBMISSION OF THE IFP TOWARDS ANNUAL CONSTITUTIONAL REVIEW

The Inkatha Freedom Party submits that the following sections of the Constitution require review –

1. **Chapter 3, Section 41(2)**
Houses of Traditional Leaders and Traditional Councils should be included as intergovernmental structures, to facilitate intergovernmental relations.
2. **Chapter 7**
Local Municipalities should be disestablished and replaced by Traditional Councils as service providers within traditional communities. Sections 151 and 155 should be amended and municipalities be replaced by Traditional Councils. This will enable efficient service delivery in traditional communities.
3. **Chapter 8, Section 166**
Traditional Courts should be included as one of the courts.
4. **Chapter 9, Section 190(1)(a)**
This section should be amended to provide that the Independent Electoral Commission manage elections in traditional communities in consultation with Traditional Councils.

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5. **Chapter 12**

It must be specified that Traditional Councils are the primary local government structure in rural areas. Section 211 must be amended to provide that the institution of Traditional Leadership is guaranteed and protected, and not only recognised. The recognition of Traditional Leadership should include all layers of Traditional Leadership, to prevent the introduction of other layers outside the Constitution. The Houses of Traditional Leaders should be regarded as Departments operating under Parliament and Provincial Legislatures.

Yours sincerely,


PRINCE MANGOSUTHU BUTHELEZI MP
PRESIDENT: INKATHA FREEDOM PARTY



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LEGAL OPINION
[Confidential]

TO : Adv. SP Holomisa, MP and Mr BA Mnguni, MP
Co-Chairpersons of the Constitutional Review Committee

COPY : Acting Secretary to Parliament

DATE : 17 October 2012

REFERENCE : 194 / 2012

COM REF : CR 12 / 12

SUBJECT : REQUEST TO REVIEW SECTIONS 211, 212 AND CHAPTERS 3 AND 7 OF THE CONSTITUTION

1. Our Office was requested to advise on the submission from the Office of the President: Inkatha Freedom Party to review sections 41(2), 166, 190(1)(a), 211, and chapter 7 of the Constitution.
2. Please be advised that some of the issues raised in the submission were raised during 2009, 2010 and 2011 constitutional review process wherein our Office provided three legal opinions referenced 146/ 09 (Committee Reference 7 and 13) and 94/10 (Committee Reference 7), and 130/11 (Committee Reference 6/11) respectively. These legal opinions are attached for ease of reference.
3. We will in turn deal with each submission proposal.

Intergovernmental structures: s 41(2) of the Constitution

4. The submission proposes that Houses of Traditional Leaders and Traditional Councils should be included as intergovernmental structures to facilitate intergovernmental relations. Section 41(2)(a) of the Constitution empowers Parliament, through legislation, to establish or provide structures and institutions that promote and facilitate intergovernmental relations.
5. Section 41(2) of the Constitution does not establish or determine structures and institutions to promote and facilitate intergovernmental relations. The section merely



obliges Parliament to enact legislation that establishes or provides for structures and institutions to promote and facilitate intergovernmental relations.

6. Parliament enacted the Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005) (IGR Act) to give effect to the provisions of section 41(2)(a) of the Constitution. Chapter 2 of the IGR Act sets out and establishes intergovernmental structures at national, provincial and municipal spheres of government. The established intergovernmental structures includes:

- President's Co-ordinating Council (s 6 of IGR Act);
- national intergovernmental forums (s 9 of IGR Act);
- provincial and other intergovernmental forums (s 16 and 21 of IGR Act);
- Premier's intergovernmental forums (s 18 of IGR Act);
- Inter-provincial forums (s 22 of IGR Act);
- Inter-municipality forums (s 28 of IGR Act); and
- District intergovernmental forums (s 24 of IGR Act).

7. Indeed out of the above-mentioned intergovernmental structures established by the IGR Act, traditional leadership or traditional councils structures are not expressly incorporated. However, there are provisions which permit the chairperson of each structure to invite any person to the meeting of the forum. In my view the mentioned provisions could be used by chairpersons of the forums to extend invitations to traditional leadership. It can be contended that due to the many previous submissions alluding to a similar point, it is apparent that such a provision does not suffice as an expression for a mandatory inclusion or actual invite to traditional authority, but leaves it discretionary on the chairperson for each intergovernmental forum. Clearly that is unsatisfactory state of affairs for traditional leadership.

8. In addition, section 5 of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003) permits the creation of partnerships between district and local municipalities and kingship and queenship councils, principal traditional councils and traditional councils within traditional communities. The national government and all provincial governments are enjoined to promote partnerships between local municipalities and traditional councils through legislative or other measures. Section 81 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998), (Municipal Structures Act) also provides a manner under which traditional leaders should participate in local government structures and matters that affect traditional communities.

9. In my view, any change to the current state of affairs is a policy consideration and any amendment proposals should be directed to the IGR Act and not necessarily the Constitution.



Chapter 7: Disestablishment of local municipalities in traditional communities

10. The submission suggests that local municipalities within traditional communities should be disestablished and replaced by traditional councils. The submission suggests an alternative to the existing regime of government as stipulated in the Constitution.
11. Section 155(1) of the Constitution determines the categories of municipalities. In terms of section 155(1)(b) a local municipality is a category B municipality which shares municipal executive and legislative authority in its area with a district municipality within whose area the local municipality falls.
12. In terms of section 155(2), (3), (5), (6) and (6A) of the Constitution, national and provincial legislation is obliged to determine and establish different types of municipalities. However, with the constitutional mandate to review the Constitution conferred on the Committee by section 45(1)(c) of the Constitution, the Committee may decide on the appropriate manner to address the submission even if it is contrary to the existing structure of government.
13. Currently a municipality has both legislative and executive powers vested with the municipal council. Legislative bodies are democratically elected to represent the people and ensure government by the people under the Constitution¹ in terms of the legislated electoral system.
14. The traditional councils are not elected bodies but are bodies established in terms of section 3 of the Traditional Leadership and Governance Framework Act. Traditional leadership is according to customary law. Customary law, like the common law and any other law is now governed by the Constitution. The Constitutional Court in *Pharmaceutical Manufacturers' Association of South Africa: In re Ex parte President of the RSA 2000 (2) SA 674* explained that there is no law or public power that can exist separately from the Constitution because there is only one system of law.
15. In our previous opinion we dealt extensively with the proposal to disestablish local municipalities and their replacement by traditional councils within traditional communities. We refer the Committee to the view, which has been reduced to current policy argued by Christiaan Keulder², that traditional authorities should be fully incorporated into formal local government structures under the control of the elected structures in line with the Constitution. She argues that traditional leaders should not have legislative powers and should not be turned into a politically elected office. The White Paper on Traditional Leadership published in July 2003, is the current policy adopted by Cabinet, afforded traditional leadership and traditional councils an

¹ See section 42, 43, 61, 105 and 157 of the Constitution.

² See Traditional Leaders and Local Government in Africa, Lessons for South Africa, Christiaan Keulder.



advisory role in any of the government programmes which impact on traditional communities³.

16. In summary the proposal suggests that traditional councils in traditional communities should have the local municipalities' competences. South Africa is a sovereign, democratic state founded on the constitutional values⁴ inclusive of a multi-party system of democratic government. I am of the opinion that, it is a policy decision to decide whether the traditional councils are in a position to deliver municipal councils' constitutionally assigned obligations or if there should be a different governance structure applicable only to traditional communities. In line with the Constitution, a policy decision can be made either by Parliament or the executive.
17. The submission further proposes that the Houses of Traditional Leaders should be regarded as departments run by Parliament and Provincial Legislatures or that traditional community must be run by traditional councils instead of local municipal councils. Departments are established by the President in terms of the Public Service Act, 1994 (Proclamation No. 103 of 1994) and not in terms of the Constitution. If the traditional leadership or traditional councils prefer to be departments or part of the legislatures that is a policy consideration which requires an adopted policy.
18. The Committee or the executive may consider policy proposals in this regard which may alter the Constitution or proposal be accommodated through the Public Service Act.

Traditional courts as s 166(e) courts under Constitution

19. We now turn to deal with the submission which proposes that traditional courts must be included in section 166 of the Constitution. Section 166(e) provides that courts are any other court established by an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts. (Underline is my emphasis). We agree with the submitter that unless traditional courts are established by an Act of Parliament as such, traditional courts are not courts envisaged in section 166(e).
20. It is crucial to note that currently the traditional courts are not established in terms of an Act of the democratically elected Parliament but are in existence in terms of customary law and the Black Areas Administration Act, 1927 (Act No. 38 of 1927). A Traditional Courts Bill is currently considered under Parliament's legislative processes.

³ On page 59 of the White Paper published in Gazette No. 25438 dated 10 September 2003, the conclusion on the role of traditional leaders.

⁴ See section 1 of the Constitution of the Republic of South Africa.



21. In the *In Re: Certification of the Constitution of the RSA, 1996* 1996 (10) BCLR 1253 (CC) at paragraph 199, the Court said:

Traditional Courts functioning according to indigenous law are not entrenched beyond the reach of legislation. NT 166 does not indeed provide for their recognition. Subsection (e) refers to "any other court established or recognised by an Act of Parliament". .. The qualification "which may include any court of a status similar to either the High Courts or the Magistrates' Courts" can best be read as permitting the establishment of courts at the same level as these two sets of courts. It does not, as the objectors contended, provide for a closed list.

22. Still in paragraph 199, the Court pronounced clearly that 'section 166 does not preclude the establishment or continuation of traditional courts.' In my view it follows that until an Act of Parliament is promulgated, giving effect to the structure, functioning and authority of traditional courts, as courts envisaged by section 166(e), traditional courts are not in the ambit of section 166(e).

23. In my view therefore, there is no need to amend section 166(e) of the Constitution as the provisions of section 166(e) are capable to accommodate traditional courts as courts envisaged in section 166(e) of the Constitution. It is my view that the proposed amendment to section 166 of the Constitution is not justifiable in order to recognise traditional courts as courts of law, but same could be achieved through an Act of Parliament.

Managing elections in traditional communities by traditional councils

24. We now deal with the submission that the Independent Electoral Commission must manage elections within traditional communities in consultation with traditional councils, thus a proposal to amend **section 190(1)(a)** of the Constitution.

25. The Chapter 9 institutions supporting constitutional democracy are listed in section 181 of the Constitution with their functions or powers constitutionally defined. Section 190(1)(a) provides that the Electoral Commission must manage elections of national, provincial and municipal legislative bodies in accordance with national legislation. It is a common factor that when the Electoral Commission conducts its constitutional obligation, to manage elections of national, provincial and municipal legislative bodies, the Constitution does not require the Electoral Commission to manage the elections in consultation with any of those government spheres elections are conducted for. (Underline is my emphasis)

26. According to section 5⁵ of the Electoral Commission Act, (Act No. 51 of 1996), the Electoral Commission can perform certain functions consistent with consulting or

⁵ **5. Powers, duties and functions of Commission**

(1) The functions of the Commission include to—



liaising with defined institutions in general terms. The relevant parts of section 5 of the Electoral Commission Act provides as follows:

- In terms of subsection 5(g) the Electoral Commission can establish and maintain liaison and cooperation with parties; and
- In terms of subsection 5(l) the Electoral Commission can promote cooperation with and between persons, institutions, governments and administrations for the achievement of its objects.

27. In my view the quoted provisions of the Electoral Commission Act are sufficiently wide to accommodate the consultation of traditional councils within traditional communities for purposes of the Electoral Commission's functions.

28. The submission suggests something contrary to the Constitution and the Electoral Commission Act for purposes of elections in traditional communities. Neither the Constitution nor the Electoral Commission Act provides in the peremptory expression that the Electoral Commission must consult with those whom it is managing elections for. However through the means established by the Electoral Commission, the engagement and consultation occurs whenever necessary.

-
- (a)manage any election;
 - (b)ensure that any election is free and fair;
 - (c)promote conditions conducive to free and fair elections;
 - (d)promote knowledge of sound and democratic electoral processes;
 - (e)compile and maintain voters' rolls by means of a system of registering of eligible voters by utilising data available from government sources and information furnished by voters;
 - (f)compile and maintain a register of parties;
 - (g)establish and maintain liaison and cooperation with parties;
 - (h)undertake and promote research into electoral matters;
 - (i)develop and promote the development of electoral expertise and technology in all spheres of government;
 - (j)continuously review electoral legislation and proposed electoral legislation, and to make recommendations in connection therewith;
 - (k)promote voter education;
 - (l)promote cooperation with and between persons, institutions, governments and administrations for the achievement of its objects;
 - (m).
 - (n)declare the results of elections for national, provincial and municipal legislative bodies within seven days after such elections;
 - (o)adjudicate disputes which may arise from the organisation, administration or conducting of elections and which are of an administrative nature; and
 - (p)appoint appropriate public administrations in any sphere of government to conduct elections when necessary.



29. The phrase "in consultation" has been accorded the meaning that the other stakeholder may not make the final decision without being in agreement with the other person who must be consulted⁶. In turn such a scenario creates a stalemate where the parties cannot have consensus. It is my view that such a consequence was never intended by the Constitution drafters. In line with the above views, the status of traditional councils including the role they may have during elections is a policy decision which the Committee may consider and decide whether the proposal is accepted or not. It is thus my view that there is no justified Constitution review in this regard, but after policy considerations by the Committee, amendments should focus on the Electoral Commission Act.
30. Other parts of the submission are advocating for policy reconsiderations to change some parts of the government structure. The policy considerations can be done either by the Committee or the executive.
31. In conclusion I am of the view that the proposed review of sections 41(2), 166, 190(1)(a), 211 Chapter 7 of the Constitution as proposed in the submission of the Inkatha Freedom Party is not necessary but perhaps consideration of legislative amendments to national and provincial legislation could be warranted.



Ms P. Ngema
Parliamentary Legal Adviser

⁶ See MacDonal and Others v Minister of Minerals and Energy and Others 2007(5) SA 642(C) and the dictionary of legal words and phrases, Claassen Volume 2, D-I.



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LEGAL OPINION
[Confidential]

TO : Hon Adv. S.P Holomisa and Hon Mr B.A. Mnguni
Co-Chairpersons of the Constitutional Review Committee

COPY : Secretary to Parliament

DATE : 18 August 2011

SUBJECT : REQUEST TO REVIEW SECTION 212 OF THE CONSTITUTION

LEGAL ADVISER : P. Ngema

REFERENCE : 130 / 2011

COMMITTEE REF : CR 6 / 11



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TO : Hon Adv. S.P Holomisa and Hon Mr B. A. Mnguni
Co-Chairpersons of the Constitutional Review Committee

COPY : Secretary to Parliament

DATE : 18 August 2011

REFERENCE : 130 / 2011

COM REF : CR 6 / 11

SUBJECT : REQUEST TO REVIEW SECTION 212 OF THE CONSTITUTION

1. Our Office was requested to advise on the submission from the Mpumalanga Provincial House of Traditional Leaders and the National House of Traditional Leaders (NHTL) to review sections 211 and 212 of the Constitution.
2. Please be advised that some of the issues raised in the submission were raised during 2009 and 2010 wherein our Office provided two legal opinions referenced 146/09 (Committee Reference 7 and 13) and 94/10 (Committee Reference 7), respectively. These legal opinions are attached for ease of reference. The proposal that sexual orientation should be excluded from Chapter 2 of the Constitution is addressed in a separate legal opinion referenced 129 / 11 from our Office.
3. The submission proposes the change from "may" to "must" in section 212(1) of the Constitution and the expressed inclusion of traditional communities into the sphere of local government. The Collins English Dictionary defines "must" to express an obligation or compulsion whilst "may" is defined to indicate a possibility.
4. "Must" is generally understood to be peremptory and "may" is discretionary, permissive or obligatory. No general definite rule has been laid down in relation to the use of "must" or "may". However, consideration of the whole context and the general provisions of a statute should provide guidance whether "may" is the one meant to confer a discretionary power or the obligatory power.
5. Section 211 of the Constitution recognises the institution of traditional leaders, status and role in accordance with customary law.



6. Section 212(1) of the Constitution employed the use of "may" when it empowered Parliament to enact national legislation to provide for the role for traditional leadership. The Traditional Leadership and Governance Framework Act, 2003 (Act No.41 of 2003), is national legislation envisaged in section 212(1) of the Constitution. In our view it is moot to consider the use of "may" or "must" in this regard, since Parliament has already enacted the envisaged legislation.
7. The submission proposes a peremptory provision for the establishment of houses of traditional leaders. Whilst traditional authorities are not found in all the nine provinces of the country, there are established Provincial Houses of Traditional Leaders in six provinces¹, namely Eastern Cape, Free State, KwaZulu-Natal, Limpopo, Mpumalanga, and North West, and one National House of Traditional Leaders (NHTL). In terms of the Traditional Leadership and Governance Framework Act the Premier of a province, who has recognised a traditional community, is enjoined to establish a traditional council in line with the principles set out in the respective provincial legislation. In our view the proposed amendment is unnecessary as the Constitution already recognises the institution of traditional leadership. The Traditional Leadership and Governance Framework Act provides for the establishment of houses of traditional leaders.
8. Section 4 of the Traditional Leadership and Governance Framework Act sets out the functions of traditional councils. Section 19 of the Traditional Leadership and Governance Framework Act, provides functions of traditional leaders. Section 20 of the Traditional Leadership and Governance Framework Act provides the guiding principles for the allocation of roles and functions where cognisance should be given for the roles and functions that should involve traditional leaders. Any legislation, where necessary, may grant a significant role to traditional leaders over and above what is stipulated in the Traditional Leadership and Governance Framework Act. In our view the amendments proposed are not necessary since they have been provided for in the Traditional Leadership and Governance Framework Act.
9. The submission further proposes that where traditional communities exist, traditional councils should govern instead of local municipalities. It suggests disestablishment of local municipalities and replacement with traditional councils within traditional communities. Christiaan Keulder² argues that traditional authorities should be fully incorporated into formal local government structures under the control of the elected structures. She argues that traditional leaders should not have legislative powers and should not be turned into a politically elected office. There is also a view that the institution of traditional leaders and traditional authorities should be protected from the partisan politics and should not be allowed to serve as elected and traditional

¹ Traditional Leaders and Local Government in Africa, lessons for South Africa, Christian Keulder at page 310, HSRC/RGN Publishers, 1998.

² See 1. id where she outlines her proposals after setting out the information she found on the four case studies conducted on the African traditional leadership systems incorporated into the local government. She provides proposals specific to the South African environment after contrasting it with what was in place when the book was written and published.



representatives at the same time³. Christiaan Keulder is of the view that once a traditional leader is elected to a political position, the traditional leader position should be resigned in order for such individual to assume the other role.

10. In our view the proposal suggests that traditional councils in traditional communities should have the local municipalities' competence. South Africa is a sovereign, democratic state founded on the constitutional values⁴. In our view it is a policy decision to decide whether the traditional councils are in a position to deliver services constitutionally assigned and required from local and district municipalities or if there should be a different governance structure applicable to traditional communities.
11. The submission proposes that there be an express inclusion of traditional councils into the sphere of local government. National and provincial legislation in the statute books accommodates partnership with and incorporation of traditional leadership into the existing constitutional government framework. Section 5 of the Traditional Leadership and Governance Framework Act permits the creation of partnerships between district and local municipalities and kingship and queenship councils, principal traditional councils and traditional councils within traditional communities. The national government and all provincial governments must promote partnerships between local municipalities and traditional councils through legislative or other measures. Section 81 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998), (Municipal Structures Act) also provides a manner under which traditional leaders should participate in local government structures and matters that affect traditional communities.
12. We are of the view that the Municipal Structures Act and the Traditional Leadership and Governance Framework Act provide a scope and framework directing the engagement and participation of traditional leaders within the democratic structures of local government.
13. The levels of traditional leadership are already recognised. Section 8 of the Traditional Leadership and Governance Framework Act stipulates that the following leadership positions within the institution of traditional leadership are recognised: the Kingship or queenship, principal traditional leadership, senior traditional leadership; and headmanship.
14. We now turn to deal with the submission which proposes that traditional courts must be listed as a court like all those recognised in section 166 of the Constitution. Section 166(e) stipulates that the courts are any other court established by an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts. It is crucial to note that currently the traditional courts are not

³ The research conducted on comparative studies for traditional leadership and local government mostly shares this view.

⁴ Section 1 of the Constitution of the Republic of South Africa.



established in terms of an Act of Parliament but are in existence in terms of customary law.

15. We are of the view that traditional courts are not the courts envisaged by section 166(e). They are subject to the Constitution in terms of section 2 of the Constitution which provides for the supremacy of the Constitution and invalidation through the courts of law of any conduct that may be inconsistent with it. Should the Committee decide to recognise traditional courts, we submit that it would be unnecessary to amend the Constitution, as same could be achieved through an Act of Parliament. The Traditional Courts Bill could achieve the intended purpose.
16. The submission also request clarity on the constitutional status and type that the NHTL should take. We are of the view that such has been clarified in section 212(2)(a) of the Constitution and through the enactment of the constitutionally envisaged Traditional Leadership and Governance Framework Act and the National House of Traditional Leaders Act, 2009 (Act No. 22 of 2009). Section 16 of the Traditional Leadership and Governance Framework Act, provides that the house of traditional leaders in the Republic are a national house of traditional leaders, provincial houses of traditional leaders and local houses of traditional leaders.
17. The submission proposes that traditional councils should be among the Chapter 9 institutions and manage elections together with the Electoral Commission in traditional communities. We submit that the Chapter 9 institutions supporting constitutional democracy are listed in section 181 of the Constitution with their functions or powers constitutionally defined.
18. The Electoral Commission is established to manage elections of national, provincial and municipal legislative bodies. The traditional leadership governance is not a legislative body. The composition of and appointment to the Electoral Commission is prescribed by national legislation and not derived from customary law or customs as is the case with traditional leadership.
19. We submit that the decision to recognise traditional councils as proposed, although a policy decision, would require a number of amendments including but not limited to the Constitution, the Traditional Leadership and Governance Framework Act and the Electoral Commission Act, 1996 (Act No. 51 of 1996) etc.
20. We now turn to deal with the proposal to consider the mandate of the NHTL. The role of the NHTL in relation to the legislative process is set out in section 18 of the Traditional Leadership and Governance Framework Act. Section 11 of the National House of Traditional Leaders Act sets out the powers and duties and section 13 of the same Act stipulates the responsibilities of the NHTL. All other houses of traditional leaders have an advisory role in government.



21. We now deal with the proposal for the applicability of the Financial Management of Parliament Act, 2009 (Act No.10 of 2009) to the House of Traditional Leaders. The NHTL is a constitutionally recognised structure but it is not Parliament of the country as constitutionally composed in terms of section 42 of the Constitution.
22. The Financial Management of Parliament Act regulates the financial management of Parliament. The NHTL is not a legislature with the legislative authority as stipulated in terms of section 43 of the Constitution. It is our submission that the Financial Management of Parliament Act is limited to the financial management of Parliament in line with the institution's constitutional status and powers.
23. It is our view that the submission for constitutional review in the points raised has been addressed by the enactment of the Traditional Leadership and Governance Framework Act and the National House of Traditional Leaders Act.
24. We are of the view that the review of section 212 as proposed is not necessary.


Ms P. Ngema
Parliamentary Legal Adviser

Enq. Mr B J Modipane
Tel: 013 766 2947
Date: 18/08/2009
Ref: 3/3/1

212

130/11

Constitutional Review Committee

Att: Ms Pat Jayiya

Sir/madam

SUBMISSION ON THE CONSTITUTION ANNUAL REVIEW

Introduction

Mpumalanga House of Traditional Leaders is an institution established in terms of Mpumalanga Provincial House and Local Houses of Traditional Leaders Act no 3 of 2005. Its main aim is to advise the Premier on matters affecting traditional leadership within the Province and serve as a coordinating office for the affairs of the Traditional Leaders.

2. We wish to make the following submissions to the Constitutional of Review Portfolio Committee.

- In terms of chapter 12 of the Constitution on Traditional Leaders, we submit that the roles , functions and status of Traditional councils must be enshrined in the constitution and
- The empowerment of the House definition of the House, the role and the type of entity.

similar

- Recognition of traditional leadership must include all layers of traditional leadership.
- similar Intergovernmental relation must be amended to include the institution of Traditional Leadership, the IGR.
- new • In terms of chapter 7 subsection (6) governments must disestablish Local Municipalities replaced by Traditional Councils as service providers within traditional communities, as in time of immemorial.
- new MD • Chapter 8 section 166 Traditional Courts should be listed as one of the recognized courts.
- new • Chapter 9 s190 (1)(a) Electoral Commission and Traditional council must manage election in traditional communities.
- similar • The status of the House must be defined whether public entity of be part of Parliament.
- The House of Traditional Leaders must be a chapter 9 institution.
- new • Chapter 2 should exclude sexual orientation..
- similar • The House Financial management of the House of Traditional Leaders must be regulated by the Parliament Financial Management Act.

We hope the above is in order

Ikosi SE Mahlangu
Chairperson Mpumalanga Provincial House
of Traditional Leaders

Eng. Mr. B J Modipane
Tel: 013 766 2947
Date: 26/07/2010
Ref: 3/3/1

Constitutional Review Committee

Att: Ms Pat Jayiya

Sir/madam

**RE: SUBMISSION ON THE CONSTITUTION ANNUAL REVIEW
PRESENTATION BY MPHTL AND NHTL**

Introduction

The two Houses of Traditional Leaders presented before the committee on Friday, 23 July 2010 on Constitutional Annual Review

Discussion

The Mpumalanga Provincial House of Traditional Leaders has deliberated on its presentation before the committee on Friday, 23 July 2010. We, therefore, wish to clarify the aspects of our presentation as follows:

1. We support the contention by National House of Traditional Leaders that the Constitution should be amended to guarantee protection to the institution of traditional Leadership. Section 212(1) should be amended to read as follows:

“National legislation [may] shall provide for a role for traditional leadership as an institution [at local level] on matters affecting [local] traditional communities”.

2. Section 212(2)(a) should be amended to read as follows:

“national or provincial legislation [may] shall provide for the establishment of houses of traditional leaders”

3. Section 212(2)(b) should be amended to read as follows:

“national or provincial legislation [may] shall establish a council of traditional leaders.”

4. Section 212 should be amended with the insertion of paragraph (c) after paragraph (b) to read as follows:

“the institution of traditional leadership is hereby protected and guaranteed”

5. We request that the Committee should approve additions of the sections into the constitution which will cover the following aspects:

- 5.1. Powers of the Institutions of Traditional Leadership;
- 5.2. Protocol of Traditional Leaders;
- 5.3. Roles and Functions of the Institutions of Traditional Leadership
- 5.4. Status of the Institution of Traditional Leaders and Traditional Leaders;
- 5.5. Budget and Financial Regulation of the Houses of Traditional Leaders;
- 5.6. Role of the Institutions of Traditional Leadership in the legislative process; and
- 5.7. Relationship between Institutions of Government and Traditional Leadership.

Conclusion

Our submission is that section 39 of the Constitution allows the country to use precedents from outside the country. Our contention is that the constitution of Ghana should guide us on the issue of traditional leadership hence we request that the same clauses be inserted in our constitution as addition to inputs raised above. Other countries such as Uganda, Kenya, DRC, Namibia, Nigeria, Tanzania, etc. as a bench mark on how the institutions are recognized.

The Constitution should provide the mandate of the Institution of Traditional Leaders as it does with Parliament and Provincial Legislatures. The role of House of Traditional Leaders should not only be about customs and customary law but extended to deal with all matters affecting traditional communities. This includes the referral of bills to the Houses of Traditional Leaders for inputs. The issue of mandate further complicates the issue of funding and budgeting for the Houses. We are given minimal funding as a result.



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LEGAL OPINION
[Confidential]

To: Hon SP Holomisa, MP
Hon BA Mnuguni, MP
Co- Chairpersons of the Joint Constitutional Review Committee

Copy: Secretary to Parliament

Subject: Section 211 and 212 of the Constitution: NHTL

Legal Adviser: Adv Z Adhikarie

Date: 18 July 2010

Committee ref: 7
REFERENCE NR: 94/10



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Memorandum

To: Hon SP Holomisa, MP
Hon BA Mnuguni, MP
Co- Chairpersons of the Joint Constitutional Review Committee

Copy: Secretary to Parliament

From: Senior Legal Adviser

Subject: Sections 211 and 212 of the Constitution: National House of Traditional Leaders

Date: 18 July 2010

I was requested to advise on the submission received from the National House of Traditional Leaders (NHTL).

The NHTL proposes that sections 211 and 212 of the Constitution be amended.

In respect of section 211 the NHTL proposes that the following two provisions be included in the section:

4. The institution of Traditional Leadership is hereby guaranteed.
5. Parliament shall not enact any legislation which confers on any authority the right to withdraw the recognition of the institution on Traditional Leadership."

It appears from the submission that the NHTL are seeking to ensure a perpetual guarantee of its existence which no Constitution can do.

To the extent that provisions that pertain to entrenching the institution are policy issues they must be considered by the Committee and the relevant portfolio committee.

The proposal relating to S212

This proposal seeks to include the provisions of the Traditional Leadership and Governance Framework Act, 2003, relating to the role and functions of the Traditional Leaders into the Constitution (sections 19 and 20). Insofar as these provisions are contained in the relevant legislation, this is in my view appropriate as its incorporation into the Constitution will not further enhance or entrench the status of the Institution.

However the Committee may wish to consider whether it is appropriate to incorporate the proposed detail of the relevant provisions into the Constitution.

Adv Z Adhikarie
Senior Legal Adviser



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LEGAL OPINION

[Confidential]

TO: Adv S P Holomisa, MP
Mr B A Mnguni, MP
Co-Chairpersons of the Constitutional Review Committee

COPY: Secretary to Parliament

DATE: 17 September 2009

SUBJECT: Submission by the Mpumalanga Provincial House of
Traditional Leaders & the National House of Traditional
Leaders

LEGAL ADVISER: Adv K Beja

COMMITTEE REFERENCE: 7 & 13

REFERENCE NUMBER: 146/09



Background

1. You requested that we advise the Joint Constitutional Review Committee (the Committee) on the feasibility of submissions received from members of the public "on specific sections of the Constitution that they feel need to be reviewed".
2. I have opted to combine the two submissions as they are closely related.

The submission

3. In their submission, the Mpumalanga Provincial House of Traditional Leaders (MPHTL) make the following suggestions:
 - a. The roles and functions of Traditional councils must be defined in Chapter 12 of the Constitution.
 - b. The status of the House must be defined, whether it is public entity or part of Parliament.
 - c. Recognition of traditional leadership must include all layers of traditional leadership.
 - d. Intergovernmental relations must be amended to include the institution of Traditional Leadership.
 - e. The House Financial Management must be regulated by the Parliament Financial Management Act.
4. The National House of Traditional Leaders (NHTL) proposes the following amendments to Chapter 12 of the Constitution:
 - a. that a traditional leader be defined in the Constitution to mean "any person who in terms of customary law of the traditional community concerned, holds a traditional leadership position."



- b. Section 211 should be amended to state that Parliament shall not enact any legislation which confers on any authority the right to withdraw the recognition to or from a traditional leader for any purpose or in any way detracts or derogates from the honour and dignity of the institution of traditional leadership.
- c. The roles, functions and powers of a traditional leader should be clearly stated in the Constitution. Chapter 7 of the Constitution which deals with Local Government deprives traditional leaders of their right to govern their own communities. It proposes that the powers, functions and duties of any Local Government be performed by traditional leaders to ensure that service delivery and development takes place rapidly in the traditional communities.
- d. The NHTL also suggests that where an organ of state within the national government or a provincial government considers allocating a role for traditional councils or traditional leaders, that organ of state must seek the concurrence of the Minister if it is an organ of state in the national sphere of government or the Member of the Executive Council responsible for traditional affairs in the province concerned if it is an organ of state of that province.
- e. It further suggests that where an organ of state has allocated a role or function to traditional councils or traditional leaders, the organ of state must monitor the implementation of the function and ensure that the implementation of the function is consistent with the constitution and that the function is performed and where a traditional council does not perform an allocated function, any resources given to a traditional council to perform that function may be withdrawn.
- f. Finally the NHTL suggests that traditional leaders be represented in all legislative making bodies, including Parliament.

Opinion

- 5. Chapter 12 of the Constitution deals with the recognition and the role of traditional leaders. Section 211 recognises the institution, status and role of traditional leadership. Section 212(1) provides that "National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities." Subsection (2) on the role of traditional leaders also provide that "To deal with matters relating to traditional leadership, the



role of traditional leaders, customary law and the customs of communities observing a system of customary law –

- a. National or provincial legislation may provide for the establishment of houses of traditional leaders; and
 - b. National legislation may establish a council of traditional leaders.”
6. Furthermore, there is currently legislation that deals with traditional leadership (Traditional Leadership and Governance Framework Act No.41 of 2003), which regulates matters of traditional leadership.
7. This Act already deals with a number of issues raised in the two submissions including:
- a. a definition of a “traditional leader” (section 1),
 - b. establishment and recognition of traditional councils (section 3),
 - c. functions of traditional councils (section 4), which include regulation of its own financial management issues,
 - d. promotion of partnerships by the national government and all provincial governments between municipalities and traditional councils through legislative or other measures (section 5),
 - e. withdrawal of recognition of traditional communities (section 7),
 - f. recognition of traditional leadership positions (section 8),
 - g. roles and functions of traditional leadership (sections 19&20)
8. It therefore appears to me that the current legislation sufficiently deals with the matters raised in the submissions. However, should these institutions feel that more needs to be done or that some matters are not addressed in the current legislation, it is my view that such matters would best be addressed in the piece of legislation referred to above and various pieces of provincial legislation dealing with traditional matters. The Constitution itself requires national or provincial legislation to be enacted to address matters of traditional leadership.
9. Furthermore, the National House of Traditional Leaders Bill B56-2008 and the Traditional Leadership and Governance Framework Amendment Bill B57-2008 are currently before Parliamentary Committees to address gaps and legal uncertainties and vacuums that have been identified.
10. It is therefore my recommendation that the submissions be referred to the relevant Parliamentary Committee(s) for further investigation of possible vacuums in the current pieces of legislation.