

THEME COMMITTEE 5

SUBMISSION FOR BLOCK 5 - TRADITIONAL LEADERS & CUSTOMARY LAW

Introduction

The guiding principles of DP policy in respect of traditional leaders and customary law are: 1) to ensure that members of traditional communities have equal access to justice; and 2) that any provision for traditional courts are consistent with and subject to the Bill of Rights.

The DP believes room can and should be made in the South African judicial system for customary law. Customary law, just like Roman-Dutch law, is not by definition static. Traditional leaders and customary law will have to adapt to the new order. We envision a marriage of tradition and modernity which will be to the benefit of all.

An interesting case in point is the election of chiefs in Botswana. Nothing could preclude the election of chiefs, nor the possibility of a female chief, in South Africa.

1. Relevant Constitutional Principles

Principle V; and specifically the first sentence thereof:

"The legal system shall ensure the equality of all before the law and equitable legal process"

Principle VII:

"The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights. "

Principle XIII:

"The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith. "

Proposal

The DP supports Professor T. Nhlap's recommendation that traditional courts be recognised and incorporated in to the existing court system. Traditional courts should be at the bottom of the hierarchy, below the magistrates courts. Traditional courts should deal only with customary law. Applicants should have the right to appeal.

Traditional courts could be accommodated in S. 103 of the Constitution.

Provision should be made granting to Parliament the authority to monitor and regulate these courts.

Issues such as the training and accountability of officers of traditional courts should be addressed by appropriate Parliamentary legislation, and not in the Constitution.

DEMOCRATIC PARTY (DP)