

TO: THEME COMMITTEE 5
FROM: THE NATIONAL PARTY

THE RECOGNITION AND APPLICATION OF CUSTOMARY LAW

1. PRESENT POSITION:

1.1 Section 1(1) of the Law of Evidence Act (45 of 1988) - in essence identical to section 11(1) of the (repealed) Black Administration Act (38 of 1927) - provides for the recognition and application of customary law:

"Judicial notice of law of foreign states and indigenous law -

- (1) Any court may take judicial notice of the law of a foreign state and of indigenous law as far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.
- (2) The provisions of subsection (1) shall not preclude any party from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned.
- (3) In any suit or proceedings between Blacks who do not belong to the same tribe, the court shall not in the absence of any agreement between them with regard to the particular system of indigenous law to be applied in such suit or proceedings, apply any system of indigenous law other than that which is in operation at the place where the defendant or respondent resides or carries on business or is employed, or if two or more systems are in operation at that place (not being within a tribal area) the court shall not apply any such system unless it is the law of the tribe (if any) to which the defendant or respondent belongs.
- 4) For the purposes of this section "indigenous law" means the Black law or customs as applied by the Black tribes in the Republic or in territories which formerly formed part of the Republic."

1.2 In KwaZulu/Natal the customary law has been codified in: The KwaZulu Law on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law Proc R151 of 1987.

The coded versions have amended the customary law in some important respects.

1.3 Details of the application by the courts of the provisions of the Act of 1988 and of the Zulu codes are dealt with in various textbooks, articles etc..

2. THE PROVISIONS OF THE CONSTITUTION.

The Constitution of the Republic of South Africa, 1993 (Act 200 of 1993) contains various provision relating to customary law.

2.1 Section 241(1) provides for the continued existence and functioning of all existing courts and judicial officers until changed by a competent authority. In terms of section 241(10) the jurisdiction and procedure of such courts of law remain in force.

2.2 In terms of section 101(2) the supreme court has retained the jurisdiction which vested in it prior to the commencement of the Constitution.

2.3 Section 181(1) reads:

A traditional authority which observes a system of indigenous law and is recognised by law immediately before the amendment of this Constitution, shall continue as such an authority and continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority."

2.4 Section 181(2) provides for the recognition and application of customary law and its "regulation by law":
"Indigenous law shall be subject to regulation by law".

2.5 Section 182 refers to the membership of a local government "of a traditional leader of a community observing a system of indigenous law and residing on land within the area of jurisdiction of an elected local government"

2.6 The implication of section 181(2) read with section 101(2) and section 241 is that section 1 of the Law of Evidence Amendment Act (45 of 1988 - supra) continues to be the enabling provision for the recognition and application of customary law.

2.7 Section 14(3), concerning personal and family law adhered to by persons professing a particular religion and marriages concluded under a system of religious law, does not seem to affect customary law.

2.8 Section 126 read with schedule 6 confers legislative competencies on the provincial legislatures; in other words, traditional authorities and customary law are within a provincial legislature's legislative competence.

2.9.1 There is a potential incompatibility of certain customary laws with the provisions of Chapter 3 (Fundamental Rights), especially as regards Section 8 of the Constitution:

"8(1): Every person shall have the right to equality before the law and to equal protection of the law."

"8(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogation from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language."

"8(3)(a): This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms."

"8(3)b)"

"8(4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."

2.9.2 Section 103 deals with the power of the courts to deal with allegations that any law or provision of such law is invalid on the ground of its inconsistency with a provision of the Constitution; the Supreme Court, and in the final instance the Constitutional Court (see section 98(2)), are competent to deal with a possible conflict between customary law and the provisions of this Constitution.

2.9.3 One of the potential areas of incompatibility concerns the position and rights of women in terms of customary law (majority, locus standi in judicio, inheritance, property etc.)

3. THE NEW CONSTITUTION

3.1 Schedule 4, containing the constitutional principles to be included in the new constitution, has various provisions that could affect the validity of customary law rules; particular reference should be made to: Constitutional Principles nos.: II, III, IV, XIII

3.2 There are no constitutional guarantees as to the continued existence of customary law; this may result in legislative and judicial action diminishing the role and application of customary law, and eventually even the gradual phasing out thereof.

4. THE NATIONAL PARTY'S APPROACH TO CUSTOMARY LAW

"4.1 The future of customary law depends on a policy decision whether the present legal pluralism be dissolved, harmonized or continued. The following approaches regarding the future of customary law exist:

- (a) the continued existence of the current system of legal dualism, with or without an extensive set of rules for conflict of laws;
- (b) the integration of the two systems (legal unification) - that may take the form of:
 - (i) systematic integration (partial integration);
 - (ii) natural integration during the course of time; or
 - (iii) drastic integration by means of codification (involving the whole legal spectrum); and
- (c) the abolition of one of the systems - which may take the form of:
 - (i) systematic abolition;
 - (ii) abolition through disuse;
 - (iii) drastic and immediate abolition by means of legislation."

(This paragraph is quoted from Vol. 32 (Indigenous Law) of the "Law of South Africa", p. 219-220).

4.2 The National Party believes:

4.2.1 that full recognition should be given to the customary (indigenous) legal systems, with the provisos that such customary law (a) shall not conflict with specific legal provisions contained in a parliamentary or provincial law and (b) shall not be opposed to the principles of public policy or natural justice (provided that the lobolo or bogadi custom be not declared to be so repugnant).

4.2.2 that the cause of action should determine what system of law the court should apply, but that courts should be given judicial freedom to determine whether in a particular instance indigenous law, or the law of the land, should be applied.

4.2.3 that any legislative provisions (in Parliamentary or Provincial laws) affecting customary law must first be discussed with the Council of Traditional Chiefs and, where appropriate, with the relevant House of Chiefs;

4.2.4. that legislation be introduced to remove gender discrimination in the application of customary law, especially as regards the question of majority, locus standi and inheritance of.

5. The National Party proposes that consideration be given to incorporate the following clauses in the new constitution:

THE APPLICATION OF CUSTOMARY LEGAL SYSTEMS

"(1) Customary legal systems shall be recognized and applied in all courts provided that it shall not be in conflict with a parliamentary or provincial Act or with the principles of public policy or natural justice. It is accepted that the lobolo or bogadi customs are not repugnant to the principles of public policy or

(2) The Courts shall have a judicial discretion to decide which system of law shall be applied in a particular case, taking into account the cause of action, the intention of the parties and the implications of such application."

The National Party is furthermore of the view that initiatives should be taken by way of Parliamentary or Provincial Acts to and the customary legal systems with regard to the removal of gender

The National Party is in favour of the retention of section 181(1) and (2) of the present Constitution