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SUPPLEMENTARY SUBMISSION BY THE KWAZULU GOVERNMENT ON TRADITIONAL AND INDIGENOUS LAW FOR SUBMISSION TO THE TECHNICAL COMMITTEE ON CONSTITUTIONAL MATTERS

DEADLINE : 17h00 : JUNE 8, 1993

HOW TO RECOGNISE AND PROTECT INDIGENOUS LAW IN THE NEW CONSTITUTIONAL DISPENSATION OF SOUTH AFRICA

INDIGENOUS LAW & FORM OF STATE

1. The modalities and techniques related to the recognition and protection of indigenous law in the new constitutional dispensation of South Africa are significantly affected and qualified by the form of state of the new South Africa.

2. The KwaZulu Government has constantly advocated that South Africa should be organised as a federation. Therefore, the recognition and protection of indigenous law would primarily be a matter of State law, rather than federal law. This conclusion derives both from the KwaZulu Government's advocated notion of residuality as well as from the fact the major areas on incidence and relevance of indigenous law are related to subject matters which in many federations are left to the jurisdiction of member states, such as family law, property, inheritance, et cetera.

3. There is also a compelling reason to allocate the recognition and protection of indigenous law and traditional structures to the state level rather than to the federal one. Undoubtedly, there is no uniformity in the country on the nature, functions and, most of all, the social relevance and importance of indigenous law and traditional structures. Therefore, it would be advisable that the treatment of this matter be different from one region to the other so as to accommodate the need to provide with greater recognition and importance traditional structures where they still perform a valuable social role without extending this regulation of interest to the whole of the country.

4. Nevertheless, the Federal Constitution should recognise the need to protect indigenous law and the role of traditional leaders, and could mandate state constitutions to provide in this respect.

5. The recognition and protection of indigenous law and the recognition of a social role for traditional leaders and structures are very intertwined and can be considered as two aspects of the same situation. However, the recognition of a political role (rather than a social one) for traditional leaders is a matter which can be conceptualised separately. Furthermore, it would be futile to deal with the political recognition of traditional leaders if indigenous law and traditional structures are not preserved and protected in the social fibre of the new South Africa.

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INDIGENOUS LAW AND SOCIAL RECOGNITION OF TRADITIONAL STRUCTURES AND LEADERS

6. Emphasis should be given to the protection of indigenous law. In fact, the protection of traditional structures in the social fibre of the new South Africa can be achieved through the protection of indigenous law, due to the fact that traditional structures can be resolved into rules of organisation and operation of what can be denominated as a *social and cultural formation*.

7. Similarly, the social role of traditional leaders can also be resolved in a set of indigenous rules which regulate their relation with the members of the traditional social and cultural formation and with the tangible and intangible assets of such a formation. This includes the fact that traditional leaders often hold in trust various assets for the benefit of the members of the social and cultural formation in accordance with rules set forth by indigenous law and many of their powers derive from this trust relationship. In this regard it is also essential that the protection of indigenous law extends to the recognition of these trust obligations and of the underlying form of property, e.g. communal property.

8. Therefore and in conclusion, through adequate forms of recognition and protection of indigenous law, the social role and functions of traditional leaders and structures should also be recognised and protected. As far as the political role is concerned, see *infra*.

THE POSITION OF INDIGENOUS LAW IN THE HIERARCHY OF LEGISLATIVE SOURCES

9. The KwaZulu Government maintains and submits that indigenous law can not be adequately recognised and protected if left to the discretion of the ordinary legislature and to the whims of daily politicking. Therefore, it must hold an equal position in the hierarchy of sources of law as ordinary legislation. This means that ordinary legislation can not modify indigenous law. However, both legislation and indigenous law are to be subject and conditioned to all constitutional sources of law, including federal and state constitutions. This corrective will ensure that indigenous law is recognised and protected only to the extent that it conforms with democratic requirements and with the overall blueprint of society.

10. This approach is consistent with the KwaZulu Government position in constitutional matters which calls for the adoption of *long* constitutions, which are constitutions modeled after established parameters of modern constitutionalism and which regulate extensively a broad range of social and interpersonal relations ranging from social and economic relations to relevant portions of the systems of administrative law, criminal law, labour law, family law, et cetera. Indigenous law will be recognised consistently with these constitutional parameters.

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11. An additional requirement is related to the sphere and scope of application of indigenous law. Indigenous law shall not have territorial but only personal application. This is consistent with the KwaZulu Government approach which considers the recognition of indigenous law as a part of the greater dimension of recognition of the autonomy of social and cultural formations.

12. The KwaZulu Government believes that all social and cultural formations should be able to regulate their interests in autonomy and outside the interference of government. In this scheme of references, indigenous law would be granted a privileged and a strengthened position, while the self-regulation of other social and cultural formations would remain subordinated to the law, with the proviso that when the law exceeds its role and reaches into undue influences, the social and cultural formations can resort to the constitutional court which through constitutional adjudication should determine the parameters and the limits of their autonomy in each given case. [See in this respect the Constitution of the State of KwaZulu/Natal]

12. Therefore, indigenous law should primarily be recognised and protected as a privileged and associative phenomenon in the overall legal system. Hencefrom, the requirement of personality in the application of indigenous law.

13. Accordingly, the Constitution of the State of KwaZulu/Natal in Article 13 determines that indigenous law applies only to those who voluntarily recognise themselves with it. This approach has been used extensively for the protection of minorities in other countries of the world and has inspired the constitutional debate related to the protection of the rights of Indians in Canada.

14. There are situations in which it might be advisable that to indigenous law be recognised territorial application, in which case that ought to be determined by a law of Parliament. When this happens, indigenous law should no longer be granted a privileged status in the hierarchy of sources of law and should have the same status as the law which embodies it and extends its application territorially. This solution is also adopted in Article 13 of the Constitution of the State of KwaZulu/Natal.

15. An additional element related to the subject matter hinges on the requirement of certainty. It is advisable that indigenous laws are collected in organised legislative texts. Article 13 of the Constitution of the State of KwaZulu/Natal states that this effort be performed by a special Committee of Parliament which works with the advise and consent of the traditional leaders.

16. While it would also be advisable that certainty be reached as far as the individuals which recognise themselves with indigenous law are concerned, experience in other countries indicates that this matter is extremely sensitive and complicated. International parameters suggest the idea that minority protection should rely on the notion of self-identification. This approach has been used with reference to the protection of North American Indians and led to the concept that Indians are those individuals who are so identified by recognised social and cultural formations [the relevant Indian tribes].

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17. The identification of relevant social and cultural formations should be left to the combined effort of the legislature and the jurisprudence, rather than to established constitutional parameters. This will allow a concerned social and cultural formation to challenge legislation for failure to provide recognition, while would create a system capable of adjusting rapidly evolving realities. This solution is also registered in Article 13 of the Constitution of the State of KwaZulu/Natal.

18. The protection of indigenous law would be insufficient without the recognition of the integrity of indigenous law as an autonomous legal system. This includes the fact that indigenous law must be produced in accordance with its own sources of production and interpreted and applied in accordance with its own rules, provided that all applicable constitutional requirements are satisfied. This includes the necessity of the recognition and protection of jurisdictional venues of interpretation and application. This approach has been fully adopted in the Constitution of the State of KwaZulu/Natal in Articles 13 and 78 (b).

19. The integrity of the legal system also demands the full recognition of communal property as a necessary element of organisation and operation of traditional structures. The analysis of the societal inter-relations established by indigenous law shows that communal property is often at the foundation of the system of social organisation. Failure to recognise communal law could lead to a conflict between such an institution and other applicable constitutional principles related to property and economic matters.

20. An additional essential element to this subject matter is the possibility of ensuring the integrity of the indigenous legal system through adequate judicial review. The KwaZulu Government contends and submits that the privileged role of indigenous law can only be guaranteed allowing the social and cultural formations to directly resort to the constitutional court and that this technique is the logical consequence of the position of indigenous law in the hierarchy of sources of law, if the recognition of indigenous law derives directly from the constitution rather than from ordinary law.

21. The following provisions of the Constitution of the State of KwaZulu/Natal describe what the KwaZulu Government considers an acceptable regulation of interests in this subject matter:

> Article 13
> **Traditional and Customary Rules**
> The State of KwaZulu/Natal shall recognise and protect the application of traditional and customary rules not inconsistent with the principles and provisions of this constitution in all matters left to the autonomy of individuals and that of social and traditional formations to which individuals belong on a voluntary basis or from which they have not dissociated themselves in a manner prescribed by law. Traditional and customary rules are produced in accordance with the rules and the sources governing their production and shall not be modified or repealed by the law. Traditional or customary laws shall not have territorial application unless so authorised by law, in which case they shall be subject to the law to the extent that they apply to individuals who do

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not share in such tradition or custom. All traditional and customary law shall be collected and published by a committee of the General Assembly working in conjunction with the affected interests.

Article 39
Communal Property
Communal property is recognised and shall be protected. Communal property shall be administered and regulated by traditional and customary Rules.

Article 78(b)
Tribal, customary, and religious courts shall have concurrent jurisdiction over cases and controversies which, when proposed, are based on the application of traditional and customary law and religious rules respectively. The law shall identify and recognise such courts, and determine to which limited extent they may decide on incidental issues and matters not based on traditional and customary law or on religious rules[1].

Article 100
Jurisdiction of the Constitutional Court
The Constitutional Court shall have original and exclusive jurisdiction in the following matters:
[...]
- resolution of conflicts between powers of the State [...]

22. The KwaZulu Government wants to stress how this system of regulation will ensure the survival and prosperity of the Zulu monarchy into the 21st century as a viable social and cultural formation within the broader parameters of a Republic. Through the protection of indigenous law the relation between the King and his subjects, and the traditional rulers and their subjects will be recognised and preserved, while the communal property of the monarchy will continue to perform its essential role of social integration.

23. Obviously the protection of indigenous law is part of a broader set of constitutional parameters which include the limitation on the role of government, the protection of cultural and traditions and the preservation of the integrity of civil society. IN this respect reference is made to the applicable principles and provisions set forth in the Constitution of the State of KwaZulu/Natal.

FROM THE REGULATION OF INTERESTS TO THE FORMULATION OF PRINCIPLES

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[1]. This Article also provides for the relevant jurisdictions of other social and cultural formations, for instance for the jurisdiction of the Roman Sacra Ropa Tribunal over the annulment of Catholic marriage.

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24. The Technical Sub-Committee has been required to formulate principles rather than create a full constitutional regulation of the affected interests in the subject matters. However, the KwaZulu Government maintains and submits that in this specific subject matter, it will not be impossible to formulate principles until and unless there is clarity on the overall parameters of the constitutional regulation of interests.

25. In fact, the failure to provide for any of the elements which for instance concur to the regulation of interests set forth in the Constitution of the State of KwaZulu/Natal would dramatically affect the entire position of indigenous law in the legal system. For example, if the application of indigenous law were to be subject to the provisions of an Act of Parliament, or if no judicial review of constitutionality were provided, the position of indigenous law would result in being greatly weakened.

26. Therefore, the KwaZulu Government maintains and subjects that the formulation of principles in this subject matter must by necessity be detailed and comprehensive. The KwaZulu Government submits to the Technical Committee that the following principles should be recommended to the Negotiation Council for adoption.

* Indigenous law shall be recognised and protected under the applicable constitution and provision in this regard could be made in the federal constitution.

* Indigenous law should be applicable to those who identify themselves with it as members of a recognised social and cultural formation.

* Indigenous law should not be subject to ordinary law and there shall be the possibility of a judicial review of constitutionality in this regard.

* Indigenous law should be protected as an autonomous legal system and should extend to the rules of organisation and operation of the social or cultural formation to which it relates.

* Specific recognition should be provided for communal property and judicial venues for the interpretation and application of traditional law.

* The area of autonomy of the social and cultural formation should be protected from government interference through constitutional adjudication.

* The law should play a proactive role in protecting and recognising indigenous law (e.g., collection of norms).

RECOGNITION OF A POLITICAL ROLE FOR TRADITIONAL LEADERS.

27. It would be futile to recognise the political role for traditional leaders if the social role of traditional structures were not to be recognised and protected through the protection of indigenous law. Once indigenous law is adequately recognised and

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protected, the issue of the recognition of a political role for traditional leaders can be put in an adequate light and perspective.

28. The KwaZulu Government submits and maintains that traditional leaders should be recognised a political role consistent with the requirements of democracy and within the mainframe of the constitutional structures of the new South Africa. The KwaZulu Government does not believe that traditional leaders should be recognised a separate and independent role, nor that a golden ghetto should be provided for them. The KwaZulu Government approach is that the political role of traditional leaders should interact with the mainstream of the political life of the new South Africa.

29. In the Constitution of the State of KwaZulu/Natal the electoral system is based on the principle of small constituencies designed so as to respect existing cultural and social-political territorial divisions. This would ensure that the electoral system can register the existence of tribal support for traditional leaders and that this can be translated into the appointment of traditional leaders into mainstream politics.

30. The KwaZulu Government will submit to this Technical Committee an additional position paper detailing how the political role of traditional leaders can be recognised and protected within the structures of the federal government.

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