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REPABOLEKI YA BOPHUTHATSWANA

REPUBLIC OF BOPHUTHATSWANA

REPUBLIEK VAN BOPHUTHATSWANA

TONA YA MERERO YA PUSO, YA PHEMELO LE YA DIPHOFO TSA SELEGAE
THE MINISTER OF STATE AFFAIRS, OF DEFENCE AND OF CIVIL AVIATION
DIE MINISTER VAN STAATSAANGELEENTHEDE, VAN VERDEDIGING EN VAN BURGERLIKELUGVAART

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SUBJECT: Submission to TC on Constitutional Matters

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SUBMISSION BY BOPHUTHATSWANA GOVERNMENT TO TECHNICHAL COMMITTEE ON CONSTITUTIONAL MATTERS

TRADITIONAL LAW

Traditional Law as the name denotes is an established system of immemorial rules which had evolved from the way of life and natural wants of the people, the general context of which was a matter of common knowledge, coupled with precedence applying to special cases, which were retained in the memories of the Chief, his councillors, their sons, their sons' sons, until forgotten or until they became part of immemorial rules.

According to section 2 of the African Law and Tribal Courts Act, customary law can be defined:
"In relation to a particular African tribe, the legal principles and judicial practices of such tribe except in as far as such principles and practices are repugnant to -

(a) natural justice or morality;

(b) the provision of any enactment:
Provided that nothing in any enactment relating to the age of majority, the status of women, the effect of marriage on the property of spouses, the guardianship of children or the administration of deceased estates, shall affect the application of customary law, except in so far as such enactment has been specifically applied to Africans by that or any other enactment".

Even though the criticism levelled against the retention of traditional law is normally based on the argument that the greater part of traditional law is unwritten law and therefore looked at with uncertainty as to the precision thereof, sight must not be lost of the fact that up until now it has successfully provided

tribal communities with rules necessary for the orderly existence thereof. It is therefore no minimal statement to say that traditional law plays an important role in the lifes of a great many South Africans.

Despite what was said above, it must be agreed with T.W. Bennett, African Customary Law, 1st ed, 1991, on 18 that "Customary Law has seldom attracted much attention in South Africa. Unknown and, apart from a small group of academic devotees, seldom studied, it is a Cinderella subject".
Because of the above, the law-makers of the new South African legal order are now confronted with a product of years of neglect, a subject of doubtful authenticity (a so-called "invented tradition") and, even worse, a subject besmirched by its long association with apartheid. In theory at least customary law should find a favourable reception in a more democratic political environment. It is supposed to develop spontaneously in a given jural community. The adjective 'customary' implies that the rules were not fashioned by a professional class of lawyers. Over the past decade, however, it has become apparent that this understanding is a misconception, and the inverted commas now regularly flanking the term 'customary law' reveal a scepticism about its provenance.

The persistent refusal to reassess the congruence of the official version of customary law with social practice has amounted to a serious disjunction. It is mainly the one-sidedness of the South African political process that is responsible for this state of affairs: because the government is unrepresentative, African law

are seldom, if ever, heard. Most law-makers aimed at Africans are concerned to control their movement, education, work, housing, etc. It should also be appreciated that, for the legal profession, African family law is financially unrewarding work, and most lawyers are unschooled in the subject. Apathy and lack of interest have found a convenient justification in a policy of cultural self-determination: It is not for Whites to interfere in the affairs of Blacks, they are responsible for their own domestic affairs. And, ironically, because customary law suffers from the taint of apartheid politics, liberal political views have also discouraged pursuit of the subject. Finally, it should be appreciated that the current version of customary law suits a large and conservative African constituency. Any reform must inevitably bring an improvement in the status of women, a change few men would support.

Having said that, the next issue to be dealt with is the compatability of a Bill of Rights with customary law. Most of the instruments concerned with human rights mentioned the protection of cultural rights too. The African Charter is a case in point. It seeks to embody both the traditional, 'first generation' rights found in the 1948 Universal Declaration and the 'second generation' rights to culture contained in the 1966 International Convention on Economic and Social Rights. Paragraph 4 of the Preamble urges states to take into consideration 'the virtues of their historical tradition and the values of African civilization. Art 18(2) gives definition to this ideal by obliging states to assist the family which is the custodian of moral and traditional values recognized by the community". Neither of these provisions is remarkable in itself, but when viewed in the overall context of the Charter

(which makes no reference to individual rights in marriage), they suggest a strong commitment to preservation of the foundation of African culture: the family.

The question of the compatability of customary law and a Bill of Rights is one where extensive discussion with the people is required, so that all that is rich and meaningful to the people can be retained and progressively developed, while that which is divisive, exploitative and out of keeping with the times especially that which has been distorted by colonialism and apartheid - can be eliminated.

It must be borne in mind that the universality claimed for human rights should not blind us to cultural sources. Although the accession of many developing countries to the international declarations and conventions is tending gradually to unversalize the norms, they were originally the product of bourgeois Western values. Quite apart from the disruptive effects that human rights will have on the established legal and social order in Africa, their cultural provenance is cause for suspicion and resistance. No independent African state would willingly acknowledge western cultural or moral hegemony. It should also be noted that the notion of due process of law permiated indigenous law: security of the person was assured, and customary legal process was characterized not by unpredictable and harsh encroachments upon the individual by the sovereign, but by meticulous, if not cumbersome, procedures for decision-making. The African conception of human rights was an essential doctrine and the principle of

accountability to the ancestral spirits.

The most powerful argument in favour of sustaining customary law, and hence allowing free pursuit of cultural rights, is that this law (provided it is modified to take account of prevailing sentiments) endorses current social practice, and therefore rests on a foundation of popular acceptance.

Where a society is in fact culturally plural, as South Africa still is, the legal endorsement of cultural differences gives effect to a pre-eminent right of self determination. In this regard, it is noteworthy that most constitutional documents and international treaties include the protection of cultural rights.

The decision whether to favour customary law or human rights is obviously a question of policy that must be decided on political ideological grounds. But the options are not as starkly opposed as they might seem.

In so far as the customary law of the text books has strayed from a genuine community practice, the development of an authentic version may correct certain abbreviations. And, regardless of the cogency of arguments for human rights, one thing is clear: customary law cannot simply be abolished at the whim of the legislator; this much we should have learned from the failure of many of the 'law and development' programmes of the 1960's.

The South African society of the foreseeable future will consist of different groups that to a greater or lesser extent will remain

culturally distinct. The infrastructure for the legal enforcement of cultural pluralism already exists: chiefs' and headman's courts have jurisdiction over Africans and are competent to apply customary law, and even magistrates' courts and Supreme Court may now take judicial notice of customary law. This does not mean, however, that the excesses of the past regime shuld be perpetuated.

Between the two poles of cultural and human rights there is a continuum, suggesting that a 'weak cultural relativism' is feasible. In other words, not all the norms currently grouped under the pole of human rights are so fundamental that they must be applied in South Africa. Nor should all the norms of the current version of customary law be recognized.

In this regard, special attention will have to be paid to the status and rights of women and children and the possibility of amending customary law to such extent that they are allowed to take their rightful places in the community.

In closing, it is the opinion that provision ought to be made for the retention of customary law in the constitution.

This can be done along the same line that was followed in Bophuthatswana, namely as can be seen from section 67 of its Constitution:

"67.(1) In all proceedings involving questions of tribal customs followed by persons in Bophuthatswana it shall be in the discretion of the court to decide such questions in accordance

with the tribal law applying to such customs except in so far as the court may find that such law has been repealed or modified or is contrary to public policy or opposed to the principles of natural justice: Provided that no such finding shall be made by any court in respect of the custom providing for the payment of bogadi.

(2) The court shall not, in the absence of any agreement between the parties regarding the system of law to be applied in any such proceedings, apply any system of customary law other than that -

(a) which is observed at the place in Bophuthatswana where the defendant or respondent resides, carries on business or is employed; or

(b) if more than one system of customary law is in operation at that place, which is observed by the tribe to which the defendant or respondent belongs.

(3) For the purposes of subsection (1), a court including the Supreme Court in applications, trials and appeals may summon to its assistance in an advisory capacity such assessors as the court may deem necessary and the opinions of any such assessors shall be recorded and shall form part of the record of the proceedings".

It must be noted that this section is subject to the general principle embodied in the Bill of Rights in the Bophuthatswana Constitution, as per section 9 thereof:

"All people shall be equal before the law, and no one may

because of his sex, his descent, his race, his language, his origin or his religious beliefs be favoured or prejudiced".