

ep/comments

**COMMENTS BY THE GOVERNMENT ON THE INCLUSION OF THE RIGHTS OF
TRADITIONAL COMMUNITIES IN THE PROPOSED BILL OF RIGHTS**

1. It is a fact of life that notwithstanding more than a century of government under a Western legal system numerous aspects of the lives of traditional communities are determined by non-state legal rules, namely, customary law. Indigenous African legal systems have survived an imposed alien legal order and this has resulted in a legal pluralism which will continue for the foreseeable future, whether the State wants it or not.

2. The need for the inclusion of rights in respect of traditional communities in the proposed bill of rights flows from constitutional principle 2.12.

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

3. The underlying principles agree with recent international law developments in this connection (see the Draft Declaration on the Rights of Indigenous Peoples in the process of preparation under the supervision of the United Nations) and the only meaningful way

to give effect thereto, is to embody the necessary rights in the proposed bill of rights.

4. A note of caution must be sounded. Certain norms of indigenous law (arranged marriages, bride-wealth, widow-inheritance and polygamy and particularly the status of women) which are central elements of these societies, will be regarded as a denial of some of the fundamental rights of African women, if judged in a European setting. It is essential that membership of a traditional community be based upon the principles of voluntary association and informed choice so that those who prefer not to live according to the ways of their forefathers cannot be compelled to do so. It should be made clear that the proposal below is regarded as necessary to give effect to constitutional principle 2.12, and not as the Government's view of the ideal status of women in such a society.

5. It is proposed that the following rights be considered for inclusion in the chapter on fundamental rights.

RIGHTS OF TRADITIONAL TRIBAL COMMUNITIES

X(1) Every traditional tribal community shall have the right to exist as such and the right to its ethnic, cultural, religious and linguistic identity.

(2) Every traditional tribal community shall have the right to the recognition of its customary law as the legal system governing its internal affairs within its community.

(3) For the purposes of this section "customary law" means those legal rules regulating its internal affairs that are accepted as binding upon them by the members of a particular traditional tribal community in their community.

(4) Membership of a traditional tribal community shall rest on the principles of voluntary association and informed choice and the acknowledgement of the authority of chiefs, headmen and other instances and structures in the social system of the community.

(5) No law with regard to land lawfully occupied and used by a traditional tribal community according to its system of communal ownership shall be made without prior consultation with such community.

(6) A customary marriage according to customary law shall be recognised as a valid institution.

(7) Every member of a traditional tribal community shall have the right to have any dispute between him and another member of that community concerning a customary marriage, property, contracts, delicts, succession and land matters in the social and

economic system of the community decided according to customary law by the court of a chief or headman or other traditional authority.