**NATIONAL ASSEMBLY**

**QUESTION FOR WRITTEN REPLY**

**PARLIAMENNTARY QUESTION NO: 698**

**DATE OF QUESTION: 24 APRIL 2020**

**DATE OF SUBMISSION: 11 MAY 2020**

**Prof C T Msimang (IFP) to ask the Minister of Justice and Correctional Services:**

Whether, in view of the recognition of customary law and its practice in sections 211 and 212 of the Constitution of the Republic of South Africa, 1996, any steps have been taken to codify this law for the sake of common understanding and common application; if not, why not; if so, what are the relevant details?

**NW900E**

**REPLY:**

1. Customary law is mostly unwritten, with no dedicated body of persons tasked with making rules or with the authority to define its norms. This body of law covers all matters regulating personal and family life, and only certain aspects of customary law have been codified, for example the recognition of customary marriages, and parts of the law on succession, especially that dealing with the abolition of the principle of primogeniture. Often, this codification emanates from court orders on disputes lodged with the courts.

1. The Recognition of Customary Marriages Act,1998(Act No. 120 of 1998) defines customary law as the customs and usages traditionally observed among the indigenous African peoples of South Africa and form part of the culture of those peoples. Section 211 protects those institutions that are unique to customary law. It follows from this that customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. Specifically, section 211(3) of the Constitution orders the application of customary law by the courts, where this law is applicable. Customary law is protected by and subject to the Constitution in its own right, and may be tested only against the Constitution, and not the common law or legislation. While many South Africans subscribe to and live according to customary law, sections 30 and 31 of the Constitution provide for the right to cultural diversity. The recognition and application of customary law rests on the right to culture of the particular community. Customary law in South Africa is tied to ethnicity, therefore the law regulating the lives of people will differ across communities, ethnicities and provinces.
2. Living customary law exists in the system of living norms that regulate everyday lives of people who live according to customary law. This type of customary law is seen as dynamic, evolving and context specific as it changes in the beliefs and circumstances it applies to.
3. Also, in **Pilane and Another v Pilane and Another** 2013 (4) BCLR 431(CC) the Constitutional Court confirmed the notion of living customary law as follows:

‘the true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs’.

1. Since the advent of democracy, the Department has through the South African Law Reform Commission, codified certain Branches of customary law, and this includes Customary Marriages and the Law that relates to the Customary Marriages Act.
2. The Traditional Courts Bill which seeks to create a uniform traditional court system, is currently with the National Council of Provinces, after having been passed by the National Assembly.

This is part of the ongoing Project of Transformation of Customary Law, because customary law is living law. Codification is not do-able in a once-off project.