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Department of Law

FOR ATTENTION MS M EMMETT

The Technical Committee on Fundamental Rights

18 October 1993

FAX 011 397 2211

Dear Ms Emmett

CUSTOMARY LAW

Further to our telephonic conversation on Friday 15 October 1993 I append a submission which I request you to put before the Technical Committee on Fundamental Rights, and/or the Ad hoc Committee to which you referred, or, if the proposals are going before the Negotiating Council before the Technical Committee or the Ad hoc Committee have an opportunity to revise their proposals, before the Negotiating Council itself.

A copy of the Tenth Progress Report of the Technical Committee on Fundamental Rights dated 5 October 1993 reached me only recently. I would have preferred a longer time to consider it, but, as I have been informed that its provisions on customary law (or a subsequently amended version of those provisions) have still to be debated and are to be debated this week I have to confine myself to the main points.

1. There are three possibilities open to the Negotiating Council:

   (a) to make no mention of customary law in the Bill of Rights; or

   (b) to deal only with the main principle that customary law will be recognised and applied; or

   (c) to deal with the main principle and the details of it's recognition and application.

2. As it seems to be clear that mention of customary law is desired by some participants in the Negotiating Council I will not discuss 1 (a) above.

3. If the main principle only is to be dealt with I recommend the clause I proposed in a letter to the editor of Consultus. I have been informed that this letter will be published in the October 1993 issue of the Consultus; but as that issue has not yet appeared so far as I am aware (it has not yet reached Grahamstown) I attach, with the

editor's consent, a copy as an annexure to this letter. (Sub-section (4) of my proposed section falls away if clause 22 of the Tenth Progress Report is accepted.)

4. If the main principle and the details of the Recognition and application of customary law are to be incorporated in the Bill of Rights it will be essential for the Negotiating Council to deal with the following topics.

(a) The fact that there is more than one system of law in operation in South Africa. If only customary law and not religious law is being dealt with the Bill of Rights needs to refer to two systems of law: (i) South African law (sometimes referred to as "the general law"; and (ii) customary law.

(b) Judicial notice of the systems of law referred to.

(c) The detailed rules relating to the application of the different systems of law in, inter alia, the following circumstances.

(i) Where the law is normally applied administratively though a dispute may be brought to court. An example is the adminstration of estates. At least the following topics need to be dealt with:

(aa) who may make wills;

(bb) what property may be left by will;

(cc) the choice of law in intestate succession, ie which system of law is to be applied to which estates.

Another example of law normally dealt with administratively though a dispute may be adjudicated by a court is the law relating to land tenure.

(ii) Where the law is applied in the courts. The following topics need to be dealt with.

(aa) The choice of law, eg the present rules on the choice of law in succession.

(bb) Where both systems of law have causes of action on the same facts, eg (1) Ex parte Minister of Native Affairs: In re Yako v Beyi 1948 (1) SA 388 (A); (2) Guardianship and custody of children.

(cc) where, on the facts, only one system of law recognises a cause of action or a defence. It is not automatic that that system of law must be applied: Ex parte Minister of Native Affairs: In re Yako v Beyi, above, and Umvovo v Umvovo 1953 (1) SA 201 (A).

6. Further information on the above points is to be found in my book on The Customary Law of Immovable Property and of Succession 3ed (1990); in my contribution on "Customary Family Law" in the Family Law Service edited by Professor I D Schäfer and published by Butterworths; in the following articles and notes: (1956) 73 SALJ 402; (1957) 74 SALJ 313; (1958) 2 Journal of African Law 82; 1960 Acta Juridica 49; 1963 Acta Juridica 49; 1965 82 SALJ 487; (1967) 84 SALJ 416; (1969) 86 SALJ 15; (1969) 86 SALJ 25; (1973) 90 SALJ 4; 1977 Acta Juridica 95 (1981) 98 SALJ 320; 1982 (45) THRHR 208; (1983) 100 SALJ 413; (1984) 101 SALJ 224; (1984) 101 SALJ 445; (1989) 106 SALJ 166; and in the works of other authors.

7. I have been informed that an amended version of the Tenth Progress Report of the Technical Committee on Fundamental Rights is to be debated, but as I have not seen the amended version I must perforce comment on the Tenth Progress Report in its unamended form. My comments are on its draft clause 32 and are as follows.

(a) In referring in 32(1) to "Every person who (a) in pursuance of the right entrenched in section 17" (Section 17 refers to the right of association), the clause overlooks the fact that most of the persons to whom customary law applies become subject to it by birth, not by exercising a choice under section 17.

(b) In referring in 32(1) to "Every person who ... (b) of free and informed choice observes the rules and practices of a system of customary law and associates with other persons observing the same rules and practices" the clause overlooks the fact that a person not normally observing the rules and practices and not normally associating with other persons observing the same rules and practices may enter into a contract with one such person. For example, a man belonging to a tribe which has no fixed number of ikhazi (the cattle paid over under a lobola contract under Cape Nguni law - in some systems of customary law the cattle are called lobolo) enters into a customary marriage with a woman belonging to a tribe that has a fixed number.

(c) In referring to "Every person" (singular) the draft clause puts the choice of law into the hands of one only of the litigants which will often result in injustice. For example, suppose that a man whose wife had predeceased him dies intestate. Suppose, further, that he had married his wife, who had been his only wife, according to South African law; and that he left sons and daughters. It is clearly not a just solution that, as is provided in clause 32(1), the eldest son can claim the whole estate on the ground that he by his choice (whether under 32(1)(a) or (b)), exercised before or after his father's death, "belongs to a community which observes a system of customary law" (32(1)(a)) or by his "free and informed choice observes the rules and practices" (32(1)(b)), although his father did not and his brothers and sisters do not. I am assuming that the committee regards intestate succession as part of "the internal affairs of the community." If the Committee does not so regard it intestate succession is not dealt with anywhere in the draft Bill and the clause fails because it fails to deal with one of the most important aspects of customary law. Another example is land tenure. If two or more partners

buy land on freehold tenure in an urban area and take transfer of it can one of them later claim a customary law right because he, though not the other partner or partners, falls within the terms of clause 32(1)?

It is a fundamental error to allow (as clause 32 does) a party to a court case to bind the court to apply a system of law that favours him and deprives his opponent of any chance of success or to allow one of a number of claimants in an estate to require the court to apply the system of law that favours him above other claimants. There must be rules on this choice of law (technically referred to as rules on the conflict of laws) and they need to be independent of the choice of litigants and claimants in estates etc.

(d) It is neither wise nor practicable as in sub-clause 32(2), to allow every court applying customary law to determine the conditions on which and the time within which rules of customary law are to be changed to conform to clause 8. Ninety-nine per cent of the cases on customary law are heard in magistrates courts or in Chiefs' courts. Is every magistrate's court to be allowed to determine whether the intestate rules of the customary law of succession, in which there is primogeniture of males through males, is in conformity with clause 8 or not? Similarly in regard to rules on land tenure, family law, contract, delict etc all of which are within the jurisdiction of magistrates courts. If this is to be the law some magistrates courts will decide in one way and some in another way, so one would have deceased estates devolving by different rules in different magisterial districts and other cases decided by different rules in different districts.

Remember that cases in magistrates courts and Chiefs' courts are not reported at present so one magistrate's court or Chiefs' court will not have the means of discovering what other such courts are deciding unless a way of bringing decision to their attention. A Bill of Rights is not the correct place for a requirement that customary law cases be reported but the legislature should give the matter its attention.

It would not do to give jurisdiction in choice of law cases (conflict of law cases) to the Supreme Court only or to the constitutional court only because cases on customary law seldom reach the Supreme Court and even Divisions of the Supreme Court can and have in the past differed from one another. Further, as magistrates courts have to apply rules for the choice of law (conflict of laws) whenever a case possibly involving choice between more systems of law than one comes before them it is essential to have choice of law (conflicts of law) rules.

(e) Clause 32(3) does not say what "measures" are referred to. If legislation is being referred to this sub-clause conflicts with sub-clause 32(2). If legislation is passed in terms of 32(3) how can courts still operate in terms of 32(2)? On the other hand if courts operating in terms of 32(2) can override legislation what is the point of having 32(3)?

8. It will have become clear that I favour the course of action referred to in my points 1(b) all 3 above. I do not think there is time enough for either the Technical Committee or the Ad hoc Committee or the Negotiating Council to study and make recommendations on the details that need attention. The details should be left to the future legislative or legislatures.

Yours sincerely

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Dear Sir

THE RECOGNITION AND APPLICATION OF SYSTEMS OF LAW IN A CHARTER OF FUNDAMENTAL RIGHTS.

In his article in (1993)6 Consultus 32 on "The Government's proposals on a charter of fundamental rights: A critical appraisal" H J Fabricius SC draws attention, inter alia, at 37 to section 28 which, in the Government's proposed charter, appears under the heading "Litigation". It needs to be noted, however, that it is not only in the courts that law is applied. Most estates, for example, are wound up without recourse to litigation, some being wound up in terms of South African law (using this title to mean the law common to all South Africans) and others in terms of indigenous (customary) law. Hence a Charter of Fundamental Rights needs to have provisions for the recognition of different systems of law and for choice of law rules which will operate both in and out of court.

If the framework of the Government's proposed Charter is to be adopted I suggest the following in place of their proposed section 28:

"28. The right to the recognition and application of systems of law.
Every person shall have the right to the recognition and application of systems of law in accordance with the following provisions.

(1) South African law, including its rules on conflicts of law, shall be the general law.

(2) The law of indigenous groups and religious groups shall be recognised and applied in accordance with choice of law rules relating thereto.

(3) Judicial notice shall be taken of the systems of law referred to in subsections (1) and (2) above.

(4) All legal disputes other than those settled out of court, shall be settled by a court of law."

Subsections (1) and (3) of the above reflect the present position regarding South African law and the law of indigenous groups. (The history of the recognition and application of indigenous law is too long to be reviewed here: as to the present position see (1989) 106 SALJ 166.) The detailed choice of law rules should not be included in the Charter but should be dealt with in legislation. This follows from the fact that experience gained during the operation of the rules first enacted may give rise from time to time to a need for change and legislation can be changed more easily than a Charter of Fundamental Rights.

Some readers may wonder whether we have arrived at the position where judicial notice can be taken of the law of religious groups. In this connection it is important to remember that religious freedom is one of the fundamental rights to be provided for and that a provision such as that proposed above does not prevent a court hearing evidence concerning rules which are not otherwise available to it: cf (1957) 74 SALJ 313 at 330.

Sub-section 4 of the above proposal replaces the Government's subsection 28(1) which H J Fabricius SC, with respect correctly, points out is too wide. Courts exist for the settlement of legal disputes. In its note to its section 28 the Government explains that a provision is necessary to ensure that the jurisdiction of the courts is not ousted.

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