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# TELEFAX TRANSMISSION

DATE 27/10/93

MESSAGE FOR Melody Cornett. (Multi-party negotiations).

FAX NUMBER (011) 3972211

SENDER Bulle van Rooi

NUMBER OF PAGES (INCL. THIS ONE) 5.

COMMENTS

Dear Melody

Will you please pass this on to the technical comm + ad hoc working group. Fundamental rights as well as Leon Woods.

Thanks again!

Bulle van Rooi.

PLEASE CONTACT SENDER IN THE EVENT OF AN ERROR IN TRANSMISSION

THANK YOU

**MEMORANDUM**

**TO** : **TECHNICAL COMMITTEE AND AD HOC WORKING GROUP: FUNDAMENTAL RIGHTS DURING THE TRANSITION**

**FROM** : **LOBBYING COMMISSION, INDEPENDENT FORUM FOR ELECTORAL EDUCATION (IFEE)**

**DATE** : **21 OCTOBER 1993**

## 1. CUSTOMARY LAW

Clause 32 in the 10th Progress Report dated 5 October 1993 is cause for grave concern.

The right to freedom of association has little relevance to people, especially women, who are trapped in communities which are at present subject to customary law.

They do not have a choice. Socio-economic conditions and family obligations do not allow them the freedom to move elsewhere where customary law does not pertain.

Their fundamental right to equality before the law and equal protection of the law as set out in clause 8 is denied in the present formulation of clause 32.

The clause would be best omitted altogether because the fundamental rights should be for everyone without exception. We therefore strongly recommend that the equality clause should trump cultural and customary rights.

Clause 7 (Application) and Clause 36 (Interpretation). As has been pointed out by Professor Ettiene Mureinick from Wits Law School:

"The Bill is now expressed to bind only the legislative and executive organs of the State. The effect, it appears, is to make customary law reviewable under the Bill of Rights only when it has been translated into legislation or is being applied by government.

Where unwritten customary law is being applied by a court to a dispute between private individuals, the Bill of Rights seems to put it beyond challenge for violation of a right guaranteed in the Bill.

To be sure, the Bill does instruct the Courts in the application and development of customary law (interpretation), to have due regard to the spirit, purport and object of the Bill; but that is obviously something much weaker than annulling customary law which conflicts with the rights in the Bill.

The net effect is that unless customary law has been translated into legislation or is being applied by government, it is probably beyond the reach of an effective challenge under the Bill of Rights, even for conflict with a guarantee of sex equality.

And even where customary law has been translated into legislation, there may be no point in striking it down for sex discrimination, because the only effect might be to revive the unwritten customary rules from which the legislation was drawn, rules also discriminatory but immune from challenge."

We therefore strongly recommend that the drafters return to their earlier intention to make the Bill binding where appropriate on the Courts and where just and equitable on non-governmental bodies and private persons. Failing to do so would make a nonsense of the interpretation clause 36 (4) which states that in the interpretation of any law and the application and development of the common and customary law, a court shall have due regard to the spirit, purport and objects of this chapter.

## 2. PROPERTY (CLAUSE 28)

We are of the opinion that there should be no property clause in the interim Bill of fundamental rights. The issue of land is sensitive and the need for restitution so great that property should continue to be dealt with in terms of existing laws until such time as an elected government has had time to work through the issues properly and to take into account the demands of those who were dispossessed with in living memory, often unlawfully and almost always unjustly.

However, we recognise the political realities and understand that a property clause may be inevitable for political reasons at this stage of the negotiations.

We are concerned about the consequences of the phrase "rights in property" in 28 (2) and (3) of the 5th of October draft. This should be amended in both cases to read: "Expropriation of property by the State ..." and "Expropriation of property for the purpose of ...."

In the light of the above, we would like to repeat our plea for clarity and simplicity during the interim period. We strongly recommend that the drafters stick with acceptable terminology and phrasing. Failing to do so will complicate the already difficult task of interpreting the interim Bill of Rights. Our lawyers and judges will be new to the task of interpreting a Bill of Rights and by using obscure terminology and phrasing the drafters will be depriving them of looking towards the constitutional jurisprudence of other countries for guidance.

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