

Balika

CUSTOMARY LAW

Request from bilateral discussion between SAG and ANC to Technical Committee

1. To look at -
 - 1.1 Professor Kerr's draft clause, together with
 - 1.2 the clause from the SAG/ANC bilateral as suggested in the Ad Hoc committee minutes of 4.11.93.
 - 1.3 The overrider clauses suggested by the Black Sash and the Emancipation Commission of the ANC.

(All these documents attached)

2. To draft a clause on customary law incorporating the above and to suggest an appropriate place for it in the constitution ie chapter 3 or else where.

The Editor
Consultus
1605 Momentum Centre East Tower
343 Pretorius Street
PRETORIA
0002

26 April 1993

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.

RSH Kar's
draft

- (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.

A J KERR SC
Professor Emeritus of Law and
Honorary Research Fellow

- 2.3 Clause 15(2) - Freedom of Expression
- 2.4 Clause 27(c) - Labour Relations
- 2.5 Clause 28 - Property Rights Clause

3. **Clause 32 - Customary Law:**

- 3.1 The ANC proposed and both the Government and DP agreed, that, as this clause was not a "rights" issue it should be removed and dealt with in the Constitution.

It was noted that the role of customary law and the rights, powers and functions of Traditional Leaders should rather be dealt with in the Constitution and Clause 32 should therefore be deleted from the Bill of Rights.

- 3.2 It was noted that there was agreement between the S A Government and the ANC that the following subclause be in the Constitution. The S A Government's suggestion was that it be included in the Bill of rights as Clause 22(2):

22(2) "Without derogating from the provisions of the Chapter on Fundamental Rights in this Constitution, the parties to a dispute may agree to the application of a system of customary law for the purpose of settling their disputes."

The Ad Hoc Committee agreed that the Technical Committee should be requested to consider the question of where this clause would be appropriately included.

Professor Cheadle suggested, and it was agreed that any final decision by the Ad Hoc Committee should await the decisions of the Negotiating Council on the role of Traditional Leaders.

4. **Clause 8 - Equality:**

- 4.1 The Ad Hoc Committee noted that subclause 8(2) including the phrase "sexual

*Minutes
of 4/11/93*



28. OCT. 1993

**BLACK SASH SUBMISSION TO THE TECHNICAL COMMITTEE
ON FUNDAMENTAL HUMAN RIGHTS**

Regarding Section 32, in the 10th draft on Fundamental Human Rights:

The Black Sash reiterates its stance on customary law in South Africa. There is, in our opinion, no convincing reason for imposing a moratorium on an equality clause in favour of customary law [Sec. 32 (2)]. Those who propose such a limitation of the bill of rights are not the people whose rights are diminished by customary law. If the attempt were to succeed, many women in SA would face a perpetuation of their second-class status as citizens and might continue to be subjected to an authority outside their own person.

At the June 1993 World Conference on Human Rights in Vienna, women's organisations from around the world formulated a women's human rights statement for adoption at the UN. Clause seven of this statement reads:

"Regarding the universality of human rights, all international instruments should be applied equally to women, and governments should not use cultural and religious issues as a shield to evade responsibility for defending the fundamental human rights of women."

The Black Sash strongly supports the Vienna statement on Women's Human Rights. We believe that the inclusion of Section 32 would signify to the international community that, in the future SA, full human rights would be reserved for men only.

We believe that it would be best to omit Section 32 altogether. However, if it is believed essential to include a provision on customary law in Chapter 3, we would propose the alternative formulation.

"The rights enshrined in this chapter shall not be denied to any person who belongs to a community which observes a system of customary law or to a person who observes the rules and practices of a system of customary law and associates with other persons observing the same rules and practices."

This formulation would allow those who choose to abide by customary law to do so, but would not prevent those who wish to claim their right to equality to do so.

Jenny de Wit

THE BLACK SASH NATIONAL EXECUTIVE
with the Black Sash Legislation Watch

constitutional court to use the procedures laid down in the clause. Does this mean, for example, that all courts (including magistrates courts) can put the legislature on terms? Does it also mean that any court can decide on its own particular conditions such as a moratorium of 2 5 or 10 years on a particular practice? The wide phrasing of the section interferes with the substance of our notion of separation of powers.

7.2.4 protecting legislative changes and other measures aimed at bringing customary law in line with fundamental rights (32(3)):

Clearly this is necessary in the clause as it is presently drafted. However, it is recommended that a stronger statement of equality "trumping customary law" is necessary .

8. Need for clarity on equality for women

Given the history of gender oppression and structured discrimination against women in South Africa, we believe that the Bill of Rights should unequivocally affirm effective equality for South African women.

We recommend the inclusion of the following additional clause:

Notwithstanding ^{provisions} anything in this Bill, the rights and freedoms ^{contained herein} ~~in it~~ are ^{apply} guaranteed equally to male and female persons. [and, in no circumstances, ^(section 31) may cultural rights or rights under customary law, derogate from ~~the~~ ^{such} other rights, including those in section 8 protected here.] ^{application.}

"The rights enshrined in this chapter shall not be denied to any person who belongs to a community which observes a system of customary law or to a person who observes the rules and practices of a system of customary law and associates with other persons observing this same rules and practices." (Black Sash)

*ANC
Equality
Commission*

**UNMANDATED SOUTH AFRICAN PROPOSAL IN RESPECT OF CLAUSE
80 (3) AND (4)**

"(3) The President shall allocate portfolios in the Cabinet to parties after consultation with the Executive Deputy Presidents and leaders of parties entitled to Cabinet portfolios and appoint Ministers on the advice of the leaders of such parties: Provided that such allocations and appointments shall preferably be made on a basis of consensus and in the spirit underlying the concept of a government of national unity: Provided further that if consensus cannot be reached, the President's decision on the allocation of portfolios and the advice of the leaders of parties concerned on the persons to be appointed to the Cabinet from their parties, shall prevail."

**UNMANDATED SOUTH AFRICAN PROPOSAL IN RESPECT OF CLAUSE
77 (6) AND 81 (1)**

"77(6) In appointing an Executive Deputy President to act as President during his or her absence or temporary incapacity, the President shall take into consideration the exigencies of government and the spirit underlying the concept of a government of national unity: Provided that if the President is unable to do so, the Cabinet shall make such an appointment."

"81(1) The meetings of Cabinet shall be presided over by the President, or in his or her absence, by an Executive Deputy President: Provided that the Executive Deputy President shall, in the absence of the President, preside over consecutive meetings by Cabinet in turn unless the exigencies of government and the spirit underlying the concept of a government of national unity otherwise dictate."

DRINGEND

AAN : DR JAN HEUNIS

VAN : ADV ANTON MEYER

Notwithstanding the provisions of any other law, a person or body that has the power in terms of any law to grant or allocate any concession, permit, quota, authority or right for or regarding the exploitation or development of any natural resources, whether living or otherwise, shall, before exercising such power in respect of any such resources within the area of jurisdiction of a province or in the sea adjoining such area, consult with the executive council or the appropriate Minister of the province concerned.

(b) The date fixed under paragraph (a) shall -

(i) in the case of land outside a proclaimed township, not be fixed earlier than 19 June 1913; and

(ii) in the case of any other land, not be fixed earlier than 1 January 1948: Provided that the Commission contemplated in subsection (2) may in any particular case where the interests of justice so demand dispense with such date and consider any claim in respect of a dispossession earlier than 1 January 1948 but not earlier than the date contemplated in subparagraph (i).

In the period prior to the first elections appointed transitional Councils shall administer local government on an amalgamated basis, whereas such structures will be elected on a democratic basis as provided for in 143 (1).

A resolution of a transitional council pertaining to the budget of such transitional council shall be taken by a two-thirds majority, and a resolution of such structure pertaining to town planning regulations shall be taken by an absolute majority of all councillors

Such councils shall elect, in terms of the relevant Provincial Ordinances, according to a system of proportional representation from amongst its members an executive committee¹ to exercise such powers and perform such duties and functions determined by such transitional or metropolitan council, provided that:-

- (i) the executive committee may, instead of exercising such power or performing such duty or function, submit its report and recommendation to the transitional or metropolitan council concerned for its decision in the matter;
- (ii) The transitional or metropolitan council shall determine the number of members of and the quorum for the executive committee;
- (iii) the executive committee shall exercise its powers and functions and perform its functions, and duties on the basis of consensus; and
- (i) Where consensus cannot be achieved, any resolution of the executive committee shall be taken by a two-thirds majority.

Note Cross refer P.R formula with Electoral Act.

¹ For the purposes of this Constitution, Executive Committee shall also mean Management Committee in terms of the relevant Provincial Legislation.