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COMMENTS ON THE ADDITIONAL CLAUSE ON CUSTOMARY LAW AND FUNDAMENTAL RIGHTS

Note: Clause 4, included in the document, is not intended as part of the customary law clause but as an additional section for the Property clause.

1. As it stands the interim Bill of Rights does not assert clearly that cultural practices should be subject to the equality clause. It is therefore possible that courts will either apply a low level of scrutiny when considering the constitutionality of practices which are claimed to discriminate against women or that they will say that such 'cultural practices' are entitled to special protection.

It is essential that the Bill of Rights should state unambiguously that all cultural practices are subject to the overriding commitment to equality. For this reason, I think that the apparent objective of the proposal at hand is very important, however, it is so ambiguously worded that it is likely to confuse the issue rather than secure equality for women.

Overall, it seems important to sort out exactly what the relationship between 'culture' and 'customary law' is. As it stands now this is absolutely unclear.

2. Clause (1) attempts to define the ambit of customary law and clause (2) to assert that customary law is subject to the equality clause. Neither is clear and each leaves omissions that I think women should challenge.

3. Clause (1): This clause is unworkable for the following reasons, among others:

(i) The reference to clause 17 (which, I believe, is a reference to freedom of association) seems to be totally unnecessary.

(ii) (a) is too broad. It suggests that mere 'acknowledgement' of the authority of chiefs brings a person under customary law. Read together with (b), 'acknowledge' in this context must mean something less than a recognition of authority that is 'free and informed'. This means that customary law could be imposed on an unwilling party.

(iii) The last part of clause (1) attempts to distinguish 'internal affairs' of a community and 'interpersonal relationships'. The drafters probably intend that customary law should apply in interpersonal relationships only when individuals agree to that. However, the distinction between the two is far too vague. Do rules relating to succession to property within the context of the extended family belong to 'internal affairs' or 'interpersonal relationships' for instance?

If it is deemed necessary to include an affirmation in the constitution that customary law is a valid system of law, this should appear in a section of the constitution which acknowledges the other legal systems as well. There is no reason to grant it a special status as a right in the Bill of Rights. This seems simply to reinforce apartheid thinking which is that law for African people is 'different'.

Moreover, if the purpose is just to recognise customary law there seems to be no reason to distinguish something that might be categorised as 'internal affairs' and another area, 'interpersonal rights'. (If the reference to 'internal affairs intends to protect traditional patterns of leadership I would argue that the issue is more appropriately dealt with in conection with local authorities.)

4. A section along the lines of clause (2) could provide the explicit statement of the preeminence of the equality clause that I think is necessary. However:

(i) It should state unambiguously that equality trumps culture.

(ii) It should apply to all cultural practices and not only customary law so as to ensure that other cultural practices, oppressive of women, are not upheld on the basis of the culture clause.

(iii)It should add that cultural practices may be tested against all the values enshrined in the Bill of Rights, not only equality. (Speech in schools could perhaps be an issue here.) NB Although a general provision referring to the applicability of the full Bill to all cultural practices would cover equality, I think that equality should, nevertheless, be mentioned expressly because it is the most important value in this regard and the one most likely to be treated roughly.

(iv) The reference to sections 87(4) and (6) is, strictly speaking, unnecessary. Those two clauses give the constitutional court a general authority to give the legislature time to correct unconstitutional practices. I believe the provision was included to allay fears that the court would, of its own accord and without consultation, meddle in the affairs of people.

However, clause (2) may be interpreted to mean that 'putting on terms' is the only option available to a court which has determined a practice to be in conflict with the Bill of Rights. This is unacceptable.

The phrase 'any court of law' apparently means that courts other than the constitutional court could use this procedure where customary law is concerned. This seems unwise and impractical. It opens the possibility of problems being put to the legislature by one court while other courts uphold the practices. There should

surely be unanimity within judicial structures before the remedy is adopted.

It also allows lower courts to dictate to the legislature to some degree. This may well also be incompatible with our commitment to separation of powers because it would allow courts which are appointed in the regular way (and thus without due regard for the political role expected of them) to give directions to the legislature.

Proposed Clause:
Perhaps an additional clause in the Bill of Rights along the lines of section 28 of the Canadian Charter of Rights would be better. The Canadian section 28 states:

> Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

This is too limited for our purposes because it still allows a cultural right to be asserted by a man and for a woman who protests only to be told: You have an equal right to cultural rights (although those culture rights might themselves discriminate against you). However, we might try:

> Notwithstanding anything in this Bill, the rights and freedoms in it are guaranteed equally to male and female persons and, in no circumstances, may cultural rights or rights under customary law, derogate from the other rights, including those in section 8, protected here.

In working on this proposal, I think, we should consider a way to clarify the relationship between culture and customary law. I am not confident that this draft does it.

Christina Murray