

1/3/3/2/13

TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS

ADDENDUM TO THE TWELFTH PROGRESS REPORT

The impasse which resulted from the Council's discussion of the clause on customary law (clause 32) may be resolved in one of the following ways:

1. CUSTOMARY LAW

First Option

By the inclusion of the following clause in Chapter 3 either instead of the existing clause 32 or as an addition to clause 22:

"(1) Subject to sections 7(2) and 34(2) and to rules and procedures

prescribed by law, parties to a dispute who -

(a) belong to a community which observes the rules and practices of a system of customary, indigenous or religious law; or

(b) who of own choice observe such rules and practices;

shall have the right to agree, of free and informed choice and at any stage during proceedings aimed at determining such dispute, to the application of the said system for the purpose of determining their dispute.

(2) Indigenous law may be regulated by law, including legislation designed to assist its development in accordance with the values embodied in this Chapter.

Second Option

By the inclusion of the following provision somewhere else in the Constitution but preferably not in the Chapter on Traditional Authorities:

- (1) Subject to sections 7(2) and 34(2) and to rules and procedures prescribed by law, parties to a dispute who -
 - (a) belong to a community which observes the rules and practices of a system of customary, indigenous and religious law; or
 - (b) who of own choice observe such rules and practices;

may, at any stage during proceedings aimed at determining such dispute, of free and informed choice agree to the application of the rules of the said system for the purpose of determining their dispute.

- (2) [The same as subclause (2) above.]"

In both instances the present clause 1 of Chapter "Y" must be deleted. With the first option the entitlement to rely on the said systems of law is subject to the criteria of the Limitation clause (clause 34). It is in other words, easier to limit a right than an entitlement couched in the language of the clause proposed under the second option. For the rest it makes little difference where the provision is actually included for in both instances it will form part of a constitution which, as a whole, is supreme law (see clause 4 of the Constitution)

2. FAMILY LAW UNDER RELIGION

In order to address the concern which has been raised about religious law the following subclause could be included under the existing clause 14:

- (3) Nothing in this section shall preclude legislation recognising -
 - (a) personal and family law under religion, and
 - (b) the validity of marriages concluded under religious law subject to specified conditions."