

Submission by the African National Congress**To the Technical Committee on the Repeal of Discriminatory Legislation****19 May, 1993**

These representations are done in line with the call by the Multiparty Negotiating Process for various political parties to make submissions to be considered by the various technical committees in order to prepare for their discussion and negotiation by the Negotiation Council. Our submissions are based on the ANC Women's League submissions to Codesa and those decisions of the Gender Advisory Committee.

A. CONSTITUTIONAL MATTERS**1. Constitutional Principles**

- 1.1 South Africa will be a united, sovereign state in which all will enjoy a common South African citizenship.
- 1.2 South Africa will be a democratic, non-racial and non-sexist country.
- 1.3 The constitution shall be the supreme law.
- 1.4 There shall be a justiciable Bill/Charter of Fundamental Rights, which will spell out fundamental and socio-economic rights of all citizens and how state policies will ensure their implementation.
- 1.5 There shall be separation of powers between the legislature, the executive and the judiciary with appropriate checks and balances.
- 1.6 There will be a legal system that guarantees the equality of all before the law.
- 1.7 There will be representative and accountable government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters role and, in general, proportional representation.
- 1.8 The diversity of languages, cultures and religions will be acknowledged subject to principles of equality, democracy, non-sexism and non-racialism.
- 1.9 All will enjoy universally accepted human rights, freedoms and civil liberties including freedom of religion, speech and assembly which will be guaranteed by an entrenchment of a justiciable bill of fundamental rights subject to the principle of equality, democracy, non-sexism and non-racialism.
- 1.10 The government shall be structured at national, regional and local level. At each level there shall be democratic representation.
- 1.11 The Bill of Rights shall guarantee just property rights (Provided that legislation shall in the public interest, authorise expropriation against payment of reasonable compensation which shall, in the event of a dispute, be determined by a court of law).
- 1.12 The constitution shall define a suitable role for traditional leaders consistent with the objectives of a united, non-racial, non-sexist and democratic South Africa.

Other issues to be looked at:

- * Notion of the family
- * regressing historical racial and gender imbalances
- * charter for women's rights, to form part of the Bill of Fundamental Rights, which among other things will deal with abortion, privacy, the family, women and child protection, diverse cultural practices, etc.
- * the rights of the disabled people

2. Constituent Assembly/Constitution making Body

- 2.1 This must be a democratically elected body.
- 2.2 When drawing up electoral procedures, methods should be sought to encourage full participation of women. This should apply to both encouraging women to exercise their political rights to campaign and stand for elections and to vote. These provisions would include, among others, education programmes, elimination of sexual harassment, drawing up of electoral lists and giving women exposure in the media.
- 2.3 All parties should include a proportion of women in their electoral lists. It is essential that women are evenly distributed within the lists, to ensure their inclusion in the elected body.
- 2.4 Among the subcommittees to be formed there should be a gender sub-committee to monitor and raise gender issues in the drafting of the constitution and bill of rights.

B. TRANSITIONAL EXECUTIVE COUNCIL AND ITS SUB-COUNCILS AND COMMISSIONS

1. Women should be included in the TEC and its sub-councils in addition there should be a gender commission. This will be in pursuant of the principles of a non-racial, democratic and non-sexist South Africa. We recognise that the noble ideal of a non-sexist state will not be realised if the TEC stage of the transition does not have women represented in all structures as an appropriate structure to level the playing fields with regard to gender. The establishment of a gender commission will enhance women's participation in all the transitional structures.
 - 1.1 Status of the gender commission
 - * It should be an independent commission of a specialised nature, enjoying the same status as the other TEC Commission.
 - 1.2 Composition of the commission
 - * It should be composed of 7(seven) to 11(eleven) gender specialists
 - 1.3 Functions/Powers of the Gender Commission

- * It should ensure gender sensitisation of the TEC and its Sub-councils.
- * It should scrutinise all recommendations from the sub-councils and come up with gender perspective of these.
- * It shall also make an input into legislation pertaining to the reform and repealing of law and administrative procedures that impinge on the rights of women.

1.3 Relations with other transitional structures

- a. Independent Electoral Commission: One of the tasks of the IEC would be to set out rules that would enable maximum participation in the first non-racial elections. We believe that such rules should ensure that women participate effectively in elections. Special procedures will have to be drawn so as to realise this goal. The commission will be in the best position of defining enabling legislation for women's maximum participation.

The following are examples of these functions. There is the need to be sensitive to women's situations such as the double burden of women which is employment and family management. Accordingly, electoral procedures should conform to the times when women are most available. Another is that of general illiteracy amongst women. Voter education should be tailored to suit women too. There are current indications that women under tribal authorities, in the farms and those in domestic service are denied the right to organise meetings or to attend meetings. The probability is that intimidation would increase during elections. There is therefore the need for educational material to be produced informing the populace and women on rights to vote. There is also need to repeal by-laws which restrict access to farm workers. Educational material directed to chiefs and employees should be produced.

- b. Media: currently there is a move towards setting up a media board. The drafting of guidelines for fair usage of the electronic media during the transitional period dominates the media discourse. The gender commission will make appropriate recommendations in this regard. The media personnel as relating to the board should include women. The commission will also define in terms of the gender perspective what fair coverage implies. These factors should apply to the print media as well.

REPEAL OF GENDER DISCRIMINATORY LEGISLATION

In its report to CODESA 2 the Gender Advisory Committee called for the "repeal of all legislation in South Africa and the TBVC states which discriminates on the basis of race, creed, or gender which circumscribe and impede free political, economic and social activity." It suggested that "this be attended to by a general law asserting certain basic civil and political rights, combined with an omnibus law repealing all legislation in accordance with a schedule of Acts to be provided."

The identification of such legislation is obviously a very involved task which might take a long time. It also has a danger of leaving some laws and thus not being able to repeal them. It will seem a practical way of dealing with this will be to enact an omnibus law which will automatically outlaw all discriminatory legislation which will impede political activity and to set up an enforcement mechanism which will be accessible to all citizens without going through long court procedures.

C. LAW REFORM FOR THE FREE AND FAIR PARTICIPATION OF WOMEN

CITIZENSHIP:

1. The South African Citizenship Act of 1949 contains many **clauses** which are discriminatory to women. It also includes clauses which may **prove** problematic to returning exiles and their families. This memorandum will **only** focus on the gender implications of the act. Some of the discriminatory consequences of these clauses relate to the law of domicile and the fact that the wife has always followed the domicile of her husband. These will doubtless be removed once the 1992 Domicile Act is proclaimed.

The following commentary on the act must be read with the act.

- 1.1 Section one deals with definitions. This requires amendment in the following manner:
 - 1.1.1 the definition of "father" should be rendered redundant; and
 - 1.1.2 the definition of "responsible parent" must apply equally to the mother or father of a minor.
- 1.2 Citizenship by Birth: persons born in SA before 1949 (section 2) Section 13 appears to protect the position of married women in this section.
- 1.3 Citizenship by Birth: Persons born outside of SA who qualify for citizenship by birth (section 4(1)(b)) This section only confers the status of citizenship by birth on children of SA fathers working outside SA. This must be amended to include the children of SA mothers working outside SA.
- 1.4 Citizenship by descent - Persons born outside SA before 1949 (section 5) This generally only allows for citizenship through the male line and must be amended.
- 1.5 Citizenship by descent - persons born outside SA after 1949 (section 6) Section 6 (1)(a) has different requirements according to whether the mother or father is a SA citizen. This distinction should be removed.
- 1.6 Citizenship by Naturalisation (section 10)

- 1.6.1 Section 10(2) makes allowances for the wives to qualify for permanent residence outside of the country in certain circumstances, but not for husbands. In other words the spouse of a man receives benefits that are denied the spouse of a woman.
- 1.6.2 Section 10(4) requires application by a "responsible parent" or "guardian". These are overwhelmingly fathers and not mothers. Thus women will generally not be able to apply on behalf of their children.
- 1.6.3 Section 10(4) bis only applies to the male line.
- 1.6.4 Section 10(6) provides special dispensations for wives and widows of SA citizens, but not for husbands and widowers.

1.7 Permanent residence and ordinary residence

These are important requirements for the acquisition of citizenship by naturalisation. One has to be lawfully admitted for the purpose of permanent residence, and to be ordinarily resident and physically resident for certain periods before qualifying for citizenship by naturalisation. This means that any discrimination in that acquisition of permanent and ordinary residence has to be considered. These are discussed in respect of the Aliens Act no 1 of 1937 below.

- 1.8 Problems of Proof Insofar as many people do not have papers of any kind, proof of birth, marriage and residence will be difficult.

2. The Aliens Act no 1 of 1937

- 2.1 Section 4 sets out the requirements for permanent residence. The following provision discriminates against women:

2.1.1 Section 4(3)(e) allows the wife, children and dependants of a qualified man to qualify for permanent residence; but does not extend the same benefits to the husband, children and dependents of a qualified woman.

- 2.2 Section 12 sets out the exceptions to the section 2 requirement of permanent residence permits. Insofar as section 12 (1)(a) bases an exception on the acquisition of a lawful domicile prior to 1937, this may discriminate against married women who follow the domicile of their husband.

3. The Restoration of South African Citizenship Act no 73 of 1986 provides for the restoration of SA citizenship to TBVC citizens. Insofar as this depends on actual

application and residence qualifications, many people may be discriminated against. Careful attention should be paid to the position of all TBVC residents.

4. SECURITY OF EMPLOYMENT FOR PUBLIC SERVANTS

A. TEACHERS:

1. Women teachers are subjected to gender discrimination in the law and in the practices of the teaching profession. Legal discrimination against women (organised on a racial basis) means that they receive few or no maternity rights, and different pension, medical aid and housing subsidy benefits. The forms of indirect discrimination include unequal pay, unequal division of labour, gendered teacher training, sexual harassment and the allocation of "feminine" tasks within schools such as "pouring the tea".
2. Teachers are presently excluded from the Labour Relations Act and from the current initiative to draw up a Public Service Labour Relations Act. Teachers accordingly have no rights of freedom of association, collective bargaining and dispute resolution. Teachers in state schools have no recourse to the courts (civil or labour) in respect of "unfair labour practices".
3. In relation to job security, the rights of a women to retain her permanent status as a teacher after marriage is not always guaranteed. If an unmarried woman falls pregnant, this is regarded as "misconduct" and she is dismissed. Teachers generally are also restricted in their political participation:
 - 3.1 The Indians Education Act and Coloured Persons Education Act describes the following as "misconduct" which can lead to a disciplinary hearing: If a teacher "makes use of his position in the department to promote or to prejudice the interests of any political party, or presides or speaks at any public or political meeting, or draws up or publishes or causes to be published, any writing or delivers a public speech to promote or to prejudice the interests of any political party" (S16(ga) in both acts).
 - 3.2 The Education Affairs Act (House of Assembly) sets out the position on civil and political rights of teachers in section 96 of the act. It allows a teacher to be a member of and in the management of a political party but states that he or she may not act politically in a manner which "may embarrass the department", act as a chairperson of a public meeting, publish in his or her name a document to further or prejudice a political party or use his or her position as a teacher to promote a political party.
 - 3.3 Regulation 15 of the 1981 regulations in terms of the Education and Training Act provide that a teacher cannot use his or her position to promote the interests of a political party/organisation; publish a paper or

express him or herself in the press or in a public meeting on political matters. A teacher also not circulate documents relating to elections or work in respect of an election in a school, on school premises or at a school function.

B. POLICE:

The Police Act does not appear to contain any discrimination in respect of job security. If there is such discrimination, it is likely to be found in the regulations made in terms of the act. I was unable to track these down due to time restraints.

There are restrictions on the political involvement of the police but they are appropriate to the role of the police.

C. PUBLIC SERVICE:

There is no overt discrimination in the Public Service Act in respect of political freedom and job security. It may well be present in the regulations and practices of the public service.

The restrictions on political involvement appear to be appropriate to the role and position of public servants.

D. NURSES:

The situation of male and female nurses has also to be looked at. The Nurses Act restrict them from political participation and are not covered by the Labour Relations Act.

E. DOMESTIC AND FARMWORKERS: There is need to focus on these two groups - whose political participation is restricted by by-laws and other measures.

CITIZENSHIP:

5. TBVC citizenship: do women have lesser rights of citizenship than men?

In each case citizenship of the particular "independent state" is governed by the "constitution" act and a citizenship act.

5.1 Bophuthatswana: The Bophuthatswana Constitution act provides for citizenship as follows (sec. 80):

2.1.1 All Batswana defined by an act of parliament

2.1.2 All persons legally domiciled for at least 5 years (this was automatic until 1978 when application had to be made). This is a problem in so

far as women follow the domicile of their husband

2.1.3 Anyone else who applies and is accepted as a citizen

The Bop Citizenship Act is discriminatory. Persons born outside of Bop can only qualify for citizenship through the male line. This affects citizenship by birth and descent. The provisions regulating the acquisition of citizenship by registration or naturalisation grant greater rights and privileges to men and the dependants of men.

- 5.2 **Ciskei:** The Ciskei Constitution act states that citizenship shall be obtained by birth, descent and naturalisation on such conditions as may be determined by an act of parliament.

The Ciskei Citizenship Act grants citizenship to persons born outside of the Ciskei only through the male line. The provisions regulating the acquisition of citizenship by registration or naturalisation grant greater rights and privileges to men and the dependants of men.

- 5.3 **Venda:** The Venda Constitution Act regulates citizenship and appears to allow citizenship to follow either parent. The only discriminatory rule appears to apply to citizenship by registration / naturalisation which is dependent on 5 years domicile.

- 5.4 **Transkei:** I have been unable to track down the Transkei Constitution and Citizenship Act. It is probable that gender discrimination occurs in a similar manner to the other independent states.

"Democracy means freedom to choose"



INKATHA

Inkatha Freedom Party

Iqembu leNkatha Yenkululeko

MULTIPARTY NEGOTIATION PROCESS
TECHNICAL SUBCOMMITTEE #6
ON THE AMENDMENT OR REPEAL OF
LEGISLATION IMPENDING FREE POLITICAL ACTIVITY
AND DISCRIMINATORY LEGISLATION

FIRST POSITION PAPER
OF THE INKATHA FREEDOM PARTY

WORLD TRADE CENTRE : 18 MAY 1993

All legislation impeding free political activity and discriminatory legislation should be amended or repealed immediately. This exercise needs to be preceded by the determination of applicable reference concepts. In fact this exercise amounts to a comparison between existing legislation and given concepts of political freedom and lack of discrimination. The preliminary threshold issue of what is discrimination and what is political freedom needs to be resolved. The IFP proposes that the Technical Sub-Committee reviews the existing legislation against the parameters of the Bill of Rights set forth in the Constitution of the State of KwaZulu/Natal and recommends the repeal of all the legislation which would not allow the free exercise of any of the rights set forth in such a Constitution.

Special attention should be given to those rights and considerations which are immediately related to the political presence of segments of society in the political process leading to elections and therefore special attention should be given to the rights of the victims of apartheid, women, the disabled and other groups which require special protection.

The IFP fear that any possible listing of legislation which carries with itself the potential for discrimination any impairment of free political activity would not be either exhaustive nor comprehensive. Therefore, rather than listing specific segments of legislation which ought to be repelled, the IFP finds it more appropriate to suggest the modus operandi of this technical sub-committee so as to ensure that this technical sub-committee will be able to identify any relevant piece of legislation to be amended or repelled.

Once this technical sub-committee has agreed on the reference parameter to be used to determine what needs to be amended or repelled --which we suggest to the Constitution of the State

of KwaZulu/Natal-- it would be advisable that this technical sub-committee opens its door to receive the grievances of social and cultural formations throughout South Africa.

In fact, the type of work that the committee is going to undertake is substantially no different to a process of constitutional adjudication. In this respect it might be useful that the sub-committee forward a request letter to the judicial authorities of South Africa, requesting them to indicate what legislation would appear to be discriminatory or otherwise not in compliance with the preagreed parameter with relation to cases of controversy before them. The sub-committee should also open itself to the direct access of social and cultural formations in the country.

This exercise would be valuable to set the initial parameters for a future constitutional jurisprudence of a new South Africa. In this respect it would be advisable that this committee motivates all its recommendations on the basis of explicit constitutional principles rooted in acceptable and recognised principles of modern constitutionalism and human right protection.

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