

2/4/6/5/2/3

**CONSTITUTIONAL ASSEMBLY**

**SUBTHEME COMMITTEE 3 OF THEME COMMITTEE 6**

**SPECIALISED STRUCTURES OF GOVERNMENT**

**21 FEBRUARY 1995**

**DOCUMENTATION**

**SUBMISSIONS VOL 4**



## INDEX

### COMMISSION ON GENDER EQUALITY

<b>1. <u>ORGANISATIONS</u></b>	
<b>1.1 NATIONAL WOMEN'S RESOURCE AND SERVICE CENTRE</b>	<b>A</b>
<b>1.2 UNISA</b>	<b>B</b>
<b>2. <u>INDIVIDUALS</u></b>	
<b>2.1 JOHAN E GROBLER</b>	<b>C</b>
<b>2.2 NINA ROMM</b>	<b>D</b>



500

A)

# NATIONAL WOMEN'S RESOURCE AND SERVICE CENTRE

3 RD FLOOR, HEERENGRACHT BLDG.  
P O BOX 31104  
BRAAMFONTEIN

TEL: (011) 403 - 7614/5  
FAX: (011) 403 - 7879

1995 January 17

Mr. Snakes Nyoka  
Manager  
Commission on Gender Equality

CONSTITUTIONAL  
ASSEMBLY

30 JAN 1995

Dear Sir

RESPONSE TO QUESTIONNAIRE

---

- 4.1 The commission on Gender Equality obtains its legitimacy through constitutional mandate.
- 4.2 A commission on Gender Equality can serve as a monitoring, facilitative and resource allocation mechanism.

It can also be an interdepartmental co-ordinating mechanism on gender policy within ministries.

Liasing with human rights groups, can develop instruments to safeguard against human rights violations against women and children.

Should receive continuously submissions on specific gender issues.

With the Women's National Coalition should set up a Democracy and Gender Barometer for South Africa.

Should develop working relations with SADC counterparts and other international structures within government ministries on the issue of gender equality, structure policy and implementation at national and international levels.

**DIRECTORS :** D MABILETSA(CHAIRPERSON), S NENE (EXEC. DIRECTOR), DR P LOLWANA, DR N MAGAU, DR M TSHABALALA, W DIREKO, H MKHIZE, S MOTLANA, NKOSI, I THABHALI



4.3 STATUS

The commission should be a permanent constitutional structure that operates within the office of the State President and liaising with similar structures at regional level within offices of the Premiers.

4.4 The commission should vigorously address the residual inequalities with respect to traditional authorities [chapter 3] and in particular the nature and consequences of marital regimes, the exclusion of women from public office as councillors, chiefs, council members, public service positions etc..

5.1 Public hearings, TV, radio, print media focus groups, educational projects with a strong focus on the use of vernacular, project design and evaluation.

5.2 \* Women's National Coalition  
36th Floor  
Room 3609  
Carlton Centre  
Johannesburg, 2000

\* NGO Planning Committee  
36th Floor  
Room 3618  
Carlton Centre  
Johannesburg, 2000

\* Mrs. Helen Suzman

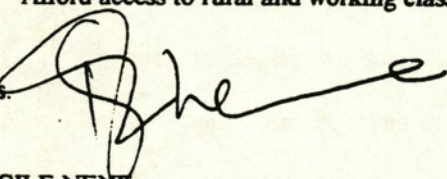
\* Human Rights Lawyers

\* SACC Justice and Peace Division

\* NGO Themat Groups on Peace and Equality  
c/o NGO Secretariate

NB. Afford access to rural and working class women and gender sensitive men.

Thanks

  
SBONGILE NENE  
EXECUTIVE DIRECTOR

---





Fakulteit Regsgeleerdheid

UNISA

Faculty of Law

Department of Legal History, Comparative Law and Legal Philosophy  
Departement Regsgeskiedenis, Regsvergelyking en Regsfilosofie

Tel : (012) 429-8412

Fax : (012) 429-3442

Home Tel and Fax : (012) 342-2893

Snakes Nyoka  
Manager: Theme Committee 6  
Constitutional Assembly  
PO Box 15  
CAPE TOWN  
8000

Dear Sir

**THE CONSTITUTION-MAKING PROCESS: COMMISSION ON GENDER EQUALITY**

Thank you for the opportunity of submitting comment on the abovementioned institution.

**1 REQUEST FOR STUDIES ETC**

We do not have any comparative studies on Commissions on Gender Equality available at present. However, such a study was initiated in January 1995 and will be forwarded to you upon completion (April 1995). Please bear in mind that the Women's Bureau has an impressive resource centre. If you wish to make use of this facility, you may contact Ms Barbara Wegg, telephone and fax (012) 47-6176.

**2 THE NEED OR OTHERWISE FOR A COMMISSION ON GENDER EQUALITY**

If the preamble and section 8 of the Constitution are taken into consideration against the background of our country's history of discrimination, it may well be argued that "equality" is the grundnorm of the interim Constitution.

Although an effort has been made to eliminate statutory discrimination based on sex and gender, instances of such discrimination are still encountered in many spheres. Discrimination based on gender and sex will not be eradicated by legislation alone - attitudes will have to change. An expert body which will make recommendations with regard to law reform as well as being tasked with the promotion of gender equality, will be essential in this regard.

If not specifically addressed, the question of gender equality may well be afforded



secondary status as initiatives to correct racial inequality get off the ground.

### **3 STATUS AND FUNCTIONS OF THE COMMISSION**

At this stage it is unclear what the relationship between the Human Rights Commission and the proposed Commission on Gender Equality will be.

Section 7 of the Human Rights Commission Act merely states that the Commission "... shall maintain close liaison with institutions, bodies or authorities similar to the Commission in order to foster common policies and practices and to promote cooperation in relation to the handling of complaints in cases of overlapping jurisdiction."

Furthermore it is unclear what effect the possible introduction of Civil Rights Legislation may have on the functions of a Commission of Gender Equality.

Until such time as these uncertainties have been clarified, we shall restrict ourselves to these general comments:

- The success of the Commission will depend, to a large extent, on the appointment of effective people to the Commission. The appointees should possess considerable expertise and credibility and should have a proven track-record of dedication to the ideal of gender equality. These requirements should be included in the statutory provisions relating to the appointment of members to the Commission.

Proper consultation with Women's Organisations and other interested parties will be essential in ensuring that appropriate people are appointed.

- Apart from the promotional and advisory functions, the possibility of an adjudicative function for the Commission should be considered. (This possibility will be considered in our comparative study.)
- Once the Convention on the Elimination of all Forms of Discrimination against Women has been ratified, the Commission could be tasked with overseeing/ monitoring the implementation of this Convention.

The Commission could also assist with the report-back duties which will follow from ratification of this Convention.

- A mediation function for the Commission should be considered.



**3**

- The Commission could play an extremely important role in establishing Codes of Conduct along the lines of the British ACAS codes. (This matter will be dealt with in our comparative study.)
- The Commission should be accessible to everyone. In order to promote such accessibility, its functions will have to be widely publicised.
- An Annual Report of the Commission's activities should be published.
- The absence of relevant statistics is an obstacle faced by many persons conducting research regarding gender issues. The Commission could possibly liaise with the Central Statistical Department in this regard.

**4 METHODOLOGY TO REACH OUT TO THE PUBLIC**

Reaching out to the public is essential to the effectiveness of a Commission of this nature. The following may be considered:

- "Road shows" of experts conducting workshops/information sessions countrywide.
- Regional advice offices - one person in each Provincial legislature could be trained to fulfil this function.
- A series of in-depth articles in national as well as local newspapers.
- A phone-in information facility.
- A "user-friendly" booklet explaining the functions of the Commission should be compiled.

**5 GENERAL**

The above comments may not be regarded as representative of the Women's Bureau and all its members. There was not sufficient time to consult with our members on this matter. These comments follow from discussions held with the Executive Directors of the Women's Bureau.



4

This situation is unsatisfactory. Please bear in mind that most organisations will require at least two months in order to arrange meetings, workshops etc from which representative comment can follow.

## 6 INDIVIDUALS WHO MAY BE CONSULTED

- 1 Adv Frances Bosman SC  
Tel: (012) 323-9302
- 2 Prof Ronel Erwee  
Tel: (012) 420-3335  
Fax: (012) 43-7223
- 3 Adv Elize Delport  
Tel & Fax: (012) 342-2893

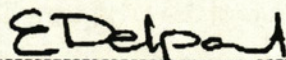
These persons are all directors of the Women's Bureau.

## 7 FUTURE CORRESPONDENCE

Please address all correspondence to:

Ms Nathalie Stockton  
The Women's Bureau,  
PO Box 75749  
LYNNWOOD RIDGE  
0040

Yours sincerely



ADV ELIZE DELPORT  
Executive Director: Women's Bureau of South Africa



CONSTITUTIONAL  
ASSEMBLY

30 JAN 1995

8 Duodecim Court  
Carstens Street  
Tamboerskloof 8001  
Tel. 234 704 (o/n & a/n)  
26 January 1995

The Secretariat  
Constitutional Assembly

RE. SUBMISSIONS

I would like to submit the following document (for which I hereby assume copyright). I have entitled it "Abortion as social need and a humanist theory of reproductive freedom".

Although addressed to Theme Committee 4: 1) An entrenched bill of rights), it is no doubt relevant to Theme Committee 6: 1) Commission on Gender Equality. If so, I would appreciate it if a copy were made and forwarded.

My apologies for the untimeliness of my submission: my thanks for the willingness to be flexible about the deadline date. I look forward to the Committees' responses and am more than willing to contribute -in any way, time permitting- to policy proposals on abortion.

The work represented in the report is by no means only my own. to the extent that I have, for the sake of flow and brevity (and due to time constraints), omitted to acknowledge the many quotations and page references it contains.

I am registered at the U. Stellenbosch as a Master's student (Philosophy), and am in the process of completing my thesis, which is on abortion. My promotor is dr Johan Hattingh.

Yours respectfully

Johan E. Grobler



C

ABORTION AS SOCIAL NEED AND A HUMANIST THEORY OF REPRODUCTIVE  
-----  
FREEDOM  
-----

-A. INTRODUCTION

-A.1 OUTLINE, CONSIDERATIONS AND OBSTACLES

For a systematic exploration of abortion, much theory on and most current general attitudes toward abortion represents at worst a crisis and at best a challenge. A systematic exploration of abortion must be critical

\* 1) of the historical conditions out of which the need for abortion can be shown to arise (in the case of abortion: from the social realities of women who confront the abortion question, and to women's complex and often contradictory awarenesses thereof), as well as

\* 2) of its own -humanist- principles, aims and goals in terms of reproductive freedom -as the "right" to have children and the "right" not to have them- which make criticism of the above-mentioned historical conditions possible.

Most current (including South African) literature on the morality of abortion and on how pregnant women understand that morality is counterproductive insofar as it frames the "abortion debate" as a (either/ or) choice between the fetus' "right to life" (the "pro-life" position) and the pregnant woman's "right to choose" (the "pro-choice" position). This assertion can be said to be the backbone of any properly systematic enquiry of abortion theory. This is so because the meaning of "rights", "choice", "morality", "consent", women's social mobility,



\* 3) the alarmism and negativism (which, in portraying abortion as a "hard" choice evoking "loss" and "pain", echoes "right-to-life" influence and testifies to the power of familial ideology and the fetal imagery that encodes it) from which "slippery slope" arguments and notions of abortion as an "evil" (and conversely, as a "necessary evil") derive their force;

\* 4) fetishism, as the usages of fetal imagery (and legal abortion) in neoconservative politics.

The validation of the project of critical theory can be made concrete i.t.o. abortion by focusing on the following aspects: pluralism; humanism; historical amnesia, rights, needs and the social; rights, liberty and conservatism; and the dual concept of crisis: (lived and systemic).

-A.2 PLURALISM AND HUMANISM

A cornerstone of modern, democratic societies is this: any ethical theory which would claim that one and only one form of life is compatible with reason, virtue, or morality, that "the good life" can be defined unequivocally and with certainty, and which would venture a material definition of this mode of life, would fall into dogmatism. In terms of abortion, this means: it is no longer possible to answer the question "should each and every pregnancy be -forcibly- brought to full term?" in a unanimous way.

Humanism, in its associating of rationality and consciousness



situation of a pregnancy which a woman "wants" but cannot have, or that she does not want and is made to feel guilty for not having, is an unjust one, whose terms and conditions must be refused.

Pregnancy and birth are fundamentally social experiences- a woman does not simply "get pregnant" and "give birth" like the flowing of tides and seasons. She does so under the constraint of material conditions that set limits on "natural" reproductive processes -for example, existing birth control methods and technology and access to them; class and race divisions and the distribution/ financing of health care; nutrition; employment, particularly of women; and the state of the economy generally. And she does so within a specific network of social relations and social arrangements involving herself, her sexual partner(s), her children and kin, neighbours, doctors, family planners, birth control providers and manufacturers, employers, the church, and the state.

-A.4 RIGHTS, LIBERTY AND CONSERVATISM.

The insistence that universalizable need interpretations move into the center of moral discourse is not just a great enrichment of ethical theory; the open reflection about our needs and the cultural traditions in the light of which they are interpreted represent the highest stage of a humanist ethical orientation.

Rights discourse precludes the systematic consideration of a whole range of questions: "do reproductive technologies simply



must carry the necessary enabling conditions that will make them concretely realizable and universally available, that certain social conditions -decent health care, education, housing, nutrition, etc.- are so fundamental to individual moral agency and citizenship that society must provide it to everyone.

Because pregnancies occur in women's bodies, the continued possibility of an "unwanted" pregnancy also affect women in their capacity to enjoy sexuality and maintain their health. To assert women's "right to choose" is dangerous because it can easily be used to reinforce the view of all reproductivity as the special, biologically destined province of women. Recent judicial and legislative debates in the U.S. bear witness to its vulnerability to political manipulation.

Neoconservatives' receptivity to the classical, asocial concept of "liberty" informed the U.S. state under Reagan's attempt to restrict women's abortion access through the accomodation of anti-abortion politics to the framework of liberal privacy. The formal legality which a civil liberties struggle for individual "privacy" seeks assures women neither material access nor moral and political legitimation in their abortions.

The assertion that judgments about contraceptive safety, for example, can be made only in personal terms assails the commitment to establishing and enforcing generalizable standards of health and safety that transcend individual judgments: the need for social standards and their vigorous enforcement being a matter of life and death. Apart from its political and



These three traditions of rights discourse feed directly into the two essential ideas which underlie a feminist view of reproductive freedom: the first is derived from the biological connection between women's bodies, sexuality, and reproduction. It is an extension of the general principle of "bodily integrity" or "bodily self-determination" to the notion that women must be able to control their bodies and procreative capacities. The second is a "historical and moral argument" based on the social position of women and the needs that such a position generates. It states that, insofar as women, under the existing division of labor between the sexes, are the ones most affected by pregnancy (since they are the ones responsible for the care and rearing of children) it is women who must decide about contraception, abortion, and childrearing. These two ideas entail two different perspectives: "lived crisis" and "systemic crisis".

Lived crisis refers to experienced needs, demands, feelings, and dissatisfactions that the social structure generates in individuals, whereas systemic crisis articulates the contradictions, malfunctioning, and disturbances of social systems that derive from their structural arrangements in distributing wealth, power, and other goods. The dual concept of crisis informs the two dimensions which, when taken together, can be said to add up to a critical theoretical perspective: the "explanatory-diagnostic" and the "anticipatory-diagnostic". Reproductive freedom, like reproduction, is social and individual at the same time; it operates at the core of social life as well as within and upon women's individual bodies. There is a tension



individual moral agency and citizenship that society must provide them to everyone. Extended to abortion, such a concept of social rights implies, first, embedding abortion itself in the full range of social services -health care, prenatal care, child care, safe and reliable contraception, sex education, protection from sexual and sterilization abuse- that make up authentic reproductive choice: and, second, standing in solidarity with all women, however young or poor, to make sure they have access to those services.

-B TOWARDS A CRITICAL THEORY OF REPRODUCTIVE FREEDOM

-B.1 AUTONOMY AND EQUALITY, FEMINISM AND THE SOCIAL

These two ideas, in turn, translate into two principles which are indispensable to a humanist program of reproductive freedom: autonomy and equality, in the sense of control by women over reproductive matters and greater sharing of responsibility for such matters between women and men. The tensions between these ideas are considerable: how does one break out of the apparent contradiction between "women's right to control" over reproduction and their need not to be defined by it? How does one transform the social relations of reproduction to bring men, as potential fathers, into those relations on an equal basis?

Although neither of these ideas are dispensable to a theory of reproductive freedom, no political movement for reproductive rights or women's emancipation has yet sustained this double agenda in a systematic and consistent way. On the one hand, a policy emphasizing male sharing of female responsibility could -



historically determined, socially organized activity (separate from the activity of mothering), encompassing decisions about whether, when, under what conditions, and with whom to bear or avoid bearing children; the material/ technological conditions of contraception, abortion, and childbirth; and the network of social and sexual relations in which those decisions and conditions exist.

Human sexuality is fundamentally social, involving reciprocity, the conscious articulation and recreation of desire. Sexual and maternal meanings and practices vary enormously through history, across cultures, and within the same culture -indicating that these "natural" realms of human experience are incessantly mediated by social praxis and design. The same is true of contraception, abortion, and childrearing practices. These considerations make it important to keep in mind that a woman's reproductive situation is never the result of biology alone, but of biology mediated by social and cultural organization. That is, it is not inevitable that women, and not men, should bear the main consequences of unintended pregnancy and thus that their sexual expression be inhibited by it. Rather, it is the result of the socially ascribed primacy of motherhood in women's lives. Yet biology as it is socially mediated by male-dominant institutions affects all women.

-B.2 FEMINISM AND HUMANISM: ASSERTIONS AND RECOGNITIONS

A humanist perspective

- \* 1) recognizes that anti-humanism coincides with an



transforming the oppressive socioeconomic and cultural conditions that encumber the meaning and experience of abortion, the more abortion will become a genuine tool of freedom rather than an occasion of misery:

\* 6) recognizes that behind the "pro-life" ideology, which draws support from the idea that the fetus is a "seperate person" with an existence independent of the pregnant woman, there is a struggle not over the contents of the womb, but over the meaning of maternity and the competence of adult women to exercise judgment: a struggle in which "morality", "rights", "choice", "consent", as well as the relationship between women and pregnancy and "fetal personhood" is used to restrict women's moral expression and social mobility:

\* 7) recognizes that the concept of "fetal personhood", and its consequences for the pregnant woman (forced motherhood) raises ethical problems that go beyond the capacity of legislative and judicial mechanisms to resolve.

-B.4 CONTEMPORARY MORAL DISCOURSE AND "FETAL PERSONHOOD"

The humanist/ anti-humanist distinction coincides with ethical frameworks' contextuality or abstraction. On the subject of women's moral integrity, humanists choose to side with women because they will have the responsibility for the results of the abortion decision. They trust their ability to weigh the alternatives carefully. The pro-life side picks fetuses because they have little confidence in the moral judgment of women. These



western European forebears Europe and that the "preciousness" of each child is a modern -and thoroughly ideological- invention. As feminist analysis shows, however, this "modernization" of motherhood, its "civilization" within the property relations of the bourgeois family, may be seen as unqualifiedly "progressive" only if we exclude the vantage point of the mother herself.

Similarly, the idea of "fetal personhood" and of the fetus as the primary protagonist in the abortion conflict is relatively new to secular thought. Where that idea has emerged historically, it has been linked with an attack on the social position and morality of women. Indeed, the moral construction of the "abortion dilemma" as one that pits the fetus against the woman in an adversarial relationship of two separate "persons" is not only a relatively recent concept but also a distortion of reality. Conservative movements such as "right-to-life" seek to alter radically the rationalistic concept of personhood inherited from the liberal humanist tradition; they degrade the struggles of large groups of living, mature, conscious human beings who still have not won the rights of full persons, even in the liberal bourgeois sense.

-B.5 THE THREE ELEMENTS OF RIGHT-TO-LIFE IDEOLOGY

-B.5.1 RELIGIOUS SYMBOLISM

The position that a fetus at any point of pregnancy, beginning at conception, is a full -right-bearing- human person broaches no compromise. There are three constitutive elements in the conservative struggle over morality; these have to be sorted out



While the idea of fetal innocence has little consistency or theological content, it is used continually by the anti-abortion movement to mobilize moral outrage and religious sentiment in an attempt to justify an absolute prohibition of abortion. Abortion is constructed as murder and the fetus as a helpless victim. It also implies that the fetus is an object of preference -holier, closer to God, than women and their families: it makes conflicting concerns, such as the health or well-being of pregnant women, negligible. To a moral tradition that celebrates renunciation and turning away from the world, the woman who dies in childbirth becomes the supreme example of blessed motherhood and Christian "self-sacrifice". Against this, it must be asserted that religious sectarianism masquerading as universal morality cannot be summoned to settle the "abortion question".

-B.5.2 BIOLOGICAL REDUCTIONISM

Increasingly, in response to accusations of religious bias and violations of church-state separation, the evidence marshaled by "pro-lifers" to affirm the personhood of the fetus is its possession of a human body and genotype. This assertion of scientific objectivity comes in a general ideological climate that has seen the revival of genetic "theories" of race and reductionist theories of genetics, the rise of sociobiology in the social sciences and, as part of the backlash against feminism, the renewed respectability of biological arguments supporting gender distinctions.

Various techniques are used to convey the idea that the fetus



And, even if one were to concede this reduction of the fetus identity to its genetic material, this does not move us one step toward knowing what value to give the fetus, what rights it has (either as a class or in a particular case), or whether to regard it as a person in the moral and legal sense (which is the only sense there is). Being human in a genetic sense is distinct from being human in a moral sense. The fetus is not a human person in this latter sense: therefore, whatever rights it may have could not possibly outweigh the right of a woman to obtain an abortion, since the rights of actual persons invariably outweigh those of any potential person whenever the two conflict.

This does not necessarily mean denying that the fetus, as a potentially human and presently sentient being, is morally deserving of consideration, or even that it can make moral or emotional claims of those in charge of its care -mainly pregnant women. The problem is that whatever those claims may be, they frequently come into conflict with the rights and needs of women and others with whom they are connected who are (in the opinion of humanists) full human persons. But the right-to-life position either denies such conflict or dissolves it into a definition of "motherhood" that makes the fetus' life determinant of the woman's.

-B.5.3 MATERNAL REVIVALISM

The right-to-life view of motherhood is a mixture of religious and biological-determinist elements. Woman becomes the passive receptacle of the male seed. Abortion, from this view, is a sin



deep nerves- tears that women will no longer mother.

-B.6 "FETAL PERSONHOOD" AND THE DEVELOPMENT OF MORAL PERSONHOOD

One of the ways in which a humanist view of personhood begins to address the issues that "right-to-lifers" raise and to move well beyond them is by asserting that the doctrine of fetal personhood is morally offensive: by asserting that the preformed, self-sufficient monad, of which the fetus as person is a crude vulgarization, is philosophically, socially and biologically implausible. Biological determinism and moral absolutism arrive at the same end. The charge that women who get abortions are invariably "selfish" and "irresponsible" insults not only women as moral agents but motherhood as a human practice and a conscious, demanding activity. What makes human life distinct is its capacity for consciousness and sociability. Antiabortion discourse frequently contains the "slippery slope" argument, a polemical device which leads from fetuses to "euthanasia" among the mentally disabled, the physically disabled, the elderly, and so on. A humanist perspective, on the other hand, asserts that there is a coherent explanation for why most people treat babies, for example, different from fetuses, and late fetuses differently from early ones.

"Personhood", in this view, is not static. We become humanized in a never-ending development that involves, as consciousness, rational and "moral" faculties but, more primally, feelings, sensations, the body -and always in the context of a relationship with others. It is this relationship, this interdependence, that



-B.7 THE PREGNANT WOMAN AS ACTIVE AGENT OF THE FETUS "PERSONHOOD"

A social, relational concept of personhood, because it is focused on process rather than on some illusory substance or property, allows us the only -humanist- possibility of encompassing such beings within our moral framework. It gives human content to the otherwise mystical, abstract notion of "potentiality." Pregnancy's biological dimensions are mediated by the social process of coming into relationship, in this case the earliest, most elemental relationship, which is what humanizes it.

Even the concept of "viability", whenever it may occur, is meaningless -a device to protect doctors against lawsuits and to denigrate the role of the pregnant woman in prenatal nurturing. What does it mean, for example, to speak of viability in a society that has no intention of providing care for the children of working mothers, much less aborted fetuses? More important, the fetus is never viable insofar as it remains utterly dependent for its survival on the mother or another human caretaker until long after birth.

A humanist perspective asserts that there is no eliminating the pregnant woman as an active agent of the fetus' "personhood." For it is her consciousness that is the condition of its humanization, of its consciousness evolving from the potential to the actual. It asserts that, in a different sexual culture with unrestrained availability of legal, publicly funded abortion



women from jobs where there may be substances hazardous to reproductivity. (2) medical "advances" that treat the fetus as "patient" and the pregnant woman as the "maternal environment," and (3) "custody" suits in which the husband or male partner seeks recognition as an equal party in the abortion decision. Employers, doctors, and potential fathers have claimed "relationships" with the fetus that conflict with the pregnant woman's and preempt her claim to autonomy. These are, at best, ambiguous areas.

#### -B.8.1 CORPORATIONS

Some U.S. employers began in the late 1970s to adopt a policy of excluding women workers from jobs that involve substances known to be hazardous to the developing fetus. Employers in these industries state two motives for imposing such wholesale (and sex-discriminatory) "protection": one motive is legal, the alleged concern about employer liability for damaged offspring and future lawsuits by them or on their behalf. The other is "moral," the alleged concern with "protecting the unborn child" from harm. Of course, as labor and feminist activists opposed to such exclusionary policies have emphasized, the actual motive is to shift the costly burden of reducing workplace hazards from the companies onto the employment status of women.

Such policies ignore the fact that harmful agents may be transmitted to the fetus through the male's sperm, or may render him sterile. Because of the gender bias built into reproductive medicine, scientific studies have focused largely upon the



pregnant woman is no longer the only or even the main patient in an obstetrical situation. whether it is beneficial or unduly risky in any given case, it is currently being used ideologically to discredit or circumvent the decision-making autonomy of pregnant women. Here again women are put into an impossible dilemma, one whose terms must be denied. Various questions arise: "if the damaged fetus can be treated, does that mean it must be?"; "is the woman guilty of 'neglect' if she refuses and complicit in denying her own autonomy if she doesn't?"

-B.8.3 POTENTIAL FATHERS

The father's "right to decide", "equality" and "protection" have been and can be turned into political weapons to deny women the conditions of autonomy. In both the custody and the abortion situation, the actual inequality in women's and men's long-term and socially defined responsibilities for children and in their access to the means of support is disregarded in assigning legal rights. This is not to say that potential fathers may never have any legal or moral claim or right to be consulted in these situations. But, a humanist morality cannot recognize the "marriage bond", the man's genetic connection to the fetus or the biological contribution of his sperm alone as the basis for any such claim. The only basis for such a claim to have moral weight is through the social relationship established between the man and the pregnancy -the actual demonstration of care and involvement and responsibility in the situation, or in prior coparenting experiences.



Legislative and judicial measures challenging "women's right to choose" in the name of "parental rights" are not in the least motivated by a spirit of support for women or shared responsibility but by an adversary posture in which the woman is pitted against the fetus and its "protective father": there is no intention of questioning the existing arrangements whereby primary responsibility for most aspects of reproduction and child care remains with women. Nor is there concern about the implications that involuntary pregnancy and childbearing may have for a woman's life and that of a prospective child. On the levels of both personal relationships between men and women and public policy, there is a dilemma: how do women negotiate between the social (yet personal) need to extend responsibility for reproduction to men and the state and the personal (yet social) need to defend their control over the terms and conditions of reproduction? How does one create radically new arrangements of shared responsibility for children, including the power over whether they are born, in a world where women still have power over little else?

This, in turn, arouses an awareness of the injustice in the very occurrence of the dilemma. One must, finally, take a moral stance that is also a political stance: to refuse the terms of the dilemma, to reject being caught between unviable choices. This is very different from demanding the "right to choose".



patients are "careless" or morally insensitive: or, on the contrary, that they are steeped in "guilt" and "despair".

Guilt does not exist in a vacuum but in a context shaped by history, politics, and religious and moral codes. Centuries of legal and religious condemnation, along with the lived reality of abortion as sinister, secret, dirty, and dangerous, inevitably stamps women's moral sense of abortion as wrong or deviant. The assumption of "reluctance" is a bow by liberal apologists to the ideological power of the right wing and not a reflection of fact. Similarly, the much-discussed "ambivalence" of many women toward the experience of abortion (not the right) often reflect conscious desires thwarted by harsh realities. Conflicting feelings should not be confused with guilt.

One's needs exist, and they have validity along with the needs of significant others to whom one is responsible, in a context of interpersonal relations for which the decision to have an abortion or have a child has irrevocable consequences. Other children sexual partners, coworkers and kin have claims on one's time and resources; parents have legitimate expectations that their daughters develop the tools of independence; a potential child may be thought to have certain rights not to be delivered into an environment that is sure to be unloving, unhealthy, or insecure. These consequences are not inevitable, but they are consequences for others. Women perceive them to exist, and that perception affects their consequences of their moral responsibility.



consciousness about abortion. insofar as that means an assertion of women's collective rights and needs, not just a resignation to grim necessity. Insofar as the dominant patriarchal ideologies about abortion are based on the concepts of maternal duty and self-denial, then for all women the language of self-assertion contains an oppositional dimension.

For a woman to say, in regard to abortion, "I will decide, based on my needs as well as those of the (living) persons to whom I am immediately responsible," is by definition an act of resistance in the context of a dominant ideology and culture that define her in terms of the needs of others. We have to recognize such aspirations. When a woman says, "It is my responsibility and nobody else's," responsibility begins to edge into a conviction of right. Seen from this perspective, it may be that a feminist or resistant consciousness emerges as the consequence more than the cause of a decision to get an abortion. Women of all races, classes and age groups may perceive the necessity of abortion to be the result of external conditions rather than choice, but the act of choosing to deal with external conditions through an abortion is one of self-determination and therefore self-empowerment. In a culture that still underwrites women's powerlessness in the face of maternity and moral decision making, it is also in most cases an objective assessment of moral praxis.

The decision to go ahead with a birth, to decline abortion, however, in spite of difficulties or the resistance of others, may also express the morality of praxis. It depends on the



and not part of her body, the fact remains that human embryos and infants are completely dependent on a primary caretaker, who in most cultures is the biological mother. The fetus has no resources to take care of itself. If chosen, maternity is not servitude. It can be pleasant and satisfying, socially as well as personally. But it is at the same time a service that every childbearing woman performs for others, whatever her personal stakes in the matter. Moreover, it is a service that requires an irreducible burden: the renunciation of bodily health and well-being for many months, perhaps with permanent physical consequences - a demand that under any circumstances other than criminal punishment is seen as absolutely necessitating the person's voluntary consent.

On this ground alone - the consequences of pregnancy and childbirth for a woman's own body and health - her autonomy in regard to the abortion decision is justified. This is the core of the feminist basis for abortion. But in popular consciousness the "social consequences" rationale may hold greater sway than this feminist principle at the present time. That is the notion that, as long as women are assigned the major burdens and tasks of children's care, then women must retain control over the terms and conditions of their birth.

There is a long-standing tradition of female outrage at male claims to know better than they the "duties of motherhood." Feminists assert that there is nothing moral about giving birth to children they cannot feed or care for, that it is precisely



routine caretaking of their children, since not doing so would assure their loss of custody in the event of a dispute.

In the case of abortion, the social reality principle ought to leave wide latitude for greater involvement of men than currently exists in responsibility for birth control and reproduction. At the same time, the work and service of a woman's body in pregnancy puts her in a special situation regarding abortion that can never be "equally shared." Feminist theory must develop a concept of equality in which special needs are recognized yet not allowed to become the pretext for social liabilities. This means rejecting "maternal thinking" as a gender-specific practice while defending abortion as a gender-specific need.

Liberals, on the other hand, give many utilitarian reasons for making abortion a matter of women's individual choice, including the unenforceability of criminal sanctions; the need to limit poverty, population, child abuse, and birth defects; and the idea that the law should not intrude on individual behaviour that causes no "social harm." The reason for feminists has to do with none of these things but with the essentially moral question whether women are to be allowed "authenticity," the power to act with moral freedom. Reproductive freedom is not so much a right in the abstract juridical sense as it is a basic human need, a need that is indispensable to being a person. Control over one's body, which, for women, includes control over whether, when, with who and in what circumstances they shall bear children is not just a libertarian "right" (i.e., a private space in which one is



moral judgments, whatever a woman's family and sexual relationships, whatever her age or marital or economic condition, whatever the state of her health or that of the fetus, and whatever the society has (or has not) provided in the way of child care and related benefits, abortion is taboo. Yet these are precisely the conditions that most directly impinge on the meaning of childbearing in the lives of women, who are still the ones mainly responsible for children after they are born. And it is these conditions that, in the last analysis, construct the practical morality, as well as the practice, of abortion.

-B.12 TWO DUBIOUS IDEAS WHICH OBSCURE ABORTION AS SOCIAL NEED

Because choices depend on conditions existing in society, there are and can be no individual solutions to the dilemmas posed by reproductive politics. Feminist and right-wing activism have succeeded in deprivatizing the abortion issue and have brought it squarely within the arena of political discourse. The practical content of feminist abortion politics has implied social solutions. To demand that the state provide uniform, funded, and high-quality abortion services to all women has been to acknowledge that abortion should be a matter of public responsibility and not of "private choice" alone.

Yet feminist thinking about abortion continues to reflect two assumptions that obscure the ways in which abortion is a basic need of women, which is different from either a "necessity" (unchosen) or a "choice" (unnecessary). These -dubious-



The basis of this victimizing, victim-blaming position is a perspective that reduces women's condition universally to "male violence." It also idealizes motherhood, implying that the termination of every unwanted pregnancy is somehow a tragedy. Whatever this intention, this view does not accord with the facts. Many, perhaps most, abortions are not the product of "grim, driven desperation," but of women's sober determination to take hold of their lives and, sometimes, of a sense of enlarged power for being able to do so. Nor can we expect that in a society where women entered sexual intercourse willingly, where adequate contraception was a genuine social priority, there would be no "abortion issue." We cannot assume that there will ever be a 100% effective, nonharmful contraceptive in a human (not merely a technical sense. While the terms of the need for abortion will change, the "abortion issue" will not go away.

The view of abortion as a necessary evil born out of desperate circumstances is a liberal accommodation to recent waves of antiabortion ideology. It is clearly mistaken: it denies that the easing of women's access to birth control and abortion (which are positively related) coincides with periods of their increased social power and status; while restrictions on that access usually indicate a broad-scale attack on women's sexual and social autonomy and on social movements. What makes abortion "awful" is the shame and guilt caused by the two heavily ideological notions that all women still learn to some degree: (1) the association of fetus with "baby" and the abortion woman with "bad mother," and (2) the assumption that sex for pleasure



Further a society moves toward transforming the oppressive socioeconomic and cultural conditions that encumber the meaning and experience of abortion the more will abortion become a genuine tool of freedom than an occasion of misery. In this regard, it is similar to work or divorce.

\* Second, it means that the need for abortion is universal in the sense that its availability is essential to all women, for it defines the terms and conditions of "womanness" in the society; and it is specific in the sense that the need grows out of a particular set of problems. Not being able to get an abortion when she needs it presents a woman with irrevocable consequences for her sexuality, her body, and her relation to maternity. These are very different consequences from those confronted by a woman whose desire for children is thwarted by economic, political or biological circumstances.

-B.12.2 ASSERTING THAT THE "RIGHT TO HAVE CHILDREN" AND THE "RIGHT NOT TO HAVE CHILDREN" ARE NOT EQUIVALENT RIGHTS

For the feminist movement for reproductive rights in the U.S., reproductive freedom has generally become understood as involving much more than access to safe, legal abortion. For example, The Committee for Abortion Rights and Against Sterilization Abuse (CARASA) spells out -in its organizational principles- that no category of women -poor, young or disabled- should be excluded from reproductive freedom. It also calls for basic economic and social changes: equal wages for women, decent housing, adequate welfare benefits, reliable child care and good schools, an end to



Another source of social conflict in the freedom of individuals to have children, quite separate from the need of women to have control over their fertility, is the existence of real children, who have separate needs from parents. The principle that society has an obligation to provide its children with not only the best possible health care, education, housing, and nutrition, but also with protection from abuse may justify public intervention in parents' rights over their children. There are, however, difficulties in reconciling society's obligation to support people's desire to have children -their procreative freedom- with its responsibility to provide resources for those children, where the state and family are still dominantly patriarchal and women have little power in formulating national policy. The practical application of childbearing restrictions may be coercive and discriminatory. Yet, even if we lived in a society where gender, class and racial equality have been achieved, a politics of reproduction would still exist, in the tension between "social right" as defined by those in power and the desires of individuals.

Women collectively, and especially women of color and the poor, are still essentially powerless. Once again, political context makes all the difference. The immediate politics for seeking to create reproductive freedom is a fight for the conditions of equality: to remove the political, institutional, and cultural obstacles to realizing a social concept of women's reproductive needs. The implementation of shared parenting in a gender-neutral way involves changes in consciousness and values as well



system- must undergo sweeping and specific changes before reproductive freedom for all women can exist. Institutionalized reproductive services and their political settings, even at their most expansive, are usually monopolized by medical and family planning professionals whose concept of "social need" is often different from that of feminists or women as reproductive health consumers.

There are two reasons for why it is appropriate to encompass "abortion rights" within a broad and expansive definition of women's health:

\* First, pregnancy is a health issue for women -sometimes in dramatically life-changing or life-threatening ways. To affirm this is to say that access to decent health care and the conditions of physical well-being for all people is a moral question; health and morality cannot be separated.

\* Second, the fact that the reproductive and fertility control services to which most women have access are at present contained within medical institutions means that it is within those institutions that the quality and availability of services must be challenged. This means challenging the modes of organization and authority within the institutions -transforming the medical system and its dominant ideologies from within.

Where access is concerned, individual rights -in U.S. constitutional law- guarantee only that the state will erect no "obstacles," no roadblocks, in women's path -for example, will not arrest women on the way to the doctor's office or shut down



democratize political control over social welfare programs. The historical conditions in which women may anticipate sharing reproductive responsibility with men, or with the "community as a whole," must be those within which democratic principles and processes are built into reproductive (and all) decision making. That is, we will need a radical social democracy in which domination by bureaucrats and medical professionals is not allowed to repress those whose lives are immediately affected by decisions. What this will mean in practice is an active feminist movement that retains its autonomy from a democratic state and even a socialized health-care system. Feminists will need to be organized politically as advocates of women's needs even in a society whose institutions formally embrace the equality of women.

Given such a context, concrete situations in which collectively organized social intervention into reproduction, or even "population" matters in a narrower sense, will be not only legitimate but necessary. The view of reproduction and parenting as essentially social relationships implies, amongst others, not only a commitment to the legitimacy of social regulation of those areas of human activity but also a rejection of the idea that there is a "natural right" to procreate indefinitely or to procreate at all. That idea must be distinguished sharply from the idea of a socially determined need (of both men and women) to participate in the care and rearing of children, as a distinct and special part of human existence. The latter is essential to a humanist social vision of the future. The former is a remnant of



-0 DEFETISHIZING CRITIQUE AND THE IMAGE OF THE FETUS

-0.1 THE RISE OF PHOTO/VIDEO AND THE USAGE OF ULTRASOUND

Critical theory's observation that both the natural and social sciences proceed from a naive objectivism by taking their objects of cognition to be givens gives us a handhold on the persistence of the idea that abortion is obviously immoral, on the awesome influence of fetal imagery -which turn the fetus into a fetish- has attained in modern culture. Critical theory explores the construction of fetal images as cultural objects or givens which attain historical meanings through the investment of erotic feelings in a fantasy: it focuses on the ways in which the image of the fetus, in the cult of fetal personhood, functions as a special effect of an ideological apparatus which addresses extinction fears only to distract us from the exterminist practices of the military-industrial complex.

Once one is reminded that the politics of reproductive technologies is constructed contextually, one realises that every image of the fetus we are shown is viewed from the standpoint neither of the foetus nor of the pregnant woman but of the camera. The individuality ascribed to the fetus in utero effaces the pregnant woman and the fetus' dependence on her. This puts the usage of ultrasound in obstetrical practice into the context of the larger cultural climate of reproductive politics. The anti-abortion strategy to make fetal personhood a self-fulfilling prophecy by making the fetus a public presence addresses a visually orientated culture in which reproductive technology's



Within the social relations of the (male-dominated) practice of obstetrics the practical applications of new reproductive technologies have (as a result of physicians' fears of malpractice suits, amongst others) become directed more towards enlarging clinicians' control over reproductive processes than towards improving health (women's or fetus'), thereby diverting social resources from epidemiological research into the causes of fetal damage. Similarly, the -fraudulent- anti-abortion claim that the fetus is becoming viable at an earlier and earlier point reinforces the idea of "obstetrical management" -that the treatment of the fetus is a matter between it and its doctor.

Although they do not inevitably require or imply "fetal autonomy", obstetrical technologies of visualization and electronic/ surgical intervention disrupt the definition, as traditionally understood, of "inside" and "outside" a woman's body, of pregnancy as an "interior" experience. Increasingly, who controls the interpretation of bodily boundaries in medicine becomes a major issue for humanism. Treating a foetus as if it were outside a woman's body is a very political act. The impact of fetal images on the pregnant woman is degrading insofar as the pregnant woman becomes the "maternal environment", the "site" of the fetus, a passive spectator in her own pregnancy. Sonographic detailing of "fetal anatomy" tend to discredit and displace the woman's felt evidence in favour of the more "objective" data on the video screen.

Ultrasound imaging is constituted through three layers of



-0.2 RELATIONSHIPS TO REPRODUCTIVE TECHNOLOGIES AND IMAGERY

The reception and meanings of foetal images derive not only from representations but also from the particular circumstances of viewers. Neither in the media nor in clinical experience does fetal imagery have a totally receptive field, since pregnant women respond to these images out of a variety of concrete situations and in a variety of complex ways. Pregnancy acts on women's bodies in different ways, with the result that the relation of their bodies, and consciousness, to reproductive technologies may differ. Women's "control", even in a limited sense, may mean different things to different women (birth control information is one thing, possession of one's reproductive organs and custody of children is another): this makes it necessary to articulate continually that reproductive freedom means the freedom to have as well as not to have children.

women's relationships to reproductive technologies and images differ for two sets of reasons:

- \* firstly, the dominant images and codes that mediate the material conditions of pregnancy, abortion, etc., determine what women exactly women "know" about these events in their lives, their meaning as lived experience; and,

- \* secondly, depending on social differences such as class, race and sexual preference, and biological ones such as age, physical disability and personal fertility history, and, above all, on whether a woman wishes to be pregnant or not.



are applied from the technologies themselves. We need to demand that all women have access to the knowledge and resources to judge its uses and to use it wisely, in keeping with their own particular needs.

\* Finally, a humanist ethic of reproductive freedom to complement feminist politics needs to be developed. What, one can ask, ought women to choose if they became genuinely free to choose? Are some choices unacceptable on moral grounds, and does this mean under any circumstances, or only under some? Once we have pictured the social conditions of the pregnant woman's freedom, however, we have not dissolved the contradictions in how she might use it.

-Jonan E. Grobler  
26/01/95



663      'D'

# NINA ROMM

---

P O BOX 651256, BENMORE, 2010, SOUTH AFRICA  
PHONE (011) 884-3630      FAX (011) 884-0132

22 January 1995

**THE EXECUTIVE DIRECTOR  
CONSTITUTIONAL ASSEMBLY  
c/o PARLIAMENT  
P.O. BOX 15  
CAPE TOWN  
8000**

**CONSTITUTIONAL  
ASSEMBLY**

3 1 JAN 1995

**RE : SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY FOR  
THE NEW SOUTH AFRICAN CONSTITUTION**

---

Attached please find a submission of 22 pages.

As indicated, I am willing to submit further material, or present verbal submission on any of the issues addressed, if necessary.

Also as indicated, this submission should receive attention by all Committees concerned with the Constitution.

An Executive Summary of the contexts will reach you shortly.

I would appreciate being kept abreast of all future developments.

Yours faithfully,

*N Romm*

NINA ROMM

**CONSTITUTIONAL  
ASSEMBLY**

3 1 JAN 1995

---



**SUBMISSION  
TO THE  
CONSTITUTIONAL  
ASSEMBLY  
ON VARIOUS ASPECTS  
RELATING TO  
THE NEW  
SOUTH AFRICAN  
CONSTITUTION**

**COMPILED BY  
NINA ROMM**



**NOTES ON VARIOUS ASPECTS  
RELATING TO THE NEW SOUTH  
AFRICAN CONSTITUTION**

# **PREFACE**

**The following comments on the nature of progressive democracy and its implications for gender equality are submitted to focus attention on the values we believe must be contained in South Africa's final Constitution.**

**It furthermore points to specific issues that need to be addressed by the Constitution - and appropriate legislation - if our vision of democracy is to proceed beyond 'lip service' to non-sexism, and to become more than a farcical suggestion of a just society.**

**The specific issues referred to are not discussed in detail in this preliminary document - but are raised to indicate our hope and concern that consideration of the issues will be a central focus for the constitution-makers.**

**The election promises of the majority party in the Government of National Unity led the citizens of South Africa to expect that it will be a priority to formulate a Constitution specifically intended to permit the emergence of a totally non-sexist society.**



**We thus look forward with great hope to the efforts of the constitution-making body : Relying on them, and the rigor of their efforts, to give solid form to the social aspirations of the nation.**

*Addressing the problem of gender equality means giving consideration to every social institution, including, inter alia, Education, Health, Economy, Security, Development, Justice, Environment, etcetera. In this document we obviously do not present specific propositions addressing the problem of Gender Equality in every arena and clause of the Constitution.*

*Rather, we make the assumption that the constitution-makers will work from the broad perspective of the intention to establish a non-sexist and non-racist democracy - and that they will not rest until they have generated a Constitution embodying this ideal.*

**However, from developments to date, it seems necessary to point attention to certain (underexplored) specific areas.**

.....

*As the process evolves, and should it appear necessary in the light of the initial submission of the constitution-makers to the people of South Africa, we will add further participatory comment on the constitution as a whole.*



***We consider it the responsibility of the constitution-makers to research the constitutions of progressive democracies globally when addressing key issues referred to in this document, as an aid to the formulation of our own Constitution.***

**In addition, we assume that all participants will resource as much literature as possible around the problem of gender equality - and appropriate methods that can be utilized to overcome the problem of gender discrimination. In this way, participants to the constitution-writing process will ensure that they are sufficiently informed to place this country, our constitution, and our legislation at the forefront of progressive democratic thinking and legislation, in accordance with world developments.**

**During the last thirty years much international material has not been available in South Africa. If we hope to make a meaningful and judicious transition from apartheid to a non-sexist and non-racist dispensation, research conducted internationally on Gender Equality must be assimilated and incorporated into the constitution-making process.**

.....

*At present, the suggestions in this document are submitted as preliminary proposals, which should be taken account of, and developed by, the constitution-makers.*

**We look forward to a process that is consistently consultative and transparent, honouring a vision of integrity, justice, and entrenched democratic principles - in the formulation of a just Constitution for a non-sexist and non-racist South Africa.**



CENTRAL ISSUES TO BE ADDRESSED URGENTLY IN  
FORMULATING GENERAL PRINCIPLES FOR THE CONSTITUTION  
AND SUBSEQUENT LEGISLATION -  
TO ENSURE GENDER EQUALITY IS ACHIEVED :

**1. DEMOCRACY AND THE CHARACTER  
OF THE STATE**  
( ACHIEVING A JUST AND NON-SEXIST SOCIETY)

**2. GENDER EQUALITY**

2 (i) EDUCATION FOR SOCIAL TRANSFORMATION

2 (ii) FREEDOM OF SPEECH

2 (iii) PRO-CHOICE LEGISLATION

2 (iv) QUOTA SYSTEM

2 (v) CUSTOMARY LAW

**3. SECURITY**



**1.**

**DEMOCRACY  
AND THE CHARACTER  
OF THE STATE**

NOTES ON VARIOUS ASPECTS RELATING TO THE NEW SOUTH AFRICAN CONSTITUTION

Submitted by Nina Romm

6



# 1. DEMOCRACY AND THE CHARACTER OF THE STATE

These comments refer to the nature of democracy, and to the manner in which a State can be constituted to ensure its democratic character.

The document makes the assumption that constitution-making in South Africa is taking place at the tail-end of the 20th-century, and that as constitution-makers we are in full cognisance of developments world-wide, and can utilize global experience to constitute a truly progressive democracy.

We are thus in a unique position - in many older democracies, social thinking may have evolved to a point which is substantially more sophisticated than the ideas embodied in their constitutions - in which instance both constitution and legislation may impede the possibility of social growth. (Since law, and interpretation of the law, determine patterns of social behaviour, as we have seen with our previous constitution and legislation.)

The character of South African society is at this historical moment not crystallized and fixed in an old mould, but is rather in a 'fluid state' - it will be constituted and given form to a large extent by the way in which its formal constitution is written. The constitution-writers are thus faced with an enormous obligation and responsibility - to ensure that the constitution is commensurate with the promises for a transformed non-racist and non-sexist South Africa made by the Government of National Unity, and commensurate with the most contemporary thinking and legislation on issues of non-racism and non-sexism that exist globally.

It would be a tragic historical error if we did not live up to the promise of the revolutionary shift from apartheid to democracy that has so dramatically touched the heart and mind of the world - if we did not live up to the possibility of utilizing world experience and research to create what could be the most progressive constitution in the world: A constitution reflecting evolved global thinking around non-sexist and non-racist social orders.

***In the light of this perspective, the problem and challenge of creating a non-sexist and non-racist society is at the core of state-making/ state-construction - and provides the central challenge in the establishment of true democracy.***



## DEMOCRACY AND THE CHARACTER OF THE STATE

The new South African Constitution should constitute the social climate and legislative context within which we can truly begin to create a new South Africa which does not simply replicate historical patterns of oppression. The Constitution should thus present the society with an invitation, a challenge, and the legislative platform within which to transform itself.

The new South African Constitution could provide the opportunity and the legislative blueprint for a Reconstruction and Development programme which is not half-hearted and hypocritical, but which truly embodies a political vision based on the intention to establish a non-sexist and non-racist democracy:

*The promise that the 1994 elections might lead to the emergence of a non-racist and non-sexist democracy excited the judicial conscience of the world - and made this election perhaps one of the most significant political events of the century.*

*Our final constitution will provide evidence of how far we intend to fulfil this promise as a constitutional reality.*

If we are serious about constructing a true democracy then the eradication of racism and sexism will be the central intention governing our understanding of what the State should be; the central intention governing how we phrase the Constitution as a whole; and the central intention at the heart of all legislation.

Since our society has traditionally been one that is both unmitigatedly racist and unmitigatedly sexist, this will mean a complete legal reformulation of our understanding of how the State should operate, and of how relations between citizens will take place.

.....

The Constitution, as a 'cornerstone document' should provide a framework for transformation: an infrastructure that will shape the nation.



## DEMOCRACY AND THE CHARACTER OF THE STATE

*In the light of the above, it is clear that to create a new South Africa, racism and sexism will have to be dealt with across the board.*

*It is thus, in fact, unacceptable to have a separate GENDER COMMISSION to address the problem of sexism - rather, in every area, clause, and bill the problem of sexism should be central.*

**THE ESTABLISHMENT OF A MARGINALIZED AND GHETTOIZED GENDER COMMISSION CAN EASILY LEAD TO 'WOMEN'S ISSUES' BEING CONSIDERED SECONDARY, RATHER THAN INTRINSIC TO THE TRANSFORMATION OF SOCIETY AS A WHOLE, AND AS AN ESSENTIAL ASPECT IN THE CONSTRUCTION OF A DEMOCRATIC STATE.**

While I believe this perspective is the only democratic and judicious approach to the formulation of our new constitution, I have at this time taken cognisance of the current formulation of committees - and have placed most remarks under the category TRANSFORMATION/GENDER, expecting this document to be addressed in detail by Sub-Theme Committee 6.

However, I would suggest that this document should also be taken account of by Theme Committee 1, assessing DEMOCRACY and the CHARACTER OF THE STATE (with especial reference to comments of education and re-training) - as well as by all other committees.



## 2.

# GENDER EQUALITY



## 2. GENDER EQUALITY

### 2. (i) EDUCATION FOR SOCIAL TRANSFORMATION

2. (i) a. *If we are to translate the rhetoric of non-sexism into a social reality in South Africa, re-training programmes will have to be conducted across the board to transform people's approach to gender.*

2. (i) b. *The Constitution must contain a clause ensuring not only the Right to Education for all, but specifically the Right to a non-Racist and non-Sexist education for all.*

*Such a Clause could operate to:*

(i) *ensure that educational textbooks do not contain sexist material, or material which reinforces traditional stereotypes supporting gender discrimination;*

(ii) *make mandatory the re-training of trainers - who will otherwise inevitably replicate old habits of speech and inference;*

(iii) *make mandatory a reassessment of the use of male pronouns in all textbooks - since language defines perception, and our image of the world;*

(iv) *ensure a systematic redressing of past discriminatory practices - which have led to women not obtaining top posts within the education system.*



## 2. GENDER EQUALITY

### 2. (ii) FREEDOM OF SPEECH

#### 2. (ii) a. LIMITATION CLAUSE

A **Restriction or Limitation Clause** should be incorporated into the constitution specifically addressing the problem of hate-speech - the use of language which denigrates and undermines the dignity of any person. This Limitation Clause, addressing the issue of the Right to Dignity of the Individual, is the natural counterpoint clause to the Freedom of Speech Clause.

Without the inclusion of such a clause, one invites a situation condoning violence and the degradation of persons through language - ignoring the reality that freedom requires concomitant responsibility.

Once such a clause is included in the constitution, it can then be applied in a variety of contexts.

For example, it would self-evidently apply to all educational curricula - where all manifestations of gender-stereotyping should be defined as a form of hate-speech: in the same way as all forms of racial stereotyping should be eradicated because they undermine the dignity of the persons involved. It would also have applications in terms of media representations of women.

#### 2. (ii) b. CENSORSHIP VS RESPONSIBILITY

The approach to the issue of freedom of speech in South Africa has been tainted by the nature of censorship within the context of apartheid.

Censorship has thus come to be equated with authoritarian repression. In this equation, unrestrained freedom/liberty is regarded as good, and censorship/constraint as bad.

This unfortunate reductivism have removed the importance of giving cognisance to the problem of 'hate-speech' - or speech which has the effect of undermining the dignity of the individual.



## **2. GENDER EQUALITY : (ii) FREEDOM OF SPEECH**

While this is a complex problem, which will have to be debated in the society - without a clause countering the Freedom of Speech Clause, citizens of South Africa, as well as the Constitutional Court, will not have the constitutional back-up to explore in depth the complex relationship between the Right to Freedom of Speech on the one hand, and the implications of the Right to Dignity of the Individual on the other hand.



## **2. GENDER EQUALITY**

### **2. (iii) PRO-CHOICE LEGISLATION**

#### **2. (iii) a. LIMITATION CLAUSE**

A Limitation Clause should attend the Right-to-Life Clause, stipulating that the woman's right to control her own body takes precedence over the Right-to-Life Clause.

#### **2. (iii) b. COMMENTS SUPPORTING PRO-CHOICE LEGISLATION**

The issue of pro-choice legislation - the necessity to make available to women the option of abortion as a method of fertility control, is central to the task of ensuring women's emancipation in South Africa.

A situation must be avoided where a Right-to-Life clause can be used as an instrument to tilt the balance in favour of one side of the argument.

In progressive democratic thinking world-wide there is a recognition of the Reproductive Rights of Women. It is imperative that a clause acknowledging this is built into the current constitution.

(In this regard, the INTERNATIONAL WOMEN'S RIGHTS ACTION WATCH can be consulted for appropriate information.)

.....



## 2. GENDER EQUALITY : (iii) PRO-CHOICE LEGISLATION

There is no doubt that the problem of a pro-choice perspective - the right of a woman to choose abortion for regulation of fertility, should this become necessary - is controversial.

Giving cognisance to this, and to the diversity of public opinion on the issue, progressive democratic thinking gives recognition to the right to individual choice.

It should be reiterated that the problem of abortion should in no way be compared for instance, to that of murder: While in the case of murder all societies agree on its criminal nature, the case of abortion is quite different.

In all known societies there is a wide range of opinion on the issue, as there is in most religions, as well as within the medical profession - both in South Africa, and internationally.

Arguments can, and have been presented, to support both Pro-Life and Pro-Choice perspectives.

*Progressive thinking acknowledges that this controversy will not necessarily be resolved at any stage - since strong religious, moral, social, cultural and historical factors are at stake. However, since there can be no unequivocal and definitive resolution to the question, it is inappropriate for the State to prevent the Right to Choice by the woman herself.*

Pro-Choice legislation thus allows for choice by adherents to both arguments - a truly democratic resolution; while any legislation counter to this clearly, in authoritarian fashion, acknowledges one side of the argument, while ignoring or summarily dismissing the other.



## **2. GENDER EQUALITY**

### **2. (iv) QUOTA SYSTEM IN ALL SPHERES**

*Measures to ensure that 'Equal Rights' rhetoric is translated into social reality*

**A SEPARATE DOCUMENT ON THIS ISSUE WILL BE SUBMITTED  
IN DUE COURSE.**

Comment will be made on the implications of the ANC 33.3% quota (adopted during the 1994 elections) - for government, education, commerce, legal institutions, etcetera.



## **2. GENDER EQUALITY**

### **2. (v) CUSTOMARY LAW**

**A SEPARATE DOCUMENT MAKING COMMENT ON CUSTOMARY LAW WILL FOLLOW IN DUE COURSE.**

In addressing the problem of customary law, it should be self-evident to the Constitution-makers that at this historical juncture, and in the light of our expressed intention to establish a non-racist and non-sexist South Africa, the only law that should be customary in the new South Africa is law which unequivocally affirms gender equity. The 'custom' of non-discrimination must become the paramount custom in this country.

All legislation must be aimed at eradicating discrimination on the basis of gender.



# 3.

## SECURITY



## **3. SECURITY**

### **3. (i) SECURITY APPARATUS**

3. (i) a. SECURITY AND THE INDIVIDUAL

3. (i) b. SECURITY AND THE COMMUNITY

3. (i) c. SECURITY FORCE SPENDING VS  
SPENDING TO MAINTAIN SOCIAL SECURITY

**A SEPARATE DOCUMENT COMMENTING ON THE NECESSITY  
FOR A HOLISTIC AND BALANCED APPROACH TO THE  
BUDGET WILL FOLLOW IN DUE COURSE.**



# CONCLUSION

This outline of issues crucial to the structuring of the new constitution is of necessity synoptic in nature - the intention has been to highlight areas intrinsic to the construction of a true democracy, that have not been given sufficient attention in the social arena to date.

The democracy that we generate in South Africa does not have to be flawed by the restrictions and failures evident in older crystallized democracies - we have the opportunity to learn from the mistakes and limitations embodied in earlier Constitutions.

At the tail-end of the 20th-Century - in the light of research conducted internationally during the past 30 years on the problem of gender, by, inter alia, the United Nations, as well as in the light of improved global information dissemination - we have a profound opportunity and responsibility to lay the framework for an enlightened democracy which does not replicate the errors of the past.

While legislation alone does not construct social reality, without the legislative infrastructure suggesting a social vision, we cannot hope to build a nation.

The constitution-writers have an obligation not to retreat into platitudes, stereotypes, and traditions which entrench oppression while suggesting liberty.

Let us meet the challenge!



## **PLEASE NOTE**

**As indicated, all issues have been addressed  
in a synoptic manner.**

**If extended discussion is required on any of  
the issues addressed in this document, I am  
willing to submit further material, or to  
present verbal submission.**



# **APPENDIX TO THE DOCUMENT: NINA ROMM - INDEPENDENT SUBMISSION TO CONSTITUTIONAL ASSEMBLY**

*Background as political activist and citizen engaged in the project of social transformation.*

**Founder : Women Acting to Remove Restrictions Interfering with Obtaining Rights  
(WARRIOR) - 1995**

**Leader : Women's Rights Peace Party  
(WRPP) - 1994**

**Founder and Co-ordinator :  
Women for Women in Government  
(WWG) - 1993**

**1982 - 94** Present lectures, seminars, workshops across South Africa in business, university, and community contexts on various aspects of creative social change.

**1984** Sabbatical research program conducted in South Africa and the United States on **THE ROLE OF CREATIVITY IN INDIVIDUAL AND SOCIAL CHANGE**

**1977-87** Lecturer/ Senior Lecturer University of South Africa - Department of History of Art and Fine Arts.  
Special research area - Creativity related to Individual and Social Transformation