

**C105**

TE ME

[105]

# African National Congress

51 Plein Street  
Johannesburg 2001  
P.O. Box 61884  
Marshalltown 2107



Tel: (011) 330-7086  
Fax: (011) 330-7242  
Telex: 42-1252

## COMMISSION ON THE EMANCIPATION OF WOMEN

### SUBMISSION TO THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS

### BILL OF RIGHTS: AFRICAN WOMEN AND CUSTOMARY LAW

**BRIGITTE MABANDLA**

**FAX** TO: MULTI PARTY  
 FAX NO: 393 2211 PAGE: 1 OF: 6  
 ATTENTION OF: MELODY EMERT  
 FROM: FRENE GINNALA DATE: 10/10/93  
 COMPANY: ANC  
 FAX NO: 330 7242 Post-It Notes from 3M

**The People Shall Govern!**

## **A REPLY TO THE WESTERN CAPE WOMEN'S COALITION**

### **MEMORANDUM: CUSTOM VIS-A-VIS THE BILL OF RIGHTS**

#### **INTRODUCTION**

I would like to make a few comments regarding the memorandum referred to herein.

My first comment relates to the citation of the resolution passed at the conference on Custom and Religion in May 1993. The Coalition does not acknowledge that the original resolution was adopted at the conference organised by the Community Law Centre (UWC). This may have been an oversight, but it is ethically incorrect not to acknowledge the source of information. The second point I want to raise relates to the manner in which this resolution is used to support a point contrary to the spirit of the conference resolution.

Turning to the substance of the memorandum, I recognise that the authors associate themselves with the aspirations of African women (there is a lengthy description in the memorandum on the disadvantages suffered by these women especially under customary law.) Notwithstanding this, the authors propose a moratorium on the application of the bill of rights to customary relationships.

I am responding to this proposal because I believe if carried through it will exacerbate the situation of the African women.

#### **NATIONAL CONSENSUS: A CONSTITUTIONAL SYSTEM FOR SOUTH AFRICA.**

To begin with the issue under discussion requires a political solution. Constitutional principles agreed to at the multi-party negotiations forum indicate that South Africa has by consensus agreed to have a constitutional system, under which human rights will occupy the central position in the new dispensation. What needs to be discussed is the positioning of customary law under the new dispensation. Neither the technical committee nor the women's coalition should undermine the consensus already reached. The question before the technical committee is not whether the bill of rights should apply or not apply to any given sector of the society, but to advance legal theory on the impact of human rights on customary law. The politicians will then decide on the positioning of customary law.

I therefore believe that the legal group of the Western Cape Coalition acted beyond their mandate. This point is further strengthened by the fact that

affected women were not consulted nor were their demands seriously considered. African women as workers, and as the largest section of the rural constituency have lobbied hard, especially in the past three years for the constitutionalisation of equality. In fact there are numerous recommendations from women's forums calling for the override of customary law by the bill of rights.

The pertinent question is how could the core group of the women's constituency be ignored? Despite the fact that these constituencies are represented in the coalition. In my view the misdirected action is a reflection of the race and class divide in our society. The lesson to be learned is that the needs of the most marginalised should form the baseline of our demands as women. We should therefore use the needs of the most marginalised to provide a framework for action. Accordingly our main task is to find the best possible means of realising the aspirations of our women.

### DEFINING THE LEGALITY OF CUSTOMARY LAW?

The pertinent question is whether there is any legal impediment to the operation of the equality clause (or the bill of rights) to a situation where customary law is in force. If there is, we need to devise a legal mechanism for the protection of women in such circumstances. We should therefore operate from the assumption that the bill of the rights will be the supreme law of the land. I believe that the matter does not present as much problems as assumed by the authors of the said memorandum. After all, past and present governments have limited customary law to the extent that it offends the social policies of such governments. In fact present customary law is a creature of social engineering by such governments. Under South African law customary law is repugnant to the extent that it is contrary to public policy. This suggests that there is in fact precedents for the curtailment of customary law. The proposed moratorium therefore would have the effect of restating customary law (an unascertainable system of laws). The implications of the suspension of the bill of rights would be disastrous indeed as it would elevate this undetermined mass of norms called customary law, above the supreme law of the nation, (the constitution) It is difficult to visualise how human rights lawyers or the courts for that matter can justify such a situation.

Imagine the bizarre situation where the constitutional court says to an African woman, seeking relief from an oppressive customary relationship: "Well there is a moratorium on the application of the bill of rights, you are differently situated in society, you are an African woman, you therefore have to wait for two years before the constitution applies to your case".

Consider also a situation where a woman is denied public office because it would be contrary to customary law and practice for her to occupy such office (as

perhaps interpreted in particular localities). Far fetched? No in fact this is a strong probability in the rural areas where customary law is enforced

**DO WE SUSPEND THE OPERATION OF INTERNATIONAL HUMAN RIGHTS TREATIES IN SOUTH AFRICA FOR TWO YEARS POST - ELECTIONS?**

Further, does it mean that we suspend ratifying CEDAW or do we ratify and make reservations with regard to areas impinging on customary law. Imagine South Africa failing to accede to human rights instruments after all its struggle against oppression and at a time when the world is searching for mechanisms to improve the attainment of human rights by women (remember CEDAW is being reviewed in 1995 in Beijing).

Let us now examine the suggested time frame for the proposed moratorium. The Coalition proposes a moratorium for the first two years after elections. Ironically this period happens to be the most important in the formative years of the new South Africa. This is the time when new structures of government will be defined and set up, when policies are conceptualised and our home grown jurisprudence is nurtured. Should the most marginalised section of our society be excluded at this time in our history?

There may be an assumption that the operation of a bill of rights in a situation where customary law is practiced would result in hardship or uncertainty. This assumption is undermined by the Namibian experience. Namibia provides a precedent for South Africa because, the bill of rights overrides customary law. Constitutionalising equality and abolishing discrimination increased the chances for Namibian women to realise their human rights. Hence two years after the adoption of the constitution law reform takes place and gender specific laws in conflict with the bill of rights are being repealed. Chiefs and the rural communities are also being educated about the implications of the supreme law of the land (Constitution). To illustrate the point that constitutionalising equality strengthened the chances for Namibian women, the Namibian government used a quota system to establish women's representativity in local government. This was obviously an override of customary practice.

### **UNDERMINING THE CONSTITUTIONALITY OF THE PRINCIPLE OF EQUALITY.**

So far, I have tried to argue the importance of the full application of the bill of rights from the moment the country adopts one. I am also arguing that the constitutionalisation of substantive equality is paramount to the establishment of a framework for the realisation of de facto equality for women. I would like to make one point relating to the probable disastrous effect of the proposal made by the Western Cape Women's Coalition. The most frightening implications of the proposal is that it may in fact undermine the constitutionality of the principle of equality. This would naturally please all the forces desperate to find a formula

for limiting the principle of equality. The NP and DP both support limiting the equality principle. The NP supports customary law as a mechanism of limiting equality. The DP has argued vigorously for the limitation of equality by suggesting that the principle of liberty takes precedence over the principle of equality. As women we should be guided by the commitment to attain de jure and de facto equality. It is through this lens that we should scrutinise and critique the agendas of political parties.

### **THE WAY FORWARD**

The challenge facing us now is to determine the way forward. I think we need to affirm the African women by adopting the position that human rights apply to all in South Africa and that equality is the central principle in the human rights discourse in our country. The powers of traditional leaders should thus be subjected to the constitution. The constitution should provide the framework for all policies. A retraction of the memorandum would enable the realisation of these objectives.

**BRIGITTE MABANDLA**  
**CO-ORDINATOR GENDER PROJECT**  
**8 SEPTEMBER 1993**