[132]

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

FUNDAMENTAL RIGHTS
SUBMISSION ON 10TH. PROGRESS REPORT

October 13th. 1993

1 **Application of the bill to institutions of private power:**

The tenth report proposes the deletion of the section in the application clause which provided for the application of the bill of rights to institutions of private power (horizontal application) and has replaced it with a much more limited version in section 36(4).

Section 7(1)(b) reads as follows:

> "(The provisions of this Chapter shall) bind, where just and equitable, other bodies and persons".

This allows for limited application of the bill of rights to institutions of private power where the court considers this to be "just and equitable". In other words it allows the possibility of using the bill of rights at first instance to challenge race and gender discrimination in the private sphere (by corporations and landlords for example). This is important because:

* in the absence of specific legislation outlawing forms of private discrimination, the bill of rights is the only remedy.
* Given the history of discrimination in South Africa, surely we should not have to wait for legislation to be enacted before we can challenge private discrimination.

[redacted]

The People Shall Govern!

* This clause, together with the provision that the courts can put the legislature to terms to amend or make laws on a particular subject, will provide a way of ensuring that parliament does legislate in all areas of private discrimination.

The new section 36(4) reads as follows:

> "in the interpretation of any law and the application and development of the common and customary law, a court shall have due regard to the spirit, purport and objects of this chapter".

This is a much weaker form of horizontal application. It does mean that the courts generally must have regard to the bill of rights in interpreting and applying any law. But it does not provide a right to use the bill of rights at first instance. In other words, it does not give a cause of action which will allow victims of private discrimination to go to court on the basis of the equality and non-discrimination guarantees in the bill of rights. One cannot guarantee that such laws on race and gender discrimination will be passed in the near future, or that such laws will cover every aspect of private discrimination.

We recommend that

1.1. section 7(1)(b) should not be deleted. Without this clause there is presently no protection against private discrimination or guarantee against discrimination. It should be noted that the Courts will have the discretion to decide whether the use of the bill of rights against private power is "just and equitable" and the courts can opt to ask the legislature to deal with the matter.

1.2. Section 36(4) should remain as it does try and get fundamental rights into the legal system as a whole and request judges to have regard to fundamental values in all their cases. However, the bill of rights as it stands does not provide any mechanism for resolving conflicts between rights (such as equality and culture, or equality and freedom of expression). It is necessary

to provide guidelines for judges and magistrates by building in some way in which non-racism and non-sexism (or equality) are entrenched in the bill of rights[1] .

We recommend that: the following be added to the end of 36(4):

"and the values which underlie an open, democratic non-sexist and non-racist society based on equality and freedom".

2 The Equality Clause:

2.1 Affirmative Action:

The affirmative action clause has been narrowed (see the comments of the Technical Committee after section 8(3)[2]). The effect of this is to reduce the ambit of permissable affirmative action programmes and to increase the court's testing power of affirmative action programmes.

2.1.1 The wording has been changed from "this section shall permit measures aimed at the adequate protection and advancement of persons..." to "this section shall not preclude measures designed to achieve the adequate protection and advancement...".

* "Permit" is more expansive and positive than "not preclude".
* "Aimed at" seems to offer less chance of the courts introducing a test of intention than "designed to achieve".

The issue here is how much power we want to give to the courts to test and outlaw the affirmative action programmes of employers, educational institutions and the state.

---

[1] As they are in the preamble to the constitution and the constitutional principles.

[2] Page 8 of the Tenth Report.

We recommend that the previous wording be retained:

"this section shall permit measures aimed at the adequate protection and advancement of persons..."

2.1.2. Affirmative action is permitted for persons "disadvantaged by unfair discrimination". The measures could thus be challenged and it would be necessary to prove discrimination. Surely this is completely unnecessary in a country where systemic discrimination has been structured and entrenched in the laws, practices, norms and values of our society.

We recommend that : the second half of the section (3(3)) should therefore be amended to read:

"protection and advancement of disadvantaged persons or groups or categories of persons in order to enable their full and equal enjoyment of all rights and freedoms".

2.2 **The presumption of discrimination (section 8(4)):**

This section creates a presumption of discrimination once prima facie proof of discrimination has been shown. It is not clear whether this refers to both direct and indirect discrimination. In so far as section 8(2) includes the words "directly or indirectly", it can probably be inferred that the word "discrimination" in section 8(4) does include both direct and indirect discrimination. However this should be made clear and section 8(4) should be amended to read:

"Notwithstanding section 36(2), prima facie proof of direct or indirect discrimination on any of the grounds...".

3 **The introduction of a new right of "physical and mental integrity of the person"**

The rights to dignity and personal security do not necessarity cover the right to mental and physical integrity of the person. Such a right is important not only in

respect of the right to be free from violence to the person (important in terms of the political violence, general violence and violence against women), but also in terms of general rights to mental, physical and spiritual health and well-being. This goes beyond the rights of due process and freedom from detention and torture suggested by "security of the person".

We recommend that a new clause be added to read:

> "Every person shall have the right to the physical and mental integrity of his or her person"

4 **Political Rights - section 21:**

At present political rights are only guaranteed to "citizens" (see section 21(1) and (2)). This is unacceptable during the period of transition where the citizenship laws and official practices in obtaining citizenship in SA and the TBVC states have discriminated against women and blacks.

We recommend that the word "citizen" be replaced by "person" in section 21(1) and to "eligible person" in 21(2).

5 **The interpretation clause:**

5.1 Section 36(1) provides guidelines to the interpretation of the bill of rights and, by implication, to the resolution of conflicting rights. If we are serious about redressing the wrongs of gender and race discrimination, then this clause should be amended to include the principles of non-sexism and non-racism.

We recommend the clause read as follows:

> "In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open, democratic, non-sexist and non-racist society based on equality and freedom.....

5.2 **Application of the bill of rights by judges in applying the law of the land section 36(4).**
See comments in paragraph 1.2 above.

6 **The Limitation Clause 34**

We recommend that Clause 34 (a)(ii) be amended by adding after the word "open" the words "non racial, non sexist".

7. **Customary Law Clause 32**

The Commission has great difficulty is understanding why such a clause has ary place in a Bill of rights and also with the formulations used.

7.1. A Bill of rights is intended to protect the rights of individuals. In this case it is being used to protect an institution i.e. customary law. No explanation for such a radical departure is offered.

If it is the intention to include a constitutional affirmation that customary law is a valid system of law, why is this done in the bill of rights? Surely this should be done elsewhere in the constitution (outside the bill of rights) in a clause which acknowledges both customary law and our other legal systems, all of them subject to the bill of rights. There is no reason to grant special status as a right to customary law in the bill of rights, nor is one offered by the Committee. It not only seems to reinforce apartheid thinking that Africans are "different", but it also seems to open the way to suggesting that customary law is different in so far as it is "foreign" to "western" human rights, and that human rights (especially equality) should not be applied to sections of customary law.

We recommend that the clause 32 be deleted in its entirety.

7.2 While the present draft reflects some kind of consensus that customary law should be subject to fundamental rights the manner in which this is expressed is problematic:

* It does not resolve the tension between equality and customary law with any clarity (although it tries to do so in clause 32.(2); and
* it introduces an unnecessary and confusing notion of opting in or out of customary law and practices was being discriminatory or incompatible with fundamental rights (clause 32 and especially 32 (1).

7.2.1. Choosing to be governed by customary law

Once more the bill of rights is not the proper place for this. Once customary law is recognised, this together with existing rights such as freedom of association will automatically allow such choice. Furthermore this choice must always be open to the test of equality and other human rights. All South Africans should have equal "rights" to insist that their lives are compatible with fundamental rights. The opting in and out clause (32(1)) only complicates the matter by establishing uncertainty as to when customary law applies and how it applies.

For example what happens if a husband and wife decide differently as to whether customary law applies or not? What happens if a woman wants to be subject to customary law (as many women in rural societies do) but wants to be able to challenge the discrimination that she suffers under this law (as many women do wish to do)?

In the absence of a clear statment that customary law itself if subject to equality, such tensions will not necessarily be resolved in favour of equality.

Furthermore, what are "internal affairs" of a community? How does this relate to "interpersonal relationships"? Do rules relating to succession to property within the context of the extended family belong to "internal affairs" or "interpersonal relationships"? Does "internal affairs" include traditional patterns of leadership and if so, should this not be dealt with under local authorities where it seems to belong?

In summary, the clause as it is presently drafted raises more questions than it answers in its attempt to affirm a choice that people already have.

7.2.2 **Allowing challenges to customary law on the basis of equality (32(2));**

While the clause does permit challenges to customary law based on equality, it does not do so clearly enough. There is no unequivocal statement that equality trumps customary law. The discrimination suffered by women in customary law is well known. To deny an individual woman her right to equality in certain instances because a group insists on its traditional values is contrary to the very notion of protecting rights.

7.2.3. Reminding courts that they can be "creative" in requiring the change of customary laws and practices in line with the guarantee of equality (32(2)):

This clause is extremely problematic. Firstly, the phrase "any court of law" appears to permit courts other than the

constitutional court to use the procedures laid down in the clause. Does this mean, for example, that all courts (including magistrates courts) can put the legislature on terms? Does it also mean that any court can decide on its own particular conditions such as a moratorium of 2 5 or 10 years on a particular practice? The wide phrasing of the section interferes with the substance of our notion of separation of powers.

7.2.4 **protecting legislative changes and other measures aimed at bringing customary law in line with fundamental rights (32(3)):**

Clearly this is necessary in the clause as it si presently drafted. However, it is recommended that a stronger statement of equality "trumping customary law" is necessary .

8. **Need for clarity on equality for women**

Given the history of gender oppression and structured discrimination against women in South Africa, we believe that the Bill of Rights should unequivocally affirm effective equality for South African women.

We recommend the inclusion of the following additional clause:

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