Comment on Draft Bill on the Abolition of Discrimination against Women*

I. Introduction:

The introduction to this Bill states that since the government has recently signed the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), legislation is required as part of a "comprehensive" programme to abolish all forms of discrimination against women, to promote gender equality (para 1), and to "purge" the statute book of provisions which are contrary to the principles contained in a charter of fundamental rights. However, the Bill proceeds to proclaim that, although the legislation on taxation, medical and pension schemes and subsidies contains several discriminatory aspects which "need rectification in respect of married women", these aspects will not be addressed in the draft Bill because their adjustment is "comprehensive" and will have "far reaching implications" requiring "in-depth study" and thorough attention. This gives the immediate impression that what is contained in the Bill is relatively unimportant: an impression which is, to some extent, true.

II. The Existing Clauses of the Bill:

Clause 41 and 52:

The relatively minor amendments of the Magistrates Court Act, the Defence Act, the Citizenship Act, Deeds Registries Act etc. contained in this Bill remove some of the discrimination in our law between men and women, but will not substantially affect the lives of many women. What will have a major impact is clause 41, which abolishes the marital power from all marriages where it still exists - marriages celebrated prior to 1984 in community of property or, prior to 1988, in the case of marriage of two Africans or an African man to a woman of another race. Transactions entered into by women prior to the abolition are unaffected but Clause 52 is a clear statement that married women are now able to contract. However, both clause 41 and clause 52 require an amendment making them subject to chapter III of the Matrimonial Property Act 88 of 1984 to clarify the fact that the abolition of the marital power gives rise to the joint and concurrent administration provided for in sections 14 and 15 of the Matrimonial Property Act 88 of 1984.

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* These comments were compiled with the assistance of a grant from Lawyers for Human Rights. The views expressed here do not necessarily coincide with those of Lawyers for Human Rights.

Clause 51:

The Bill further provides for both spouses to act as joint and equal guardians of the children. This clause is, however, very terse and ambiguous. It urgently needs clarification and expansion. It states that it applies "during the duration" [tautologous?] of a marriage. There is no reference to the problems of a possible conflict on divorce nor is there any reference to partners to a customary marriage or a marriage not recognised by civil law (eg a Hindu or Moslem marriage). Clause 51 proceeds to state that both parents of a minor may "dispose of ... guardianship and custody of a minor". This wording cannot be taken at face value: no guardian has the power to "dispose of" guardianship or custody without the authority of the court. Guardianship powers cannot be delegated in this way. Furthermore, guardianship is not so much a right as a duty (Thompson v Thompson 1946 CPD 321). The Supreme Court is the upper guardian of all minors (Coetzee v Meintjies 1976 (1) SA 257) (T)) and when necessary, the court supervises the appointment of guardians and carrying out of the duties. It would seem anomalous if the Legislature were to set this at naught in the interests of giving both parents joint and equal guardianship over the children. This clause must be clarified immediately, perhaps even in a separate Bill dealing with guardianship, custody and access to minor children.

Clause 9:

Clause 9 (which is an amendment of section 2 of the Matrimonial Affairs Act 37 of 1953, as amended) is totally unnecessary. Section 2 is redundant and is no longer required. In view of the abolition of the marital power, this clause should be repealed, not amended.

Clauses 34 and 48:

The Memorandum expresses some doubt as to whether the prohibition on women working underground should be abolished (p 6). We think that there is no reason why the prohibition should not be scrapped. There is no reason why women should not work underground. The prohibition may rest on two justifications: women's lack of physical strength; and the problem of personal risk for women underground. As to the first, if a job requires physically strong workers, then that is a legitimate condition that can be placed on appointment, but the condition must be expressed in terms of strength not sex. If a job requires a strong person, there will be many women and some men who do not qualify, but there will be some women who do. Limiting women's entitlement to apply for the job is discrimination on the grounds of sex. In relation to the second reason, women's safety is a problem in many workplaces which should be addressed, not by excluding women from the wokrplace altogether, but by specific legislation (see, for example, the provision on sexual harassment in the Promotion of Equal Opportunities Draft Bill). We think

therefore that the prohibition on underground employment should not reamin. survive the enactment of an equal rights clause in a bill of rights.

Note that the Occupational Diseases in Mines and Works Act 1973 is incorrectly referred to as the Occupational Diseases in Mines and Industries Act on p 6.

Clause 6:

This clause should read "section 10 of the South African Citizenship Act, 1949, is hereby amended - a) by the substitution for subsection (2) of the following"...

Clause 15:

Section 12(5) has already been deleted by Section 1 of Act 80 of 1992.

Clause 27:

The last line should read "other grounds deemed by the Director-General to be unnecessary".

III. Omissions and Lacunae in this Bill:

Abortion:

Many critical issues have been omitted from this Bill which require immediate attention. Firstly, the rising rate of teenage pregnancy and the many thousands of illegal abortions indicate that the situation has reached crisis point. Even from women living in relatively conservative communities, there is a widespread demand that women's right of choice be respected in this matter and that provision be made for pre and post-abortion counselling, advisory services, family planning and sex education in schools.

Customary Marriages:

A second issue that needs urgent attention is the inferior position of African women, married according to customary law. African women married according to customary law are severely discriminated against in regard to their lack of property rights, their lack of guardianship rights over minor children and their lack of rights on intestacy. In terms of Section 11(3) of the Black Administration Act (21 of 1943) a woman married according to customary law (outside Natal) who is living with her husband is deemed to be a minor and her husband is her guardian. This section should be repealed as soon as possible. As far as customary marriages are

concerned, the imposition of one system of law and the suppression of the customary system would seem to be "unrealistic and inequitable" at this time (see South African Law Commission Working Paper 10 Project 51 Marriages and Customary Unions of Black Persons (1985)). Perhaps the answer is to achieve equality of treatment of the institution of marriage, leaving the choice of marriage to the parties themselves, but abolishing those aspects of customary law which are discriminatory to women. It is suggested that a Bill should be introduced which makes provision for the following:

a) the recognition of a customary marriage entered into before or after the commencement of the Bill as having the status of a common law marriage;
b) the requirements for such a valid customary marriage (see clause 3 of Bill attached to SALC Working Paper 10 Project 51);
c) competency to enter into customary marriage, specifically stating that no spouse of a subsisting common law marriage shall be competent to enter into a customary marriage;
d) requirements for the solemnisation of customary marriages (clause 6 of SALC Working Paper 10 Project 51);
e) proof of the existence of customary marriage should be by registration (see clause 12 of SALC Working Paper 10 Project 51);
f) maintenance to be governed by common law (clause 13); and the reform of the entire system of maintenance (infra);
g) guardianship of all minor children to vest in both parents married according to customary law;
h) succession and property - all intestate succession and property rights to be determined according to common law;
i) divorce - provision for possible redistribution of assets ito S 7 (3) of Divorce Act of 1979 or other legislation (see infra).

No country in Africa has legislated with the single purpose of improving the status of women (T.W. Bennett A Source Book of Customary Law (1991) p 331). While governments might have paid lip service or been genuinely sympathetic to the plight of women, they could not afford to estrange the majority of their supporters, who benefitted from the patriarchal system. Reform in South Africa has also been cautious and haphazard (see amendment to the Black Administration Act 21 of 1943 S 5)). Although the application of customary law is subject to a `repugnancy' proviso, which might limit the application of discriminatory customary laws, in practice the courts have rarely used this clause (Chiduku v Chidano 1922 SR 55 at 58). There is some suggestion that it may even be irrelevant. It is therefore up to the legislature to assume responsibility for bringing about change in customary law practices (T.W. Bennett A Source Book of Customary Law (1991) p 133).

Redistribution of Assets:

The question of the redistribution of assets upon divorce also requires urgent attention. At present, in terms of Section 7(3) of the Divorce Act 70 of 1979, as amended, a court can effect a redistribution of assets on divorce only if the marriage was a civil one, out of community of property before 1984, and in terms of an antenuptial contract excluding accrual, or a foreign marriage under a legal system which provides for a transfer of assets from one spouse to another. This is restrictive and potentially discriminatory to women not falling into those categories. It accentuates and proliferates the poverty of divorced women, who are inadequately compensated for their child-care responsibilities. It is suggested that section 7 (3) of the Divorce Act 70 of 1979 be amended to remove this discrimination (Professor June Sinclair has indicated that she is very willing to draft this clause).

Maintenance:

A final matter to which the legislature must give urgent attention is the reform of the Maintenance Act 23 of 1963. Although the Maintenance Act was amended recently (Act 2 of 1991), these amendments are merely procedural and so not improve the position for poverty-stricken women. Fundamental political and economic changes are required to ensure that poverty-stricken single-parent households are provided with some form of social security system (see U.K. Report of the Committee on One Parent Families Cmnd. 5629 - I DHSS (1974)). Welfare services (in the form of maintenance) must be made accessible in terms of physical proximity, language and the removal of bureaucratic inefficiency and "red-tape" (see S. Burman & S. Berger `When Family Support Fails: The Problems of Maintenance Payments in Apartheid South Africa' (1988) 4 SAJHR 194 & 334). The number of maintenance staff must be increased and more court time devoted to these issues. A summons should automatically be issued on default of payment. The introduction of a formula system should be investigated to ensure certainty and to remove the possibility of injustice arising from judicial discretion (see UK and Australian Child Support Acts).

Finally, although the legislature has stated that pension and taxation will require future rectification: such issues demand immediate amendment (see attached Comment on Taxation and Gender Discrimination and Proposals for Reform).

Conclusion:

Unless urgent and thorough attention is paid to these areas of the law, the inferior position of women, politically, socially and economically, will not only continue, but will escalate. If the government is genuinely interested in reform it will view those omissions in a serious light and will take immediate steps to rectify the situation.

Women's Networking Seminar

10h00 - 17h00
September 9, 1992

OM Prefab Boardroom
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