

PROTECTION OF WOMEN'S RIGHTS AS DISCUSSED IN THE INTERIM REPORT ON GROUP AND HUMAN RIGHTS

1. The proposed article 3

I agree with the findings of the SA Law Commission as discussed in the Interim Report on Group and Human rights pp472-476. In my opinion, the proposed bill of rights does provide adequately for the protection of women's rights within the framework of the bill as a constitutional mechanism.

The proposed article 3 will ensure equality before the law in as far as discrimination against women may occur in legislation or as a result of executive or administrative acts. A positive obligation is thereby imposed on the state not to discriminate on grounds of gender. All existing and future Acts of Parliament will thus be measured against this article.

However, a bill of rights will not be able to protect women against discrimination by private individuals as a bill of rights does not regulate relations between private individuals. Discrimination against private individuals may only be addressed by prohibiting discriminatory practices through specific legislation.

Article 3 further contains an affirmative action clause. Thus, despite the enshrinement of equal rights and opportunities, legislation may be enacted or policies implemented for the advancement of persons who have been disadvantaged by past discriminatory laws or practices.

This clause could also be applied to good effect by establishing legislation to provide for reporting and monitoring mechanisms in order to re-evaluate and rectify disadvantages suffered by women. (This will be in line with the UN Convention on the Elimination of Discrimination against Women. See also the discussion document on women's status prepared by Dene Smuts and Carole Charlewood.)

2. General comments

Prof Carpenter (p 462 of report) points out that discrimination may be hidden in people's attitudes. Legislation will not be sufficient to eliminate such discrimination. The only way in which the elimination of hidden discrimination may be achieved, is through intensive education programmes and lobbying.

The legislature should be urged to take cognisance of the UN Conventions as discussed on pp 466-468 of the report. Should South Africa rejoin the UN, the government should be urged to become a signatory to these and other conventions protecting the rights of women.

Mrs C Hall (p 468 of report) makes a most important point: In order to establish true equality, it is important to recognise women's rights as a human rights issue and to avoid these rights being perceived or legislated as a separate category.

The proposed legal status of a Women's Charter as proposed in certain quarters needs to be clarified and defined:

- As a manifesto or statement of hopes, a Women's Charter could serve as an instrument to educate and change the attitudes of people.
- As a legislative code, the content of a Women's Charter would be taken into consideration by a constitutional court, the human rights commission or the Ombudsman when deciding upon the discriminatory effect of legislation or administrative / executive acts.
- For reasons similar to those put forward in the DP Discussion document on women's status, I support the introduction of women's desks in government departments.

3. Proposed course of action

- a) All statutes should be scrutinised for obvious discriminatory clauses. The assistance of a group of lawyers will be needed for this. Ideally, lawyers should each examine a limited number of statutes within their specific fields of expertise. In as far as is possible, research will also have to be conducted into any "hidden" discriminatory effects which the application of a statute may produce.
- b) Once areas of discrimination have been established, it should be taken up with the relevant enforcement body, be it the constitutional court, the human rights commission or the ombudsman.
- c) Once legislation has been rectified, an education programme will have to be launched in order to inform not only women, but all persons about the rights of women. Women should be encouraged to take action when their rights are violated and should be supplied with clear instructions on what route to follow when such violation occurs.

A brief discussion of the current position of women in the workplace

The interests of women are protected by legislation to a certain extent:

So, for example, S17(b) of the Basic Conditions of Employment Act 3 of 1983 prohibits the employment of a woman for a period of four weeks prior to and eight following the birth of a child.

However, no guarantee is given that a woman may return to her job after the period of maternity leave has expired.

The lack of child-care facilities, provided by either the State or a private employer, proves to be a stumbling block preventing women from pursuing a career after the birth of their children.

Discrimination on grounds of gender would constitute an unfair labour practice in terms of the Labour Relations Act 28 of 1956.

It should be pointed out that many employees are excluded from even this basic legislative protection. Arguably the most significant exclusion is that of the approximately 862 000 domestic workers, of whom 89% are women.

Whilst legislation does not sanction discrimination against women, it is trite knowledge that discrimination against women occurs in practice. Conditions vary from one employer to the next, but complaints most frequently seem to relate to housing subsidies, pensions, medical schemes, maternity leave and lack of child-care facilities.

One of the biggest factors militating against equality in the workplace is the outdated and legally unfounded sole breadwinner criterion: In terms of the breadwinner criterion, the woman's job is seen to be supplementary to that of her husband. Thus, a married woman often does not qualify for a housing subsidy or membership (for herself and her family) of a medical aid scheme.

International perspective

An international trend towards protecting the particular interests of women (and children) in the workplace has become discernible.

Many Western countries (including the USA and the UK) have adopted Sex Discrimination legislation in order to promote equality in the workplace. In these countries, the State or the employer usually provides child-care facilities and such other facilities as would assist a woman in coping with both her working and family duties.

These efforts may largely be attributed to the standards set by the International Labour Organisation.

The position of the International Labour Organisation

The ILO recognises the need for setting standards for the employment of women aimed at protecting them against abuse in the workplace and securing for women workers the same rights and treatment as men.

Issues addressed by the ILO include:

Equal remuneration

Convention No.100 adopted in 1951 concerned equal remuneration for men and women workers for work of equal value. This Convention provides that ratifying states must promote and, in so far as is consistent with the methods in operation for determining wages, ensure the application of this principle of equality, and that this should be done by means of legislation, collective agreements or wage fixing machinery. Stress is laid, in this connection, on the importance of promoting the objective appraisal of jobs on the basis of work to be performed.

Maternity protection

Conventions Nos. 3 and 103, of 1919 and 1952 respectively, provide for social security benefits and medical care. In addition, they establish the right to maternity leave of not less than 12 weeks. Convention 3, which applies only to industry, provides that 6 weeks of leave must be taken before childbirth and 6 weeks after. Convention 103, which is of general application, is more flexible and merely specifies that at least 6 of the 12 weeks leave must be taken after childbirth. Under both Conventions the post-confinement leave is obligatory and must be extended in certain cases. These instruments also provide that an employer may not dismiss a woman while she is on maternity leave, or give her notice of dismissal at such a time that it would expire while she is on leave.

Employment of women with family responsibilities

The continuing increase in the number of women working outside their homes, and having problems due to their family responsibilities, led to the adoption of Recommendation 123 of 1965. This Recommendation provides that the public authorities should try to help such women to reconcile their dual family and work responsibilities by making available child-care services and facilities, and by facilitating their entry into employment or their re-employment after a comparatively long period of absence.

Freedom from discrimination

In 1958 the ILO adopted both a Convention (No.111) and a Recommendation (No.111) on discrimination in employment and occupation. Both instruments refer to grounds of discrimination as diverse as race, sex or political opinion. They cover discriminatory laws or acts in very general terms such as 'any discrimination, exclusion or preference ... which has the effect of nullifying or impairing equality of treatment', and which can be the result not only of legislation but also of existing factual situations or practices. They reach into all sectors of employment and occupation, both public and private, and extend to vocational training and access to employment and to particular occupations, as well as to conditions of employment in general. The methods proposed in these texts to combat discrimination range from direct intervention through legislation to educational activities and from action by the State to action by employers' and workers' organisations.

Night work

Three Conventions prohibiting the employment of women at night have been adopted: No.4 of 1919 was revised by No.41 of 1934, and again by No.89 of 1948. This last Convention, which is more flexible than the earlier ones, prohibits night work by women in industrial undertakings during a period of 11 consecutive hours.

Underground Work

Convention No.45 adopted in 1935 prohibits the employment of women on underground work in mines of all kinds.

While South Africa complies with certain standards regarding maternity leave, night work and underground work, much may be gained by following other ILO standards as set out above.

The employment of children and young persons

The ILO has showed a constant and continuing concern for the protection of children.

Conventions aimed at the protection of children in the workplace deal with issues such as minimum age, night work and compulsory medical examinations.