

SUBMISSIONS TO TECHNICAL GROUP ON LEGISLATION OF THE GENDER ADVISORY COMMITTEE :-

(3) ester

A. PREAMBLE :-

The Situation prevalent in S A has thus far been viewed in the Context of discrimination levelled against Blacks particularly in Constitutional Law, whereas with regard to Women it prevailed mainly in the sphere of marriage and family law.

The findings of the S A Law Commission as discussed in the Interim Report on Groups and Human Rights, does tend to provide adequately for protection of women's rights within the frame work of the Bill of Rights as a constitutional mechanism. Article 3 thereof ensures equality before the law in as far as discrimination against women may occur either in legislation, or executive or administrative acts.

A positive obligation is imposed on the State not to discriminate on grounds of Gender. However the bill does not protect women from discrimination by Private individuals organisation or enterprises.

We should emphasise that a bill of rights ought to establish all appropriate measures to ensure the equality of women with men in marriage and parenthood and in political, social economic and cultural life, guaranteeing them the exercise of human rights and fundamental freedom on a basis of equality with men.

B. BRIEF APPRAISAL OF GENDER DISCRIMINATORY LAWS :-  
(MARRIAGE AND FAMILY) :-

- (i) The Matrimonial Property Act No. 88/1984 as Amended by Act 3/1988

Section 11 of this Act contains a welcome provision to the Act. It has the effect of levelling the plane. However discrimination still remains because Black

Marriages contracted before the promulgation of the 1988 Amendment do not benefit from the Act i.e as far as it pertains to the Marital Power of husband.

A Ciskei Decree to be called the Matrimonial Property Decree of 1992 is soon to be published shortly and it contains provisions similar to the S.A Act, except that it will give spouses a period of 5 years instead of 2 years within which to alter their marital status. It also contains a provision abolishing the Marital Powers of the husband.

(ii) Black Administration Act 38/1927 - Sec. 22

A woman who married by civil right a man who previously had a customary wife, cannot contract a marriage in community of property. Their marriage has to be out of community of property. Even if they wish to invoke the provisions of the Matrimonial Property Act they are unable to do so. To crown it all, upon the intestate death of one of them e.g husband, then Customary law is applicable. The effect being that the eldest son of the deceased has to be traced in order to administer the estate. The poor wife will have to rank as a dependant. This is irrespective of her contributions during the course of the marriage.

(iii) (a) Proclamation R188/1969 - R.S.A

This proclamation which is still applicable in the Ciskei, contains provisions setting out a system of primogeniture, the effect of which is an inheritance confined solely to the eldest son of the deceased to inherit all his parents property. This is highly discriminatory. Even if the eldest child of the deceased can be a woman she is by-passed up to the eldest male descendant. This relates however only to land which is held and owned through a Quitrant Title. This means land granted to a Black person in a Black Area on individual tenure on quitrent conditions.

(iii)(b) Black Administration Act 38/1927 - Section 23(2)

This section provides that all land in a location held in individual tenure upon quitrent conditions by a Black shall devolve upon his death, upon one male person to be determined in accordance with the prescribed table of succession. This system relates to the proclamation mentioned here above.

This provision is so cruel in that it cannot be circumvented by means of drawing up a will. Section 23(c) of the Act mentioned provides that any will made in respect of the land in question, which stipulates a bequest contrary to the primogeniture rule will be of no force and effect.

(iv) Customary Law Amendment Decree No. 23/1991

Because of the practical hardships that are experienced by women who are married by Customary rites, the Ciskei has gone one step ahead in alleviating these hardships. This decree was enacted mainly for the protection of such women.

In practice, because Customary Marriages are normally confined to the two families, upon the death of the husband, proof of the existence of the marriage is usually required at the Magistrate's Office, where the estate has to be reported.

So the woman depends entirely on her deceased husband's family to confirm existence of the marriage. Should they be unwilling to do so, then it becomes difficult for the Magistrate to recognise her status as a married woman. This decree has now given better status to the Customary Union on the same level as a common law marriage. It further makes it imperative for spouses contracting a customary marriage to register same within a period of 5 years after its inception.

Another important provision in this decree is contained in Section 5 thereof. This Section makes it competent for a woman who is party to a customary union to acquire and possess property in her own name, and in the <sup>same</sup> vein, can also dispose of property so acquired, as well as to defend her rights in a court of law without the assistance of her husband.

This provision has really been a milestone when consideration is had of the position of the customary woman previously. She simply had no locus standi whatsoever in a court of law. She was treated like a minor for all intents and purposes.

(v) Section 11(3)(b) of Black Administration Act 38/1927

This section provides that a Black woman who is a partner in a Customary Union and who is living with her husband, shall be deemed to be a minor and her husband shall be deemed to be her guardian.

The position in Ciskei has been rectified through the Constitution Act 20 of 1981. This Act repealed the provisions of Section 11(3)(b) Although the constitution was subsequently repealed, this did not reverse the situation.

(V) Maintenance of Surviving Spouse Decree No. 27/1991

This decree has been promulgated mainly to come to the assistance of spoused married out of community of property - where upon the death of one of them, Customary Law becomes applicable. The effect thereof being that a male heir has to be sought to administer the estate. The widow then ranking as a dependant. At least Section 2 of this decree gives the widow a claim against the estate in an amount sufficient to provide reasonable maintenance needs for her.

VII Intestate Succession Decree No. 31/1991

This decree has gone a step further to the one of 27/1991. In case of spouses married either by Customary rites or common law, where Customary Law is applicable to their estate, and they had no children, and their estate is intestate then Section 2 of the Decree No. 31/1991 makes provision for the surviving spouse to inherit in her own right.

In the case where the deceased was a widow/widower survived by descendants both male and female then such descendants of such a spouse shall all inherit equally.

(VIII) Regulations, By-Laws and Informal Policies

I have not been able to gather further information pertaining to the above.

(IX) Marriage Act 24/1988 - Ciskei

Section 16 contains different ages for both genders to qualify for marriage. Are we happy with that? (To be discussed)