

CONSTITUTION, LAW AND THE GENDER QUESTION

1.0 Introduction

The historical moment to translate the Freedom Charter from "a vision of the future and a constitutional reality" is indeed upon. The historical conjuncture at which this happens is of grave importance as the social forces that bring the moment upon us, shape the nature of the questions and discussions we should engage in. At this conjuncture the Gender Question cannot be wished away. Neither can it be perfunctorily dealt with. The present nature of our struggle, its forms and its content, our strategies and tactics, demand that the question be dealt with. The present nature of our struggle, its forms and its content, our strategies and tactics, demand that the question be dealt with in great depth, and with better understanding of the issues involved.

2.0 Historical Legacy

2.1 To transform South Africa into a truly democratic society we must address and sweep away the historical legacy of racial oppression and discrimination.

2.2 For centuries black women have suffered under colonial subjugation and male domination, particularly white women have generally been excluded from participation in the political and economic life of the country.

2.3 Women in general have been employed in a limited range of economic work and the agricultural productive sector has been the most exploitative. For African women the gender position as is seen in the

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 anti-sexism

Table I

Changing Racial and Gender Composition of Domestic Service

| | 1911 | 1970 | 1980 |
|---------------------------------------|-------|-------|------|
| All White Servants as % of all | 4.79 | 0.25 | - |
| All women as % of all domestic S. | 55.02 | 89.27 | 90 |
| African women as % of all domestic S. | 30.72 | 76.68 | 83 |

CONSTITUTION, LAW AND THE GENDER QUESTION1.0 Introduction

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2.0 Historical Legacy

- 2.1 To transform South Africa into a truly democratic society we must address and sweep away a vast and deeply entrenched historical legacy of racial, class and sexual domination, oppression discrimination.
- 2.2 For centuries black women of our country have suffered under colonial subjugation, and all women suffered under male domination particularly white male domination. For centuries women have generally been excluded from effective and meaningful participation in the political and socio-economic life of our society.
- 2.3 Women in general, but black women in particular, have been employed in a limited range of occupations or areas of work. For African women employment has been mainly in the field of domestic work and agricultural production. The former sector, being the most exploitative sector has been changing in both racial and gender position as is seen in the table below:

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- 2.4 Most of women's employment is within those sectors where there is a lack of protective legislation for workers and where trade union activity had until very recently been explicitly forbidden. Thus women's participation was severely prescribed and their experience very much limited. (See Matsebe-Casaburri 1986).
- 2.5 Although the history of the struggle of resistance against all forms of oppression imposed by the white colonial minority regime shows and increasingly participation of women, the vast majority of women have been hindered in their participation by their illiteracy, lack of access to information and by attitudes, values and tradition, some of which are rooted in conservative non-progressive culture. Thus the situation of women is to be ascribed not only to the apartheid regime but also to historical legacy embedded in the cultures both black and white. The issues raised here address these historical legacies.

3.0 Limitations

- 3.1 While we recognize that there are limits to a constitution, that it cannot be too detailed and too specific, the constitution which is an embodiment of a national view must however be quite clear about the rights it wants to entrench. Because it should not be changed easily, it cannot be ambivalent about what rights it specifically has to protect i.e. be explicit on what it entrenches.
- 3.2 Historical moments at which constitutions are drawn, determine what the constitution will be like. Lessons we learn from a comparison of the constitutions of the G.D.R., South Africa, the U.S.A. and the U.S.S.R. illustrate this very clearly on the gender issue. Whilst the second is totally vague on the issue, the U.S.A one is so very general that the discrimination on the basis of colour and sex continued for centuries before successful challenges were made in the courts.
- 3.3 While the U.S.S.R. constitution specifically does address the issue in various articles as we shall show, it is often vague. The G.D.R. constitution is often very explicit on several aspects of the gender question.

This paper does not pretend to be exhaustive. It is brief and merely raises issues that sensitize us to the enormity and the complexity of the task ahead of us in our attempt to achieve a truly democratic (non-racist, non-sexist) society.

4.0 The issues

- 4.1 In redressing the old legacies of colonial and white oppression and gender discrimination, all laws imposing such oppression and discrimination should be abolished. As stated in the introductory speech, all laws and legal institutions must be examined to eliminate specific and effective racism and sexism.

- 4.2 Paragraph 4 of the guidelines speaks of the corrective action which should be provided for by the constitution in order to guarantee rapid and irreversible restructuring. This should indeed include special dispensation in favour of women as well. Not only should the constitution "promote the habits of non-racist behaviour" but it certainly should promote anti-sexist thinking and behaviour. Thus paragraphs (I), (J) and (K) on p.4 must reflect this.
- 4.3 Culture is an important aspect of national life. Women play a very dominant role as transmitters of culture. But some conservative and retrogressive aspects regarding women being embedded in culture and religion demands that the entrenchment of equality of these aspects in the constitution should never be understood to give rights that override the constitutional human rights of all individuals especially those of women.
- 4.4 On the question of franchise and participation of nationals, in political life, because blacks in general and women especially suffer high levels of illiteracy, education for democracy and education for participation in democracy would be crucial in our country. But such education should also focus on whites who have been socialized into non-democratic political participation. Such education should be entrenched. Unless this is done women and blacks shall never become informed participants in the political process and this would leave the grounds open for manoeuvres and enemies of our revolution. This is made even so much more urgent by the fact that women constitute a little more than half of the population.
- 4.5 The content and form of voting shall determine whether women will be included or excluded from political participation. Unless the constitution entrenches full participation that would allow for electoral laws that can maximize women's participation, pose apartheid South Africa may not have much meaning for women.
- 4.6 Nationality and citizenship which impinge directly on franchise, have often been used de facto to disenfranchise and nationalize women and their children. The patriarchal nature of most society e.g. in the U.K., France, Botswana have resulted in the ridiculous situation where the children (born within wedlock) of women citizens who are bona fide citizens and residing in their countries, have been denied citizenship while children of male citizens born to non-citizenship (often born outside wedlock) as long as partentiy is not denied) are entitled to citizenship.
- 4.7. Other forms of discrimination against women abound in the experiences of the states around us. These need to be studied in great detail with a view to eliminating of such discrimination and entrenchment of such non-discrimination in the constitution.

4.8 The Bill of Rights and affirmative action must not pay lip service to the equality and special dispensation vis-a-vis women. Effectively, anti-sexism (like anti-racism) must be entrenched in the constitution so that any law or practice (administrative or otherwise) that discriminates on the grounds of gender can be declared unconstitutional. Here again paragraphs (I), (j), (k) and (r) are specifically to pay attention to the gender issue.

4.9 We welcome the protection/entrenchment of workers rights within a charter. Such a charter should be guided by the differential historical conditions and experiences of the genders. The charter therefore should take into consideration the specific disabilities of women workers such as sexual harassment etc.

Protection of both genders against all work harmful to their reproductive capability and capacity and health must be entrenched.

4.10 Equality in training, access to work and equality in remuneration for similar work performed mechanisms for these should be addressed by the charter.

Women's right to choice of work, right to paid work and free choice of employment must be guaranteed and not be hampered by such things as "what does your husband say of it."

4.11 The protection of the family is absolutely necessary. However the nature of that family is usually much more problematic than it has been assumed. Family and kin relations are not as harmonious and conflict free as may have been earlier. The rapid increase in the divorce rate, and in family violence is indicative of this. Guaranteeing of protection to the family should extend protection to all members especially to women.

Protection of family must therefore not be to the exclusion of constitutionally guaranteed human rights of members. The right to privacy of the family should not be allowed to be the "theatre for the secret oppression of women and girls".

4.12 Some examples of relatively egalitarian protection of the family are seen in Article 38 (1) - (4) of the G.D.R constitution.+ The family unit must be conceptualized for purposes of the constitution as a component of efforts to build and reproduce a nation that upholds non-racialism and non-sexism. Therefore the constitution should allow for channels to be established that would guarantee that "the much vaunted 'privacy' of the family, does not retain the clandestine quality of subverting the serious and critical efforts at founding a truly non-sexist non-racial and united democratic South Africa."

4.13 Women's social rights have often been eroded by the denigration of their person, sexual harassment and commercialization of women. The constitution should allow for channels of enforcement to eliminate such practices.

4.14 Women's right to shelter, land, property and residence have historically been tied to men - their fathers, husbands and male kin. Fundamental human rights are undermined in this manner. The implications of this on the process of development process is that it slows or subverts the process as the Zimbabwe experience seems to suggest. This is an area that demands detailed study and there is need to 'delink' these rights of women from men. This is made even more necessary by the fact of the increase of female headed households.

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