MCH91-82-3-2

To: Rhonda Copelon
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From: David Hyland & Sadhvee Hansraj
Re: ANC Constitution & Workers' Rights
Date: 24 November 1992

Introduction:

The purpose of this memorandum is to examine Article 6, §§1, 2, 6, 8 and 11 of the ANC draft constitution. That examination will focus on possible gender issues and the prescriptions of CEDAW.

Section 1:

This section presents a conflict with the Constitution itself and with CEDAW and, if interpreted wrongly, could lead to serious problems. Granting workers the right to "...regulate such unions without interference from the State" would appear to run counter to Section 2, which imposes a limitation of non-discrimination. If read separately from Section 2, it would appear that worker regulation could include rules of membership which exclude on the basis of race, gender, sexual orientation, religion or gender. The rest of the Constitution appears to contemplate State intervention even in the case of private discrimination.

Section 2:

There is some ambiguity particularly relating to the extent to which the State may intervene in union affairs when the rules of the organization are detrimental to women on issues such as membership rules, "hiring hall" provisions, union-sponsored apprenticeship programs, dues payments, etc. For example, if union membership rules required five years' industry experience or completion of an apprenticeship program prior to being placed on a "hiring hall" list, women may be effectively deprived of the right to freely join a trade union. To alleviate this problem, it might be wise to explicitly set forth a union's affirmative obligation to refrain from discriminating on the basis of race, gender, ethnicity, sexual orientation, etc.

Section 6:

To the extent that women in female-dominated occupations find it necessary to strike, it is important to clearly define the standard for determining what would 'endanger' the population. For example, if South African women made up the vast majority of the nurses in the country, their right to strike may be meaningless in the constitutional framework if a strike could be construed as endangering the life, health

or...safety...of any section of the population. And if women made up the vast majority of agricultural workers in a particularly important commodity, a similar situation could arise. One possible way to balance the interests of women union members in female-dominated occupations and the interests of the population as a whole might be to impose mandatory binding arbitration when a strike is deemed unacceptable to the state.

Section 11:

The analysis of Section 11 requires separating what appear to be two provisions: 1) equal pay and 2) equal access. The only focus here will be on equal pay inasmuch as equal access appears to be fairly straightforward.

On equal pay, the issues turn on valuation, who places the value on a particular job, the consequences of re-valuation and implementation. There are two primary theories which lead to very different results. The first is the "equal pay for equal work" theory which essentially mandates that women who do the same job as men get paid the same wage. Hence, women who drive delivery trucks must be paid the same as men who drive delivery trucks. This theory of equality does not move women very far economically, however. Given that many occupations are for all practical purposes sex-segregated, and given that male-dominated occupations are on average better paid than female-dominated occupations, only a few women stand to benefit from the first theory.

The second theory, "comparable worth" or "pay equity"[1], recognizes the de facto segregation of the workforce and seeks to remedy wage inequality through assigning a value to specific skills and training, stress levels, physical/mental demands associated with any job. Most comparable worth models assign "points" for various job components. By employing a comparable worth theory to all occupational categories, it is typically the case that female-dominated occupations are undervalued by the marketplace.

If the State undertakes to give meaning to its provision by conducting a nationwide comparable worth project, the primary political issue is solidifying support among men as well as women. Because it usually the case that female-dominated occupations will end up being valued more highly as against

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[1]*See*, excerpt, Blum, *Between Feminism and Labor: The Significance of the Comparable Worth Movement* (Univ. of Calif. Press: Berkeley) (1991). Also, *see*, Gold, *A Dialogue on Comparable Worth* (ILR Press: Ithaca) (1983).

male-dominated occupations, it is possible that implementation could mean that men lost real wages.[2]

General Notes and Comments:

One key question left unanswered by the draft is the availability and extent of remedies for private and/or public breach of Constitutional provisions. The ANC may want to consider the availability of compensatory and punitive damages, attorney fees and injunctive relief, among others, to provide incentive for unions and the state to refrain from gender discrimination. Particularly important for women in the context of these provisions would be attorney fees. Discriminatees may often find themselves unemployed and/or without the necessary funds to secure private legal assistance. Another avenue may be providing redress through an administrative agency which pursue the case on behalf of the complaining party.

Another issue which was not explicitly addressed was sexual harassment. While it may be that the ANC does not want to include that kind of protection on a constitutional level, it may wish to consider including language which directs a court to construe job-based sexual harassment as sex-discrimination, actionable as a violation of a Constitutional right under Article 6.[3]

Comments on the Note following §12:

For the purposes of this critique, it is profitable to ask at least three questions. 1) Should workers' rights be explicitly protected in the text of the Constitution? 2) If those rights are embodied in the Constitution, how much

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[2]American labor unions have been dealing with pay equity issues for over a decade. In my work as a contract negotiator with a public employee union in the State of Maryland, the employer agreed to a phase-in implementation of recommendations contained in a long-term pay equity study. The key issue was what "line" to use in implementing the changes. The employer wanted to use the "female line" as it existed prior to the study, meaning that many male-dominated occupations would see an actual decrease in their salaries. Clearly, the male members of the union would not accept cuts in pay to make their salaries more in line with women's. Ultimately, the employer agree to use an "all male line" which would have the effect of keeping most men's salaries stable while *increasing* women's salaries. Taking that approach made it much easier to politically "sell" the contract provision to the whole membership because no one would experience a cut in pay.

[3]The issue of sexual harassment and constitutional theory in the U.S. experience is treated in another IWHRC memorandum.

textual specificity should there be? 3) How should constitutional review be structured procedurally and/or substantively to guarantee that the intent of the framers is carried out?

1) Generally, protecting workers' rights through the use of a constitutional provision is more effective than the relying on the legislature and executive to pass laws in piecemeal fashion. Even more important than its general efficacy, situating these rights within a constitutional framework is consonant with international law, most specifically "second generation" economic rights. Inasmuch as the ANC is committed to adhering to principles of international law, such a move represents a progressive step forward.

2) The note raised an issue that is not entirely clear. It would appear that textual specificity (more and extensive clauses) would serve to *prevent* a constitutional court from raising the spectre of contract-based theories to deny workers' rights. The problem may be alleviated by drafting which includes at least two specific components: 1) clearly stating that workers' rights are not based in classical contract theory and 2) that workers' rights embodied in the constitution are fundamental and may only be circumscribed by the state where there is a compelling government interest.

3) Drafting changes may somewhat alleviate the problems associated with constitutional court review of workers' rights disputes. The suggestion that the Industrial Court participate in review is interesting, particularly when viewed through the lens of the U.S. experience. In the United States, private employment is governed by the National Labor Relations Act. The National Labor Relations Board, an administrative agency created by the Act, initially reviews labor disputes between unions and employers. Judicial review is available, including review by the U.S. Supreme Court. Caselaw which has developed since the 1935 passage of the Act grants much authority to the Board within an administrative law framework. Like other administrative agencies, the NLRB is viewed as having special expertise on labor issues. It is that expertise which justifies lighter judicial review.[4]

If we may presume that the Industrial Court can be analogized to the NLRB, then the Drafting Committee may wish to begin discussing exactly how labor adjudication should be structured procedurally to guarantee that workers' rights are given the meaning envisioned by the drafters.

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[4]It is important to note that the NLRA was passed during the waning days of the "Lochner Era" in American jurisprudence, which was characterized by contract-based theories which in many cases effectively denied workers the right to organize and bargain collectively.