

GENDER AND THE CONSTITUTION

August 9th is National Women's Day.

LOUISE OLIVIER, KwaZulu-Natal D.F.A. & Street Law Co-ordinator writes that the newly adopted Constitution protects and promotes gender equality.

THE CONSTITUTION OF the Republic of South Africa, as adopted by the Constitutional Assembly on 8 May 1996 constitutionally protects and promotes gender equality. The C.A. can be commended on the importance that the Constitution has attributed to gender equality and women's rights.

Indeed, the Legislature (National Assembly and National Council of Provinces), the Executive (Government of National Unity) and the Constitutional Court have taken a proactive approach in ensuring gender advancement. South Africa ranks seventh in the world for the number of women in its Parliament. Two out of the eleven Constitutional Court judges are women. This can be compared to the dismal record of the Supreme Court where out of a total of 147 judges, only four are women. A vital element of the new dispensation is its formal commitment to gender as well as racial equality.

The wording and interpretations of many of the sections in Chapter 2, the Bill of Rights, of the Constitution will have a great impact on gender protection and promotion. Section 8 of Chapter 2 deals with the application of the Bill of Rights stating that it binds the legislature, the executive, the judiciary and all organs of state. Furthermore, the Bill of Rights binds natural and juristic persons taking into account the nature and duty imposed by the right (section 8(2)). This section deals with the application of the Bill of Rights. In some countries, like Canada, the Bill of Rights applies to government law and actions only. It is not certain if the Constitutional Court will adopt a horizontal or vertical interpretation. The wider approach, i.e. horizontal application, will ensure that private individuals, citizens and organisations will be bound by the Bill of Rights. Such an application would be beneficial to women as the violation of women's rights which occur regularly in the private sphere would be addressed. Domestic violence, which occurs between private individuals and sexual harassment would then fall within the sphere of the Constitution. A National Coalition of Women survey states that in South Africa one in six women are beaten and one rape occurs every 37 seconds.

Section 8 states that the Bill of Rights applies to *all law* (my emphasis). It is clear that this applies to any legislation passed

by national and provincial bodies. However, what is not clear is whether unwritten customary law and common law are also subject to the Bill of Rights. The issue is crucial to many South African women, as customary law and common law is often discriminatory e.g. inheritance for a customary law wife.

It is submitted that the interpretation of the application clause adopted by the Constitutional Court should be a wide one so as to include customary law and common law.

The equality clause in Section 9 is a non-derogable right with respect to race and sex only. This means that if an Act of Parliament declares a state of emergency in terms of Section 37 the equality clause cannot be suspended when it deals with issues of race and sex. This provision illustrates the degree to which the Constitution upholds gender equality. Section 9(1) states that the state may not unfairly discriminate ... on one or more grounds, including (inter alia) gender, sex, pregnancy, marital status, and sexual orientation. The list is an exhaustive one and has extended upon the grounds laid out in the 1994 interim Constitution, with pregnancy and marital status being two additions. An example of the practical effect of such an inclusion is that schools will not be able to suspend or expel pregnant students, simply on the grounds of their pregnancy. Such action would be deemed to be unconstitutional.

The inclusion of the grounds of sex and gender have interesting repercussions for women. Sex is generally thought of in biological terms and gender in psychological terms. Therefore legislation which discriminates against women in the context of pregnancy would be sex-based discrimination, while discrimination against men or women in terms of their parenting roles would be gender based discrimination. This highlights the fact that not all difference between men and women are reducible to biological differences.

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The right to freedom and security of the person (Section 12) is an essential provision relating to women's rights. Societies subjugation of women relates to the security of the person through violence against women, reproductive health or the way pregnancy impacts on women's education and employment and hence socio-economic status. A person's

rights to freedom and security, Section 12, would also impact on the present law relating to marital rape. Our courts have adopted the approach that marital rape can occur only if the spouses are separated. Section 12 emphasises the importance of this right for women by specifically mentioning the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction and the right to security in and control over their body. This recognises a person's right to freedom of choice in determining their reproductive rights. The thinking of the Constitution drafters is further reflected in proposed legislation. The Termination of Pregnancy Bill legalises abortion on demand for the first trimester of pregnancy and with certain limitations and conditions for more advanced pregnancy.

Many pro-life advocates would argue that the right to life (Section 11) clause protects the rights of the unborn foetus. However, not all rights are absolute and the Constitutional Court can limit any right if such limitation is deemed reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and taking

National Co-ordinator of the Democracy For All Programme, MAWETHU MOSERY, believes that democracy education has been instrumental since the 1994 elections, in enhancing developments in South Africa.



DEMOCRACY EDUCATION IS about democracy values, human rights, the rule of law and co-existence or alternative dispute resolution. Democracy education has been vital since the 1994 elections in enhancing developments in South Africa. Therefore a new curricula is being developed for the new education system within the constitutional framework.

Democracy for All has been earmarked and tasked with formalizing democracy education in South Africa's new education system, a system that is based on the National Qualifications Framework (NQF). This NQF relies on input and outcome based learning and development and refers to essential outcomes and specific outcomes. Essential outcomes are those found in every learning area, whereas specific outcome is an end product of a specific learning area or learning process.

Democracy education fits in well within the new education system as it has four broad and basic components: a) democracy values/principles and practices; b) human rights; c) justice and rule of law; d) mechanisms to resolve disputes (ADR). These four areas meet and form 80% of essential outcomes thus filtering through all areas of learning in the new education curriculum. As a result of democracy education being 80% of essential outcomes it will have an impact on all learning areas and processes. Democracy education is also essential as part of the "Human and Social Sciences" area as much as it can be found in life orientation as a specific outcome.

The challenge D.F.A. now faces is to work with the Department of Education in developing the learning areas specifying essential and specific outcomes for democracy education. D.F.A. also has to prepare for the implementation and support of the new education system.

GENDER AND THE CONSTITUTION

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into account the nature of the rights. Thus it could be argued that the Termination of Pregnancy Bill is a reasonable and justifiable limitation on the right to life clause. Such interpretation would be left to the Constitutional Court if, and indeed when, the matter arises.

Section 187 of the Constitution makes provision for a Commission for Gender Equality with the objective to promote respect for and protect, develop and attain equality. It is important that this Commission, when established, has a clear mandate, is focused, financially viable and accountable. It must not reflect the problems of the other constitutional body, the Human Rights Commission which has idealistic objectives difficult to attain, little accountability and a very limited budget.

The provisions, in the Constitution regarding gender equality are impressive and commendable. However, they will remain lofty ideals unless a nationwide educational programme on gender equality is implemented by the Government.

UNISA SETS ITS FOOT ON THE DOORMAT

*Submitted by William Mpilo,
Street Law Co-ordinator at Street Law: UNISA*

THE UNIVERSITY OF South Africa has finally set its foot on the doormat of the disadvantaged communities in our country. For many years UNISA has been exploring the feasibility of launching a Street Law programme that can make the difference in the lives of the ordinary people of South Africa.

This year saw the UNISA dream come true. For the first time in the history of the university the Street Law programme has finally taken off the ground. The UNISA Law Faculty, hand in hand with the UNISA Law Students Association which is a voluntary students association, has finally decided to take the bull by the horns and face the challenge facing all South African teaching institutions viz: the dangers besetting an ignorant and apathetic society.

FACING THE CHALLENGE

With the birth of our new constitution which introduced the rule of law in our country, the UNISA Street Law pilot programme could not have come at a more opportune moment i.e. the dawn of the era of human rights in South Africa. It is in that respect that UNISA has decided to offer the democracy and human rights education as priorities in its programme for the year 1996.

This year 48 UNISA law students volunteered to assist in the programme. These students were trained as facilitators for two full days by the organisation of the Lawyers for Human Rights on the 24th & 25th of July 1996. The communities out there are very excited at the idea and they have shown a remarkable interest in the programme. This will no doubt constitute their first direct experience in human rights education. We hope that this will also pave the way for the Truth Commission's mission.

Two groups of facilitators will conduct workshops in eight areas in the North West and the Gauteng regions in August. These students are really looking forward to this first experience.

GOVERNMENT SHOWS INTEREST

Though, financial constraints and practical considerations limit our focus to school communities for this year, UNISA still maintains the original idea of servicing the wider spectrum of these communities. It is envisaged that this first step of the process will mark the beginning of a massive human rights campaign in South Africa.

The government has also expressed a keen interest in the UNISA Street Law programme as UNISA has students all over the country who have the potential to extend the delivery of the programme to even the remotest of grassroots levels. Clearly, ordinary people can only constructively participate in our democracy if they understand how the government functions, what their rights are and what their role is vis-a-vis the government.

THE TIME HAS COME

Hasn't the time come for all the Street Law offices in the country to rally for adequate resources needed to fulfill their key role of transforming the South African society into a truly democratic state?