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REPORT FOR CONSTITUTION COMMITTEE ON RESEARCH AT THE CITY UNIVERSITY OF NEW YORK (CUNY)

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Introduction.

I would like to begin by explaining my motivation for undertaking this study.As a member of the committee responsible for gender studies I have been concerned for some time now that beyond the rhetoric of constitutionalising women's rights, hardly any research has been done supporting our vision.In the past eighteen months I have tried to explore networking with women legal acadmics for the purpose of addressing the gender issue.

My findings are as follows;

1. South African academics are conservative. Women are no exception.

2. Feminist schorlaship is in its infancy in S.A. Accordingly,there is no substantial legal research available.

3. The scope of analysis of gender related problems is limited. This occurs notwithstanding the fact that most women academics recognise that the intersection of race and clas determines the lot of most women. There is no comprehensive framework to assess the interaction of these factors in the South African situation. This framework is never fully considered when contemplating the position of women in a Post - Apartheid constitutional dispensation[1].

Thus, for the above reasons the absence of an agreed strategic perspective on Gender led me to seek persons outside S.A, who are of the same mind as ourselves.

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1. See C. Albertine . Occasional paper on Women. Centre for Applied Legal Studies. University of the Witwatersrand. Johannesburg. 1992. Also The Draft Charter of Rights. Christina Murray et al. UCT. 1992.

I deliberately sought expert scholars of international repute dealing with gender issues. I then approached professors Rhonda Copelon and Celina Romany of City University of New York,to train me in the **methodology** of research commonly employed by critical legal scholars. I informed them that in the process of learning I would like to address pertinent constitutional issues.

Accordingly, when we drew up the research training programme we addressed all the issues in the current constitutional debate.

In my report, I will refer to some of these issues. I intend identifying the issues and then provide you with useful references, the idea of using qotes from these authorities is to demonstrate the appropriateness of material used as references, for the issues under discussion.

It is my hope that the report will be of help as we conceptualise our constitutional perspective.

In my view the authorities identified explode the myth of reliance on the exclusivity of negative rights as the determining factor to the justiciability of a Bill of Rights.

We need to advance sound legal theory in defence of our positions. We cannot defer answers to questions such as "justiciability" and" degree of specificity" in the drafting of the bill of rights. The release of the Charter for Rights by the U.C.T /U.W.C group requires us to respond promptly and appropriately to the document which is reallly an answer to our position.

For the profiles of Professors Copelon and Romany please see Annexure 1

SUMMATION OF WORK DONE AT CUNY

Data Collation Methods

1. Primary Sources

The A.N.C's draft bill of rights was used as the basis for the research. I took into account current debates taking place in S.A on the bill of rights. Four seminars were organised for the purpose of identifying issues, the composition of which is as follows:

a) Two of these seminars were attended by senior law students involved in Human Rights work. Most of these students were to assist me in my work.

b) One seminar was organised for the law professors. At the end of this particular seminar, some professors agreed to help, one such person is Jean G Zorn, who was in Papua New Guinea at the time when the present constitution of that country was being drafted. I must say that becouse of the limited time I had, I was not in a position to fully use the assistants that was on offer.

c) The fourth seminar was held at the Centre for Constitutional Development, where I met a number of anti-apartheid activists. Once more there was not enough time to truly explore possibilities of assistants. One positive outcome of this particular meeting is that, Kimberle Crenshaw an acclaimed black feminist scholar, attended the seminar and learned from my input about the constitutional issues under discussion in S.A and therefore managed to provide a useful critic of the A.N.C draft bill of rights at the New York A.N.C conference(November 1992).

2. Secondary Sources

Publications featuring gender debates were acquired and reviewed.

2. Issues Identified

It is here stated that a review of the greater text of the extracts as well as the arguments presented and reviewed must be read in the appendix.

I recommend that committee members should seriously read some of the articles I refer to and cite. Particular note should be taken of those writen by feminist scholars because they raise interesting issues. This factor is most strongly urged.

Whilst dealing with the content of a Bill of Rights I had to deal with conceptual issues such as implications in the distinction between positive and negative rights, the nature of a bill of rights, degree of specificity in the articulation of rights in a bill of rights costing of rights viz comparison between negative and positive rights. Competing interests in the hierarchy of rights and also whether women's needs are reflected in the rights discourse.

2.1 A Negative or Positive Constitution.

The question was whether a Bill of Rights can include both negative and positive rights.

I found that most of the critical analysis of the Federal Constitution and U.S.A state constitutions arise from cases involving gender, housing, education and health. Feminist scholars have contributed towards the rich source of American jurisprudence precisely, because the equality clause of the bill of rights has over the decades come under scrutiny as women try to claim the illusive right. In addressing the question of the content of a bill of rights I had to deal with conceptual questions such as the very nature of a bill of rights. I contrasted the parliamentary system with the system of judicial review and modern sytems which combine both.

I found the following readings instructive:

a) Laurence Tribe, **"The Idea of the Constitution: A Metaphormorphosis"[2].**

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2. Conference paper. Annual meeting of the Association of American Law Schools. Los Angeles.January 1987. See note 1 in the Appendix.

Lawrence is a liberal who on occasion has been critical of the narrow interpretation of first generation rights at the same time cautioning against reading too much into the constitution. Perhaps he finds the balance in his second treatise!. Contrast Tribe with William.

b) William W Van Alstyne is a critique of modern constitutions which embody social and economic rights. In his, **"The Idea of a Constitution as Hard Law"**, he extols the U.S.A bill of rights for brevity icluding only essential justiciable rights, contrasting it to some Latin American constitutions and former communist constitutions. He observes that they contain only "aspirations" and not justiciable rights[3].

c) Melanie Beth Olivier in her article;**"Human Needs and Human Rights:Which Are More Fundamental?"**, attempts to link social and economic rights to the known fundamental rights (Civil and Political Rights).[4] As indicated above, feminist sholarship has enhanced the development of jurisprudence in the U.S.A especially in the interogation of the rationale behind decisions on the equality cluase of the constitution.

d) Judy Scale Trent in her article; **"Black Women And The Constitution: Finding Our Place, Asserting Our Rights"**; she argues that black women are invisible in the constitution and motivates for the recognition of race and gender in the interpretation of the constitution[5].

e) Robin West examines the development of constitutionalism in the U.S.A. and distinguishes what she terms progressive and conservative constitutionalism [6].

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3. Conference paper. Annual Meeting of the association of American Schools. Los Angeles. January 1987. See note two in the Appendix

4. Harvard Civil Rights- Civil liberties. Law Review Volume 24. 1989. See note 3 in the appendix

5. Emlory Law Journal. Vol. 40. 1991. See note 4 in the Appendix

6. Michigan Law Review. Volume 88 ...641. February 1990 .See note 5 in the appendix

2.2 The distinction between negative and Positive Rights

The distinction between negative and positive rights is criticised by a number of scholars who argue that these rights are indivisible eg. right to life including health and food.

Melanie Beta Oliviero argues in her article " Human Needs and Human Rights: Which are more fundamental?" that these rights are indivisible[7].

It has been argued that the distinction has natured the conception that positive rights are an anti-thesis of negative rights. In my view sometimes the debates in South Africa invoke the distinction to weigh one category of rights against the other and such comparisons positive rights are seem as "suspect rights".

In dealing with the question of the `nature' of the bill of rights, I had to study the evolution and development of American constitutionalism Lawrence Tribe and Robin West were instructive in this regard. It is important however to explain that I found Robin West's artilce useful for a quick reference.

I also read critiques of the USA bill of rights such Susan Bandes in her article: **"The Negative Constitution: A Critique"** in which she advocates for state action;

Burt Neuborne in his: **"State Constitutions and the Evolution of Positive Rights"**, examines the failure of the negative rights constitution to address the needs of the poor. He advocates for the conclusion of positive rights in the consitution. The public/private divide in the rights discourse is an issue constantly raised by feminist scholars who argue that the equality clause in the bill of rights has been interpreted disadvantage women Celina Romany and Rhoda Copelon raise this matter when examining human rights instruments.

I also looked at concepts such disproportionate impact and affirmative action but only to the extent that they relate to the issues I have mentioned above.

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7. **see also Daniel a Faber: Playing the Baseline: Civil Rights, Environmental Law and Statutory Interpretation, 91 COLUM Rev 676, 678 Book Review.**

2.3 Institutional competence / Justiciability

After reading some articles on justiciability of positive rights I came to the conclusion that the agreement against inclusion of social and economic rights in a bill of rights on the basis of non justiciability is not pursuasive.

From a historic perspective, it would seem that during the course of constitutional development criteria for determining the contours of civil and political rights were established through judicial review. Procedural due process rights developed through the determination of the ambit of of negative rights. As a result of which negative rights have on occasion been interpreted to encompass positive rights. The determination of judiciably manageable standards is at the discretion of the judiciary in its interpretation of the constitution, hence uncertainty results from the shifting contours of the negative rights.

It is perhaps for this reason that Neuborn seems to argue for explicit articulation of positive rights in a bill of rights.[8].

2.4 Degree of specificity

This brings us to the point of "degree of specificity and actual inclusion of social and economic rights in a bill of rights. Admittedly the ANC draft bill of rights is too wordy and rather detailed. The style of drafting needs to be addressed for the final draft. Conceptually it meets modern jurisprudential standards. In the article of Burt Neuborn cited above a case is made for explicit articulation of social and economic rights.

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8. Rutgers Law Journal. Vol 20.. 881. 1989. See Appendix

2.5 **COSTING**

With regards to the costing of rights, I established that there are detailed studies which compare negative and positive rights. I however found articles which indicate that administrative costs for adjudicating civil and political rights are expensive, eg. the duty of the state to provide policing, protect witnesses, the right to counsel and whilst the right to equality is coached in negative terms; inherent in the rights is the duty of the state to protect people from discrimination. Thus inherent in the negative rights are obligations for state action and some of the actions the state may have to take might be costly.

There is an assumption of an improved quality of life, where the state intervenes to action on social and econimic rights. It can therefore be argued that ensuring such rights as health; education and subtantive equality, is an investment in human resources.

PHASE 2 OF THE RESEARCH

I may just add that we agreed that in the next phase of my research we will look at drafting negative rights so carefully that they include positive rights. I must remind the committee members that I only had one month within which to familiarise myself with the issues and to identify areas of research of broader constitutional issues & gender issues. I also had to learn research methodology so I did not have the time to address all the pertinent questions.

GENDER

a) I dealt with the following issues:

1) formal substantive equality;
2) women and Human Rights (see invitation)

I am working on the following papers;

a) A Conceptual Framework for the Charter for Women's Rights.

b) Constitutionalising women's rights.

The Women's League Policy Unit and the Women;s Coalition are interested in these papers. I have presented a draft of the first page at three seminars in South Africa. I need to develop it further for publication. I have also presented the draft second papers at a number of seminars already. I need to develop both papers.

I think the greatest benefit of my visit to CUNY was to improve my understanding of the current debates **in feminist jurisprudence** in particular the assertion by these scholars that the rights discourse does not necessarily encompass women. I first encountered this debate at a conference in Canada where expert feminist scholars at the University of Toronto at a conference I attended from 31st August - 2 September 1992. The conference entitled "Constitution on Women's International Human Rights", was organised to examine international instruments in preparation for the UN Conference on Human Rights due in 1993.

Rhonda Copelon in her article "Recognising the Egregrious in the everyday: Gender - Based Violence and Human Rights"; attempts to equate domestic violence to torture. The latter is embodied in the civil and political rights UN Convenant as a prohibited practice. The covenant is now part of customary international law in which torture is part of the framework of jus cogens. By deduction having equated domestic violence to torture she argues it is also a jus cogens.

Celina Romany on the otherhand, in her article, "Women as Aliens: A Feminist Critique of the Public/Private Disticion in International Human Rights Law", argues for the expansion of `principles and doctrines of International Human Rights Law to encompass women's needs. She argues that none of the principles or doctrines encompass women including social and economic rights. With regard to the latter she is supported by Prof Hilary Charlesworth of Australia, whos in her article "What are Women's International Human Rights", advances powerful agreements to prove that women's needs were not considered in the elaboration of social and economic rights, she argues that the covenant on social economic and cultural rights does not touch on the economic, social and cultural context in which most women live." It is thus necessary for women to influence the rights discourse.

CRITIQUE OF ANC DRAFT BILL OF RIGHTS

I subjected the ANC draft to a critical appraisal. A fuller text of the critique will be forwarded sometime in March, I attach hereto some of the preliminary remarks made by Prof Rhonda Kopelon and some of the students who were assisting me.

I wish to propose that the committee organises a working seminar maybe in April and invite some of our friends who have commented on our draft, so that we can have a final review of our document. I would like to invite the two women who have been assisting me at CUNY as well as others who are presently examining our documents.

The ANC Solidarity Conference recommended that CUNY be the clearing home for networking in constitutional research between ourselves and our USA friends. I welcome this because CUNY has a very pleasant working environment for outsiders.

CONCLUSION

My experiences at CUNY have been empowering.

I was touched by the humility and the readiness to help by my hosts. Because my visit was brief they suggested I return and adjusted their programmes to accommodate me. They are expecting me of January up unitl the end of February. I am hoping that cdes will react to my report and perhaps make suggestions which will enable me to follow up on more relevant issues.

APPENDIX

NOTES:

1.
The gist of this paper can be found in the following extracts; "...the Constitution is not and should not be reduced, to the expression of any supposedly coherent political theory or idea-to any "one grand tradition", to use Gerry Lopez's phrase. In its composition, as in its operation, the Constitution, has not been over our history, the projection of any unitary philosophy or vision."

"To say that the Constitution does not embrace anyone's theory of democracy or of moral philosophy is not to say that it would be possible or desirable to construe its terms in a disembodied way, without attention to the purpose and ideas that underlie and connect them." Lawrence sees the U.S.A constitution as representing conflicting interests in society in accordance with hitorical developements of that country. He says this in the following words; "...the constitution as a whole embraces conflicting, even radically inconsistent, ideas and visions."

2.
" The world is now full of written constitutions, of which ours is but one example and by no means in an obvious way the best..... It is characterised comparatively by its brevity. On its face, it does not explain itself nearly as elaborately or as well as many of the world's modern constitutions tend to do. Its mere seven articles and twenty - six amendments are far more lucid (and intergrated) for instance, than the 1977 Constitution of the Soviet Union or the still newer 1982 Constitution of the People's Republic of China, each of which is substantially fuller and significantly more elaborate than our own". He then argues that the American constitution is an example of real law which he calls hard law. "... the majority of the world's constitutions read better than our own, not merely because all are recent... but because even now most are to same extent hard law. They may ans do fail that idea in any several critical ways. Many are not hard law because they are simply not law as we understand in the United States. That is,they cannot be invoked in court and they cannot be used by judges to hold against legislative acts." This artcle lists other articles to enforcement of constitutions such as the appointment of judges, he calls this corruption in the selection of Judges such as when "party sycophants" are appointed and also the absence of security of tenure for the judges of most of these countries.

4.

"In the struggle to maintain a constitutional balance between human needs and human rights takes on particular importace in Third World setting. Social and Economic Rights emerge as central to there constitution of these countries' political structures. In the final analysis, human needs are indistinguisheable from human rights. The process through which needs become rights in these cases is an aspect of constitutionalism that is distinguished from the vehicle of legislative process which is the common means of addressing these concerns on Western constitutional systems."

5.

"..We the dispossessed, cling to the assertion of rights as our only source of protection in an overwhelmingly racist and sexist society"

6.

" ...Conservative constitutionalism has replaced liberal legalism in the court. A new progressive conception of constitutional interpretation has begun to replace the critical and deconstructive scholarship that dominated the dissenting discourse of the last decade. Over the last decade or so a number of ***progressive legal academicians,*** including Sunstein, David Strauss, Suzanna Sherry, Catherine McKinnon and Frank Michelman and joined by some ***critical and liberal scholars,*** such as Roberto Unger and Laurence Tribe- have begun to articulate yet another alternative , not only to to the mid - century legal understanding of constitutional interpretation, but also to the constitutionalism that emerged from the critical legal studies movements' powerful critique of liberal legalism during those same years". She futher says : " the alternative constitutional paradigm developed in the academic arena and not in the courts. Accordingly the theories that have eveolved are political."

8.

Burt Neuborn in his article **"State Constitutions and the Education of Positive Rights"**, observes as follows: "In retrospect, it was asking a great deal to derive positive rights with distributional implications from the Due Process and Equal Protection Clauses of the Federal Constitution. After all the text of the federal constitution says nothing about education, shelter, nutrition or health..... While innovative exercises in legal alchemy were able to transform the Equal Protection Clause into a de facto, substantive provision in negative rights areas like `travel', voting and speech using equality as a laever to establish substantive

flaws was for more difficult in the economic and social areas."

See also, **Shapiro v Thompson, 394 US 618 (1969)** on voting, **see also Dunn v Blumstein 405 US 330 (1972) and on `speech' see, Police Department of Chicago v Mosley, 408 US 92 (1972).** He concludes this point by saying that: "using equality as a lever to establish substantive floors was far more difficult in the economic and social areas."

ANNEXURE 1. Profiles of Rhonda Copelon and Celina Romany

Profiles of Celina and Rhonda

Both are consultants to the expert committee reviewing CEDAW for the 1994 Bejieng U.N conference. They are also consultants working with Latin American women's groups on the regional human rights instruments. Rhonda is currently working on an article on domestic violence wherein she argues that it can be classified as torture and therefore be classified as a ius cogens. Celina in her latest work, uses the discourse on PRIVATE/PUBLIC to argue for state intervention in bringing about true equality between the sexes. In the process she examines the concept of human rights. Her work is particularly relevant to the debate on whether social and economic rights should be constitutionalised.