

# Women and the Transition to Democracy in South Africa

CATHERINE ALBERTYN\*  
*Centre for Applied Legal Studies  
University of the Witwatersrand*

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## INTRODUCTION

In December 1993, after two years of intensive negotiations, the South African parliament ended white political domination by enacting an interim constitution. Opening the door to the first non-racial government in South Africa, this constitution enshrines the principles of liberal democracy and constitutionalism by establishing universal suffrage, an elected parliament, a regionally based senate,<sup>1</sup> a strong central government with nine regional governments,<sup>2</sup> an independent judiciary and a justiciable bill of rights. In establishing a legal framework for a democratic state committed to human rights, the interim constitution makes a distinct break from the apartheid past and affirms principles of democracy and equality developed over many years of struggle by the national liberation movement. It also represents a political settlement between two former political enemies: the National Party (NP) government-in-power and the African National Congress (ANC) government-in-waiting. It is, therefore, a negotiated agreement whose process and content were shaped both by a history of political struggle and by the immediate context of the political transition.<sup>3</sup> This political transition was in the end often legalistic and technical, overly dominated by lawyers, inaccessible to the majority of the population and largely forged through a top-down process of negotiation, bilateral meetings and political deals.

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\*BA LLB (UCT) PHD (Cantab) Senior Research Officer, Gender Research Project, Centre for Applied Legal Studies, University of the Witwatersrand. Thanks to Christina Murray, Michele O'Sullivan and David Everatt for their comments on previous drafts.

<sup>1</sup> The Senate is composed of ten senators from each of the provinces (section 48 of the Constitution of the Republic of South Africa Act 200 of 1993).

<sup>2</sup> A law passed by a Provincial legislature prevails over matters listed in Schedule 6 to the Constitution prevails over an act of the national parliament, unless the national law falls within the exceptions specified in section 126 of the Constitution.

<sup>3</sup> The transitional period refers to the period between the unbanning of the ANC on 2 February 1990 to the election held on 27-29 April 1994.

This article will consider the historical context as well as the transitional period and the process of writing the interim constitution to assess the extent to which they took account of the experiences, interests and demands of women in South Africa. There are, of course, both practical and theoretical questions about the use of the category 'women'. South African women are divided by race, class, culture, urban and rural situation, education, language and other variables. These divisions have shaped women's ability to participate in the transition. Although the issue of the representation of women is not canvassed in any theoretical detail; the question of which categories of women did participate, and which were excluded or marginalised, is addressed in this article.

Parts II and III examine the historical context to assess the extent to which the form and content of the national liberation and women's struggles influenced (a) women's participation in the political transition, and, (b) the inclusion of gender interests in the interim constitution. These sections pay particular attention to the meaning of equality in these struggles. Part IV describes the formation of the Women's National Coalition and analyses its role during the transition. Parts V and VI discuss the actual process of writing the interim constitution. Here the article identifies the limitations of this process and illustrates these through a study of one of the most bitterly fought battles in the process, namely, the attempt by the traditional leaders to exclude customary law from the application of the bill of rights. Part VII concludes the article by analysing the participation of women in the transition. In particular, this section considers the nature of women's legal and political struggles; the limitations and benefits of these struggles, and of constitutionalism and rights: and the prospects for ensuring equality for women under the interim constitution.

The next few years will doubtless cast a more searching light on the immediate past. However, if we believe that a constitution provides a political and legal framework that can be harnessed to promote equality and social justice for all disadvantaged groups, then we have to come to grips with the historical, theoretical and practical constraints that inform women's ability to do this. An understanding of the interplay between gender, law and power in the transition to democracy in South Africa will help not only to assess our approach to the writing of the final constitution in the next few years, but also to determine the legal and political struggles that will be necessary to obtain equality, particularly gender equality, in the future.

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## II THE HISTORICAL CONTEXT: STRUGGLING FOR EQUALITY AND DEMOCRACY

It is said that each country's constitution reflects the history of its people and their struggles. South Africa's interim constitution is a particularly good example of this. Despite the fact that it is the product of a negotiated settlement, its nature and content reach back to the principles and aspirations of the national liberation struggle enshrined in political manifestos such as the 1943 African Claims in South Africa, the 1954 Women's Charter, the 1955 Freedom Charter, the 1988 ANC Constitutional Guidelines and the ANC's 1990 draft Bill of Rights.<sup>4</sup> As an indigenous response to the peculiarly legal form of oppression of apartheid, the Freedom Charter is widely recognised as the first substantive document to provide a framework for a united, democratic South Africa. The Constitutional Guidelines and draft Bill of Rights represent more concrete attempts to give legal and constitutional form to the principles of this Charter. Although there are tensions and differences between these documents,<sup>5</sup> all seek to give substance to the principles of equality, democracy and social justice.

The general concept of equality expressed in these documents encompasses both political and economic equality. This insistence on the indivisibility of political rights and economic equality underlies the commitment to social justice and to a redistribution of resources to redress the political, social and economic inequalities of apartheid. As such, these documents challenge the abstract, formal equality of traditional legal thought. However, the general tendency in the documents to limit the meaning of legal equality to a section on 'equal rights', and to separate this from the more substantive social and economic claims, suggests that the concept of legal equality remains a limited one. This is discussed in more detail below.<sup>6</sup>

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<sup>4</sup> For a discussion of the historical and political reach of the Freedom Charter and African's Claims, see D Everatt 'The Freedom Charter in Historical Perspective' in N Steytler (ed) *The Freedom Charter and Beyond : Founding Principles Democratic South African Legal Order* (1991) at 21. For a discussion of the constitutional and legal themes in these documents and the Constitutional Guidelines see D Davis 'The Freedom Charter : A Challenge and a Bequest' in Steytler (ed) 1991 at 1. For a discussion of the Women's Charter, see C Walker *Women and Resistance in South Africa* (1982) at 156-164.

<sup>5</sup>See Davis *ibid* at 13-18.

<sup>6</sup>See at 8 - 10 below.

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From the late 1980's the concern with legal equality as 'equal rights' translated into a concern with human rights and the protection and advancement of political, social and economic rights that are found in the later documents. This reflects the political developments of the 1980's which saw support for a justiciable bill of rights in South Africa extend beyond the liberal legal establishment to both the ANC and the South African government.<sup>7</sup> The framing of legal, political and economic claims in human rights terms was thus a distinguishing feature of the period immediately before the unbanning of the ANC and of the transitional period itself. At a national level, a consensus emerged among the key players around a constitution based on a justiciable bill of rights. Political battles over the precise form of this constitution increasingly became legal debates over the place of socio-economic rights, affirmative action, the enforceability of the bill of rights and the balance of power between parliament and the courts.<sup>8</sup> This was expressed in at least six bills of rights<sup>9</sup> and then in the finer details of writing the interim constitution. To a large extent, therefore, the political leadership began to frame questions of redistribution and social justice in legal terms. With the

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<sup>7</sup> See Sachs, A. "A Bill of Rights for South Africa: Areas of Agreement and Disagreement", 1989 *Columbia Human Rights LR* 13.

<sup>8</sup> Hence the conflict between the need for (a) a multi-party democracy with reviewable state action through a justiciable bill of rights and (b) a strong central state to provide the social goods and services necessary to transform SA. The Constitutional Guidelines probably place the greatest emphasis on the need for a strong central government to deliver social and economic equality to all South Africans. While a bill of rights is said to guarantee fundamental human rights of all citizens, no mention is made of the role of an independent judiciary. This had to wait until the publication of the ANC draft bill of rights in 1990 which made provision for first, second and third generation rights, positive and affirmative action and provided for the enforcement mechanisms of a Constitutional Court and Human Rights Commission.

<sup>9</sup> These included the bills published by the ANC (1990), the SA Law Commission (1991); the Inkatha Freedom Party (1992), a group of progressive law academics from the Universities of Cape Town and the Western Cape (H Corder et al *A Charter for Social Justice* 1992), the South African Government (Charter of Fundamental Freedoms, 1993) and the Democratic Party (1993).

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onset of negotiations<sup>10</sup>, these debates intensified and shifted to formal round-table talks and behind-closed-door meetings accessible to a few.

Within civil society a range of social movements sought inclusion in the transitional process through right's struggles and campaigns for right's charters. Workers, the disabled, children's rights groups, gay and lesbian groups, people with HIV/AIDS, the church, women and others all engaged in struggles to have their rights recognised in the new constitution. The ability of these social movements to affect the negotiations' process varied according to their political strength and level of organisation, the nature of their demands, and the history and nature of their struggles. The remainder of this article discusses these issues in relation to women.

### IIIWOMEN AND THE STRUGGLE FOR EQUALITY<sup>11</sup>

The history of women's struggles in South Africa has been a struggle against both gender inequality and racial oppression. However, the dominance of race in the political and legal ordering of South African society has meant that struggles for gender equality have been divided on the basis of race, and have been subordinated to the struggle against racial oppression. Race and class divisions have differentially shaped the political consciousness of women. Thus white middle-class women's struggles have generally concerned issues of political equality and their legal status, while the political struggles of black women (and the few white women in the liberation struggle) have involved claims for political and economic equality within the transformation of the state.<sup>12</sup> It has only been in the immediate past, with the onset of the transition and the

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<sup>10</sup> Negotiations refers to the formal political negotiations about the form of post-apartheid South Africa. These took place in two phases: the Conference for a democratic South Africa (CODESA) during 1992 and the Multi-Party Negotiating Forum during 1993. See below at 22-27.

<sup>11</sup> This section relies on Walker (1982) for much of the history and interpretation of the Federation of South African Women and the Women's Charter.

<sup>12</sup> White women were given the vote in 1930, thereafter they engaged the state in struggles to improve their legal status. For example, the 1953 Matrimonial Affairs Act relieved white women of the worst disabilities that they suffered as minors under their husband's legal guardianship. These improvements extended to the 1984 Matrimonial Property Act and the 1993 Fourth General Law Amendment Law which removed the last vestiges of the marital power. However segregation and apartheid meant that

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breaking down of the racial divisions of apartheid, that equality for all women has been identified as an autonomous aspect of the achievement of democracy.

(1) *Equality and the 1954 Women's Charter*

The changing form and content of demands for equality by women have their roots in a differing social and political history. The 1950's saw an increased involvement by women and men in the political campaigns of the Congress Alliance<sup>13</sup> and by women in struggles against the pass laws in urban and rural areas.<sup>14</sup> The decade thus saw the emergence of a new women's movement<sup>15</sup> as women became politically active at grassroots level and the Federation of South African Women (FSAW) was established within the Congress Alliance in 1954. At the inaugural meeting of the FSAW women resolved to fight for

`equal rights with men in relation to property, marriage and children,..the removal of all

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changes in the subordinate status of black women were tied up with changes in the nature of the state itself. See Walker, 1982 at 145-151.

<sup>13</sup> This was an alliance of organisations within the national liberation movement: the ANC, the South African Indian Congress, the South African Coloured People's Association and the Congress of Democrats. Its campaigns included the 1952 Defiance Campaign (see Walker 1982 at 131-132) and the 1955 Freedom Charter campaign.

<sup>14</sup> See Walker at 129-131 and 189-235. The most significant political event of these struggles was the 1956 march on Pretoria by 20 000 women to protest the pass laws. In 1957 the Federation of SA Women estimated that about 50 000 women took part in 38 demonstrations in 30 centres against the pass laws. See Fine & Davis *Beyond Apartheid: Labour and Liberation in South Africa* (1991). However, these struggles always took place within the context of the national liberation struggle (S Hassim, 'Where have all the Women Gone? gender and politics in South African debates' Paper no. 36. Conference on Women and Gender in Southern Africa, Natal University, Durban, January 30 - February 2, 1990).

<sup>15</sup> The 'first wave' of the South African women's movement was the fight for the vote by the suffragette movement of the twenties. This movement was an early example of the dominance of racial concerns over gender solidarity. See C Walker, 'The Women's Suffrage Movement: The Politics of Gender, Race and Class' in C Walker (ed) *Women and Gender in Southern Africa to 1945* (1990).

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laws and customs which deny women such equal rights; the development of every child through free compulsory education for all; the protection of mother and child through maternity homes, welfare clinics, creches and nursery schools, in countryside and towns, through proper homes for all, and through the provision of water, light, transport, sanitation, and other amenities of modern civilisation.<sup>16</sup>

These were practical goals in a programme for the emancipation of women. They were incorporated into a Women's Charter that was adopted at the same meeting and which became the manifesto of the FSAW.

The Women's Charter was written by a very small group of women activists<sup>17</sup>. It was thus a particular view of the legal, social, cultural and economic position of women in the fifties, and included pragmatic demands to improve the lives of women, especially black women. As a political manifesto it sought to map out the direction that the leaders of the FSAW hoped that the organisation would take. In many ways it was a revolutionary document, however, its potential as a programme for the emancipation of women was diminished by both theoretical and political constraints.

Firstly, the Women's Charter sets out its demands through a theoretical lens that locates women within the family and in terms of their roles and responsibilities as mothers, however the sexual division of labour in the household is not questioned. For example, in a section entitled 'Women's Lot' the Charter states:

'We women share with our menfolk the cares and anxieties imposed by poverty and its evils. As wives and mothers, it falls on us to make small wages stretch a long way....It we who feel the cries of our children....It is our lot to keep and care for the homes....We know the burden of looking after children....We know what it is like to keep family life going in pondokkies or shanties.'<sup>18</sup>

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<sup>16</sup> From the Women's Charter which is reproduced in Walker at 281-282.

<sup>17</sup> Walker suggests that it bore the stamp of activists from the disbanded Communist Party of South Africa, Hilda Watts and Ray Alexander. She attributes the 'strong feminist streak' in the Charter to these women (at 156).

<sup>18</sup> Cited in Walker at 279.

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Although the identification of women as mothers is an important unifying theme, it is also a limiting factor in the formulation of the Charter's demands. These demands can be divided into (1) a claim for legal rights with men (legal equality), and (2) demands for social services and amenities to protect and sustain women's role as mothers. Thus women ask for equal rights with men `in relation to property, marriage and children, and for the removal of all laws and customs that deny women equal rights.'<sup>19</sup> These constitute claims for formal legal equality, namely, the identical treatment of women and men in respect of marriage, property and inheritance. These claims ignore the fact that actual equality with men may require differential treatment. The more substantive demands are not constructed as part of the claim for legal equality, but as demands for health, welfare, services and amenities for `the protection of mother and child'. In this way the call for legal equality is separated from claims for social and economic equality. The demand for maternity benefits or creche facilities is not seen as a call for equal rights or equality. At best it is a request for `protective legislation' to maintain women's role as mothers.<sup>20</sup> The concept of legal equality, therefore, is not one which can transform women's position in society.

Such limitations in the Charter are perhaps neither surprising nor unexpected in the context of the society and legal thinking of South Africa in the fifties.<sup>21</sup> Certainly the claim for equal legal status and equal treatment on the basis of race in South Africa was based on similar claims for identical treatment. Moreover, in so far as women were defined in terms of their roles as wives and mothers only, with little theoretical understanding of the material, social and cultural roots of women's inequality `as women'; it was unlikely, if not impossible, for a substantive understanding of legal equality to develop. What is both exciting and disappointing about the concept of equality in the Women's Charter is that it challenged, but was unable to overcome, the

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<sup>19</sup>See Walker at 281.

<sup>20</sup> See Murray & O'Regan in Steytler at 251.

<sup>21</sup> Walker writes that

`Since patriarchal ideology was still so deeply-rooted and largely unquestioned amongst many Congress supporters, contained within (the Charter) lay the seeds of potential conflict between the new women's movement and the male-dominated Congress Alliance' (at 157).

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limitations of formal legal equality. It called for equal (meaning the same or identical) treatment of women with men in the law, but in calling for social amenities and services such as maternity homes, welfare clinics and proper homes it recognised that this was not enough. The translation of this into a more substantive understanding of legal equality was only to occur several decades later.

A further limitation of the 1954 Women's Charter lies in the particular relationship between race and gender oppression expressed within it. On the one hand, gender and racial oppression were seen to be inextricably linked:

'Freedom cannot be won for any one section or for the people as a whole as long as we women are in bondage'.<sup>22</sup>

The demand for equality for women was squarely located within, and then subordinated to, the national liberation struggle. In so far as the struggle for the liberation of black women was linked to the transformation of the apartheid state, the linking of national liberation with women's liberation was sound. However, the Charter's admission that the national liberation struggle took 'first priority in the struggle for equality'<sup>23</sup> meant that a political and strategic concern with women's equality vis-a-vis men was lost as women were primarily mobilised for national liberation. This subordination of gender struggles to the national liberation struggle was not simply a matter of the leadership acting to suppress women's struggles, although there may be examples of this.<sup>24</sup> It was as a result of deeply rooted patriarchal attitudes and values, structured by the material inequality between men and women, and often held as much by women themselves as by the men.<sup>25</sup> The result was that there was little if no space to address issues of gender inequality, either within the movement or within the oppressed communities themselves.<sup>26</sup> This meant that social movements committed to women's issues did not

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<sup>22</sup>Women's Charter, 1954 cited in Walker at 281.

<sup>23</sup>See Walker at 156-160 and 279-282.

<sup>24</sup> It has been argued that the participation of women within the national liberation struggle was ultimately subject to gender and class control by the ANC leadership. This is best illustrated in the anti-pass struggles of women which were called off by the ANC leadership in 1958. See Fine & Davis at 179-182 and Walker at 216-225.

<sup>25</sup>See Walker at 157.

<sup>26</sup> See L Beall, S Hassim & A Todes 'A Bit on the Side? Gender Struggles in the

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develop and the practical goals of the Women's Charter were not pursued.

The subordination of gender and class to race, as well as the limited nature of equality demands, were repeated in the Freedom Charter. The FSAW had co-ordinated the drafting of a document entitled 'What Women Demand' for inclusion in the Freedom Charter. These demands were incorporated in the Freedom Charter with the exception of a call for basic social amenities to be provided in the reserves. Although this would have improved the lives of impoverished rural women, it was rejected because of political opposition to the reserve system as a manifestation of apartheid.<sup>27</sup> Moreover, the content of the Freedom Charter reflected the marginal political status of gender inequality and the dominance of race over gender. For example, although the Freedom Charter called for all people to be equal before the law<sup>28</sup>, it referred only to the repeal of 'laws which discriminate on the grounds of race, colour or belief'.<sup>29</sup>

These features of the Women's Charter and Freedom Charter reflected and influenced a mode of struggle that had far-reaching implications for the meaning of, and struggle for, gender equality. Because gender equality was not seen as a separate claim, it did not develop politically or theoretically. As a result, there was little or no analysis of women's oppression and the political and legal content of equality remained vague and undeveloped. Furthermore, no social movement committed to the advancement of women was able to develop<sup>30</sup>. It is thus not surprising that many of the

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Politics of Transformation in South Africa' (1989) 33 *Feminist Review* 30 for a discussion of this trend in the seventies and eighties.

<sup>27</sup> See Fine & Davis at 150-152 and Walker at 182-183.

<sup>28</sup> 'All shall be equal before the law!' Freedom Charter, 1955.

<sup>29</sup> There are many other examples in the Freedom Charter, see Murray & O'Regan at 250-252.

<sup>30</sup> Between the fifties and 1990, no movement committed to challenging and eradicating the oppression of women by men, developed in South Africa. The women's organisations that existed were generally either committed to achieving legal equality for (mostly) white middle-class women, part of the national liberation movement (for example the Natal Organisation of Women affiliated to the United Democratic Front), or non-political groups concerned with church and self-help activities (such as manyano's

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claims and demands of the 1950's remain valid today.

(2) *The ANC Constitutional Guidelines*

One of the consequences of the political and theoretical marginalisation of women within the national liberation movement was illustrated three decades later when the ANC's 1988 Constitutional Guidelines,<sup>31</sup> widely recognised as the most important political document since the Freedom Charter, possibly paid even less attention to the situation of women than its predecessor. Although the Guidelines confirm the need for a bill of rights to 'guarantee the fundamental human rights of all citizens, irrespective of race, colour, sex or creed', its provisions refer to material inequality on the basis of race only. For example:

'the state and all social institutions shall be under a constitutional duty to eradicate race discrimination in all its forms...and...to take active steps to eradicate, speedily, the economic and social inequalities produced by racial discrimination'.<sup>32</sup>

The result was that while the Guidelines seek to address the material, ideological, economic and cultural underpinning of racial oppression, gender inequality is dealt with separately in a single clause on legal equality:

'Women shall have equal rights in all spheres of public and private life and the state shall take affirmative action to eliminate inequalities and discrimination between the sexes'.<sup>33</sup>

It may be argued that the inclusion of a clause on women was an important step, especially in its recognition of the need for women to have rights in the private sphere. However, the wording and location of the clause demonstrate little appreciation of the material and ideological underpinnings of gender oppression and provide little on which

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and self-help groups, particularly within African communities). One of the largest women's organisations was the Inkatha Women's Brigade which organised women but was essentially conservative in that it did not 'empower women or in any way equip them with the capacity to challenge social structures which oppress them or even less the men who may keep them subordinate' (Hassim, *ibid* at 9).

<sup>31</sup> *The ANC's Constitutional Guidelines for a Democratic South Africa*, 1988. Hereinafter referred to as 'the Guidelines'.

<sup>32</sup> From the Guidelines.

<sup>33</sup> Article W of *The Guidelines*.

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to base political and legal claims for substantive gender equality. Dorothy Driver has exposed the particular status of gender in the language of the Constitutional Guidelines.<sup>34</sup> She argues that this version promises no more than that women shall have equal rights with each other. A legal reading perhaps allows an interpretation of equal rights 'with men', but only in a formal sense of the same or identical rights. In this context the reference to affirmative action is one which allows women to 'catch up' to the standard of men. At best, the Guidelines encompass a formal concept of equality which does not take account of the particular social and economic inequalities of women's lives. As such, they demonstrate the continuing poverty of the concept of legal equality.

(3) *From resistance to negotiation politics*

From 1986 key constituencies<sup>35</sup> in South Africa began to engage in 'talks' with the ANC-in-exile. In February 1990, the government unbanned the ANC. These changes in the political climate were to alter the subordination of gender to the national liberation struggle. One of the earliest signs of this was the response of women in the ANC to the Constitutional Guidelines in mobilising around its peremptory treatment of women. In 1989, a top-level ANC seminar was held in Lusaka to discuss the position of women in the Guidelines.<sup>36</sup> Thereafter a number of conferences were held both in the country and outside resulting in a growing debate and set of recommendations on constitutional and political issues and gender.

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<sup>34</sup> D Driver published various versions of this article: 'Women and language in the ANC Constitutional Guidelines' in Idasa, 1990 *Towards a Non-sexist Constitution: Women's perspectives* and 'The ANC Constitutional Guidelines in process: A Feminist Reading' in S Bazilli (ed) 1991 *Putting Women on the Agenda* at 82-102. The latter is the fullest version.

<sup>35</sup> During the eighties the ANC met with a number of delegations from South Africa including representatives from business, the parliamentary opposition (the Democratic Party), the Church, white student organisations and (secretly) members of the government.

<sup>36</sup> The ANC in-house seminar was organised by the Constitutional Committee of the ANC Women's Section and the South African Studies Project on 'Gender and the Constitution', Lusaka in 1989.

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For example, the Malibongwe Conference held in Amsterdam in January 1990 brought ANC women in exile together with women from inside the country.<sup>37</sup> At the conference a wide range of issues concerning women was discussed<sup>38</sup>, but perhaps one of the most important statements came from women in the ANC to the effect that the struggle for gender equality should be an autonomous aspect of the national liberation.<sup>39</sup> According to the ANC's Frene Ginwala:

‘The ANC would not be true to its principles and values if it did not address the question of the emancipation of women within the ANC, the liberation movement, and in post-apartheid South Africa.’<sup>40</sup>

Ginwala acknowledged the previous failure of the ANC in this regard, suggesting that it may even have weakened the struggle by limiting the involvement of women.<sup>41</sup> The conference's ‘Programme of Action’ called for building of a national women's movement within the country in the context of a ‘united, non-racial, non-sexist, democratic South Africa.’<sup>42</sup>

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<sup>37</sup> The following conferences were held after the Malibongwe Conference: a Lawyers for Human Rights conference called ‘Putting Women on the Agenda’ in Johannesburg in November 1990; and a National Consultative Workshop on ‘Gender Today and Tomorrow - Towards a Charter of Women's Rights’ organised by the Constitutional Committee of the ANC and the Centre for Development Studies and Community Law Centre, University of the Western Cape, Cape Town in November 1990.

<sup>38</sup> Papers were delivered on health, education, culture, law, media, employment, violence, the family and general theoretical and discussion papers on women's oppression. They illustrated the extent of research and discussion within the country.

<sup>39</sup> B Mabandla ‘Changes in South Africa - Advances for Women?’ in J Kerr (ed) *Ours by Right - Women's Rights are Human Rights* (1993).

<sup>40</sup> Frene Ginwala (1989) ‘Formulating National Policy regarding the Emancipation of Women and the Promotion of Women's Development in our Country’. Unpublished paper delivered at the Malibongwe Conference.

<sup>41</sup> See Ginwala at 1.

<sup>42</sup> See the ANCWL paper *Women United in Action for a Non-racial, non-sexist,*

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Legal and constitutional issues were part of the conference agenda. Frene Ginwala strategically seized the opportunity to deliver a key paper that (1) called for changes to the Constitutional Guidelines to ensure that race and gender were dealt with in a similar way<sup>43</sup> and (2) identified issues for the future post apartheid constitution. These included demands that: <sup>44</sup>

- \*the preamble contained a clause explaining gender oppression and its impact on society;
- \*a constitutional duty was placed on the state to ensure racial and gender equality, in addition to an equality clause;
- \*the constitution protect women from cultural practices that discriminated against them;
- \*the constitution recognise reproductive rights;
- \*gender and race equality 'trump' other rights; and
- \*women were able to participate in law-making and enforcement and in writing the constitution.

The ANC was unbanned in South Africa in February 1990. Four months later in May, the National Executive Committee (NEC) of the ANC made a landmark policy statement acknowledging that the emancipation of women had to be addressed 'in its own right'. It announced that the Constitutional Guidelines would be amended to categorise South Africa as an 'independent, united, democratic, non-racial and non-sexist state' and that urgent consideration was being given to the formulation of a policy to 'advance and ensure the emancipation and development of women.'<sup>45</sup> Such a policy would include the development of a programme for including women's interests in a

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*democratic South Africa* at 5 and the resolutions of the Programme of Action under the heading *Women United*. From the papers of the Malibongwe Conference, 15-18 January 1990, Amsterdam.

<sup>43</sup> In particular, her paper called for racism and sexism to be dealt with in the same way, and for the Guidelines to be re-evaluated to ensure that they did not entrench patriarchy.

<sup>44</sup> See Ginwala at 6-8.

<sup>45</sup> *Statement of the National Executive Committee of the African National Congress on the Emancipation of Women in South Africa* May 2nd 1990.

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future constitution.<sup>46</sup> The May statement represented a substantial shift in ANC position on women. It was the first official acceptance of the independent nature of women's liberation. It was also significant in its acknowledgment of the material, cultural and ideological context of gender oppression and facilitated a far more sophisticated policy and strategy on gender in the mass democratic movement than previously.

This shift in the ANC's policy was partly driven by pressure from within the organisation.<sup>47</sup> However, it was also made possible by the different political context afforded by the legality of the organisation and by the shift from liberation to negotiation politics. These changes in the political context not only affected the ANC but saw the emergence of a range of new social movements and organisations within civil society, including the Women's National Coalition.

#### VWOMEN UNITING AROUND EQUALITY AND WOMEN'S RIGHTS - THE WOMEN'S NATIONAL COALITION

An important strand of the ANC's May 1990 statement was its call for women, particularly the ANC Women's League (ANCWL), to take the lead in creating a non-sexist South Africa and to initiate a national debate for a Charter of Women's Rights to

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<sup>46</sup> Here the statement recognised the need to protect gender equality in the constitution by ensuring that 'laws, customs, traditions and practices which discriminate against women shall be held to be unconstitutional' as well the importance of the delivery and enforcement of equality. In respect of the latter the ANC recognised the need both for the state to 'take appropriate measures to ensure the principle of gender-equality' and for an accessible legal system and a representative judiciary to help women enforce their rights.

<sup>47</sup> ANC women had learnt from the experience of other countries, seeing that their sisters in Zimbabwe, Mozambique and Namibia had not benefitted equally from national liberation. Other post colonial have also demonstrated that national liberation does not mean an end to sexual oppression. See for example, S Urdang 'The Last Transition? Women and Development in Mozambique' in 1983 28/29 *Review of African Political Economy* 8 on Mozambiquan women, H Seymour 'Obstacles to Women's Participation in the Development Process' 1986 *Journal of African Marxists*, 8, 75 on the Nigerian experience and generally, R Howard 'Women and the Crisis in Commonwealth Africa 1985 *International Political Science Review* 6,3.

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elaborate and reinforce

`our new constitution, so that in their own voice women define the issues of greatest concern to them and establish procedures for ensuring that the rights claimed are made effective.<sup>148</sup>

The Charter would involve

`millions of women directly in the process of determining how their rights would be protected in a new legal and constitutional order.<sup>149</sup>

The ANC's view of the Charter in this statement linked the mobilisation of women with the identification by women of their needs and concerns, and the translation of these into rights for inclusion in the new constitution. Central to this strategy was the development of a rights-based women's movement in South Africa. The development of this movement was initiated by the ANCWL although it soon gained a momentum of its own.

On 27 September 1991, the ANCWL hosted a meeting of about 40 organisations to discuss the possibility of women coming together to draw up a Women's Charter. At this meeting it was apparent that many women's organisations shared a concern over (1) the general nature of gender oppression; (2) the entrenchment of the elimination of racism and sexism in the new constitution; (3) the participation of women in the constitutional negotiations; (4) the protection of women's rights in the constitution beyond the mere declaration of equality between women and men; and (5) the uniting of women's groups in a campaign for a Charter of Women's Rights and for any other constitutional provisions that were necessary to entrench equality for women.<sup>50</sup> This initiative appeared to respond to a need amongst women to define an agenda to track their way through the period of negotiation politics and constitution making in which they

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<sup>48</sup> *Statement of the National Executive Committee of the African National Congress on the Emancipation of Women in South Africa* May at 4.

<sup>49</sup> *Statement of the National Executive Committee of the African National Congress on the Emancipation of Women in South Africa* at 4.

<sup>50</sup> These issues were set out in a letter dated 7/11/1991 from an ANC Women's League member and member of the interim national committee, Mavivi Manzini. It was written on behalf of the interim committee after the initial meeting and sent to women's organisations.

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confronted the reality of gender discrimination and exclusion at every step. What these women had in common was the need to fight against exclusion and for the legitimacy of their participation as women and their claims for equality. Although many of the women's organisations which participated may have defined the content of these issues differently, the shared exclusion from the political process and the mutual concerns of principle expressed in the call for equality and women's rights provided sufficient impetus for the development of an alliance of women in the Women's National Coalition (WNC).

The WNC was launched on 25 April 1992. Its membership consisted of 70 national organisations and eight regional coalitions. Each regional coalition was made up of regionally-based organisations. This grew to 92 national organisations and thirteen regional coalitions over the next two years. The WNC brought women together across the racial, political, language and cultural divide with member organisations as diverse as the South African Communist Party,<sup>51</sup> the Congress of South African Trade Unions (Cosatu),<sup>52</sup> the Vroue Landbou-Unie,<sup>53</sup> the National Party, the Rural Women's Movement and the Business and Professional Women's Club. At the time that it was formed, its primary role was to co-ordinate a national campaign for the development and education of women which will (1) acquire and disseminate information about women's needs and aspirations and (2) unify women in formulating and adopting a Charter to entrench equality for women in the new constitution.<sup>54</sup> It was thus the first broadly based organisation in South Africa that was committed to addressing the inequality of women.

In essence, the role of the WNC was twofold. On the one hand it engaged in a political campaign that sought to mobilise and educate women at **grassroots** level around issues of concern to them. On the other hand it sought to influence the **national** political process of writing a constitution. At the centre of both of these roles was a

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<sup>51</sup>South African Communist Party.

<sup>52</sup>The Congress of South African Trade Unions.

<sup>53</sup> The Women's Agricultural Union was essentially a white, Afrikaner women's organisation.

<sup>54</sup> From the constitution of the Women's National Coalition, section 2.

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participatory research project and campaign that sought to elicit women's demands and experiences for inclusion in a Women's Charter. In engaging the women of South Africa through writing a Charter, the WNC sought both to build a social movement, and, as that social movement, to be effective in national politics. At both levels rights were an important part of the campaign. Firstly, they were tools around which women would mobilise. Secondly, they were to be legal and constitutional guarantees that would help to ensure equality for women.

*(1) Mobilising South African women around equality:*

Charter campaigns have traditionally been used by the national liberation movement in South Africa to mobilise people and groups around political aims.<sup>55</sup> The Women's Charter campaign of the early nineties was no different as it sought to mobilise women under the banner of equality and women's rights. In this, the WNC was engaged in the task of building a women's movement. This was not to be easy. Although it could capitalise to some extent on the political and organisational experience of women involved in the national liberation and anti-apartheid struggles and in various types of organisational work, the WNC nevertheless faced the challenge of building a social movement of women and organisations with little common history and experience. It thus sought to unite women in a society that had been divided by race and class. Added to these political difficulties were those of resources - limited time, money and personnel.<sup>56</sup>

In an attempt to build unity, the WNC sought to be inclusive and representative in all its structures and activities. It also sought to mobilise women around broad issues and slogans. It was here that 'equality' and 'women's rights' proved to be important mobilising devices. In this sense, rights constituted an important political resource<sup>57</sup> as

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<sup>55</sup> See Everatt at 21: 'The ANC and its allies were (and are) unique amongst comparable organisations in using the production of documented statements of principle as tools of mobilisation and organisation.'

<sup>56</sup> See the Convenors' report to the National Conference of the WNC, 25-27 February 1994.

<sup>57</sup> S Scheingold (*The Politics of Rights: Lawyers, Public Policy and Political Change* 1974 at 204-5) argues that 'Rights are no more than a political resource which can be deployed...to spark hopes

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they provided a set of broad principles and concepts which allowed women to mobilise without necessarily confronting the differences between them. This was essential to the success of the WNC as both its mobilising potential and its political power were dependent on its ability to mobilise and speak for women as women. However, it did mean that the WNC tended to avoid conflict and the existence of differences in rhetoric and practice. In other words, the longer term need among women to address these differences was subordinated to what was seen as the immediate political need to build a movement and to influence the national constitutional process.<sup>58</sup>

In mobilising women around equality and in seeking to include women's demands in a Charter, the WNC sought to construct an understanding of equality that took account of the social, economic and cultural reality of women lives. In this way both the campaign and the Charter were part of a feminist project to develop a substantive understanding of equality in the constitution and the law.

*(2) Involving women in the constitutional process*

The task of ensuring equality for women in the new constitution was a central goal of the WNC. However, the effective translation of women's claims for equality into constitutional provisions and legal rights was a process that was initially not clearly thought out by the leadership or understood by the majority of the WNC membership.

The initial view of many women in the WNC was that the Charter would ensure equality for women by being included in the new constitution. There appeared to be a common understanding that the attachment of the Charter to the constitution would grant women effective and enforceable legal guarantees and rights. In other words,

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and indignation. Rights can contribute to political activation and organisation, thus planting and nurturing the seeds of mobilisation...'

<sup>58</sup> The best example of this is the dispute concerning the bills published by the government on women during 1993. Many women wanted the WNC to take a public statement in support of the bills, but the majority wanted the organisation to reject the bills. Members of the steering committee were active in campaigns both in favour and against these bills. The WNC avoided taking an official position. Indeed it was unable to do so. Many women in the WNC were frustrated by this inability to take a political stance.

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rights were viewed as not merely a political resource, but as a guarantee of a substantive benefit. This common understanding was increasingly challenged by a second view that the Charter should be a political document guiding a range of political and legal strategies towards equality for women.<sup>59</sup> It was this view that was eventually accepted by the WNC as a starting-point for the Charter at its conference in February 1993.

It is perhaps not surprising that it was the more marginalised and oppressed groups and regions, including working class and rural women,<sup>60</sup> who insisted that the Charter should be a legally enforceable document entrenching and guaranteeing their rights in law. In making this demand, they made very specific claims, such as a call for six months of maternity leave.<sup>61</sup> This demonstrated both the power and the danger of rights for oppressed groups. On the one hand the rights campaign of the WNC had mobilised women and given them a public voice which allowed them to articulate their experiences and demands. On the other hand, the translation of (for example) particular

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<sup>59</sup> This view of the Charter as part of a package of structures, mechanisms and strategies for women's equality was expressed by the author at a conference on National Machinery in Durban, December 1992 ('Choices in Structural Mechanisms to Empower Women in a Future Democratic Government', unpublished paper, Conference on Structural Mechanisms to Empower Women in Future Democratic Government, University of Natal, Durban, 4-7 December 1992). It was supported at this conference. It had previously been implicit in a document produced by the Caucus on Law and Gender in Cape Town ('What could a Women's Charter be and what could it be used to achieve?', COLAG, April 1992). It was set out in some detail in a document by members of the Legal Working Group produced for the National Council meeting in August 1993 ('The Status of the Charter: Option Five' by C Albertyn, R Murphy, N Pillay & L Zondo, unpublished discussion paper, July 1993) and was repeated in a document by convenor Frene Ginwala for the National Council meeting of November 1993 ('Option 7').

<sup>60</sup> This was apparent from the reports of regions and organisations at the National Conference of the WNC held in February 1994.

<sup>61</sup> This demand was made by Cosatu at the National conference of the WNC, 26-28 February 1994.

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class and/or race-based sets of demands into the abstract and general language of rights and equality had masked both (a) the class and race origins of the claims, and (b) the technical nature of entrenching and implementing them in practice.

In so far as the interim constitution was concerned, the political negotiations ultimately moved more quickly than the collection of women's demands and the writing of the Charter. As a result neither the Charter nor the research was available for the interim constitution. However, many women did not want to lose the opportunity to influence this national process. Women delegates at the constitutional negotiations requested assistance from the WNC. It was decided that the WNC would set up a Negotiations Monitoring Team to monitor the negotiations and to provide reports and information to the member organisations of the WNC. The monitoring team would not so much act on behalf of the WNC<sup>62</sup> as facilitate a process whereby member organisations could themselves engage in mobilisation of their membership around issues and in lobbying the parties in the negotiations process. In this way the WNC sought to influence the national process. The extent to which it was possible for women to influence this process is discussed below.

#### VNEGOTIATING THE CONSTITUTION - THE PROCESS<sup>63</sup>

At the first round of constitutional negotiations at the Conference for a Democratic South Africa (CODESA) in 1992, there were very few women among the delegates.<sup>64</sup> Several women expressed their opposition to this exclusion both publicly

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<sup>62</sup> This would have not have been possible given the inclusive and representative nature of the WNC.

<sup>63</sup> This discussion is based on the author's participation in the process as a member of the WNC Monitoring Group and as a member of the Gender Research Project, Centre for Applied Legal Studies writing submissions, briefing and consulting with the Rural Women's Movement on the issue, briefing the Women's Caucus in the MPNP and attempting to discuss the issue with members of the Technical and Ad Hoc Committee on Fundamental Rights. It is also based on discussions with others involved in the process, including ANC delegate Mavivi Manzini, Transkei delegate Nomsa Jujula and WNC monitor, Elsabe Wessels.

<sup>64</sup> There were 23 women among the more than 400 delegates from political parties (*Natal Witness* 7 March 1992). For an account of the GAC at CODESA see Friedman,

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and within their parties.<sup>65</sup> The working committee of CODESA also received an unprecedented number of letters of protest from the public. These protests resulted in the establishment of a Gender Advisory Committee (GAC) to advise on the 'gender implications' of CODESA's terms of reference and the minutes and decisions of the management committee and working groups. Although the GAC had limited powers, its appointment was a symbolic, but brief, victory for the political participation of women.

CODESA dissolved before the final report of the GAC was considered. The next round of constitutional negotiations in the form of the Multi-Party Negotiating Process (MPNP) saw history repeat itself with the appointment of a minimal number of women delegates and Technical Committee<sup>66</sup> members. Ironically the main demand of the GAC had been for the inclusion of women in the process and structures of the transition. The exclusion of women was again taken up by women, resulting in a decision that each political delegation to the Negotiating Council should have one woman delegate, and later, that each technical committee should have at least one woman member.<sup>67</sup> It was a decision that was crucial to the participation of women in

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S. *The Long Journey: South Africa's Quest for a Negotiated Settlement*, 1993 at 129-138.

<sup>65</sup> For a discussion of this see Murray and O'Regan 'Women's Rights' in *South Africa Human Rights Yearbook 1992*. See also Friedman at 129.

<sup>66</sup> The Technical Committees did all the drafting and preparation of reports and legislation. There were seven Technical Committees on Constitutional Issues, Violence, Fundamental Rights during the Transition, the Independent Media Commission and the Independent Broadcasting Authority, the Repeal of Discriminatory Legislation, the Transitional Executive Authority and the Independent Electoral Commission.

<sup>67</sup> A seminar to discuss the exclusion of women was convened by the Gender Research project of the Centre for Applied Legal Studies on 15 March 1993. This was attended by members of the defunct GAC. At this meeting a resolution was taken to call for the GAC to be included in the MPNP as a Technical Committee. Women thereafter put pressure on their political parties. The ANC initially called for the delegations to be expanded to consist of one negotiator and two advisors (instead of one negotiator and one advisor), one of the three to be a women. This was jeered at the Negotiating Council when put forward by Cyril Ramaphosa of the ANC. The women then caucused

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the political transition. As each delegation in the Negotiating Council consisted of two delegates and two advisors (without speaking rights), it meant that 50% of the delegates at the Negotiating Council were women.<sup>68</sup> However, there remained many problems and obstacles to the full and equal participation of women in the processes of the MPNP.

Firstly, the delegations consisted of political parties and governments<sup>69</sup> only. These delegations sat on the Negotiating Council, which was the decision-making body on the MPNP, and nominated the experts who sat on the various Technical Committees. Although each delegation was bound to include a woman delegate, some did not do so at all. Others appointed a token woman in a non-speaking capacity. Moreover, there was no representation of women per se. This meant that the promotion of gender issues was dependent on the willingness and ability of women and others to raise and defend them. Some women delegates did not raise these issues; others were

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among themselves and the IFP Women's Brigade suggested that all delegations be expanded to include one woman delegate who would have full voting rights. This was accepted by the Negotiating Council.

The second battle occurred when the lists of members of the Technical Committees were published. There were almost no women in the lists and two of the most important committees had no women on them. Of course, the subsequent appointment of women to these committees did not necessarily mean that gender concerns were considered by them. Indeed, it was only in the committees concerning the electoral process and the transitional executive council that the presence of women had a significant impact.

<sup>68</sup> The Negotiating Council was responsible for the day-to-day negotiations and decision-making. As set out in the text, two delegates (one of whom had to be a woman) and two advisors made up the negotiating teams. The final decision-making body was the Plenary which met from time to time to endorse the final versions of the various bills and the interim constitution. The delegations to the plenary consisted of 10 delegates. Women (no number specified) had to be included in the delegation. From the *Standing Rules of Procedure* of the MPNP.

<sup>69</sup> With the exception of the delegation of Traditional Leaders (see below at footnote ) and the ANC which was not, at that stage, a political party.

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constrained by a combination of their status within their parties and the difficulties of raising gender questions in an unsympathetic environment.<sup>70</sup> Lack of experience and of technical legal expertise were also obstacles that faced some of the women delegates.<sup>71</sup>

Secondly, it was difficult for the wider constituency of women to influence the process either through the political delegations or in the Technical Committees. The Technical Committees were particularly important in determining what went before the Negotiating Council. Their reports formed the basis and substance of the interim constitution and the legislation which accompanied the transition. Although the Technical Committees were technically bound to follow the instructions of the Negotiating Council and the political parties in drafting these reports; in reality they had enormous power in deciding the content of their reports, and consequently, in deciding which submissions and comments (of organisations outside of the MPNP) they would consider and include in their reports.

With very few exceptions<sup>72</sup>, these Technical Committees paid little or no attention to gender in their reports. It was therefore necessary to attempt to influence these reports from outside the MPNP. However, the process made it difficult to do so. Although the reports were ostensibly in the public domain, they were embargoed until released in the Negotiating Council. If the Negotiating Council made a decision on the report, the matter was closed (unless a delegation could be persuaded to re-open the matter). If a decision was delayed or referred back to the Technical Committee, it

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<sup>70</sup> One of the delegates, Martheanne Finnemore, conducted a survey of delegates' perceptions of women delegates in the MPNP. This is reported in (1994) 20 *Agenda: A Journal about Women and Gender* at 16-21.

<sup>71</sup> Finnemore (at 16) notes that most of the male delegates were lawyers or politicians and most of the women were from caring professions like education, social work and nursing. This clearly had an impact on the differential experience of men and women, the gendered political culture and the ability of the delegates to participate in the technical legal debates.

<sup>72</sup> The Committees on the Transitional Executive Council and the Independent Electoral Commission.

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became possible to comment on the report until such time as it was superseded by a second (and thus embargoed) report.

Within the constraints of this process it was possible to make written submissions to the Technical Committees. The legalistic and technical nature of many of the issues limited the ability of women's and other social organisations to make interventions. Where written submissions were made, they required extensive informal lobbying and outside support if they were to receive attention. However, lobbying was made difficult by two factors. Firstly, many of the key decisions in the MPNP were taken in closed bilaterals which, almost without exception, excluded even women delegates. In so far as these bilaterals were a primary locus of decision-making, this was a key source of exclusion. Secondly, there were powerful informal networks within the political parties, the Technical Committees and in the MPNP as a whole which were dominated by men and thus tended to exclude women. In reality, it was extremely difficult, if not impossible, for any social organisations to participate formally or informally in the process.

In other words, the political significance of the presence of women delegates at the MPNP<sup>73</sup> was tempered by several levels of marginalisation and exclusion in the processes of the MPNP. This was compounded by a variety of additional factors, including a lack of gender consciousness at the MPNP; the inexperience of the women delegates; and the difficulties women faced in participating fully in the formal and informal debates and networks (the MPNP was described by more than one woman as an 'old boy's club'). Finally, women were not sufficiently organised and developed as a social movement to place significant pressure on the process. This was partly a result of a history which had marginalised women's struggles and women's issues and subsumed them under the national liberation struggle. By contrast, workers (and Cosatu) who had been organising for nearly twenty years outside of the national liberation struggle, were able to force their concerns on the MPNP in a much more powerful way.<sup>74</sup> Women did not have this level of political or economic influence.

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<sup>73</sup> Finnemore points to the positive influence that women made at the MPNP. In particular, gender issues were raised that would otherwise not have been and (some) of the male delegates came to appreciate women's participation.

<sup>74</sup> Cosatu was able to mobilise 100 000 workers to march to the World Trade Centre, where the MPNP was taking place, in protest against the constitutional

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Despite these problems, women did influence the constitutional negotiations. The nature of this impact, and the extent to which women had to fight to have their voices heard, is perhaps best illustrated by the dispute over the inclusion of customary law in the bill of rights.

#### VINEGOTIATING THE CONSTITUTION - THE WOMEN AND THE CHIEFS

During the debate on the bill of rights in August 1993, a member of the traditional leader's delegation,<sup>75</sup> Chief Nonkonyana, objected to the equality provisions in the bill of rights, stating that, as a traditional leader, he did not support equality for women.<sup>76</sup> The Chief's demand that customary law be excluded from the bill of rights was linked to a second claim for the recognition of the status and powers of traditional leaders.<sup>77</sup> Both of these claims brought the traditional leaders into conflict with women fighting for the principle of gender equality to be entrenched in the interim constitution.

However, the traditional leaders were seen to constitute an important source of political support for both the ANC and the government. Their claim for the exclusion of

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entrenchment of the right to lockout. Although the workers did not achieve the removal of the right to lockout (as a result of a complicated set of events in which the organisation's lawyers themselves had conceded the right in the first place), they were nevertheless able to get sufficient publicity to get the issue reconsidered.

<sup>75</sup> The only delegations at the MPNP which were not political parties or governments were the provincial delegations of traditional leaders. These delegations had been brought into the talks to resolve the conflict that arose when Chief Buthelezi of the Inkatha Freedom Party (IFP) tried to have the Zulu king accepted as a delegate. As this would have effectively given Buthelezi three delegations (IFP, the Kwazulu government and the Zulu king) and opened up claims by other traditional leaders, the matter was resolved by allowing the constituency of traditional leaders to participate on a provincial basis.

<sup>76</sup> 'Equality for Women? No Thanks.' *Sunday Times* 8 August 1993.

<sup>77</sup> This was set out in a submission to the Constitutional Committee, the TEC Committee and the Negotiating Council by the Traditional Leaders - 'Joint Position Paper concerning Role of Traditional Leaders' 13 August 1993.

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customary law from the bill of rights, and particularly the equality clause, was not dismissed outright, but an attempt was made to find a compromise position. This immediately constructed the issue as one of conflict between two extreme positions held by 'the women' and 'the chiefs'. On the one hand women pointed to the discrimination that women suffer under customary law and tradition and argued that it was untenable that the equality guarantee would not extend to the majority of black women. On the other hand the chiefs claimed to be fighting to maintain a popular traditional way of life in the face of western value systems and the destruction of apartheid and colonialism.<sup>78</sup> However their real concern appeared to lie in the application of the equality clause to the accession to chieftainship<sup>79</sup> and their continued status as chiefs.

In an attempt to find a compromise between these two positions, the matter was referred to a committee of 'experts'.<sup>80</sup> The informal instruction given to the writer at the time was to find something that could be 'given' to the chiefs, such as the exclusion of succession to chieftainship from the equality clause. The 'expert' reports were unanimous on the fact that customary law discriminated against women, but they differed on the constitutional consequences of this. Only one submission was

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<sup>78</sup> Chief Nonkonyana said in a newspaper interview at the time:

'Tradition has survived the schizophrenia of the migrant labour system. People who uphold their culture will not abandon it because they live in Sandton or a shack elsewhere' (*Saturday Star*, 21 August 1993).

<sup>79</sup> Chief Nokonyana said in a newspaper interview that

'my fear is that my son can be successfully challenged for my throne by my daughter, because the Bill says that all forms of discrimination - and it is emphatic on gender - should not be permitted. So now my daughter, who is the first born, can take my son to court and I have no doubt that my son would some second' (*Saturday Star*, 21 August 1993).

<sup>80</sup> Once more a battle for the inclusion of women had to be fought over the constitution of this committee. The appointment of three men (two professors and a judge) again led to protest and resulted in the subsequent appointment of two women. The committee was asked to comment on the impact of the bill of rights on the law of succession and inheritance, marriage and family law, and the authority of chiefs.

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unequivocal in its conclusion that customary law should be made subject to the bill of rights.<sup>81</sup> The Technical Committee on Fundamental Rights then drafted a compromise clause which became known as 'clause 32'.

The compromise clause was opposed on all sides. The traditional leaders felt that it gave too much away and the women delegates (particularly within the ANC), who continued to lead opposition to the clause in the apparent absence of support from their parties, believed that it compromised the right to equality for all women. Feeling themselves to be increasingly beleaguered in their parties, the women delegates began to work through the Women's Caucus<sup>82</sup> and the WNC to garner support and introduce external pressure on the issue. Within the Women's Caucus, attempts were made to persuade the women of parties who were supporting the chiefs<sup>83</sup>. This was relatively successful. Outside the MPNP, attempts were made within the WNC to lobby and protest the issue. The Rural Women's Movement, who had been briefed on the issue, sent a strong statement to the MPNP. Various other women's organisations made submissions to the MPNP. A small protest was held by women from the Northern Transvaal.<sup>84</sup>

The claim made by all women's organisations was a simple one. It stated that equality was indivisible. All women should be able to claim equality through the bill of

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<sup>81</sup> The submission by the writer and Thuli Madonsela of the Centre for Applied Legal Studies. The remaining reports appeared to favour a moratorium on the matter (Judge Olivier of the South African Law Commission); more consultation with the 'man-in-the-rural homestead' because of the 'state of confusion' that would result from the application of the equality clause (Professor Mqoke of the University of the Transkei), and constitutional recognition for the application of customary law by consent and a case by case review by the courts of the discrimination (Professor Dlamini of the University of Zululand) aspects of customary law.

<sup>82</sup> This was a caucus of women delegates in the MPNP.

<sup>83</sup> Princess Stella Sicgau of the Cape Traditional Leaders delegations had already made her support of the women's position known. When the matter was finally debated, she refused to participate as she disagreed with the position of her delegation.

<sup>84</sup> 'Women's Struggle still far from over' *The Star* 7 December 1993.

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rights. To exclude customary law from the bill of rights was to exclude the most oppressed and marginalised groups, namely, rural women. Thus not only should equality apply to all women, but it should trump claims to culture and custom that justified discrimination against women. The practical demand was for the removal of clause 32 and the insertion of an equality trump. The framing of the issue as an equality claim, together with the fact that it did not give rise to a conflict of interests between different groups of women, meant that it received widespread support from women's organisations. However the technical and elitist nature of the MPNP, which promoted the participation of political parties and legal experts rather than social organisation, meant that it was difficult to translate this support into effective opposition to the clause.

Ultimately, therefore, the public opposition from women's organisations was small, if vociferous.<sup>85</sup> It was to have little direct impact on the MPNP although WNC monitor, Elsabe Wessels, argues that the intervention of the WNC and the creation of a monitoring team was a significant move.<sup>86</sup> Prior to the involvement of the WNC, the delegations had not been conscious of any organised constituency of women, even within their own parties. The presence of the WNC filled this gap and placed a moral pressure on some of the parties, especially the ANC, to respond to a women's constituency. Even if the issue did not achieve a high media profile, there was a new consciousness of gender issues among some of the delegations at the talks.<sup>87</sup>

In so far as the nature of the negotiations process meant that the power lay with political parties and not in civil society, perhaps the most important development in respect of the customary law issue occurred when women in the ANC finally persuaded

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<sup>85</sup> It was also not unanimous. For example, the Western Cape region of the Women's National Coalition sent in a submission that a two-year moratorium should be imposed on the application of the equality clause to customary law. This was subsequently withdrawn.

<sup>86</sup> Personal discussion with Wessels.

<sup>87</sup> This growth of consciousness of gender issues is recorded by Finnemore in her survey. However she does not suggest any substantive reasons for this beyond the fact of participation by women.

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their party to support the removal of clause 32.<sup>88</sup> The ANC then took the matter to a bilateral meeting with the government where agreement was reached on the removal of clause 32. However the battle was not yet won. Negotiations continued with the traditional leaders delegation up to the final day of the MPNP, with new versions of clause 32 being drafted by the Ad Hoc<sup>89</sup> and Technical Committees in a last ditch effort at compromise. It was clear that both the Technical Committee and Ad Hoc committee were taking little or no account of submissions by women's organisation. These experts were largely unresponsive to the views of (mostly women) lawyers who disagreed with them. They also used their status as 'experts' to dismiss the opposition of the women delegates.<sup>90</sup>

Final agreement as to the removal of clause 32 was reached by the Negotiating Council within hours of the meeting of the Plenary which accepted the constitutional package of the MPNP. Even then it was a victory by default as the traditional leaders decided to withdraw from the compromise and ask for a blanket protection for 'cultural rights' in the Bill of Rights. This move provided the necessary impetus for the Negotiating Council to agree to the complete removal of clause 32. A last minute attempt to introduce an equality trump was opposed by (male) legal experts who assured the women that this already existed in the bill of rights.<sup>91</sup> This is not the case.<sup>92</sup>

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<sup>88</sup> This arose out of a meeting of women delegates, ANC women and lawyers in November 1993 at which a submission was discussed which would deal with the outstanding issues relating to gender and the bill of rights. The discussion was eventually translated into a submission of the ANC Emancipation Commission which was used to assist in persuading the ANC negotiators of the importance of the issue (personal knowledge).

<sup>89</sup>The Ad Hoc Committee was established to resolve political disputes in respect of the bill of rights.

<sup>90</sup> From discussions between the writer and some of the women delegates.

<sup>91</sup> Discussion with ANC delegate Mavivi Manzini.

<sup>92</sup> Although equality is a central principle in the Bill of Rights and in the Constitution as a whole; there is no clear statement that the equality clause 'trumps' the right to culture (section 31). Nor is it clear that the limitations clause (section 33) will necessarily be interpreted in such a way as to allow all legislative limitations on the right to culture in

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## VI CONCLUSIONS - WOMEN AND THE TRANSITION

In considering the participation of women in the transition, this article has traced the recent history of women's struggles, the emergence of a rights-based social movement committed to gender equality (the Women's National Coalition) after the unbanning of the ANC in 1990, and the nature and scope of participation by women, both as delegates and as a social movement, in the writing of the interim constitution. It has also discussed the changing legal concepts and political demands for equality in the Women's Charter of 1955 and by the WNC in the early 1990's. The underlying assumption of this narrative has been that the nature and scope of the struggle for gender equality, including its legal forms and theoretical bases, have been shaped by the changing character of the state and political struggles, particularly the national liberation struggle.

With the interim constitution in place, it is apparent that women have made significant gains in the struggle for gender equality. Foremost amongst these achievements was the presence of women as delegates in the MPNP. Other important accomplishments centred on matters of principle and content. Thus women succeeded in obtaining an equal commitment to race and gender equality in the preamble<sup>93</sup> and the constitutional principles.<sup>94</sup> The use of non-sexist language throughout the constitution is another instance of successful intervention by and on behalf of women. In so far as the content of the Constitution was concerned, the inclusion of equality rights in the bill of rights was never in dispute. However, the form which they took and the

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the interests of equality.

<sup>93</sup> The preamble speaks of the need to create 'a sovereign and democratic constitutional state in which there is equality between men and women and people of all races'.

<sup>94</sup> These are the principles that will guide the writing of the final constitution by the democratically elected government. The first principle proposes a 'democratic system of government committed to achieving equality between men and women and people of all races'. The third principle states that '(t)he Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.

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status of the equality guarantee in the bill of rights were issues which had to be negotiated, defended and fought for by women and other groups. Here the energy and resources of women were consumed by the battle over customary law and the equality clause. As a result, there was less or no intervention by women's organisations on such important issues as the wording of the equality clause,<sup>95</sup> the status of affirmative action, the horizontal application of the bill of rights<sup>96</sup>, the inclusion of a clause which would ensure that equality trumped other rights<sup>97</sup> and effective enforcement mechanisms.

In the end, the Interim Constitution, with its justiciable bill of rights, facilitates the equal participation of all in the new order by providing a framework for pursuing equality and human rights both politically and through the law. Equal participation, in this sense, is also the achievement of the long battle to remove clause 32: it offers to women a constitutional basis for challenging inequality in customary law in the courts and in the national and regional parliaments<sup>98</sup>. By thus facilitating women's involvement in the political processes and collective choices of the new society the constitution extends political equality to all women in principle. However it cannot address the practical obstacles to political participation, nor can it guarantee the achievement of actual social and economic equality.<sup>99</sup>

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<sup>95</sup> The concern here was to find a wording that best facilitated a substantive interpretation of equality by the courts.

<sup>96</sup> Some intervention were made on this issue. However, the bill of rights is not probably not directly applicable to private actors, although it may be applicable to unwritten customary law and the common law (section 7(2) read with section 33(2)), which provides a bridge to extending the ambit of the equality clause to private actors.

<sup>97</sup> See above at 34.

<sup>98</sup> Indigenous law is one of the areas of competence of the provincial legislatures.

<sup>99</sup> Here the South African transition had many elements of a transitional pact described by O'Donnell and Schmitter in their study on states which have undergone a transition from authoritarianism to democracy (G O'Donnell, P Schmitter & L Whitehead *Transitions from Authoritarian Rule : Comparative Perspectives* (1988)). The authors identify three steps in a transitional process: liberalisation, democratisation and socialisation. **Liberalisation** involves the extension of a general range of civil liberties such as freedom of speech, movement and association to groups and individuals to

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It may be argued that constitutionalism and rights provide the necessary framework and tools for the attainment of substantive political, social and economic equality by women. If rights are to be used effectively in this struggle, then we need to recognise their limits at the same time as we seek to transform them from abstract concepts to political and legal weapons that can be used to achieve social justice. Schneider has argued that women's experience with rights in the USA has shown a dialectical relationship between rights and politics and has revealed both the benefits and limitations of rights.<sup>100</sup> Rights claims by the women's movement in the USA were part of a larger political process of consciousness-raising, mobilisation, political organisation and the articulation of a political vision. This process did not end when a rights claim was enshrined in the law. On the contrary, new issues and questions arose about the content, limits and implementation of the legal right. In this way, legal struggles were connected to broader political struggles for equality. However, Schneider recognises that rights cannot perform the task of social reconstruction alone. 'Rights...can only begin to help people organise themselves, identify with larger groups', and confront the entrenched and systemic obstacles to real equality. For example, equality claims soon bring women against the 'persistence of separate spheres of work and family divided along gender-based lines, and the tenacity of women's responsibility for child-rearing'.<sup>101</sup> The radical redefinition of the divisions between the public and the private, and the restructuring of work and family, that this entails means that the task of

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which they had previously been denied. **Democratisation** involves the extension of citizenship and the participation and representation of all in political processes and collective choices of all in society. **Socialisation** involves the delivery of social and economic equality.

A transitional pact is 'an explicit but not always a publicly explicated or justified agreement among a select set of actors who seek to define (or better to redefine) the rules governing the exercise of power on the basis of mutual guarantees for the vital interests of those entering into it (at 37)'. Although it involves the extension of political rights to all (democratisation), it does not involve the achievement of social and economic equality (at 12).

<sup>100</sup> 'The Dialectic of Rights and Politics: perspectives from the Women's Movement' in 1986 *New York University Law Review* 589.

<sup>101</sup> Schneider at 650 & 651.

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social reconstruction requires a wide variety of transformatory strategies and interventions.

One of the tasks for women in South Africa is to ensure that the interim constitution, with its rights framework, is not used in a way which restricts rather than furthers the goal of gender equality. Rights and equality have already played an important role in mobilising women within the WNC. The need to transform rights and to imbue them with a 'women's content' was also implicit in the strategies of the WNC and its attempt to involve women in drawing up a Women's Charter. However, the infusion of political and legal discourse with rights claims, policy formulations<sup>102</sup> and legislative programmes that reflect women's experiences and interpretations remains one of the most important tasks for the women's movement in South Africa. Unless women are able to achieve this, their victories will be few and short-lived. The Women's Charter, which was finalised in April 1994, could play an important role here. Yet, as Schneider's work suggests, all of this needs to take place within a vision of social reconstruction that addresses the material bases of women's inequality. The need to create this long-term vision, and to develop short-term political and legal interventions that advance rather than frustrate this vision, is perhaps one of the biggest challenges facing women in South Africa.

Finally, there is a unique opportunity of a second chance of writing a Constitution within the next two to five years.<sup>103</sup> Although this process will inevitably be constrained by the 'permanence of the temporary', namely, the establishment of institutions and structures, the development of legal precedent and the entrenchment of vested interests under the Interim Constitution; there will be opportunities to 'improve' the current constitutional framework. In doing this, we should heed both the lessons of our history and our developing vision of the future.

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<sup>102</sup> Particularly important here is the need to ensure that the Reconstruction and Development Programme of the new government reflects the needs and experiences of women, especially poor and rural women.

<sup>103</sup> The Interim Constitution will last for a period of up to five years. During this time, Parliament will constitute itself as a Constitutional Assembly to draw up the 'final constitution' for South Africa.