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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 4
FUNDAMENTAL RIGHTS

**PARTY SUBMISSIONS &
TECHNICAL COMMITTEE OPINION:**

- "Everyone"
- "Universally Accepted Fundamental Rights"
- Nature and Application of Bill of Rights

- ACDP

AFRICAN CHRISTIAN DEMOCRATIC PARTY

SUBMISSION TO THEME COMMITTEE FOUR/ BLOCK ONE

WHICH RIGHTS QUALIFY AS UNIVERSALLY ACCEPTABLE FUNDAMENTAL HUMAN RIGHTS?

The western heritage of the rights culture may be traced back to its birth and development by Christian law scholars of the canon law era (11th through 13th Centuries AD), by medieval Christian theologians and by civil law teachers working in a Christian intellectual framework.

The rights mentioned in the Bible, which these scholars founded their teachings upon, are "unalienable rights" - rights of the person, which are God-given and which a person is not permitted to transfer or abdicate from.

This concept of rights, as a God-given, "immutable" (incapable of restriction and reduction by government or other persons) and "universal" (belonging to every person, regardless of circumstance or situation), has no parallel in either Greek or Roman philosophical thinking - it is of Christian origin and was rejected by Renaissance humanist and Enlightenment rationalists of the seventeenth and eighteenth centuries.

What is said in this paper must be read in conjunction with the heading and the ending of the paper on the use of the term "everyone" in Constitutional Principle II.

Many Christians probably are of the opinion that human rights and the concept of universally accepted rights are anathema in Biblical context. The Bible, however, clearly pronounces itself on the subject of rights and, in fact, proposes a complete hierarchy of rights to envelope and govern society as a whole.

In the Hebrew Old Testament the word *mishpat* is normally translated with justice and likewise in the New Testament, where *exousia* is translated with authority. What follows are headings, rather than lists of the species of those rights the PARTY views as universal and fundamental.

Surely the most basic human right must be the right to life. So basic, in fact, that relatively little constitutional writing was done on this subject in jurisdictions across the globe. The viewpoint of the PARTY in this respect is clear - the human being has the right of life from the moment of conception to the point of natural death. This right is subject always to the death penalty after due process of law.

The right to freedom and security of the person may almost be said to be of the same rank as the right to life, because the former is virtually useless without the latter.

From a Biblical perspective, it is believed that, if Jesus Christ makes one free, he is free indeed and as such, Christians hold the right to freedom and security of the person in high esteem. It is indeed an aspect of respect for the person, the individuality and uniqueness of the bearer of this right that numbers it as being among one of the most basic and widely accepted rights. This right should not be limited by the wording of the new constitution; the PARTY suggests that any attempt to list aspects of this right must not have a limiting effect.

The right of Freedom of association and expression are so inherently a part of the right to security that it needs to be seen as an expression of the former, rather than simply separate rights. In this respect, it is good to keep in mind that the wording of the American Declaration of Independence mentions, among the rights with which the Creator endowed human beings are: life, liberty and the pursuit of happiness. Even if done unintentionally, the grouping has the effect to show that rights are always exercised conjunctively with and in relation to, other rights.

The right to property and the contractual freedom that goes with it are important, especially in a country where discriminatory laws made it impossible for constituent portions of society to own property.

This right shall also include the use of enjoyment thereof, without any person being subject to forfeiture of his property, except in satisfaction of a lawful civil judgement obtained by due process of law.

The right to be secure in one's person and property against unlawful search or seizure, shall not be infringed.

The right of expression, including artistic freedom, speech and the press, shall not be infringed. Obscene defamatory and profane expressions are licentious and an abuse of this right. That which is obscene, including pornographic expressions offensive to chastity or purity, is licentious and punishable by civil government.

That which defames, including slanderous and libellous expressions, must be subject to civil redress.

The right of movement and association, including petitioning the government to redress grievances, shall not be abridged and should not be subject to licensing, permits or registration.

The right to freedom of religion shall not be infringed and no person shall be compelled, nor suffer before the law on account of his religious opinions. All people shall be free to profess and evangelise and by argument, to obtain their opinions in matters of religion and this shall not affect their civil capabilities. This right shall not permit the commission of anti-social, deviant, immoral or criminal acts.

All persons have an immutable and inalienable right to emigrate freely from the country of their origin to settle in another. This right also exists in the country of origin between constituent parts thereof.

A husband and wife are endowed with the exclusive non-delegable right to conceive and bear children without any infringements. This shall not, however, permit or compel abortion or infanticide.

Parents are endowed with the original right to educate their offspring and minor legal dependants. Parents are free to use one or more agents of their choice to assist in exercising this right. Licensing, permits or registration should not impair this right.

Both husband and wife and their children of majority, are endowed with the original right to care for their spouse or parents respectively and use one or more agents of their choice to do so, except civil government Euthanasia shall never be permitted or compelled.

The right to transfer property by gift shall not be impaired, nor be subject to taxation.

The right to exercise jurisdiction over one's property shall not be infringed, except by prior consent of the owner(s). This shall not, however, limit judicial resolution of disputes between individuals involving nuisance and trespass or other relevant common law remedies.

All power of suspending laws or the execution of laws, without consent of the representatives of the people are an abuse of authority and shall not be permitted.

The immutable right of every person to pursue any lawful vocation shall not be infringed, regulated or controlled. Civil government shall grant no privilege or franchise to any business, occupation, profession or persons.

One day of the week will be designated for a Sabbath rest, when no commercial or civil government undertakings, except vital functions, shall be permitted.

No forfeiture of any rights shall occur except after a wrongful act, an appropriate trial or proof procedure, a judgement of liability of guilt and a lawful punishment, incarceration or levy. This is referred to in this document as due process of law.

No slavery or slave trade shall be permitted.

No torture shall be allowed. This shall not include incarceration on lawful grounds after due process of law.

Everyone shall be entitled to due process of law in civil as well as criminal matters.

All persons from conception to natural death shall be equal before the law and to the protection thereof.

All persons have the right to an effective remedy for acts violating their constitutional fundamental rights and to be assisted in readily obtaining these remedies.

No one shall be subjected to arbitrary arrest, exile or detention without trial.

Everyone has the right to an adequate standard of living that would ensure the health and well-being of each individual within the family nucleus.

Disabled persons shall be entitled to all rights and shall be entitled to have an equal chance in exercising them.

In the exercise of one's rights and freedoms, every person shall be subject only to such limitations as are determined by law, solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of Biblical moral principles, public order and general welfare in a particular society.

AFRICAN CHRISTIAN DEMOCRATIC PARTY

SUBMISSION TO THEME COMMITTEE FOUR / BLOCK ONE

SUBMISSION ON THE USE OF THE TERM "EVERYONE" IN CONSTITUTIONAL PRINCIPLE II

POSITION OF THE UNBORN

The term 'everyone' includes all human beings, from conception to natural death. As such, even an unborn child should be afforded the protection given it's elder peer.

It is to be argued that even international human rights documents afford the unborn child fundamental human rights and, especially, the right to life.

Chief among these are the American Convention on Human Rights and the Declaration on the Right of the Child, 1959, which respectively refers to conception and the pre-natal condition of the child.

In January 1993, South Africa became signatory to the Convention on the Rights of a Child, 1989, which states that a child is any person under 18 years of age and thereby implicitly also from conception.

Reference of this article is also reflected in Section 30 of the Interim Constitution but it stops short of including the safeguard that, children have rights "before, as well as after, birth."

Our disregard for this provision, as stipulated in the above documents on Human Rights, can lead to a breach of our understanding as a country to conform to international human rights agreements and conventions. We the PARTY submit that an amendment be made to insert the missing clause in order to conform with the spirit of the child's full rights as described. Surely, to arbitrarily deny a child any of these rights, because of his or her age, is prohibited even in the language of our own Interim Constitution.

Arguments levelled against the granting of rights to unborn persons do not take into account the growing body of evidence in fetology, that proves life not to begin at birth, but that birth is a mere change in environment for the unborn person. As medical science progresses, boundaries are shifted as to sophistication and life support techniques and, thus, viability of existence outside of the mother's womb will eventually disappear as a test for when life is said to begin.

Not to include unborn persons among those entitled to the universal and fundamental human rights, that we as born members of the species esteem, is to negate the very values that we, as a society hold dear. The mere fact that these individuals are unable to claim their rights for being observable, is the same as to deny the unseen particles in quantum physics or the spectrum of electromagnetic waves and the like, just as non-sensical.

If the new Constitution is to be inclusive - giving everyone in South Africa a fair equal chance, we must not be seen to deny the existence of a few million people - that is the estimated number of unborn persons whom we want to deny legal rights.

AFRICAN CHRISTIAN DEMOCRATIC PARTY

SUBMISSION TO THEME COMMITTEE FOUR / BLOCK ONE

SUBMISSION ON THE USE OF THE TERM "EVERYONE" IN CONSTITUTIONAL PRINCIPLE 11

THE POSITION OF JURISTIC PERSONS

The interim Constitution, in Section 7 (3), states that the nature of the individual rights should dictate their applicability to juristic persons.

The western heritage of the rights culture may be traced back to its birth and development by Christian law scholars of the canon law era (11th through 18th Centuries AD), by medieval Christian theologians and by civil law teaches working in a Christian intellectual framework.

The message of the Bible, which these scholars founded their teachings upon, was "unalienable rights" - rights of the person, which are God-given and which a person is not permitted to transfer or abdicate from.

This concept of rights, as a God-given immutable, (incapable of restriction and reduction by government or other persons,) and "universal", (belonging to every person, regardless of circumstance or situation), has no parallel in either Greek or Roman philosophical thinking - it is of Christian origin and was rejected by Renaissance humanist and Enlightenment rationalists of the seventeenth and eighteenth centuries.

In this, the ACDP then disagrees with the ruling of the German Federal Constitutional Court's ruling that the concept of fundamental human rights is based on the liberty of the individual as a natural person.

Despite the traditional reluctance in South African jurisprudence to cloth juristic person with human characteristics, it is submitted that, granting of rights to legal personae, will be acceptable, provided that the activities of such juristic persons be of a nature to that will enable the particular right to be applicable. A pertinent example will be that religious bodies will have freedom of religion as an entrenched and justiciable right.

It must, however, always be kept in mind where these rights originated and as such, justice, righteousness and mercy, are to be the lenses through which anyone wishing to apply them must, out of necessity, view them. God, in His all-encompassing wisdom, entrusted these to Man when He clothed the very first human beings with the authority to rule and to dominate the rest of creation. To create a position where these rights benefit the licentious and the unruly and to the detriment of the obedient and innocent, it will be a matter of time before the Supreme Creator steps in to establish His order and original authority.

SUBMISSION BY THE ACDP THEME COMMITTEE 4, BLOCK ONE

THE NATURE AND APPLICATION OF A BILL OF RIGHTS

Biblical Scholars in the eleventh through thirteenth centuries AD used the concept rights in the Bible (translated with "justice" and "authority") to form the basis of the eighteenth century Enlightenment that rejected the Bible and Christianity.

For these scholars, rights were both "unalienable" and "universal". "Unalienable" in the sense of being God-given and incapable of transfer or surrender by man and "Universal" in that they belong to all persons from conception to natural death, irrespective of situation or origin.

Clearly then, the nature of a Bill of Rights should be a document enforcing the heritage of divine authority with the corresponding duties that inevitably come from being granted responsibilities in discharging the authority. What it had become, though, is a lofty set of ideals that man has set for himself to escape from the natural consequences of a sinful nature.

It is, therefore, hardly any surprise that notorious human rights violators had lengthy and impressive sounding lists of rights and, yet, disregarded these with contempt as in the old USSR and it's satellites.

To try and safeguard against these abuses, we attempt to correct evil with evil. Humanity came to the conclusion that, because of the corrupting effect of power, even properly constituted, elected representative of society, to be found in legislatures across the world, are incapable of safeguarding the rights of individuals, as they are subject to the whims of an electorate and therefore, has to act acceptably to stay in power. On the face of it, the brilliant way of circumventing this shortcoming, was to place all that power in the hands of a select ministry of normally judicial background, who are elected to bodies such as constitutional courts.

The theory behind this widely followed practice seems to be that because these individuals are not accountable to an electorate and, therefore, secure in their positions, that they will discharge their position of authority with a sense of wisdom, fairness and justice. This surely must be a fallacy. A jurisprudential background does not ensure fairness, as the experience of having legally trained senior officers in despotic governments, clearly must have shown.

When God instituted His government on earth, He provided the same checks and balances are now a part of the federal systems of government in accepted democracies across the globe. It was not, however, part of His method to place any more authority in the hands of the judiciary than in the hands of the other two power bearers.

Two ways of ensuring a fair distribution of power come to mind:

- Firstly, to provide a balance of power, even for the constitutional court and
- Secondly, to ensure that the court does not make law by interpreting the constitution and Bill of Rights from a particular perspective.

As Christians, we feel that the following aspects should be clearly spelled out : It must not be left open for the constitutional court, or any other competent body, to adversely affect morality in this country. In this regard, to elevate atheism and occultism to the level of recognition that organised and accepted religion occupies is unacceptable. Equally so, the right to life should make provision for the death penalty, while ruling out abortion and euthanasia. The sanctity of the family must be protected and same-sex relationships should not be recognised.

In the same vein, pornography and it's partner, prostitution, must be specifically excluded from any protection afforded in the Bill, to ensure that the core family is allowed it's continued and unthreatened existence.

That the Bill of rights currently makes no provision for the protection of the sanctity of marriage between a man and a woman and the attending issues of a family. In the light that, most human rights documents afford the family as the core unit of society certain rights, the lack thereof, in the local version, needs to be urgently addressed.

In the American experience and in several other jurisdictions, the effects of providing those who temporarily or permanently, throw off the protection of society by committing heinous crimes in a warped sense of justice or fairness with the same, if not greater rights, than their victims have become shockingly apparent. In the case of murder, the criminal totally negates the most basic of rights and, yet, is afforded the same rights, coupled with the ineffectiveness of a fettered system of policing.

Every act that a person commits has certain consequences and, while it would be insensible to declare every murderer outlawed, a balance needs to be struck between the rights of the innocent, law-abiding victims and that of the criminally-intent perpetrator who shows contempt for the laws that must, of necessity, regulate society.

The Bill should further include redress and support systems for the victims. It would be a good idea to make the enforceability of the rights a direct consequence of fulfilling one's duties or responsibilities as a law-abiding citizen.

Should one view human rights as distinct from any biblical perspective, then it would be arguable that, just as breach of contract leads to certain penalties, breach of the contract between humans to use certain fundamental human rights as the boundaries within which to act, should lead to certain forfeitures.

It is only when we realise that humanity in it's fallen nature is not capable of handling God's authority properly, that we will begin to see the Bill of rights, not as an absolute, and infallible ideology to ensure peace and prosperity for all. Rather, it is to be viewed as the written boundaries within which all persons are to do all those things which we, as humans collectively called society, hold in esteem. In order to make this possible, we should not place undue accent on the innate dignity and worthiness of the human individual.

We should constantly remind ourselves that the ideology of human rights and human rights instruments today, has at it's core, the limitation of State authority and the achievement of maximum freedom and liberties for the individual.

In this well-meaning, though thoroughly misguided process, due regard is not given to balancing these libertarian ideas with the prevention of adverse consequences that could easily flow from the process

To counteract this effect, proper measures must be introduced to clearly stipulate the demarcated areas within which individuals who will want to use their rights to the detriment of themselves and society, will be barred from doing so. Neglecting to take up this task, will inevitably, lead to lawlessness and chaos, for which we will have ourselves to blame.

Application of the Bill of Rights

If we accept the above reasoning for proper limitations and boundaries, then it becomes apparent that what is true of individuals will be equally true of the associations into which they organise themselves.

Because of the by now proven ability of power to corrupt those entrusted with it, the first instance where safeguards will have to be employed is with the government and it's organs and structures. It is the view of the PARTY that the Bill should be applicable, where a person or association in a position of power, has the ability to abuse that position and there is no remedies already to be found in the positive and common law.

It has always been a biblical principle that the weak should be assisted. Care should, however, be taken that, again, in the misguided sense of ensuring equity and justice, we do not do away with a well-developed legal system that has the practical advantage of having been successfully applied for several centuries.

To provide private individuals unqualified recourse to a Bill of rights arising from their having entered in to the relationships upon which the free-market system and economy rests, could have serious negative consequences on development in this country.

- ANC

WHAT CONSTITUTES UNIVERSALLY ACCEPTED FUNDAMENTAL RIGHTS

PRELIMINARY SUBMISSION BY ANC

Using Chapter 3 of the Interim Constitution as a point of departure, it is submitted that the fundamental rights listed therein are all to be regarded as universally accepted fundamental rights with the exception of the following:-

- Section 19 - Residence
- Section 24 - Administrative Justice
- Section 26 - Economic Activity

In addition there are certain universally accepted fundamental rights which are not reflected in Chapter 3. They are the following:-

- The Right to Home Life
- Women's Rights
- Disabled Persons Rights
- Socio-Economic Rights, including :
 - Freedom from Hunger
 - Right to Shelter
 - Right to Work
 - Right to Health
 - Welfare Rights
 - Right to Education
 - Right to Minimum
 - Income

The exercise of all rights must be subject to principles of non-racism and non-sexism.

THE NATURE AND APPLICATION OF A BILL OF RIGHTS PRELIMINARY SUBMISSION OF THE ANC

1. The Nature Of A Bill Of Rights

It is vital to emphasise that there is a shared universal consensus in the world community about what constitutes human rights. In many countries citizens have experienced abuse of power by those in authority which has often resulted in a reduction in the basic rights and freedoms that citizens are entitled to. It is the ANC's contention that rights can therefore be defined as regulatory measures that protect individuals against civil and political abuse while also providing for the improvement of their social and economic circumstance

South Africa has emerged from a situation that had a total absence of the respect for human rights as well as the denial of access to economic and social opportunity. Our Bill Of Rights must be a comprehensive and adequate response to the distortions created by apartheid. In particular it must provide for the means to redress the injustices and inequalities that characterise the daily lives of the majority of South Africans including women.

The ANC believes that the human rights contained in the Universal Declaration of Human Rights and the later Covenants on Civil and Political Rights; and on Economic, Social and Cultural Rights represent an embodiment of the comprehensive rights that must be included in a South African Bill Of Rights. Several other international covenants and treaties include rights that need to be incorporated in the South African Bill of Rights.

Chapter 3 of the Interim Constitution has limitations in that it fails to address the full range of Rights that should be included in the new Bill.

The ANC's perspective is that the bill of rights should include Social, Political, Economic, Environmental, and Civil rights. These rights should be indivisible and of equal value. Furthermore given the imperative for redress the bill must also include mechanisms for corrective action. e.g.

affirmative action and other measures to redress imbalances.

The Bill will go beyond these rights and allow for the recognition of the diversity that exists within our open and democratic society. Thus, language, cultural and religious freedom will be recognised. Rights that have not been included in chapter 3 of the Interim Constitution, such as the right to home life, disabled persons rights, and children's rights must also be contained in our new Bill of Rights. Human rights should be formulated in a manner that provides for effective equality for women.

In conclusion the ANC wishes to assert that the inclusion of social and economic rights is justified by the needs circumstances and requirements of our society.

THE APPLICATION OF THE BILL OF RIGHTS:

The bill shall bind all legislative and executive organs of state at all levels of government. The rights shall apply to natural persons.

We believe it is necessary to extend the application of human rights beyond the parameter of a relationship between the state and private individuals to a relationship that applies between private individuals. Such an extension is necessary in order to obviate a situation where the denial of rights to individuals will be labelled a private matter.

The application of rights between private persons cannot in our view be absolute or totally unqualified.

- DP

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DEMOCRATIC PARTY SUBMISSION : BLOCK 2
THEME COMMITTEE 4

1. **INTRODUCTION**

It is unclear to the Democratic Party the precise meaning of the phrase "the nature of Bill of Rights and Application". However insofar as we understand the terminology employed we wish to make a preliminary submission as follows:

2. **NATURE OF THE BILL OF RIGHTS**

- 2.1 Potentially this covers the spectrum of so-called first, second and third generation rights. Since the question of the second and third generation (socio-economic) rights and their place, meaning and content in a future Bill of Rights is to be dealt with separately by the Theme Committee we do not intend to comment specifically until this topic is debated thoroughly at the relevant time.

The other implication of the nature of the Bill of Rights is the question of which rights are universally accepted as being "fundamental"? In our view the interim constitution adequately answers this question by insisting that the entire constitution adequately answers this question by insisting that the entire constitution, especially chapter 3, be interpreted so as to promote the concept of "liberty and equality". In our view those rights which promote liberty and equality are the universal norms.

- 2.2 Little purpose will be served by doing a comparative survey of the constitutions of the world in order to give meaning and content to this principle. Certainly, in respect of the first category of rights, an irreducible core already exists in the

Constitution of the Republic of South Africa, 1993 (Act 200 of 1993). To a large extent these are not even discretionary since the Constitutional Assembly is bound, in terms of, especially constitutional principles 111, V, VIII, IX, XI, XII to enshrine this irreducible core in the final constitution.

2.3 Without necessarily agreeing with the exact wording and specific content of each and every right contained in chapter 3 of the constitution we indicate below that the following sections of chapter 3 would certainly form part of the irreducible core of rights which should enjoy universal application:

- 8: Commitment to Equality;
- 9: Commitment to Life;
- 10: Right to dignity;
- 11: Freedom and security of person, including right against detention without trial;
- 12: Right against servitude;
- 13: Right to privacy;
- 14: Freedom of belief (including religion);
- 15: Freedom of expression;
- 16: Right of free movement;
- 17: Right of voluntary association;
- 18: Right of peaceful assembly;
- 19: Right of choice of residence;
- 20: Rights of citizenship;
- 21: Right of franchise and political activity;
- 22: Right of access to independent courts/tribunals;
- 23: Right of access to information;
- 24: Right to fairness in respect of administrative acts;
- 25: Right to criminal justice i.e. due process;
- 26: Right to free economic activity;
- 28: Right to property;
- 31: Right to language and culture.

- 2.4 There certainly can be argument about the inclusion of further rights, but we believe that the aforementioned irreducible core of universally accepted norms are the minimum requirement consistent with a free society enjoying a culture of human rights.

3. APPLICATION OF BILL OF RIGHTS

- 3.1 The meaning and content of the application of Bill of Rights must, in the final analysis, answer the question "who is bound by the Bill of Rights"? Obviously the state, in all its emanations and organs is bound by the Bill of Rights. To the extent that this concept is established and codified by section 7(1) of the constitution, the Democratic Party agrees with it.

- 3.2 A problematic issue arises in respect of the judiciary itself. Is the judiciary understood to form part of the "state at all levels of government"? Section 7(1) of the Constitution suggests it does not, for the simple reason that it is excluded from the provisions of that section. However, section 35(3), dealing with the interpretation of the Bill of Rights, states -

"in the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this chapter".

This suggests that, by necessary implication via the common law, the judiciary is bound by the Bill of Rights.

- 3.3 The entire question of application cannot be determined until the issue of horizontality and verticality is resolved. The essence of the common law deals with private relations in society. To the extent that this has already been debated under block 1 it is worth restating the Democratic Party proposition is that there is no reason why, subject to the proper safeguards, the Bill of Rights should not apply horizontally. The private law should be made congruent to laws applying to state action. One may illustrate this by use of two simple examples:-

- I. The University can be construed as forming part of the state. Its actions and disciplinary procedures will be bound therefore by the due process provisions of the Bill of Rights. But if we contrast this position against that of a major corporation, vastly more powerful than a university administration, we could find that the private corporation is not bound to conduct its disciplinary or ordinary procedures in accordance with the Bill of Rights. This anomaly is obviously unacceptable.

- II. When it comes to a defamation action by, for example, a local municipal councillor, who is a member of the organs of state, he will be in a completely different position because of the vertical application of the Bill of Rights than, for example, a company director involved in a similar defamation action who is not bound by the Bill of Rights because it has no horizontal application. This anomaly, too, cannot be justified.

3.4 It is the contention of the Democratic Party that if we are at all concerned with the principles of justification and the use of power, which we should be, then the Bill of Rights should not be a party to drawing an arbitrary line in the sand between state power and social power. Generally speaking, childrens' rights, labour rights and rights to free speech will not really have much meaning or impact if they are solely confined to conferring obligations on the state. Obviously they should have wider implication. However, we reiterate our view, contained in the report on block 1, that such application has to be very carefully considered and an audit will have to be undertaken of all the provisions of the Bill of Rights to ensure that its horizontal applicability does not lead to gross injustices, impractical anomalies, or absurd consequences. We believe such an audit is both practical and necessary.

4. **THE BILL OF RIGHTS AND THE DUTIES AND OBLIGATIONS OF THE STATE**

4.2 We understand this topic to be largely redundant because insofar as we are dealing with the vertical application of the Bill of Rights to a core of universally accepted fundamental freedoms it is trite to observe that such rights are essentially defensive or negative in character and form. They constrain the state from doing certain things i.e. the state shall not do X or Y.

4.3 The crucial point here, however, concerns second and third generation rights which are positive in nature and oblige the state to take actions and incur expenditure in the interests of the holder of the right. The difficulty here is that this leads to confusion in the role of the judiciary with that of the legislature.

There are certain more subtle arguments which also require consideration. However, we believe that this is more properly discussed, for the reasons stated above, when the Theme Committee and the Constitutional Assembly considers the nature, place and purpose of so-called second and third generation rights.

5. **THE BILL OF RIGHTS AND THE DUTIES AND OBLIGATIONS OF THE CITIZEN**

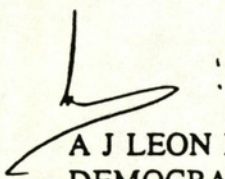
5.1 The Democratic Party fully subscribes to the view that the citizen has rights and obligations. However, it is the purpose, primarily, of statute law to regulate the obligations of citizens to the state and to his or her fellow citizens. It is quite clear that obligations of citizens towards each other will only come into play when the Constitutional Assembly has resolved the question of the horizontal application of this bill. We need comment no further on this issue beyond that which is contained in the foregoing paragraphs and in our previous submissions to the Constitutional Theme Committee.

5.2 However, the immediate issue to be disposed of is whether the Bill of Rights should create citizen's obligations towards the state. In our view this is pre-eminently a question to be disposed of by legislation on a wide variety of fields.

The core fundamental of a democracy remains the rights which citizens obtain from the state and not the other way around. What obligations are we to cast on the individual beyond the presumption that he or she has to obey the law and the constitution itself? On this there should be no debate whatsoever and it is up to the legislature and the executive to ensure compliance therewith. However, if it is proposed to cast obligations on citizens, in rigid terms, in a Bill of Rights then the Democratic Party believes we are creating a significant problem. If the bill attempts to enumerate a set of rights against the citizen, held by the state, then we in fact will limit essentially the citizen's obligation to those which are codified in the Bill of Rights. In fact the state has almost limitless theoretical rights against the citizen constrained essentially by two factors:-

- (i) Regular Elections; and
- (ii) The Constitution itself, especially the Bill of Rights.

For these reasons we do not believe this issue requires further consideration.



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FREEDOM FRONT

THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

SUBMISSION ON UNIVERSALLY ACCEPTED FUNDAMENTAL RIGHTS

The Freedom Front proposes that Theme Committee 4 should adopt the following procedure:

- (i) To draw up a list of all or virtually all universally accepted fundamental rights, freedoms and civil liberties;
- (ii) To add to the above-mentioned list some rights that are particularly relevant in the case of South Africa by virtue of 'diversity of language and culture' (Constitutional Principle XI) and other relevant Constitutional Principles;
- (iii) To improve, both as to content and form, the extended list referred to in paragraph 2 above, using chapter 3 of the transitional constitution as a guide, as well as any other material that may be relevant to South African circumstances.

At this stage the Theme Committee is concerned only with (i) above. The Freedom Front herewith submits a paraphrase of the rights mentioned in the International Covenant on Civil and Political Rights 1966, with the submission that this international instrument provides the closest approximation to all universally accepted fundamental rights. The Freedom Front contends that the phrase 'all universally accepted fundamental rights' in Constitutional Principle II cannot be understood literally, as it would be impossible to extract from the constitutions of all states identical human rights. The phrase should rather be interpreted as 'all fundamental rights generally or predominantly accepted by the world community', which would exclude rights that are peculiar to particular regions. It is in this sense that the above-mentioned paraphrase is hereby tendered for consideration.

A paraphrase of the rights mentioned in the International Covenant on Economic, Social and Cultural Rights 1966 is also attached for consideration, although these rights cannot be said to be universally accepted.

List of universally accepted fundamental rights (paraphrase of rights contained in the International Covenant on Civil and Political Rights):

1. All peoples have the right of self-determination;
2. No distinction of any kind is to be drawn between people on any grounds;
3. Men and women to have equal enjoyment of all civil and political rights set out in this Covenant;
4. State measures derogating from obligations of parties to this Covenant in time public emergency are permissible, but only to a very limited extent;
5. No one (states, groups or persons) may act in a way aimed at the destruction of any of the rights and freedoms recognised in this Covenant, nor should there be any restriction upon or derogation from them on certain pretexts;
6. There is an inherent right to life, which is to be protected by law, but such right is qualified by the death penalty in certain circumstances;
7. Torture and cruel, inhuman or degrading treatment or punishment is prohibited;
8. Slavery and servitude, as well as forced or compulsory labour, as defined, is prohibited;
9. There is a right to liberty and security of the person, with certain qualifications allowed by law;
10. All persons deprived of liberty are to be treated with humanity and with respect for the inherent dignity of the human person;
11. There may be no imprisonment merely on the ground of inability to fulfil a contractual obligation;
12. Everyone lawfully within a state has a right of liberty of movement, freedom to choose his residence, to leave any country and to enter his own country, subject to certain qualifications;
13. Expulsion of aliens lawfully within states parties to the Covenant may take place only on legal grounds;
14. All persons have a right of equality before courts and tribunals (together with a large number of concomitant rights, especially in criminal proceedings);
15. Criminal law may not have retrospective operation;

16. Everyone has the right to recognition everywhere as a person before the law;
17. Arbitrary or unlawful interference with privacy, family, home or correspondence, honour and reputation is prohibited;
18. Everyone has the right to freedom of thought, conscience and religion;
19. Everyone has the right to hold opinions without interference and the right to freedom of expression, as defined;
20. Any propaganda for war shall be prohibited by law, as well as the advocacy of certain other anti-social acts;
21. The right of peaceful assembly, with certain specified exceptions, shall be recognised;
22. The right of everyone to freedom of association with others, including the right to join and form trade unions. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others;
23. Family rights, in the context of protection of the family as the natural and fundamental group unit of society;
24. Rights of children, including protection against certain acts and the right to acquire a nationality;
25. Every citizen is entitled (without unreasonable restrictions) to take part in the conduct of public affairs, directly or indirectly; to vote and to be elected at genuine periodic elections (universal and equal suffrage and secret ballot); to have access on an equal basis with others to public service in his country;
26. All persons are equal before the law and entitled without any discrimination to the equal protection of the law;
27. Persons belonging to minorities (ethnic, religious or linguistic) are not to be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

List of rights (paraphrase of rights contained in the International Covenant on Economic, Social and Cultural Rights):

1. The right of self-determination of all peoples;
2. An undertaking by parties to the Covenant to attempt to achieve progressively the full realisation of the rights recognised in this Covenant;
3. An undertaking by parties to the Covenant to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the Covenant;
4. Recognition that state parties may subject rights under this Covenant only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society;
5. Prohibition of any interpretation of the Covenant of acts aimed at the destruction of any of the rights or freedoms recognised in the Covenant, or their limitation to a greater extent than is provided for in the Covenant, as well as the prohibition of restrictions upon or derogation from any of the fundamental rights recognised in a certain manner;
6. The right to work;
7. The rights of everyone to the enjoyment of just and favourable conditions of work, ensuring certain enumerated aims;
8. The right of everyone to form trade unions, as well as the right to strike, subject to certain qualifications;
9. The right of everyone to social security, including social insurance;
10. Recognition of the widest possible protection and assistance to be accorded to the family, with special measures of protection for young mothers and all children and young persons;
11. Recognition of the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.
12. Recognition of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
13. Recognition of the right of everyone to education (with certain defined aims). With a view to achieving of the full realisation of this right, recognition that (a) primary education shall be compulsory and available free to all; (b) secondary education in its different forms, shall be

made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

14. An undertaking to implement within a specified time compulsory primary education free of charge for all, and, within a specified reasonable period, of the progressive implementation of the principle of compulsory education free of charge for all;
15. Recognition of the right of everyone: (a) to take part in cultural life; (b) to enjoy the benefits of scientific progress and its applications, (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.



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THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

SUBMISSION ON THE NATURE OF THE PROPOSED BILL OF RIGHTS AND ITS APPLICATION

I. GENERAL OBSERVATIONS

The concept of a bill of rights is a public law concept, dealing with relations between the subject and the state, and not with private law relations between persons among themselves. The fundamental purpose of a bill of rights has traditionally been to protect the citizen against harsh or oppressive measures by the state or government. This effect, which can be called 'vertical', should be the primary effect of the proposed South African bill of rights.

In some legal systems bills of rights also have horizontal effect, i.e. effect between persons in their private law relations with one another. It is quite possible that any comprehensive bill of rights will contain rights that should, by reason of their nature, be enforceable not only against the state but also against fellow citizens, e.g. the right to dignity. There may be a number of such rights, the number differing from state to state, but in principle all private law rights should not be entrenched in a bill of rights. There are various reasons for this, but only two are mentioned here. First, the general rules of private law are in most states contained either in a civil code or (as is the case at present in South Africa) in statutes and the common law. Secondly, bills of rights are usually entrenched, the very reason for such entrenchment being that a legislature, wielding power over citizens, should not easily amend or repeal the fundamental rights of citizens. There is not the same general need to entrench private law rights, as citizens do not wield power over one another (vertical operation), but stand alongside one another (horizontal operation of law) in so far as their legal relationships are based on consent or related concepts.

The draft questions submitted by the experts for a framework on the nature and application of a Bill of Rights are here used as a guideline for the submissions below.

(1) Nature..2/-

II. THE QUESTIONS DRAFTED BY THE EXPERTS

In the light of the exposition above the various draft questions posed by the technical experts can now be considered.

Questions (i) and (ii)

A bill of rights should primarily impose duties on the State. This has, traditionally, been the function of bills of rights, which operate in the public law sphere and protect the citizen from unlawful state intervention in his existence. It should impose duties on individuals in a limited number of cases only, otherwise large parts of private law would be incorporated in a bill of rights, and entrenched against fellow citizens. There is no need for such entrenchment, as fellow citizens do not wield power over one another. The nature of the particular right will determine whether it should have operation against other individuals.

The question whether the Bill should impose constitutional duties on juristic persons such as employers, trade unions, churches and other organs of civil society will, likewise, depend on the nature and scope of the particular right concerned.

Question (iii)

Question (iii) poses the question whether the Bill of Rights should apply in disputes where the common law or African customary law is in question. The question has not been very clearly phrased, but it seems to seek an answer in circumstances where there is a conflict of laws.

As far as the common law is concerned, the Bill of Rights should make it clear that the common law can be supplementary to the Bill, but not in conflict with it. In the latter event the Bill should override the common law. (The present Bill does not expressly provide that the common law should be supplementary to the provisions of the Bill).

As far as African customary law is concerned, the problem is more complex. African customary law has traditionally been a separate legal system in South Africa. It has, as such, received statutory recognition in the Black Administration Act of 1927, even to the extent that a separate system of courts (commissioners' courts) was introduced in this regard.

Constitutional Principle 13 guarantees, to a certain extent, the autonomy of this legal system, but makes it (like the common law) subject to the overriding provisions of the Bill of Rights. To a certain extent this Constitutional Principle would seem to be in conflict with the Constitutional Principle providing for the acknowledgement and protection of the diversity of language and culture (Constitutional Principle XI). Where the provisions of Constitutional Principle XIII are aimed at the protection of the institution, status and role of traditional leadership, according to indigenous law, but indigenous law itself is made subject to the Bill of Rights and also to legislation dealing specifically with fundamental rights, it seems that it is difficult not only to reconcile Principle XI with Principle XIII, but also to reconcile the two sentences in Principle XIII itself.

It seems...3/-

It seems that the way out is to phrase the Bill of Fundamental Rights in such a manner that it should detract as little as possible from the existing role of indigenous law.

Question (iv)

Question (iv) poses the question of pro-active operation of a Bill of Rights. This question has also not been clearly phrased. It seems, however, that it requires an assessment of whether there is a duty to take positive measures instead of merely providing for a legal remedy after the event.

The Freedom Front is of the view that, generally speaking, the Bill of Rights should not include an obligation to take positive measures. The Bill should be as brief as possible, leaving it to the Constitutional Court to interpret the broad general sweep of such provisions, as is the case in the United States of America. We are of the view that it is not feasible and perhaps not even possible to determine in advance the scope of particular provisions of the Bill of Rights. The Bill should rather specifically prohibit unwanted acts than impose obligations to fulfil vague and unspecified duties.

Question (v)

Question (v) reads as follows: "Which rights should be guaranteed in the Constitution and placed beyond the reach of simple majority decisions by Parliament?"

The Freedom Front is of the opinion the all rights contained in the Bill of Rights should be placed beyond alteration by simple majority decisions by Parliament, otherwise the concept of entrenchment would not be given effect to.

Question (vi)

Question (vi) raises the query whether some or all of the rights contained in the Bill of Rights should be conferred on non-citizens, whether legally or illegally in the country.

The Freedom Front is of the view that no rights contained in the Bill of Rights should be conferred on non-citizens illegally in the country. In the case of non-citizens legally in the country it would seem fair the some rights contained in the Bill of Rights should be applicable to them. It is to difficult to determine at this stage which rights should be applicable to such persons: this can be done when the entire list of rights in the Bill has been crystallized.

Question (vii)

Question (vii) concerns the question of the possible limitation by legislation of rights contained in a Bill of Rights.

The Freedom Front is of the opinion that this question and question (v) overlap to a certain extent. In our view the rights in a Bill of Rights should be absolute in the sense that they should not be capable of limitation by legislation, otherwise than by legislation in accordance with the limitation clause contained in the Bill of Rights itself.

III. GENERAL CONCLUSIONS

It should be clear from 1 and 2 above that the scope of the horizontal effect of the provisions of a bill of rights can only be determined when all the rights in the bill have been formulated and the vertical scope of each right has been determined. Likewise the applicability of such provisions to juristic persons can only be determined at a later stage. It should be done by the Theme Committee in subsequent blocks.

- IFP



INKATHA

Inkatha Freedom Party

IQembu leNkatha Yenkululeko

SUPPLEMENTAL SUBMISSION¹ TO THEME COMMITTEE No. 4 FOR BLOCK No. 1

In terms of points 7.1.2 and 7.1.3 of the Report on Block 1 of this Theme Committee, the IFP hereby tables this additional submission as a supplement and as an integral part of the submissions previously made.

PART 1 APPLICABILITY OF THE BILL OF RIGHTS TO "EVERYONE"

1. Constitutional Principle II indicates that everyone shall enjoy universally accepted fundamental rights, freedom and civil liberties. From an interpretative viewpoint "everyone" may or may not refer to juristic person and/or non-South African persons within the Republic.
2. In terms of applicable international declarations and covenants the protection of fundamental freedom and liberties must be ensured both to respect to citizens as well as foreigners while they are within the territory of the Republic². However this applies only with respect to first generation human rights such as freedoms of speech and religion and freedom from unwarranted arrest, search and seizure, et cetera. Usually the entitlement to second generation human rights, such as the rights to education, work, and medical assistance, is limited to citizens or to residents only. The IFP believes that these second generation rights should be limited only to citizens, which leaves open the possibility that the competent legislature may extend them also to residents by means of applicable laws.
3. Preliminarily it must be said that some of the human rights are inherently not applicable to juristic persons, as it might be the case of the right to health. However it must be considered that in the final analysis juristic persons are in reality an associative phenomenon made of

¹. The IFP makes this submission under protest, for the Constitutional Committee should withhold consideration of the matters covered in this report and further development of the work program so as to allow international mediation to take place.

². Compare with the UN Declaration of Human Rights of Individuals who are not Nationals of the Country in which They Live (1985).

physical persons. If the right to privacy to a juristic person may be violated, it is the correspondence of individuals which may be opened and their telephone conversations which may be tapped. Similarly were the right against unwarranted search and seizure not to apply to juristic persons, government could search and seize properties of a corporation, even if from a substantive viewpoint such properties belong to the individuals who form such corporation as much as that property which those individuals have in their respective houses.

4. It must also be considered that juristic persons have an essential role both in the economic system and the enjoyment of basic human rights and freedom, such as is the case for commercial cooperations and private associations. Therefore, the applicability of the bill of rights to protect juristic person will also foster economic development and the protection of pluralism in society by means of securing the position of individuals within the social economic, cultural and political formation in which they develop their activities and personal life experience.
5. Usually in modern constitutions the need does not arise to protect associative phenomena which are not established as juristic persons, such as unstructured groups. In fact, this phenomena are usually sufficiently protected by the extension of human right protection which is recognized to individuals who comprise it. To the extent that human rights protection is specifically recognized to juridic persons, the need does not arise to provide similar recognition for unstructured associative phenomena.
6. In conclusion, human rights shall be applied also to juristic persons to the extent that the nature of the human right concerned so allows. Any relevant decision in this respect should be left to the development of constitutional jurisprudence by the Constitutional Court, so as to accommodate the fact that today it is necessary to protect juristic persons from human right violation which a few years ago were felt not to interfere with the scope of actions of juristic person.
7. Finally, since at present the interim Constitution @ section 7 (3) extend the application of Chapter 3 to juristic persons, the Constitutional Assembly has no discretion to reduce this aspect of human right protection and may not decide that the Bill of Rights does not apply with respect to juristic persons. As it is more fully explained in Part 4 *infra*, Constitutional Principle II does not allow to go below the "hard bottom" set out in Chapter 3.

PART 2

"ALL UNIVERSALLY ACCEPTED FUNDAMENTAL RIGHTS, FREEDOM AND LIBERTIES"

THE BILL OF RIGHTS IN THE CONSTITUTION

1. The Constitution shall not provide for less human rights protection than what it is provided for in Chapter 3 of the interim constitution.

2. In its Constitution, South Africa shall commit itself to recognize, protect and promote all internationally recognized human rights as they are expressed in (a) prevailing trends of modern constitutions, (b) international declarations and covenants on human rights and (c) international treaties of general or regional application.
3. All recognized human rights shall be regarded as fundamental human rights.
4. All the rights, freedom and liberties listed in the following documents should be considered as universally accepted and recognized³.
 - a. UN Universal Declaration of Human Rights,
 - b. UN International Covenant on Civil and Political Rights,
 - c. UN International Covenant on, Economic, Social and Cultural Rights,
 - d. UN Third International Covenant on Peoples' and Indigenous Rights,
 - e. Africa's Banjul Charter on Human and People's Rights,
 - f. European Declaration for the Safeguard of Human Rights.
5. International Conventions related to specialized subject matters, such as those related to Children's rights, Marriage Rights, Labour Rights and International Labour Organization-sponsored Conventions, and World Health Organization-sponsored conventions.
6. In addition human rights usually recognized and protected in modern constitution should also be considered as following within the scope of application of Constitutional Principle II. Since human rights are a constitutional reality in continuous progress and development special attention shall be given to the most recent constitutions. It should be also noted that within a federal system the most advanced human right protection its usually embodied in the constitution of the members states rather than in the national one. It is suggested that the human rights recognized and protected in the following constitution be considered as falling within the scope of application of Constitutional Principle II.
 - a. Spanish Constitution of 1978,
 - b. The Nigerian Constitution of 1989,
 - c. The Constitution of the State of Alaska of 1988,
 - d. The Constitution of the State of Hawaii as amended in 1979,
 - e. The Constitution of Liberia of 1984
 - f. The Constitution of Canada of 1982.

EVOLUTIVE CLAUSE, OPEN LIST OF RIGHTS

1. The Constitution shall make provision for the updating and evolution of human rights protection, which are historically an ever changing field of law.

³ For a full recognizance of internationally recognized human rights as per 1987, see the documentation collected in *Human Rights Source Book* edited by A. Blaustein, R.S. Clark and J. Sigler, Paragon House Publishers, New York, 1987.

2. The following constitutional text ought to be considered:

Human rights in the Constitution⁴

All fundamental human rights and all those other rights which are inherent to fundamental human needs and aspirations as they evolve with the changes and growth of society, and as they will be recognisable on the basis of the principles underlying the provisions of this constitution, are hereby entrenched in this constitution and in their essential content shall not be modified by virtue of constitutional amendments.

RESIDUAL RIGHTS OF THE PEOPLE

1. The Constitution shall entrench the principle of freedom as the fundamental principle underlying the legal system. The following text should be considered:

11. Rule of Freedom

All conduct and activities which are not prohibited shall be permitted. The Republic of South Africa may prohibit and regulate conduct and activities for a demonstrable State's interest founded on public interests and welfare.

2. The Constitution shall entrench the principle that all powers of government derive from the people who are the depository of any residual power which is not exercised by the government. The following language ought to be considered:

1. Inherent Rights and Obligations

The Republic of South Africa acknowledges and recognises that all individuals have the natural right to life, liberty and the pursuit of happiness, and to the enjoyment of the rewards of their own industry; that all individuals are equal and entitled to equal rights, opportunities and protection under the law, and that all individuals have corresponding obligations to the State and a general obligation of social responsibility to the people of the Republic.

2. Source of Government

All political power is inherent in the people. All government originates with the people, is founded only upon their will, and is instituted only for the good of the people as a whole. Government shall respect and encourage the exercise of the power of the people to organise and regulate their interests autonomously.

LIST OF HUMAN RIGHTS

1. The Constitution shall list, entrench and protect at least the following rights and areas of

⁴. All constitutional text in this submission consists of excerpts from the draft constitution of the Federal Republic of South Africa, submitted by the IFP to the World Trade Centre in June 1993.

constitutional protection:

- Freedom of speech
- Freedom of religion
- Physical and psychological integrity
- Liberty
- Travel and movement
- Privacy
- Assembly and association
- Free enterprise
- Contractual autonomy
- Private property
- Political rights
- Freedom of the media
- Freedom to access government information
- Family rights
- Right to bear arms
- Cultural and traditions
- Procreative freedom
- Right to work
- Free enterprise
- Functional private property
- Communal property
- Right to education
- Health care
- Housing
- Sanitation
- Labor law and labor rights
- Protection of women, senior citizens and youth
- Autonomy of Universities, research, arts and culture
- Autonomy of trade unions and political parties
- Environmental rights
- Cultural rights
- Minority rights
- Rights of ethnicity and self determination
- Group rights
- Autonomy of social and cultural formations
- Preeminence of civil society
- Preservation of traditional communities and role of traditional leaders

PART 3
ENTRENCHMENT AND JUSTICIABILITY OF RIGHTS

JUSTICIABILITY OF FUNDAMENTAL RIGHTS

1. All fundamental human rights shall be fully justiciable.
2. For specific rights which require implementing action on the side of the government justiciability will also be determined by the actual wording of such rights and to a great extent may depend on the provisions of the legislation required to fulfil and implement such rights.
3. Justiciability of rights is also intrinsically limited by the fact that the Constitution recognizes conflicting rights, such as the right to privacy and the right to freedom of information and media.
4. The Constitution must contain a general provision guiding constitutional adjudication. The following text ought to be considered:

16. Justiciability of rights

All rights and freedoms recognised and guaranteed under this constitution shall be justiciable to the fullest practical and reasonable extent. In the case of a violation of the rights and freedoms recognised and guaranteed under this constitution any aggrieved party shall be entitled to be heard by a court of record on the basis of urgency and, upon showing a *prima facie* violation of rights, shall be granted preliminary relief pending the final disposition of the case.

FUNDAMENTAL RIGHTS AND CONSTITUTIONAL AMENDMENTS

1. The essential content of fundamental rights shall not be modified by virtue of constitutional amendments of any type.
2. Any constitutional amendment shall be approved by special majorities and with special procedures, including separate approvals and a cooling-off period.

PART 4
"DUE CONSIDERATION TO *INTER ALIA*
THE FUNDAMENTAL RIGHTS CONTAINED CHAPTER 3"

1. The Constitution shall not provide for less human rights protection than what it is provided for in Chapter 3 of the interim constitution.
2. The IFP submits that the above captioned language of Constitutional Principle II requires that none of the rights recognized in Chapter 3 be omitted or in anyway diluted in the new Constitution. The legislative history of the specific formulation of this Constitutional

Principle is absolutely clear in this respect. This language derived from a decision of the Negotiating Council which moved a similar provision from the body of one of the first drafts of Chapter 3 to Schedule 4 for consistency purposes intending to preserve its normative value. This provision intended to establish Chapter 3 as the "hard bottom" of human right protection, and it was moved to Schedule 4 because it prescribed with respect to the drafting of a new constitution.

PART 5 VERTICAL AND HORIZONTAL APPLICATION OF RIGHTS

A human right can be defined as a individual or collective area of entitlement and/or autonomy which the legal system does not wish to allow to be violated. There is a constitutional presumption that the law alone is not sufficient or adequate to fully protect and entrench a given human right, and that therefore the reinforced protection of a rigid constitution is to be sought.

Human rights may be violated by government as well as by any order entity. In the absence of a controlling constitutional provision, the law could allow either the government as well as a private entity to violate any right concerned. For instance the right to privacy may be violated by the action of government intercepting telephone communications or by the actions of an employer intercepting the same telephone communication of an employee. Similarly, the unwarranted search and seizure shall be constitutionally prohibited both in case of government's action as well as action of entities other than government.

Theoretically any human right could be violated in a similar fashion by a comparable action of either the government or of an entity other the government. There would be no justification for being satisfied with the protection of an area of entitlement and/or autonomy from that which government may do, if we are insensitive to the fact that the very same interests are in jeopardy because of actions of other entities which are still operating under and in term of the same legal system to which government belongs .

It must be stressed that protecting an area of entitlement and/or autonomy from violative actions on the side of entities other than government has absolutely no effect whatsoever on the extent to which the right is protected . It is erroneous to believe that if the bill of rights has horizontal application the "content" of any given right is extended, for the content remains the same while its area of protection is extended with respect to additional possible violations.

Nowadays none of the democratic constitutions of Western countries limits the application of the bill of rights to the relation between government and its subjects only. In fact, the idea of an exclusively vertical application of the bill of right its repugnant to universally recognized notions of human right protection and constitutional decency. Why would anyone allow that freedoms of speech, religion and political association be protected from the abusive or interfering action of government but not from the equally damaging action of an employer, schoolmaster or simple

neighbor?

In a South African context the horizontal application of the bill of rights its also an absolute necessity to ensure that a culture of human right protection developed also with respect to all significant relation under the control of the state . This is essential to ensure that our people's rights are not violated in legal or factual relations which are often characterized by enormous disparities in the economic and social powers of the parties concerned.

NATURE OF THE BILL OF RIGHTS:

1. The Bill of Rights shall have horizontal application in addition to vertical application.
2. The applicable test shall require that the Bill of Rights is extended to "all significant legal relations which are under the control of the State."
3. The Bill of Rights shall be entrenched in the national constitution but shall be implemented exclusively by provincial legislation and executive action with respect to the matters of provincial competence (i.e.: employment/labor, health, education, welfare, environment et cetera).
The national government might have the power to coordinate this implementing role of Provinces. The jurisprudence of the Constitutional Court will also give a uniform interpretation of the applicable constitutional parameters.

In accordance with point 7.1.4 of the Report of this Theme Committee, the IFP will make detailed submissions on the implications and/or consequences of the horizontal application of human rights protection with respect to each human right concern. In following Blocks each human rights will be specifically considered and discussed, and our submissions will demonstrate that it is not desirable nor acceptable to refuse protection to any right concerned if such right is capable of been violated by entities other than government.

DUTIES AND OBLIGATIONS

1. In addition to a Bill of Rights the constitution shall also contain a Bill of Duties and Obligation. Many aspects of the Constitution would reflect the presence of a Bill of Duties and Obligation.
2. It is important to develop a culture of social obligations and civic duties, in addition to a culture of human right protection. The constitution must show that no right comes without corresponding obligations.
3. The following provisions ought to be considered:

PREAMBLE

WE, the people of South Africa, mindful of our unique and diverse heritage, inspired by the desire to secure the blessings of democracy, freedom and pluralism for our and future generations, respecting the equality of all men and women, recognising the

right of people to organise themselves in autonomy and independence at all levels of society, desiring to ensure that individual rights and liberties are accompanied by obligations of social solidarity to others, determined to guarantee that the rights of all people are protected both as individuals and members of social and cultural formations, do now ordain and establish this constitution for the Republic of South Africa to provide both the people of South Africa as well as the Provinces with a national government to serve their individual and collective needs, wants and aspirations.

1. Inherent Rights and Obligations

The Republic of South Africa acknowledges and recognises that all individuals have the natural right to life, liberty and the pursuit of happiness, and to the enjoyment of the rewards of their own industry; that all individuals are equal and entitled to equal rights, opportunities and protection under the law, and that all individuals have corresponding obligations to the State and a general obligation of social responsibility to the people of the Republic.

2.- 58. [...]

OBLIGATIONS AND DUTIES

59. Allegiance to the Constitution

All citizens shall have the duty to uphold this constitution and live by the rule of law. All those who hold any of the offices provided for in this constitution shall take an oath or a solemn affirmation to uphold and defend this constitution, obey the law and exercise their public functions with discipline and honour.

60. Contribution to Public Expenditures and Needs

- a. All citizens have the duty to contribute to the common needs and to public expenditure by reasons of their resources. [...]
- b. The Republic of South Africa shall encourage voluntary charitable activities and other forms of expression of social solidarity.

61. Military obligations

All citizens have the sacred duty to defend the territory of the Republic of South Africa from any external enemy and from any threat to the enjoyment of freedom, democracy and pluralism in the Republic.

62. Duty to work

All capable citizens have the duty to contribute with their work and skills to the common development and growth of the Republic

63. Family duties

All citizens have the duty to provide moral and financial support to their spouses, to educate their children and to assist their parents when in need of care.

[...]

PART 6
GENERAL DISCUSSION OF APPLICABLE CONSTITUTIONAL PRINCIPLES

1. Constitutional Principles III, IV, V, VII, VIII, XI, XII (1), XXVIII, XXXIV may relate in several aspects to the identification of rights to be protected and to the measure and means of their protection and justiciability. Additional Principles may either directly or indirectly apply. Among them those Principles which relate to the powers and functions of Provinces, which shall implement the Bill of Rights with respect to all matters of their competence.
2. The application of each of the Constitutional Principles will need to be discussed with respect to each specific Human Right concerned, which exercise will form the object of discussions and reports at a later stage in work of this Theme Committee.
3. For instance Constitutional Principles I, III, V relate to the equality clause which will be the object of the second report of Block 2.
4. Constitutional Principles IV and VII relate to the enforcement, limitation, interpretation and suspension of the Bill of Rights which will need to be specifically addressed in Block 3 and 10, which in this respect will need to be rephrased to reflect the need to specifically address the issue of justiciability of the Bill of Rights by the Constitutional Court and by the ordinary courts.
5. Constitutional Principles XI and XII relate to an essential aspect to our Bill of Rights which *inter alia* will need to entrench and protect pluralism, recognizing the constitutional autonomy of social and cultural formation with respect to all interest which such formations are able to regulate by themselves, as we indicated in the previous submission of the IFP to this Theme Committee.
6. Constitutional Principle VIII relates to the freedom of information and access to government information which will be addressed in Block 6, while Constitutional Principle XXVIII relates to important labour and political rights to be addressed in Block 5.
7. Finally Constitutional Principle XXXIV relates to the issue of self-determination and will characterize the identification and definition of a large number of rights being analyzed by this Theme Committee. Specifically, this Constitutional Principle supports the need to develop a Bill of Rights which also entrenches the constitutional autonomy of social, cultural and economic formations with respect to all matters for which a government does not have a compelling public interest to justify its regulatory or otherwise interfering legislative or administrative action.

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THEME COMMITTEE 4 : NATIONAL PARTY SUBMISSION

BLOCKS 1 & 2

NOTES ON ASPECTS PERTAINING TO BILLS OF RIGHTS

1. THE NATURE AND ORIGIN OF A BILL OF RIGHTS

Existing bills of rights, in the municipal sense, can be classified into three main categories based on the origin of their contents:

- the reactive bills of rights that owe their origin to a particular crisis in the history of the state. Examples in this regard are the American constitution and bill of rights which were conditioned by the repressive conduct of the pre-1776 British colonial rule; the French Déclaration des Droits de l' Homme et du Citoyen (1789) reflects a response to conditions of the pre-revolutionary period; the catalogue of fundamental rights of the German Basic Law was in reaction to the atrocities of Nazism; the protection of fundamental rights and freedoms, together with the Principles of State Policy in the constitution of Namibia, inter alia address the problem of institutionalized racism
- the bills of rights which seek to preserve a certain continuity, viz. entailing norms which have already become established in the legal tradition of society.

The Canadian Charter (1982) serves as an example of this kind of bill.

- superimposed bills of rights. They simply contain borrowed provisions or mainly consist of copies of other instruments; they are unrelated to the history of the country concerned and do not address the particular needs of the particular society. Most post-colonial bills of rights of African countries fall within this category.

(Cf van der Vyver JD "Constitutional Options for post-apartheid South Africa" vol 40 no. 3 Emory Law Journal, Summer 1991 785 - 7)

The current phase of development in South Africa probably reflects elements of both categories 1 and 2. On the one hand, the introduction of a fully-fledged bill of rights into the final Constitution can be regarded as a definite reaction to a past of strife, conflict, discrimination (including racism) and institutionalized apartheid. On the other hand, human rights-orientated documents such as the Freedom Charter, numerous proposed bills of rights from various political parties, and the South African Law Commissions proposals, all in some way contributed to the inclusion of Chapter 3 in the current Constitution. In that sense, Chapter 3 can be seen as the culmination of a gradual move towards the establishment of a

genuine human rights dispensation in South Africa. Since its inception Chapter 3 has, moreover, set the trend as well as provided a foundation for establishing a proper and fully-fledged bill of rights as part of the new Constitution.

The South African bill of rights should, in a balanced way, be the product of and reflect elements from all three the major categories set out above: it should be decisively anti-discriminatory and pro-equality, whilst, simultaneously, upholding liberty; it should preserve those accomplishments which had already been attained in the establishment of a human rights culture in this country and it should incorporate the universally accepted and proven principles contained in other instruments, to the extent that South African conditions require and permit.

In modern terms, the nature of a bill of rights is closely interrelated to the concept of constitutionalism. In the words of Prof van der Vyver:

"One should put one's trust in the principle of constitutionalism (the Rechtsstaatsidee), which requires, among other things, that the powers of government be meticulously circumscribed by law, and in particular, that measures for the curtailment of political powers be incorporated into a justiciable constitution. Constitutionalism seeks to promote legitimacy of a particular regime through the principles of representative government

(democracy), and counteracts the abuse of power through the principle of legality (a government of laws and not persons). (op. cit 765).

2. APPLICATION

Questions pertaining to the nature of bills of rights are inextricably linked to questions pertaining to their application, for the former (the nature) determines the latter. Van der Vyver (op cit 771) defines a bill of rights as "a constitutional instrument in which the basic rights and freedoms of the subordinates of state authority are defined and afforded protection by means of constitutional entrenchment against the exercise of legislative and executive powers".

Who, then, can be regarded as subordinates of state authority? Does the term only apply to natural persons?

The current Constitution in s. 7(3) states that "juristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, the nature of the rights permits" It is, furthermore, noteworthy that s 7(4)(b) inter alia bestows standing on "an association acting in the interests of its members" (s. 7(4)(b)(ii) as well as on "a person acting as a member of or in the interest of a group or class of persons" (s. 7(4)(b)(iv)).

There are no reasons in logic or in law why these provisions should not be retained, also as they are in compliance with modern thinking and trends. Society does not only consist of individuals: "A plurality of associations as "society" is seen as interposed between the individual and the state. This is vital, both as an expression of the need to congregate and as a buffer against all-powerful central authority "(Prof Ulrich Karpen "Application of the Basic Law" in Starck (ed) Main

Principles of the German Basic Law at 68).

Prof Karpen then goes on to say: "But we must stress as well that defining separate spheres of private, associations and government is essential as a pre-requisite of freedom" and also that "the state is a creature of society and men, and the individual and his voluntary associations are not at mercy of government" (at 68).

To deny "non-natural persons" certain protection along lines to be indicated by the courts, would amount to a denial of those institutions as being essential elements of society, (and as has been pointed out by Prof Karpen, supra). Important institutions, such as the press, should be entitled to claim the protection of the fundamental right to freedom of expression, as should churches be entitled to claim freedom of religion, belief and opinion, and so on. To do otherwise, would be a step backwards compared to the stage of development which has been reached in this country.

3. VERTICAL AND HORIZONTAL APPLICATION

The next issue pertaining to the application of the bill of rights concerns the so-called vertical and horizontal application thereof. There can be no doubt that bills of rights had initially been intended to only apply vertically. There seems to be unanimity of opinion amongst South African commentators that the current Chapter 3 although primarily designed to apply vertically, also finds definite and substantive horizontal application.

Apart from the fact that bills of rights by definition are devised to primarily apply vertically (see e.g. the definition by Van der Vyver supra), the necessity for their horizontal application has been given recognition in most jurisdictions. Horizontal application, however, never applies in an unqualified way. For example, in the USA, horizontal application is mostly tied up with the doctrine of "state action"; "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment" However, the US Supreme Court, in order to strike down discriminatory practices in private-law relations, at times bent backwards to construct "state action". Also, the Civil Rights Acts were utilized to stamp out discriminatory practices which fall out of reach of the Bill of Rights itself.

The current s. 35(3) of the interim Constitution shows some

remarkable similarities with the method followed in Germany. In that country, the Constitutional Court has applied the principles enshrined in the catalogue of fundamental rights to non-public law spheres of the law in a more disciplined and consistent manner than its American counterpart. The Court thus identified a certain "objective order of values" that derives from the specific provisions of the Basic Law and which serves as a guide in the construction of all branches of the law. In this way, the guiding principles of the Basic Law find application in private law, particularly to the extent that such application will result in a "betterment" of private law.

Similarly, our s. 35(3) provides: "In the interpretation of any law (1) and the application (2) and development (3) of the common law (4) and customary law (5), a court shall (6) have due regard to the spirit, purport and objects (7) of this chapter" Thus a court is obliged (shall (6)) when interpreting any law (1) (viz. including all statutory law) and the development (3) (i.e. betterment / improvement) of the common law (4) (i.e. all private law and non-state law) and customary law (5) (including indigenous law), to apply the spirit, purport and objects (7) (i.e. the values underpinning) Chapter 3.

Any remaining possibility of "private discrimination" is moreover, eliminated by s. 33(4).

4. "ALL UNIVERSALLY ACCEPTED FUNDAMENTAL RIGHTS, FREEDOMS AND CIVIL LIBERTIES"

Constitutional Principle II proclaims in peremptory terms that "everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties which shall be provided for and protected by entrenched and justiciable provisions in the Constitution....."

The reference to "all universally accepted fundamental rights" etc., should, firstly, be evaluated in the context of the wide variety of international instruments for the protection of such rights, and which include:

- The United Nations Charter i.e. the Universal Declaration of Human Rights (1948);
- The International Covenant on Economic, Social and Cultural Rights (1966);
- The International Covenant on Civil and Political Rights (1966);
- The International Covenant on the Elimination of all forms of Racial Discrimination (1965)

Due cognizance should also be taken of the United Nations' Declaration on the rights of persons belonging to National

Ethnic, Religious and Linguistic Minorities (adopted by the General Assembly by its Resolution 47/135 on 18 December 1992). International "regional" instruments include;

- The African Charter on Human and People's Rights (1981);
- The American Declaration of Rights and Duties of Man (1948)
- The European Convention on Human Rights (1950) together with its various Protocols.

The methodology to be followed in ascertaining which rights etc., ought to be included will, in practical terms, probably follow the course of checking inclusion of any right proposed for inclusion, against the contents of, at least, these instruments.

In view of the peremptory wording of Constitution Principle II, the onus for the exclusion of any right which prima facie falls within the ambit of a universally accepted fundamental right, shall rest on the party alleging that such right should not be included.

Finally, the importance of public international law (including international humanitarian law) as a source for qualifying the concept under consideration, should be recognized. In that regard, the current Constitution sets certain examples worth pursuing e.g. s. 35(1), which dictates that public international

law shall be taken cognizance of by the courts, s. 116(2), which enjoins the Human Rights Commission to evaluate proposed legislation against "norms of international human rights law which form part of South African law or other relevant norms of international law" and s. 119(3), pertaining to gender issues.

5. CREATING A HUMAN RIGHTS CULTURE

South Africa has in recent times, made remarkable progress in pursuing the objective of establishing a vibrant human rights culture. Various community-based projects have been initiated and it can safely be said that, at the very least, the body politic as well as civil society are enthusiastically pursuing those objectives.

As far as the "institutionalised" side of the coin is concerned, the courts, the legal fraternity and various NGO's are actively engaged in the establishment of a proper human rights jurisprudence based on, in particular, the principles laid down by the current Chapter 3. Soon, the Constitutional Court will provide further impetus to this process.

Various southern African courts have already shown their willingness and ability to give effect to the principles of municipal instruments of human rights as well as the principles of international humanitarian law. Since the inception of the 1993 Constitution, South African courts have followed suit. An

amazing number of judgments based on the provisions of Chapter 3 have been delivered, and are still being delivered by our courts.

The jurisprudence which has thus been established should not be disregarded nor neutralized by unnecessarily tampering with the core elements of the current Chapter 3. The Chapter should be utilized as a basis to work from in the process of the development of an encompassing and fully-fledged bill of rights.

- PAC



17 February 1995

**PAC PRELIMINARY SUBMISSIONS ON WHAT ARE "UNIVERSALLY ACCEPTED
FUNDAMENTAL RIGHTS."**

1. It is generally accepted that the International Bill of Rights consists of the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights and its additional Protocols and the Covenant on Economic, Social and Cultural Rights.
2. The three International Instruments cover Civil and Political Rights, Socio-Economic Rights and Solidarity Rights.
3. In addition, we submit that the African Charter on Rights and Freedoms of 1981, is relevant to South Africa. It makes the unique contribution of not only according rights but also imposing obligations on individuals and Society.
4. We submit therefore that, the term "Universally accepted fundamental Rights" mean the First generation, Second generation and Third generation of Rights. These rights are equally important and necessary. If there are any differences among them, they may be in the area of enforcement, limitation and suspension.



17 February 1995

PAC PRELIMINARY SUBMISSIONS ON BLOCK 2: THE NATURE AND APPLICATION OF A BILL OF RIGHTS.

A. Nature of a Bill of Rights.

Our Preliminary Submissions on Block I, do in our opinion adequately deal with the issue of the nature, character and content of a South African Bill of Rights.

B. Application of a Bill of Rights.

- (i) The South African Bill of Rights should bind all the organs of State, including the Legislature, Executive and the Judiciary, at all levels of Government.
- (ii) It should apply to all Laws in force and all administrative decisions taken and acts performed during the operation of the new Constitution.
- (iii) The Bill of Rights should bind private social bodies and persons.
- (iv) We submit therefore that a South African Bill of Rights should in principle, have both vertical and horizontal application. Horizontal application will help, inter alia, to deal with racism in our society, especially, "privatised apartheid."

- TECHNICAL COMMITTEE

**Prof H. Cheadle
Prof J. Dugard
Prof I. Rautenbach
Ms S. Liebenberg**

OPINION OF TECHNICAL COMMITTEE
(THEME COMMITTEE 4)

The meaning of 'universally accepted fundamental rights' in Constitutional Principle II, Schedule 4 to the Constitution of the Republic of South Africa Act 200 of 1993

1. Constitutional Principle II of Schedule 4 of Act 200 of 1993 proclaims:

'Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution....'

2. The term 'universal acceptance' has been considered by South African courts in the context of acceptance of rules of customary international law. These decisions make it clear that 'universal' acceptance or recognition does not require that all States should consent to a particular rule. It is sufficient that there be widespread or general acceptance of the rule on the part of States.

Inter-Science Research and Developments Services (Pty) Ltd v Republica Popular de Mozambique 1980 (2) SA 111 (T) at 125 A - B;
S v Petane 1988 (3) SA 51 (C) at 56 - 57.

3. The same principle applies to the 'universal acceptance' of human rights. Rights are 'universally' accepted when there is widespread and general acceptance or recognition of the rights on the part of States. It is not necessary that all States accept the existence of such rights as this would give States that object to such rights the power of veto in respect of such rights. During the apartheid years, for example, South Africa did not accept many of the rights contained in the Universal Declaration of Human Rights of

1948, but this did not mean that the rights were not viewed as 'universally accepted.'

4. Today 'universally accepted' human rights are to be found in international human rights treaties and the declarations of the organs of the United Nations. Their 'universal acceptance' is evidenced by the number of States that have ratified them (in the case of multilateral treaties) and by the number of States that have voted for them (in the case of declarations).
5. Some human rights are so widely accepted by states that they form part of customary international law and are therefore binding on all States. The prohibitions on slavery, torture, prolonged arbitrary detention and systematic racial discrimination fall into this category.
6. Most universally accepted fundamental rights are contained in multilateral treaties and declarations of which the following are the most important:
 - (a) United Nations Charter, articles 55 and 56 (184 parties).
 - (b) Universal Declaration of Human Rights, a resolution of the General Assembly of the United Nations, which was approved by 48 of the 56 member States of the United Nations in 1948 (South Africa, together with seven other States abstained from voting).
 - (c) International Covenant on Civil and Political Rights, 1966 (over 120 parties including 36 African States).
 - (d) International Covenant on Economic, Social and Cultural Rights, 1966 (over 120 parties).

These treaties are given additional protection by regional human rights treaties and treaties which elaborate on the rights contained in the above named treaties (known as specialized human rights treaties). The purpose of those specialized conventions is to place detailed obligations on

States parties to protect the rights concerned and to provide for special measures of supervision of their obligations under the treaty.

Regional human rights treaties

European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950

American Convention on Human Rights, 1969

African Charter on Human and Peoples' Rights ('Banjul Charter'), 1981

Special human rights treaties

- (a) International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (over 137 parties)
- (b) Convention on the Elimination of All Forms of Discrimination against Women, 1979 (over 130 parties)
- (c) Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (over 80 parties)
- (d) Convention on the Rights of the Child, 1989 (over 154 parties)

These are the principal specialized human rights treaties. In addition there are treaties that deal with such matters as the protection of refugees, migrant workers and the prohibition of slavery.

7. Declarations adopted by international Conferences also play an important role in clarifying how the international community views human rights obligations.

The Vienna Declaration on Human Rights and Programme of Action of 25 June 1993, which was adopted by consensus by the representatives of 171 States participating in the World Conference on Human Rights is probably the most important Declaration of this kind.

8. National Bills of Rights are not 'universally accepted fundamental rights' in the sense that they lack general acceptance. Furthermore they are usually the product of particular historical and political circumstances operating at the time of their adoption in the different countries and this has inevitably influenced the inclusion or exclusion of particular rights. On the other hand they cannot be ignored as they have either influenced the drafting of international conventions (as in the case of the United States Bill of Rights) or they have in turn been influenced by such conventions (as with the Canada Charter of Rights and the Namibia Constitution). This means that Theme Committee 4 may legitimately refer to national Bills of Rights for assistance in the formulation of the rights contained in 'universally accepted' instruments. The necessary implication of this is that a right included in a national Bill of Rights that does not appear in any universally accepted instrument should not be considered by the Theme Committee. The Second Amendment to the US Constitution which recognizes 'the rights of the people to keep and bear arms' is a case in point. It does not appear in any of the conventions listed in paragraph 6 and cannot therefore be considered as a 'universally accepted fundamental right'.

This interpretation accords with Section 35 of the Interim Constitution which accords to international human rights norms a higher status than national comparative standards.

9. The international conventions listed in paragraph 6 establish courts, investigative commissions and committees to interpret and enforce the rights contained in these conventions. In formulating a Bill of Rights for the South African Constitution, Theme Committee 4 should have regard to the interpretations placed on these rights by these Courts, commissions and committees.

10. The international conventions listed in paragraph 6 provide for the enforcement and protection of 'universally accepted fundamental rights' in different ways. International Courts, commissions and investigative committees are established to provide international machinery for the enforcement of these rights, but at the same time signatory States are required to provide effective domestic remedies for the rights in question. Only where the domestic remedy is inadequate does the aggrieved individual have the right to invoke the available international machinery.
11. The methods employed by international conventions to secure the protection of human rights are relevant to the work of Theme Committee 4 for two reasons. First, they provide guidance as to how 'universally accepted fundamental rights, freedoms and civil liberties' might be entrenched and protected by the Constitution as required by Constitutional Principle II. They show that judicial methods of protection, although very important, are not the only mechanism employed for the protection of rights. Secondly, they indicate the degree of protection that South Africa will be obliged to accord to human rights when it ratifies a number of international human rights conventions which it signed in 1993 and 1994.¹ Obviously the Constitution must ensure that the protection it accords to human rights does not fall below the level of protection that South Africa will be bound to provide in terms of its international obligations.

¹ In 1993 South Africa signed the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and the Convention on the Rights of the Child. In October 1994 President Mandela signed the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. All these conventions are still to be ratified by Parliament in terms of section 231 (2) of Act 200 of 1993.

12. Distinctions are sometimes drawn between 'First Generation rights' (civil and political rights), 'second generation rights' (economic, social and cultural) and 'third generation rights' (collective rights). This distinction is often difficult to maintain and does not accord with the following key paragraph contained in the 1993 Vienna Declaration on Human Rights and Programme of Action:

'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.'

In the case of all universally accepted fundamental rights the emphasis should be on providing the most effective national remedy for the violation of the rights concerned. This would accord with the approach adopted by international human rights law.

OPINION ON THE MEANING OF "EVERYONE" IN CONSTITUTIONAL PRINCIPLE II, SCHEDULE 4 TO THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, ACT 200 OF 1993

JOINT OPINION OF THE TECHNICAL COMMITTEE TO THEME COMMITTEE FOUR

1. Our brief was formulated as follows in para. 7.1.1 of the Report on Block 1:

The Technical Committee would produce an opinion for the Theme Committee on the following issues:

- i) "Everyone shall enjoy...." (Whether the term 'everyone' includes juristic persons, structured and unstructured groups, and organs of civil society, etc.)
- ii)....

The issue of juristic persons

2. The significance of a positive opinion that the word, "everyone" in Constitutional Principle II includes juristic persons within its scope is that the debate on whether they should be bearers of rights at all in the final Constitution is closed. On this interpretation, Constitutional Principle II requires that juristic persons be entitled to claim "all universally accepted fundamental rights, freedoms and civil liberties." (" Everyone shall enjoy..."). On the other hand, if the term "everyone" does not include juristic persons within its scope it is still open to the drafters of the final Constitution to decide whether juristic

persons should be entitled to claim some of entrenched fundamental rights, and to what extent.

2. It is our unanimous opinion that in the context of Constitutional Principle II "everyone" refers to natural persons. We come to this conclusion for the various reasons set out below. Each of these reasons is not necessarily wholly endorsed by all of us. However, these differences in approach do not affect our joint conclusion.

2.1. The word, "everyone" does not by itself resolve the question whether it includes juristic persons within its scope. The word assumes a different significance depending on the context of the instrument in which it is found, and the relevant jurisprudence of the particular system which protects "fundamental rights, freedoms and civil liberties."

Other Jurisdictions

In the context of the Canadian Charter of Rights and Freedoms the holders of the particular rights are either "everyone" (freedom of expression, religion, assembly, association as well as legal rights relating to security of person and a fair trial), "every citizen" (democratic and mobility rights) and "every individual" (equality rights). The jurisprudence on the Canadian Charter indicates that the courts have interpreted the phrase "everyone" to include companies in relation, for example, to certain legal rights.

International Human Rights Law

The International Covenant on Civil and Political Rights (1966) refers, inter alia, to "every human being", "no-one", "everyone" and "all persons" as the subjects of the different rights protected in Part III of the Covenant. It is clear that no particular significance can be placed on the differences of formulation in this context.

In the context of the European Convention on Human Rights (1950), the majority of the articles refer to "everyone" as the holders of the particular rights protected in this Convention. However, the right to peaceful enjoyment of possessions is by contrast expressly conferred on "every natural or legal person". This distinction between "everyone" and "every natural and legal person" strongly suggests that the extension of the rights in the Convention to juristic persons was only specifically contemplated in relation to the protection of property rights.

The American Convention on Human Rights (1969) refers inter alia to "every person", "all persons" "everyone" and "no one" in relation to the various rights protected. It is clear from the context that no significance can be attached to these different formulations in this Convention.

The African Charter on Human and Peoples' Rights (1981) refers mainly to "every individual" or to "all peoples" as the bearers of the particular rights. Article 14 simply states that the "right to property shall be guaranteed" [by the States parties] without referring to the bearer of this particular right.

2.2. In no system protecting human rights are juristic persons allowed to be the bearers of " all universally accepted rights, freedoms and

civil liberties". [our emphasis]. It is relatively uncontroversial that there are some rights that juristic persons by their very nature are either incapable of claiming or should not be allowed to claim because of the social implications of allowing such claims. Examples include the rights to human dignity, to life, physical integrity, forced labour, children's rights, political rights (the right to vote etc.). One would thus have expected that the drafters of our interim Constitution would have expressly inserted such a qualification if they intended "everyone" to include juristic persons in the context of Constitutional Principle II.

2.3. The South African interim Constitution and the German Constitution contain explicit clauses dealing with the position of juristic persons in relation to the entrenched rights [see s. 7(3), SA Constitution; article 19, German Constitution]. From this one may deduce that if "everyone" is used without adding anything concerning juristic persons, it refers only to natural persons. This argument is reinforced by the consideration that the same constitution makers formulated and approved both section s. 7(3) and Constitutional Principle II of Schedule 4.

2.4. "Everyone" in the context of Constitutional Principle II refers to the bearers of "universally accepted fundamental rights, freedoms and civil liberties". The body of international law protecting human rights is based on the concept of the dignity of the human person. This concept of the inherent dignity and worth of the human person is found in the preamble of the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and in a variety of regional and specialised conventions, resolutions and declarations protecting human rights.

Juristic persons are essentially artificial entities which are given legal recognition, and which have a separate legal identity from that of their individual members. Companies, for example, as juristic persons in our legal system have the capacity to be the independent holders of certain rights and duties. This facilitates the purposes for which the companies are usually established, viz. the mobilisation of shareholders' capital for commercial gain.

The purpose of protecting fundamental rights is primarily to protect different aspects of human dignity. From this perspective "everyone" in Constitutional Principle II refers to natural persons. This approach does not exclude the possibility that in certain instances enjoyment of the entrenched fundamental rights can be extended to juristic persons.

3. As stated above, our opinion in this regard is only dealing with the meaning of "everyone" in the context of Constitutional Principle II. The effect of our conclusion is that it is still open for the Constitutional Assembly to decide that juristic persons should be allowed to be bearers of some of the entrenched rights in the final Constitution. While there is consensus that juristic persons cannot be the bearers of certain rights, there are other rights in respect of which this question will be contentious. It should also always be borne in mind that the fact that juristic persons might not themselves be the bearers of certain rights does not mean that they cannot be granted locus standi to challenge the constitutionality of laws which conflict with those rights. In many instances the interests of juristic persons can also be protected through an action brought by its members.

4. If it is decided that consideration should be given to allowing juristic persons to claim entitlement to some of the rights in the final Bill of Rights, two possible ways of approaching the question are the following:

4.1. The first approach is to be specific in respect of each right by the use of terms such as 'citizen' or 'individual' or distinguishing between natural and juristic persons. This approach would, in the text, determine whether a juristic person is the bearer of the right in question or not. A difficulty of this approach is that the nature of the different juristic persons in our legal system will also have to be taken into account in defining to what extent they can be holders of the particular rights. As a result the text of the Constitution would have to be fairly detailed;

4.2. The second approach is to use a phrase such as "every person" in relation to the entrenched rights and leave it to the Courts to determine when the right should be extended to juristic persons, and to what extent. This is the effect of s.7(3) of the interim Constitution. The disadvantage of this approach is that there is uncertainty in relation to the different rights, and this issue will have to be determined by litigation. The decisions of the Courts in this regard may have ramifications and effects which the drafters of the Constitution did not intend.

5. We would suggest that Theme Committee IV approach this issue by considering in relation to each right, the following questions:

5.1. whether juristic persons should be allowed to be the holders of the right in question; or

5.2. this should be left to the courts to develop.

At the end of the exercise it may well be decided by the Constitutional Assembly to opt for either approach outlined in paras. 4.1. and 4.2. in drafting the final Constitution [i.e. clearly defining the holders of each right in relation to juristic persons or leaving this question to the courts]. This is assuming of course that it is decided that juristic persons should be allowed to be holders of rights at all under the final Constitution.

Structured and unstructured groups and organs of civil society

6. Principle XII deals with the rights of structured groups and organs of civil society. Unstructured groups are not included in the word "everyone" in Constitutional Principle II, or by Constitutional Principle XII. This again leaves the question open in respect of the drafting of the final constitution.

Ms. S. Liebenberg

Prof. H. Cheadle

Prof. I. Rautenbach

Prof. J. Dugard

17 February 1995

OPINION OF TECHNICAL COMMITTEE (THEME COMMITTEE 4)

The meaning of the phrase, "after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of the Constitution" in Constitutional Principle II of this Interim Constitution Act 200 of 1993

1. Constitutional Principle II provides that in drafting the Bill of Rights in the final Constitution "due consideration is to be given" inter alia to the fundamental rights contained in Chapter 3 of this Constitution."
2. We are asked to advise on the meaning to be attached to the phrase, "due consideration."
3. The Shorter Oxford English Dictionary gives as one of its meanings for the word, "due" : "...such as ought to be; fitting, proper, rightful". The Chambers Twentieth Century Dictionary (1972) also includes as one of its meanings the connotation of fairness.
4. In the context of Principle II, this phrase means that in drafting the final Constitution Theme Committee 4 and the Constitutional Assembly are required to consider each 'fundamental right' contained in Chapter III of the interim Constitution with a view to including it in the final Constitution. This consideration must be conducted in good faith and must take account of both the reasons for retaining each right and the reasons for excluding or amending it. The 'consideration' must be proper, serious and fair.

5. There is no obligation upon Theme Committee 4 (or the Constitutional Assembly) to retain all the rights contained in Chapter 3 of the interim Constitution. Each right must, however, be properly considered.

6. The fact that the right in question is already included in Chapter 3 is not the only factor that is required to be considered by Constitutional Principle II. This is also indicated by the use of the phrase, "inter alia". Consideration must also be given to whether the right is a "universally accepted" fundamental right, freedom or civil liberty. It is also required that consideration be given to whether there are other rights not presently included in Chapter 3 that may properly be regarded as "universally accepted" fundamental rights, freedoms or civil liberties.

7. In drafting the Bill of Rights the Constitutional Assembly should therefore give consideration to these factors. The above approach should also inform the Constitutional Assembly and its Theme Committees in planning and structuring its work programme.

Prof. J. Dugard

Prof. I. Rautenbach

Prof. H. Cheadle

Ms. S. Liebenberg

17 February 1995