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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 4

FUNDAMENTAL RIGHTS

8 August 1995

Room M 46

REPORTS:

10. ACCESS TO COURTS

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THEME COMMITTEE 4

-FUNDAMENTAL RIGHTS

SCHEMATIC REPORT ON

ACCESS TO COURTS

NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING[1] ASPECTS	REMARKS
1.	II, V, VI, VII	**Nature of right (Application of Constitutional Principle II)**	Access to court is a fundamental right within the meaning of Constitutional Principle II. It is also endorsed by Constitutional Principles V, VI and VII.		
2.		**Content of right**	The Constitution must guarantee the right to access to a court of law.	The present wording of s 22 is accepted - DP, NP and possibly the PAC. The word 'justiciable' to be replaced with language more comprehensible to the lay person - ANC. Separate religious or cultural courts to deal with matters of personal law - ACDP. The ANC warns of the cost implications of entrenching this right but makes no proposal on this subject.	

NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING[1] ASPECTS	REMARKS
3.		**Application of the right (Nature of Duty)**	It is agreed that the State is obliged to enforce this right by ensuring that every person has access to impartial and independent courts and tribunals for the settlement of disputes and that the jurisdiction of the courts is not excluded by law. (This may include a duty on the State to provide legal representation to indigent - ANC).		
4.		**Application of the right (To common and customary law)**	This right will apply to the adjudication of both common law and customary law disputes.		

NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING[1] ASPECTS	REMARKS
5.		**Application of the right (Duty on Private Actors)**	The right operates vertically against the State in the sense that the State is required to ensure access to a court of law. The right will operate horizontally to ensure that both natural and juristic persons (ie non-State actors) submit their disputes to courts of law for determination.		
6.		**Bearers of the right**	Natural persons and juristic persons		
7.	Section 33	**Limitation of right**	It is accepted that the right should be subject limitation clause.		

THEME COMMITTEE 4
FUNDAMENTAL RIGHTS

REPORT ON RIGHT THE RIGHT OF ACCESS TO COURTS

This report is drawn up on the basis of submissions received from political parties, organisations of civil society and individuals; the public participation programme and other activities of the Constitutional Assembly.

PART I

MATERIAL CONSIDERED BY THE THEME COMMITTEE

1. **Submissions received from political parties (in alphabetical order):**
   - ACDP
   - ANC
   - DP
   - FF
   - NP
   - PAC

2. **Submissions received from the public and civil society[1]:**

2.1 Individuals (in alphabetical order)

2.2 Organisations (in alphabetical order)

2.3 Government structures\ institutions (in alphabetical order)

3. **Technical Committee reports:**

   None to date

4. **Relevant Constitutional Principles**
   II, V, VI, VII

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2. This section will be completed once all the submissions received have been processed.

PART II

1. NATURE OF THE RIGHT (Application of Constitutional Principle II)

1.1 Non-contentious Issues

1.1.1 Access to court is a fundamental right within the meaning of Constitutional Principle II. It is also endorsed by Constitutional Principles V, VI and VII.

2. CONTENT AND SCOPE OF THE RIGHT

2.1 Non-Contentious Issues

2.1.1 The Constitution must guarantee the right to access to a court of law.

2.2 Contentious\ Outstanding[2] Issues

2.2.1 The present wording of s 22 is accepted by the DP, NP and, possibly the PAC.

2.2.2 The ANC would prefer the word 'justiciable' to be replaced with language more comprehensible to the lay person.

2.2.3 The ACDP proposes separate religious or cultural courts to deal with matters of personal law.

2.2.4 The ANC warns of the cost implications of entrenching this right but makes no proposal on this subject.

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2 It should be noted that items marked *"Outstanding"* do not signify disagreement amongst political parties or contention. Parties felt that these matters could best be dealt with at the level of the Constitutional Committee, where negotiation could take place.

3. APPLICATION OF THE RIGHT (Nature of the duty on the state)

3.1 Non-contentious Issues

3.1.1 It is agreed that the State is obliged to enforce this right by ensuring that every person has access to impartial and independent courts and tribunals for the settlement of disputes and that the jurisdiction of the courts is not excluded by law. This may include a duty on the State to provide legal representation to indigent (ANC).

4. APPLICATION OF THE RIGHT (To common and customary law)

4.1 Non-contentious issues

4.1.1 This right will apply to the adjudication of both common law and customary law disputes.

5. APPLICATION OF THE RIGHT (Duty on private actors)

5.1 Non-contentious issues

5.1.1 The right operates vertically against the State in the sense that the State is required to ensure access to a court of law. The right will operate horizontally to ensure that both natural and juristic persons (ie non-State actors) submit their disputes to courts of law for determination.

6. BEARERS OF THE RIGHT

6.1 Non-contentious Issues

6.1.1 Natural persons and juristic persons are the bearers of the right.

7. LIMITATION OF THE RIGHT

7.1 Non-contentious Issues

7.1.1 It is accepted that the right should be subject to the general limitation clause.

1.. It should be noted that items marked "*Outstanding*" do not signify disagreement amongst political parties or contention. Parties felt that these matters could best be dealt with at the level of the Constitutional Committee, where negotiation could take place.

ADDENDUM

PARTY SUBMISSIONS

- ACDP

AFRICAN CHRISTIAN DEMOCRATIC PARTY
SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE FOUR

ACCESS TO COURT

Content of the Right

The problem on how to make the justice system accessible to the people is surely as old as the institution itself.

In *Exodus 18*, Moses, who alone adjudicated all the disputes in the nation of Israel, and who, understandably, could not cope, was given sage advice by his father-in-law on how to address the question of accessibility.

"[S]elect capable [persons], from all the people, [persons] who fear God, trustworthy [persons] who hate dishonest gain - and appoint them as officials over thousands, hundreds, fifties and tens."

This referred to a judiciary system with a judge over every ten families with a right of appeal to judges over every fifty families and these families having again a right of appeal.

At its core, the system is made accessible by having an adjudicating official virtually on every street block, presiding over everyday squabbles. This is indeed a system worthy of reproduction, keeping in mind that the law that these judges applied was the law of God. This was due to the religiously homogenous nature of the society in question.

Translating this into the modern South African situation, a number of key aspects become evident. Just as every society has its own God - namely the authority in the society, every societal god implies a societal religion. If the authority in a society is Man, himself, then humanism is the religion of that society.

Due to the fact that any court system adjudicates on a system of law, that is shaped by the ultimate recognised authority in that society and consequently by the religion of that society, a court of law is inherently a religious institution in it's very core.

This is precisely the reason why the Lord Jesus Christ, commenting on the religious character of the Roman legal system imposed on the Jews, cautioned them not to allow themselves to be adjudicated by a heathen judge.

The system of adjudication, therefore, is very much a matter of freedom of religion. In keeping with stated aims of allowing for diversity in a religiously heterogeneous society, it would simply make sense to address the question of accessibility to court with due regard to religious differences. Again, we state that religious freedom must not include satanism, spiritism and other "beliefs or consciences" of their ilk.

With the call for recognising the aspect of religious and cultural rights, the ACDP proposes a system of adjudication centred on a particular religious or cultural foundation that would incorporate traditional African courts, Muslim Judicial Council and Christian Tribunals to mention just a few.

To a very large proportion of the South African populace, the right of access to court will be utterly useless if, by using these courts, they have to bow to a foreign religion and submit to what would be to them a renunciation of their own religious belief system.

The ACDP proposes that even sec 22 in Act 200 of 1993 lends itself perfectly to a diversified legal system as contemplated above.

One further aspect that makes the courts inaccessible is the question of sophistication: with law becoming such an intricate field of practice, and even more so with the stated necessity to refer to international law in observance of the constitutional matters.

Aspects that immediately come to mind regarding this, is firstly the question as to who will pay for this legal assistance that the state seems willing to provide and secondly, why not allow individuals to appear on their own behalf in all *fora* ? Surely the law is not meant to exclude but to incorporate.

The ACDP proposes that the legal system, which in any case is based on principles of good common sense, or should be, must be de-sophisticated to accommodate ordinary people. Why must we be made to believe in ideals of equality before the law and yet be discriminated against because of a lack of education or sophistication.

For too long the legal system was a mystifying esoteric science where men and women in robes used an incomprehensible vernacular and yet come up with such incomprehensibilities as did Mr Justice Chaskalson, on reacting to the public outcry on the abolition of the death penalty:

"The question is not what the majority believe a proper sentence should be. It is whether the Constitution allows the sentence."
(quoted in The Argus, 8 June 1995)

If law is so simple in the eyes of the President of the Constitutional Court, surely ordinary citizens have the right to benefit therefrom.

Application of the Right

2.1 **Nature of the duty to be imposed on the State**

To recognise the cultural and religious diversity of South Africans as persons and to provide this right in accordance therewith.

2.2 **Application of the right to common law and customary law**

For the ACDP, the new constitution must reflect the absolute truth of God's law. This will be the ultimate test even for customary and common law, recognising that customary and common already forms the basis to be extended to realise the ultimate goal mentioned in 2.1.

2.3 **Should the right under discussion impose a constitutional duty on actors other than the State?**

This right is essentially a right to be exercised against the State who should at least provide the legislative framework to make exercising it a reality.

2.4 **Who should be the bearers of the right?**

The ACDP believes that with families being at the core of societal corporations, both juristic and natural persons should have this right, this specifically includes the right for Christian companies to use a Christian tribunal and *mutatis mutandis ditto* for Muslim corporations.

2.5 **Should the right under discussion be capable of limitation by the legislature?**

The ACDP places one main limitation on the application of the right as evidenced above. We do not agree that "belief systems" and consciences that violate biblical principles be allowed the status afforded recognised theistic religions.

8th June 1995

[COURT.WPS]

- ANC

PRELIMINARY ANC SUBMISSION

THEME COMMITTEE 4 - ACCESS TO COURTS

No right of access to court to have a dispute heard has existed in South Africa prior to the enactment of the Interim Constitution. Access to court was severely restricted under apartheid and often denied to the majority of citizens in our country. In addition, the legislature often acted to oust the jurisdiction of the courts further, leaving citizens with no or limited recourse to the courts in matters involving patent injustice or a violation of fundamental human rights.

It is for this reason that the ANC believes that a right of access to court must be entrenched in a Bill of Rights. The right to have a dispute heard by a court or similar tribunal fundamentally affects the extent to which a person is able to enforce the provisions of a Bill of Rights in his or her own life. This is not a matter which should be left open to be implied by the courts through the interpretation of provisions such as the right to due process of law.

1. Content of the right and its formulation

The Interim Constitution states in section 22 that:

"Every person shall have the right to have justiciable disputes settled by a court of law or where appropriate, another independent and impartial forum."

Concerns have been raised as to what constitutes a "justiciable dispute". The matter has been a subject left open, often for varied interpretation, by the courts. The definition of a "justiciable dispute" is, we believe, a technical one and not one which will be easily interpreted by the average South African in reading the Bill of Rights.

The ANC is also of the view that careful consideration needs to be given to the cost implications for the state in constitutionally entrenching a right of this nature. In addition, the extent to which this clause as currently drafted may intersect with the

intended scope of section 24 needs careful consideration.

Given the concerns cited above, we believe that the intended meaning and scope of this provision must be clarified and an attempt made to re-word the clause in simple language.

2. Application of the right

2.1 The state has a duty to protect and enforce the right. This may include a duty to provide financial resources or legal representation to those who are limited in their exercise of this right by a lack of such resources.

2.2 The right shall bind the state and all social structures.

2.3 The bearers of this right shall be private persons of where appropriate, groups or social structures.

- DP

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Democratic Party

12 June 1995

CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 4

SUBMISSION BY DEMOCRATIC PARTY

21. ADMINISTRATIVE JUSTICE
22. ACCESS TO COURTS
23. DETAINED, ARRESTED AND ACCUSED PERSONS

ADMINISTRATIVE JUSTICE

1. Content of the Right

Two constitutional principles are applicable to the right to administrative justice, namely:-

Principle VI

> There shall be a separation of powers between the legislature, executive and judiciary with appropriate checks and balances to ensure <u>accountability, responsiveness and openness</u>. (Our emphasis)

Principle IX

> Provision shall be made for freedom of information, so that there can be open and accountable administration at all levels of government.

Section 24 of the Interim Constitution provides:-

> "Every person shall have the right to -
>
> (a) lawful administrative action where any of his or her rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened."

The Democratic Party strongly supports the provision of a right to fair administrative justice in the final Constitution. As is clear from a reading of the constitutional principles, referred to above, it is obligatory for the Constitutional Assembly to enact such a provision if it is to meet its obligations in terms of the aforesaid principles.

The Democratic Party strongly believes that the critical feature of the new Constitution and its greatest impact will be whether or not government officials operate in an open and transparent manner - and whether such a process will advance the concept of democracy. We subscribe to the notion that, in the final analysis, the quality of government is determined by the quality of its administration.

Democratic government is no longer understood to be merely a matter of voting in a general election every five years. The aspiration to democracy has grown into an aspiration to governmental decision-making which ideally should be open, participatory and accountable.

Section 24 of the Interim Constitution promotes government accountability in so far as it confers a right to be given reasons for administrative action which affects the citizen's rights or interests. This right is fortified by a right to question the justification of administrative action in court.

The combined effect of Section 24 is to require officials to justify their decisions, both to the people whom they affect and, under challenge to the courts. Properly applied, these rights promise administration that is unrecognisably more accountable than South Africa has traditionally enjoyed.

Participatory government means an opportunity to influence decisions that affect the citizen. The Bill gives a right to "procedurally fair" administrative action where someone's rights or legitimate expectations are affected or threatened. In most contexts, procedural fairness will be taken to require a person about to be affected by an official decision to be given a hearing, and therefore an opportunity to influence the outcome. Open government depends primarily on the right that the Bill gives of access to official information. But here, unfortunately, an important opportunity has been lost in the Interim Constitution, because the right is restricted

to information required for the "protection or exercise" of a person's right (Section 24(a)).

The Democratic Party strongly believes that the final Constitution should enact a right of access to any information, not qualified by that restriction. The effect of this will be to force the government to procure a Freedom of Information Act. It is clear, of course, that no right of access to official information can be absolute. There have to be exceptions to protect personal privacy, law enforcement, commercial confidentiality, national security, etc. These, however, are well catered for under the general provisions of the limitations clause (Section 33). Section 33 caters for such exceptions because it permits any right in the Bill to be limited by law of general application if the limitation is reasonable, and justifiable in an open and democratic society based on freedom and equality.

An unqualified right to information in the Bill of Rights would force the government to list in a law, all the exceptions that are considered necessary, and then defend them in court, under the limitation clause as justifiable limitations on the right to information. That law would have had to codify what information citizens are entitled to, and what they are not.

We believe that the current narrower right to information as contained in the present formulation of Section 24 misses the opportunity to oblige government to produce such a Freedom of Information Act. It obliges officials to disclose only that which is necessary for the protection or exercise of a person's rights, and the government remains free to fight for the most restrictive interpretation of that category which the courts will accept.

Accordingly the Democratic Party proposes two alternative formulations:

Either:-

Section 24(a) should be amended to read:

"(a) lawful administration action" [where any of his or her rights or interests is affected or threatened]

[ ] = deletion from the clause.

Section 24(c) should be amended to read:

"(c) be furnished with reasons in writing for administrative action unless the reasons for such action have been made public."

We believe, however, that an alternative formulation of the right to administrative justice could be as follows:-

"24(a) No person shall be affected adversely by decision made in the exercise of public power, which is unlawful, unreasonable or procedurally unfair;

24(b) Every person adversely affected by decision made in the exercise of public power shall be entitled to be given reasons, in writing, for the decision".

The formulation of the above right will entrench every person's right, when adversely affected by governmental action, to decision which is lawful, reasonable and procedurally fair. It also guarantees the right to be given reasons for a governmental decision.

The combined effect will be to require public officials thoughtfully and deliberately to consider their decisions, to take due account of the impact of a decision on those whom it affects, to explain the decision to those whom it affects, and, where fairness so requires, to hear those affected before the decision is taken.

The above formulation will, therefore, foster governmental processes that are both accountable and participatory: Accountable because decisions will have to be justified to those governed by them, and participatory because those governed will have had an opportunity to influence them. In short, the Article will foster democratic decision-making. It will also require the kind of decision-making processes that tend to yield well justified decisions.

Whichever formulation is adopted by the Constitutional Assembly, it is imperative that a right to administrative justice be entrenched in the Bill of Rights. This will make it impossible to legislate such a right away. This will put an end to the legislative practice of the past which tended to exclude the jurisdiction of the Supreme Court to review governmental decision-making, a pernicious practice by which the government has in the past attempted to insulate its decisions from judicial scrutiny, particularly under the security laws.

2. Application of the Right

There shall be a positive duty on the sate primarily and on other organs of government at all levels.

3. Application to Common and Customary Law

The right should apply to common law and customary law.

4. Other Actors Bound

Although the state will be the primary respondent of the application of this right, it is conceivable that it could also impact on the requirement for fairness in administrative decisions in respect of any public authority or quasi judicial body and should affect any body which exercises a public power.

5. Bearers of the Right

By the nature of the right to administrative justice natural persons should be the bearers of the rights contained in this provision.

6. Limitations of the Right

The limitations applicable in Section 33(1) should be applicable to the provisions of this Section, save and except that the distinction drawn under the provisions of Section 33(1)(bb) between administrative justice in ordinary situations and administrative justice in relation to free and fair political activity, should be removed and the additional requirement of necessity should be imposed on any limitation applying to the right to administrative justice.

ACCESS TO COURTS

1. Content of the Right

Section 22 of the Interim Constitution provides:-

> "Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum."

The rights contained in this Section echo the provisions of Constitutional Principle V which, *inter alia*, states

> "The legal system shall ensure the equality of all before the law and an equitable legal process...".

The current formulation of Section 22 is unusual in so far as a clause relating to access to court is usually linked to a specific right (such as those of arrested persons, or those contesting administrative injustice). However, its inclusion as a substantive right, available to resolve justiciable disputes is important given the history of South Africa, particularly the notorious provisions in legislation during the apartheid era which contained a significant number of ouster clauses (e.g. The Public Safety Act 3 of 1953).

Therefore this guarantee of access to court provides a crucial procedural safeguard for the enforcement of all legal rights in the Constitution, not simply those relating to the Bill of Rights. It effectively eliminates "ouster clauses". The inclusion of the concept of "independent and impartial fora" recognises the important role which has been played and will increasingly be played in the future by tribunals particularly in the sphere of administrative justice.

The Democratic Party supports the retention and the wording of Section 22.

2. Application of the Right

There shall be a positive duty on the state to ensure that every person has access to impartial and independent fora for the settlement of legal disputes and that impediments such as legislative ouster clauses are not enacted.

3. Application to Common and Customary Law

Obviously this right would be applicable in the adjudication of both common law and customary law disputes.

4. Other Actors Bound

The primary obligation of this right binds the state and its actors not to prohibit or impede access to the courts. However, it would also have an indirect application on civil society. It should certainly also have application to juristic persons such as voluntary organizations, associations and even corporate enterprises in their disputes with other actors in civil society and the state.

5. Limitations of the Right

The normal limitations in Section 33 will apply.

The concept of justiciability contained in the current wording of the Bill will also act as a limitation since it is likely to limit an over-broad reach of the right to those disputes susceptible of resolution by court of law or tribunal (see further, Du Plessis and Corder, "South Africa's Transitional Bill of Rights" at 163).

DETAINED, ARRESTED AND ACCUSED PERSONS

1. Content of the Right

Section 25 of the Constitution provides:

- FF

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FREEDOM FRONT

THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

SUBMISSIONS ON ACCESS TO COURTS

The Freedom Front makes the following submissions regarding access to courts (or, as it is often called, 'access to justice').

1. The content of the right of access to courts

Section 22 of the transitional Constitution reads as follows:

> 'Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum'.

The above-mentioned provision can be taken as the basis for a similar provision in the new Constitution. Constitutional Principle II provides for the entrenchment in the new Constitution of justiciable provisions covering 'all universally accepted fundamental rights'. In this context Constitutional Principle V requires that the legal system shall ensure 'the equality of all before the law and an equitable legal process'.

In the context of section 22 the Freedom Front wishes to raise five points, viz.

(a) The general right of recourse to a court of law in the case of justiciable disputes;

(b) Alternatively, the right of recourse to arbitration (or, possibly, mediation) in the context of the words 'another independent and impartial forum';

(c) The right of paupers or indigent persons to litigate or have recourse to other legal remedies;

(d) The need to conduct legal proceedings in a language understood by the parties to the litigation, accused persons and witnesses;

(e) The constitutional obligation to protect traditional leadership, according to indigenous law.

(a) The general right of recourse to a court of law in respect of justiciable disputes

The Freedom Front supports in principle the right of every person to have justiciable disputes settled by a court of law.

The right referred to above implies, in the first place, that no legislature may in legislation exclude the jurisdiction of the ordinary courts in respect of disputes that are otherwise justiciable, i.e. capable of determination by a court of law.

Secondly, we wish to submit that the so-called 'right' of recourse to a court of law is not an unqualified right. Its exercise depends on the availability of finance. This matter is dealt with in (c) below.

(b) The 'right' of recourse to arbitration (or mediation) in the context of the words 'another independent and impartial forum'

The Freedom Front submits that provision for a right to have justiciable disputes settled, where appropriate, by another independent and impartial forum than a court of law, ought not to be inserted in a constitution. Arbitration and mediation depend on consent between the parties involved in the dispute, and to stipulate in a constitution (or, for that matter, in any statute) that parties have a right to go to arbitration or mediation is a contradiction in terms.

The statement above does not mean, however, that the state should not make statutory provision outside the Constitution for persons to agree or consent to arbitration and mediation. Many parliaments in different countries have, thoroughout the years, passed statutes to this effect. Such South African statutes should, in principle, remain in force.

(c) The right of paupers or indigent persons to litigate or to have recourse to other legal remedies at no or minimal personal cost

Where an applicant himself is not able to afford litigation or other legal expenses, and where he does not qualify for free legal services as a pauper, while, at the same time financial aid by a state-aided or other institution such as a legal aid board

or a legal resources centre is not forthcoming, he should not be entitled to litigate at state expense. These matters pose special problems, if not of a juridical nature, then at least of an economic nature (a question of financial resources and of manpower).

There have been reports in the media recently that a government spokesman has advocated legal services at state expense for everyone. This is an ideal that cannot, in the opinion of the Freedom Front, be realised within the restraints imposed by the South African economy and the resources of the state. Free legal services for the whole population in the present South African economy is a goal that is as unattainable as the aim of free medical services for large proportions of the population or free education for all beyond a certain stage. Such 'rights' would not be 'justiciable' within the requirements of Constitutional Principle II.

(d) The need to conduct legal proceedings in a language understood by certain persons concerned

Section 107 of the transitional Constitution is an admirable attempt to solve the problems of a multi-lingual society in so far as court proceedings are concerned. However, the provisions of section 107 are subject to the overriding provisions of section 3 of the transitional Constitution. However, section 3 is inadequate to afford sufficient protection to at least some of the present official languages. Section 3, if re-enacted without amendment in the new Constitution, will have a bearing on any section in such Constitution that will replace the present section 107.

It is necessary that all language provisions in the Constitution should be considered together. Both the provisions referred to above fall outside the present chapter on fundamental rights. They should therefore be considered by another theme Committee than Theme Committee 4.

(e) The constitutional obligation to protect traditional leadership, according to indigenous law

Constitutional Principle XIII deals with the protection of the institution, status and role of traditional leadership, according to indigenous law. According to this Principle indigenous law as well as the common law shall be recognised and applied by the court, but subject to the fundamental rights contained in the Constitution and legislation dealing specifically with the latter.

The application of indigenous law is made subservient to the fundamental rights to be set out in the Constitution and related legislation. This means that there is a potential conflict between rules of indigenous law on the one hand , and the Constitution and the above-mentioned related legislation on the

other hand. To avoid a clash between these two legal systems, with its potential for social and political discord and strife, the Constitution should be drafted in a manner that preserves indigenous law to the greatest extent possible. Conflict of other laws with indigenous law should in this way be reduced to a minimum.

Justice.TC4
12.06.95

- NP

NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 4

ITEM 22: ACCESS TO COURT

ACCESS TO COURT

1 Content of the right

Section 22 of the Constitution 1993 provides that:

"Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum".

This section is most commendable and provides a crucial procedural safeguard for the enforcement of all legal rights and not only those included in the Chapter on Fundamental Rights.

It is a substantive right of access to a court of law and also includes other independent and impartial forums. It recognises the important role that can be played by the various tribunals.

2. Application of the right

2.1 *Nature of the duty imposed on the state*

Primarily the rights apply against the State including all organs of state at every level of government and imposes a positive duty on the State. The State must provide courts and other independent and impartial forums to which citizens will have access. It places a positive duty on the State not to exclude jurisdiction of the courts.

2.2 *Common law and customary law*

The right should without doubt apply to common law and customary law:

2.3 *Actors other than the State*

The right operates vertically against the State. The relationship between individuals in this regard is governed by the common law and other statutes. In as much as an individual relationship can affect this right, the individual will be bound by this right.

2.4 *Bearers of the right*

Every person, including a juristic person, is the bearer of this right.

2.5 *Limitation of the right*

In terms of the Constitution 1993, the stricter limitation test of section 33(1), namely that the limitation must also be necessary, does not apply to this right. Any legislation which may regulate or limit the right in any way must always be subject to the criteria laid down in the general limitations clause.

The Wording

We propose that the wording of the present section 22 be retained.

- PAC

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PRELIMINARY SUBMISSIONS OF THE PAC ON ACCESS TO COURTS

This is an important right which guarantees all persons access to a forum where their disputes can be resolved. Further, it also imposes a positive obligation on the state to make access to such forums a reality.

Content of the Right

The right of every person to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.

Other related aspects.

1. This right can be claimed by both natural persons and juristic persons.

2. It binds the state. As stated above, it does not only accord every person some procedural guarantees but does also impose positive duties on the state.

3. This right can be limited and suspended.

R K Sizani
MP