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**CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 4  
FUNDAMENTAL RIGHTS**

**DOCUMENTATION  
*PARTY SUBMISSIONS***

**31 October 1994**

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# AFRICAN NATIONAL CONGRESS

## SUBMISSION ON WORK PROGRAMME FOR THEME COMMITTEE 4.

### Priority Issues:

#### A) A conceptual framework :

i) The interim constitution presents chapter 3 as dealing with fundamental rights , it is the ANC's view that the committee needs to discuss the possibility of adopting the universal approach which speaks of a Bill of Rights.

#### ii) Constitutional Rights:

We believe that the committee should discuss the vital need to ensure that the Bill of Rights finally adopted by this government incorporates civil, economic, social and environmental rights. The work of the theme committee should be to provide the Management Committee with a document that incorporates this approach.

#### B. Review of Interim Constitution:

Our responses on (a) - (i) arise from the perspective described above.

a) (i ) Each of the rights that the committee seeks to include in the Bill of Rights has to be examined in the light of the constitutional principles in order to assess whether the Rights as suggested by the committee fully reflect our intention to ensure that South Africans

enjoy the full range of Rights as described in A above. The formulation of each clause must ensure that we are precise in stating the exact intention of each clause.

(ii) Further deliberation on the following issues is necessary:

- i) the Preamble of the constitution
- ii) the Right to life clause
- iii) the Right to dignity clause
- iv) Right to legal representation
- v) Rights that relate to marriage and issues of sex and gender
- vi) Customary Law
- vii) Privacy
- viii) Freedom of religion
- ix) Education
- x) Sport and Recreation
- xi) Worker's rights
- xii) 2nd generation rights
- xiii) Incitement to race hatred
- xiv) Property

b) It is the ANC's belief that those clauses that relate to social and economic rights need to be urgently addressed, e.g., gender rights, worker rights, customary law, right to legal representation, property rights, education, and second generation rights.

c) Areas of overlap occur in several clauses. Detailed discussion within the committee will isolate areas of overlap. At this stage the issues of priority identified in A should be dealt with.

d) The committee requires time to "engage in substantive discussion before a decision in this regard.

e) Once more further committee work will influence decisions on this point.

f) Each group of rights will require a report to be issued. We would suggest that the rights be grouped into broad categories of civil and political rights and social and economic rights and that reports be submitted within these categories.

g) The ANC believes that due cognisance should be taken of the Charters on Rights that have been produced by various stakeholders in the field of Human Rights. Some of examples of this are, the Charter on Children's Rights from the National Commission on Children's Rights, the Women's Charter and the Charter on Workers.

Furthermore, Several service organisations, research units and NGOs, that have been involved in the struggle for human rights in South Africa have produced work that would serve as a basis for much of our discussions. Decisions as to which organisations should be consulted by the committee would have to follow a thorough review of work that has been done in this area.

h) The committee would require media and community liaison assistance with the capability to prepare accessible summaries of the committee's deliberations for public consumption. Such assistance would also be used in the setting up of public hearings and other public events. We propose that once the committee has adopted a work programme, it should be published for purposes of stimulating public comment on the Bill of Rights . The committee should follow this with a call for submissions and the setting up of public hearings on the various aspects of the Bill. It is our belief that the committee should begin by seeking public discussion of our suggestion that we should work towards drawing up a Bill of Rights rather than revising chapter 3 of the Interim Constitution.

i) The ANC will make a submission in this regard at the next meeting of this committee.

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**Demokratiese Party**  
**Democratic Party**

25 October 1994

Mr John Tsalamandris  
Managing Secretary  
Theme Committee 4  
Room 208  
Parliament Chambers  
Church Street  
CAPE TOWN

Dear Mr Tsalamandris

I enclose herewith a memorandum from the Democratic Party concerning a work programme, themes and nominations for Theme Committee 4 on Fundamental Rights.

Yours sincerely

  
A J LEON MP

## **SUBMISSION BY DEMOCRATIC PARTY**

### **THEME COMMITTEE 4**

#### **1. NOMINATION OF EXPERTS FOR TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS**

We hereby nominate the following persons:-

Professor C J R Dugard, University of Witwatersrand  
Professor Carole Lewis, University of Witwatersrand  
Advocate David Unterhalter, Johannesburg Bar "

Since these persons have also been nominated for consideration as members of panel of constitutional experts, we believe that such panel should first be selected and thereupon the technical committee appointed. We are of the view that few, if any, technical experts are outside the abovementioned list.

#### **2. PROPOSALS FOR WORKING PROGRAMME AND PRIORITISATION THEREOF**

##### **2.1 Identification of areas of overlap with other Theme Committees**

###### **2.1.1 Theme Committee 1:**

Matters dealing with the establishment of ... common citizenship, democracy and equality; freedom of information; franchise.

###### **2.1.2 Theme Committee 5:**

Enforcement of the constitution; judicial functions.

##### **2.2 Constitutional Principles - Elaboration : Non-contentious**

###### **2.2.1 A review of chapter 3 of Constitution in conjunction with constitutional principles:**

Principle 11 :  
Equal Rights (S.8.1)  
Civil Liberties (S.9-19 and 21)

Principle 111 : Prohibition of Discrimination (S.8.2)



Principle 4 : Equality before the Law (S. 22,25)

Principle XI : Diversity of Language and Culture (S.31)

Principle XII : Collective Right of Self- Determination  
(S.32(b) and (c))

**2.3 Other Non-contentious Rights in Chapter 3**

- S.7(4) Enforcement of Rights
- S.20 Citizen's Rights
- S.34 State of Emergency and Suspension
- S.35 Interpretation of Bill of Rights

**2.4 Constitutional Principles/Rights in Chapter 3 which are contentious and related matters**

- 2.4.1 Principle III : Promotion of equality in respect of S.8.3, 8.4 - affirmative action)
- 2.4.2 Principle XXXIV : Community self-determination
- 2.4.3 Right to form trade unions and collective bargaining in respect of S.27, 33(5)(a) and (b) i.e. insulation of Labour Law from Bill of Rights
- 2.4.4 Application of Bill of Rights (S.7(1),(2),(3))
- 2.4.5 Freedom of/Access to Information (S.23)
- 2.4.6 Administrative Justice (S.24)
- 2.4.7 Bail (S.25(2)(d))
- 2.4.8 Economic Activity (S.26)
- 2.4.9 Property (S.28)
- 2.4.10 Second and Third Generation Rights in Chapter 3 (S.29,30)
- 2.4.11 Limitations (S.33)

**2.5 Other Matters**

**2.5.1 Second and Third Generation Rights - Generally**

**2.5.2 Relationship of various Charters of Rights to Bill of Rights**

A J LEON MP



# INKATHA

Inkatha Freedom Party

Iqembu leNkatha yeNkululeko

## PRELIMINARY SUBMISSION TO THE IV THEME COMMITTEES ON FUNDAMENTAL RIGHTS

### ISSUES IDENTIFICATION AND AGENDA

(please note that the indication of the IFP positions  
is of use also in assisting the identification of the relevant issues)

#### NATURE OF THE BILL OF RIGHTS:

**ISSUE:** Should the Bill of Rights apply to relations between government and people only, or should it also apply to inter-personal relations?

Should the Bill of Rights be implemented by the national government only, by the Provinces only, or by both?

**ALTERNATIVES:** The Bill of Rights may either have exclusively vertical application or may also have horizontal application. When the Bill of Rights also has horizontal application it will protect against violations of human rights which may occur within inter-personal relations. No constitution will make the Bill of Rights applicable to any type of inter-personal relations. Almost all modern constitutions have a horizontal application of the Bill of Rights and employ different tests to determine which inter-personal relations fall within the domain of the Bill of Rights. Usually this test consists of general principles which are subject to judicial interpretation.

A separate issue regards the implementation of those human rights, second, third and fourth generation human rights, which require an action by government in order to be implemented and fulfilled, such as the case of the right to work or the right to medical care. The implementation of these rights could be left to Provinces under the control of the national government. The control of the national government can be structured on the basis of several techniques and parameters.

**AGENDA:** The different types of horizontal application of the Bill of Rights ought to be studied to analyse how human rights protection can be extended to inter-personal relations. Special attention should be given to the relation between a horizontal application of the Bill of Rights and the need for the interpretation of the applicable principles by means of

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Sub Committees Chairmen:

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Economic and Finance: Mr. M.A. Nzuzo; Social and Cultural: Dr. F.T. Mdlalose; Elections Publicity and Strategy: The Rev. C.J. Mterwa  
Appointment and Disciplinary: Mr. E.S.C. Sithebe; Community Development: Mr. M.V. Ngema.

constitutional adjudication to be conducted by the Constitutional Court rather than by the ordinary judiciary.

The implementation of second, third and fourth generation human rights in federal states should be particularly analysed to determine how Provinces could be the level of government responsible for the implementation of these rights. Attention should also be given on the role to be played by the national government in ensuring the consistent implementation of these rights across the country.

**IFP POSITION:** The Bill of Rights shall have horizontal application. 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." The Bill of Rights shall be entrenched in the national constitution but shall be implemented by the Provinces with respect to the matters of their competence (i.e., employment/labour, education, welfare, et cetera). The Republic might have the power to coordinate this implementing role of Provinces.

#### **LIMITATION OF RIGHTS:**

**ISSUE:** Should human rights be limited and how should such limitations operate?

**ALTERNATIVES:** Human rights may be limited implicitly by virtue of their mutual interferences and there may be no need for a specific limitation clause in the Constitution. The Constitution may provide for a limitation clause specifying that a Legislature may limit human rights, in which case it may or may not provide for an applicable test. The test generally used refers to reasonable limitations as per manner, place and time. Usually the limitation clause is counter-balanced by a limit of the extent to which rights can be limited. Often the distinction between "right" and "exercise of right" is used as a parameter to direct the relevant constitutional adjudication, in which case the constitution states that the exercise of the right may be limited but not the right itself.

**AGENDA:** Limitation clauses around the world should be analysed not merely in respect of the text of the constitution but especially in respect of the jurisprudence which has developed around such texts.

**IFP POSITION:** The IFP believes that human rights shall not be limited but that the exercise of such rights can be limited for compelling reasons of public interest, provided that the essential core of such right is not affected.

#### **SUSPENSION OF RIGHTS**

**ISSUE:** Should human rights protection be suspended under special circumstances?

**ALTERNATIVES:** The suspension of human rights under exceptional extreme or extraordinary circumstances could be provided for in the Constitution or the constitution could be silent on this point, leaving the matter at a meta-judicial level.

**AGENDA:** Suspension clauses should be carefully analysed, bearing in mind that they constitute the weakest link of the constitutional chain and that as in the case of the Weimar Republic could lead to the collapse of the entire constitutional system.

**IFP POSITION:** Suspension of human rights should be limited to extraordinary and extreme situations and shall not affect a basic group of rights which relate to basic human freedom and dignity. The suspension of rights should be reviewable or alternatively should be approved by Parliament or in the absence of Parliament, by the President of the Constitutional Court, or the President of the Senate. Human rights should only be suspendable on the declaration of a state of emergency.

#### **DUTIES AND OBLIGATIONS**

**ISSUE:** Should the Bill of Rights contain a Bill of duties and obligations?

**ALTERNATIVES:** Several types of duties and obligations could be provided for in the Constitution.

**AGENDA:** There should be a full compilation of Bills of duties and obligations appearing in modern constitutions.

**IFP POSITION:** Reference is made to Attachment I.

#### **LIST OF HUMAN RIGHTS**

**ISSUE:** Which human rights should be entrenched in the Constitution? What are the differences in nature between various types of human rights?

**ALTERNATIVES:** Broadly speaking, there is an internationally recognised list of human rights. Broadly speaking four types of human rights have been identified and they are referred to as first, second, third and fourth generation human rights. The first generation human rights are individual rights which are self-implementing and require no action by government, and actually consist of freedom from adverse governmental action. Second generation human rights are individual rights which require the implementing action of government in order to be fulfilled. Third generation human rights are rights which require collective exercise and usually are also based upon the implementing action of government. Fourth generation human rights are group rights which are recognised to a group identified as a political, ethnic or cultural minority and also extend to the autonomy of social and cultural formations.

**AGENDA:** The full list of internationally recognised human rights should be acquired and carefully studied with special regard to the Universal Declaration of Human Rights, first, second and draft Third International Covenant on Human Rights, the European Declaration on the Safeguard of Human Rights and the OAU Declaration of Human Rights. Bills of Rights contained in modern constitutions such as Spain, Namibia, Fiji and Liberia should also be particularly considered. The following human rights are tabled for specific consideration:

#### **FIRST GENERATION**

- 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

**SECOND GENERATION**

- Freedom of the media
- Freedom to access government information
- Family rights
- Cultural and traditions
- Procreative freedom
- Right to work
- Free enterprise
- Functional private property
- Communal property
- Right to education
- Health care
- Housing
- Labour law and labour rights

**THIRD GENERATION**

- Protection of women, senior citizens and youth
- Universities
- Environmental rights

**FOURTH GENERATION**

- Cultural rights
- Minority rights
- Rights of ethnicity and self determination
- Group rights
- Autonomy of social and cultural formations
- Pre-eminence of civil society
- Preservation of traditional communities and role of traditional leaders

**IFP POSITION:** Reference is made to **Attachment II**

**EQUALITY**

**ISSUE :** What type of principle of equality should be entrenched in the Constitution?

**ALTERNATIVES:** Formal equality will need to be entrenched. In addition the Constitution may entrench the principle of substantive equality. This can be achieved either by promoting equal opportunities or equal access to opportunity. The principle of equality may be implemented and

**AGENDA:**

enforced exclusively by the National Government or by the National Government and the Provinces in their respective areas of jurisdiction. All the main variations of the principle of substantive equality will need to be explored. The relation between substantive equality and the need for constitutional adjudication to be conducted by the Constitutional Court only will also need to be explored. It will also be necessary to look at the many alternatives related to the application of the principle of formal equality with respect to the area of provincial autonomy. The difference between implementation and enforcement will also need to be fully explored.

**IFP POSITION:**

The principle of Equality should foster equal access to all political, social and economic opportunity and should mandate the Republic to remove all substantive hindrances to the implementation of this principle. Equal "access" to opportunities does not mean redistribution of wealth, assets or resources, nor does it mean "equal opportunities." However, special training opportunities and assistance to small business are required to substantiate equal access to opportunities, the principle of which should be constitutionalised.

The principle of Equality should be entrenched in the national constitution but implemented by the Provinces with respect to the matters of their competence (i.e. employment/labour, education, welfare, et cetera). The Republic might have the power to coordinate this implementing role of the Provinces.

**EVOLUTIVE CLAUSE OF THE BILL OF RIGHTS**

**OPEN OR CLOSED LIST OF RIGHTS**

**ISSUE:**

Are the Bill of Rights protected in the Constitution only those specifically mentioned in the Constitution?

**ALTERNATIVES:**

The Constitution could contain either a closed list or an open list of human rights. An open list of human rights would allow for the recognition by means of constitutional adjudication of new human rights as they emerge from changes and growth of society. In this case the Constitution would provide a test for constitutional adjudication which would direct the Constitutional Court in its process of interpreting the constitution and identifying new human rights.

**AGENDA:**

The evolution of the protection of human rights in modern democracies by means of constitutional adjudication should be carefully studied to understand how all new and emerging human rights have been produced by means of interpretation of existing constitutions.

**IFP POSITION:**

Reference is made to Section 29 of Attachment II.

**FUNDAMENTAL RIGHTS AND CONSTITUTIONAL AMENDMENTS**

**ISSUE:**

Can the Constitution be amended to eliminate human rights?

- ALTERNATIVES:** Human rights could be entrenched in their entirety and protected from constitutional amendments or alternatively only their essential content could be shielded from constitutional amendment.
- AGENDA:** Limits to the amendability of the Constitution should be studied with special regard to the Constitutions of Germany, India, Namibia and Spain.
- IFP POSITION:** The essential content of fundamental rights other than economic, social and political rights shall not be modified by virtue of constitutional amendments.

7409  
27.10.1994



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1994 10 27

The Secretary  
Theme Committee 4

Dear Sir

Herewith NP Submissions on Work Programme for Theme Committee 4.

Yours faithfully

A handwritten signature in black ink, appearing to read 'G B Myburgh', is written over a horizontal line.

ADV G B MYBURGH MP

**WORK PROGRAMME : THEME COMMITTEE 4  
SUBMISSIONS : NATIONAL PARTY**

**(A) CONSTITUTIONAL ISSUES WHICH NEED TO BE ATTENDED TO  
BY THEME COMMITTEE 4**

1. The constitutional principles which have a bearing on Chapter 3 of the Constitution, should be identified and the rights in contained therein analysed with a view to ensuring that the rights, either as worded or with the necessary improvements are on conformity with the constitutional principles. This exercise could be contained in the first interim report to the Constitutional Committee.
2. The remaining rights contained in Chapter 3 should then be considered to determine on which rights there is consensus amongst all the parties. This can also be contained in a report to the Constitutional Committee.
3. At this stage we should identify and obtain inputs on contentious issues which we foresee will most probably include:
  - Second and third generation rights;
  - Group rights
  - Right to self determination

This can form the basis for a further report to the Constitutional Committee.

**(B) ISSUES TO BE DEALT WITH ON A PRIORITY BASIS**

After identifying the contentious issues an invitation should be extended for submissions to the Theme Committee as to which further rights should be contained in this Chapter of the Constitution. (For role players in this regard see under (G).) A return date for submissions should be set. Upon receipt of the submissions the parties should be asked to make their recommendations as to the rights they would like to be incorporated. Thereafter the matter should be debated and the question of additional rights reflected in a further interim report to be submitted to the Constitutional Committee.

2.

It should be borne in mind that universities are at present in an examination mode and sufficient time should be allowed.

Should a constitutional principle exist for which there is no corresponding rights in Chapter 3, rights should be drafted by the experts envisaged and also published for comments. A separate interim report could be submitted on this issue.

(C) **AREAS OF OVERLAP WITH OTHER THEME COMMITTEES**

An analyses should be made of the constitution to ascertain which other articles relate to the theme. The theme committee should then decide how this matter is to be dealt with and reported upon.

(D) **ISSUES TO BE DEALT WITH IN COMMISSIONS**

Depends upon the analyses conducted under (C).

(E) **SEPARATE REPORTS**

It is too early to contemplate how many separate reports, if any, will be needed.

(F) **NUMBER OF REPORTS REQUIRED**

Too early to say.

(G) **STRUCTURES AND PEOPLE TO BE CONSULTED**

(1) All legal professional organisations, legal academics, judges, magistrates, para legals, all higher educational institutions, human rights organisations and all professional bodies of the legal fraternity.

(2) The public at large.

(3) Consultation must be sought through public advertisements as well as specific requests.

(H) **COMMUNITY AND MEDIA LIAISON ASSISTANCE REQUIRED**

Administrative assistants to send invitations to interested persons and organisations and to draft and release press statements.



31 October 1994

TO: John Tsalamandris

FROM: PAC

RE: Submissions on the work programme of Theme Committee 4.

1. This Committee has the major task of identifying Rights that should be enshrined in a South African Bill of Rights. This task should be done in phases.

This should entail an analysis of the mandate:-

- (i) The Constitutional implications of the Constitutional Principles relevant to this Theme Committee. (see: documents setting up the Theme Committees)
  - (ii) Identifying a wish list of Rights that ought to be in our Bill of Rights.
  - (iii) Identifying Contentious and non-Contentious Rights.
2. Calling on submissions from political parties and the Public in general on,
    - (1) Non-Contentious Rights.
    - (2) Contentious Rights - The issues should be analysed and the Submissions properly focussed.

NB: This should be well structured, focussed and managed.

3. Periodic Reports should be submitted to the Constitutional Committee which will give the instructions on issues which must go to the Technical Committees for drafting.

NB: This process is supposed to be completed by 30 June 1995.



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27 October 1994

The Chairpersons, (for the attention of Mr John Tsalamandris)  
Theme Committee No 4.

## THEME COMMITTEE NO 4

### PROPOSED WORK PLAN

Your letter dated 25 October 1994 refers.

It is proposed by the Freedom Front that the work plan of Theme Committee 4 (TC-4) should be as follows:

This is done in response to the letter by mr Hassem Ebrahim dated 18 October 1994.

1. (a) Which constitutional issues within the broad Theme need to be attended to?

#### **THEME 4 : FUNDAMENTAL RIGHTS**

1. Everyone entitled to all universally accepted fundamental rights, freedoms and civil liberties  
Principle 2
2. General prohibition of discrimination  
Principle 3
3. General provision: all universally accepted fundamental rights, freedoms and civil liberties to be entrenched and justiciable  
Principle 2 (due consideration to be given to inter alia the fundamental rights contained in Chapter 3 of the Constitution)
4. Specific provisions: acknowledgment and protection of diversity of language and culture  
Principle 11 and sections 3, 31 and 107 of the Constitution

5. Specific...2/-

- 
5. Specific provisions: recognition and protection of certain collective rights of self-determination  
Principle 12
  6. Specific provisions: recognition and protection of aspects of traditional leadership and indigenous law  
Principle 13
  7. Specific provisions: self-determination  
Principle 34
  8. Limitation, suspension and interpretation of rights  
No Principles, but sections 33, 34 and 35 of Constitution
  9. Institutions relating to fundamental rights: various Commissions, etc (See Theme 6 paragraph 4 below)  
Principles: None, but sections 115 to 123 of Constitution
  10. Equality of all before the law and an equitable legal process  
Principle 5
  11. Freedom of information aimed at open and accountable administration  
Principle 9
  12. Protection of certain rights in the labour field  
Principle 28

- (b) Which of the constitutional issues need to be dealt with as a priority?

The following constitutional issues need to be dealt with as a priority: Items 1, 3, 4, 5, 6 and 7.

- (c) Which are the areas of overlap with each other in the Theme Committee?

All the themes identified are interlinked with one-another and would have a direct bearing on the development of each aspect.

(d) -...3/-

(d) -

(e) Which groups of constitutional issues do the committee anticipate will require the submission of separate reports?

Items 4, 5 and 7 as well as item 6.

(f) -

(g) What are the structures and who are the role players that are to be consulted?

It is proposed that the following structures be consulted:

- \* All institutes and structures dealing with fundamental rights
- \* The Human Rights Commission, once established
- \* The South African Law Commission
- \* The Volkstaatraad
- \* The Council of Traditional Leaders (when established)
- \* Political Parties
- \* The United Nations and other International Structures dealing with fundamental rights
- \* The Venice Commission.

Kind regards



**DR CP MULDER MP**  
**FREEDOM FRONT**

CPM/gb