

DEMOCRATIC PARTY
SUBMISSION TO TECHNICAL COMMITTEE ON THE CONSTITUTION

November 1993

PROPOSALS ON CONSTITUTIONAL PRINCIPLES

PRINCIPLE I

The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government dedicated to the achievement of equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.

Motivation:

Editing: the word "committed" is problematic. Can a system be committed?

Rationalising: the insertion of freedom brings the principle in line with adjustments to the Bill of Rights.

PRINCIPLE VIII

The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged provided that the right to equality between men and women shall not be diminished

Motivation: See attached.

PRINCIPLE XII

Indigenous law, like common law, shall be recognised and applied by the courts subject to the provisions of the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

Motivation:

The first sentence has been deleted because it is in clear conflict with Principle I ("a democratic system of government") and exempts Traditional Leaders from the First Principle, an exemption formalised in Principle XVI. The effect of these provisions will be to perpetuate an institution which would otherwise gradually change and either evolve or disappear in the course of modernisation under the influence of a rights-based order.

There is also a conflict between the first and second existing sentences. The institution cannot be recognised and protected while the indigenous law that controls the conditions for its perpetuation changes.

PRINCIPLE XVI

At each level of government there shall be democratic representation.

Motivation:

Second sentence deleted for reasons discussed above. The matter should at best be left to each SPR. This principle would bind those SPR legislatures not wishing to perpetuate the institution to do so against their democratically determined wish.

NEW PRINCIPLE

The institution of traditional leadership shall be acknowledged subject to principles XII and XVI as amended and may at the discretion of provincial legislatures be accommodated in structures of local or provincial government on a transitional basis in order to encourage its evolution and eventual assimilation into a democratic, rights-based system of government and law.

MEMORANDUM AND PROPOSAL CONCERNING CULTURE AND EQUALITY

A. PROPOSED ADDITIONAL CLAUSE

No right or privilege in this chapter shall diminish in any way whatsoever the right to equality between men and women.

B. NOTES

- (i) This clause would not preclude the different treatment of men and women where this is appropriate (eg pregnancy leave) because equality encompasses different treatment where it is necessary to realize the right to equality.
- (ii) The term equality should not be qualified by a word such as treatment because this may limit the meaning of the right to equality.
- (iii) This clause would be desirable whether or not a separate clause dealing with African customary law is included in the Bill.

C. JUSTIFICATION

1. At present the draft interim Bill of Rights protects a right to equality and a right to culture. However, it provides no mechanism for resolving conflicts between these two rights.

Usually conflicts between rights in a Bill of Rights are resolved by a process of balancing the interests. This is clearly not appropriate where the conflict is between culture and equality because it means that the right to equality may be compromised.

There is an important distinction between the way one might want to resolve a conflict between freedom of speech and dignity of the person on the one hand, for instance, and culture and equality on the other. In the former case, a balancing approach is acceptable. In the latter, where one of the rights (culture) is a group right, balancing is

inappropriate because it would mean that the right to culture does not allow individual dissent. To deny an individual woman her right to equality in certain instances because a group insists on its traditional values is contrary to the very notion of protecting rights. It would finally mean that women, for instance, are required to choose between their culture and their right to equality.

This point is substantiated by studies on cultures which suggest that cultural practices are never monolithic, supported by all member of the group. Instead, individuals and smaller groups constantly contest dominant cultural norms. There is no reason to privilege these dominant norms in a Bill of Rights to the extent of allowing them even to override the fundamental rights to which South Africans are now committed.

2. The proposed clause would not nullify the right to culture nor limit cultural diversity in South Africa. Cultural rights, particularly those relating to education and language, for instance, would remain secure against threats by dominant groups. However, the clause would ensure that culture is not used as a screen behind which to hide human rights abuses. It seems to be an essential term of the Bill of Rights if the commitment to the establishment of a non-racist, non-sexist South Africa in the CODESA Declaration of Intent is to be reflected in this Constitution.

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