

2/2/1/1/6/29



CONSTITUTIONAL ASSEMBLY

**RE: HORIZONTALITY**

**MEMORANDUM**

**TO: Constitutional Committee Sub-committee**  
**FROM: Executive Director**  
**DATE: 4 March 1996**

---

We enclose for your consideration a memorandum from Panel of Experts on horizontality.

---

**H EBRAHIM**  
**EXECUTIVE DIRECTOR**  
**CONSTITUTIONAL ASSEMBLY**

---

P. O. Box 15, Cape Town, 8000  
Republic Of South Africa

Tel: (021) 245 031, 403 2252 Fax: (021) 241 160/1/2/3; 461 4487, E-mail: conassem@iaccess.za



**You've made your mark**



**Now have your say**

**THE NEW CONSTITUTION**

# PANEL OF CONSTITUTIONAL EXPERTS

## MEMORANDUM

**TO:** CHAIRPERSONS AND EXECUTIVE DIRECTOR OF THE CA  
**DATE:** 20 FEBRUARY 1996  
**RE:** HORIZONTALITY

---

**THE FOLLOWING IS SUGGESTED IN AN ATTEMPTED TO FACILITATE DISCUSSIONS ON THE ISSUE OF "HORIZONTALITY":**

**Two things are required:**

- (1) A political decision as to whether, or to what degree, the bill of rights should be horizontally applicable.
- (2) A careful scrutiny of the wording in all relevant sections in the Bill of Rights and the rest of the Constitution to ensure that the political intention is captured and to prevent - as far as possible - conflicting interpretations and confusion.

**Take into account:**

- (1) It is not a decision between "day and night". There are degrees of "horizontalness" and more than one way to achieve a desired effect.
- (2) Whereas it is clear that horizontalness is often essential, *inter alia* because the violation of rights by private concerns can be just as harmful, or more so, than by the state, in no country has the entire private law been "constitutionalized".
- (3) Some rights are naturally more horizontally applicable than others.
- (4) Other "law", e.g. common law and civil rights or anti-discrimination legislation, will always be necessary to supplement or implement the constitution, and to regulate conflicting rights.
- (5) Not all details and consequences can be foreseen. Some aspects will have to develop in jurisprudence in practice.

- (6) The Constitutional Court is expected to give a judgment on horizontality and the wording of the interim Constitution, perhaps in March. This may be instructive.

**Recommend**

- (1) The general approach of some flexibility in S 38(1) is welcomed. However, the wording of S 38(1) needs to be improved. The "where applicable" is (a) clumsy (The Bill of Rights "applies ..., where applicable") and (b) open to different interpretations. (It could either refer to where it is stated in the Constitution, or to the nature of the right. The last may be problematic, because it could cause rights to conflict, which calls for law to solve the problem, not the Constitution). Perhaps the word **appropriate** would be better in the second instance.
- (2) The main difference between 38(1) and 7(1) of the interim Constitution is that the judiciary is expressly mentioned in 38(1). What does this mean for the 'seepage clause' in S 39(3)?
- (3) The specific wording of other clauses need to be carefully scrutinized, e.g Section 8.
- (4) Does Section 7 have any dramatic effect? Not necessarily.