

24/4/1/2/15

CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 4
FUNDAMENTAL RIGHTS**

13 March 1995

Room M 46

DOCUMENTATION

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 4 MEETING

FUNDAMENTAL RIGHTS

Please note that a meeting of the above Group will be held as indicated below:

Date : Monday, 13 February 1995
Time : 08h30 - 12h30
Venue : Room : Old Assembly Chamber

AGENDA

1. Opening
2. Minutes
3. Matters Arising
4. Core Group Report
5. Supplementary Report on Block 1
6. Block 2: Item 1 - Nature and Application of Bill of Rights
7. Community Liaison
8. General
9. Closure

**** Please note that documentation for this meeting will only be circulated after the Core Group meeting on Thursday 9 March 1995.**

Members are reminded to bring copies of the Constitution and Standing Rules for the Constitutional Assembly to the meeting.

**H Ebrahim
Executive Director
Constitutional Assembly**

Enquiries : John Tsalamandris and Zuleiga Adams
Tel : 403 2266
Pager: 468 5050 code 4716

CONSTITUTIONAL ASSEMBLY

**MINUTES OF
MEETING OF**

**THEME COMMITTEE 4
FUNDAMENTAL RIGHTS**

MONDAY 27 FEBRUARY 1995 (AT 18H10)

PRESENT

Mdladlana MMS (Chairperson)

Asmal AK	Mfebe MW
Bakker DM	Mohammed IJ (alt)
Cachalia IM (alt)	Molekane RS
Camerer S	Mulder CP
Chalmers J	Myakayaka-Manzini YL
Chauke P (alt)	Pandor GNM
Coleman M	Rhoda RT
Green LM	Saloojee C
Hajaij F	Selebi JS
Kgoali J	Solomon C
Leon AJ	Surty ME
Lubidla EN (alt)	Thabethe E (alt)
Mabandla BS	Viljoen V
Maseko TMJ (alt)	Xingwana LM
Mashamba TGG	
Mathebe P (alt)	

APOLOGIES: Gamndana T, Njobe MAA, Radue RJ, Rasmeni SM, Tyobeka V, Prof. Rautenbach

J Tsalamandris, Z Adams, Prof. H Cheadle, Prof. J Dugard and S Liebenberg were in attendance.

1. OPENING

- 1.1 The meeting was opened by Mr Mdladlana.

2. MINUTES

- 2.1 The following corrections were made to the minutes of the Theme Committee meeting of 14 February 1995:

2.1.1 Paragraph 6.3 should read: " The IFP noted that the issue of European Declarations should be included in discussion".

3. MATTERS ARISING

- 3.1 The meeting was referred to the rest of the agenda items.

4. CORE GROUP REPORT

- 4.1 The minutes of the Core Group Meetings of the 8th and 9th of February were noted.

5. CONSTITUTIONAL COURT REPORT

- 5.1 Senator Surty gave a verbal report on the attendance of a Theme Committee delegation on the first day of the Constitutional Court sitting.
- 5.2 The delegation consisted of Senators' Radue and Surty and Mr Sizani.
- 5.3 The Committee were informed that the sitting was well attended and the proceedings very interesting. The arguments presented before the Court on the first day were in favour of the abolition of the Death Penalty.
- 5.4 The delegation requested the registrar to forward to the Theme Committee copies of the head arguments as it relates directly to the work of the Theme Committee.

6 REPORT ON BLOCK 1

- 6.1 The meeting noted that errors corrected in Paragraph 1.1.1 of the report was not reflected in the documentation.
Paragraph 1.1.1 should read:

"The ANC states that rights referred to are rights of born person(s) or natural persons. The Bill of Rights refers to rights enjoyed by human beings and even Chapter 3 refers primarily to rights of natural persons. The term "everyone" therefore excludes juristic person(s)".

6.2 The chairperson informed the Committee that the report on Block 1 was submitted to the Constitutional Committee for discussion in the meeting of 27 February 1995, but was not discussed. The report will be tabled again at the next Constitutional Committee meeting.

7. PARTY SUBMISSIONS:- "UNIVERSALLY ACCEPTED FUNDAMENTAL RIGHTS"

7.1 Each party was asked to present their submissions following which points of clarity and questions were asked.

7.2 The **Democratic Party** submission was presented by Mr Leon who spoke to the document "**Democratic Party Submission: Block 2: Theme Committee 4**", included in the documentation.

7.2.1 Points of clarity and discussion:

- i) Questions included why the submission did not state *Right to Equality*, and the intellectual discourse or philosophy that informed the DP's conception of a "core" of fundamental rights?

Mr Leon accepted that equality should be listed as a right.

With regards the philosophical basis for identifying fundamental rights, Mr Leon said that the principles of liberty and equality, Chapter 3 of the Interim Constitution and\ together with various international instruments (with certain exceptions) forms the basis of the DP's identification of an "irreducible core" of rights.

7.3 The **ACDP's** submission was presented by Mr Green who spoke to the document entitled "**AFRICAN CHRISTIAN DEMOCRATIC PARTY: Submission to Theme Committee Four\ Block One: Which rights qualify as universally acceptable fundamental human rights?**", included in the documentation.

7.3.1 Points of clarity and discussion:

- i) Questions to Mr Green included: - the issue of "God-given" rights and the limitation thereof by the state; - the Biblical interpretation of rights and the exclusion of people who do not prescribe to the Bible or the ACDP's interpretation of "Christian" views; - inalienable rights and the right to life.

Mr Green responded to the various questions stating that the ACDP's list of rights conforms to what is generally accepted as basic human rights and is subscribed to by most Christians. Amongst a list of universally accepted rights, he listed the following rights, some of which also have a Biblical basis:

- freedom and security
- freedom of association
- freedom of expression
- freedom of religion
- right to property and contractual freedom
- freedom from unlawful search and seizure
- freedom from torture and arbitrary arrest
- right to transfer property by gift
- right to pursue a lawful vocation
- right to due process of law in civil and criminal cases
- freedom from slavery
- right to an adequate standard of living
- right to effective remedies for acts violating constitutional rights

7.4 The **ANC** submission was presented by Mr Mfebe who spoke to the document entitled "***What constitutes universally accepted fundamental rights: Preliminary Submission by ANC***".

7.4.1 Other members of the ANC also added that:

- a) Chapter 3 of the Interim Constitution is a point of departure and the ANC subscribes to those universal rights enunciated in international documents such as the International Declaration of Universal Human Rights, the Covenant on Civil and Political Rights and the Covenant on Social, Economic and Cultural Rights.
- b) The ANC believed in the principle of the indivisibility and inter-relatedness of rights. Thus, they do not accept the hierarchical conceptualization of First, Second and Third Generation rights.
- iv) It is not the concept of universal "acceptance" of rights in international declarations that is crucial but rather the universal value system that informs the content of these documents that is important.

7.5 The **FF's** submission was presented by Dr Mulder who spoke to the document entitled, "***Freedom Front: Theme Committee 4 (Fundamental rights): Submission on Universally Accepted Fundamental Rights***", included in the documentation.

7.5.1 Points of clarity and discussion:

- i) Questions to the Freedom Front submission included the issue of self determination, i.e. does the FF regard the right to self determination as an universal right or a right peculiar to South African circumstances?; and the distinction between economic and social rights on the one hand , and civil and political rights on the other.

Dr Mulder stated that the FF regards the right to self determination as an universal right as it is regarded as such in terms of the UN Covenant on Social, Economic and Cultural Rights. Furthermore regarding separation between economic and social rights and civil and political rights, Dr Mulder said the FF position had been influenced by the ANC submission on "The Nature and Application of the Bill of Rights" which according to the FF interpretation, regarded the inclusion of social and economic rights as dependent on specific circumstances and hence was not universal.

7.5 The IFP submission included in the documentation was noted by the Committee. The IFP were not present in the meeting.

7.6 The NP's submission was presented by Mr Bakker who spoke to the document entitled "**Theme Committee 4: National Party Submission Blocks 1 & 2: Notes on aspects pertaining to Bills of rights...all universally accepted fundamental rights, freedoms and civil liberties**", included in the documentation.

7.6.1 Points of clarity and discussion:

- i) Questions included: - the level of importance the NP places on South African jurisprudence to the exclusion of a wide range of international tribunals; - the absence of a definitive statement as to what the NP regards as universal fundamental rights.

Mr Bakker replied that the NP does take into account into account international jurisprudence. Furthermore Mr Bakker added that the NP submission makes reference to certain universally accepted frameworks from which universal fundamental rights can be deduced.

7.7. The PAC were not present in the meeting. Their submission included in the documentation was noted by the Committee.

8. TECHNICAL COMMITTEE REPORT

8.1 Prof. Dugard spoke to the document entitled "***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***".

8.1.1 Discussion on the opinion followed and the following inter alia was noted:

- i) The report does not reflect on whether the provisions of Chapter 3 are in accordance with international charters and covenants (This issue is dealt with in the Technical Committee report on "after having given due consideration").
- ii) It is important to take into account a developing notion of fundamental rights that allows for an evolutionary nature of rights in a Bill of Rights, as is the case with some international covenants.
- iii) International law imposes obligations only on those states which have ratified international instruments. Many states are however morally bound by the provisions of these instruments as they have become accepted as an international standard of what constitutes human rights, becoming accepted as a part of International Customary Law in effect.

8.2 The opinion of the meaning of 'everyone' was present by Prof. Dugard who spoke to the document entitled "***Opinion on the meaning of 'everyone' in Constitutional Principle II, Schedule 4 of the Constitution of the Republic of South Africa, Act 200 of 1993: Joint Opinion of the Technical Committee to Theme Committee Four***", included in the documentation.

8.2.2 Questions and discussion centred on the process of deciding whether to confer rights to juristic persons, and the implicit political nature of such a decision.

8.2.3 A possible third option to the 2 options suggested in paragraph 5.1 and 5.2 was noted and it was agreed that this option be taken to political party caucuses for discussion.

8.3 The Technical Committee further reported that they were processing submissions with the objective of identifying key issues and directing them to the relevant block of the Work Programme of the Theme Committee.

8.4 It was agreed that:

- i) Political parties be given a further opportunity to study the opinions of the Technical Committee in preparation for the Theme Committee meeting on Monday 6 March 1995.
- ii) The Drafting Sub-Group should begin considerations on drafting the Supplementary report on Block 1, to which the opinions of the Technical Committee should be attached. The Group at the same time taking account of the Guidelines for Drafting as set by the Constitutional Committee.
- iii) The Technical Committee role in the Drafting Sub-Group should concur with the terms of reference for Technical Experts as set by the Constitutional Committee.

9. BLOCK 2: ITEM 1- NATURE AND APPLICATION OF BILL OF RIGHTS

9.1 The meeting decided to postpone discussion on this item for the next meeting.

10. GENERAL

10.1 The meeting noted the document entitled "*Absence during Constitutional Assembly Proceedings*", included in the documentation.

10.2 The document outlining the schedule of meetings and events of the Constitutional Assembly for the period 27/02/95 - 18/03/95 was noted.

10.3 It was agreed that the Theme Committee would attend the Raoul Wallenberg Workshop on Human Rights to be held on 4-5 March 1995. It was further agreed party leaders would be asked to ensure that there is attendance at the workshop.

The ACDP noted that it would not be able to attend and Mr Bakker (NP) informed the Committee that he would also not be attending.

11. CLOSURE

The meeting rose at 20H50

CONSTITUTIONAL ASSEMBLY

MINUTES OF MEETING OF

THEME COMMITTEE 4 FUNDAMENTAL RIGHTS WEDNESDAY 6 MARCH 1995 (AT 10H30)

PRESENT

Leon AJ (Chairperson)

Cachalia IM (alt)
Camerer SM
Chalmers J
Coleman M
Dlamini BO
Gamndana T
Govender D
Green LM
Hajaij F
Lubidla EN
Mabandla BS
Maseko TMJ
Mathebe P (alt)
Mdladlana MMS
Mfebe MW
Mohammed IJ (alt)

Molekane RS
Mulder CP
Myakayaka-Manzini YL
Njobe MAA (alt)
Pandor GNM
Piliso M
Radue RJ
Rasmeni S
Rhoda RT
Selebi JS
Sizani RK
Surty ME
Thabethe E (alt)
Thompson B
Tyobeka VM (alt)
Viljoen V

Apologies: Asmal KA, Kgoali JL

J Tsalamandris, Z Adams, Prof. J Dugard, Prof. I Rautenbach and Ms S Liebenberg were in attendance.

1. OPENING

1.1 The meeting was opened by Mr Leon.

2. MATTERS ARISING

2.1 The outstanding issues from the meeting of 27 February 1995 were noted as follows:

2.1.1 The conclusion to the Technical Committee's opinion to the Theme Committee regarding the issues:

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

ii) "after having given due consideration to inter alia the fundamental rights contained in Chapter 3".

iii) What constitutes "universally accepted fundamental rights".

2.1.2 The need for the Drafting Sub-Group to meet to draft the Supplementary Report on Block 1.

2.2 Prof. Dugard noted that the minutes of 27 February 1995, should reflect that the Technical Committee's opinion on the issue of "Everyone" was presented by Ms Liebenberg and not Prof. Dugard.

3. BLOCK 1: OUTSTANDING ISSUES

3.1 There were no further party submissions or comments on the Technical Committee's opinion on items 2.1.1 (i), (ii) and (iii) above.

4. BLOCK 2: NATURE AND APPLICATION OF BILL OF RIGHTS:

4.1 The chairperson opened the discussion on item of Block 2 - **Nature and Application of Bill of Rights.**

Parties were then asked to present their submissions to the Committee. Each party presented their submissions following which points of clarity and questions were asked.

4.2 The ANC submission was presented by Senator Surty who spoke to the document entitled ***"The Nature and Application of a Bill of Rights: Preliminary Submission of the ANC"***, included in the documentation of 27 February 1995.

4.2.1 Points of clarity and discussion :

- i) There were no questions other than a clarifying point on the ANC's position on the judiciary.

Senator Surty noted that the judiciary is bound by the Bill of Rights. He further added that it is essential that the Bill of Rights is enforced and entrenched.

4.3 Mr Green requested permission to present the ACDP submission on the meaning of **"Everyone"** as arrived late in the meeting and was not present when the agenda item was under discussion.

4.3.1 Following discussion, the chairperson ruled that the ACDP should be given the opportunity to present their submission.

4.3.2 Mr Green spoke to the document ***"African Christian Democratic Party: Submission to Theme Committee Four/Block 1: Submission on the use of the term "everyone" in Constitutional Principle II"***.

4.3.3 Mr Green also responded to the opinion of the Technical Committee on this matter by noting that the ACDP disagrees with the conceptualization of applying fundamental rights to natural persons only. He also added that in the opinion of the ACDP, the Technical Committee have defined their opinion in terms of a legalistic perspective.

4.4 The FF's submission was presented by Dr CP Mulder who spoke to the document entitled ***"Submission on the Nature of the Proposed Bill of Rights and its Application"***, included in the documentation of 27 February 1995.

4.4.1 Points of clarity and discussion :

- i) Questions included: - The issue of application of the Bill of Rights; the issue of horizontality and verticality and how a Bill of Rights can address the inequalities of the past.

Dr Mulder responded by noting that applicability must be determined by looking at each right separately, and that the FF does not exclude horizontal application entirely. Dr Mulder also added that the FF

believed that social inequalities could be addressed by other measures such as legislation and specific government programs.

- 4.5 The NP submission was presented by Senator Radue who spoke to the document entitled "**Theme Committee 4: National Party Submission Blocks 1 & 2: Notes on aspects pertaining to Bills of Rights**", included in the documentation of 27 February 1995.

4.5.1 Points of clarity and discussion :

- i) Questions to Senator Radue included: - how the NP correlates an acknowledgement of the international recognition of horizontality while at the same time not being clear on this matter; the reference by the NP to "universally accepted and proven principles contained in other instruments", with no reference to what they are.
- ii) The ANC also registered their concern at the fact that the NP has still not complied with an undertaking made at the previous meeting to provide the Theme Committee with a list of what it regards as "universally accepted fundamental rights".

Sen. Radue responded as follows:

- i) The NP does not feel it is necessary to list specific rights at this point in time, as the NP will state its position to each right as they arise in the work programme. It was also noted that the NP use Chapter 3 of the Interim Constitution as a starting point in their approach.
 - ii) The NP is not averse to horizontality, provided it is carefully stipulated and qualified in each instance and not applied in absolute terms.
 - iii) Proven principles are those that are generally accepted in the international community
- 4.6 The PAC submission was presented by Mr Sizani who spoke to the document entitled "**PAC Preliminary Submissions on Block 2: The Nature and Application of a Bill of Rights**", included in the documentation of 27 February 1995.

4.6.1 Points of clarity and discussion :

- i) Questions to the PAC related to its opinion on the conflict between an equality provision and the recognition of customary law as it pertains to women.

Mr Sizani noted that the PAC have taken the opinion of the Technical Committee into account, but is not bound to it. The PAC supports customary law but accepts that it should be subject to the Bill of Rights. Mr Sizani said that the PAC would make more substantial submissions in this regard when the Theme Committee dealt with the issue of Equality.

- 4.7 The ACDP's submission was presented by Mr Green who spoke to the document entitled "**Submission by the ACDP Theme Committee 4, Block One: The Nature and Application of a Bill of Rights**", included in the documentation of 27 February 1995.

4.7.1 Points of clarity and discussion :

- i) Questions to Mr Green included the following:
 - Proposals the ACDP has in relation to making the Constitution and the Bill of Rights more responsive to the rights of victims rather than criminals.
 - The alternatives to a secular\ humanist approach to the Bill of Rights and particularly to the Constitutional Court?
 - The relationship between the ACDP recognition of "maximum freedom and liberties for the individual " and the ACDP's suggestions for the restrictions thereof.
 - The ACDP philosophy that seems to be rooted in intolerance which is in direct conflict with the UN Declaration.

Mr Green responded as follows:

- i) The present Interim Constitution which stipulates the rights of detained and accused persons (s25) has been abused by criminals at the expense of victims, and it is important that the a new Bill of Rights takes cognisance of this.
- ii) An alternative approach to a secular\ humanist Bill of Rights and Constitutional Court would be to include members with a sound knowledge of religious law.
- iii) The ACDP supports "maximum freedom" in principle but the Bill of Rights must not be used to denigrate the rights of others. It must protect all citizens.

vi) The ACDP's are not intolerant but are based on belief.

4.8 The Democratic Party's submission was presented by Mr Leon who spoke to the document entitled "**Democratic Party Submission: Block 2: Theme Committee 4**", included in the documentation of 27 February 1995.

4.8.1 Points of clarity and discussion :

i) Questions to the DP included the relationship between liberty and equality as a basis of a Bill of Rights, and the conflict that may arise between the two; - the DP view on the rule of law as only maintaining law and order; and the exclusion of social and economic rights from what it calls the "Core of rights".

Mr Leon responded by noting that liberty and equality must be given equal recognition in a Bill of Rights, although the one must not qualify the other. If conflict does arise it will have to be addressed by those mandated to interpret the Bill of Rights. With regards to the rule of law, Mr Leon emphasised that rule of law need to be re-established in the country. On the issue of "Core of rights", Mr Leon said that this was based on Chapter 3 of the Interim Constitution, while accepting that other rights not in the Chapter may need to be added.

4.9 The IFP Submission on item 1 of Block 2 included in the documentation of 27 February 1995, was noted by the Committee. The submission could not be discussed as the IFP delegates were absent.

4.10 During the presentation of submissions, the Committee had a brief discussion on the role of the Technical Committee opinions and whether parties could reconsider their positions and re-submit reports. No decision on this matter was taken.

5. GENERAL

5.1 The chairperson informed the meeting of 4 public meetings planned by Community Liaison Department of the Administration of the CA on Saturday 11 March 1995 and Sunday 12 March 1995, in Gauteng, Northern Transvaal, Northern Cape and Western Cape. The meeting in the Northern Transvaal meetings would be the only one taking place on Sunday.

5.1.2 The Theme Committee was requested to send 3 members to each of the public meetings. Two of the members were expected to come from the 3 largest parties and one from the smaller parties.

- 5.1.3 The chairperson informed the meeting that a briefing for the members attending would take place on Wednesday 8 March 1995.
- 5.1.4 It was noted that the ANC had provided the Secretariat with 3 names already. The NP informed the meeting that it had difficulty in general to these meetings as it is a small party in this Theme Committee.
- 5.2 The chairperson informed the meeting that the Media Department of the CA Administration is planning weekly media briefings on every Thursday. The Theme Committees are requested to send representatives to brief media representatives on progress of work in the Theme Committees.
- 5.2.1 The Theme Committee raised concern that they may always have matters to brief the media on, and as such regular weekly meetings may not be necessary.
- 5.3 Ms Liebenberg reported on the Joint Chairpersons Meeting on Traditional Authorities which had taken place earlier in the day. She noted the following decisions which had been taken at the meeting:
- i) The question of traditional authorities would remain with Theme Committee 2.
 - ii) The Joint Adhoc Technical Committee would organise a workshop for Theme Committees 2, 4, 5, and 6 to develop a Work Program to deal with overlapping issues.
- 5.4 Ms Liebenberg reported that the Technical Committee had made substantial progress with public submissions. The Technical Committee had handed to the Secretariat a summary of the submissions and where they fit into the Work Programme.
- 5.5 The chairperson requested the Drafting Sub-Group to meet after the meeting to draft the Supplementary Report on Block 1.

6. CLOSURE

The meeting rose at 12h40.

THEME COMMITTEE 4

FUNDAMENTAL RIGHTS

SYNOPSIS OF SUBMISSIONS

VOL 3: Part 1 - 4

**RE: NATURE AND APPLICATION OF
BILL OF RIGHTS**

BLOCK 2 ITEM 1: - NATURE OF THE BILL OF RIGHTS

BJ Alberts (4): Proposes a Bill of Obligations in stead of a Bill of Rights.

D Black (5): The Bill of Rights must be balanced by a Bill of Duties. The Bill of Rights should only include fundamental rights and liberties and no "secondary rights".

D Drummond (9): Bill of rights must be in favour of all.

K Hunter (11): Bill of rights to be balanced by obligations or duties.

ME Lekhoda (13): The bill of rights to be based on the ANC Freedom Charter. All basic rights to be included such as freedom of association, thought, worship, and press. Furthermore, the state must have the duty to protect the right to work and the right to education and social security.

L Makaula (14): Second and third generation rights need not be protected in a bill of rights but mechanism should be made for these groups of rights to be protected not as fully fledged rights but in order to avoid them to affect the first generation rights.

Community Peace Foundation (27): Private persons should be bound by the bill of rights by inserting a provision that entrenches this duty.

Human Rights Institute of South Africa (31): The norm for the Constitutional process should be the international treaties (on human rights). It follows thus that the hierarchy and status of the international human rights treaties should therefore be established in the constitution. I present the US Constitution as an example of the power of such provision ... Article IV which included all treaties in the supremacy clause ... I am not advocating an exact replica for the SA Constitution, I am putting it up for discussion . SA has signed these treaties it will have to ratify them and the question will then be: what is the status of these treaties? Will it be merely interpretative as the present article 35(1) would have us believe, or should it become more in line with international developments?

Algemene Kommissie Leer en Aktuele Sake, Ned Geref Kerk (34): A Comprehensive bill of rights based on biblical principles is needed.

Tabor DI (Women's Legal Status Committee) (52): The constitution should make provision for the rights of legal persons under all circumstances.

Innes M (55): There are no such things as human rights. Nobody is entitled to anything; each has duties.

Anonymous (Nelspruit) (57): For every right there shall be a definition of the responsibility coupled with the exercise of that right.

**- WORK PROGRAMME
DISCUSSION DOCUMENT**

- Phase II -** The Technical Committees shall, at the direction of the Constitutional Assembly and the Constitutional Committee, translate these political positions into draft legal texts for the constitution.
- Phase III -** The draft is then referred to the Constitutional Court to provide an opinion, in terms of Sec 71(4) of the Constitution, that it is in compliance with the Constitutional Principles listed in Schedule 4 of the Constitution.
- Phase IV -** The text approved by the Constitutional Committee should then be placed before the public for further discussion and debate.
- Phase V -** The constitutional text is now ready for debate in the plenary session of the Constitutional Assembly.
- Phase VI -** Once adopted, certification by the Constitutional Court should then be sought.

9 PROJECTION OF TIME FRAMES

Phase	Task	Deadline
1	Theme Committee analysis and evaluation	15 Nov '94
	Theme Committee completion of reports. These reports considered and evaluated by the Constitutional Committee and Constitutional Assembly on an ongoing basis.	30 June '95
2	Completion of approval of reports by the Constitutional Committee and Assembly and text drafted.	14 July '95
3	Referral to the Constitutional Court.	Ongoing
4	Full text placed before public for scrutiny.	31 Oct '95
5	Full text debated and adopted by the Constitutional Assembly.	May '96
6	Certification is sought from the Constitutional Court.	

2: Nature of Bill of Rights and application**3: Right to equality****Suggested framework for agenda item 3**

- (a) Content of the right.
- (b) Equality as a human right of the individual and the question of juristic persons.
- (c) Prohibited grounds for discrimination.
- (d) Affirmative action.
- (e) Effects on customary law, including the rules and customs of religious and traditional communities.

Relevant Constitutional Principles: I, II, III, V, XI, XII, XIII(I)

Relevant sections of Interim Constitution: Preamble, Sections 3, 8, 10, 12, 17, 32, 33(4), 119 - 123

4: Right to human dignity

Content of right

See CP II and Sections 10,12, 25(1)(b)

5: Right to life**Suggested framework to agenda item 5**

- (a) The right to life as a fundamental right.
- (b) Controversial issues such as -
 - capital punishment
 - abortion
 - euthanasia

See CP II and Section 9

6: Right to Privacy**Suggested framework for agenda item 6**

- (a) Aspects of personal privacy that need to be protected constitutionally.
- (b) Controversial aspects
 - intelligence services and state

3. Right to human dignity

INTERIM CONSTITUTION (Excerpts)

Constitutional Principle II

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, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.

Human dignity

10. Every person shall have the right to respect for and protection of his or her dignity.

Servitude and forced labour

12. No person shall be subject to servitude or forced labour.

Detained, arrested and accused persons

25. (1) Every person who is detained, including every sentenced prisoner, shall have the right –
(b) to be detained under conditions consonant with human dignity, which shall include at least the provision of adequate nutrition, reading material and medical treatment at state expense;

AGENDA ITEMS

1. Content of the right

- 1.1 See CP II and Sections 10,12, 25(1)(b)
1.2 Controversial issues (Parties can make suggestions)

2. Application of the right

- 2.1 Nature of the duty to be imposed on the state.
2.2 Application of the right to common law and customary law.
2.3 Should the right under discussion impose a constitutional duty on actors other than the state ?
2.4 Who should be the bearers of the right ?
Natural persons, citizens, juristic persons ?
2.5 Should the right under discussion be capable of limitation by the legislature ?
2.6 Other issues (Parties can make suggestions)

4. Right to Privacy

INTERIM CONSTITUTION (Excerpts)

II

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, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.

Privacy

13. Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.

Access to information

23. Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.

AGENDA ITEMS

1. Content of the right

- 1.1 See CP II and Sections 13, 23
- 1.2 Controversial issues:-
 - intelligence services and state security
 - access to private information
 - searches and seizure by police
 - protection of vulnerable persons
- 1.3 Other issues (Parties can make suggestions)

2. Application of the right

- 2.1 Nature of the duty to be imposed on the state.
- 2.2 Application of the right to common law and customary law.
- 2.3 Should the right under discussion impose a constitutional duty on actors other than the state ?
- 2.4 Who should be the bearers of the right ?
Natural persons, citizens, juristic persons ?
- 2.5 Should the right under discussion be capable of limitation by the legislature ?
- 2.6 Other issues (Parties can make suggestions)

5. Right to Life

INTERIM CONSTITUTION (Excerpts)

II

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, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.

Life

9. Every person shall have the right to life.

AGENDA ITEMS

1. Content of the right

- 1.1 See CP II and Section 9
1.2 Controversial issues:-
- capital punishment
- abortion
- euthanasia
1.3 Additional issues for consideration:-
- quality of life
1.4 Other issues (Parties can make suggestions)

2. Application of the right

- 2.1 Nature of the duty to be imposed on the state.
2.2 Application of the right to common law and customary law.
2.3 Should the right under discussion impose a constitutional duty on actors other than the state ?
2.4 Who should be the bearers of the right ?
Natural persons, citizens, juristic persons ?
2.5 Should the right under discussion be capable of limitation by the legislature ?
2.6 Other issues (Parties can make suggestions)

6. Right to Equality

INTERIM CONSTITUTION (Excerpts)

AGENDA ITEMS

1. Content of the right

- 1.1 See Relevant Constitutional Principles: I, II, III, V, XI, XII, XIII(I)
Relevant sections of Interim Constitution: Preamble, Sections 3, 8, 10, 12, 17, 32, 33(4), 119 - 123
- 1.2 Controversial issues:-
 - Prohibited grounds for discrimination.
 - Affirmative action
 - Effect on customary law, including the rules and customs of religious and traditional communities
- 1.3 Other issues (Parties can make suggestions)

2. Application of the right

- 2.1 Nature of the duty to be imposed on the state.
- 2.2 Application of the right to common law and customary law.
- 2.3 Should the right under discussion impose a constitutional duty on actors other than the state ?
- 2.4 Who should be the bearers of the right ?
Natural persons, citizens, juristic persons ?
- 2.5 Should the right under discussion be capable of limitation by the legislature ?
- 2.6 Other issues (Parties can make suggestions)

Excerpts

CONSTITUTIONAL PRINCIPLES

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 committed to achieving equality between men and women and people of all races.

II

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, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.

III

The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.

V

The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

XI

The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.

XII

Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.

XIII

1. The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

PREAMBLE

In humble submission to Almighty God,
We, the people of South Africa, declare that —

WHEREAS there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is 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;

AND WHEREAS in order to secure the achievement of this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles;

AND WHEREAS it is necessary for such purposes that provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution;

Languages

- 3.(1) Afrikaans, English, isiNdebele, Sesotho sa Leboa, Sesotho, siSwati, Xitsonga, Setswana, Tshivenda, isiXhosa and isiZulu shall be the official South African languages at national level, and conditions shall be created for their development and for the promotion of their equal use and enjoyment.
- (2) Rights relating to language and the status of languages existing at the commencement of this Constitution shall not be diminished, and provision shall be made by an Act of Parliament for rights relating to language and the status of languages existing only at regional level, to be extended nationally in accordance with the principles set out in subsection (9).
- (3) Wherever practicable, a person shall have the right to use and to be addressed in his or her dealings with any public administration at the national level of government in any official South African language of his or her choice.
- (4) Regional differentiation in relation to language policy and practice shall be permissible.

- (5) A provincial legislature may, by a resolution adopted by a majority of at least two-thirds of all its members, declare any language referred to in subsection (1) to be an official language for the whole or any part of the province and for any or all powers and functions within the competence of that legislature, save that neither the rights relating to language nor the status of an official language as existing in any area or in relation to any function at the time of the commencement of this Constitution, shall be diminished.
- (6) Wherever practicable, a person shall have the right to use and to be addressed in his or her dealings with any public administration at the provincial level of government in any one of the official languages of his or her choice as contemplated in subsection (5).
- *The English text of the Act shall, for the purposes of its interpretation, prevail as if it were the signed text. [See sec 15 of Act 2 of 1994.]
- (7) A member of Parliament may address Parliament in the official South African language of his or her choice.
- (8) Parliament and any provincial legislature may, subject to this section, make provision by legislation for the use of official languages for the purposes of the functioning of government, taking into account questions of usage, practicality and expense.
- (9) Legislation, as well as official policy and practice, in relation to the use of languages at any level of government shall be subject to and based on the provisions of this section and the following principles:
- (a) The creation of conditions for the development and for the promotion of the equal use and enjoyment of all official South African languages;
 - (b) the extension of those rights relating to language and the status of languages which at the commencement of this Constitution are restricted to certain regions;
 - (c) the prevention of the use of any language for the purposes of exploitation, domination or division;
 - (d) the promotion of multilingualism and the provision of translation facilities;
 - (e) the fostering of respect for languages spoken in the Republic other than the official languages, and the encouragement of their use in appropriate circumstances; and
 - (f) the non-diminution of rights relating to language and the status of languages existing at the commencement of this Constitution.
- (10)(a) Provision shall be made by an Act of Parliament for the establishment by the Senate of an independent Pan South African Language Board to promote respect for the principles referred to in subsection (9) and to further the development of the official South African languages.
- (b) The Pan South African Language Board shall be consulted, and be given the opportunity to make recommendations, in relation to any proposed legislation contemplated in this section.
- (c) The Pan South African Language Board shall be responsible for promoting respect for and the development of German, Greek, Gujarati, Hindi, Portuguese,

Tamil, Telegu, Urdu and other languages used by communities in South Africa, as well as Arabic, Hebrew and Sanskrit and other languages used for religious purposes.

Equality

- 8.(1) Every person shall have the right to equality before the law and to equal protection of the law.
- (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
- (3)(a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.
- (b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.
- (4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

Human dignity

10. Every person shall have the right to respect for and protection of his or her dignity.

Servitude and forced labour

12. No person shall be subject to servitude or forced labour.

Freedom of association

17. Every person shall have the right to freedom of association.

Education

32. Every person shall have the right —

- (a) to basic education and to equal access to educational institutions;
- (b) to instruction in the language of his or her choice where this is reasonably practicable; and
- (c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.

Limitation

33. (1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation —

(a) shall be permissible only to the extent that it is —

- (i) reasonable; and
- (ii) justifiable in an open and democratic society based on freedom and equality; and

(b) shall not negate the essential content of the right in question, and provided further that any limitation to —

(aa) a right entrenched in section 10, 11, 12, 14(1), 21, 25 or 30(1)(d) or (e) or (2); or

(bb) a right entrenched in section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity, shall, in addition to being reasonable as required in paragraph (a)(i), also be necessary.

- (2) Save as provided for in subsection (1) or any other provision of this Constitution, no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter.
- (3) The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter.
- (4) This Chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7(1).

- (5)(a)The provisions of a law in force at the commencement of this Constitution promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain of full force and effect until repealed or amended by the legislature.
- (b)If a proposed enactment amending or repealing a law referred to in paragraph (a) deals with a matter in respect of which the National Manpower Commission, referred to in section 2A of the Labour Relations Act, 1956 (Act No. 28 of 1956), or any other similar body which may replace the Commission, is competent in terms of a law then in force to consider and make recommendations, such proposed enactment shall not be introduced in Parliament unless the said Commission or such other body has been given an opportunity to consider the proposed enactment and to make recommendations with regard thereto.

COMMISSION ON GENDER EQUALITY

Establishment

- 119.**(1)There shall be a Commission on Gender Equality, which shall consist of a chairperson and such number of members as may be determined by an Act of Parliament.
- (2)The Commission shall consist of persons who are fit and proper for appointment, South African citizens and broadly representative of the South African community.
- (3)The object of the Commission shall be to promote gender equality and to advise and to make recommendations to Parliament or any other legislature with regard to any laws or proposed legislation which affects gender equality and the status of women.

Composition and functioning

- 120.**The Act of Parliament referred to in section 119 shall provide for the composition, powers, functions and functioning of the Commission on Gender Equality and for all other matters in connection therewith.

[Sec 120 amended by sec 9 of Act 13 of 1994]

RESTITUTION OF LAND RIGHTS

Claims

121.(1)An Act of Parliament shall provide for matters relating to the restitution of land rights, as envisaged in this section and in sections 122 and 123.

(2)A person or a community shall be entitled to claim restitution of a right in land from the state if —

(a)such person or community was dispossessed of such right at any time after a date to be fixed by the Act referred to in subsection (1); and

(b)such dispossession was effected under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2), had that section been in operation at the time of such dispossession.

(3)The date fixed by virtue of subsection (2)(a) shall not be a date earlier than 19 June 1913.

(4)(a)The provisions of this section shall not apply to any rights in land expropriated under the Expropriation Act, 1975 (Act No. 63 of 1975), or any other law incorporating by reference that Act, or the provisions of that Act with regard to compensation, if just and equitable compensation as contemplated in section 123(4) was paid in respect of such expropriation.

(b)In this section "Expropriation Act, 1975" shall include any expropriation law repealed by that Act.

(5)No claim under this section shall be lodged before the passing of the Act contemplated in subsection (1).

(6)Any claims under subsection (2) shall be subject to such conditions, limitations and exclusions as may be prescribed by such Act, and shall not be justiciable by a court of law unless the claim has been dealt with in terms of section 122 by the Commission established by that section.

Commission

122.(1)The Act contemplated in section 121(1) shall establish a Commission on Restitution of Land Rights, which shall be competent to —

(a)investigate the merits of any claims;

(b)mediate and settle disputes arising from such claims;

(c)draw up reports on unsettled claims for submission as evidence to a court of law and to present any other relevant evidence to the court; and

(d)exercise and perform any such other powers and functions as may be provided for in the said Act.

(2)The procedures to be followed for dealing with claims in terms of this section shall be as prescribed by or under the said Act.

Court orders

123.(1)Where a claim contemplated in section 121(2) is lodged with a court of law and the land in question is —

(a)in the possession of the state and the state certifies that the restoration of the right in question is feasible, the court may, subject to subsection (4), order the state to restore the relevant right to the claimant; or

(b)in the possession of a private owner and the state certifies that the acquisition of such land by the state is feasible, the court may, subject to subsection (4), order the state to purchase or expropriate such land and restore the relevant right to the claimant.

(2)The court shall not issue an order under subsection (1)(b) unless it is just and equitable to do so, taking into account all relevant factors, including the history of the dispossession, the hardship caused, the use to which the property is being put, the history of its acquisition by the owner, the interests of the owner and others affected by any expropriation, and the interests of the dispossessed: Provided that any expropriation under subsection (1)(b) shall be subject to the payment of compensation calculated in the manner provided for in section 28(3).

(3)If the state certifies that any restoration in terms of subsection (1)(a) or any acquisition in terms of subsection (1)(b) is not feasible, or if the claimant instead of the restoration of the right prefers alternative relief, the court may, subject to subsection (4), order the state, in lieu of the restoration of the said right —

(a)to grant the claimant an appropriate right in available alternative state-owned land designated by the state to the satisfaction of the court, provided that the state certifies that it is feasible to designate alternative state-owned land;

(b)to pay the claimant compensation; or

(c)to grant the claimant any alternative relief.

(4)(a)The compensation referred to in subsection (3) shall be determined by the court as being just and equitable, taking into account the circumstances which prevailed at the time of the dispossession and all such other factors as may be prescribed by the Act referred to in section 121(1), including any compensation that was paid upon such dispossession.

(b)If the court grants the claimant the relief contemplated in subsection (1) or (3), it shall take into account, and, where appropriate, make an order with regard to, any compensation that was paid to the claimant upon the dispossession of the right in question.