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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 4

FUNDAMENTAL RIGHTS

12 June 1995

Room OLD ASSEMBLY

DOCUMENTATION & PARTY SUBMISSIONS

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 4

FUNDAMENTAL RIGHTS

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

Date : Monday, 12 June 1995

Time : **09h00 - 13h00; 14h00 - 17h00**

Venue : Old Assembly

AGENDA

1. Opening

2. Matters Arising

3. Minutes:
   - 3.1 Theme Committee 5 June 1995: **Pages 3-7**
   - 3.2 Core Group 5 June 1995: **Pages 8-9**

4. **Equality : Party Submissions (See Addendum entitled Party Submissions)**

5. General
   - 5.1 Work Programme and Party Deadlines: **Page 10**
   - 5.2 Schedule of Meetings: **Page 11**

6. Closure

H Ebrahim - Executive Director
Constitutional Assembly

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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 4

FUNDAMENTAL RIGHTS

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

Date : Thursday, 15 June 1995

Time : 14h00 - 17h00

Venue : Old Assembly

AGENDA

1. Opening
2. Matters Arising
3. Minutes:
4. **Administrative Justice; Access to Courts; Detained, Arrested and Accused Persons :** Party Submissions (See Separate document entitled Party Submissions)
5. General
6. Closure

CONSTITUTIONAL ASSEMBLY

MINUTES OF MEETING OF

THEME COMMITTEE 4
FUNDAMENTAL RIGHTS
MONDAY 5 JUNE 1995 (AT 08H30)

PRESENT

Radue RJ (Chairperson)

Bakker DM
Cachalia IM (alt)
Coleman M
Gamndana T
Govender D
Green LM
Hajaij F
Kgoali JL
Lubidla EN (alt)
Mashamba TGG
Mdladlana MMS
Mohamed IJ (alt)
Molekane RS
Myakayaka-Manzini YL
Njobe MAA (alt)
Pandor GNM
Piliso MM
Ranchod BG (alt)
Rasmeni SM
Sizani RK
Smuts D (alt)
Solomon G
Surty ME
Thabethe E (alt)
Tshivhase TJ
Viljoen V
Ndzanga RA
Tambo A

APOLOGIES: Asmal AK, Camerer SM, Leon AJ

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

1. OPENING

1.1 Senator Radue opened the meeting at 09h10.

2. MINUTES

2.1 The minutes of the Theme Committee meeting of 29 May 1995 were adopted with one amendment:

i) 4.8, p5, 3rd paragraph should read: " The NP is not in favour of abortion on demand but recognises the need <u>to</u> review the current legislation..."

3. MATTERS ARISING:

None.

4. POLITICAL RIGHTS, CITIZENS RIGHTS, FREEDOM OF RESIDENCE, FREEDOM OF MOVEMENT: PARTY SUBMISSIONS

4.1 The ACDP submission was presented by Mr Green who spoke to the document, ***" African Christian Democratic Party Submission to the Constitutional Assembly, Theme Committee Four: Political Rights, Freedom of Movement, Residence and Citizenship"***

Questions to the ACDP included:

- Clarity was asked regarding 2.4(p7) which states that the bearers of rights are both natural and juristic persons

The ACDP responded as follows:

- The ACDP will amend their submission to reflect that only natural persons are the bearers of political, citizen, freedom of movement and residence rights.

4.2 The ANC submission was presented by Ms Pandor who spoke to the document, ***" ANC Preliminary Submission: Theme Committee 4 - Political Rights, Citizens Rights, Freedom of Movement and Freedom of Residence".***

Questions to the ANC included:

- How does one ensure "regular, free and fair elections based on universal franchise" in a system based on customary law?

The **ANC** responded as follows:

- The ANC believes that democracy should be promoted without infringing on customary tradition.

4.3 The **DP** submission was presented by Ms Smuts, who spoke to the document, ***"Constitutional Assembly: Theme Committee 4: Democratic Party Submission on Political Rights, Citizens' Rights, Freedom of Residence, Freedom of Movement".***

Ms Smuts added that the DP would support a clustering of rights.
There were no questions to the DP.

4.4 The **FF** was not present and their submission was noted.

4.5 The **NP** submission was presented by Senator Radue, who spoke to the documents, ***" National Party Preliminary Submission: Theme Committee 4 - Item 16(ii): Citizens' Rights"; " National Party Preliminary Submission: Theme Committee 4 - Item 16(iii):Freedom of Movement"; " National Party Preliminary Submission: Theme Committee 4 - Item 16(iv):Freedom of Residence".***

Questions to the **NP** included:

- The legacy of Apartheid Laws imposed certain economic constraints in the exercise of these rights today. Is there not a duty on the state to ensure that the right has content.
- If "other actors" other than the state are not bound by this right how does one prevent infringement on these rights by private bodies who are often the worst perpetrators?
- If the NP were to delete the phrase, "...other actors are not bound by it.", would it change the NP position radically?

The **NP** responded as follows:

- The NP has supported the removal of all apartheid laws with regard to residence and freedom of movement. It has supported legislation like the Land restitution Act and other measures by the GNU.
- The NP believes that there is an absolute positive duty on the apart of the state to protect these rights and all levels of government are bound by it. The legislative and constitutional provisions regarding discrimination will ensure that private bodies does not infringe on these rights.
- The NP will have to consult with its structures before agreeing to deleting the phrase, "...other actors are not bound by it".

4.6 The PAC submission was presented by Mr Sizani, who spoke to the documents: ***"Preliminary Submission of the PAC on Political Rights"; "Preliminary Submission of the PAC on Citizens' Rights"; "Preliminary Submission of the PAC on Freedom of Movement".***

There were no questions to Mr Sizani.

5. GENERAL

5.1 *Work Programme*

5.1.1 The chair noted the amendments to the work programme:

i) There will be two Theme Committee meetings next week:

Monday 12 June: Equality (Party Submissions are due today).

Thursday 15 June(2-5pm): Administrative Justice, Access to Courts, Detained and Arrested Persons. Party Submissions due on 7 June.

ii) Theme Committee Reports to be tabled at the Constitutional Committee meeting of 14 June.

5.2 *CPM'S*

5.2.1 Members were reminded of the upcoming CPM'S.

5.3 *Technical Committee Report*

5.3.1 Ms Liebenberg gave a brief verbal report on the work of the Technical Committee:

i) The Technical Committee is hoping to finalise a number of reports for the Constitutional Committee meeting of the 14 June 1995. These are:

- Nature and Application of the Bill of Rights
- Human Dignity
- Freedom and Security of the Person
- Servitude and Forced Labour
- Freedom of Religion, Belief and Opinion

ii) The reports will be accompanied by draft texts with explanatory memoranda.

5.3.2 Ms Pandor reminded the meeting of the recommendation from the last Constitutional Committee(CC) meeting regarding the grouping of rights. The Secretariat reported that the Technical Committee is working on the basis of the CC recommendation.

5.4 The Core Group members were reminded to meet after the Theme Committee meeting.

6. CLOSURE

The meeting rose at 10h07.

CONSTITUTIONAL ASSEMBLY

MINUTES OF
CORE GROUP OF

THEME COMMITTEE 4
FUNDAMENTAL RIGHTS
Monday 5 June 1995 (AT 10H15)

PRESENT

Radue RJ (Chairperson)

Green LM
Mdladlana MMS
Pandor GNM
Sizani RK

APOLOGIES: Leon AJ

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

1. OPENING

1.1 Senator Radue opened the meeting at 10h15.

2. REPORTS

2.1 It was decided that the reports to the Constitutional Committee meeting of 14 June would be presented by Ms Pandor and Senator Radue.

3. PARTY SUBMISSIONS

3.1 The Secretariat stressed the importance of parties meeting the deadlines for submissions if the June 30 deadline for completion of the Theme Committee reports is going to be met.

4. WORK PROGRAMME

4.1 The programme for the two Theme Committee meetings next week was finalised:

i) Monday 12 June - Equality
ii) Thursday 15 June - Administrative Justice, Access to Courts, Detained and Arrested Persons
iii) Wednesday 14 June - Constitutional Committee meeting: 9 - 6pm. The following Theme Committee Reports will be tabled:

- Nature and Application of the Bill of Rights
- Human Dignity
- Freedom and Security of the Person
- Servitude and Forced Labour
- Freedom and Religion Belief and Opinion

5. PUBLIC HEARINGS

5.1 It was agreed that a public hearing on Socio-Economic rights be scheduled for the end of July.

6. CLOSURE

The meeting rose at 10h30.

WORK PROGRAMME AND DEADLINES FOR PARTY SUBMISSIONS

DEADLINES PARTY SUBMISSIONS	TC MEETING	ITEMS
		13. Life
		14. Socio-Economic Rights i) Property ii) Education iii) Environment iv) Economic Activity v) Labour Relations vi) Freedom of Language and Culture vii) Other socio-economic rights
	29 May 1995	15. Reproductive rights
	5 June 1995	16. Political Rights 17. Citizens' rights 18. Freedom of movement 19. Freedom of residence
	12 June .1995	20. Equality
9 June	15 June 1995	21. Administrative justice 22. Access to Courts 23. Detained, arrested and accused persons
12 June	26 June 1995	24. Limitation of rights 25. States of emergency and suspension of rights 26. Other fundamental rights and directive principles
15 June	27 June 1995	27. Interpretation of Bill of Rights 28. Other issues

CONSTITUTIONAL ASSEMBLY

SCHEDULE OF MEETINGS

Latest update as at 05 June 1995

Monday 12 June	Theme Committee 4		
Wednesday 14 June	**Constitutional Committee**	08h30 - 18h00	OAC
Thursday 15 June	***Management Committee***	***08h00 - 10h00***	***V16***
	Party Caucuses		
	Theme Committee 4	14h00 - 18h30	OAC
Saturday 17 June	**CPMS** - Camarvon; Ellisras; Mhluzi.		
Thursday 22 June	***Management Committee***	***08h00 - 10h00***	***V16***
	Party Caucuses		
Friday 23 June			
Saturday 24 June	**CPMS** - George; Maokeng; Hammersdale		
Monday 26 June	Theme Committee 4	14h00 - 17h30	
Tuesday 27 June	Theme Committee 4	08h30 - 13h00	
Wednesday 28 June	Theme Committee 4	08h30 - 13h00	
Thursday 29 June	***Management Committee***	***08h00 - 10h00***	***V16***
	Party Caucuses		
Friday 30 June	***Constitutional Assembly***	***09h00 - 16h00***	***Ass***
Saturday 1 July	Winter Recess		

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 4

FUNDAMENTAL RIGHTS

PARTY SUBMISSIONS

- Equality

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- ACDP

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

EQUALITY

Content of the Right

1. The Philosophy of equality

Two very distinct approaches to the right to equality need be mentioned initially.

Humanism

In a humanist context, all species have evolved from an initial shattering explosion of matter. Through the process of evolution, guided by chance, molecular building stones have since arranged themselves to form all living beings, including man. It follows that all species are equal in importance.

Coupled with the total rejection of an infinite God, evolving man has to provide the ethical and moral values for himself to live by. As circumstances change, so does man's needs and requirements. The legal theory accepted by this world-view is legal positivism. Legal positivism has, as it's core ethics, that there are no absolutes - legal or moral - and that law is an attending set of principles that keeps evolving with man.

On the face of it, this seems acceptable, but it is only when regard is being had to the consequences of this thinking that entertaining the idea of an ever-evolving set of principles becomes abhorrent to all clearly thinking South Africans, but especially to bible-based Christians.

Examples of the effects of this legal system may be seen throughout society. Hitler, Mao, Stalin and many others used positive law to murder millions - passing laws to eliminate Jews, gypsies, the sick, landowners, Christians, or anyone they had an urge to destroy - which fundamentally means anyone who stood in the way of their absolute domination of every person and action in society. In America, laws that many people considered inconceivable a few years ago are now acceptable standards. Abortion has been legalised, because the state decided that a baby in the womb is not a baby. Perhaps, twenty years from now, infanticide will be legalised, because the state will have decided that a baby is not a human being until it can walk or talk. The distinction between right and wrong is tenuous in a society that subscribes to legal positivism.

A leading humanist, Hook, made it very clear that "[t]he rights of man depend on his nature, needs, capacities and aspirations, not upon his origins. Children have rights, not because they are our creatures, but because of what they are and what they will become. It is not God, but the human community that endows it's members with rights." (quoted in D.A. Noebel: Understanding the Times, Summit Press, (1991). This means that it is the state and not the community at large that decides what rights the individual will have.

Moreover, it will also decide what needs, capacities and aspirations man, as a collective, has and this will decide how the individual is treated.

The humanist basis for all human rights, including that of equality, is therefore, the needs and aspirations of a particular society at a particular reference in time. This could logically mean that, for example, a fireman could, some day, have less rights than an engineer, because a particular society has identified a need that can best be fulfilled by the engineering profession.

Contrast with this unacceptable and, we argue, illogical and nonsensical viewpoint, the Christian sense of equality and human rights.

Christianity

The ACDP holds to an absolute, immutable set of laws as given to Man by God. These rights can not be taken away arbitrarily, as God's laws are clear and have been proven as the backbone to the British Magna Charta, the Declaration of Independence and the Constitution of the United States of America, nor can it be surrendered or abdicated.

This concept is grounded in an acceptance that God has revealed certain truths about himself and about mankind in the Bible. He has created Man to dominate and rule the earth as a caretaker. One generation then, has a responsibility to show such stewardship, that the rich and bountiful inheritance from God may be passed on to the next generation.

God has created man with strengths and weaknesses and as such, He knows the nature of Man better than man himself. Leading psychologists have concluded that all their knowledge and theories are mere footnotes to the richness of psychological knowledge that appears in the Old and New Testaments.

What follows hereafter must always be understood as flowing from this absolute, biblical, moral and ethical view of equality and human rights.

2. Equality from a Biblical Perspective

The ACDP agrees that equality is central to a Bill of Rights. The ACDP further believes that all shall have equal access and protection of the law. We would like to stress that the origin of law has its roots in God's revelation through biblical knowledge.

We understand the general idea of the law to incorporate the following strands : fundamental *law* and *constitutional law.*

Attorney John Whitehead describes it this way:

> " The first type of law is the *fundamental law* upon which the culture and society are established. This fundamental law may be equated with the "higher law", which should be the " laws of Nature and of Nature's God." The higher law is clearly expressed in God's revelation as ultimately found in the Bible. In this the higher law has its sustenance.

The second type of law, *constitutional law*, provides the form of civil government to protect the God-given rights of people. The people can base their institutions upon constitutional law, in conjunction with the higher or fundamental law. Although the constitution is undergirded by an absolute value system, it is not a source of ultimate values." (p81. Tim La Haye: *Faith of our founding fathers)*.

According to the A.C.D.P. all fundamental human rights should be measured and defined within the law as explained in biblical meaning and revelation.

Equality before the law is a service and benefit to all, and is principally aimed to enhance the esteem of the value of all human beings, essentially in the understanding that we are formed in the image of God (Genesis 1:26 and 27, which says:

"Then God said, "let us make man in our image, in our likeness and let them rule over the fish of the sea and the birds of the air, over all the creatures that move along the ground. So God created man in his own image , in the image of God, he created him, male and female, he created them.")

Equality before the law means that as Christ is no respector of persons, so the law should be no respector of persons (state or subjects)

James 2:8-9 says:

"If you really keep the royal law found in Scripture: "love your neighbour as yourself", you are doing right. But if you show favouritism, you sin and are convicted by the law as law-breakers."

Equality provides us with a further limitation in that all are born sinners, and that no one by nature is considered to be superior to any other.

Equality is, therefore, that quality in the Bill of Rights that brings all humanity together in acknowledging its temporal nature, and to focus towards a oneness in individual and community responsibility, through love and common purpose.

Equality is that process that acknowledges human sinfulness by substituting laws of exploitation and deprivation with laws of a spiritual and social redemptive nature: to care for others.

We believe that no-one should be discriminated against, on arbitrary grounds as humanists will do with their ever-evolving set of morals and ethics according to legal positivism. It must, however, be clearly stated that sin in biblical context, including among others, homosexuality, lesbianism, incest, paedophilia and bestiality will be called sin and treated as such. The ACDP will never consider actions flowing from these practises as part of a Christian sense of human rights and unlike evolving patterns of morality in humanism, this will never change as God pronounced these practises abnormal and sinful.

3. Constitutional Perspectives

The importance of equality in the context of the South African Constitution, is made clear by the working of the document itself. From the Preamble to the Afterword, the importance of the equality-principle is woven into the fabric of the Constitution.

The reason for this, one can simply find in the historical legacy of inequality which has characterised this country and made it a pariah in the eyes of the international community.

It is, therefore, of extreme importance, to guard against similar occurrences in the new South African Constitution. The Afterword bespeaks of the document providing a bridge between the old and the new and gives as a goal, a future founded on human rights, democracy and peaceful co-existence without any superficial means of distinction between human beings.

Care should, however, be taken to ensure that one evil is not simply exchanged for another, different kind of evil. The values and purposes of the new South Africa, should be carefully scrutinised to make sure that that which is carried forward, is indeed what the majority of South Africans want and need, in order to give substance to the hopes and ideals of all, subject to God's laws.

4. Affirmative Action or Equity?

We further endorse the need for Affirmative Action, but note that is is not strictly speaking a principle of equality. It has the potential, if approached incorrectly, of creating the situation of inequality.

Affirmative Action should be defined as a temporary measure to make right the wrongs of the past, and to constitute for legal protection that will ensure individual, family and nation building, and human resource development.

Affirmative Action should aim to make people self-sufficient, to contribute to the running of the country in all its sectors.

We should be careful to have it written into the constitution as a permanent right. This will only be counter-productive.

In the aforegoing paragraph, mention was made of Affirmative Action not being strictly an equality concept, despite very definitely linked to it.

In what follows, the ACDP wishes to express an appreciation for the lucid and thorough presentation by Dr, Ramphele to Theme Committee One.

The PARTY applauds the approach of not simply transplanting American Affirmative Action on a different South African context. As such, the ACDP supports the distinction between equality and equity.

That all individuals must be treated equal before the law has already been mentioned. The need for just and fair treatment based upon a fair share in the national resources accordance with their needs and responsibilities in society. In this definition, we agree with Dr. Ramphele. The ACDP wishes to stress, however, that an arbitrary system of ethical relativism and a positive law approach to defining these needs, will not be supported. It is our view that God's Biblical Principles will always guide the defining of needs and requirements.

The ACDP supports the approach of addressing the hurts in a society caused by an unjust distribution of resources. Apartheid has left a legacy that has to be confronted in a way that would minimise conflict and the perpetuation of injustice.

The equity approach to past injustices has very clear advantages as expounded by Dr Ramphele: the following is just a summary of these:

a. The ACDP agrees that an equity focus would benefit the most disadvantaged communities as well as giving equal opportunities to individuals from an advantaged history, thus redressing the past and benefiting the new South Africa in an esteem-building process towards a prosperous future for all.

Conflict will inevitably arise if a simple black empowerment drive is introduced that will benefit individuals without flowing down in the form of a benefit to the disadvantaged community as a whole. Individuals must not be required to perform tasks impossible to them, because of educational handicaps in the name of empowerment or distributive justice. The emphasis should be on an approach where the skilled can teach the unskilled to become skilful.

b) South Africa will go a long way towards ensuring it's own failure should a balance not be drawn between responsibilities.

On one hand, society has the responsibility to create the equitable framework that will provide individuals with equal opportunities to realise their potential in the form of talent received from the Creator.

Individuals will, however, have to take the responsibility to ensure the outcome of the process of equal opportunity. To give a right to equal outcome will be to the detriment of South Africa and all South Africans.

c) Care will have to be taken to not focus on short term goals with a program of redress, but to ensure long-term benefits of the process. Affirmative Action should not be seen as a band-aid to heal the apartheid-legacy.

The ACDP applauds the goal of having one body to control the process of change from an ethical and equity perspective, rather than separate commissions to look at separate areas of discrimination. this will ensure that national resources be distributed for the national good.

Finally, the ACDP stresses that the notion must not be to force justice on the people, but to give God a chance to complete the healing that He has started in this nation with the election process. After all, He always finishes any project in His mind before He starts creating the circumstances to give birth to His intent.

Equality and so called "Sexual Orientation" Rights

It has been recognized that no rights exist *in vacuo*. At some point where an individual's right interferes with another's right these rights has to balance in the interest of society.

The ACDP does not differ with this construction, we merely state that such a thing as sexual orientation denotes behaviour, a social pattern and, as such, has to be completely distinguished from aspects of immutable status. This status is unrelated to behaviour, traditional perceptions of moral character or public health.

Race may serve as an example in that it tells us nothing about a person's lifestyle or behaviour. Removing race as a criterion of social decision makes sense to all but the most arbitrary decision

Gay rights proposals redefine status without ever saying so. Such laws protect social behaviour whose benefits and/or detriments to society has to be objectively evaluated before the particular protection is given.

Circumventing this process, proponents create a new minority status. In a South Africa with a history of arbitrary discrimination in matters of **status** particularly race, gay rights activists uses the emotion of the moment, the genuinely sincere ideal of ensuring that unwarranted discrimination be brought to as immediate conclusion to force an uncritical acceptance of this new minority status, thereby derailing a rational inquiry into the underlying behaviour and disguises the fact that this minority is bound together by sexual activity - a common inclination to commit sodomy and related sex acts with a member of the same sex.

To avoid deeper investigation, the new status group gives itself the appellation "gay" a name totally unrelated to the core issue at hand, sex between men and men and sex between women and women, including child-adult sex.

The redefinition of true status to include behaviour-based status creates potential for innumerable protected classes ranging from sexual to recreational behaviours, from serious to frivolous interests, from committed involvements to part-time hobbies. Are smokers, adulterers, motorcyclists or philatelists, eg. to be protected.

The question on whether to create a behaviour-based status should be answered by finding answers to such enquiries as whether this is a behaviour worthy of special status? What is it's impact on society and of the practitioners thereof? Is it morally neutral - judging from conventional and sincerely held moral systems?

The ACDP states clearly that homosexual and lesbian behaviour, paedophilia, bestiality, sado-masochism and other sexual orientations of their ilk are definitely not analogous to true status.

There is no analogy between groups defined by race or sex, religious conviction or national origin and those who practise particular forms of behaviour which are still criminal according to current South African law.

In order to try and show the analogy between issues of racial or sex status and homosexual behaviour, it will be necessary to decriminalise the being "gay". Despite a concerted effort to prove sodomy a natural practice, even the American Supreme Court in *Bowers v Hardwick* (1986) found that a state law prohibiting consensual sodomy was not unconstitutional.

Most activists for "sexual orientation" rights, base their argument on the so-called "Kinsey Reports" (1948 and 1953).

Dr Alfred Kinsey extrapolated a survey of prison inmates, convicted sex offenders, pimps, prostitutes and a host of other sexual deviants to "prove" that homosexuality and heterosexuality actually comprise of two opposite poles of sexual behaviour with bisexuality being neutral!

Included in this tome of wisdom, is evidence of illegal sexual experimentation on children from infancy to 15 years of age and approval of animal-human sexual relations and "cross-generational" sexual experiences.

In typical humanist fashion, the scientist who did not approve of the inhibitions introduced on society by amongst others, Judeo-Christian ethics, claim their sexuality without inhibition and he then postulates that 10% of the US population would be inclined to "more or less exclusive homo: sexuality". These figures have since been proven to be at least an quintuple overestimation.

Yet, for a variety of reasons, the world still seems to be convinced of the truth of the "10% factor" as it is widely known.

Without going into semantics it needs be said that even the terminology is misleading and only serves to confuse the issue.

The undemocratic process leading to the drafting of the Constitutional Principles thought it wise to include the terminology of "sexual orientation"

This denotes an aspect of status, such as race or sex over which one has no choice. Activists of lifestyle rights ride on the back of civil rights movements - no less so in this country. Starting to lobby the present government in the eighties already, the proponents of lifestyle rights succeeded in having their cause taken up by the liberation movement, forgetting in the euphoria of the moment the difference between status and condition or lifestyle.

Until the early 1970's, the American Psychiatric Association classified homosexuality as a mental disorder and treated it successfully as such. Following the storming of the annual convention by lifestyle activists, who attacked the association for being bigoted and discriminatory, the APA bowed under pressure and removed this disorder from their list

In like fashion, the name of Gay Related Immuno deficiency syndrome (GRID) was changed to AIDS because, even though the disease was identified and it's spread tabulated in communities practising same-sex physical relations, it was said to offend these communities

Ever since Kinsey, the search has been on for the gay "gene" - that elusive biologic determinant of sexual preference that would put lifestyle rights on a par with the status rights on whose backs the movement piggybacks

Yet, despite even "gay" researchers joining the quest, the "gay gene" remains as missing as the "missing link" in the evolution myth.

1991 was a banner year for the "gay" movement in terms of scientific research. Within just months of each other, two different studies by gay researchers hit the headlines as dramatic evidence that "gayness" begins in the chromosomes. The news sparked hopes that the finding might undercut the animosity that "gays" have contended with for centuries and lead to greater civil-rights protection. If, in fact, a genetically immutable characteristic responsible for homosexual orientation could be demonstrated, then there would be all sorts of wonderful implications for the "gay" movement.

Discovery of a "homosexual gene" would instantly take away any choice in the matter of orientation, and that in turn would mean (at least in the mind of "gays") that homosexuals could no longer be imputed with moral guilt for their deviant behaviour. It would also bolster the notion that gays are a "natural" minority, like race and gender - a crucial factor in gaining legal protection against discrimination. Finally, it would absolve guilt-ridden parents the world over of any fault in raising children who "went gay."

Other, quite opposite implications, disturb even a fair number of "gays". If homosexuality is found to be largely a biological phenomenon, then "gayness" starts to look less like a "preference" or "lifestyle", and more like an illness in need of a cure.

And finding that cure resurrects chilling images of German doctors drilling into the skulls of homosexuals in search of the source of one's homosexuality. 2

But what are we to make of the studies themselves? Are they intrinsically valid? In the first and most widely publicised study, Simon Le Vay, a neuroscientist at the Salk Institute in La Jolla, California, put forward his findings that a specific area of the brain is smaller in homosexual males than in other males.

That tiny bit of gray matter, smaller than a snowflake and found in a bundle of neurones in the hypothalamus (which regulates heart rate, sleep, hunger, and sex drive) was nearly three times as large in the 16 heterosexual men studied as in the 19 homosexual men who were the subjects of Le Vay's autopsies.

Le Vay admitted that his research was far from conclusive. Because each of the homosexual men had died of AIDS-related causes, it could not be known whether the virus might have had some effect on the brain structure. And no women's brains were examined, whether from homosexuals or heterosexuals. 3.

Fellow Salk researcher Kenneth Klivington raises the inevitable chicken-and-egg question regarding the hypothalamus: Does its size determine homosexuality, or does homosexuality determine its size? "You can postulate," he says, "that brain change occurs throughout life, as a consequence of experience."4 In other words, "use it or lose it".

The most serious broadside to Le Vay's findings comes from gay activist Darrell Yates Rist, cofounder of the Gay and Lesbian Alliance Against Defamation, who believes that progressive gay researchers looking for evidence of genetic gayness undermine the dynamic of personally chosen sexual preference. Given what Rist describes as "nearly universal male-to-male lovemaking among citizen classes in some periods of ancient Greece and Rome," he asks, "would LeVay argue that all the great men of classic antiquity had an undersized hypothalamus."[6]

"Survey of Identical Twins Links Biological Factors with Being Gay," read the headlines. And the story flashed all across America. In the Archives of General Psychiatry, Northwestern's J. Michael Bailey and psychiatrist Richard C. Pillard of the Boston University School of Medicine had just reported new evidence that genetics play a more important role than environment in the development of homosexuality.

The evidence? Among 56 homosexual men who were twins, 52 percent of their identical-twin brothers were also homosexuals. By contrast, only 22 percent of *non*-twin brothers and only 11 percent of adoptive brothers were found to be gay.[7]

Thomas H. Maugh, science writer for the *Los Angeles Times reported* "Identical twins have identical genetic makeups and, if homosexuality has a genetic basis, many of the second twins should also be gay. That is what they found: 52% of the identical twin brothers were "gay" *

Am I missing something? If identical twins have *identical* genetic makeups, then why was the percentage of the second twins not *100* percent? Far from proving the *existence* of a genetic factor, the study is the best evidence yet of its *non-existence*!

Surely what the 52 percent finding indicates is either that there is *no genetic factor at all* or that, even if there were, *a person's sexual behaviour could be modified despite his orientation.*

This certainly seems to be true.

By making being a homosexual or lesbian morally and socially acceptable, we have abandoned a large group of men and women dissatisfied with their same-sex lifestyles, says psychologist Joseph Nicolosi, author of *Reparatative therapy of male Homosexuality.* Even the Kinsey Institute noted in 1970 that 81% of 684 gays and 93% of 293 lesbians had changed or shifted their sexual feelings and behaviours after age 12. (Quoted in Family Research Report, 1993). This is the fatal fact to the argument that homosexuals are like any other minority in civil rights. Who ever heard of a black person becoming white! This country was caught asleep.

Despite pervading morality and the religious aspect of the vast majority of South Africans who condemn lifestyle rights as being as fraud on society, the MPNP gave its approval, if only by remaining silent on this vital issue.

The ANC, the IFP and National Party, who formed the Government of National Unity, decided for 40 million South Africans that Kinsey's legacy, despite abundant proof to the contrary is part of acceptable South African culture.

The ACDP says no! We will not abide and let this country be hoodwinked into accepting without proper discrimination in the true sense of the word as to every single aspect of the right to equality. Lifestyle rights do not even stand the most cursory of tests - biological, political, legal or otherwise.

The ACDP supports the goal of having one body to control the process of change from an ethical and equity perspective, rather than separate commissions to look at separate areas of discrimination. this will ensure that national resources be distributed for the national good. The ACDP agrees with Dr Mamphela Rampele in her lucid presentation to theme committee one, that the core value should be equity (for the whole period of transition), rather than egalitarian equality. Equity denotes the just and fair treatment of all, based upon a fair share in the national resources in accordance with their needs and responsibilities in society. This approach will address the hurts of Apartheid in a way as to minimize conflict and the perpetuation of injustice.

No doubt, the concept of Affirmative Action will be instrumental in the work of the proposed body to oversee the transitional aspects of human rights issues.

No doubt, a single organisation with a united vision will be much more effective than several smaller bodies , whose frames of reference could easily overlap - leading to expensive duplicity and superfluous work being done.

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Application of the Right

2.1 Nature of the duty to be imposed on the State

The State must reflect and protect South Africans by refusing to recognise sexual orientation and any conscience and/or belief that offends the morality of the large majority of citizens - this includes practices of witchcraft, satanism, bestiality, paedophilia and incest.

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

Where laws against sodomy, incest, satanism, witchcraft and bestiality exist, these must not be derogated from.

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

This right should be applied vertically as well as horizontally.

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

All natural persons will bear this right from conception to natural death.

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

Contentious issues such as special rights to homosexuals, capital punishment and abortion should ideally be decided by referendum.

7th June 1995
[EQUAL.WPS]

- ANC

PRELIMINARY SUBMISSION OF ANC TC4

THE RIGHT TO EQUALITY

Introduction

At the heart of the Bill of Rights lies the notion of the fundamental equality of all men and women, irrespective of race, colour or creed. The pre-eminence of Equality as the founding ideal of the new South Africa is evident in the Preamble of the Interim Constitution and its position as the first right which is listed in Chapter 3.

In South Africa, inequality is the very essence of the lack of political freedom. While some have been free to plunder the country's natural and human resources, others have lacked the most mundane freedoms of movement, association and expression, let alone social and economic security. In this setting all freedom in our new democracy ought to be premised on the ideal of equality, which must become the pivot and driving force of political, cultural and personal life in South Africa.

It is in the context of the historical inequality and the legacy of unfair discrimination that affirmative action becomes compulsory. While taking on a variety of forms, affirmative action means special measures which must be adopted to enable persons discriminated against on grounds of colour, gender and disability to break into fields from which they have been excluded by past discrimination. It is an issue which has to be addressed both with firmness and sensitivity.

It must become clear that attempts at achieving substantive equal rights and opportunities for those discriminated against in the past should be regarded as the fulfilment, rather than a violation of the principles of equality. Affirmative action for disadvantaged sectors of our community shall focus on blacks, women, the youth (both men and women) and the rural community.

1. Content of the right and its formulation

The Right to Equality is formulated as follows in the Interim Constitution under Section 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.

(3a) 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.

The ANC believes that all men and women shall have equal protection of the law in terms of both treatment and protection. The formulation of 8(1) in the Interim Constitution is acceptable.

Section 8(2) should not be regarded as numerous clauses of

discrimination. Equality is a universally recognised right or norm which categorically excludes discrimination on the grounds of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. This is not an exhaustive enumeration of the grounds for unfair discrimination; but an inclusive and explicit list of distinct grounds for discrimination. The formulation of Section 8(2) is therefore acceptable.

As indicated earlier, affirmative action and also the restitution of rights in land are applications of equality, and not qualifications. They reflect positive and practical mechanisms which must be used to progressively achieve a balanced sense of equality in the various fields of human endeavour at various levels of government. While Section 8(3)(b) may be included under the category of Property rights, it can also be appropriately dealt with under the Right to Equality.

Section 8(4) provided a favourable shift in the burden of proof which shall the effect of creating a favourable avenue to challenge unfair discriminatory practices. The subsection can therefore be maintained in the Interim Constitution.

2. Application of the Right

2.1. The state has a duty to protect the right.

2.2. The right applies to customary and common law, with due regard and sensitivity towards practices of customary and religious law.

2.3. The right shall bind the state and all social structures but in its application shall duly consider and be sensitive to customary and religious law.

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

2.5. The right may only be reasonably and justifiably limited in an open and democratic society.

- DP

27.02.95

CONSTITUTIONAL ASSEMBLY : THEME COMMITTEE 4
FUNDAMENTAL RIGHTS
SUBMISSION BY THE DEMOCRATIC PARTY ON BLOCK 3 :
RIGHT TO EQUALITY

3(a) CONTENT OF THE RIGHT

For democracy to flourish, equality is fundamental. Racial discrimination predominated in the South African social order in the past. The Bill of Rights needs to set its face against discrimination.

What is discrimination? A successful society must distinguish between the meritorious and unmeritorious, the just and the unjust, the productive and unproductive. When is differentiation permissible and when not? The Bill of Rights should provide the answer that differentiation is permissible when it is justified and impermissible when it is not. Only when differentiation is not justified does it merit the pejorative 'discrimination'.

The effect of this is that the court that enforces the Bill is permitted to condemn as discrimination, an arbitrary exercise of power thought to fall outside the 'best' categories of differentiation, such as racism or sexism, e.g. a court can outlaw a particular differentiation made on the ground of pregnancy. If differentiation on the ground of pregnancy is unjustified it is discrimination and therefore unconstitutional. The court need not go so far as to engage in complex debates about whether differentiation that prejudices only women, but not all women, discriminates against women.

Despite the generality of this approach, the Bill of Rights should recognise that differentiation on the specific grounds of race, ethnic origin, colour, gender, sexual

orientation, age, disability, religion, creed and conscience are generally arbitrary and therefore generally unjustified. But discrimination has created pervasive inequality in this country, and if we are to take the commitment to equality seriously, we have to acknowledge the need for reasonably drawn and rationally justifiable affirmative action programmes to undo existing inequalities.

However unpalatable it may be, we have to acknowledge too that if such programmes are to benefit the legitimate beneficiaries, they will have to use the same criteria for differentiation as those which brought about the inequality. The clause which authorises such programmes must provide that such programmes are reasonable and rational. A programme would not be rational if it was not focused to reach its intended beneficiaries or if it continued to operate after it had done its work. It should also, on proper interpretation, outlaw fixed race/gender quotas.

The Bill should also recognise that although differentiation on any of the grounds listed in the equality clause, unless it is part of a reasonably and narrowly focused affirmative programme intended to undo inequality, is usually abhorrent, sometimes it may be desirable, e.g. to educate members of different religious persuasions separately about their religions and for that reason it may be necessary to differentiate on the ground of religion. Or it may be necessary to segregate lodgings by gender in order to protect women residents from sexual harassment or assault.

These are justified differentiations and not discrimination. The Bill of Rights should consequently recognise that differentiation even on one of the grounds listed and not for the sake of countering inequality, may be justified. It is for this reason that differentiation on one of the grounds listed should be presumed unjustified. The presumption can be rebutted by demonstrating a justification of the kind outlined above. This formulation should be flexible enough to permit a court to require a more compelling justification to legitimise some types of differentiation (e.g. racial) than others (e.g. religion).

Some favour a constitution which seeks to outlaw discrimination only when the state may be considered responsible for the discrimination. But there is an important sense in which

the state is always responsible for discrimination: it can always legislate to outlaw it (unless the constitution forbids it to legislate, in which case the state is responsible because of the constitution).

Despite that, few would argue for state intervention against all discrimination anywhere. Almost everyone recognises the need for some sphere of privacy in which the choices that individuals make can be made on any ground, however arbitrary, without any liability to justify them, e.g. the choice of whom to invite into one's home, whom to favour with one's charity, whom to marry - these fall into that category.

Rather than confining equality to the area in which the state is responsible it is better to recognise that there is a sphere of privacy within which decisions to differentiate need not be justified. The Bill of Rights should recognise that the constitutional commitment against discrimination should not intrude into the sphere of privacy.

This recognition could invite racists and other discriminators to take shelter therein; many will try improperly to expand the need to protect privacy to further discriminatory ends: immunity invites abuse. To guard against this danger the Bill of Rights should confine immunity to decisions made in the exercise of private choice necessary to preserve personal autonomy.

There are perhaps some in South Africa anxious to retain the privileges bestowed by apartheid. Many hope to remove activities hitherto in the public domain, to the private, expecting that those activities will be insulated from the commitment of the new social order to root out discrimination.

Neither the constitution nor the Bill of Rights must be party to those efforts. Its recognition of a sphere of privacy immune from any need for justification, something essential to protect against Orwellian state intervention, cannot be permitted to become a shield for private apartheid. The relevant provision should be drawn narrowly to guard against that possibility.

What society considers to belong within the sphere of privacy, changes with time. At one stage it was commonly accepted that the terms of private employment were a matter for employer and employee, and the state should not intrude. Today, legal regulation of private employment is pervasive and commonplace. And it was generally accepted that when social clubs fell into the sphere of privacy and chose to exclude Jews, blacks or women, that was their prerogative. There is now a growing body of opinion that clubs often supply public goods such as business opportunities, to which all should enjoy equal access.

The boundaries of privacy are constantly shifting and the constitution or the Bill of Rights cannot finally define them. The court entrusted with interpreting the Bill of Rights will have to define and redefine the boundaries of privacy as society's conception of that ideas matures and develops.

The prohibition on discrimination in the Bill of Rights should outlaw both direct and indirect discrimination. Direct discrimination is overt discrimination. The concept of indirect discrimination hits at apparently neutral practices which have differential impact, e.g. a recruitment policy requiring all mathematics teachers to be six feet tall. Such a policy, although it makes no reference to race or sex, would favour men over women and some races over others. Since the policy would not be justified in fostering good mathematics teaching, it would be discriminatory.

The prohibition on discrimination should be expressed to be a consequence of the right to equal treatment; it cannot exhaust the content of that right. It can be as much of a denial of equal treatment to fail to differentiate as to differentiate.

It has been observed for instance, that some of the most serious denials of equality to women take the form of expecting women to be the same as men, or treating them as though they were. The relevant provision should be framed widely enough to strike at inequality in that shape.

The Bill of Rights must demand of government, rational, honest justifications for policy decisions providing entitlements such as equality or affirmative action. Rationality and reasonableness should be the standards of justification provided for in the Bill of Rights.

3(b) JURISTIC PERSONS

The Democratic Party reiterates submissions made under Block 1 and 2 on the question of juristic persons, and the horizontal application of the Bill of Rights. With specific reference to applying the equality clause to juristic persons and individuals, the Democratic Party believes the following sub-clause should be added to the general equality (and prohibition of discrimination) clause:

> "Differentiation (discrimination) shall be considered justified when it is the result of a decision made in the exercise of the type of private choice which preserves personal autonomy".
>
> (For explanation see P3-4 hereof)

3(c) PROHIBITED GROUNDS FOR DISCRIMINATION - (Section 8 of the Interim Constitution)

The Democratic Party supports the provisions of these sections, subject to the reservations it expresses in respect of S.8(3) which will be elaborated under the section on affirmative action, and further subject to the amendment detailed above under 3(b) (Juristic Persons).

The purpose of S.8(2) would appear to ensure that there should be no differentiated treatment on the grounds or elements which are vital to the nature of human identity. The words 'without derogating from the generality of this provision' would allow a court to take account of a range of elements of the human personality which have hitherto not been considered in the express words. Thus, groups affected by poverty, unemployment and lack of access to power, can be considered under S.8(2).

Among the designated criteria are gender and sex. The inclusion of gender implies that the constitution acknowledges that significant differences between men and women in respect of skills and social roles cannot be explained by biological differences, but must be located in social and political origins. The inclusion of gender as a designated prohibition allows a court to examine those social forces and power relationships which promote discrimination between men and women.

The concept of unfair discrimination doubtless represents an attempt to distinguish between a process of benign and malign distinction. It presupposes that discrimination itself can be freed from a pejorative content. To an extent the policy of affirmative action could be construed to be a form of positive treatment which would therefore fall within the concept of fair discrimination.

The Democratic Party believes discrimination means unjustified differentiation. Differentiation on the ground of race, ethnic origin, colour, gender, sexual orientation, age, disability, religion, creed or conscience, shall be presumed unjustified unless it is part of a rational programme intended to remedy substantial inequality.

Differentiation shall be justified when it is the result of a decision made in the exercise of the type of private choice which preserves personal autonomy.

In its General Comment 18, the Human Rights Committee established under the International Covenant on Civil and Political Rights noted: "The term 'discrimination' is used in the Covenant and should be understood to imply any distinction, exclusion, restriction or reference which is based on any ground such as race, colour sex, language, religion, political or other opinion, national or social origin, property, birth or other status, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons and on equal footing of all rights and freedoms. Not every differentiation or treatment will constitute discrimination. If the criteria for such differentiation are reasonable and objective and if their aim is to achieve a purpose which is legitimate under the Covenant." General comment 18(37) (UN. N York 1989) para.7. The Democratic Party supports this reasoning.

Article 14 of the European Convention on Human Rights provides: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, religion, political or other opinion, national minority, property, birth or other status'.

In general, the European Court of Human Rights has found that a violation of Article 14 arises if there is differential treatment in circumstances where there is no objective and reasonable justification, or in the event that there is such justification, proportionality is lacking between the aims sought and the means employed.

In the US, the justification for differentiation has been fundamental to anti-discrimination jurisprudence. Classifications based on racial criteria are considered suspect and the doctrine of strict scrutiny has been applied to them. The classification must be shown to be a necessary means to the promotion of a 'compelling and overriding' state interest.

3(d) AFFIRMATIVE ACTION

The Democratic Party agrees that the Bill of Rights should have a clause protecting affirmative action programmes from challenge under the Equality Clause. This is because we believe that, properly drafted and subject to certain key limitations, affirmative action need not conflict with the notion of equality. The Democratic Party believes that affirmative action must aspire to deliver equality by undoing inequality. This requires that affirmative action programmes should be explicit authorised by the constitution. Section 8(3) of the interim constitution, insulates from challenge "measures aimed at the adequate protection and advancement of persons disadvantaged by discrimination in order to enable full and equal enjoyment of all rights and freedoms."

The Democratic Party believes that clause 8(3) is deficiently drafted. Its most conspicuous flaw is its reliance on the vacuous notion of "adequate protection and advancement." The clearest thing about "adequacy", is its inadequacy as a criterion for decision-making.

Less conspicuous, but more important, is the inadequacy of the word "aimed" which makes the validity of an affirmative action programme depend solely on the intentions of its designers to the exclusion of its effects.

Many such programmes, because they are poorly focused or misconceived or badly executed, can do nothing but squander resources or destroy productivity or aggravate inequality or comprehensively apply a non-authoritarianism in the form of so-called "reverse discrimination" programmes.

To avoid these consequences, an affirmative action clause has to empower the court that applies it, to review not only the aims of the programme, but also the means by which it seeks to realise those aims. It has to empower the court to ask whether the programme is in fact one reasonably likely to achieve its goal of undoing disadvantage.

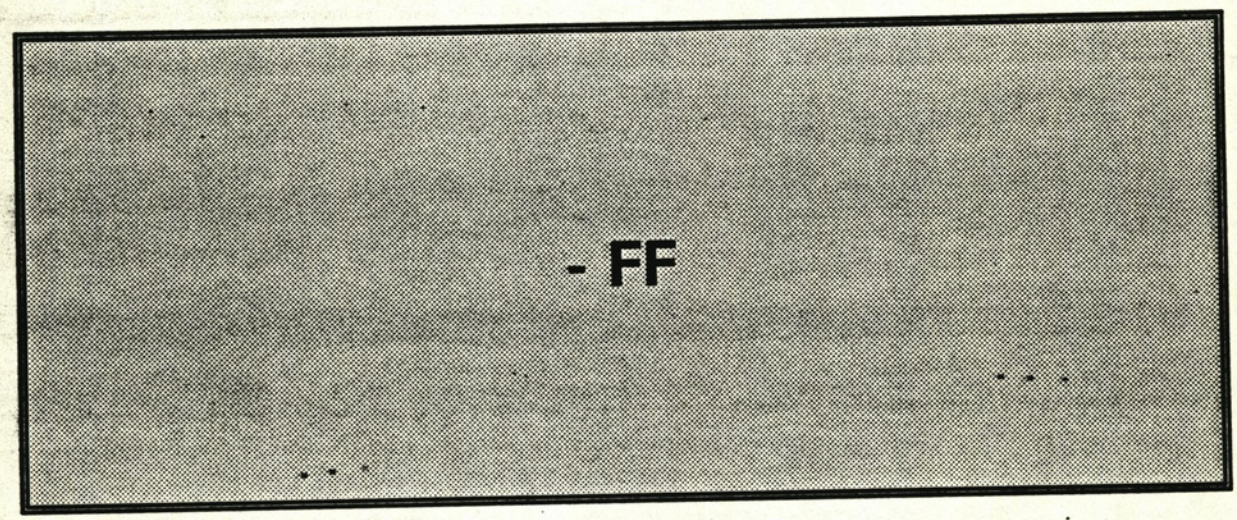
To avoid the legislature imposing group based reverse discrimination measures which do not necessarily advantage excluded individuals from previously disadvantaged groups, the Democratic Party proposes that S.8(3) of the interim constitution be amended by the interposition of the word 'reasonable' in the following context:-

3(a) This section shall not preclude reasonable measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, or to enable them full and equal enjoyment of all rights and freedoms.

"Reasonableness" as a standard of justification will allow the courts to enquire into - and ensure - that affirmative action programmes do not become limitless, discriminatory or oppressive.

3(e) CUSTOMARY LAW, INCLUDING THE RULES AND CUSTOMS OF RELIGIOUS AND TRADITIONAL COMMUNITIES

The Democratic Party reserves its rights to make a detailed submission on this provision at the appropriate stage when this matter is to be debated.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FREEDOM FRONT

THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

SUBMISSIONS ON EQUALITY

1. The Freedom Front is of the opinion that the right of every person to equality before the law is one of the elements of democracy, which can, as a general concept, be defined as a system of government by all the people collectively, usually through elected representatives, based on the recognition of equality of opportunities, rights and privileges, tolerating minority views, and ignoring hereditary class distinctions.

   In view of the fact that the new Constitution must be democratic (in terms of the Constitutional Principles) it must make provision in its chapter on fundamental rights for equality of all persons before the law.

2. Secondly, we adhere to the view that equality before the law is indeed one of the most fundamental of human rights. It is not only expressly required by Constitutional Principle V (equality of all before the law and an equitable legal process), but is implicit in Constitutional Principle III (general prohibition of discrimination). According to Lauterpacht (An International Bill of the Rights of Man, 1945, p115) 'The claim to equality before the law is in a substantial sense the most fundamental of the rights of man'.

   (a) Equality before the law

   In the present context we note that in terms of section 8(2) of the transitional Constitution only 'unfair' discrimination should be prohibited. It is conceivable that differentiation between persons on one of the grounds enumerated in section 8(2) would be justified in certain circumstances. So, for instance, it should be permissible to take sex into account where relevant (e.g. maternity benefits), or age, where relevant (e.g. military activities). We are also of the opinion that it should not

be prohibited to take sexual orientation of a person into consideration in certain circumstances, as there could otherwise be an infringement of freedom of religion (at present section 14(1) of the transitional Constitution), as homosexual practices are contrary to some religions.

This matter is more fully treated in paragraph 3 below.

(b) Equitable legal process

Equality of all before the law and an equitable legal process require constitutional provisions ensuring what can generally be termed 'access to justice'.

The concept 'access to justice' covers many aspects of the judicial system, but two dominant aspects should be mentioned at this stage, viz the plight of indigent litigants and the need to conduct legal proceedings in a language understood by parties to litigation, accused persons and witnesses. (See, in this regard, section 107 of the transitional Constitution.)

Whereas section 107 purports to deal with the latter problem, it is submitted that the provisions of section 3 of the transitional Constitution are inadequate to afford sufficient protection to at least some of the present official languages, and that these provisions, 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.

As far as indigent litigants are concerned, statutory provisions governing legal aid and a right to legal representation pose special problems, if not of a juridical nature, then at least of an economic nature (a question of financial resources and of manpower).

3. Thirdly, a distinction should be drawn between legal and factual equality (or inequality). By subscribing to the principle of equality before the law we must not be understood to allege that all people are in fact equal.

'Since in reality there are no two individuals perfectly equal, equality as a principle of justice means that certain differences between individuals are to be considered as irrelevant' (Hans Kelsen, one of the most renowned jurists of the modern era, in General Theory of Law and State, 1961 pp 439-440). Individuals differ in various respects that may be relevant and justified in considering, for instance, their appointment to particular types of work.

'Every right is an application of an equal measure to different people who are in fact not alike, are not equal

to one another; that is why equal right is really a violation of equality and an injustice'. (V I Lenin, The State and the Revolution (Peking: Foreign Language Press, 1970).

In the International Court of Justice in 1966 (South West Africa cases, Second Phase, Judgment of 18 July 1966) Judge Tanaka said:

'Examining the principle of equality before the law, we consider that it is philosophically related to the concepts freedom and justice..... In what way is each individual allotted his sphere of freedom by the principle of equality? What is the content of this principle? The principle is that what is equal is to be treated equally and what is different is to be treated differently, namely proportionately to the factual difference. That is what was indicated by Aristotle as justitia commutativa and justitia distributiva (p 305).

We can say accordingly that the principle of equality before the law does not mean absolute equality, namely equal treatment of men without regard to individual concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal'.
.....'to treat unequal matters differently according to their inequality is not only permitted but required' (pp 305-6).....In the case of apartheid, we cannot deny the existence of reasonableness in some matters that diverse ethnic groups should be treated in certain aspects differently from one another' (p 307).

Nobel laureate F A Hayek has in this context expressed himself thus in his work 'The Constitution of Liberty'(London, 1960): 'It is of the essence of the demand for equality before the law that people should be treated alike in spite of the fact that they are different'.

Some of the world's greatest jurists, philosophers and scholars therefore support the proposition that equality and justice are synonymous, and that things that are alike should be treated alike, while things that are not alike should be treated differently. Relevant differences should not, therefore, preclude different treatment. This factor is relevant, too, in the context of affirmative action, referred to below.

4. In the fourth place, the Freedom Front is not averse to measures such as those referred to in section 8(3)(a) of the transitional Constitution, conveniently referred to as 'affirmative action', subject to an important caveat. We hold the view that affirmative action requirements should

not be so extensive as to be counter-productive and in effect bring about reverse discrimination. Affirmative action should be aimed solely at equality of opportunity, coupled with implementation on the basis of merit only. Any other formula would be neither in the interest of the individual concerned, nor that of his employer or principal, nor that of the country as a whole.

5. Fifthly, the Freedom Front is of the opinion that the requirement of equality before the law poses special problems as far as the co-existence of indigenous law on the one hand and fundamental rights contained in the Constitution and concomitant legislation on the other hand (Constitutional Principle XIII) is concerned.

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.

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NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 4

ITEM 17: THE RIGHT TO EQUALITY

1 Content of the right

The right to equality is a key aspect of any bill of rights. Broadly speaking, the right prohibits the state from treating persons unequally. The state continuously differentiates between people and the right to equality (or the equality principle) ensures that any such differentiation must comply with the right as set out in the bill of rights as wells as the general limitation clause(section 33).

It is sometimes said that the right to equality actually contains three particular aspects, viz the right to equality before the law, the right to equal protection of the law, and the right to protection from discrimination (Cachalia *et al Fundamental Rights in the New Constitution* (1994) 25). A distinction between the first two aspects does not really contribute to a complete analysis and they will be discussed together.

1.1 *The right to equality before and equal protection of the law*

The right to equality before and equal protection of the law does not mean that the state may never differentiate between people. It is a fact of life when performing its regulating function in society, the state continuously differentiates between people. The right does not prohibit any and all such differentiation. In terms of the right, however, the state may not differentiate between people in a way which is unreasonable, unjustified in an open and democratic society based on freedom and equality, etc. (section 33). The present section 8 refers to particular grounds on which the state is not allowed to differentiate in an unreasonable, unjustifiable, etc. way, but

as the provision is formulated in an open-ended way, that does not exclude other grounds not mentioned there (see paragraph 1.2(b)).

1.2 *The right to protection against discrimination*

(a) No person shall be discriminated against. In section 8(2) of the transitional constitution, the term "unfair discrimination" is used to indicate clearly that not all differentiation, but only discrimination as defined in the provision shall be prohibited. Section 8(2) furthermore refers both to direct and indirect discrimination in order to cover a case where a particular measure *apparently*, or on the face of it, passes muster, but has the *effect* of being discriminatory.

(b) As pointed out above, the grounds on which discrimination by the state is prohibited are formulated in an open-ended way (*cf* the phrase "without derogating from the generality of this provision") and other grounds could be read into section 8(2) by the courts.

(c) The grounds expressly mentioned are, of course, the salient and sensitive ones that probably need to be mentioned, especially in South African circumstances. However, we wish to make two observations:

(i) With regard to the contentious "sexual orientation", we understand that the state should not discriminate on this ground when sexual orientation is irrelevant, for example, in the appointment of civil servants in general. However, the state should be quite capable of differentiating when sexual orientation is, indeed, relevant, for example in marriage, the adoption of children and other matters of this nature. We believe that it should be possible to justify a distinction of this nature in terms of the criteria laid down in the general limitation clause (section 33).

(ii) It is the declared view of the National Party that South African circumstances require special vigilance in respect of the prevention of discrimination against minorities. Apart from provisions such as the right to freedom of religion (sections 15(1) and 14(2) and to use the language and participate in the culture of one's choice (section 31), it is therefore imperative that the prohibition of discrimination on grounds such as ethnic origin, religion, culture and language be retained. Through constitutional provisions such as these, members of minorities and, consequently and indirectly, minorities themselves, are able to claim the protection of the courts for their cultures, religions and languages and for their equal treatment by the state. **We nonetheless believe that the protection of minorities by section 8 can be strengthened even further by adding "affiliation" as a further ground on which discrimination is prohibited.** In the context of section 8, such an addition will make it particularly clear that the state may not discriminate against anybody because he or she is a member of any cultural or language group, minority, organisation, political party, religious denomination, etc. Such an addition would also be in line with the right to freedom of association (section 17), as well as section 7(4)(b), which provides for the institution of proceedings by an association on behalf of its members and a person acting on behalf of a group or class of persons.

1.3 *Affirmative action*

The right to equality also entails positive steps aimed at the equalisation of existing inequality. For this reason, the present section 8(3) provides for measures designed to achieve equality for those persons disadvantages in the past by unfair discrimination. In principle, this is the correct approach to rectifying the wrongs of the past. However, affirmative action is not a licence for reversed discrimination. One cannot grant rights by infringing the rights of others. Justice is not served when individuals are being penalised

in order to correct the wrongdoings of the state. We therefore believe that, apart from the qualifications included or implied in section 8(3), viz (i) that the provision applies only to persons actually disadvantaged by past discrimination, (ii) that affirmative action measures must be designed specially for that purpose, and (iii) that such measures apply only until the object of equality has been achieved, another qualification should be spelled out. **It should be made clear that affirmative action measures shall not lead to the constitutional rights of any person being infringed or negated.** This emphasises the fact that the burden is on the state to *raise* the "full and equal enjoyment of all rights and freedoms" of everybody to the same level without affecting the existing rights of some, and that the state is not entitled to raise the level of enjoyment of rights of some by *lowering* the level of others. Such a qualification will place affirmative action in the proper perspective and will do much to eliminate a lot of misplaced perceptions on the subject.

1.4 *Restitution of land rights*

This aspect is dealt with elsewhere.

2 Application of the right

2.1 *Nature of duty on the state*

As suggested above, the state has a twofold duty to refrain from treating people unequally and, therefore, from discriminating against people, *and* to take positive steps, including affirmative action measures, to ensure that everybody enjoys equality.

2.2 *Application to common law and customary law*

In principle, the right to equality should apply to common law and customary law. However, it is an intricate matter on which further study is probably needed.

2.3 *Other actors bound by the right*

Section 33(4) of the transitional constitution provides that measures may be adopted that are "designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7(1)". On the basis of this express provision of the transitional constitution, one could possibly deduce that it has been the intention of the constitutional lawmaker that the equality principle, at least, should apply horizontally. Another provision of Chapter 3 is singled out in this way. At least in respect of unfair discrimination, it seems then that the constitutional lawmaker wanted the bill of rights to apply to private relationships. It must be concluded that in the South African context, this provision reflects the strong feelings in this regard.

2.4 *Bearers of the right*

Obviously, natural persons are bearers of the right to equality. Again, however, the questions whether a juristic person is protected in a particular case cannot be answered in simple terms, as it depends on the ground for discrimination and the type of juristic person involved. A church and an association, as juristic persons, can, of course, claim protection from discrimination on the basis of their beliefs or convictions.

2.5 *Limitation of the right*

The right to equality is subject to the general limitations clause and any limitation on the right which complies with the criteria in section 33 shall be valid.

3 Wording

As explained above, the National Party proposes (i) the inclusion of "affiliation" as one of the grounds on which unfair discrimination is prohibited, and (ii) the amendment of the present section 8(3)(a) in respect of affirmative action, by adding the phrase "Provided that such measures shall not infringe or negate the constitutional rights of any person".

- PAC

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29 May 1995

PRELIMINARY SUBMISSIONS OF THE PAC ON THE RIGHT TO EQUALITY

South Africa has had a sad history of Racial discrimination and other forms of discrimination. The right to equality needs to be emphasised, promoted and protected. We should not only promote formal equality but also substantive equality.

Content of the Right

1. Equality for all before the Law and equal protection of all before the Law.
2. A broad non-discrimination clause.
3. A sub-clause allowing Affirmative Action in order to address the imbalances of the past.

Application and other aspects of this right.

1. It should bind organs of state, private persons and social bodies.

2. Whether Juristic persons are entitled to claim this right?

   The non-discrimination clause seems to cover features or characteristics that can be associated with human beings, eg. sex, sexual orientation or colour. This does suggest that only natural persons can claim this right.

3. Customary Law and Traditional Institutions Right to Equality.

This is a sensitive and problematic area. There are two points we would like to

make in this regard.

Firstly, the question of what we mean by South African Law must be addressed as a matter of urgency. This entails the resolution of the issue of the relationship between Roman Dutch Law and Customary Law. Equally in the area of institutions, the relationship between Liberal Democratic institutions and Traditional Institutions must be attended to. It is only after such resolution that we can talk of a legitimate South African Law and Public Institutions. In this regard, we can draw some useful lessons from other countries such as, Zambia, Zimbabwe, Namibia Lesotho and Kenya.

Secondly, we do not believe that Customary Law is necessarily against the concept of human rights. We do however, accept that some of its practices may not be in accordance with human rights norms.

During the transitional phase, we need to be careful not to seek to resolve these problems by a top-down approach which will have the effect of invalidating Customary Law.

We need to develop an approach that will encourage a national debate around these issues. Whatever solutions we adopt, must to a large extent, attempt to take on board the concerns of all interested parties, be they Women or Traditional Leaders. The Sub-Committee on Traditional Law and Institutions should try to reach all sectors of our society in order to hear their views on these issues. Its proposals should be publicised and debated nationally. Only, after such a process, should the constitution-making process decide on the proposals that should be part of the final constitution.

R K Sizani

MP