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CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 4
FUNDAMENTAL RIGHTS**

26 June 1995

Room OLD ASSEMBLY

DOCUMENTATION

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 4

FUNDAMENTAL RIGHTS

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

Date : Monday, 26 June 1995
Time : 09h00 - 13h00; 14h00 - 15h30
Venue : Old Assembly

AGENDA

1. Opening
2. Matters Arising
3. Minutes:
 - 3.1 Theme Committee 12 & 15 June 1995: Pages 2-15
 - 3.2 Core Group 12 June 1995: Pages 16-18
4. **Limitation of Bill of Rights; States of Emergency and Suspension of Rights; Interpretation of Rights** : Party Submissions (See Separate document entitled Party Submissions)
5. General
6. Closure

CONSTITUTIONAL ASSEMBLY

**MINUTES OF
MEETING OF**

**THEME COMMITTEE 4
FUNDAMENTAL RIGHTS
MONDAY 12 JUNE 1995 (AT 09H00)**

PRESENT

Mdladlana MMS (Chairperson)

Cachalia IM	Ntuli MAA
Camerer SM	Pandor MIB
Coleman M	Radue RJ
Govender D	Ranchod BG
Green LM	Rasmeni SM
Hajaij F	Rhoda RT
Kgoali JL	Saloojee E
Lubidla EN	Smits D
Mashamba TGG	Surty ME
Mohamed IJ	Tambo A (alt)
Myakayaka-Manzini YL	Thabethe E
Ndzanga RA (alt)	Thompson B
Njobe MAA (alt)	Viljoen V

APOLOGIES: Asmal AK, Bakker DM, Chalmers J, Dlamini BO, Leon AJ, Mabandla BS.

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

1. OPENING

1.1 Mr Mdladlana opened the meeting at 09h05.

2. MINUTES

2.1 The minutes of the Theme Committee meeting of 5 June 1995 were adopted with the following amendments:

- i) Item 4.5, Page 3, third paragraph should read: "... how does one prevent infringement of these rights by private bodies..."
- ii) Item 4.5, Page 3, sixth paragraph should read: "...there is an absolute positive duty on the part of the state to protect these rights...The legislative and constitutional provisions regarding discrimination will ensure that private bodies do not infringe on these rights."

2.2 The minutes of the Core Group meeting of 5 June 1995 were noted.

3. MATTERS ARISING

3.1 The NP was asked whether it had reached a decision regarding the deletion of the phrase, "...other actors are not bound" in its submission on Freedom of Residence.

Senator Radue replied that the NP 's submission would be altered to reflect that " other actors may be bound subject to the general limitations clause".

3.2 The meeting noted a decision by the Core Group to schedule a public hearing on Socio-Economic rights for the end of July.

3.3 The Core Group was requested to consult with the Technical Committee on the formulation of those Socio-Economic rights not accommodated in the work programme and to inform parties when they can make submissions on this issue.

4. EQUALITY: PARTY SUBMISSIONS

- 4.1 The chairperson informed the meeting that 2500 public submissions and 1300 petitions have been received by the Theme Committee. A request was made to the secretariat to arrange the public submissions by subject with an index. This will enable the committee to give due consideration to the views of the public in its deliberations.
- 4.2 The chairperson stated that members of the Core Group and Technical Committee had given consideration to the matter but due to the volume of submissions it was not possible to process the submissions in a more acceptable way. The Reports do however include the views of the public submissions on the various rights.
- 4.3 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: EQUALITY*"

Questions and comments to the **ACDP** included:

i) **Sexual Orientation:**

- Would the ACDP support government intervention if there is discrimination in employment opportunities as a result of sexual orientation?
- The ACDP submission effectively supports state interference in the private life of consenting adults and attempts to take SA back to the days of the Immorality Act when police raids were used regularly to impose morality.
- Does the ACDP oppose constitutional protection for minorities such as gay people from state interference?
- If gay people are not deserving of protection because they choose a particular lifestyle why must protection be granted to those choosing to practice a particular religion or political belief?
- Is the question of choice the bottom line for the granting of protection?
- Does ACDP deny that there is a history of victimisation and harassment of gay people?
- The ACDP position amounts to a support for a totalitarian state which does not recognise certain areas of life that is the private domain of individuals.
- The ACDP quotes Dr Ramphela to support its position on affirmative action but seems unaware of her support for the inclusion of sexual orientation in the equality clause.

The **ACDP** responded as follows:

- The ACDP believes that the state is the servant of God and hence its duty is to protect the moral order ordained by God. Hence the ACDP cannot support non-interference in issues of moral concern. The limitations in the Pornography Bill which bans child pornography is an example of a moral decision taken by the state. Consistency with regard to legislating on moral issues should prevail.
- The ACDP is not suggesting that the state uses the police to interfere in people's privacy; it is merely saying that the constitution should not entrench people's right to practice homosexuality.
- Sexual orientation is not a ground for discrimination and hence constitutional protection is not necessary.
- When a group becomes a minority because of a chosen lifestyle it cannot be granted protection. Protection can only be granted when a group is discriminated against because of inherent factors such as race or sex which are not chosen.
- The choice of a particular sexual lifestyle cannot be protected. The choice of a particular religion or political belief must be protected in terms of the universal human right of freedom of religion, belief and opinion.

ii) **Affirmative Action:**

- Is the **ACDP** suggesting that those with less responsibilities should be allocated less resources when it states that "The need for a just and fair treatment based upon a fair share in the national resources in accordance with their needs and responsibilities in society"?
- Is the ACDP making a distinction between the principle of equality which is supreme and entrenches equal access to education, jobs etc., and equity which is concerned with addressing inequality through the "fair" allocation of resources?
- Equality is equated with "human sinfulness". Yet "human sinfulness" is not equated with discriminatory practices.
- The ACDP suggestion that equity be substituted for equality to ensure 'fairness', is very similar to the position of Islamic Fundamentalists who oppose equality for women but recognises the need to treat them 'fairly'

The **ACDP** responded as follows:

- Affirmative Action should encourage people to develop their full potential, which includes becoming self sufficient.
- Affirmative Action is essentially concerned with equity and not equality. Hence it cannot become entrenched in the constitution as fifty years from now the inequalities as a result of apartheid may have been addressed successfully.
- The application of spiritual laws implies social action.
- The ACDP supports total equality between men and women. It also believes in Affirmative Action and applying the principle of equity with regard to

redressing the inequality between men and women.

4.4 The **ANC** submission was presented by Ms Pandor who spoke to the document, "*Preliminary Submission of ANC: Theme Committee 4 - The Right to Equality*"

Questions to the **ANC** included:

- It seems that in essence the ANC supports the formulation of the existing clause in the Interim Constitution. Why the need for such emotive terminology such as "compulsion" which has dictatorial connotations? Perhaps "essential" would be more appropriate.
- If there is a broad consensus amongst parties that Affirmative Action is an application of the equality clause is there a need to maintain the phrase "...shall not preclude measures designed..." in Section 8(3a)?
- Does the ANC distinguish between substantive equality which often implies permanent measures (for e.g the disabled and pregnant women) and affirmative action programs which are designed to redress inequalities as a result of discrimination and therefore need not be entrenched on a permanent basis?
- Very little attention is being given to the application of equality with regard to children, many of whom have no access to education.
- There is a fear amongst the public that affirmative action might lead to reverse discrimination. Would the ANC agree to an additional clause in 8(3)(a) to the effect that the implementation of affirmative action would not undermine the constitutional rights of any person?
- Does the ANC support the recognition of homosexual marriages? If so how would it reconcile the conflict between the protection of gay rights and religious groups (both entrenched in the equality clause) who may object to such marriages?

The **ANC** responded as follows:

- The state does not have a choice in implementing measures to eliminate discrimination. It has to be compelled to act. Hence it is necessary to use terms such as "compulsory".
- The ANC believes it is necessary to retain the clause, "...shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups previously disadvantaged by unfair discrimination..." because of the need for clarity when the courts are used to interpret the constitution.
- The ANC does distinguish between substantive equality and affirmative action measures.

- The White Paper on education does address the unequal provision of educational resources and proposes definite measures to redress the imbalance in this area.
- The ANC is opposed to reverse discrimination and believes that affirmative

action measures must design clear criteria for its implementation. The Limitations Clause also ensures protection against reverse discrimination.

- The issue of sexual orientation and gay marriages is being used to sensationalise the right to equality when the real issue is addressing discrimination. While the ANC has no stated view on gay marriages, it believes that marriage is an issue for the legislature and cannot be defined in a Bill of Rights. It does however support the protection of gay rights in the equality clause.

4.5 The DP submission was presented by Ms Smuts, who spoke to the document, ***"Constitutional Assembly: Theme Committee 4: Submission by the Democratic Party on Block 3: The Right to Equality"***

Questions to the DP included:

- The introduction of the word "reasonable" in 8(3a) leads to a restrictive approach in the application of affirmative action. What would the DP consider as "reasonable measures"?
- Does the limitations clause not address the DP's concern that affirmative action measures could be "unreasonable"?
- Is the DP favouring a more benign form of affirmative action implementing it gradually?
- Would the DP favour the establishment of a body to monitor the implementation of affirmative action measures?
- The DP's proposed amendment of Section 8(3) suggests a paternalistic approach. Surely the disadvantaged require measures not merely aimed at rendering their situation more tolerable, but enabling meaningful access to the exercise of rights?
- The introduction of "reasonable measures" amounts to an imposition of a further limitation unnecessary given the existence of a limitations clause?
- How does one limit the power of courts to assess the "reasonableness" of affirmative action measures given the fact that it is most likely to be used by those that have enjoyed undue privileges in the past to challenge such measures?
- Has the DP considered that many elements in society are succeeding in finding new ways of perpetuating discrimination despite the existence of a democratic constitution?
- Does the DP accept that equality implies the lowering living standards for those privileged in order to raise the living standards of the disadvantaged?

The DP responded as follows:

- "Reasonable" introduces a test of rationality in the application of Affirmative Action.
- If it is accepted that Affirmative Action measures are subject to the Limitations Clause then the DP does not see the need for the introduction of the word "reasonable" Section 8(3a).
- The DP feels it is important to take into consideration the views of certain sections of the community who sees affirmative action as reverse discrimination.
- The DP would support the establishment of a body to monitor the implementation of Affirmative Action, but does not necessarily see the need to entrench such a body in the constitution.
- The DP's proposed amendment is based on Constitutional Principle V which makes specific reference to " the amelioration of the conditions of the disadvantaged", and is also influenced by the principles informing the RDP. Its intention is not paternalistic but the DP is not averse to redrafting its proposed amendment.
- It is not possible to limit the right of individuals to challenge the courts if it is perceived that their constitutional rights are entrenched.
- There has to be a sphere of privacy protected by the constitution. However, the privatisation of privilege and discrimination cannot be allowed. Therefore the DP does not view employment practices of private individuals as belonging in this sphere.
- The issue of living standards belongs with socio-economic rights. The DP does believe that the Bill of Rights should contain a clause requiring the state to guarantee the entitlement to life.

4.6 The NP submission was presented by Senator Radue, who spoke to the documents, "*National Party Preliminary Submission: Theme Committee 4 - Item 17: The Right to Equality*".

Questions to the NP included:

- The NP submission seems to entrench the perception of SA as a mere conglomeration of minorities. The concept of an "ethnic kaleidoscope" goes contrary to the aims of nation building.
- The addition of "affiliation" as a ground for discrimination is not justified as it is adequately addressed by the right to freedom of association. It will merely introduce a negative element in the application of the right to equality.
- If the right to religion and culture is entrenched why is there a need to entrench minority rights?
- Religion, culture and sexual orientation can all be regarded as different "affiliations". Surely a specific clause on affiliation is redundant?
- The NP proposal that Section 8(3a) be amended by adding "provided that such measures shall not infringe or negate the constitutional rights of any person" is covered by the Limitations Clause?
- How can the state raise the "full and equal enjoyment of all rights and

freedoms of everybody" without "lowering the level of others"?

- The NP's position on sexual orientation is ambiguous and needs to be clarified.
- What is meant by the phrase "The right to equality...does not mean that the state may never differentiate between people."?
- The NP seems to conflate rights and privileges. SA has never accorded fundamental human rights to anyone before but has granted certain groups privileges. The NP seems to suggest the protection of these privileges under the guise of the protection of human rights.

The NP responded as follows:

- No one can ignore the need to cater for the existence of minorities in SA. The equality clause must address the anxieties and fears of minority groups.
- The grounds for discrimination set out in Clause 8(2) are not exclusive and it is possible to extend those grounds to accommodate the rights of minority groups not previously considered.
- The NP have never submitted that minority rights should be protected in the constitution. The addition of "affiliation" is merely designed to protect those not part of majorities.
- If a clause on "affiliation" is redundant it can also be argued that Section 8(2) is unnecessary as 8(1) guarantees the right to equality for "every person".
- The amendment to Clause 8(3a) proposed by the NP is designed to remove the perception that affirmative action will entrench reverse discrimination.
- Constitutional Principle II states that "Everyone shall enjoy fundamental human rights". Its application does not mean that by extending these rights to the majority, the minority must be deprived of it.
- The NP supports the right to privacy and does not believe that the state should interfere in the private life of consenting adults. Matters of policy will be covered by The Limitations Clause.
- It is necessary for the state to differentiate for e.g. between advantaged and disadvantaged people.
- The NP does not support the retention of privileges, but the protection of individual human rights which should not be infringed upon by affirmative action measures.

5. GENERAL

5.1 *Work Programme:*

- 5.1.1 The Chairperson reminded parties of deadlines for submissions on **Administrative Justice, Access to Courts and Detained, Arrested and Accused persons.**
- 5.1.2 The meeting was informed about an invitation from **IDASA** to a Conference on **Socio-economic Rights** on **21 June 1995** in the **Good Hope Chamber** from **08h30 - 15h00.**

5.2 *Schedule of meetings:*

5.2.1 The next Theme Committee meeting will take place on **Thursday 15 June at 14h00 - 17h00.**

5.2.2 The Theme Committee meetings planned for 26 and 27 June may be affected by the programme of Parliament which is planning to table a number of important Bills during that week. The matter was referred to the Core Group.

6. CLOSURE

The meeting rose at 12H05.

CONSTITUTIONAL ASSEMBLY

**MINUTES OF
MEETING OF**

**THEME COMMITTEE 4
FUNDAMENTAL RIGHTS
Thursday 15 June 1995 (AT 14h00)**

PRESENT

Radue RJ (Chairperson)

Bakker DM
Chalmers J
Green LM
Hajaij F
Kgoali JL
Leon AJ
Lubidla EN (alt)
Mohamed IJ (alt)
Njobe MAA (alt)
Ntuli MIB
Pandor GNM
Piliso MM
Ranchod BG
Saloojee E
Solomon G (alt)
Surty ME
Thabethe E (alt)
Viljoen V

APOLOGIES: Asmal AK, Cachalia IM, Mdladlana SMM.

J Tsalamandris, Z Adams and J Dugard were in attendance.

1. **OPENING**

- 1.1 Senator Radue opened the meeting at 14h15.
- 1.2 Mr Leon requested that the DP submission be dealt with first as he had to depart early.

2. **MATTERS ARISING**

None.

3. **ADMINISTRATIVE JUSTICE; ACCESS TO COURTS; DETAINED, ARRESTED AND ACCUSED PERSONS: PARTY SUBMISSIONS**

- 3.1 The DP submission was presented by Mr Leon who spoke to the document, "*Constitutional Assembly: Theme Committee 4: Submission by Democratic Party: ADMINISTRATIVE JUSTICE; ACCESS TO COURTS; DETAINED, ARRESTED AND ACCUSED PERSONS*"

Questions to the DP included:

- Unlawful decisions made in the exercise of public power will obviously have an "adverse affect". Is it therefore necessary to add the word "adverse" to Section 24(a)?
- There is no international jurisprudence to support the concept of "unreasonableness" as a right or anything that affects a person adversely as a "right"?
- The DP's proposed formulation creates an undue burden on the state as it is open to such wide interpretation to cover every possible contingency.
- The concept of administrative justice is a novel one with no international precedent. Perhaps the Theme Committee should consider expert advice on the issue.
- What is the DP's view on the admissibility of unconstitutionally obtained evidence?

The DP responded as follows:

- It is possible for a person to be "adversely affected" if decisions are lawful and reasonable. Refusal to grant someone a liquor licence to protect residents interests has an "adverse effect" but at the same time are "lawful" and "reasonable".
- Concepts such as "unreasonableness", "unlawful" and "procedurally unfair" do have a specific judicial meaning.
- The concept of "a burden on the state" must not become a paramount consideration or assume the status of a governing principle. This can become a justification for undue limitations on rights, the purpose of which

is already served by the limitations clause.

- The DP agrees with the need to seek technical advice on the concept of administrative justice.
- The DP would support the idea of including in the constitution a clause that deals with unconstitutionally obtained evidence.

3.2 The ACDP submission was presented by Mr Green who spoke to the documents, "*African Christian Democratic Party Submission to the Constitutional Assembly, Theme Committee Four: Administrative Justice;*" "*African Christian Democratic Party Submission to the Constitutional Assembly, Theme Committee Four: Access to Court;*" "*African Christian Democratic Party Submission to the Constitutional Assembly Theme Committee Four: Detained, Arrested and Accused Persons.*"

Questions to the ACDP included:

- Is the ACDP suggesting that "non-believers" do not have access to the above rights?(Reference to 2.5 of ACDP submission on Access to Courts, p8).
- The Constitutional Court has been established to interpret the constitution which guarantees freedom of religion. Its judgements may conflict with the views of the majority of people who may feel that only the Christian religion should be allowed. Are the judges bound by the constitution or the views of the majority?
Is the ACDP reference to "God's laws" based on the New Testament or the Old Testament?
- Is there a codification of what the ACDP refers to as "God's law" and does it contain guiding principles to "tribunals" referred to in the ACDP submission?
- The application of religious law to the criminal justice system will conflict with the Bill of Rights. Does the ACDP accept the supremacy of the constitution?
- The ACDP's proposal to exclude the reference to "partner" in section 25(b) reflects an intolerance towards other religions and excludes all partnerships outside Christian marriages.

The ACDP responded as follows:

- The ACDP believes that "all persons' should have access to these rights.
- Freedom of religion is a religious principle and therefore the Constitutional Court would be correct in upholding the constitution. However, the ACDP objects to the constitution being regarded as the ultimate authority overruling the law of God.
- The ACDP bases itself on the Bible as a whole.
- The ACDP believes in the principle of supreme authority of divine law whether it be Islamic law or Biblical law.
- The ACDP does accept the authority of ordinary courts, but religious law should be applied to aspects of personal law.

- The ACDP agreed to withdraw its proposal to exclude the reference to "partner". However, it does not want the constitution to legitimise partnerships not ordained by religious authorities.

3.3 The ANC submission was presented by Senator Surty who spoke to the documents, "***Preliminary ANC Submission - Theme Committee 4: Administrative Justice; Preliminary ANC Submission - Theme Committee 4: Access to Courts; Preliminary ANC Submission - Theme Committee 4: Rights of Detained, Arrested and Accused Persons***"

Questions to the ANC included:

- The ANC proposed amendment to Section 24 effectively emasculates citizens right to administrative justice by removing the obligation on the part of the state to furnish reasons for administrative action.
- Why does the ANC use the term "social structures" and not juristic persons in terms of the application of the above rights.
- Does the ANC agree with the perception of certain magistrates that the rights of accused persons is presently affecting the administration of justice negatively?
- What is meant by the reference to "necessary practicalities of governance"?
- Would the ANC consider some of the concerns raised by the DP regarding the conditions for the granting of bail?

The ANC responded as follows:

- The intention of the ANC is not to avoid obligations on the part of the state to provide reasons for its actions, but to ease the day to day practical administration of justice.
- The ANC has no objection to the application of the right to appropriate juristic persons.
- The ANC believes that provisions such as the right of the accused to have access to the statement of witnesses does compromise the states ability to deliver administrative justice.
- The ANC is suggesting that Section 24 be worded in such a manner as to protect the citizen's right to administrative justice without undermining the principle of effective government. Technical advice will have to be obtained to ensure that the wording of Section 24 achieves such a compromise.
- The ANC agrees that the issues raised by the DP regarding the conditions for the granting of bail must be considered.

3.4 The NP submission was presented by Mr Bakker who spoke to the documents, "***National Party Preliminary Submission - Theme Committee 4: Item 18: Detained, Arrested and Accused Persons***"; "***National Party Preliminary Submission - Theme Committee 4: Item 22: Access to Court***"; "***National Party Preliminary Submission - Theme Committee 4: Administrative Justice***".

There were no questions to the **NP**.

3.5 The submissions from the **FF** and the **PAC** were noted.

4. GENERAL

4.1 There will be a Theme Committee meeting on the 26 June which will be followed by a social to mark the conclusion of six months work.

5. CLOSURE

The meeting rose at 16h30.

CONSTITUTIONAL ASSEMBLY

**MINUTES OF
CORE GROUP OF**

**THEME COMMITTEE 4
FUNDAMENTAL RIGHTS**

Monday 12 June 1995 (AT 14H30)

PRESENT

Mdladlana MMS Chairperson)

Green LM
Pandor GNM
Radue RJ

APOLOGIES: None

J Tsalamandris and Z Adams were in attendance.

1. WORK PROGRAMME

- 1.1 The Secretariat was mandated by the meeting to ensure that Theme Committee meetings planned for the week of 26 June to 30 June takes place despite possible conflict with the Parliamentary schedule. This will ensure completion of the Work Programme by the 30 June 1995 recess.
- 1.2 Decisions regarding the remaining items on the Work Programme were as follows:
- i) Item 26: Directive Principles will be dispensed with.
 - ii) Item 26: Other fundamental rights - The Technical Committee will be requested to present an opinion based on submissions and the relevant international documents. The Theme Committee will study the opinion of the Technical Committee, and upon agreement will forward their views to the drafters. Each party will reserve the right make submissions on these matters.
- 1.3 It was agreed that attempts will be made to complete the Work Programme before the June recess. This will enable the Technical Committee to work on the Draft Bill of Rights during recess. The Theme Committee can then commence work on the draft Bill of Rights immediately after recess.

2. PARTY SUBMISSIONS

- 2.1 Three party submissions have been received on Items 21 -23.
- 2.2 The deadline for party submissions on Items 24-26 is 19 June 1995.

3. REPORTS

- 3.1 Ms Pandor and Senator Radue will present the Theme Committee reports at the meeting of the Constitutional Committee on 14 June. The reports to be tabled are:
- i) The Nature and Application of the Bill of Rights - Ms Pandor
 - ii) Human Dignity - Ms Pandor
 - iii) Servitude and Forced Labour - Senator Radue
Freedom and Security of the Person - Senator Radue
Freedom of Religion, Belief and Opinion - Senator Radue

4. PUBLIC SUBMISSIONS

4.1 The Secretariat gave a brief explanation of the process through which public submissions are taken:

- i) As a result of the volume of submissions to Theme Committee 4 and the irregular manner in which it reaches the CA, it is not possible to process the submissions by subject before it reaches each Theme Committee member. The submissions are thus forwarded as they are received.
- ii) The Technical Committee do not do the synopsis any more. Law students are employed to do the synopsis which is then forwarded to the Technical Committee for consideration in drafting the reports.
- iii) It was noted that the Secretariat had not circulated the synopsis for a number of weeks.

4.2 It was agreed that the Secretariat will circulate synopses to members, but these may not necessarily follow the order of discussion in the Theme Committee.

5. CLOSURE

The meeting rose at 14h50.