SANDRA

UNEMBARGOED 1/18/3

CONSTITUTIONAL ASSEMBLY

CONSTITUTIONAL COMMITTEE

THEME COMMITTEE REPORTS

(BLOCK ONE)

Monday

13 February 1995

M46

CONTENTS

REPORT TO THE CONSTITUTIONAL COMMITTEE

FROM THEME COMMITTEE 1

I) INTRODUCTION

The following progress report has been compiled according to the suggested framework given by the Directorate, taking into account the developments and problems which our Theme Committee is experiencing.

II) Theme Committee 1 has been through the process of discussion of each Party submission. A sub-committee has been established to draft the reports together with the assistance of the Technical Experts.

The sub-committee was given the task to present a preliminary report to the Theme Committee by the 8 February 1995, which was done. The Theme Committee could not however reach agreement on the report. The reason for the delay was because the IFP did not agree with the preliminary report and maintained that their original submissions needed to go to the CC. After debate on this issue raised by the IFP the latter requested to consult their party on the issue.

III) The theme committee agreed to having a public hearing on the 15 February 1995, which would take place at Parliament. The Core Group was mandated by the Theme Committee to look at the rest of the Public Participation Programme which was proposed by the ANC. The Core Group would discuss this proposal on Friday, 10 February 1995. Parties also agreed to option 3 which is proposed in the recommended Public Participation Programme from the Community Liaison Department.

IV) The Theme Committee would have completed their deliberations on the draft or preliminary report by Thursday, 9 February 1995 and a report would be completed by the 13 February 1995.

CHAIRPERSON: _____ W.J Mahlangu

9/02/95

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 2
STRUCTURE OF GOVERNMENT

SEPARATION OF POWERS
(BLOCK 1)

REPORT AS AT 2 FEBRUARY 1995

1. INTRODUCTION

1.1 The Theme Committee 2 by 30 January 1995 had received submissions from the following parties, organisations and individuals.

PARTY SUBMISSIONS

ACDP
ANC
DP
FF
IFP
NP
PAC

ORGANISATION SUBMISSIONS:

ANCC
EFSA
ODISA

INDIVIDUAL SUBMISSIONS:

Bothma, O
Brijraj, R
Carser, A
Dimba, MS
Gottschalk, K
Stratten P & N

1.2. The constitutional Principle to which the Constitutional Assembly is required to give effect to in the new Constitutional Text is the following:

VI

"There shall be separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."

1.3. It was understandable that many submissions on the "Separation of Powers" also focused on aspects of the "Structure of Government," which is the next subject for detailed information-gathering and report by Theme Committee 2. The Theme Committee will not report on this latter aspect of the submissions at this stage but will confine its report to the issue of "Separation of Powers".

2. AREAS OF AGREEMENT

2.1. SEPARATION OF POWERS

2.1.1. There was general agreement in the submissions that the new Constitution must contain specific provisions in which the separate legislative, executive and judicial powers are vested.

2.2. LEGISLATURE

2.2.1. There should be a parliamentary form of government.

2.2.2. Parliament shall be the expression of the will of the people.

2.2.3. The Legislative authority of the Republic shall, subject to the Constitution, vest in Parliament, which shall have the Supreme power to make laws for the Republic.

2.3. EXECUTIVE

2.3.1. The Constitution shall make specific provision for an executive authority.

2.3.2. The executive shall be accountable to Parliament.

2.4. JUDICIARY

2.4.1. There shall be an independent, impartial judiciary, subject to the Constitution.

2.4.2. There shall be an independent Constitutional Court with the powers to nullify any Act of Parliament if such Act is in conflict with the Constitution.

2.5. CHECKS AND BALANCES

2.5.1. There shall be checks and balances that will restrain each branch of government. (Checks and balances to be revisited and tabulated under block 2 and 3)

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 2

STRUCTURE OF GOVERNMENT

SUBMISSIONS AS AT 30 JANUARY 1995

VOLUME TWO

THEME COMMITTEE 2

OVERVIEW OF POLITICAL PARTY SUBMISSIONS RECEIVED AS AT 30:01:95

NUMBER OF SUBMISSIONS	
Party Submissions	7
ACDP ANC DP FF IFP NP PAC (x2)	

PARTIES

SUBMISSION BY THE A.C.D.P.

CHARACTER OF DEMOCRATIC STATE

1. FORM OF STATE

To ensure that the government is kept as close to the people as possible, the A.C.D.P. recommend a small central government and strong provincial and local governments. History has shown that centralisation of governmental power destroys the liberty and the rights of man. The way to have good and safe government is to divide the power among the people and the localities, instead of entrusting it to one central body.

We would like to see a multi-party democracy in this country. Everything possible must be done to make a one-party state, both unconstitutional and impossible. Because of the diversity of our cultures and beliefs, a system of multi-party democracy will be most suitable for our situation.

2. SUPREMACY OF THE CONSTITUTION

The constitution must be the supreme law of the land. It must be binding to all citizens and organs of the state. This is with the proviso that it is a constitution that was drawn and accepted by those it would bind. It should only be amended with the consent of the people and the local and provisional governments

In a true democracy, the people must form their own constitution and consent to it Hence, they establish a government of people's law, not of ruler's law Both the people and the rulers must be subject to the constitution This is essential for protecting the individual's rights to life, liberty and property Citizens must not only be protected from harmful acts of other citizens, but also from abuses by their own government. Since the law is supreme and not the ruler's, the people will be protected from ruler's tyranny

For everyone to be proud of our constitution, it is important for it's contents to be acceptable to the majority, if not all the people of South Africa. It is therefore, unfortunate that Section 71.2 of Chapter 5 says "the new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect, unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles referred to in subsection (1)(a).

The A.C.D.P. wants to argue that, because the majority of South Africans were not party to the drawing up of the 34 Constitutional Principles, it will be unfair and not right to expect their wishes to be denied by the Constitutional Court, as proposed in Section 71.2 of Chapter 5.

Before the A.C.D.P. can endorse Section 71.3 of Chapter 5, we would like to see an amendment to Principle III of schedule 4, that speaks about "all other forms of discrimination." This should not include "sexual orientation" as we have it in section 8.2 of chapter 3 of the interim constitution. The majority of South Africans are not atheists with no morals, but they are, both religious and moral. We argue that this section 8.2 undermines African culture, Biblical teaching, Islamic belief and beliefs of other religions of significance. This section 8.2 must be revisited and endorsed by the majority.

3. SEPARATION OF CHURCH AND STATE

The A.C.D.P. believes in the separation of Church and State as we have it at the moment. The State should not authorise, promote or support any church or religious group. This does not mean that individuals who are members or working for the State should not have religious opinions and beliefs. The State as an institution, has functions that are totally separate from the church or any other religious body. Therefore, the State should not be permitted to interfere with what churches are doing, except if such churches are breaking the law.

The Church, as a separate institution has functions and a clear mandate that is different from that of the State. The Church as an institution, should not try to run a government, although individuals in the church can, and should be part of the team that runs a government.

It cannot be expected that only unbelievers should form a government. Any citizen of this country, including a believer that goes to church, must always be in a position to be part of a government.

4 NAME AND SYMBOLS

Changing the name of this country would be both, unwarranted and very expensive. The A.C.D.P. proposes retaining the name "South Africa", because it explains best our geographic location. We are both in Africa and in the South.

5. SEPARATION OF POWERS

Governmental powers must be separated into three executive branches, with different personnel running each branch. Every government, whether a monarchy or democracy, exercises these three functions:

- the legislative
- the executive
- the judiciary

These three branches should be independent of each other with no one branch having total control of another. As an example, the legislative branch should not be able to remove the executive or judiciary very easily and the executive should not be able to dissolve the legislative or judiciary. While independent, these branches should not be completely separate, but should band together through a system of checks and balances. this will permit each branch to guard against one department encroaching into another, which would result in tyranny. The legislative must be limited to making the laws; the executive to enforcing and carrying out the laws and the judiciary to interpreting the laws.

27 January 1995

REDRAFT 3 JAN 1995 THEME COMMITTEE 1

DIE VRYHEIDSFRONT / THE FREEDOM FRONT

THE SPIRIT AND THE VISION OF THE CONSTITUTION

1. INTRODUCTION.

What do we expect from the new, final constitution? What ideas must inspire the constitution? How can the Constitution correct the wrongs of the past? Can we expect the Constitution to ensure a better future for South Africa and how can we best secure this better future by means of a specific constitution written with a view of the specific needs of the people of South Africa? These are the questions we ask when we talk about the spirit and ~~the~~ vision of the Constitution.

2. THROUGH CONSENSUS — ACCEPTABILITY AND LEGITIMACY OF THE NEW CONSTITUTION.

The new Government is important and it has a great responsibility to govern in such a way that the country will rise from agony and strife to greatness and peace. But even more important than the new government of the day and certainly of more lasting importance for all governments that will come is the constitution we are about to write. It is the signal and the qualification of the new start.

The Constitution must therefore command the respect of all peoples and South African citizens. It is an effort to obtain once and for all legitimacy of government. Due regard must therefore be given to all opinions and the search for consensus must be painstaking. The Constitution must win the hearts and the minds of the people(s) of South Africa.

It must not bring discord. It therefore will reflect the crisis in which this country finds itself and indicate the hope we have of transcending the conflicts of the past and moving into a new future. It must bring solutions and certainly not create new problems. Constitutions are more than academic formulations of legal principles that relate to the functioning of the state. They grow from the agony of human suffering and from the determination of the creative human mind.

3. MADE IN SOUTH AFRICA.

What has been happening in the hot spots all over the world is happening in SA today as we attempt the writing of a constitution for all the people of this land. It happened in South America, Portugal, Spain, Africa and many other areas. Decades of suppressive control of different shades make way for popular constitutionalism in search of peace and progress.

The constitution we make must be truly South African however. It will reflect the South African political situation because of the essential political nature of constitutionalism. We cannot suffice with a description in general terms of

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OFFICE OF THE SECRETARY GENERAL

25·01·95

MR H. Ebrahim
The Executive Director
Constitutional Assembly
Cape Town

Dear Mr Ebrahim

ANC SUBMISSIONS TO THEME COMMITTEES

We forward herewith preliminary submissions of the ANC to the Theme Committees, in respect of Block One of the adopted CA work programme. We wish to advise that, as these are preliminary submissions, the ANC will be forwarding further submissions in due course.

We trust you find same in order.

Yours Sincerely

C. Carolus
DEPUTY SECRETARY GENERAL

ANC. SUBMISSION: THEME COMMITTEE 2

A There should be a separation of powers in the South African National Government; viz. Legislative, Executive and Judiciary This principle should be designed to restrict the power of each branch, whilst at the same time ensuring and fostering co-operation amongst them.

B. Separation of powers is meant to enhance accountability, independence and checks and balances.

C Specific form of separation of powers in South Africa will have to be functional and suitable for our South African Situation.

D. The system of checks and balances restrains the separate branches from seeking to centralize power to dominate the others.

1. LEGISLATURE/S
-legislature/s shall be the embodiment of the will and the aspirations of the people.
-Parliament shall subject to the Constitution be the supreme law maker and the expression of the will of the people.
-The political parties will have to discuss the question of bicameralism.
-The composition, powers and functions of such a bicameralis of agreed upon will be defined in the Constitution.
-The executive will be accountable to the legislature.

2. EXECUTIVE:
-The head of the State shall be the President
-The President will appoint and supervise the functioning of the Cabinet.
-The President will consult with the cabinet when taking important decisions.
-There shall be a deputy president who will be accountable to the president and Parliament.
-The executive will govern the Country.
-The executive will be accountable to Parliament
-The separation of powers between different levels of government shall be provided for in a manner that ensures the accountability of the executive to Parliament and shall not undermine the principle of majority rule.

3.Judicary.

-There shall be an independent judiciary, impartial subject to the Constitution and law.
- The independent Constitutional Court shall have the power to nullify an Act of Parliament if it finds that the law is in conflict with the Constitution.
-The South Africans shall have recourse to independent Courts of law and other tribunals.- The judiciary must be protected from Political interference.

26 JAN 1995

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Demokratiese Party
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532

25 January 1995

To: Mr Hassen Ebrahim
Executive Director
Constitutional Assembly
11th Floor
Regis House

DEMOCRATIC PARTY: SUBMISSION TO THEME COMMITTEE 2 ON "SEPARATION OF POWERS" (Ref T.C. 2 no 1)

1. In respect of the heading "Separation of Powers" the Constitutional Assembly is required to give effect to the following Constitutional Principle.

Schedule 4
VI

"There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."

2. To achieve the above in respect of the separation of powers, the Constitution must contain specific provisions in which the separate powers are allocated. The DP proposes the following provisions:

2.1 **Legislative authority of Republic**

"The legislative authority of the Republic shall, subject to this Constitution, vest in Parliament, which shall have the power to make laws for the Republic in accordance with this Constitution." (See Interim Constitution Section 37)

2.2 **Executive Authority of the Republic**

"The executive authority of the Republic with regard to all matters falling within the legislative competence of Parliament shall vest in the President, who shall exercise and perform his or her powers and functions subject to and in accordance with this Constitution." (See I.C. Sect 75)

"On being elected, the President shall vacate his or her seat in the National Assembly." (See I.C. Sect 77 (4))

2.3 **Judicial Authority**

"(1) The judicial authority of the Republic shall vest in the courts established by this constitution and any other law.

(2) The judiciary shall be independent, impartial and subject only to this Constitution and the law.

(3) No person and no organ of state shall interfere with judicial officers in the performance of their functions." (See I.C. Sect 96)

3. There are a number of mechanisms/structures that should be included in the Constitution to ensure "accountability, responsibleness and openness."

e.g. certain provisions in a Bill of Rights, a Human Rights Commission, an Auditor General, a Public Protector, regular elections, accountability at Provincial and Local level etc.

However, the most important "checks and balances" are to be found in the relationship between the President and his Cabinet on the one hand and Parliament on the other.

4. There should be no ambiguity about the Executives accountability to Parliament. Accordingly, the Democratic Party proposes, inter alia, the following provisions:

4.1 Accountability of Ministers and Cabinet

"A Minister shall be accountable individually both to the President and to Parliament for the administration of the portfolio entrusted to him or her, and all members of the Cabinet shall correspondingly be accountable collectively for the performance of the functions of the national government and for its policies." (See I.C. Sect 92 (1))

4.2 Votes of no confidence

"(1) If Parliament passes a vote of no confidence in the Cabinet, including the President, the President shall, unless he or she resigns, dissolve Parliament and call an election in accordance with section 39.

(2) If Parliament passes a vote of no confidence in the President, but not in the other members of the Cabinet, the President shall resign.

(3) If Parliament passes a vote of no confidence in the Cabinet, excluding the President, the President may -

(a) resign;
(b) reconstitute the Cabinet in accordance with section 88(4); or
(c) dissolve Parliament and call an election in accordance with section 39.

(4) The President shall where required, or where he or she elects, to do so in terms of this section, dissolve Parliament by proclamation in the Gazette within 14 days of the relevant vote of no confidence."

(See I.C. Sect 93)

4.3 **National Revenue Fund**

"(1) There is hereby established a National Revenue Fund, into which shall be paid all revenues, as may be defined by an Act of Parliament, raised or received by the national government, and from which appropriations shall be made by Parliament in accordance with this Constitution of any applicable Act of Parliament, and subject to the charges imposed thereby.

(2) No money shall be withdrawn from the National Revenue Fund, except under appropriation made by an Act of Parliament in accordance with this Constitution: Provided that revenue to which a province is entitled in terms of section 155(2)(a), (b), (c) and (d) shall from a direct charge against the National Revenue Fund to be credited to the respective Provincial Revenue Funds." (See I.C.Sect 185)

4.4 **Annual budget**

"The Minister responsible for national financial affairs shall in respect of every financial year cause to be laid before the National Assembly an annual budget reflecting the estimates of revenue and expenditure, which shall, *inter alia*, reflect capital and current expenditure of the government for that year."

(See I.C. Sect 186)

5. This submission is made without knowing which structure of government the Constitutional Assembly will decide on. The provisions may have to be adjusted dependant upon the nature and details of such structure of Government.

Colin Eglin

Colin Eglin MP
Democratic Party

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TK2-02

Mr Hassen Ebrahim,
Executive Director,
Constitutional Assembly,
Room 104.

28 January 1995

Dear mr. Ebrahim,

FREEDOM FRONT: SUBMISSION TO THEME COMMITTEE 2
BLOCK 1 - SEPERATION OF POWERS

INTRODUCTION

1. The constitution is the skeleton or essential framework of orderly government and the fundamental concept of democracy, ie the concept of restraints upon government is the main underlying principle of orderly government. What is important in this respect is the functional built-in systems of control, which is not there for the sake of academic correctness but to accommodate the hopes, fears, aims, prejudices, fundamental drives and conflicts of the people involved in the state - both individuals and groups. The constitutional built-in mechanisms is there to give them existential security, which can facilitate happiness and make people content.

2. The traditional seperation of powers, which goes back a long way, between legislative, executive and judicial powers, is perhaps the main built-in mechanisms designed to put certain restraints on the use of power in government. The purpose is to avoid the accumulation of all governmental power in a single individual or institution.

3. It was particularly Montesquieu in the 1th century that articulated this constitutional device to ensure civil liberty. The concentration of and the monopoly over power is under all circumstances not conducive to the functioning of a true democracy. Hence the strict seperation of powers.

Montesquieu pointed out that it is the seperation of powers that best ensure that the nature of government remain that of a servant of and not of a master over the people.

4. The Freedom Front, with its main emphasis on Freedom under all circumstances will insist on this principle of seperation of powers being honoured in the writing of the constitution in accordance with Constitutional Principle VI, which states:

> *"There shall be a seperation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."*

5. From the point of view of its constituency and their precarious position within the political changes in the country, the Freedom Front find even more reason now to support this basic principle of democratic government as the constitution of South Africa will be decisive for the establishment of a volkstaat and is thus seen by our supporters as also securing their existential security within South Africa.

6. This principle must also be employed at all levels of government as far as it may be applicable.

THE LEGISLATURE

7 "The legislative authority of the Republic shall, subject to this constitution, vest in Parliament, which shall have the power to make laws for the Republic in accordance with the Constitution." (1993 Constitution, Section 37).

8. "Parliament consists of the National Assembly and the Senate." (1993 Constitution, Section 36).

9. The National Assembly. The National Assembly or Lower House, should represent the electorate on the principle of democratic elections based on the equality of all voters on an individual basis. Representation can be arranged through the delimination of constituencies and the nomination of candidates for the election process, through proportional representation or through a combination of both. The duration of office should be five years.

10. The Senate. (See Appendix A for "The Role of the Senate in South Africa".) The Senate or Upper House, must reflect the true soul and

character of peoples of South Africa. It is this House that should distinguish South Africa from any other democracy in the world. The Senate should therefore have the following Functions:

10.1 The protection of provincial interests. It should also ensure that centralist monopolistic behaviour and bureaucratic red tape do not frustrate the efficient functioning of provincial and local government.

10.2 Nation building and the protection and development of the different languages and cultures of South Africa.

10.3 The protection of minorities and minority rights within the framework of the constitution.

10.4 To seek consensus through dialogue without violating the democratic process.

10.5 The protection of the Constitution. Thus the Senate must have the power to:

a. Review, revise or even veto legislation related to the functions of the Senate. There should however be a deadlock breaking mechanism.

b. To initiate judicial review of legislation.

10.6 To seek consensus through dialogue without violating the democratic process.

The Upper Chamber is of such importance that the Freedom Front proposes that a workshop be held as soon as possible to determine the possible roles and functions of the Senate in South Africa.

THE EXECUTIVE

11. The Freedom Front proposes that Sections 75 and 76 of the 1993 Constitution should be maintained. Thus:

11.1 The Head of State shall be the President. Because of the workload involved, the seperation of the offices of the Head of State and Head of Government should seriously be considered.

11.2 The President shall appoint the Cabinet, supervise the functioning of the Cabinet and consult with the Cabinet on important issues.

12. The President must be elected by parliament and could be a member of the Nasional Assembly or the Senate.

13. Due to the workload, the President must be assisted by a Deputy President or a Prime Minister.

14. The executive must be accountable to both the Head of Government and Parliament.

THE JUDICIAL AUTHORITY

15. The Judiciary must be independent, impartial and subject only to the constitution and the law.

16. There must be an independent Constitutional Court that has the power to nullify an Act of Parliamant if the act is in conflict with the Constitution.

(Senator P.H.Groenewald) maj-genl
Freedom Front.

THE ROLE OF THE SENATE IN SOUTH AFRICA

INTRODUCTION

The composition of Upper Chambers such as the Senate in the USA and the House of Lords in the UK differs. They can be constituted through election, nomination or qualification. The Upper House is usually a smaller chamber and is used in the overall system of democratic government as a mechanism of control and moderation for the sake of stability and peace.

Upper Chambers have in recent times, drasticly declined in stature and usage in Western Democracies. Relatively weak institutions, such as the House of Lords in the UK, the Canadian Senate or the French Senate still play an important role in polishing and clarifying legislation. But they have become distinctly secondary in nature and stature in that they have become chambers of reflection, revisionary debate, protest and delay. Many of them have become the dumping grounds of failed politicians or even worse; political Siberias. The British House of Lords is a relic of the insistance of feudal barons that they should advise and in a way control the monarch whose power constituted a threat to their own domains.

But society has changed. Class orientation is diminished. The need for effective government with as little frustration as possible, is overriding and a second chamber which is little more than a duplication of the first chamber, without a "distinctly defined" nature and task, has become an irritation in majoritarian democracy. It can then be seen as an unnecessary expensive luxury and irrelevant to the real political process. Many of the existing second chambers are also not clearly democratic in its composition and purpose.

THE FREEDOM FRONT PROPOSAL

Serious consideration should be given to the second chamber in the South African parliament to ensure that its nature is representative of South African society and of that which is good and noble in our people. Its role within the overall political process must be defined in such a way that it becomes a cost effective goal orientated institution which will command respect and earn dignity in fulfilling a crucial role in government. It should not frustrate democracy but play an indispensable role in facilitating not only effective and stable government but also the building of culture and common purpose in Southern Africa. Constitutionally, the South African Senate should give the world something truly South African.

The Freedom Front thus proposes that:

1. The Senate should, without increasing the number of Senators, be elected as follows:

   1.1 Equal representation from the provinces. (60% of its members).

   1.2 The true pluralistic nature of South African society must be represented. Thus the Traditional Leaders and any community seeking self-determination should each elect a fixed number of representatives to the Senate.

   1.3 The larger and nationally organised corporate entities in South African society, which in their constitutions honours the constitutional demands and criteria, should also elect a fixed number of representatives. Examples of such institutions are:

      a. Organised labour,

      b. Organised business,

      c. Organised agriculture,

2. The Senate should have the following Functions:

   2.1 The protection of provincial interests. It must ensure that that centralist monopolistic behaviour and bureaucratic red tape do not frustrate the efficient functioning of provincial and local government.

   2.2 Nation building and the protection and development of different languages and cultures of South Africa.

   2.3 The protection of the Constitution. Thus the Senate must have the power to:

      a. Revise or even veto legislation related to the functions of the Senate. There should however be a deadlock breaking mechanism.

      b. To initiate judicial review of legislation.

   2.4 To seek consensus through dialogue without violating the democratic process.

2.5 The protection of minorities and minority rights within the democratic system.

WORKSHOP TO DETERMINE THE ROLE AND FUNCTIONS OF THE SENATE

The Upper Chamber is of such importance that the Freedom Front proposes that a workshop be held as soon as possible to determine the possible roles and functions of the Senate in South Africa.

Freedom Front.
28 January 1995.

"Democracy means freedom to choose"

INKATHA

Inkatha Freedom Party

IQembu leNkatha Yenkululeko

THEME COMMITEE No. 2
STRUCTURES OF GOVERNMENT

1ST REPORT ON
SEPARATION OF POWERS[1]

SEPARATION OF POWERS (Form of Government):

1. There shall be a pure parliamentary form of government.
2. Head of State and Head of Government shall be separate. Parliament shall sit for a five year term.
3. The President shall be elected by parliament in joint session for a seven year non renewable term and shall have the task to ensure the proper functioning of the constitutional and institutional machine.
4. The President shall appoint the head of government who shall form the cabinet in his/her discretion.
5. Cabinet shall be in a fiduciary relationship with Parliament which shall freely exercise its no-confidence vote without being dissolved.

HEAD OF STATE AND HEAD OF GOVERNMENT

1. In order to secure greater democracy and improve checks and balances, the office of the Head of State and that of the Head of Government should be separate.
2. The Head of State should ensure the preservation of the constitutional order and the proper functioning of the constitutional machinery while the Head of Government shall be in charge of the daily operation of Government.
3. Important functions related to the composition of other constitutional organs, such as the Constitutional Court and the defense forces[2] could be ascribed to the Head of State

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[1]. The IFP makes this submission under protest, for the Constitutional Committee should withhold consideration of the matters covered in this report and further development of the work program so as to allow international mediation to take place.

[2]. The IFP has proposed that the Defense Force be under the control of a collegial civilian body headed by the Head of State, who is also the Commander-in-Chief of the Defense

rather than to the Head of Government.

4. The Head of State shall own exercise functions with respect to the representation of the state in international relations, ceremonial functions, the political resolution of conflicts within the institutional machine, and clemency and granting of honours.

EXECUTIVE AND PARLIAMENTARY FORM OF GOVERNMENT

1. South Africa should have a pure parliamentary system in which cabinet is collegially responsible to parliament, with which cabinet is to entertain a fiduciary relation.
2. Parliament's vote of no-confidence should not be impaired.
3. After consultation with the leaders of the political parties the Head of Government (Prime Minister) shall be appointed by the Head of State (President).
4. The Head of Government shall form the Cabinet and submit it for ratification by means of a vote of confidence of both Houses of in joint session.

MONO-CAMERALISM OR BI-CAMERALISM

1. There shall be a bicameral system and the Senate shall represent the Provinces.
2. The Senate shall have as much legislative power as the National Assembly.

RECONCILIATION OF DIFFERENT TEXTS ADOPTED BY THE TWO HOUSES

1. Differences between the texts adopted by the two Houses should be reconciled by a Joint Standing Committee of the two Houses in which the Senate and the National Assembly have an equal number of representatives.
2. The text so reconciled shall be approved by both Houses separately.
3. If one of the Houses does not approve it, the legislation is not enacted.

THE SENATE

1. The Senate should not have less legislative authority than the one given to the National Assembly.
2. The Senate should represent the provinces and its members should derive directly from the provinces either through appointment or through indirect elections.
3. Each province shall be equally represented in the Senate.
4. Legislation affecting the powers, functions and boundaries of Provinces may only be introduced in the Senate. Legislation affecting one of more specific Provinces must be approved by the senators of the Province(s) concerned.

COMPOSITION AND APPOINTMENT/ELECTION OF THE SENATE

1. Senators should be elected for a five year term by the Provincial Legislatures in consultation with the provincial Cabinet.
2. The Premiers of the Provinces shall have the privilege of the floor for themselves and/or for their ministers or designees.

Forces.

ROLE OF SENATE WITH RESPECT TO SOME EXECUTIVE FUNCTIONS

1. The Senate should have a special role in monitoring the function of the Executive branch of government with respect to some activities which are outside the competence of the Provinces such as defense and armed forces[3].

COMPOSITION OF CABINET

1. Members of Cabinet shall be appointed by the Head of Government and shall serve at his or her pleasure, subject to the power of Parliament to vote its no confidence with respect to Cabinet in its entirety.

POWER SHARING OR ROLE OF MINORITIES IN CABINET

1. The IFP does not believe in constitutionally mandated power-sharing arrangements.
2. The IFP believes that the protection of minorities should be provided for by means of a federal system and by means of very effective protection of minorities in Parliament[4].

RELATION BETWEEN HEAD OF GOVERNMENT AND MINISTERS - COLLECTIVE OR PERSONAL RESPONSIBILITY OF CABINET

1. The Ministers shall be chosen by the Head of Government and shall serve at his/her pleasure, provided that any substitution shall be ratified by a resolution of at least one House of Parliament.
2. Cabinet shall be collegially responsible to Parliament.
3. Each Minister shall be responsible to Cabinet for his/her Department, provided that Parliament may ask any Minister to provide information or to tender his/her resignation to Parliament.

CONSTITUTIONAL COURT

1. A portion of the justices of the Constitutional Court shall be appointed by the Provinces from their own judicial systems and legal fraternities.

TRADITIONAL LEADERS AND THEIR STRUCTURES

The separation of powers of government should be cross-referenced with the recognition of the role of traditional leaders and the preservation of traditional communities.

In fact, traditional communities are autonomous societies, organised by traditional and

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[3]. For instance, the Senate could be charged with the special task to authorize the execution by the Executive of international treaties or the employment of armed forces outside the country or even within the country for civil protection reasons.

[4]. As a part of the second Report of this Theme Committee, the IFP will address the issue of protection of political minorities in Parliament.

customary law and administered by traditional leaders. Within a traditional community, legislative and executive and judicial functions are exercised in terms of indigenous and customary law, which also determines the degree and the modalities of the separation of these powers. Among the most significant aspects which regard the exercise of these powers is the institution of communal property.

Given its speciality, this matter will be treated in the third Report of this Theme Committee as per the approved schedule.

National Party
Nasionale Party

Federal Council
Federale Raad

26 January 1995

Mr Hassen Ebrahim
The Executive Director
Constitutional Assembly
Regis House
Adderley Street
CAPE TOWN

Dear Mr Ebrahim

Enclosed please find the National Party proposals regarding subject matters pertaining to Theme Committee 2, and included in the Work Schedule, Block 1.

Kind regards

Jac Rabie

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THEME COMMITTEE 2

NATIONAL PARTY PROPOSALS REGARDING THE SEPARATION OF POWERS

The proposals contained in this document deal with the separation of powers as envisaged in Constitutional Principle VI viz. horizontal separation between the legislature, executive and judiciary. The proposals, furthermore, deal with principles (and not detail) and accordingly entail broad outlines which will be filled in as the work of the theme committee progresses.

1. As a general point of departure, the new Constitution must improve the current checks and balances provided by the division of powers between the legislature, the executive and the judiciary.

2. The legislature at the national, provincial and local levels shall comprise of elected representatives who directly represent the voters. Such representatives shall act independently from the respective executive authorities.

3. In order to enhance the objectives set in the previous paragraph, an electoral system based on proportional representation and which may include elements of geographical representation, shall be devised. The viability of corporate self-determination, as a method for

furthering collective rights of self-determination, should be explored.

4. The concept of representative government, apart from what has been stated above, also entails that the role of opposition parties in the legislatures must be clearly defined e.g. regarding meaningful consultation and participation in decision making.

5. At the national level, the legislature shall comprise of the National Assembly and the Senate.

6. The Senate shall represent the provinces at the national level and its members shall be directly elected and empowered to act authoritatively on behalf of the provinces, jointly and separately.

7. Decreasing the number of members of the National Assembly, should be considered.

8. The method of appointment, the functions and the functioning of the Head of State, the Head of Government and the Cabinet (including its composition) should best serve the nation's interests.

9. All executive(s) should be completely responsible to the relevant legislature(s)

In this regard the advisability to define the rights of the legislature viz-a-viz the executive in the Constitution should be explored. The same applies to Parliament's control over the administration of laws by the executive.

10. Provision must be made for Cabinet members to also be appointed from outside the ranks of Parliament, and on the grounds of expertise.

11. Government at all levels must be transparent, accountable and responsive.

12. The complete independence of the judiciary as the interpreting authority and protector of the Constitution shall be ensured. In particular, the judiciary shall protect and enforce the Constitution and all fundamental rights.

13. The mechanisms and procedures for the appointment of judges must be credible and transparent.

14. The exercise of all state powers shall be controllable and within set limits.

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30 JANUARY 1995

THEME COMMITTEE 2 - SUBMISSION BY THE PAC

SEPARATION OF POWERS

The PAC believes that if the objectives of efficiency and political freedom are to be served, complete separation of powers is neither feasible nor effectual in preventing malpractices. "Checks and balances' are more effective than total separation: though too great a degree of direct control of one government organ over another would constitute interference and would stand in the way of efficient government, a measure of control and partial separation of powers is conducive to the basic principle of limited government.

Although the doctrine of separation of powers cannot, by itself, furnish adequate guarantees of protection against excess of power by any organ of government, it certainly has an important contribution to make if interpreted in a limited sense. The PAC proposes enforceable limitation of powers, the following being the minimum requirements:

(i) The legislature shall not administer laws.

(ii) The legislature shall not function as a court of law except with regard to internal disciplinary action.

(iii) The executive shall not exercise legislative powers (except when such powers have been delegated to it by the legislature.)

(iv) Control by the legislature over the executive authority in the sense that the former has to vote funds for the latter.

(v) **The executive shall not function as a court of law.**

(vi) **The judiciary shall not exercise legislative powers.**

(vii) **The judiciary shall not perform executive functions.**

(a) The relationship legislature/executive.

(i) Members of the executive shall have seats in any legislative body.

(ii) Members of the executive shall not appoint any member to any legislative authority.

(iii) The executive shall have no powers with regard to the holding or not holding of elections, which matter shall be regulated exclusively by the constitution.

(iv) The executive shall have no power to convene or to terminate assemblies of the legislature arbitrarily, since this should be regulated either by the constitution or by the legislature itself.

(v) The executive shall have no powers to determine or to change the salaries, pensions, conditions of service and working conditions of members of legislative assemblies, such powers to be laid down solely in the constitution or by the supreme legislature to enable voters to exercise control thereof in elections.

(vi) The legislature shall control the country's budget, and the executive shall account for the funds appropriated to it without any secrecy.

(vii) No legislasture may delegate legislative powers to the executive without retaining control. Such control should include at least direct parliamentary control over delegated legislation, for example by a parliamentary public protector or committee, and in any case the powers of review of the courts should be retained as they exist at present.

(viii) The executive shall execute valid legislation.

(b) The relationship of the legislature and the executive vis-a-vis the judiciary.

(i) An Independent Judiciary is imperative.

The judiciary should be independent in the following respects:

* Judicial officers shall not be elected, appointed or dismissed by the legislature or the executive.
* The term of office of judicial officers shall not be laid down by the

legislature or the executive, but the term of office and reasons for dismissal shall be laid down in the constitution.

- The salaries and pensions of judicial officers shall not be controlled by the legislature and the executive, save as is provided in the constitution.

(ii) An entrenched, justiciable bill of human rights is fundamental to the principle of the separation of powers, checks and balances, and the limitation of powers.

(iii) Judicial review of administrative and executive acts is likewise fundamental; like a bill of human rights, this should be entrenched.

(iv) Formal, judicial acts should be supplemented by a strong public protector institution.

(v) It shall be compulsory for the executive to carry out court orders, which shall mean inter alia that legislation and executive acts which have been declared unconstitutional or ultra vires by the courts shall not be administered or carried out.

1. It is self-evident that sanctioning is a function of a court of law, and pre-eminently a constitutional court.

2. It follows therefore that any citizen should be given the locus standi to institute an action to enforce the above-mentioned principles which must be embodied in the constitution.

A G Ebrahim - MP

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PARLIAMENT OF THE REPUBLIC
OF SOUTH AFRICA

31 January 1995

PAC SUBMISSION TO THEME COMMITTEE 2

The basic question is that we have been mandated to draw up a new constitution. In fullfilling this task we must of necessity put the interest of the electorate up front and then examine our own experiences and those of others to assist us in drawing up the new constitution.

The PAC is cognizant of the fact that there is consensus about the constitution being the supreme authority. The fundamental objective, therefore, of the new constitution must be to ensure democracy, guard against abuse of power or rights and contribute towards nation building.

It has been argued that democracy can best be protected by enshrining into the constitution check and balances. The separation of the Executive, Legislature and the Judiciary, it is said, can introduce the necessary check and balances.

The PAC would like to see the doctrine of separation of powers enshrined in the new constitution. However, whilst applying the doctrine of separation of powers, the PAC believes the objective must be to ensure democratic practice and to avoid abuse of power and not to render instruments of governance ineffective. Elections are basically an exercise to seek a mandate to govern under a set of rules or policies and consequently democratically elected representatives must be allowed to carry out that mandate.

The PAC, from the outset, opposed enforced coalition, and in particular enshrining it in the Constitution. In principle we support the concept of government of national unity, but such a government must evolve out of voluntary negotiations and not forced upon. If it is possible for any component of a Government of National Unity to leave the coalition unilaterally, it is only correct that they should go into it voluntarily.

The PAC is against including into the Constitution enforced coalition.

The interim constitution provides for a National Assembly and a Senate. Basically the Senate has been assigned two tasks; act as custodian of the interest of the provinces and participate, through the Constitutional Assembly, in the drafting of the New constitution.

In the view of the PAC the role of the Senate is largely confined to looking after the interest of the provinces. If that will remain their sole task in the new Constitution then we do not need 10 from each province to say the same thing. We, moreover, believe they should be directly elected so that they are accountable to the electorate.

Since the Senate will be pre-occupied with provincial issues, there should exist some link between the Senate and provincial assemblies. After all the provincial assemblies are involved in the day to day running of the provinces.

The issue of a ceremonial, above politics State President or an Executive President must be carefully examined. Experience in Africa and elsewhere has shown that such separation has led to tension and even bitter conflict. For instance the conflict between President Azikiwe and Prime Minister Tafawa Balewa paved the way for a military take over. Nearer home, in Lesotho, the Head of State (the Monarchy) overthrew a democratically elected government.

Namibia, on the other hand, has an executive President as well as a Prime Minister. If work load is a problem we could look at the Namibian model. Tanzania also has an Executive President and a Prime Minister.

An Executive President must come from the ranks of elected representatives and be accountable to Parliament. Accountability is the essence of democracy!

A G Ebrahim

THEME COMMITTEE 3
RELATIONSHIP BETWEEN LEVELS OF GOVERNMENT

PROGRESS REPORT as at 9 February 1995

1. Theme Committee 3 has made considerable progress but has not as yet completed its report on Block 1. A draft report has been prepared and will be considered and finalised by Theme Committee 3 during the week (ie 13th to 16th February 1995).

2. An Orientation Workshop to enhance understanding of Unitary and Federal models and concepts was held on the 8th February 1995. No further events/seminars have been planned at this stage.

3. The most serious difficulties/problems being encountered are:

   3.1 The communication of Management and Constitutional Committee decisions and intentions to Theme Committee 3 and its Core Group is inadequate. This gives rise to considerable confusion, duplication, irritation and inefficiency; and

   3.2 Members of Theme Committee 3 and/or Core Group having to attend other meetings (eg portfolio committee meetings) resulting in absences, late arrivals, early departures, and having to re-open issues already dealt with.

4. Theme Committee 3 expects to submit its first report to the Constitutional Committee on the 16th February 1995.

5. Theme Committee 3 has arranged its work programme into five sections, viz
   * The nature and status of Provincial and Local Government
   * The Legislative and Executive competences of National & Provincial Governments
   * Financial and fiscal arrangements
   * Miscellaneous matters

   There remains an area of uncertainty as to which aspects of Local Government are most appropriately handled by Theme Committee 3 as against Theme Committee 2.

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 4

FUNDAMENTAL RIGHTS

REPORT ON BLOCK 1

FIRST REPORT OF THEME COMMITTEE 4 ON BLOCK 1 OF WORK PROGRAMME

Having agreed to the first block of the Theme Committee's Work Plan ie. Constitutional Principle II, the Committee has the pleasure of submitting the following report.

All parties made submissions in relation to the meaning and interpretation of Principle II and their approach to a Bill of Rights in the Constitution and these are included (in document).

As far as the specific wording on clarifying phrases in the Principle is concerned:

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

1.1 Contentious Issue(s): **"Everyone"**

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

1.1.2 The NP, DP and IFP stated that they believed **"everyone"** should include juristic persons.

1.1.3 The ACDP stated that unborn persons should be included under the term **"everyone"** .

Suggestion: **The matter be discussed and debated in greater detail.**

1.2 Contentious Issue(s): **"Vertical and Horizontal Application of Rights"**

1.2.1 The ACDP, ANC, DP, IFP and PAC supported a vertical and horizontal application of the Bill of Rights in principle.

1.2.2 The DP and FF said horizontal application should be approached cautiously.

1.2.3 The NP primarily supported vertical application, but were not against a extension of the application of the Bill, at the same time noting concern about the possible disruption of South Africa's Private Law system.

Suggestion: **Specific rights shall be examined and the implications or consequences in terms of horizontal application shall be evaluated. Expert advice can be sought by individual parties if required.**

2. ***"all universally accepted fundamental rights, freedoms and civil liberties" (which rights etc., qualify as universally accepted fundamental rights)***

2.1 Non-Contentious Issue(s):

2.1.1 All parties agreed that the UN Universal Declaration of Human Rights (1948) and other relevant Covenants on Human Rights, Civil Rights and Social and Political Rights can be used as important references for identifying universally accepted fundamental rights.

2.1.2 The parties will make submissions as to what they regard as universally accepted fundamental human rights.

2.2 Contentious Issue(s): **"Universally accepted fundamental rights..."**

2.2.1 The NP is of the opinion that expert opinion shall first be obtained to interpret what can be regarded as universally accepted fundamental rights, but the ANC and other parties indicated that experts were not necessary to evaluate what the universally accepted fundamental rights were.

2.2.3 The DP believed that such a workshop could easily be accommodated within the schedule of ongoing meetings of the Theme Committee.

3. *"entrenched and justiciable provisions"*

3.1 Non-Contentious Issue(s):

3.1.1 The Bill of Rights should be entrenched, justiciable and enforceable.

3.1.2 All parties agreed that other organs of enforcement shall also be looked at eg. Human Rights Commission.

3.1.3 All parties supported a strong independent judiciary.

3.1.4 Parties agreed that there should be a provision allowing for further additions to be made to the Bill of Rights - As suggested by the FF and IFP).

3.2 Contentious Issue(s):

3.2.1 None

4. *"due consideration to inter alia the fundamental rights contained in Chapter 3"*

4.1 Non-Contentious Issue(s):

4.1.1 Most parties agreed that due consideration must be given to each right in Chapter 3 of the Interim Constitution, but they do not regard these rights as exhaustive.

4.1.2 The parties also agreed that they are not limited to the rights in Chapter 3 only.

5. *General Discussion of Related Constitutional Principles such as I, III, V, IX, XI, XII, XIII(1), XXVIII, XXXIV*

5.1 A preliminary discussion was held in which each party gave their perspective on the Principles.

5.2 It was agreed that detailed submissions on Principles relevant to the Bill of Rights would be made by parties if necessary.

6.1 All the parties agreed that this had been covered by discussions in paragraphs 1 and 2 (See Above).

7. *Outstanding Issues*

7.1 The Committee agreed that the outstanding issues as reflected above would be dealt with in the following way:

7.1.1 The Technical Committee would produce an opinion for the Theme Committee on the following issues:

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

ii) ***"due consideration to inter alia the fundamental rights contained in Chapter 3"***

7.1.2 The deadline for the above would be 17 February 1995.

7.1.3 The issue of what constitutes **"universally accepted fundamental rights"** would be dealt with in 2 stages as follows:

i) The political parties would submit submissions to the Theme Committee by the 17 February 1995.

ii) The Technical Committee would submit an opinion to the Theme Committee by the 22 February 1995.

- ACDP

THEME COMMITTEE 4

A.C.D.P. PRELIMINARY SUBMISSION REGARDING CONSTITUTIONAL PRINCIPLE II (FUNDAMENTAL RIGHTS AND FREEDOMS)

The A.C.D.P. believes in a biblical approach to the granting of fundamental human rights.

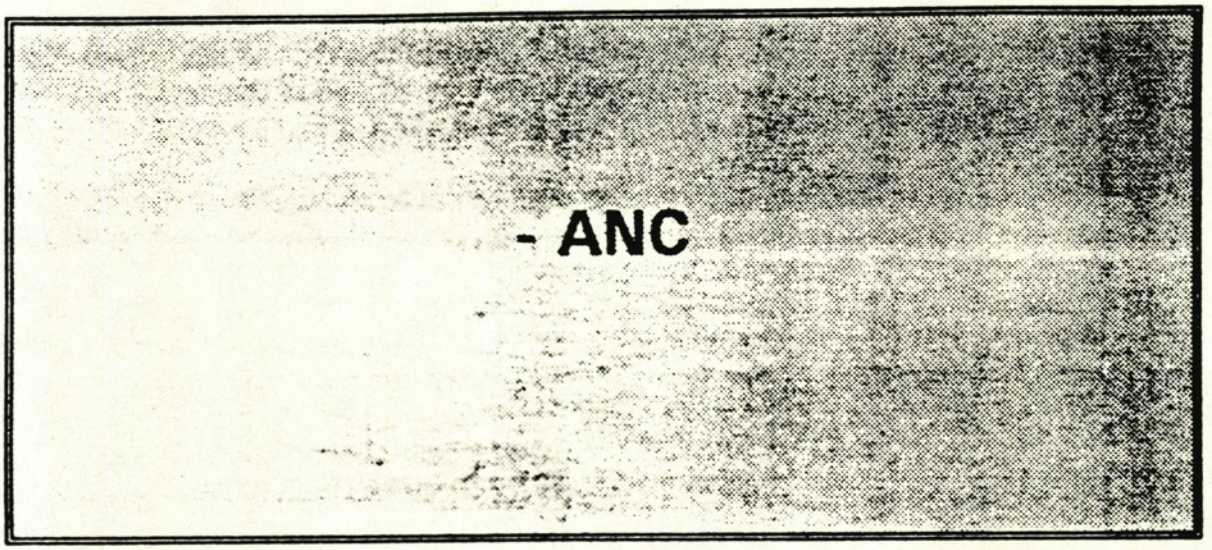
We believe that God is the giver of all good gifts, including human rights. We question the legitimacy of human rights that have not been God-ordained.

Clause 8.2 in Chapter 3 on Fundamental Rights, which refers to unfair discrimination, should be revisited. The "sexual orientation" clause, in particular, is unbiblical, because it legitimises the practice of homosexuality. The Bible literally and clearly forbids homosexuality. It is not valid to use the argument that the state cannot legislate morality, whilst the introduction of clause 8.2 has led to the protection and will lead to the possible legislation of immorality.

The practice of homosexuality is a lifestyle, or sub-culture, like gangsterism. If we call on the protection of this one sub-culture, on what basis are other sub-cultures excluded.

The right to life clause should also be revisited, because unborn children should also be protected by this right.

In conclusion, the A.C.D.P. would support any first, second, third or fourth generation rights, on condition that these rights are not condemned by the Word of God.


- ANC

ANC PRELIMINARY SUBMISSION : THEME COMMITTEE 4 : OUR BROAD VISION OF A BILL OF RIGHTS FOR SOUTH AFRICA

We in the ANC understand the concept of fundamental rights as embodied in Principle II, to refer to the human rights of our people, viz; civil/ political/ social/ developmental/ and enviromental rights. We thus believe that a Bill of Rights should entrench the human rights of our people.

Accordingly, our broad vision of the Bill of Rights is as follows:

The Bill of Rights will guarantee that South Africa is a multi-party democracy in which people enjoy freedom of association, speech and assembly and the right to change their government. Furthermore, the public shall have a right to know what is being done in their name - there shall be a right to information and a firm guarantee regarding the free circulation of ideas and opinions.

The Bill of Rights shall be binding upon the State and organs of government at all levels and where appropriate, on social institutions and persons.

The Bill of Rights shall secure the rights of all persons in all spheres of life, including housing, education, employment and access to facilities and such protection shall be ensured without discrimination on the ground of race or gender.

The Bill of Rights must guarantee language and cultural rights and religion, and respect the diversity thereof.

It must acknowledge the importance of religion in our country. It must respect the diversity of faiths and give guarantees of freedom of religion.

Workers rights to set up independent trade unions, to engage in collective bargaining and their right to strike must be protected in the Bill of Rights which should be supplemented by a Worker's Charter. This Charter should set out all those rights that workers throughout the world have gained themselves. The State will be a signatory to the International Labour Organisation (ILO) conventions. The Bill of Rights will also prohibit slave labour, the exploitation of children and discrimination in the workplace.

There shall be equal rights for women and men in all spheres, and the creation of special agencies to ensure that equal opportunity operates in practice.

The Bill of Rights should support the provision of homes, employment and utilities such as light and water, so as to repair the damage done by Apartheid and the Migrant Labour System, and in order to give real meaning to the right to a home and family life.

The property rights of the majority have been systematically ignored and violated by Apartheid. A new system of just and secure property rights must be created, one which is regarded as legitimate by the whole population.

The taking of property shall only be permissible according to law and in the public interest, which shall include the achievement of the objectives of the Constitution.

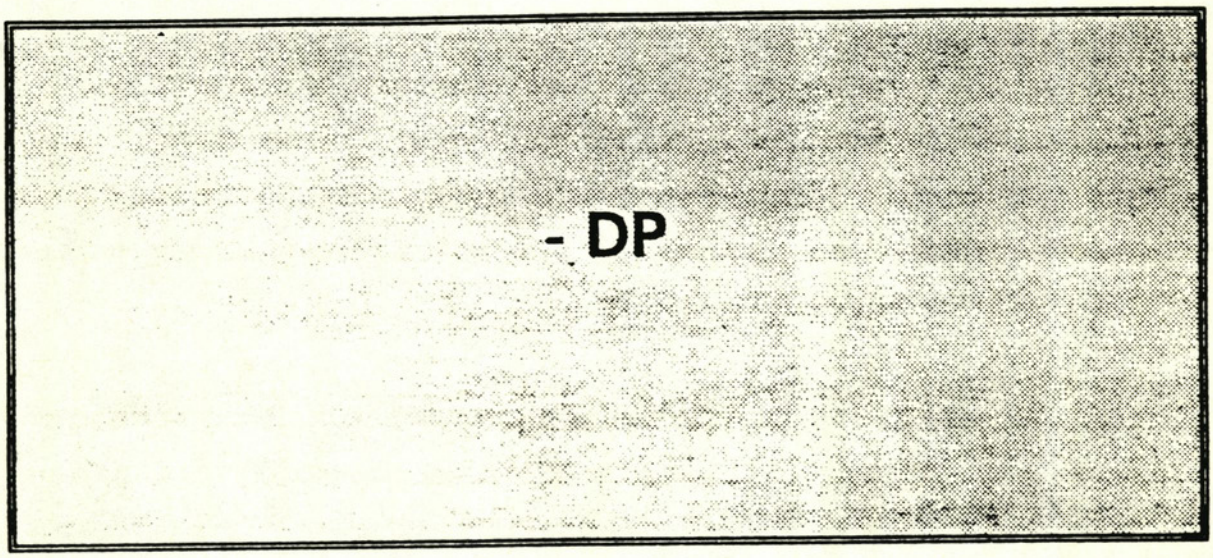
Any such taking shall be subject to just compensation which shall be determined by establishing an equitable balance between the public interest and the interest of those affected and will not be based solely on the market value of such property.

The Constitution will make it clear that seeking to achieve substantive equal rights and opportunities for those discriminated against in the past should not be regarded as a violation of the principles of equality, non-racialism and non-sexism, but rather as their fulfilment. Unless special interventions are made, the patterns of structured advantage and disadvantage created by Apartheid and patriarchy replicate themselves from generation to generation.

The Bill of Rights shall establish the principles and procedures whereby land rights will be restored to those deprived of them by Apartheid statutes. A Land Claims Court Tribunal, functioning in an equitable manner according to principles of justice laid out in legislation, will, wherever it is feasible to do so, restore such rights.

The Bill of Rights will affirm the right of all persons to have access to basic educational, health and welfare services. It will establish principles and mechanisms to ensure that there is an enforceable and expanding minimum floor of entitlements for all, in the areas of education, health and welfare. It will commit the courts to take into account the need to reduce malnutrition, unemployment and homelessness when making any decisions.

The State shall become a party to the large number of human rights conventions and in particular those dealing with racism, gender and discrimination and the rights of children, which Apartheid has, until now, rejected. In this way we will assert our rightful place in the international community.


- DP

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DEMOCRATIC PARTY

SUBMISSION ON CONSTITUTIONAL PRINCIPLE 2 : FUNDAMENTAL RIGHTS

We do not believe that the policy proposals of a particular political party should be written into the Bill of Rights. We do not believe that every, or even most, policy claims qualify as constitutional rights. We would, rather, formulate a core of essential rights which attempt to harmonise the quest for equality, so assiduously denied to our citizenry by apartheid, and the preservation of individual liberty, which should be the lodestar of a new democratic South Africa.

A Bill of Rights, drawn to be at the heart of a new constitution, should commit our country to equality, and set its face against discrimination, especially against racial discrimination. Equally, a Bill of Rights should recognise - and preserve - spheres of individual privacy immune from encroachment by any government, authority or neighbour. It should not do so, however, in a manner which will give legal recognition to attempts to privatise apartheid.

Most of the rights contained in a Bill should be terse and simple, but several need to be elaborate and detailed. Such sections must detail, with precision, the civil liberties and procedural safeguards necessary to secure individual freedom against oppression.

A distinctive feature of a durable Bill of Rights should be its enforceability mechanisms. These too need to be detailed in the charter or rights. We also need major provisions to secure information from the organs of State, innovative rights to

administrative justice and ease of procedures to allow the poor and inarticulate to approach the courts for relief. Fundamental to a good Bill of Rights will be recognition of the fact that without effective means of enforcement, legal rights will become little more than moral claims, readily ignored when the forces of government find it convenient to do so. In every clause, the drafters of the Bill must take heed of the warning of United States Supreme Court Justice William J Brennan against creating "paper promises whose enforcement depends wholly on the promisor's goodwill, rarely worth the parchment on which they were inked".

The DP Bill of Rights takes the view that policy formulation - from the detailed provision of health services to the allocation of housing - is the preserve of parliament, not the constitution. We hope that governments - and their policies - will change to meet changing circumstances. But because the promises of a Bill of Rights could be empty, cruel words echoing in a wasteland of deprivation and denial, the Bill must provide for a standard of justification which empowers the citizen to obtain from government the entitlements to the means of survival. In our view such a clause, together with associated provisions relating to equality and affirmative action, must be tightly drawn. The Bill of Rights should not, therefore, provide a laundry list offering the panoply of human happiness or perfection. It must demand of government rational, honest justifications for policy decisions providing such entitlements. "Rationality" or "reasonableness" should be the standards of justification provided for in the Bill of Rights.

The Bill of Rights must also provide the legal building blocks for honest, accountable government located in the framework of a participatory democracy. It must be an attempt to foster democratic decision-making, the surest guarantee of good government.

It is not the province of the Theme Committee to determine the hierarchy of the future court structure, but we believe the Bill of Rights should be enforceable through the existing Supreme Court structure, with an appeal lying to the Appellate Division which, in turn, should provide for disposal of constitutional final appeals to an expert constitutional court. We do, however, warn of the significant danger of vesting sole

power for constitutional interpretation in one, specially created court. Such a device could become too contentious, powerful and politicised.

It is also the Constitution - and not the Bill of Rights itself - which must provide the detailed mechanisms for entrenching the Bill of Rights (and for crucial companion rights such as the regularity of elections, the division of legislative competencies and the form of the State itself). However, the Bill of Rights, itself, merits special protection against easy amendment or encroachment. The constitution must specify super-majorities (in various legislatures if necessary) to inoculate the Bill against interference by a simple parliamentary majority.

SPECIAL NOTE ON EQUALITY

Of the conditions necessary to permit democracy to flourish, equality is one of the most fundamental. But the most prominent feature of the South African social order has been discrimination; most conspicuously, racial discrimination. The new Constitution must commit itself to equality, and set its face against discrimination, especially against racial discrimination. The Bill of Rights, drawn to be the heart of that Constitution, needs to so commit itself.

But what is discrimination? No society can function without making distinctions. Indeed, it is a characteristic of successful societies that their means of differentiation are precise; that they succeed accurately in distinguishing the meritorious from the unmeritorious; the just from the unjust; the productive from the unproductive. When is differentiation permissible and when ought it to be outlawed? The answer is the Bill of Rights should be 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 that answer is to permit the court that enforces the Bill to condemn as discrimination an arbitrary exercise of power which may be thought to fall outside of the best known categories of discrimination, such as racism or sexism. One effect, for

instance, might be to empower a court to outlaw a particular differentiation made on the ground of pregnancy without reaching the controversial question whether it constitutes sex discrimination. If differentiation on the ground of pregnancy is unjustified, it is discrimination, and therefore unconstitutional. The court need not 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 programmes to undo existing inequalities.

However, unpalatable it may be, we have to acknowledge, too, that if such programmes are to benefit their legitimate beneficiaries and no one else, they will have to use the same criteria for differentiation as those which brought about the inequality. But the Clause which authorises such programmes, must provide that such programmes are rational. A programme would not be rational if, say, 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 recognise also that, although differentiation on any of the grounds listed in the Equality Clause, unless it is part of an affirmative programme to undo inequality, is usually abhorrent, sometimes it may be desirable. It may be desirable, for instance, 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 they are 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 just outlined. 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 differentiation) than others (e.g. religious differentiation).

Some favour a Constitution which seeks to outlaw discrimination only in the public sector: 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 discrimination (unless the Constitution forbids it to legislate, in which case the State is responsible because of the Constitution).

Despite that, it remains true 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 whatever, however arbitrary, without any liability to justify them. The choice of whom to invite into one's home, for instance, falls into that category. So does the choice of whom to favour with one's charity, and so does the choice of whom to marry.

Rather than trying to confine equality to the public sector, understood as the area in which the State is responsible, it seems 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.

But to recognise a sphere immune from intervention against discrimination is to invite racists and other discriminators to take shelter there. Many will try improperly to expand the shelter given to discrimination by the need to protect privacy; immunity invites abuse. To guard against this danger, the Bill should confine immunity to

decisions made in the exercise of the kind of private choice necessary to preserve personal autonomy.

There are perhaps some in this country now who are anxious to retain the privileges bestowed by apartheid. Many of them hope to achieve that goal by removing activities hitherto in the public domain to the private, expecting that there those activities will be insulated from the commitment of the new social order to root out discrimination.

The Constitution must not be party to those efforts, and the Bill of Rights must not be. 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, of course, changes with time. At one stage it was commonly accepted that the terms of private employment were a matter for the employer and the employee, and that the State should not intrude. Now the legal regulation of private employment is pervasive and commonplace. At one stage it was generally accepted that social clubs fell into the core of the sphere of privacy, and that if such clubs chose to exclude blacks or Jews or women, that was their prerogative. There is now a growing body of opinion that such clubs often supply public goods - such as business opportunities - to which all should enjoy equal access.

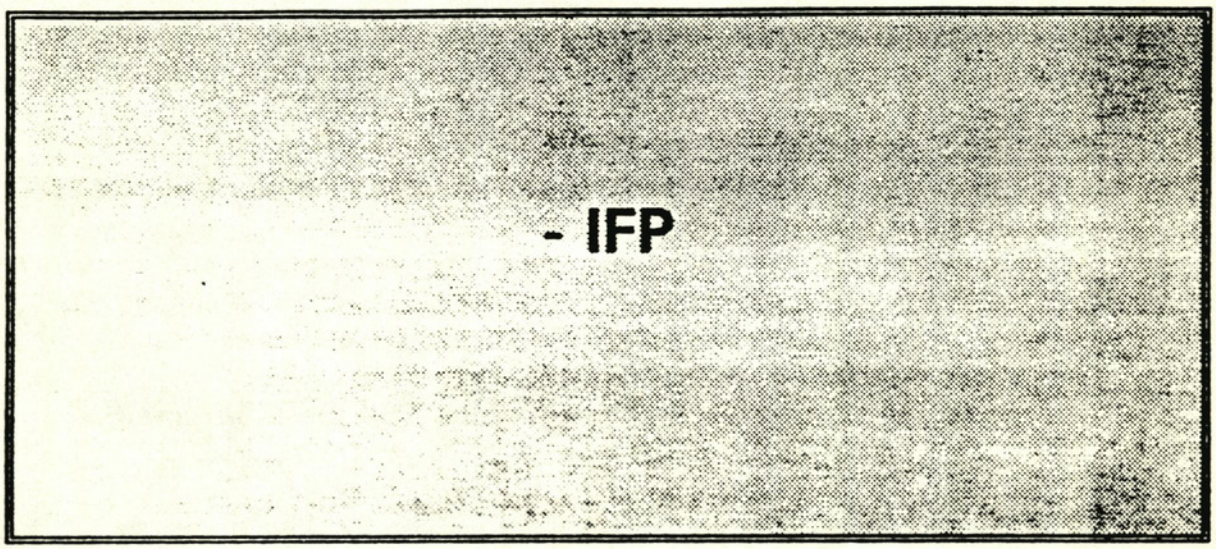
These development require us to recognize that the boundaries of privacy are constantly shifting, and that the Constitution, or its Bill of Rights, cannot, therefore, finally define them. The court entrusted with interpreting the Bill of Rights will have to define and redefine the boundaries of privacy from time to time, as society's conception of that idea 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; for instance, a recruitment policy which requires all mathematics teachers to be six feet tall. Such a policy, although it made no reference to race or sex, would favour men over women and some races over others. Since the policy would not be justified as 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.

DEMOCRATIC PARTY
24.01.1995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"Democracy means freedom to choose"

INKATHA

Inkatha Freedom Party

IQembu leNkatha Yenkululeko

THEME COMMITTEE No. 4
ON FUNDAMENTAL RIGHTS

FIRST REPORT ON
CONSTITUTIONAL PRINCIPLE II[1]

Constitutional Principle II requires that the Constitution contains provisions which protect fundamental human rights. As per the approved work program, further submissions to this Theme Committee will analyze the characteristics and wording of the specific fundamental rights as well as their possible suspension and/or limitation. Therefore, this submission shall focus only on the characteristics of the Chapter on Fundamental Rights as a whole and on its justiciability.

THE BILL OF RIGHTS IN THE CONSTITUTION

1. The Constitution shall not provide for less human rights protection than what it is provided for in Chapter 3 of the interim constitution.
2. In its Constitution, South Africa shall commit itself to recognize, protect and promote all internationally recognized human rights as they are expressed in (a) prevailing trends of modern constitutions, (b) international declarations and covenants on human rights and (c) international treaties of general or regional application.
3. All recognized human rights shall be regarded as fundamental human rights.

NATURE OF THE BILL OF RIGHTS:

1. The Bill of Rights shall have horizontal application in addition to vertical application.
2. The applicable test shall require that the Bill of Rights is extended to "all significant legal relations which are under the control of the State."
3. The Bill of Rights shall be entrenched in the national constitution but shall be implemented exclusively by provincial legislation and executive action with respect to the matters of provincial competence (i.e.: employment/labor, health, education, welfare, environment et cetera).

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[1]. The IFP makes this submission under protest, for the Constitutional Committee should withhold consideration of the matters covered in this report and further development of the work program so as to allow international mediation to take place.

The national government might have the power to coordinate this implementing role of Provinces. The jurisprudence of the Constitutional Court will also give a uniform interpretation of the applicable constitutional parameters.

EVOLUTIVE CLAUSE, OPEN LIST OF RIGHTS

1. The Constitution shall make provision for the updating and evolution of human rights protection, which are historically an ever changing field of law.
2. The following constitutional text ought to be considered:

> **Human rights in the Constitution**[2]
>
> All fundamental human rights and all those other rights which are inherent to fundamental human needs and aspirations as they evolve with the changes and growth of society, and as they will be recognisable on the basis of the principles underlying the provisions of this constitution, are hereby entrenched in this constitution and in their essential content shall not be modified by virtue of constitutional amendments.

JUSTICIABILITY OF FUNDAMENTAL RIGHTS

1. All fundamental human rights shall be fully justiciable.
2. For specific rights which require implementing action on the side of the government justiciability will also be determined by the actual wording of such rights and to a great extent may depend on the provisions of the legislation required to fulfil and implement such rights.
3. Justiciability of rights is also intrinsically limited by the fact that the Constitution recognizes conflicting rights, such as the right to privacy and the right to freedom of information and media.
3. The Constitution must contain a general provision guiding constitutional adjudication. The following text ought to be considered:

> **16. Justiciability of rights**
>
> All rights and freedoms recognised and guaranteed under this constitution shall be justiciable to the fullest practical and reasonable extent. In the case of a violation of the rights and freedoms recognised and guaranteed under this constitution any aggrieved party shall be entitled to be heard by a court of record on the basis of urgency and, upon showing a *prima facie* violation of rights, shall be granted preliminary relief pending the final disposition of the case.

FUNDAMENTAL RIGHTS AND CONSTITUTIONAL AMENDMENTS

1. The essential content of fundamental rights shall not be modified by virtue of constitutional

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[2]. All constitutional text in this submission consists of excerpts from the draft constitution of the Federal Republic of South Africa, submitted by the IFP to the World Trade Centre in June 1993.

amendments of any type.

2. Any constitutional amendment shall be approved by special majorities and with special procedures, including separate approvals and a cooling-off period.

RESIDUAL RIGHTS OF THE PEOPLE

1. The Constitution shall entrench the principle of freedom as the fundamental principle underlying the legal system. The following text should be considered:

   11. Rule of Freedom

   All conduct and activities which are not prohibited shall be permitted. The Republic of South Africa may prohibit and regulate conduct and activities for a demonstrable State's interest founded on public interests and welfare.

2. The Constitution shall entrench the principle that all powers of government derive from the people who are the depository of any residual power which is not exercised by the government. The following language ought to be considered:

   1. Inherent Rights and Obligations

   The Republic of South Africa acknowledges and recognises that all individuals have the natural right to life, liberty and the pursuit of happiness, and to the enjoyment of the rewards of their own industry; that all individuals are equal and entitled to equal rights, opportunities and protection under the law, and that all individuals have corresponding obligations to the Federal State and a general obligation of social responsibility to the people of the Federal Republic.

   2. Source of Government

   All political power is inherent in the people. All government originates with the people, is founded only upon their will, and is instituted only for the good of the people as a whole. Government shall respect and encourage the exercise of the power of the people to organise and regulate their interests autonomously.

DUTIES AND OBLIGATIONS

1. In addition to a Bill of Rights the constitution shall also contain a Bill of Duties and Obligation. Many aspects of the Constitution would reflect the presence of a Bill of Duties and Obligation.

2. The following provisions ought to be considered:

   PREAMBLE

   WE, the people of South Africa, mindful of our unique and diverse heritage, inspired by the desire to secure the blessings of democracy, freedom and pluralism for our and future generations, respecting the equality of all men and women, recognising the right of people to organise themselves in autonomy and independence at all levels of society, desiring to ensure that individual rights and liberties are accompanied by obligations of social solidarity to others, determined to guarantee that the rights of all people are protected both as individuals and members of social and cultural formations, do now ordain and establish this

constitution for the Federal Republic of South Africa to provide the people of South Africa and the member States with a Federal government to serve their individual and collective needs, wants and aspirations.

1. Inherent Rights and Obligations

The Federal Republic of South Africa acknowledges and recognises that all individuals have the natural right to life, liberty and the pursuit of happiness, and to the enjoyment of the rewards of their own industry; that all individuals are equal and entitled to equal rights, opportunities and protection under the law, and that all individuals have corresponding obligations to the Federal State and a general obligation of social responsibility to the people of the Federal Republic.

2.- 58. [...]

OBLIGATIONS AND DUTIES

59. Allegiance to the Constitution

All citizens shall have the duty to uphold this constitution and live by the rule of law. All those who hold any of the offices provided for in this constitution shall take an oath or a solemn affirmation to uphold and defend this constitution, obey the law and exercise their public functions with discipline and honour.

60. Contribution to Public Expenditures and Needs

a. All citizens have the duty to contribute to the common needs and to public expenditure by reasons of their resources. [...]

b. The Federal Republic of South Africa shall encourage voluntary charitable activities and other forms of expression of social solidarity.

61. Military obligations

All citizens have the sacred duty to defend the territory of the Federal Republic of South Africa from any external enemy and from any threat to the enjoyment of freedom, democracy and pluralism in the Republic.

62. Duty to work

All capable citizens have the duty to contribute with their work and skills to the common development and growth of the Republic

63. Family duties

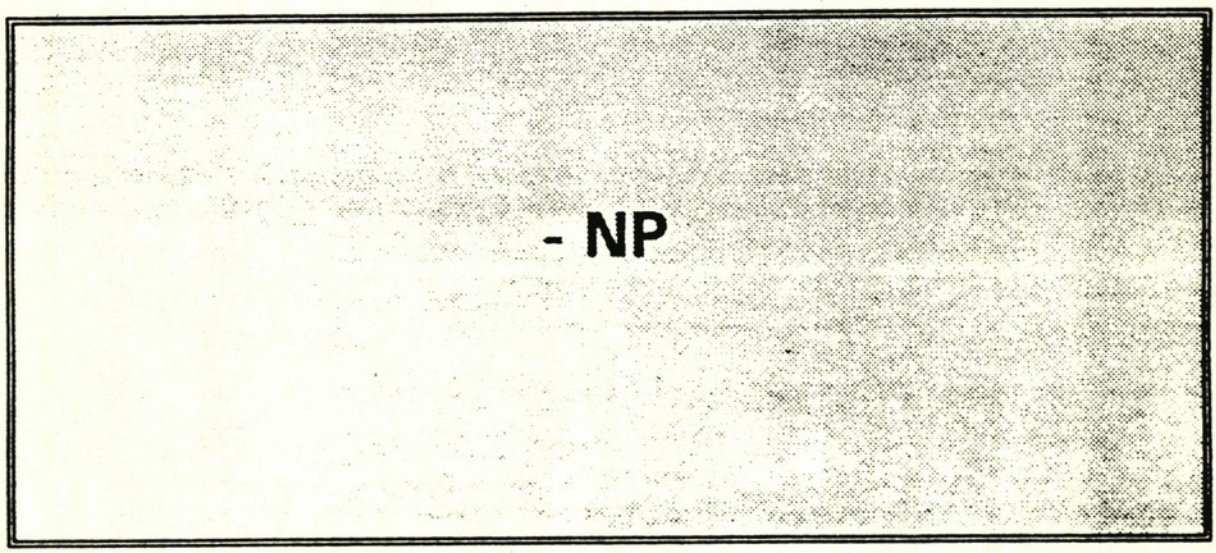
All citizens have the duty to provide moral and financial support to their spouses, to educate their children and to assist their parents when in need of care.

[...]

LIST OF HUMAN RIGHTS

1. The Constitution shall list, entrench and protect at least the following rights and areas of constitutional protection:
   - Freedom of speech
   - Freedom of religion
   - Physical and psychological integrity
   - Liberty
   - Travel and movement
   - Privacy

- Assembly and association
- Free enterprise
- Contractual autonomy
- Private property
- Political rights
- Freedom of the media
- Freedom to access government information
- Family rights
- Cultural and traditions
- Procreative freedom
- Right to work
- Free enterprise
- Functional private property
- Communal property
- Right to education
- Health care
- Housing
- Sanitation
- Labor law and labor rights
- Protection of women, senior citizens and youth
- Autonomy of Universities, research, arts and culture
- Autonomy of trade unions and political parties
- Environmental rights
- Cultural rights
- Minority rights
- Rights of ethnicity and self determination
- Group rights
- Autonomy of social and cultural formations
- Pre-eminence of civil society
- Preservation of traditional communities and role of traditional leaders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National Party
Nasionale Party

Federal Council
Federale Raad

23 January 1995

The Executive Director
Mr Hassen Ebrahim
Constitutional Assembly
Regis House
Adderley Street
CAPE TOWN

Dear Mr Ebrahim

Enclosed please find the National Party's proposals regarding the subject matters pertaining to Theme Committee 4 and included in the Work Schedule, Block 1.

Kind regards

G B MYBURGH

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THEME COMMITTEE 4

NATIONAL PARTY PROPOSALS REGARDING CONSTITUTIONAL PRINCIPLE II (FUNDAMENTAL RIGHTS AND FREEDOMS)

1. There shall be, as part of the Constitution, an entrenched and justiciable bill of rights (Appropriate alternative names for "bill of rights" might include "catalogue of fundamental rights" or "charter of fundamental rights")

2. Human dignity, as an inviolable and inalienable universal principle, shall be the fundamental value on which the bill of rights be premised. In order to attain that objective, a pre-script to the actual catalogue of fundamental rights (in a similar vein as is contained in certain Continental basic law) could be considered

3. The new bill of rights should, in principle, contain all the universally accepted fundamental rights and freedoms currently forming part of Chapter 3. Where necessary, current formulations may be reconsidered. A list containing rights which currently are part of Chapter 3 but which, due to their transitionary nature, should be deleted or re-formulated, will be submitted at the appropriate time.

4. The contents of the bill of rights shall bind all executive and legislative organs of state at all levels of government and shall be directly enforceable.

5. The locus standi bestowed by the current section 7(4)(b) shall be retained.

6. In the drafting process care should be taken not to undo very positive achievements in the development of a human rights jurisprudence, which had already been achieved by the Courts, the legal fraternity, NGO's and the public at large.

7. The bill of rights shall make provision for the application, where appropriate, of international public law (including international human rights law) and human rights protocols, treaties and other similar instruments.

8. The bill of rights shall primarily apply to the "vertical" relationship between the state and the citizenry. However, it should be ensured that non-public law areas of the law (e.g. all statutory law, the common law and customary law) be egually influenced by the letter and spirit of the bill of rights.

9. The inclusion of more socio-economic rights in the bill of rights itself, is legally untennable and will, moreover, give rise to immense practical problems for government. Alternative mechanisms to redress issues pertaining to socio-economic rights, could be utilised and should result in an even more effective protection of such rights. One

such method would be to make use of "directive principles" which could link up with the objectives of the RDP. This method has been utilised successfully in, e.g.the constitutions of India and Namibia.

10. The principle of the limitation of fundamental rights according to strict criteria, should be retained. The criteria set forth in section 33(1) could, in principle, be retained.

11. The basic and pivotal value currently underpinning Chapter 3 is that of "an open and democratic society, based on freedom and equality". This basic normative value should be retained.

12. Further and detailed proposals regarding specific sections which should be added, deleted, amended or re-formulated, will be put forward in the course of the work of the Theme Committee and when appropriate.

- PAC

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PARLIAMENT OF THE REPUBLIC
OF SOUTH AFRICA

PAC SUBMISSIONS ON CONSTITUTIONAL PRINCIPLE II:

An Entrenched Bill of Rights:

INTRODUCTION

It must be remembered that chapter 3 of the Interim Constitution covered mainly, Rights which were necessary during the Transitional phase. It therefore, paid more attention to those rights which limited the abuse of power by the State and restore human dignity. Chapter Three dealt mostly with Civil and Political Rights - a less controversial area.

It is important therefore, to note that this is a limited rights' Chapter and not a fully-fledged Bill of Rights. In addition, The undemocratic nature of the World Trade Centre process would not have been suitable for drafting a Bill of Rights for South Africa.

It is against this background that we should view the injunction of Constitutional principle II that the Constitutional Assembly should draft an entrenched and justiciable Bill of Fundamental Rights, Freedoms and Civil Liberties after due consideration of Chapter Three of the Interim Constitution.

CONSTITUTIONAL PRINCIPLE II AND ITS IMPLICATIONS

(i) It is not quite apparent to us what is meant by "After having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution." The PAC will be comfortable with an interpretation of this provision which does not impose any limitations on the Constitutional Assembly as to which rights can be included or excluded in the final Bill of Rights. We humbly submit that this section merely implores the Constitutional Assembly to, as it goes about drafting the Bill of Rights, take into consideration the jurisprudence which will be generated by Chapter 3 and

the reasons why certain provisions were inserted in that chapter.

(ii) The constitutional Assembly therefore is expected to draw a comprehensive South African Bill of Rights. It must be a Bill of Rights that will protect the rights of individual citizens while allowing the State to provide for the well - being of all members of our Society without any unfair discrimination and within reasonable environmental constraints. This implies that not only Civil and Political Rights must be included but also Socio-Economic and Solidarity Rights.

(iii) While this Bill of Rights should not ignore South African Realities, it should however, meet International norms and standards and must be compatible with South African obligations under International Law.

(iv) The PAC does support the concept of an entrenched and Justiciable Bill of fundamental Rights and freedoms. Indeed, it is imperative that it should not be a document composed of "ringing declarations of Human rights" that are "more impressive in terms of literary style than in practical enforceability."

Further, we submit that "practical enforceability" should go beyond justiciability in the narrow sense of enforcement only by the courts. Other fora/forums and mechanisms should be devised to give meaning to the Rights in the Bill of Rights. For instance, an institution modelled along the lines of the European Human Rights Commission can be designed so as to assist in enforcing the South African Bill of Rights.

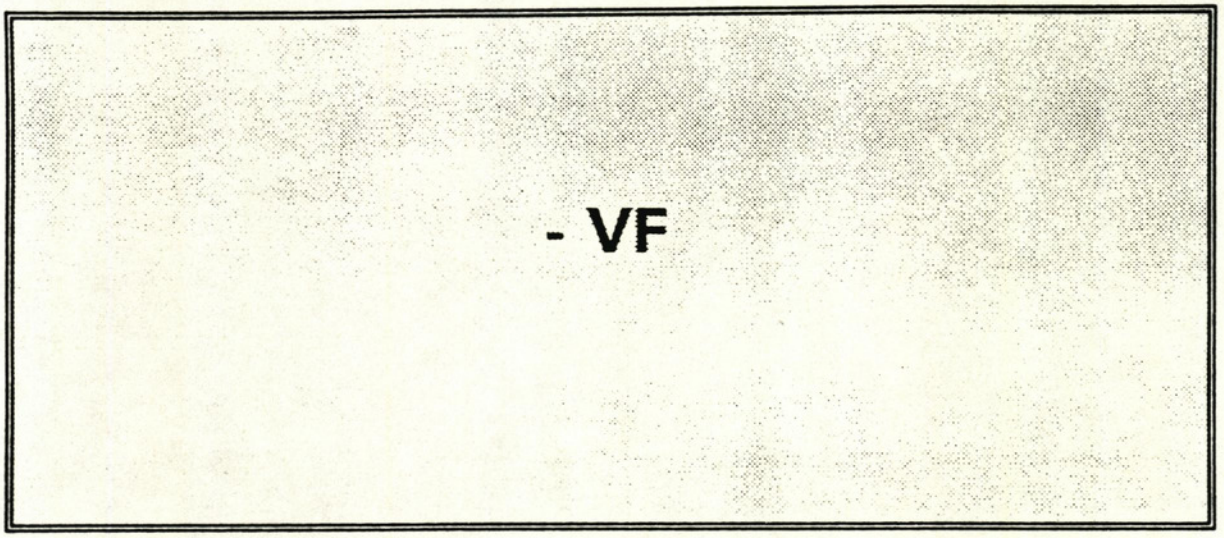
(v) A South African Bill of Rights should reflect clearly the shift of power from an oppressing minority group to a more democratic and representative dispensation. It must answer unambiguously the question, "A Bill of Rights: By whom and for whom?" It must also therefore be accessible and people-oriented.

CONCLUSION

The PAC will, when the process deals with substantive provisions, make its humble contribution towards making the document, a Bill of Rights that our people can claim as their own as they would have participated in its drafting and more importantly as it will be encompassing their rights and aspirations.

R K Sizani - MP

19 January 1995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FREEDOM FRONT

THEME COMMITTEE 4

PRELIMINARY SUBMISSION ON CONSTITUTIONAL PRINCIPLE 11

FUNDAMENTAL RIGHTS

INTRODUCTION

The Freedom Front believes that the correct approach to the consideration of fundamental rights in accordance with Constitutional Principle 11 is to proceed as follows:

1. To draw up a list of all or virtually all universally accepted (i.e. according to international law) fundamental rights, freedoms and civil liberties;

2. To add to the above-mentioned list some rights that are particularly relevant in the case of South Africa by virtue of "diversity of language and culture" (Constitutional Principle X1);

3. To improve, both as to content and form, the extended list referred to in paragraph 2 above, using chapter 3 of the transitional constitution as a guideline, as well as any other material that may be relevant to South African circumstances.

4. To consider:

   (a) the limitation, suspension and interpretation of the improved list referred to in paragraph 3 above;

   (b) the role of institutions (i.e. apart from courts) relating to fundamental rights : Human Rights Commission etc.

   (c) the role of the courts in the enforcement of fundamental human rights (court orders rendering invalid laws and administrative conduct contrary to the fundamental rights entrenched by the Constitution).

This document does not deal with 3 and 4 above, and is limited to a brief treatment of 1 and 2 above.

1) List of 'universally accepted' fundamental rights, etc

The Universal Declaration of Human Rights, 1948, being a resolution of the General Assembly of the United Nations, contains an enumeration of a large number of "human rights". By reason of the fact that the General Assembly has no legislative (law-creating) power, this enumeration or list does not constitute a collection of fundamental rights according to international law. It was only about two decades later that the human rights mentioned in the Universal Declaration were reformulated and became rules of international law in the two important treaties (covenants) referred to below.

The General Assembly of the United Nations adopted two so-called "covenants" on human rights in 1966. They were resolutions of the General Assembly, in the form of draft treaties. Eventually these resolutions became treaties, with binding legal effect on states who (a) became signatories to them and (b) later ratified them. (As a general rule a non-signatory to a treaty is not bound by it, while ratification is (in addition) generally also required for validity of a treaty).

These Covenants (as their names indicate) deal with different types of rights, but there are important overlaps. So, for instance, the right of self-determination appears in article 1 of both Covenants, and the definitions are identical. They are called the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, both adopted in 1966. The former formulates the classic fundamental rights of all peoples (sometimes called 'first generation rights'), while the latter seeks to advance the interests of underdeveloped countries, notably those in the Afro-Asian block, and contains a list of rights often referred to as 'second generation rights'.

As the Covenants referred to above probably contain the most comprehensive formulation of fundamental rights, freedoms and civil liberties accepted by the international community at large, a paraphrase of their contents would serve as a guide in ascertaining what "all universally accepted fundamental rights, freedoms and civil liberties" (stress supplied) within the meaning of Constitutional Principle 2 in Schedule 4 of the transitional Constitution are.

Although there are certain overlaps between the rights formulated in the above-mentioned Covenants, it is clear that the International Covenant on Economic, Social and Cultural Rights to a large extent deals with rights differing in nature from those in the International Covenant on Civil and Political Rights. In a certain sense civil and political rights are more fundamental, while economic, social and cultural rights deal with more sophisticated wants.

It is customary to divide rights into various categories, generally called first, second, third and fourth generation rights. However, in the present context, nothing is to be gained from the drawing up of such categories. On the contrary, much difference of opinion is likely to arise from any attempt to formulate rigid categories of rights. Accordingly, the approach below will be to deal with rights individually, instead of in predetermined categories or groups

The majority of rights contained in the International Covenant on Civil and Political Rigths at present occur also in the chapter on Fundamental Rights in the present Constitution. However, the following rights in the former instrument have not yet been incorporated in the present Constitution:

(1) The right of self-determination

(2) No imprisonment merely on the ground of inability to fulfill a contractual obligation

(3) Prohibition of propaganda for war and advocacy of certain other anti-social acts

(4) Family rights

(5) Rights of minorities to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The following rights are entrenched in the present Constitution and should also be entrenched in the new Constitution, but their definition should be improved:

(1) Right to life;

(2) Right ~~of~~ everyone to freedom of association.

2) Some rights particularly relevant in the case of South Africa by virtue of 'diversity of language and culture' (Constitutional Principle XI)

Some of the fundamental rights referred to above have already been formulated in the present list of fundamental rights contained in Chapter 3 of the Transitional Constitution. To the extent that the said chapter does not reflect all the rights generally accepted by the international community, that Chapter must be supplemented by the omissions. What rights contained in the two international Covenants should be added to the lists in Chapter 3 ?

Certain 'rights' formulated in the International Covenant on Economic, Social and Cultural Rights cannot be effectively applied in a plural society, containing a wide spectrum of people, varying from the very rich to the very poor, the employed and the unemployed, the highly skiled and the unskilled, the educated and the illiterate, etc.

In the context of the previous paragraph the right to work and the right of everyone to the enjoyment of just and favourable conditions of work (articles 6 and 7 of this Covenant), the right of everyone to social security, including social insurance (article 9), and the right of everyone to an adequate standard

of living (article 11), the right of everyone to the highest attainable standard of physical and mental health (article 12), as well as the right to free primary education and generally available secondary education (article 13) seem to be particularly in point. These "rights" are more in the nature of ideals than rights that are justiciable and can be enforced by courts.

It must be ascertained to what extent the rights mentioned in the paragraph above (i) are "universally accepted"; and (ii) can effectively be enforced by a court of law. On the other hand, the right of self-determination is particularly relevant to plural societies. This is acknowledged by Constitutional Principles XII and XXXIV, and this right must, therefore, be inserted in the chapter on fundamental rights in the new Constitution.

The following main provisions of the International Covenant on Civil and Political Rights are particularly relevant to the South African situation:

1. The right to self-determination (compare Constitutional Principles XII and XXXIV);

22. The right of everyone to freedom of association with others;

27. The right of persons belonging to minorities to enjoy, in community with other members of their group, their own culture, to practise their own religion or to use their own language.

The above-mentioned three rights should be entrenched in the new Constitution. In addition the recognition and protection of aspects of traditional leadership and indigenous law (Constitutional Principle XIII) should be so entrenched, as well as a right to freedom of information aimed at open and accountable administration (Constitutional Principle IX).