

2/4/4/4/11

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

Demokratiese Party, Sd: Verdieping, Ruskin-gebou, Ruelandsstraat 2, Kaapstad 8001
Democratic Party, 5th Floor, Ruskin House, 2 Rueland Street, Cape Town 8001

NASIONALE HOOFKANTOOR
NATIONAL HEAD OFFICE

☎ 45-1431 ☒ 1475, 8000 FAX 461-5276



Demokratiese Party
Democratic Party

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

- IFP



INKATHA

Inkatha Freedom Party

Iqembu leNkatha Yenkululeko

THEME COMMITTEE No. 4 ON FUNDAMENTAL RIGHTS

FIRST REPORT ON CONSTITUTIONAL PRINCIPLE II¹

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).

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 Constitution²

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

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 means 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

- NP



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

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 transitional 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 equally 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 untenable 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



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

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VRYHEIDSFRONT

Postbus 74693

Lynnwoodrif

0040

Tel. (012) 47-4477

47-4375

47-5165

47-5182

47-5142

47-4454/50/58

1ste Vloer Atrium 4

Perseuspark

h/v Camelia- en Prioryweg

Lynnwoodrif

Faks (012) 47-4387

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 Rights 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 skilled 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).