

2/4/6/5/1/11

**CONSTITUTIONAL
ASSEMBLY**

THEME COMMITTEE 6.3

SPECIALISED STRUCTURES OF GOVERNMENT

12 June 1995

E305

DOCUMENTATION

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CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: All members of Subtheme Committee 6.3
FROM: Bronwen Levy (Secretariat)
DATE: 31 May
RE: Next meeting of the Subtheme Committee

Please note that there will be no meeting of the Subtheme Committee on Monday 5 June 1995. The details of the next meeting of the Subtheme Committee are as follows:

DATE: 12 June 1995
TIME: 9:00
VENUE: E305

Enquiries Ms B Levy 245 031 ext 234 or 403 2182

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THE NEW CONSTITUTION

CONSTITUTIONAL ASSEMBLY
SUBTHEME COMMITTEE THREE
TRANSFORMATION, MONITORING AND EVALUATION
OF
THEME COMMITTEE SIX
SPECIALISED STRUCTURES OF GOVERNMENT

12 June 1995

AGENDA

- 1. Opening and Welcome**
- 2. Adoption of minutes**
 - 2.1 Minutes of the meeting of 29 May 1995**
- 3. Draft formulations on the Human Rights Commission**
 - 3.1 Report on party comments**
 - 3.3 Process towards finalisation of the draft**
- 4. Workshop on Land**
 - 4.1 Comments on the Programme**
- 5. Commission for Gender Equality**
 - 5.1 Report from advisors on progress re:draft report**
- 6. Any other business**
- 7. Closure**

HASSEN EBRAHIM
EXECUTIVE DIRECTOR

Enquiries Ms B Levy 245 031 ext 234 or 403 2182

CONSTITUTIONAL ASSEMBLY
SUBTHEME COMMITTEE
TRANSFORMATION, MONITORING AND EVALUATION
OF
THEME COMMITTEE SIX
SPECIALISED STRUCTURES OF GOVERNMENT
29 MAY 1995

Present
Kgositsile B (Chairperson)

Fenyane SLE
Malan TJ
Mokoena LM
Mompoti R
Netshimbupfe MA
Van Wyk A
Van Zyl ID
Zitha DA

Apologies: Camerer S, Louw L, Moatshe P

Albertyn C, Levy B and Nyoka S were in attendance.

1. Opening and Welcome

Ms Kogsitsile opened the meeting at 14:00 and welcomed the members.

2. Adoption of Minutes

2.1 The minutes of 22 May 1995 were adopted.

3. Report on the Human Rights Commission

3.1 The Technical Committee presented the final report on the Human Rights Commission (see annexure 'A'). The report had been revised

as per the comments received from the Political Parties present in the Subtheme Committee (see annexures B1, B2, B3).

3.2 The committee agreed as follows:

3.2.1 That the report was a correct reflection of the deliberations of the Subtheme Committee.

3.2.2 That the report be referred for drafting.

4. Workshop on National Machinery for the Advancement of Women

4.1 The Secretariat reported that a briefing meeting would be held at 15:00, in M201 on Tuesday 30 May 1995, for Theme Committee members attending the Workshop.

4.2 Members raised concern that the meeting as scheduled would clash with the sitting of Parliament.

4.3 The committee agreed as follows:

4.3.1 That the Secretariat should endeavour to change the time scheduled for the meeting.

4.3.2 That the Secretariat inform those members who are unable to attend of their flight arrangements.

5. Workshop on Land

The committee agreed that the programme for the proposed workshop should be distributed to members at the Workshop on National Machinery on 2/3 June 1995.

6. Any other business

6.1 Deadline for final submissions

The deadlines for final submissions are as follows:

6.1.1 Commission on Gender Equality - Thursday 1 June 1995.

6.1.2 Commission on Land - Thursday 29 June 1995.

6.2 Date of next meeting

6.2.1 *The committee agreed that the next meeting would take place on Friday 9 June 1995, where the draft formulations on the Human Rights Commission would be considered.*

6.3 Report on the Commission for Gender Equality

6.3.1 *The meeting agreed that the Technical Committee should draw up a report on the basis of submissions received and the deliberations from the workshop. This report would need to be finalised at the meeting to be held on 19 June 1995, and would need to be distributed to members before the meeting.*

7. Closure

The meeting rose at 15:00.

(A)

CONSTITUTIONAL ASSEMBLY

SUBTHEME COMMITTEE 3;
THEME COMMITTEE 6

29 May 1995

FINAL REPORT : HUMAN RIGHTS COMMISSION

PART 1 - INTRODUCTION

1 Submissions received

This report summarises the issues and debates emerging from submissions received from political parties, organisations of civil society, public debates during February 1995, public hearings during April 1995 and an information seminar.

1.1 Political parties

- 1.1.1 ACDP
- 1.1.2 ANC
- 1.1.3 DP
- 1.1.4 FF
- 1.1.5 IFP (submission dated Feb. 1995)
- 1.1.6 NP

1.2 Organisations of Civil Society

- 1.2.1 Association of Law Societies (ALS)
- 1.2.2 Black Lawyers Association (BLA)
- 1.2.3 Black Sash (BS)
- 1.2.4 Centre for Human Rights, University of Pretoria (CHR/UP)
- 1.2.5 General Council of the Bar (GCB)
- 1.2.6 Human Rights Committee (HRC)
- 1.2.7 Lawyers for Human Rights (LHR)
- 1.2.8 Legal Resources Centre (LRC)
- 1.2.9 National Association of Democratic Lawyers (NADEL)
- 1.2.10 National Land Committee (NLC)

1.3 Information seminars (February 1995 by Brian Currin)

1.4 Interim reports prepared by the technical advisors:

- 1.4.1 An Introduction to the Human Rights Commission (C Albertyn)
- 1.4.2 First draft summary of submissions (R Erwee)
- 1.4.3 First draft of areas of agreement and disagreement (R Erwee)

1.4.4 Final Report of Submissions (C Albertyn and R Erwee)

1.5 Public Participation

No information has been gathered from a meeting held under the public participation programme.

2 Constitutional Principles

The Constitutional Principle applicable to this Commission is Principle II
 Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.

It can also be argued that Principle III (prohibition of racial, gender and all forms of discrimination) as well as Principle V (equality in the legal system) have a bearing on the roles and functions of this Commission.

PART II DISCUSSION OF MATERIAL PROCESSED BY THE COMMITTEE

3 General Overview

During the initial seminar programme and debates in February the Theme Committee discussed the Human Rights Commission and raised a number of critical issues with regard to the scope, role, functions, powers and structure of the Commission. These issues gave rise to a list of questions that were sent to organisations in civil society. Some of the organisations provided written submissions prior to participation in public hearings.

The main issues of debate which were tested in public hearings, were:

- 3.1 the composition and structure of the Commission
- 3.2 whether the Commission should consider both the horizontal and vertical application of human rights.
- 3.3 the powers and functions of the Commission;
- 3.4 the role of the Commission with regard to socio-economic rights; and
- 3.5 the Commission's role in relation to the other specialised structures of Government.

There is a considerable amount of agreement amongst the parties and stakeholders, although not always unanimous agreement. All disagreement is recorded below, with indication as to where there is a majority as opposed to a minority position. Much of the recorded disagreement refers to matters which should be dealt with by

legislation.

Detail that was included in the Final Report on Submissions (19 May) and was deemed to be about non-constitutional matters has been left out of this final report.

Areas of Agreement

4 Constitutionalisation of the Commission

4.1 There is support among parties (ACDP, ANC, DP, FF, IFP, NP) and stakeholders (ALS, BLA, BS, CAR, HRC, LHR, LRC, NADEL) for the constitutionalisation of a Human Rights Commission in the Constitution.

4.2 There is agreement that the constitution should deal with broad principles of the Commission, namely, establishment, composition and appointment, essential powers and functions, independence and accountability. Further details should be left to legislation. There is general support for the level of detail, or less, that is found in the interim constitution.

5 Structure and composition:

5.1 Independence: All parties and stakeholders agree that the Commission should be an independent body accountable to Parliament. It must be subject to the constitution and to the law only.

5.2 Selection and appointment of commissioners: There is general agreement that the Commissioners should be independent in so far as the Commission itself is said to be independent.

6 Jurisdiction

6.1 There is agreement that the Commission should carry out its functions in respect of all levels of government.

6.2 There is agreement that the Human Rights Commission should deal with both the vertical and horizontal application of rights (ANC, DP, IFP, FF, NP) and (BS, CHR/UP, GCB, HRC, LHR, LRC, NADEL and BLA). Both the FF and the NP state that the primary concern of the Commission should be the vertical application of rights.

7 Powers and functions

There is agreement that the Commission should have the kind of powers and functions stipulated in section 116 (1), (2) & (3) of the interim constitution, and that these sections should serve as a guide to the powers and functions that are written into the final constitutional text. (Explicit - FF, NP, ANC, LRC; implicit - DP, ALS, FF, BS, GCB, HRC, LHR). It is also agreed that the final text should sketch broad powers only and provide a broad mandate to the Commission to protect, promote, respect and fulfil human rights. (see para 13.1) This constitutional mandate could be fleshed out by legislation.

The various agreed powers are listed below. The text of the interim constitution has been added to facilitate an understanding of the issues. Often the agreement appears to be a general one - However, there were differences (a) as to whether this should be an open or closed list and (b) in the detail of these constitutional powers (see areas of disagreement para 13).

7.1 General mandate (section 116 (1)(a))

"to promote the observance of respect for and the protection of human rights"

There is general agreement on this function.

7.2 Promotion/education/awareness-raising. (section 116 (1) (a) & (b)).

"to promote the observance of respect for and the protection of human rights"

"develop an awareness of fundamental rights among all peoples of the Republic".

The ANC, DP, FF, NP (parties) and the ALS, BLA, BS, CHR (UP), HRC, NADEL and LHR (stakeholders) indicated that this should be a central function of the Commission.

7.3 Monitoring Function (section 116(2) and 116(1)(c) & (e)).

"make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and this Constitution, as well as appropriate measures for the further observance of such rights"

"request any organ of state to supply it with information on any legislative or executive measures adopted by it relating to fundamental rights"

"If the Commission is of the opinion that any proposed legislation might be contrary to Chapter 3 or to norms of international human rights law which form part of South African law or to other relevant norms of international law, it shall immediately report that fact to the relevant legislature"

Explanation: These sections provide that the Commission should monitor proposed legislation and report where such legislation is

contrary to human rights. Implicit within these sections is the power to monitor and review government policy and administrative provisions and procedures with respect to their compliance with human rights standards as well as make recommendations for change. The Commission is entitled to obtain information from any organ of state for such purposes of monitoring and recommendations

Again, there is agreement among the parties on this. (but see para. 13.5)

- 7.4 **Advisory/lobbying Function (section 116(1)(c) and 116(2)).**
"make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and this Constitution, as well as appropriate measures for the further observance of such rights"

"If the Commission is of the opinion that any proposed legislation might be contrary to Chapter 3 or to norms of international human rights law which form part of South African law or to other relevant norms of international law, it shall immediately report that fact to the relevant legislature"

There is agreement on these sections, but see para. 13.6 below for points of disagreement and further suggestions.

- 7.5 **Research Function (section 116(1)(d))**
"undertake such studies for report on or relating to fundamental rights as it considers advisable in the performance of its functions"

Stakeholders and parties appear to support a research function. The NP caution that this should be within the budget.

- 7.6 **Investigative Function: (section 116(3))**
"The Commission shall be competent to investigate on its own initiative or on receipt of a complaint, any alleged violation of fundamental rights..."

All parties agree that the Commission should investigate complaints of abuses of human rights upon receipt of an complaint and on its own initiative. However there are differences in nature and extent of investigative functions, and how these should be constitutionalised or written into legislation (see para 13.7 below).

- 7.7 **Assisting parties to redress wrongs (116(3)):**
"if (it) is of the opinion that there is substance to any complaint made to it, (the Commission) shall, in so far as it is able to do so, assist the complainant and any other person adversely affected thereby, to secure redress".

There is agreement on the power to settle complaints through mediation, negotiation and conciliation, and that it could refer matters to court. There is also agreement that the Commission should not

have adjudicative powers.

There is some disagreement on further powers in respect of redressing wrongs however, eg. whether the Commission can itself take matters to court (see below at para. 13.8).

8 Relationship with other specialised structures of government

All parties agreed that the relationship between the Public Protector, the Human Rights Commission and the Commission for Gender Equality should not be formalised in the constitution, but should be let to evolve and to develop their own methods of referral and liaison.

Areas of disagreement and need for further clarity

9 Application to social and economic rights:

The role of the Human Rights Commission in respect of all human rights, including social and economic rights, relates directly to the interpretation of Constitutional Principle II and the phrase "all universally accepted fundamental rights" is relevant here. With the exception of the FF, all parties agree that at least some social and economic rights fall within the category of "universally accepted human rights".

Moreover, with the exception of the FF, all parties agree that the Commission should consider at least some, if not all, social and economic rights. The consideration of all socio economic rights is explicitly supported by the ANC. The DP adds a qualification that it depends on whether social and economic rights are included in Chapter three, while the NP adopts three criteria to determine whether that the Commission should consider social and economic rights [they should be necessary for survival at the minimum level of human dignity, universally acceptable and practically and reasonably affordable].

The majority of the stakeholders support the Commission considering social and economic rights (BS, BLA, CHR/UP, HRC, LHR, LRC).

10 Structure and Composition:

10.1 Selection:

There is disagreement among the parties and stakeholders on the method of selecting commissioners.

10.1.1 The ACDP, FF and NP support the method of selection laid down in the interim constitution. The FF require unanimity or near-unanimity of a joint committee of both

houses of parliament.

- 10.1.2 The ANC proposes that a multi-party parliamentary committee should - through a two thirds majority - form a panel of independent persons of repute and human rights experts to solicit nominations, interview and select commissioners. The panel should make recommendations to the President who shall make the appointments

Many of stakeholders appear to support this method of

10.2 Selection criteria:

Additional criteria are suggested for inclusion in the constitution:

- 10.2.1 Independent - agreement
 10.2.2 Impartial (NP, HRC)
 10.2.3 Person of integrity (NP, CHR/UP)
 10.2.4 A commitment to human rights/track record of human rights/knowledge of or background in human rights/practical experience of human rights; (LRC, HRC, BS)

10.3 Size

The NP is the only party to state that the size,, namely 11, should be included in the constitution. The ANC is against inclusion. The DP suggests that it should not be included or left to legislation. If included, this should be done in broad terms, eg. "between 3 and 11".

11 Prioritising systemic problems:

The LRC suggested the incorporation of the following section in the constitution:

"The Commission shall be competent to investigate on its own initiative, or on the receipt of a complaint, any alleged violation of human rights; Provided that the Commission shall, within the exercise of its discretion, give priority to matters where a systematic or systemic violation of fundamental human rights is alleged."

This is supported by the ANC and opposed by the NP.

12 Accountability:

The NP and FF believe that the Commission should be accountable to Parliament generally and in terms of parliamentary control over its expenditure. The ANC requires accountability rather than "control" in respect of funds. It argues that control would interfere with independence.

13 Powers and Functions:

- 13.1 There is no agreement on whether the constitution should include an open or closed list of powers and functions of the Commission.
- 13.1.1 The majority position appears to support an open list such as that currently found in the interim constitution. Section 116 reads "The Commission shall, *in addition to any powers and functions assigned to it by law*, be competent and obliged to ".
- 13.1.2 The Freedom Front calls for closed list with no additional powers and functions assigned by law.
- 13.2 General comments on the wording in the constitution:
CHR/UP and LRC suggest that the wording is repetitive and could be streamlined. The DP similarly believes that the wording could be reduced. The NP believes that it should be fleshed out
- 13.3 General Mandate:
LRC suggests an amendment to read:
"promote the protection of, respect for and fulfilment of fundamental human rights".
This corresponds to international human rights language. NO comment from the parties has been received.
- 13.4 Educational function:
The NP and FF feel that the education function should be spelt out more clearly. The FF wants it specifically to cover the initiation of programmes aimed at education around democratic values and human rights, and public information projects. The ANC believes that the current formulation is sufficient.
- 13.5 Monitoring function:
The ability to obtain information from organs of state so that the Commission may effectively monitor state compliance with human rights norms is mentioned by BS. The CHR(UP) recommend that a way of ensuring the protection of second generation human rights, is to require the submission of reports by the different governmental departments on a regular basis to a central authority which could be the Commission. The Commission could evaluate the reports after a hearing and make recommendations on the performance of different departments. These are submitted to Parliament and are made public. This is presently provided for in 116(1)(e).

In addition, the GCB emphasises that subsection 116(2) contains a flaw in that it does not oblige the relevant legislature to react to the relevant report of the Commission. The GCB submits that this section be amended to make provision for a reference to the Constitutional Court, so that this Court may be given the power to interdict Parliament and a provincial legislator from passing any legislation

which would be contrary to the provisions of Chapter 3 of the Constitution (or to relevant norms of international law).

13.6 Advisory function (116(2)):

The FF argues that law reform should be confined to human rights law reform, as not all law is human rights law. The former is adequately dealt with by the SA Law Commission.

13.7 Investigative Function:

The ANC believes that the details of the investigative powers should be left to legislation, whereas the NP and CHR/UP believe that the Commission would require wide-ranging and extraordinary powers of search and seizure entrenched in the constitution in order to function effectively.

13.8 Assisting parties to redress wrongs:

The CHR/UP suggests that the power of mediation, conciliation and negotiation be specifically stated in the constitution.

There were differences expressed over the creation of a separate tribunal to enforce rights; the manner of referring matters to court and the question of financial assistance.

13.8.1 Most submissions were against the idea of a separate tribunal to enforce human rights claims. However, the ANC and Nadel felt that it may be necessary over time but should not be constitutionalised. The NP was also against this. The DP suggested that an enabling clause should be inserted into the constitution to provide for an enforcement function. LHR supported the idea of a tribunal.

13.8.2 Litigation: Most submissions supported the idea that the Commission could refer matters to court and engage in litigation in its own name or on behalf of an individual or group. The NP suggested that this be specifically stated in the constitution, but that this should be limited to the ability to refer cases to other parties to take to court, not for the Commission to take cases to court. However the ALS felt that the Commission should not take cases on behalf of an individual, only a group.

13.8.3 Financial Assistance: The FF argues that the provision for financial assistance is too ambitious and its limitation only to violations of human rights is not clear. The NP supported the inclusion of this in the constitution, but cautioned against its use. HRC supports financial assistance to a party to bring proceedings.

13.9 Powers in relation to International Human Rights:

The current constitutional wording appears to limit the ability of the Commission to apply international human rights norms in respect of any proposed legislation. This is contrary to several submissions about the importance of international human rights norms, including the ANC, FF, IFP, the CHR/UP and the LRC. Many submissions were silent on this point.

13.9.1 The ANC supported the application of international human rights norms to all activities. It supported the following wording suggested by the LRC:

"In undertaking its activities, the Commission shall have regard to internationally accepted human rights".

13.9.2 The CHR(UP) states that in exercising its functions the Commission should not be limited to the rights recognised in the Constitution, but aim to bring South Africa in line with those rights recognised by the rest of humanity.

13.9.3 The FF suggests that the words "which form part of South African law" (section 116-2) should apply not only to international human rights law but also to other relevant norms of international law mentioned in this subsection.

13.9.4 The NP supported the referral to international covenants in line with its three criteria.



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FREEDOM FRONT

THEME COMMITTEE 6: SUBTHEME COMMITTEE 3

HUMAN RIGHTS COMMISSION

(Replies to draft final report of submissions)

The Freedom Front comments as follows on the points calling for its comment.

1) Paragraph 7 (Powers and Functions)

The Freedom Front agrees that the Commission should have the kind of powers and functions stipulated in section 116 of the transitional Constitution. See page 2 of our original submission, in which we expressed 'general agreement' with the provisions of section 116.

2) Paragraph 11 (Application to social and economic rights)

The Freedom Front has adopted the view (expressed in one of its initial submissions to Theme Committee 4) that all social and economic rights are not 'universally accepted fundamental rights' (stress supplied), as the former are mainly supported by developing countries and not by the world community generally or universally.

3) Paragraph 12 (Structure and Composition: paragraph 12.1.1)

The Freedom Front required unanimity or near-unanimity in order to ensure that the Human Rights Commission will have widespread support and a status respected by everyone or almost everyone.

4) Paragraph 14 (Accountability)

The Freedom Front agrees with the statement that 'the Commission should be accountable to Parliament generally and in terms of

Parliamentary control over its expenditure'.

5) Paragraph 15 (Powers and Functions: paragraph 15.1)

The Freedom Front refers to and reiterates what it submitted in paragraph (i) on page 2 of its original submission. Surely, if all fundamental human rights are to be entrenched in the chapter on fundamental rights in the new Constitution, all fundamental provisions relating to the Human Rights Commission should also be set out in the Constitution. Some such provisions should not be set out in an ordinary Act of Parliament, which can be amended far more easily than the Constitution can.

6) Paragraph 15.6 (Powers and Functions: advisory function)

The Freedom Front is adamant that a 'law reform programme' for the Human Rights Commission should be confined to human rights law reform. If all law reform (reform of the entire legal system, including private law - which has nothing to do with human rights - , mercantile law, adjective law, etc.) were to be dealt with by the Human Rights Commission, it would cease to be a human rights commission. The South African Law Commission has done extremely valuable work in connection with general law reform over many years in the past and should continue to do so in future. All law is not human rights law.

7) Paragraph 15 (Powers and Functions: paragraph 15.8.3: Financial Assistance)

The Freedom Front repeats its view that

(i) adequate financial assistance of this nature will not be forthcoming; and

(ii) limiting financial assistance to human rights cases means that there will be little or no financial assistance to ordinary indigent litigants not involved in human rights litigation.

8) Paragraph 19 (Powers and Functions : Investigative Function)

The Freedom Front opposed the holding of public meetings in connection with socio-economic rights because it does not consider the input of the general public at such occasions to be the most appropriate manner of dealing with the matter: emotive public meetings may give effect to imaginary grievances or raise insoluble problems, leading to public confrontation.

NP COMMENTS ON FINAL REPORT OF SUBMISSIONS ON HUMAN RIGHTS COMMISSION

- 4.1 NP agrees to
- 4.2 Yes: Constitution should deal with principles
- 5.1 NP agrees
- 5.2 Yes with correction, line 3 to read:
"..... the Commission itself is said to be independent".
- 6. NP agrees
- 7. NP agrees (see line 4)
- 7.1 NP agrees
- 7.2 NP agrees
- 7.3 NP agrees
- 7.4 NP agrees
- 7.5 Yes (within its budget)
- 7.6 NP agrees
- 7.7 The Commission should only have powers (as in the present Constitution) to refer persons to third parties i.e. e.g. the legal profession for further legal advice and action.
- 8. NP agrees
- 9. No comment
- 10. **The NP's position is that the Bill of Rights should primarily apply vertically. However in respect of certain fundamental rights horizontal application can occur i.e. the right can operate between individual persons – but always subject to the limitations clause (i.e. Sec 33 of the Constitution) or through legislation (which must also comply with Sec 33).**
- 11. **See our view on Socio Economic rights. (Annexure attached).**

We are not opposed to Socio Economic rights – Each right must be treated on its own merits and should comply with our 3 criteria.

12. NP stands firm on our **original submission**.
 Parliament should have the say. We are the elected responsibilities.
 Members of HRC must be independent and impartial and persons of integrity.
- 12.2 NP suggests same as at the moment (11)
- 13 NP does not believe that there are any grounds for inclusion of such a clause.
 – The Truth Commission will regard any wrongs in this regard — leave it to the Government and Legislation.
- 14 NP agrees
- 15.5 Second Generation rights will be protected in the Bill of Rights.
- 15.7 NP agrees: Search & Seizure –
 Limitations Clause in the Constitution (section 33)
- 15.8 The HRC must NOT become a tribunal or Court of Law. We have an independent judiciary.
- 15.8.3 Help is necessary for indigent persons who have suffered gross violations of Human Rights – however caution is necessary – the HRC budget will be limited.
- 15.9 NP is in favour of applying international Covenants but they must meet Theme Committee 4's view that they be justiciable and enforceable. (See our Socio Economic Rights submission).

NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 4

ITEM 14(vii): OTHER SOCIO-ECONOMIC RIGHTS

1. Content of the rights

The National Party in principle accepts and supports the inclusion of socio-economic rights in the bill of rights including those socio-economic rights already contained in Chapter 3 of the Constitution, 1993.

Guided by Constitutional Principle II, Theme Committee 4 in its First Report agreed that a bill of rights must be entrenched in the new Constitution and that it shall be justiciable and enforceable. In considering other socio-economic rights this guideline must be borne in mind.

It is sometimes argued that socio-economic rights are not enforceable because they are dependent upon the State's resources. This is an over-simplification of the process by which human rights are protected within a modern State. Apart from a number of other mechanisms such as the Human Rights Commission, the Public Protector, Parliamentary control, public debates and political influence, the courts can enforce priorities in respect of socio-economic questions without usurping the functions of government.

This fact disposes of the old idea that in respect of socio-economic rights the State's only function is to provide money.

In reality the State's role in respect of socio-economic rights is not only to provide protection for people, but also to create opportunities for them. (See Eide et al The Universal Declaration of Human Rights: A commentary (1992) Pages 387-389.)

Accordingly the National Party in approaching socio-economic rights submits that each such right proposed for inclusion in the bill of rights should be carefully considered. The question posed is what criteria should be applied in order to determine whether or not such socio-economic right qualifies for inclusion?

The National Party suggests the following criteria:

- 1.1 The proposed right must be necessary for survival at a minimum level of human dignity. (Haysom: 1992 SAJHR 461)

- 1.2 The proposed right should form part of the universally accepted socio-economic rights as reflected in international human rights instruments.
- 1.3 The proposed rights should be practically and reasonably affordable by the State given its economic and financial resources. i.e. it should be capable of implementation i.e. enforceable.

Excessive detail which could lead to a manifesto of State policy in the bill of rights should be avoided. Given the fact that Theme Committee 4 has resolved in terms of Constitutional Principle II that the rights in the bill should be justiciable and enforceable, we should guard against creating the impression that the bill contains a host of "rights" which have little effect on the lives of people or that the State is not able to deliver on expectations raised. This could seriously undermine the efficiency and legitimacy of the bill of rights.

The National Party proposes that at least the following socio-economic rights should be considered for inclusion in the bill of rights. They appear to meet the criteria set out above:

- (i) The right to a minimum standard of living including basic nutrition and shelter.
- (ii) The right to the enjoyment of the highest attainable standard of physical and mental health.

2. Application of the rights

2.1 *Nature of the duty of the State*

The State will be under a duty, within the reasonable bounds of its resources, to perform so as to at least guarantee the human dignity of every person.

The extent of the State's obligations in terms of those rights will however always be interpreted in terms of the general limitations clause.

2.2 These rights should apply to common-law and customary law.

2.3 *Other Actors*

These rights should in the main apply vertically. However, circumstances may arise where these rights come into conflict with other fundamental rights.

2.4 *Bearers of the rights*

All natural persons who are citizens should be the bearers of these rights.

2.5 *Limitation of the rights*

These rights may be limited in terms of Section 33 of the Constitution 1993.

2.6 *Wording*

Great care will have to be taken with the text of socio-economic rights and this aspect will have to receive close attention at the drafting stage.

wk4

AFRICAN NATIONAL CONGRESS

Positions on Specific Issues on the Report on Work on the HUMAN RIGHTS COMMISSION

1. On the issue of whether the IFP should be reflected as having made a submission or not : YES. The IFP participated in all the TC6.3 work on the Human Rights Commission. Its verbal submission, reflected at various points in the report, were valuable.
2.
 - a. Agreement must be recorded where the majority of parties (including stakeholders and political parties) have taken a particular position.
 - b. Where most stakeholders have disagreed with political parties that fact should be reflected. However the fact of what the political parties agree on should be recorded.
 - c. The final report to the CC must record positions of political parties in the CA.
3.
 - i. A proposal from the ANC is that a parliamentary multi-party committee should - through a two-thirds majority - form a panel of independent persons of repute and human rights experts. The task of soliciting nominations, interviewing and selection of Commissioners should be carried out by the panel. The panel's recommendations should be considered by the President who should then make the appointments.
 - ii. There's no need to constitutionalise the size of the Human Rights Commission
4. On accountability to parliament generally and in terms of parliamentary control over its expenditure, the ANC prefers parliament not to control expenditure but for the commission to account for funds to parliament. Control has connotations that have the potential to interfere with the Commission's independence.
5. The ANC supports the proposed formulation from the Legal Resources Centre on systemic problems.

6. - The education function is adequately covered by section 116 (1) b. Those who want to extend it must let us consider an actual formulation. Details should go to legislation.
- Section 116 (3) covers the investigative function. Any further details should be in legislation.
- The ANC supports the formulation suggested by the Legal Resources Centre in 15.9.4 regarding internationally accepted human rights.

REPUBLIC OF SOUTH AFRICA

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 6
SPECIALISED STRUCTURES OF GOVERNMENT

LAND RIGHTS AND THE CONSTITUTION

WORKSHOP: 26-7 JUNE 1994

VENUE: GOOD HOPE CHAMBER, PARLIAMENT, CAPE TOWN

DRAFT PROGRAMME

MONDAY, 26 JUNE 1995

09:30 **Registration and Tea**

10:00 **Opening and Welcome**

Speaker : Mr Cyril Ramaphosa, Chairperson, Constitutional Assembly.

10:15 **Land poverty in South Africa: An historical account.**

Facilitator :

Speakers : Dr Funiwe Njobe, Senior Research Manager, Land and Agriculture Policy Centre and Theme Committee 6.3 Technical Committee member.

Professor Andre van der Walt, Department of Private Law, University of South Africa.

Questions and Clarifications

11:00 **Land Invasions and Instability: Suggested Solutions.**

Facilitator :

Speakers : Sbusiso Shabane, Association of Rural Organizations

Mr Peter Brown, Natal Agricultural Union

Mr Leon Reinstoff, Managing Director, Hunt, Lench and Hapburn.

Questions and Clarifications

12.00 Tea break

12:15 **The Government of National Unity's approach in undoing the damage of forced removals and dispossession of land rights: Strengths and Weaknesses.**

Facilitator :

Speakers : Mr Derek Hanekom, Minister of Land Affairs.
Mr Brendon Pearce, National Land Committee

Questions and Clarifications

13:00 Lunch

14:00 **Land rights and the Property clause.**

Facilitator :

Speakers : Professor Shadrack Gutto, Deputy Director, Centre for Applied Legal Studies, University of the Witwatersrand.

Dr Antonie Geldenhuys, Chairperson, National Peace Secretariat, Senior Partner, Hoffmeyer, Van der Merwe and Partners and Theme Committee 6.3 Technical Committee member.

Ms Aninka Classens, Senior Researcher, Centre for Applied Legal Studies and Theme Committee 6.3 Technical Committee member.

Questions and Clarifications

15:00 Open discussion

16:15 **Closing remarks**

TUESDAY, 27 JUNE 1995

LAND RIGHTS: INTERNATIONAL PERSPECTIVES

09:00 The Australian, Canadian and New Zealand experiences

Facilitator :

Speakers : Donna Greshner, Law Lecturer, University of Albertos,
Canada.

Justice Eddie Durie, Chief Judge of the Maori Land Court,
Wellington, New Zealand.

Questions and Clarifications

10:15 The African, Chilean and Indian experiences

Facilitator :

Speakers : Mr Ben Hlatwayo, Department of Public Law, University of
Zimbabwe.

Prof Issa Shivja, Professor of Law, University of Warwick,
United Kingdom.

Mr Joe Tome, University of Santiago, Wisconsin.

Questions and Clarifications

11h30 Open discussion

12:30 Review and the way forward

13:15 Vote of thanks

Speaker : Mr Leon Wessels, Deputy Chairperson, Constitutional
Assembly.