

IFP PROPOSAL:

FUNDAMENTAL RIGHTS

DRAFT DISCUSSION DOCUMENT

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 which, matters covered by or related to the scope of application of. CONSTITUTIONAL PRINCIPLE II, our Theme Committee has the pleasure of submitting the following report.

All parties made submissions in relation to matters covered by the scope of application Constitutional Principle I I outlining their respective approaches for the formulation of a Bill of Rights.

Mindfully of the instruction of the Constitutional Committee that (i) our Report shall contain details of contentious issues and details of non-contentious issues brought forward in all party's submissions, and that (ii) our Report shall not contain minority reports or attachments, and that (iii) this Theme Committee is not a negotiation forum, we have drafted our Report to be as comprehensive as possible of party's submissions and discussions in the Theme Committee

The parties agreed that by deliberating on and debating the nature, scope and interpretation of Constitutional Principle II of Schedule 4 they would be in a better position to determine their approach to subsequent stages of the Recommended Work Programme. following specific phrases from Principle I I were discussed:

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

Contentious issue

The ANC states that rights referred to in Constitutional Principle II are rights of born person(s). human beings or natural persons. According to the ANC the Bill of Rights refer to rights

enjoyed by human beings and even Chapter 3 refers primarily to rights of persons. The terms 'everyone' therefore excludes juristic person(s).

The DP and NP noted with interest the perspective of the ANC and reserved their position as to whether everyone includes juristic persons.

ACDP states that unborn persons should be included under term 'everyone'.

details of IFP's submission on this subject are reported as follows:

APPLICATION OF THE BILL OF RIGHTS TO EVERYONE.

1. Constitutional Principle II indicates that everyone shall enjoy universally accepted fundamental rights, freedom and civil liberties. From an interpretative viewpoint 'everyone, may or may not refer to juristic person and/or non-South African persons within the Republic.

2. In of applicable international declarations and covenants the protection of fundamental freedom and liberties must be ensured both to respect to citizens as well as foreigners while they are within the territory of the Republic. However this applies only with respect to first generation human rights such as freedoms of speech and religion and from from unwarranted arrest and search and seizure. et cetera. Usually the entitlement to second generation human rights, such as the rights to education, work, and medical assistance, is limited to citizens or to residents only. The IFP believes that these second generation rights should be limited only to citizens, which leaves open the possibility that the competent legislature may extend them also to residents by means of applicable laws.

3. Preliminarily it must be said that some of the human rights are inherently not applicable to juristic persons, as it might be the case of the right to health. However it must be considered that in the final analysis juristic persons are in reality an associative phenomenon made of physical persons. If the right to privacy to a juristic person may be violated, it is the correspondence of individuals which may be opened and their telephone conversations which may be tapped. Similarly were the right against unwarranted search and seizure not to apply to juristic persons, government could "search and seize properties of a corporation, even if from a substantive viewpoint such properties belong to the individuals who form such corporation as much as that property which those individuals have in their respective houses.

4 It must also be considered that juristic persons have an essential role both in the economic system and the enjoyment of basic human rights and freedom, such as is the case for commercial cooperations and private associations. Therefore, the applicability of the bill of rights to protect juristic person will also foster economic development and the protection of pluralism in society by of securing the position of individuals within the social economic, cultural and political formation in which they develop their activities and personal life experience.

5. Usually in modern constitutions the need does not arise to protect associative phenomena which are not established as juristic Persons, such as unstructured groups. In fact, this phenomena are usually sufficiently protected by the extension of human right protection which is recognised to individuals who comprise it. To the extent that human rights protection is !specifically recognised to juristic persons,the need does not arise to provide similar recognition for unstructured associative phenomena.

6. In conclusion, human rights shall be applied also to juristic persons to the extent that the nature of the human right concerned so allows. Any relevant decision in this respect should be left to the development of constitutional jurisprudence by the Constitutional Court. so as to accommodate the fact that today it is necessary to protect juristic persons from human right violation which a few years ago were felt not to interfere with the scope of actions of juristic person.

[16 The IFP made its submission under protest, for it claimed that 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.]

Vertical land horizontal application of rights,

Contentious Issue

All parties, except the NP agreed with the principle of rights being vertically and horizontally applied and protected. NP supported the vertical approach but did not oppose the horizontal application, although it registered the concern about the disruption of the Private Law System, which the EFP deemed to be unfounded.

FF and DP said horizontal application should be approached cautiously.

The details of the IFP submission in this respects are as follows:

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 ~ be implemented exclusively by provincial legislation and executive action with respect to the matters of provincial compete= (i.e.: employment/labor, health, education, welfare, environment et cetera).
The national government might have the power to coordinate this implementing role of Provinces. jurisprudence of the Constitutional Court will also give a uniform interpretation of die applicable constitutional parameters.

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

“all universally accepted fundamental rights, freedoms and civil liberties” (which rights etc., qualify as universally accepted fundamental rights)

Non-Contentious issues

- 1) Mut the universal declaration on human rights and other relevant Charters, Conventions and Covenants contain fundamental rights, freedoms and civil liberties.
- 2) That parties will make submissions as to what they regard as universally accepted fundamental rights.

3) ANC and other parties agreed that the United Nations Charter and 2 covenants on Human Rights, Civil Rights, Social and Political Rights can be used as an important reference for identifying universally accepted fundamental rights.

The IFP listed specific human rights sources which the IFP believes are covered by the language of Constitutional Principle II, and stressed the notion of residual powers left in a people as a part of human rights protection. Moreover the IFP insisted that the list of human rights should be an open one. The details of the IFP positions in this regard are as follows:

THE BILL OF RIGHTS IN THE CONSTITUTION

I 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 recognise, protect and promote all internationally recognised 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 recognised human rights to be regarded as fundamental human rights.

ALL Universally ACCEPTED FUNDAMENTAL RIGHTS, FREEDOM AND LIBERTIES

I. All the rights, freedom and liberties listed in the following documents should be considered as universally accepted and recognized.

- a. UN Universal Declaration of Human Rights,
- b. UN First International Covenant on Human Rights,
- c. UN Second International Covenant on Human Rights,
- d. UN Third International Covenant on Human Rights,
- e. UN draft Fourth International Covenant on Human Rights,
- f. Africa's Banjul Charter on Peoples' and Human Rights,
- g. European Declaration for the Safeguard of Human Rights.

2. International Conventions related to specialized subject matters, such as those related to Children's rights, Labour Rights and International Labour Organization-sponsored Conventions, and World Health Organization-sponsored conventions.

3. In addition human rights usually recognised and protected in modern constitution should also be considered as following within the scope of application of Constitutional Principle II. Since human rights are a constitutional reality in continuous progress and development special attention shall be given to the most recent constitutions. It should be also noted that within a federal system the most advanced human right protection is usually embodied in the constitution of the members states rather than in the national one. It is suggested that the human rights recognized and protected in the following constitution be considered as falling within the scope of application of Constitutional Principle II.

- a. Spanish Constitution of 1978,
- b. The Nigerian Constitution of 1989.
- c. The Constitution of the State of Alaska of 1988,
- d. The Constitution of the State of Hawaii as amended in 1979.
- e. The Constitution of Liberia 1985.

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

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 the constitution and in their essential content shall not be modified by virtue of constitutional amendments.

RESIDUAL RIGHTS OF THE PEOPLE

1. The Constitution shall entrench the principle of freedom as the 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 all individuals have the 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 and 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.

Contentious Issue

All parties, accept the NP agree that universally accepted fundamental rights can be identified without expert advice. The NP is of the opinion that expert opinion must first be obtained to interpret what can be regarded as universally accepted rights. The ANC position and the broad view was that expert opinion was not a prerequisite in identifying such rights. No party is averse to hearing expert opinion but such opinion is not a prerequisite to identifying rights.

Suggestion: That the parties make their submissions as to which rights are universally accepted fundamental rights and the matter be debated/discussed upon receiving these submissions.

In its submission the IFP listed the following rights to be debated in following stages of the work program of this Committee and objected to the list proposed by the Directorate claiming

All constitutional text submitted by the IFP 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.

that the proposed aggregation, nomenclature and definition of such rights may influence the debate.

LIST OF HUMAN RIGHTS

1. The Constitution shall list, entrench and protect at least the following rights 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 cue
 - 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 society and self determination
Group rights
Autonomy of social and cultural formations
Pre-eminence of civil society
Preservation of traditional communities & role of traditional leaders

In addition the IFP urged this Committee to agree that the Constitution shall contain not only a Bill of Rights but also a Bill of Duties and Obligations. The details of the IFP submission in this respect are as follows:

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.

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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, the 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 the individual rights and liberties are accompanied by obligations of social solidarity to other, determined to guarantee the rights of all people are protected both in individuals and members of social and cultural formations, do now ordain and establish the 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 recognise 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 the rights, opportunities and protection under the law, and that all individuals have corresponding obligation., to the Federal State and a general obligation of social responsibility to the people of the Federal State. 2.- 58. f... I

OBLIGATIONS AND DUTIES

59. Allegiance to the Constitution

All citizens 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 must 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 their care.

"entrenched and justiciable provisions

Non-contentious issues

- 1) All rights have to be entrenched and enforced.
- 2) ANC suggests additional institutions of enforcement eg. Human Rights Commission.
- 3) NP suggests strong independent judiciary.
- 4) FF suggests that entrenched rights could be expanded or developed with evolution of time.

The details of the IFP position are as follows:

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 be determined by the 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 recognising 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 fade* 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 amendments of any ".

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

Contentious Issues

None

due consideration to inter alia the fundamental rights contained in Chapter 3.19

Non-contentious Issues

- 1) "Inter alia in phrase "suggests among other things and leaves the door open to other sources or derivatives of rights eg Charters etc.
- 2) Due consideration must be given to rights in Chapter 3 of Interim constitution.
- 3) Rights in Chapter 3 not exhaustive nor are parties restricted to rights in Chapter 3.

Contentious Issue

ACDP shall challenge any right inconsistent with Christian perspective of its constituency.

Suggestion That such issue be raised when dealing with substantive rights eg. Equality

In discussing the application and/or of other Constitutional Principle the IFP made *inter alia* following observations:

I...I

5. Constitutional Principles XI and XII relate to an essential aspect to our Bill of Rights which *inter alia* will need to entrench and protect pluralism, recognising the constituting autonomy of social and cultural formation with respect to all interest which such formations are able to regulate by themselves, as we indicated in the previous submission of the IFP to this Theme Committee.

7. Finally Constitutional Principle XXXIV relates to the issue of self-determination and will characterise the identification and definition of a large number of rights being analyzed by this Theme Committee. Specifically, this Constitutional Principle supports the need to develop a Bill of Rights which also entrenches the constitutional autonomy of social, cultural and economic formations with respect to all matters for which a government does not have a compelling public interest to justify its regulatory or otherwise interfering legislative or administrative action.