NATIONAL PARTY SUBMISSION

THEME COMMITTEE 1 BLOCK 2

1. EQUALITY

The concept of "equality', should not be viewed in isolation but should be seen in its interrelatedness to the concepts of "liberty" (or "freedom") and "human dignity".

The interrelatedness between dignity, equality and freedom is perhaps best illustrated by saying that the dignity of mankind is the point of reference for the ideas of equality and freedom; in its basic substance it allows the ideas of equality and freedom to be attributed to the guarantee of human dignity, (Cf Wiirtenberger T "Equality" in Karpen (ed) The Constitution of the Federal Republic of Germany at 68).

The concepts of "freedom" and "equality', are also central to the value system which underpins the current Chapter 3. That fact becomes evident when one looks at the wording of Section 35(1). The two concepts also appear in s. 33(1)(a)(ii) and in s. 26(2). It can thus be argued that the concept of "an open and democratic society based on freedom and equality (s. 35(1)) establishes the basic 2 values on which Chapter 3 is premised. Hence, the two concepts go hand in hand, qualifying and balancing one another. The one cannot be given content without regard being had to the other.

This basic balance between the two concepts should be retained as the around norm of the new bill of rights and the Constitution as a whole. In the sense as set out, the concepts of "equality" and

"freedom" entail more than each being a fundamental right; each represents an encompassing value system.

The idea of eauality includes two seemingly opposite viewpoints: on the one hand the formal equal treatment, and on the other hand the active equalization of unequal fact and circumstances. Equal voting rights, equality before the law and access to the law, and access to public institutions can be regarded as examples of formal equality.

on the other hand, active equalization attempts to even out existing inequalities e.g. inequalities at economic, social or educational levels. Through unequal treatment, attempts are made to attain a situation of substantive eguality. on the other hand, an overwhelmingly strong dynamism of the equality principle contradicts the idea of freedom, just as much as an exclusively freedom-orientated policy gives the opportunity for the more skilled and more advantaged to achieve prosperity at the cost of the disadvantaged.

The balanced view entails that equality and freedom are mutually related and dependent upon each other.

Hence, in order to attain substantive equality, affirmative action programmes are necessary as they embody active equalization. However, as the process of active equalization is based on the premise of a temporary state of unequal treatment in order to attain the set objectives in fact and circumstance, active equalization can never be a limitless exercise: in principle, it must come to an end when the objectives had been attained. Therefore, any affirmative action clause should include a qualification to that effect.

The encompassing prohibitions concerning discrimination as are contained in s. 8(2) should be broadly retained.

Questions pertaining to the effect that the principle of equality may have an customary law, are intricate and complex. In principle, equality should prevail over discriminatory practices. However, it,should be left to the individual in each instance to seek relief from the courts. Due to a conglomerate of factors, the issue should be treated with circumspection in order not to unduly disturb traditional patterns of authority.

2. ELIMINATION OF VERTICAL AND HORIZONTAL DISCRIMINATION

The primary mechanism through which discrimination, horizontal and vertical, should be addressed, is the bill of rights.

> There can be no doubt that bills of rights had initially been intended to only apply vertically. There seems to be unanimity of opinion amongst South African commentators that the current Chapter 3 although primarily designed to apply vertically, also finds definite and substantive horizontal application.

Apart from the fact that bills of rights by definition are devised to primarily apply vertically, the necessity for their horizontal application has been given recognition in most jurisdictions. Horizontal application, however, never applies in an unqualified way. For example, in the USA, horizontal application is mostly tied up with the doctrine of "state action'#; "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment" However, the US Supreme Court, in order to strike down discriminatory practices in private-law relations, at times bent backwards to construct "state action". Also, the Civil Rights Acts were utilized to -tamp out discriminatory practices which fall out of reach of the Bill of Rights itself.

The current s. 35(3) of the interim Constitution shows some remarkable similarities with the method followed in Germany. In that country, the Constitutional Court has applied the principles enshrined in the catalogue of fundamental rights to non-public law spheres of the law in a more disciplined and consistent manner than its American counterpart. The Court thus identified a certain objective order of values" that derives from the specific provisions of the Basic Law and which serves as a guide in the construction of all branches of the law.' In this way, the guiding principles of the Basic Law find application in private law, particularly to the extent that such application will result in a "betterment" of private law. Similarly, our s. 35(3) provides: "In the interpretation of <u>any law</u> (1) and the <u>application</u> (2) and <u>development</u> (3) of the <u>common law</u> (4) and <u>customary law</u> (5), a court shall (6) have due regard to the <u>spirit, purport and objects</u> (7) of this chapter" Thus a court is obliged (shall (6)) when interpreting <u>any law</u> (1) (viz. including all statutory law) and the

development (3) (i.e. betterment / improvement) of the common law (4) (i.e. all private law and non-state law) and customary law (5) (including indigenous law), to apply the spirit, purport and objects (7) (i.e. the values underpinning) Chapter 3.

Any remaining possibility of "private discrimination" viz discrimination on the horizontal level is moreover, eliminated **by** s. 33(4).

3. **ONE,** SOVEREIGN STATE

The concept of 'lone, sovereign state" primarily distinguishes the nature of the state model from a model such as the confederalist model. Whereas the latter concept implies that "member states" are autonomous except for specifically defined areas where they act as one, the concept of 'lone, sovereign state" basically calls for loyalty to that state in a primary sense.

Given that basic point of departure it does not, however, follow that the internal structuring of the 'lone sovereign state" cannot make provision for different levels of government, each based on original powers. Concepts such as a "unitary state" or a "federal state" relate to the method in which a particular state is internally structured. Hence, the concepts of 'lone sovereign state"

and a "unitary state,, bear different meanings : the latter relates to the internal structure of the state whereas the former relates to the overall model of the state. The two concepts are, accordingly, not synonymous and should not be equated to one another.

In the sense as set out above, the concept of provincial autonomy should be evaluated vis-a-vis the constitutional position of provinces within one, sovereign state. The position of provinces will basically be determined by the internal structure of the single, sovereign state. For example should the single, sovereign state have the internal structu provinces will only have delegated (as apposed to original) powers. Should the single sovereign state have a fede structure, provinces will have original powers (i.e. powers which are defined in the Constitution).
Hence, the extent of provincial autonomy is determined by the Constitution. On the basis that there shall be a

single, sovereign state, provinces could thus never claim a degree of autonomy which will usurp the role and functio by the Constitution and which would moreover imply that a province could function as an entity not falling withi authority of the Constitution.

Constitutional Principle XVIII (1) clearly provides that provinces shall have original powers ("shall be defined in the Co also Constitutional Principle XVIII (27))- The powers and functions of the provinces thus defined shall determine the ac provincial autonomy.

> Within the parameters thus set, it is the position of the National Party that the federal characteristics enshrined in the current Constitution, shall accordingly be retained and strengthened. The provincial autonomy thus attained will in no way infringe the character of the one, sovereign state.

MINORITY PARTICIPATION AND SELF-DETERMINATION

> The envisaged democracy shall be a Participatory democracy based on the principle of inclusiveness. The latter principle is reflected by elements which are encapsulated by the letter and spirit of the Constitutional Principles and which inter alia include: proportional representation; a multi-party system and the protection of the role of minority parties; the promotion of conditions for the encouragement of the diversity of language and culture; and the protection of the organs of civil society.
>
> Hence, government (i.e. legislature and executive) shall be structured in a way that gives full effect to the principle of inclusiveness and accordingly broadly reflects all interest groups at all levels of government.

In order to realise these objectives, it may be necessary to draw a distinction between political representation on the one hand, and the need for non-party political representation on the other

hand. Party political interests will be served by means of participation in the formal structures of government (i.e. legislative and executive) on a proportional basis. Non-party political interests, on the other hand, will obviously be served through the usual means of the structures of civil society. However, given the diversity of, in particular, language and culture, mechanisms should be devised to give additional promotion to those interests through the means of formalised statutory bodies which will receive financial assistance from the state. Such a step would be in accordance with the letter and spirit of Constitutional Principle XI, and may also, arguably, comply with the "any other recognised way', envisaged in Constitutional Principle xxxiv (1).