CONSTITUTIONAL ASSEMBLY THEME COMMITTEE 4

FUNDAMENTAL RIGHTS

SUBMISSION BY THE DEMOCRATIC PARTY ON BLOCK 3: RIGHT TO EQUALITY

3(a) CONTENT OF THE RIGHT

For democracy to flourish, equality is fundamental. Racial discrimination predominated in the South African social order in the past. The Bill of Rights needs to set its face against discrimination.

What is discrimination? A successful society must distinguish between the meritorious and unmeritorious, the just and the unjust, the productive and unproductive. When is differentiation permissible and when not? The Bill of Rights should provide the answer 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 this is that the court that enforces the Bill is permitted to condemn as discrimination, an arbitrary exercise of power thought to fall outside the 'best' categories of differentiation, such as racism or sexism, e.g. a court can outlaw a particular differentiation made on the ground of pregnancy. If differentiation on the ground of pregnancy is unjustified it is discrimination and therefore unconstitutional. The court need not go so far as to 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 action programmes to undo existing inequalities.

However unpalatable it may be, we have to acknowledge too that if such programmes are to benefit the legitimate beneficiaries, they will have to use the same criteria for differentiation as those which brought about the inequality. The clause which authorises such programmes must provide that such programmes are reasonable and rational. A programme would not be rational if 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 also recognise that although differentiation on any of the grounds listed in the equality clause, unless it is part of a reasonably and narrowly focused affirmative programme intended to undo inequality, is usually abhorrent, sometimes it may be desirable, e.g. 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 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 Idnd outlined above. 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) than others (e.g. religion).

Some favour a constitution which seeks to outlaw discrimination 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 it (unless the constitution forbids it to legislate, in which case the state is responsible because of the constitution).

Despite 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, however arbitrary, without any liability to justify them, e.g. the choice of whom to invite into one's home, whom to favour with one's charity, whom to marry - these fall into that category.

Rather than confining equality to the area in which the state is responsible it is 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.

This recognition could invite racists and other discriminators to take shelter therein; many will try improperly to expand the need to protect privacy to further discriminatory ends: immunity invites abuse. To guard against this danger the Bill of

Rights should confine immunity to decisions made in the exercise of private choice necessary to preserve personal autonomy.

There are perhaps some in South Africa anxious to retain the privileges bestowed by apartheid. Many hope to remove activities hitherto in the public domain, to the private, expecting that those activities will be insulated from the commitment of the new social order to root out discrimination.

Neither the constitution nor the Bill of Rights must be party to those efforts. 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, changes with time. At one stage it was commonly accepted that the terms of private employment were a matter for employer and employee, and the state should not intrude. Today, legal regulation of private employment is pervasive and commonplace. And it was generally accepted that when social clubs fell into the sphere of privacy and chose to exclude Jews, blacks or women, that was their prerogative. There is now a growing body of opinion that clubs often supply public goods such as business opportunities, to which all should enjoy equal access.

The boundaries of privacy are constantly shifting and the constitution or the Bill of Rights cannot finally define them. The court entrusted with interpreting the Bill of Rights will have to define and redefine the boundaries of privacy as society's conception of that ideas 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, e.g. a recruitment policy requiring all mathematics teachers to be six feet tall. Such a policy, although it makes no reference to race or sex, would favour men over women and some races over others. Since the policy would not be justified in 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.

The Bill of Rights must demand of government, rational, honest justifications for policy decisions providing entitlements such as equality or affirmative action. Rationality and reasonableness should be the standards of justification provided for in the Bill of Rights.

3(b) JURISTIC PERSONS

The Democratic Party reiterates submissions made under Block 1 and 2 on the question of juristic persons, and the horizontal application of the Bill of Rights. With specific reference to applying the equality clause to juristic persons and individuals,

the Democratic Party believes the following sub-clause should be added to the general equality (and prohibition of discrimination) clause:

> "Differentiation (discrimination) shall be considered justified when it is the result of a decision made in the exercise of the type of private choice which preserves personal autonomy".
> (For explanation see P3-4 hereof)

3(c) PROHIBITED GROUNDS FOR DISCRIMINATION - (Section 8 of the Interim Constitution)

The Democratic Party supports the provisions of these sections, subject to the reservations it expresses in respect of S. 8(3) which will be elaborated under the section on affirmative action, and further subject to the amendment detailed above under 3(b) (Juristic Persons).

The purpose of S.8(2) would appear to ensure that there should be no differentiated treatment on the grounds or elements which are vital to the nature of human identity. The words 'without derogating from the generality of this provision' would allow a court to take account of a range of elements of the human personality which have hitherto not been considered in the express words. Thus, groups affected by poverty, unemployment and lack of access to power, can be considered under S. 8(2).

Among the designated criteria are gender and sex. The inclusion of gender implies that the constitution acknowledges that significant differences between men and women in respect of skills and social roles cannot be explained by biological differences, but must be located in social and political origins. The inclusion of gender as a designated prohibition allows a court to examine those social forces and power relationships which promote discrimination between men and women.

The concept of unfair discrimination doubtless represents an attempt to distinguish between a process of benign and malign distinction. It presupposes that discrimination itself can be freed from a pejorative content. To an extent the policy

of affirmative action could be construed to be a form of positive treatment which would therefore fall within the concept of fair discrimination.

The Democratic Party believes discrimination means unjustified differentiation. Differentiation on the ground of race, ethnic origin, colour, gender, sexual orientation, age, disability, religion, creed or conscience, shall be presumed unjustified unless it is part of a rational programme intended to remedy substantial inequality.

Differentiation shall be justified when it is the result of a decision made in the exercise of the type of private choice which preserves personal autonomy.

In its General Comment 18, the Human Rights Committee established under the International Covenant on Civil and Political Rights noted: "The term 'discrimination' is used in the Covenant and should be understood to imply any distinction, exclusion, restriction or reference which is based on any ground such as race, colour sex, language, religion, political or other opinion, national or social origin, property, birth or other status, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons and on equal footing of all rights and freedoms. Not every differentiation or treatment will constitute discrimination. If the criteria for such differentiation are reasonable and objective and if their aim is to achieve a purpose which is legitimate under the Covenant." General comment 18(37) (UN. N York 1989) para.7. The Democratic Party supports this reasoning.

Article 14 of the European Convention on Human Rights provides: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, religion, political or other opinion, national minority, property, birth or other status'.

In general, the European Court of Human Rights has found that a violation of Article 14 arises if there is differential treatment in circumstances where there is no objective and reasonable justification, or in the event that there is such justification, proportionality is lacking between the aims sought and the means employed.

In the US, the justification for differentiation has been fundamental to anti-discrimination jurisprudence. Classifications based on racial criteria are considered suspect and the doctrine of strict scrutiny has been applied to them. The classification must be shown to be a necessary means to the promotion of a 'compelling and overriding' state interest.

3(d) AFFIRMATIVE ACTION

The Democratic Party agrees that the Bill of Rights should have a clause protecting affirmative action programmes from challenge under the Equality Clause. This is because we believe that, properly drafted and subject to certain key limitations, affirmative action need not conflict with the notion of equality . The Democratic Party believes that affirmative action must aspire to deliver equality by undoing inequality. This requires that affirmative action programmes should be explicit authorised by the constitution. Section 8(3) of the interim constitution, insulates from challenge "measures aimed at the adequate protection and advancement of persons disadvantaged by discrimination in order to enable full and equal enjoyment of all rights and freedoms. "

The Democratic Party believes that clause 8(3) is deficiently drafted. Its most conspicuous flaw is its reliance on the vacuous notion of "adequate protection and advancement. " The clearest thing about "adequacy", is its inadequacy as a criterion for decision-making.

Less conspicuous, but more important, is the inadequacy of the word "aimed" which makes the validity of an affirmative action programme depend solely on the intentions of its designers to the exclusion of its effects.

Many such programmes, because they are poorly focused or misconceived or badly executed, can do nothing but squander resources or destroy productivity or aggravate inequality or comprehensively apply a non-authoritarianism in the form of so-called "reverse discrimination" programmes.

To avoid these consequences, an affirmative action clause has to empower the court that applies it, to review not only the aims of the programme, but also the means by which it seeks to realise those aims. It has to empower the court to ask whether the programme is in fact one reasonably likely to achieve its goal of undoing disadvantage.

To avoid the legislature imposing group based reverse discrimination measures which do not necessarily advantage excluded individuals from previously disadvantaged groups, the Democratic Party proposes that S. 8(3) of the interim constitution be amended by the interposition of the word 'reasonable' in the following context:-

3(a) This section shall not preclude reasonable measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, or to enable them full and equal enjoyment of all rights and freedoms.

"Reasonableness" as a standard of justification will allow the courts to enquire into - and ensure - that affirmative action programmes do not become limitless, discriminatory or oppressive.

3(e) CUSTOMARY LAW, INCLUDING THE RULES AND CUSTOMS OF RELIGIOUS AND TRADITIONAL COMMUNITIES

The Democratic Party reserves its rights to make a detailed submission on this provision at the appropriate stage when this matter is to be debated.