

## DEMOCRATIC PARTY SUBMISSION: BLOCK 2

### THEME COMMITTEE 4

#### 1. INTRODUCTION

It is unclear to the Democratic Party the precise meaning of the phrase "the nature of Bill of Rights and Application". However insofar as we understand the terminology employed we wish to make a preliminary submission as follows:

#### 2. NATURE OF THE BILL OF RIGHTS

2.1 Potentially this covers the spectrum of so-called first, second and third generation rights. Since the question of the second and third generation (socioeconomic) rights and their place, meaning and content in a future Bill of Rights is to be dealt with separately by the Theme Committee we do not intend to comment specifically until this topic is debated thoroughly at the relevant time.

The other implication of the nature of the Bill of Rights is the question of which rights are universally accepted as being "fundamental"? In our view the interim constitution adequately answers this question by insisting that the entire constitution adequately answers this question by insisting that the entire constitution, especially chapter 3, be interpreted so as to promote the concept of "liberty and equality". In our view those rights which promote liberty and equality are the universal norms.

2.2 Little purpose will be served by doing a comparative survey of the constitutions of the world in order to give meaning and content to this principle. Certainly, in respect of the

first category of rights, an irreducible core already exists in the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993). To a large extent these are not even discretionary since the Constitutional Assembly is bound, in terms of, especially constitutional principles 1 1, V, VIII, IX, XI, XII to enshrine this irreducible core in the final constitution.

2.3 Without necessarily agreeing with the exact wording and specific content of each and every right contained in chapter 3 of the constitution we indicate below that the following sections of chapter 3 would certainly form part of the irreducible core of rights which should enjoy universal application:

- 8: Commitment to Equality;
- 9: Commitment to Life;
- 10: Right to dignity;
- 11: Freedom and security of person, including right against detention without trial;
- 12: Right against servitude;
- 13: Right to privacy;
- 14: Freedom of belief (including religion);
- 15: Freedom of expression;
- 16: Right of free movement;
- 17: Right of voluntary association;
- 18: Right of peaceful assembly;
- 19: Right of choice of residence;
- 20: Rights of citizenship;
- 21: Right of franchise and political activity;

- 22: Right of access to independent courts/tribunals;
- 23: Right of access to information;
- 24: Right to fairness in respect of administrative acts;
- 25: Right to criminal justice i.e. due process;
- 26: Right to free economic activity;
- 28: Right to property;
- 31: Right to language and culture.

2.4 There certainly can be argument about the inclusion of further rights, but we believe that the aforementioned irreducible core of universally accepted norms are the minimum requirement consistent with a free society enjoying a culture of human rights.

### 3. APPLICATION OF BILL OF RIGHTS

3.1 The meaning and content of the application of Bill of Rights must, in the final analysis, answer the question "who is bound by the Bill of Rights"? Obviously the state, in all its emanations and organs is bound by the Bill of Rights. To the extent that this concept is established and codified by section 7(1) of the constitution, the Democratic Party agrees with it.

3.2 A problematic issue arises in respect of the judiciary itself. Is the judiciary understood to form part of the "state at all levels of government"? Section 7(1) of the Constitution suggests it does not, for the simple reason that it is excluded from the provisions of that section. However, section 35(3), dealing with the interpretation of the Bill of Rights, states -

"in the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this chapter".

This suggests that, by necessary implication via the common law, the judiciary is bound by the Bill of Rights.

3.3 The entire question of application cannot be determined until the issue of horizontality and verticality is resolved. The essence of the common law deals with private relations in society. To the extent that this has already been debated under block 1 it is worth restating the Democratic Party proposition is that there is no reason why, subject to the proper safeguards, the Bill of Rights should not apply horizontally. The private law should be made congruent to laws applying to state action. One may illustrate this by use of two simple examples:-

0 1. The University can be construed as forming part of the state.

Its actions and disciplinary procedures will be bound therefore by the due process provisions of the Bill of Rights. But if we contrast this position against that of a major corporation, vastly more powerful than a university administration, we could find that the private corporation is not bound to conduct its disciplinary or ordinary procedures in accordance with the Bill of Rights. This anomaly is obviously unacceptable.

- 0 ii. When it comes to a defamation action by, for example, a local municipal councillor, who is a member of the organs of state, he will be in a completely different position because of the vertical application of the Bill of Rights than, for example, a company director involved in a similar defamation action who is not bound by the Bill of Rights because it has no horizontal application. This anomaly, too, cannot be justified.

3.4 It is the contention of the Democratic Party that if we are at all concerned with the principles of justification and the use of power, which we should be, then the Bill of Rights should not be a party to drawing an arbitrary line in the sand between state power and social power. Generally speaking, children's' rights, labour rights and rights to free speech will not really have much meaning or impact if they are solely confined to conferring obligations on the state. Obviously they should have wider implication. However, we reiterate our view, contained in the report on block 1, that such application has to be very carefully considered and an audit will have to be undertaken of all the provisions of the Bill of Rights to ensure that its horizontal applicability does not lead to gross injustices, impractical anomalies, or absurd consequences. We believe such an audit is both practical and necessary.

#### 4. THE BILL OF RIGHTS AND THE DUTIES AND OBLIGATIONS OF THE STATE

4.2 We understand this topic to be largely redundant because insofar as we are dealing with the vertical application of the Bill of Rights to a core of universally accepted fundamental freedoms it is trite to observe that such rights are essentially defensive or negative in character and form. They constrain the state from doing certain things i.e. the state shall not do X or Y.

- 4.3 The crucial point here, however, concerns second and third generation rights which are positive in nature and oblige the state to take actions and incur expenditure in the interests of the holder of the right. The difficulty here is that this leads to confusion in the role of the judiciary with that of the legislature.

There are certain more subtle arguments which also require consideration. However, we believe that this is more properly discussed, for the reasons stated above, when the Theme Committee and the Constitutional Assembly considers the nature, place and purpose of so-called second and third generation rights.

## 5. THE BILL OF RIGHTS AND THE DUTIES AND OBLIGATIONS OF THE CITIZEN

- 5.1 The Democratic Party fully subscribes to the view that the citizen has rights and obligations. However, it is the purpose, primarily, of statute law to regulate the obligations of citizens to the state and to his or her fellow citizens. It is quite clear that obligations of citizens towards each other will only come into play when the Constitutional Assembly has resolved the question of the horizontal application of this bill. We need comment no further on this issue beyond that which is contained in the foregoing paragraphs and in our previous submissions to the Constitutional Theme Committee.

- 5.2 However, the immediate issue to be disposed of is whether the Bill of Rights should create citizen's obligations towards the state. In our view this is pre-eminently a question to be disposed of by legislation on a wide variety of fields. The core fundamental of a democracy remains the rights which citizens obtain from the state and not the other way around. What

obligations are we to cast on the individual beyond the presumption that he or she has to obey the law and the constitution itself? On this there should be no debate whatsoever and it is up to the legislature and the executive to ensure compliance therewith. However, if it is proposed to cast obligations on citizens, in rigid terms, in a Bill of Rights then the Democratic Party believes we are creating a significant problem. If the bill attempts to enumerate a set of rights against the citizen, held by the state, then we in fact will limit essentially the citizen's obligation to those which are codified in the Bill of Rights. In fact the state has almost limitless theoretical rights against the citizen constrained essentially by two factors:-

- (i) Regular Elections; and
- (ii) The Constitution itself, especially the Bill of Rights.

For these reasons we do not believe this issue requires further consideration.

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16.02.95