

THEME COMMITTEE 1 : EQUALITY BEFORE THE LAW:

GENERAL PRINCIPLES

- 1 . The Freedom Front is of the opinion that the right of every person to equality before the law is one of the elements of democracy, which can, as a general concept, be defined as a system of government by all the people collectively, usually through elected representatives, based on the recognition of equality of opportunities, rights and privileges, accommodating minorities, and ignoring hereditary class distinctions. In view of the fact that the new Constitution must be democratic (in terms of the Constitutional Principles) it must make provision in its chapter on fundamental rights for equality of all persons before the law.

2. Secondly, we adhere to the view that equality before the law is indeed one of the most fundamental of human rights. It is not only expressly required **by** Constitutional Principle 5 (equality of all before the law and equitable legal process), but is implicit in Constitutional Principle 3 (general prohibition of discrimination).

(a) Equality before the law

In the present context we subscribe generally to the provisions of section 8(2) of the transitional Constitution, noting that only 'unfair' discrimination should be prohibited, for it is conceivable that differentiation between persons on one of the grounds enumerated in section 8(2) would be justified in certain circumstances. So, for instance, it should be permissible to take sex into account where relevant (e.g. maternity benefits), or age where relevant (e.g. military activities). We are also of the opinion that it should not be prohibited to take sexual orientation of a person into consideration in certain circumstances, as there could otherwise be an infringement of

freedom of religion (at present section 14(1) of the transitional Constitution), as homosexual practices are contrary to some religions.

(b) Equitable legal process

Equality of all before the law and an equitable legal process requires constitutional provisions ensuring what can generally be termed 'access to justice'.

The concept 'access to justice' covers many aspects of the judicial system, but two predominant aspects should be mentioned at this stage, viz the plight of indigent litigants and the need to conduct legal proceedings in a language understood by parties to litigation, accused persons and witnesses (see, in this regard, section 107 of the transitional Constitution).

Whereas section 107 purports to deal with the latter problem, it is submitted that the provisions of section 3 of the transitional Constitution are inadequate to afford sufficient protection to at least some of the present official languages, and that these provisions, if re-enacted without amendment in the new Constitution, will have a bearing on any section in such Constitution that will replace the present section 107.

As far as indigent litigants are concerned, statutory provisions governing legal aid and a right to legal representation pose special problems, if not of a juridical nature, then at least of an economic nature (a question of financial resources and of manpower).

3. Thirdly, a distinction should be drawn between legal and factual equality (or inequality). By subscribing to the principle of equality before the law we must not be understood to allege that all people are in fact equal. People differ in various respects that may be relevant and justified in considering, for instance, their appointment to particular types of work. There is support by eminent scholars throughout the ages

for the proposition that equality and justice are synonymous, and that things that are alike should be treated alike, while things not alike should be treated differently. Relevant differences should not, therefore, preclude different treatment. This factor is relevant, too, in the context of affirmative action, referred to below.

4. In the fourth place the Freedom Front is not averse to measures such as those referred to in section 8(3)(a) of the transitional Constitution, conveniently referred to here as 'affirmative action', subject to an important caveat. We hold the view that affirmative action requirements should not be so extensive as to be counter-productive and in effect bring about reverse discrimination. Affirmative action should be aimed solely at equality of opportunity, coupled with implementation on the basis of merit only. Any other formula would be neither in the interest of the individual concerned, nor that of his employer or principal, nor of the country as a whole.

5. Fifthly, the Freedom Front is of the opinion that the requirement of equality before the law poses special problems as far as the coexistence of indigenous law on the one hand and fundamental rights contained in the Constitution and concomitant legislation on the other hand (Constitutional Principle **XIII**) is concerned.

Constitutional Principle **XIII** deals with the protection of the institution, status and role of traditional leadership, according to indigenous law. According to this Principle indigenous law as well as the common law shall be recognised and applied **by** the courts, but subject to the fundamental rights contained in the Constitution and legislation dealing specifically with the latter.

The application of the comm-on law poses no special problems. However, the application of indigenous law is now made subservient to the fundamental rights set out in the Constitution and related legislation. This means that there is a potential conflict between rules of indigenous law on the one hand and the Constitution and the abovementioned related legislation on the other hand. To avoid a clash of these two legal systems, with its potential for social and political discord and strife, the Constitution should be drafted in a manner that preserves indigenous law to the greatest extent possible. Conflict of other laws with indigenous law should in this way be reduced to a minimum.