DEMOCRATIC PARTY

SUBMISSION ON CONSTITUTIONAL PRINCIPLE 2 : FUNDAMENTAL RIGHTS

We do not believe that the policy proposals of a particular political party should be written into the Bill of Rights. We do not believe that every, or even most, policy claims qualify as constitutional rights. We would, rather, formulate a core of essential rights which attempt to harmonise the quest for equality, so assiduously denied to our citizenry by apartheid, and the preservation of individual liberty, which should be the lodestar of a new democratic South Africa.

A Bill of Rights, drawn to be at the heart of a new constitution, should commit our country to equality, and set its face against discrimination, especially against racial discrimination. Equally, a Bill of Rights should recognise and preserve - spheres of individual privacy immune from encroachment by any government, authority or neighbour. It should not do so, however, in a manner which will give legal recognition to attempts to privatise apartheid.

Most of the rights contained in a Bill should be terse and simple, but several need to be elaborate and detailed. Such sections must detail, with precision, the civil liberties and procedural safeguards necessary to secure individual freedom against oppression.

A distinctive feature of a durable Bill of Rights should be its enforceability mechanisms. These too need to be detailed in the charter or rights. We also need major provisions to secure information from the organs of State, innovative rights to administrative justice and ease of procedures to allow the poor and inarticulate to approach the courts for relief. Fundamental to a good Bill of Rights will be recognition of the fact that without effective means of enforcement, legal rights will become little more than moral claims, readily ignored when the forces of government find it convenient to do so. In every clause, the drafters of the Bill must take heed of the warning of United States Supreme Court Justice William J Brennan against creating "paper promises whose enforcement depends wholly on the promisor's goodwill, rarely worth the parchment on which they were inked".

The DP Bill of Rights takes the view that policy formulation - from the detailed provision of health services to the allocation of housing - is the preserve of parliament, not the constitution. We hope that governments - and their policies - will change to meet changing circumstances. But because the promises of a Bill of Rights could be empty, cruel words echoing in a wasteland of deprivation

and denial, the Bill must provide for a standard of justification which empowers the citizen to obtain from government the entitlements to the means of survival. In our view such a clause, together with associated provisions relating to equality and affirmative action, must be tightly drawn. The Bill of Rights should not, therefore, provide a laundry list offering the panoply of human happiness or perfection. it must demand of government rational, honest justifications for policy decisions providing such entitlements. "Rationality" or "reasonableness" should be the standards of justification provided for in the Bill of Rights.

The Bill of Rights must also provide the legal building blocks for honest, accountable government located in the framework of a participatory democracy. It must be an attempt to foster democratic decision-making, the surest guarantee of good government.

It is not the province of the Theme Committee to determine the hierarchy of the future court structure, but we believe the Bill of Rights should be enforceable through the existing Supreme Court structure, with an appeal lying to the Appellate Division which, in turn, should provide for disposal of constitutional final appeals to an expert constitutional court. We do, however, warn of the significant danger of vesting sole power for constitutional interpretation in one, specially created court. Such a device could become too contentious, powerful and politicised.

It is also the Constitution - and not the Bill of Rights itself - which must provide the detailed mechanisms for entrenching the Bill of Rights (and for crucial companion rights such as the regularity of elections, the division of legislative competencies and the form of the State itself). However, the Bill of Rights, itself, merits special protection against easy amendment or encroachment. The constitution must specify super-majorities (in various legislatures if necessary) to inoculate the Bill against interference by a simple parliamentary majority.

SPECIAL NOTE ON EQUALITY

Of the conditions necessary to permit democracy to flourish, equality is one of the most fundamental. But the most prominent feature of the South African social order has been discrimination; most conspicuously, racial discrimination. The new Constitution must commit itself to equality, and set its face against discrimination, especially against racial discrimination. The Bill of Rights, drawn to be the heart of that Constitution, needs to so commit itself.

But what is discrimination? No society can function without making distinctions. Indeed, it is a characteristic of successful societies that their means of differentiation are precise; that they succeed accurately in distinguishing the meritorious from the unmeritorious; the just from the

unjust; the productive from the unproductive. when is differentiation permissible and when ought it to be outlawed? The answer is the Bill of Rights should be 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 that answer is to permit the court that enforces the Bill to condemn as discrimination an arbitrary exercise of power which may be thought to fall outside of the best known categories of discrimination, such as racism or sexism. one effect, for instance, might be to empower a court to outlaw a particular differentiation made on the ground of pregnancy without reaching the controversial question whether it constitutes sex discrimination. If differentiation on the ground of pregnancy is unjustified, it is discrimination, and therefore unconstitutional. The court need not 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 programmes to undo existing inequalities.

However, unpalatable it may be, we have to acknowledge, too, that if such programmes are to benefit their legitimate beneficiaries and no one else, they will have to use the same criteria for differentiation as those which brought about the inequality. But the Clause which authorises such programmes, must provide that such programmes are rational. A programme would not be rational if, say, 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 recognise also that, although differentiation on any of the grounds listed in the Equality Clause, unless it is part of an affirmative programme to undo inequality, is usually abhorrent, sometimes it may be desirable. It may be desirable, for instance, 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 they are 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 kind just outlined. 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 differentiation) than others (e.g. religious differentiation).

Some favour a Constitution which seeks to outlaw discrimination only in the public sector: 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 discrimination (unless the Constitution forbids it to legislate, in which case the State is responsible because of the Constitution).

Despite that, it remains true 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 whatever, however arbitrary, without any liability to justify them. The choice of whom to invite into one's home, for instance, falls into that category. So does the choice of whom to favour with one's charity, and so does the choice of whom to marry.

Rather than trying to confine equality to the public sector, understood as the area in which the State is responsible, it seems 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.

But to recognise a sphere immune from intervention against discrimination is to invite racists and other discriminators to take shelter there. Many will try improperly to expand the shelter given to discrimination by the need to protect privacy; immunity invites abuse. To guard against this danger, the Bill should confine immunity to decisions made in the exercise of the kind of private choice necessary to preserve personal autonomy.

There are perhaps some in this country now who are anxious to retain the privileges bestowed by apartheid. Many of them hope to achieve that goal by removing activities hitherto in the public

domain to the private, expecting that there those activities will be insulated from the commitment of the new social order to root out discrimination.

The Constitution must not be party to those efforts, and the Bill of Rights must not be. 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, of course, changes with time. At one stage it was commonly accepted that the terms of private employment were a matter for the employer and the employee, and that the State should not intrude. Now the legal regulation of private employment is pervasive and commonplace. At one stage it was generally accepted that social clubs fell into the core of the sphere of privacy, and that if such clubs chose to exclude blacks or Jews or women, that was their prerogative. There is now a growing body of opinion that such clubs often supply public goods - such as business opportunities - to which all should enjoy equal access.

These development require us to recognize that the boundaries of privacy are constantly shifting, and that the Constitution, or its Bill of Rights, cannot, therefore, finally define them. The court entrusted with interpreting the Bill of Rights will have to define and redefine the boundaries of privacy from time to time, as society's conception of that idea 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; for instance, a recruitment policy which requires all mathematics teachers to be six feet tall. Such a policy, although it made no reference to race or sex, would favour men over women and some races over others. Since the policy would not be justified as 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.

DEMOCRATIC PARTY
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