

PRELIMINARY SUBMISSION OF ANC TC4

THE RIGHT TO EQUALITY

Introduction

At the heart of the Bill of Rights lies the notion of the fundamental equality of all men and women, irrespective of race, colour or creed. The pre-eminence of Equality as the founding ideal of the new South Africa is evident in the Preamble of the Interim Constitution and its position as the first right which is listed in Chapter 3.

In South Africa, inequality is the very essence of the lack of political freedom. While some have been free to plunder the country's natural and human resources, others have lacked the most mundane freedoms of movement, association and expression, let alone social and economic security. In this setting all freedom in our new democracy ought to be premised on the ideal of equality, which must become the pivot and driving force of political, cultural and personal life in South Africa.

It is in the context of the historical inequality and the legacy of unfair discrimination that affirmative action becomes compulsory. While taking on a variety of forms, affirmative action means special measures which must be adopted to enable persons discriminated against on grounds of colour, gender and disability to break into fields from which they have been excluded by past discrimination. It is an issue which has to be addressed both with firmness and sensitivity.

It must become clear that attempts at achieving substantive equal rights and opportunities for those discriminated against in the past should be regarded as the fulfilment, rather than a violation of the principles of equality. Affirmative action for disadvantaged sectors of our community shall focus on blacks, women, the youth (both men and women) and the rural community.

1. Content of the right and its formulation

The Right to Equality is formulated as follows in the Interim Constitution under Section 8:

- (1) Every person shall have the right to equality before the law and to

equal protection of the law.

- (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
- (3a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.
- (b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with Sections 121, 122 and 123.
- (4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

The ANC believes that all men and women shall have equal protection of the law in terms of both treatment and protection. The formulation of 8(1) in the Interim Constitution is acceptable.

Section 8(2) should not be regarded as numerous clauses of discrimination. Equality is a universally recognised right or norm which categorically excludes discrimination on the grounds of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. This is not an exhaustive enumeration of the grounds for unfair discrimination; but an inclusive and explicit list of distinct grounds for discrimination. The formulation of Section 8(2) is therefore acceptable.

As indicated earlier, affirmative action and also the restitution of rights in land are applications of equality, and not qualifications. They reflect positive and practical mechanisms which must be used to progressively achieve a balanced sense of equality in the various fields of human endeavour at various levels of government. While Section 8(3)(b) may be included under the category of Property rights, it can also be appropriately dealt with under the Right to Equality.

Section 8(4) provided a favourable shift in the burden of proof which shall the effect of creating a favourable avenue to challenge unfair discriminatory practices. The subsection can therefore be maintained in the Interim Constitution.

2. Application of the Right

- 2.1. The state has a duty to protect the right.
- 2.2. The right applies to customary and common law, with due regard and sensitivity towards practices of customary and religious law.
- 2.3. The right shall bind the state and all social structures but in its application shall duly consider and be sensitive to customary and religious law.
- 2.4. The bearers of the right shall be private persons or where appropriate, groups or social structures.
- 2.5. The right may only be reasonably and justifiably limited in an open and democratic society.

PRELIMINARY SUBMISSION OF ANC TC4 **ON POLITICAL RIGHTS**

1. Content of the Right

Political rights are dealt with in various international documents, including Article 21 of the Universal Declaration of Human Rights which reads as follows:

1. Everyone has the right to take part in the government of his or her country, directly or through freely chosen representatives.
2. The will of the people shall be the basis of the authority of government; this will be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The ANC supports a formulation of political or participatory rights which must encapsulate the following:

- I. South Africa as a multi-party democracy in which all persons shall enjoy basic political rights on an equal basis.
2. Elections shall be regular, free and fair and based on universal franchise.
3. All men and women based entitled to vote shall be entitled to stand for and occupy any position or office in any organ of government or administration.
4. All citizens shall have the right to form and join political parties and to campaign for social, political and economic changes either directly or through freely chosen representatives.

The formulation in the Interim Constitution cogently expresses the right to free political activity which should occur in a multi-party system of representative democracy. It is believed that detailed principles of election and qualification of voters must appear elsewhere in the constitution.

2. Application of the Right

- 2.1. The state shall protect the political rights of its citizens.
- 2.2. The right shall apply to both common law and customary law.
- 2.3. The right shall bind the state, private persons, social structures and political organisations.
- 2.4. The bearers of the right are human beings.
- 2.5. The limitations will occur only under strict, justifiable, necessary and reasonable conditions which apply in an open and democratic society.

CITIZENS RIGHTS, FREEDOM OF MOVEMENT AND FREEDOM OF RESIDENCE

1. Content of the Right

The cluster of rights named above can be dealt with under one section as they are very closely related and overlap considerably. Further, in the Universal Declaration of Human Rights they are dealt with under Article 13, and are similarly dealt with in other major international instruments.

The significance of these rights, even in a South African context, must not be underestimated. The former South African government's abuse of citizens rights in terms of the issue or denial of passports and deportations, give these rights a significant dimension.

Restrictions in terms of freedom of movement and residence as experienced through the notorious pass laws, laws prohibiting movement of civilians to other provinces, influx control and the abhorred Group Areas Act, all restricted free movement within the borders of our national territory.

The ANC believes that all South Africans shall have the right, without discrimination, to move freely and reside in any part of the country, to receive a passport, travel abroad, to return to his or her country and to emigrate if he or she so wishes.

We support the formulation of the Law Commission which reads as follows:

Every person shall have the right to freedom of movement and residence anywhere within South Africa.

Every citizen shall have the right to enter, remain or return to South Africa, and no citizen shall be deprived of his or her citizenship.

2. Application of the Right

2.1. The state has a duty to protect the right.

2.2. The right applies to both common law and customary law.

2.3. The right shall bind the state, private individuals, institutions and social structures.

2.4. The bearers of the rights shall be human beings.

2.5. Any limitation shall have to be justifiable and reasonable in an open and democratic society.

AFRICAN NATIONAL CONGRESS (ANC)