20 June 1995

THEME COMMITTEE 4

DEMOCRATIC PARTY SUBMISSION

26. OTHER FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES
27. INTERPRETATION OF BILL OF RIGHTS

26. OTHER FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES

Some favour the inclusion in the Bill of Rights of what are known, following the Indian Constitution, as Directive Principles of State Policy. Directive Principles would be part of the Bill (or at least of the Constitution), but they would not be fundamental rights, and they would in consequence not annul Acts of Parliament with which they were in conflict. The category of Directive Principles is therefore a halfway station which can accommodate values thought important enough to merit recognition in the Bill of Rights, but not important enough to merit the force of a fundamental right. Recognition of a value as a Directive Principle is a compromise often suggested to resolve conflict between those in favour of elevating a value to the status of fundamental right and those altogether against including it in the Bill of Rights.

But what is the content of the compromise? The point of relegating a value to the Directive Principles is to deny it the force of a fundamental right. But the inclusion of a value in the Bill of Rights (or elsewhere in the Constitution), however that is done, sooner or later generates demands for it to be given some legal effect. In India, one effect given to Directive Principles is a power to restrict the fundamental rights. Entailed in that power is a capacity to immunise from legal challenge government action which is repugnant to a fundamental right, just because it pursues a goal postulated by one of the Directive Principles. In the name of pursuing democratic ends, the power of restriction given to Directive Principles may consequently be used to sanction undemocratic means.

The best known theory of Directive Principles is the Indian one. To include Directive Principles in our own Bill of Rights would invite the adopting of the ideas that have grown up in India about Directive Principles, including the idea that they have the power to restrict fundamental rights. It may be that the Indian courts have somehow avoided the worst dangers inherent in that idea. But because the dangers are inherent in the idea, there can be no assurance that our own courts would do the same. No one can restrain the internal logic of an idea. To import Directive Principles,

therefore, would be to import their capacity to erode the fundamental rights. Justice Bhagwati, former Chief Justice of India, once went so far as to say that "it is only in the framework of the socioeconomic structure envisaged in the Directive Principles that the Fundamental Rights are intended to operate" (Minerva Mills Ltd v Union of Indian 1980 AIR 1789 SC at 1847).

In India, moreover, fundamental rights were given years to establish themselves before the courts started invoking the Directive Principles to restrict them. It may be that when fundamental rights are established and flourishing, the harm done by permitting their restriction is less than fatal. In South Africa, however, fundamental rights are still struggling for their constitutional birth. If we allow them liberally to be restricted before they exist, they may well be stillborn.

Furthermore, although Directive Principles may be thought a useful way of remedying the deficiencies of a weakly drafted Bill of Rights, it is far from clear what they can contribute to a carefully considered one. A value is sometimes consigned to Directive Principles to avoid the hard work of resolving a dilemma about whether it should be included in the fundamental rights, and, if so, in what way. The Directive Principles may consequently become the rubbish bin of the Bill of Rights. Proper attention to difficult values can avoid this consequence, and produce a far more coherent Constitution.

The rights to shelter and health care, for instance, obvious candidates, since they are so problematic, for relegation to Directive Principles, are dealt with by the Democratic Party in its previous submission, in an article named "Right to the Essentials of Life", in a way which gives them real content without usurping the proper province of the legislature or the executive. The guarantee of equality in section 8 is likewise so much stronger than many other alternatives as to make the recognition of gender rights as Directive Principles pointless.

We consequently believe that, in a thoughtfully drafted Bill of Rights, Directive Principles are unnecessary, that they can ruin the coherence of the Bill, and that they could undermine its fundamental rights. In short, that they would weaken rather than strengthen the Bill of Rights.

27. INTERPRETATION OF BILL OF RIGHTS

1. Content of the Right

We support the formulation contained in section 35:

1.1 Section 35(1) is a statement of principles of interpretation which have been recognised by many courts (see Gilbert Marcus (SA Journal on Human Rights Vol. 10 Part 1 1994 at 95)).

The second clause within Section 35(1) enables a court to have regard to principles of public and international law and comparable case law. It has been argued that this scarcely requires articulation in the constitution as it is inevitable that the Constitutional Court will be significantly

influenced by the manner in which other courts have interpreted rights similar to those embodied in the constitution.

1.2 Section 35(2) embraces "the presumption of constitutionality". It directs the courts to interpret laws which are susceptible to constitutional challenge and is not a directive applicable to the interpretation of the constitution itself. The presumption has been explained by Georges C J in Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd (1984)(2)(SA778)(ZS):-

"Arguments have also been addressed at some length on the presumption of constitutionality. It is a phrase which appears to me to be pregnant with the possibilities of misunderstanding. Clearly a litigant who asserts that an act of parliament or a regulation is unconstitutional must show that it is. In such a case the judicial body charged with deciding that issue must interpret the constitution and determine its meaning and thereafter interpret the challenged piece of legislation to arrive at the conclusion as to whether it falls within that meaning or it does not. The challenged piece of legislation may, however, be capable of more than one meaning. If that is the position then if one possible interpretation falls within the meaning of the constitution and the others do not, then the judicial body will presume that the law makers intended to act constitutionally and uphold the piece of legislation so interpreted.

"...One does not interpret the constitution in a restricted manner in order to accommodate the challenged legislation. The constitution must be properly interpreted, adopting the approach accepted above. Thereafter the challenged legislation is examined to discover whether it can be interpreted to fit into the framework of the constitution. "

Properly interpreted, section 35(2) provides a safeguard to prevent an overzealous court from striking down parliamentary legislation which is capable of a constitutional interpretation. We therefore support its retention.

1.3 Section 35(3) clearly indicates that legislation, the common law and customary law do fall within the ambit of the constitution. Should such a law fall foul of "the spirit, purport and objects" of the Bill of Rights it may be struck down as invalid. We believe that this approach is both enlightened and necessary, particularly since it will strike at customary law rules which might discriminate against certain categories of persons such as women.

DEMOCRATIC PARTY (DP)