

Strasbourg, 23 February 1998
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CDL (98) 16
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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

Constitutional Court Conference on Equality Jurisprudence

organised by the South African Constitutional Court
and the European Commission for Democracy through Law
within the framework of the programme "Democracy, from the law book to real life"

Hotel Villa Via, Gordon's Bay, South Africa
31 January to 2 February 1998

REPORT

Background

This conference was organised by the Venice Commission and the South African Constitutional Court within the framework of the programme "Democracy, from the law book to real life", financed by Switzerland. Canada also provided financial support for the conference.

The Venice Commission invited a number of presidents and judges from different European constitutional courts to attend the conference as well as several constitutional law experts. The South African Constitutional Court invited judges in South Africa from the Constitutional Court, the Supreme Court of Appeal and selected High Courts.

The topics for the conference were proposed by the South African Constitutional Court. Reference was made to four cases dealing with equality recently decided by the South African Constitutional Court (the Hugo, Prinsloo, Harksen and Larbi-Odam cases, all decided in 1997).

The full list of participants and programme appear in Appendices 1 and 2 respectively.

Evaluation

The turnout was very good and there were some 70 high level participants altogether.

The equality protection clause in the South African Constitution contains a number of interesting features. For example, the Constitution provides for the concept of unfair discrimination and there is a presumption of unfairness if discrimination has taken place on a number of specified grounds. The Constitution also provides explicitly for indirect discrimination and affirmative action. The problems facing judges in South Africa are therefore how such concepts are to be applied in practice and what are the limits of these concepts, not whether or not they are constitutionally justifiable. The presentations from Europe served to prove that similar problems occur in other jurisdictions and the European participants provided examples of how such cases had been tackled by their own courts. Nonetheless, it is clear that the challenges facing South Africa in respect of equality in the light of its history are on a much greater scale than those which judges in Europe face.

The conference also provided an opportunity for South African judges from the Constitutional Court, the Supreme Court of Appeal and several High Courts to get together.

While in South Africa Mr La Pergola, President of the Venice Commission, had meetings in Cape Town with Mr Valli Moosa, Minister for Constitutional Development, and Mr Dullah Omar, Minister of Justice, to discuss co-operation between South Africa and the Venice Commission.

Follow up

Transcripts of the conference will be available.

A second conference is being planned to take place in October in South Africa. The participation would be enlarged to constitutional court judges from the southern African states. The topic for this conference has yet to be chosen. European participation in this conference is also envisaged.

Venice Commission Secretariat
Strasbourg, 11 February 1998

Constitutional Court Conference on Equality Jurisprudence

31 January - 2 February 1998
Villa Via Hotel, Gordon's Bay, South Africa

PROGRAMME

Saturday 31 January 1998

Participants arrive during the day at the Villa Via at Gordon's Bay

19h 00 - Dinner

Welcome - Justice A. Chaskalson, President of the Constitutional Court of South Africa

Sunday 1 February 1998

09h 00 - 11h 00: **Modern approaches to equality jurisprudence - substantive and formal equality**

Justice P.N. Langa, Deputy President of the Constitutional Court of South Africa

Justice L. Adamovich, President of the Constitutional Court of Austria

Principle of non-discrimination and citizenship of the European Union

Mr A. La Pergola, President of the Venice Commission and Advocate General at the European Court of Justice in Luxemburg

Justice Claire L'Heureux-Dube, Supreme Court of Canada

11h 00 - 11h 30: Tea

11h 30 - 13h 00: **Indirect discrimination - the concept: proof and role of intent**

Justice P.J.J. Olivier, Supreme Court of Appeal of South Africa

Justice M. Melchior, President of the Court of Arbitration of Belgium

13h 00 - 14h 15: Lunch

14h 15 - 15h 40: **Conflict between equality and constitutionally protected freedoms**

Justice L. Ackerman, Constitutional Court of South Africa

Justice L. Solyom, President of the Constitutional Court of Hungary

15h 40 - 16h 00: Tea

16h 00 - 17h 30: **Affirmative action**

Justice S. Ngcobo, Cape of Good Hope High Court

Justice J. Said Pullicino, Chief Justice of Malta

Monday 2 February 1998

09h 00 - 11h 00: **Implementation of equality**
a) remedies
b) specialist tribunals and the relationship between such tribunals and the courts

Justice C. O'Regan, Constitutional Court of South Africa

Justice P. A. Müller, President of the Federal Tribunal of Switzerland

11h 00 - 11h 30: Tea

11h 30 - 12h 30: Open discussion

Concluding comments by Mahomed, Chief Justice of South Africa

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