

20.04.1995

**CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 4
FUNDAMENTAL RIGHTS**

DEMOCRATIC PARTY SUBMISSION ON:

3.1: FREEDOM OF RELIGION

3.2: FREEDOM OF ASSOCIATION

3.3: FREEDOM OF DEMONSTRATION

FREEDOM OF RELIGION, BELIEF AND OPINION

1. Content of the Right

1.1 Section 14 of the Constitution reads:

- "(1) Every person shall have the right to freedom of conscience, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.
- (2) Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary.
- (3) Nothing in this Chapter shall preclude legislation recognising-
- (a) a system of personal and family law adhered to by persons professing a particular religion; and
 - (b) the validity of marriages concluded under a system of religious law subject to specified procedures. "

The Democratic Party supports the broad nature of the rights entailed in the provisions of Section 14. However, we believe that they need to be rearranged fundamentally.

For example, we are of the view that freedom of conscience and religion, thought, belief and opinion should appear together with the provisions of free expression and speech. Likewise, we believe that the right to freedom of peaceful and unarmed assembly and to peaceful association could all be contained under a similar right, in other words, the right to fundamental freedoms.

In place of the current formulations of Section 14 (freedom of religion, etc), Section 17 (freedom of association) and Section 18 (freedom of demonstration, we would propose the following:

1.2 Right to Fundamental Freedoms

Every person shall have the right to:-

- (1) Freedom of conscience and religion, and consequently, the State shall not favour one religion over another:
- (2) Freedom of speech, thought, belief, opinion and expression, including freedom of the press and the other media of communication. In respect of the exercise of its control, if any, over any public media, the State shall ensure diversity of expression and opinion:
- (3) Freedom of peaceful and unarmed assembly:
- (4) Freedom of peaceful association, subject, however, to the provisions of (the equality clause):

We strongly believe, in addition, that the provisions in Section 14, as currently worded, protecting academic freedom are extremely valid and important. However, we question whether they would not be better placed together with the rights to education contained in Section 32 of the Interim Constitution.

Wherever the academic freedom clause is placed in the final constitution, we strongly believe that the right to academic freedom needs to be contained in the Charter of Rights. We believe a formulation, slightly expanded on the present one, could read as follows:

- (1) The freedom to study, learn and teach shall be guaranteed.
- (2) The state shall not try to shape education or culture in accordance with any particular political or ideological commitment.
- (3) The academic freedom of every university and similar institution of higher learning shall be guaranteed.

As regards the right to education, South Africa has a multitude of religious faiths and beliefs. One of the fortunate aspects of our history and tradition as a nation has been the presence of a great deal of religious tolerance.

However, freedom of conscience, religion and belief must be interpreted in the light of all the provisions of the Bill of Rights, and especially the limitation and equality clauses.

The Democratic Party supports a broad general formulation and believes it is the role of the courts to give practical effect and content to the right. We would, therefore, propose that instead of the somewhat tortuous formulation in the Interim Constitution that a broadly based right of religious freedom, together with its companion rights be formulated, along the lines suggested above.

As regards the necessity for a specific clause enshrining the right to academic freedom, we regard the light of learning as the torch of democracy. True learning, independent of political control is the nemesis of tyranny. Recognizing that, the authors of apartheid twisted education into a means of repression. Never again can that be permitted. Democracy means that decisions are taken by persuasion, rather than coercion. True persuasion can only take place in a culture which respects learning. Unless learning flourishes, therefore, democracy cannot be attained. And without freedom, learning cannot flourish. The Bill of Rights should seek to guarantee the freedom and independence of learning.

During apartheid, among those who most constantly kept alive the idea of democracy, and indeed the values affirmed by any future Bill of Rights, were the independent universities. They became, in consequence targets for oppression. The Bill of Rights should seek to put them, and all institutions of higher learning like them, beyond further interference.

The formulation of the rights proposed in respect of freedom of peaceful and unarmed assembly and association will be dealt with separately below.

1.3. Application of the Right

A positive duty is imposed upon the State to adhere to the rights contained herein and not to interfere with either the belief of religious freedom, the belief and practice and propagation of religious viewpoints, nor the rights of academic freedom.

1.4 Constitutional Duty on Other Actors

Clearly, these rights would be appropriate for horizontal application, subject to suitable limitation in the appropriate clause.

1.5 Bearers of the Right

Clearly, a meaningful right to religious freedom should exist for both individual citizens and to institutions which practice both the expression of religious viewpoints (churches, synagogues, mosques and temples) and related juristic persons. In respect of the right to academic freedom, we believe that institutions, such as universities and technikons, should be able to enforce the right against individuals or the State itself.

1.6 Limitations

The right to freedom of religious expression and belief and opinion and academic freedom should be subject to reasonable limitations in a properly formulated limitations clause, such as that provided for in the Interim Constitution in terms of Section 33.

2. FREEDOM OF ASSOCIATION

Section 17 of the Interim Constitution provides:

"Every person shall have the right to freedom of association".

2.2 Content of the Right

Freedom of association is a general capacity of citizens to join, without interference from the State or others, in associations, in order to attain various ends. This is an uncontroversial right which should be supported. For the reasons stated under 3. 1 (freedom of religion) we believe this more properly belongs together with citizens rights to fundamental freedom and that would be the proper place for the right to appear.

In order to allay any, fears, whether legally founded or not, that freedom of association could be used as a shield behind which privatised racism or discrimination can take place, we have proposed that freedom of peaceful association should be made subject to the provisions of the equality clause. In any event this is probably unnecessary since the constitution will be read as a whole (in other words, the equality clause will be read together with all other clauses such as that providing guaranteed right to association). It might be as well to dispel any fears on this count by making such provision explicit.

2.3 Application of the Right

A positive duty is imposed on the State which is apparent from the wording of the clause.

2.4 Application of the Right to Common/Customary Law

We believe that freedom of association is a fundamental democratic right which should, subject to resolution on the debate on the horizontal application of the Bill, be made applicable to the common law and customary law as well.

2.5 Bearers of the Right

Both natural and juristic persons should enjoy the right to freedom of association primarily because the rights of association itself implies a collectivisation of individual rights, such as the formation of organisations and associations to advance a particular cause. It would be unduly limiting and ineffectual if the right were to be confined to natural persons only.

3. FREEDOM OF DEMONSTRATION

Section 16 of the Interim Constitution provides:

"Every person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to present petitions.

3.1 Content of the Right

The Democratic Party regards the right to demonstrate, subject to the limitations contained in the above clause as being fundamental and of social value to our democratic society. This is particularly true in South Africa, with our long history of public demonstrations against oppressive rule. However, like all rights, the right to demonstrate is subject to limitation. Aside from reasonable restrictions which the government would be able to place on demonstrations in order to maintain public order, which are provided for in terms of the general limitation clause of the Interim Constitution (Section 33), we particularly approve of the constitutional requirement (in terms of the current formulation) that any assembly or demonstration be both "peaceful" and "unarmed". Since a lawless or armed assembly of persons would completely negate the democratic and constitutional rights of others, and all too unfortunately in the recent history of South Africa has often become the norm of public demonstrations, we believe these limitations to be both necessary and democratic. These limitations are also consistent with similar provisions in other human rights instruments.

3.2 Application of the Right

The bearers of the right should be natural persons and juristic persons (collectivised associations of persons who are likely to demonstrate with a common objective in mind).

3.3 Limitation of the Right by the Legislators

This matter has been dealt with under the Content of the Right.

3.4 Application of the Right to Common/Customary Law

The Democratic Party believes that this right should be applicable in terms of both the common law and customary law.