

FREEDOM FRONT

THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

SUBMISSIONS ON FREEDOM OF DEMONSTRATION AND PETITION

1. Content of the right

- 1.1 Section 16 of the transitional Constitution provides: "Every person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to present petitions".

The Freedom Front is of the opinion that the above-mentioned three rights, formulated without qualification, should be qualified as set out below.

By reason of the fact that one has to do with three rights in the present context it is not feasible to attempt to give an exposition of the content of 'the right' , The content of the various rights will appear from the discussion under 1.2 below.

1.2 Controversial issues

The right to assemble peacefully

The International Covenant on Civil and Political Rights 1966 provides in article 21 that no restrictions may be placed on the exercise of the right of peaceful assembly 'other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others'.

The restrictions referred to above reflect rules of international law generally accepted, as the above-mentioned Covenant is an international instrument reflecting the views of the majority of states in the world. These restrictions on the right accordingly form part of universally accepted fundamental rights, within the meaning of Constitutional Principle II in Schedule 4 of the transitional Constitution.

The Freedom Front proposes that identical or similar restrictions should be introduced into the new Constitution, using the present section 16 as a basis. We are of the opinion that such restrictions are necessary in the public interest. Contemporary South African events have shown that large assemblies of people cannot be effectively controlled. Breaches of the peace, public violence and criminal actions by some flow from such assemblies, unless strict controls are exercised.

The restrictions proposed by us above ought to cover also state security and disruption of commercial and community life. An extended wording of the restrictions mentioned above may, therefore, be necessary to cover these cases. As far as picketing is concerned, we suggest that it should be dealt with not in the context of this right, but in the context of fundamental rights relating directly to labour relations (at present section 27 of the transitional Constitution), as the latter should be dealt with in one 'package'.

We would like to stress that the word "unarmed" should be retained in a future bill in respect of this right, as a potential breach of the peace or the invasion of private rights would otherwise be much more likely.

The right to demonstrate

The Freedom Front submits that the internationally accepted right of demonstration is closely allied to the right of peaceful assembly. Presumably because of this reason it is mentioned in section 16 of the transitional Constitution, together with the right to assemble. It is difficult, however, to draw a line between the two in particular circumstances.

An assembly is not necessarily a demonstration: it may have the purpose of a public discussion by persons not necessarily holding the same opinions. An assembly may, therefore, prove to be not be partisan in nature or aimed at the furthering of sectional interests. A demonstration is, however, partisan by its very nature. On the other hand, a demonstration will not necessarily imply an assembly of persons: it may be manifested by a single person or a small group of persons

The significance of distinguishing between assemblies and demonstrations is that the latter are more likely to lead to a breach of the peace or Public violence, and should therefore perhaps be subject to different types of restrictions. Subject to this distinction our comments above relating to the right of peaceful assembly, together with the proposed restrictions relating to such peaceful assembly, are also applicable to peaceful demonstrations.

We would like to stress that the word "unarmed" should be retained in a future bill in respect of this right, as a potential breach of the peace or the invasion of private rights would otherwise be much more likely.

The right to present petitions

The practice in South Africa is that the exercise of a right of assembly and demonstration is often accompanied by the presentation of petitions to government officials.

The 'right' to present petitions, however, is not a universally recognised fundamental human right. The Freedom Front sees no need for the bill of rights to confer such a right. Consideration of a petition by the authorities will almost inevitably take place at a protest march or demonstration, not during it. There is no justification, in our view, for linking a right to petition authorities to a right of peaceful assembly or demonstration. If such a right were to be acknowledged, it would create the impression that there is an onus on the authorities receiving the petition to give effect to demands contained in it, which may be quite unjustified. Such an act is confrontational and not in the interest of amicable resolution of any differences that may exist in this connection.

2. Application of the right

2.1 Nature of the duty imposed on the state

The nature of the duty (in the sense of its scope and ambit) appears from paragraph 1.2 above.

2.2 Application of the right to common law and customary law

The Freedom Front is of the opinion that the abovementioned proposals relating to this part of the proposed bill of rights is in conformity with the rules of South Africa's common law. We do not anticipate any conflict between this statutory right and the broad principles of the common law in this regard, If necessary, however, common law rules in this context may supplement the statutory provisions contemplated.

As far as indigenous law (customary law) is concerned we propose that the indigenous law should be repealed to the extent of any conflict. Our motivation is that the right of peaceful assembly is a phenomenon of modern society and should therefore be seen in the context of contemporary conceptions of human rights as opposed to traditional or customary concepts.

2.3 Should this right impose a constitutional duty on actors other than the State?

The Freedom Front is of the view that there is a constitutional duty in this regard not only on the State but also on all inhabitants of the country. The proper exercise of this right can be effected not only when the State allows freedom of assembly but also when private persons allow it and do not disrupt such assemblies.

2.4 Who should be the bearers of the right?

Naturally Juristic persons cannot exercise this right, which is by its nature confined to natural persons. All citizens and lawful inhabitants of the country should possess this right. In the case of persons performing essential services, however, a right of peaceful assembly (just like the right to strike) should be formulated in such a way that it is not capable of being used as a pretext for dereliction of their duties by such persons. as such conduct is against the public interest.

2.5 Should this right be capable of limitation by the legislature?

The Freedom Front believes that the right of peaceful assembly should be capable of limitation by the legislature only to the extent permitted by international law, as reflected in the exceptions to this right referred to in paragraph 1.2 above.

2.6 Other Issues

The Freedom Front is convinced that the public interest requires that freedoms of assembly, demonstration and petition should not be permitted by the constitution in respect of 'essential services' in a wide sense. Special statutory provision should be made for the airing of grievances by soldiers, the police, medical personnel, etc., so that military discipline, law and order, the maintenance of health services, etc. can at all times be kept intact.

THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

SUBMISSIONS ON FREEDOM OF ASSOCIATION

1. Content of the right

1.1 Constitutional Principle XII deals -with so called "Collective rights of self-determination in for maintaining organs of civil society" . Section 17 of the transitional Constitution contains the cryptic statement: "Every the right to freedom of association.

It is necessary to delineate the scope of the right of freedom of association in the present Context, which is a general Front is of the opinion that the relationship of a right of association as far as collective bargaining and other concerned (also Constitutional Principle XXVIII), should be considered in the context of labour rights, which are spe by the bill of rights and arise for discussion at a later stage.

The concept of freedom of association is, apparently, in conflict with various other principles. One of these is the g non-discrimination, in respect of which we consider the contradiction to be more apparent than real. The motivat below. Another principle apparently contradictory to the principle of freedom of association is the principle of equ case the alleged contradiction is more apparent than real: the fact that people are equal in human dignity or equal b not mean that they can insist on equal treatment with others in the case of associations catering for the special need envisaged by the principle of freedom of association. This is in accordance with Constitutional Principle XI, v acknowledgement and protection of the diversity of language and culture in South Africa.

1.2 Controversial issues

Right to dissociate

The transitional Constitution does not refer to a right to dissociate, presumably because it impliedly smacks of discrimination, which is generally disapproved of and outlawed.

However, the phenomenon of dissociation is implicit in a right to associate. If persons form a voluntary association some criteria for membership must be established. For instance, a club for the recreation of young men would necessarily exclude elderly persons and females. In this regard we adopt the premise that membership of the association must depend not only on the wish of a prospective member but also on the wish of the association as such. Any other view would lead to the absurd result that any person outside the organisation would be able to force the organisation to accept him or her as a member although he or she does not comply with the lawful rules governing the nature of the association.

The limitations placed on the exercise of the right of association by article 22(2) of the International Covenant on Civil and Political Rights 1966 are in accordance with the view expressed above. Article 22(2) provides: 'No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in the exercise of this right'- The right of association can, therefore, always be exercised unless it harms the broad general interest as defined above.

'Privatised' apartheid, exclusive clubs, etc.

The possibility of 'privatised' apartheid or unofficial discrimination may be regarded as the basic objection to a right of dissociation. It has already been submitted above that a right of association necessarily implies a right of dissociation. In this regard we have used the example of exclusive clubs above. However, a collective right of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations shall, according to Constitutional Principle XII be recognised and protected, 'on the basis of non-discrimination and free association'.

Constitutional Principle xii has been mandatorily superimposed on the applicable body of universally accepted fundamental principles of international law relating to human rights, and is therefore predominant in the event of any conflict with the latter. This Principle implies a right of dissociation. It would, for instance, not be possible to have a linguistic, cultural or religious association unless its membership is confined to persons belonging to the linguistic, cultural or religious group concerned. This is the justification for excluding young persons from a club for retired persons, or for excluding women from a men's club or for excluding non-golfers from a golf club.

We are of the opinion, therefore, that distinctions drawn on the basis of relevant considerations, taking into account the nature of the club or association in question, do not amount to discrimination which is prohibited. It is for this reason, we submit, that the present section 8(2) of the transitional Constitution does not prohibit discrimination of all the various types enumerated, but only 'unfair' discrimination. In our view unfair discrimination would be

discrimination or distinction not allowed by reason of the nature and aims of the association or club concerned.

The view we have adopted above is applicable also to the concept of community self-determination envisaged by Constitution Principle xxxiv. However, the scope and implications of Principle XXXIV (which goes wider than the collective rights of self-determination in forming, joining and maintaining organs of civil society within the meaning of Constitutional Principle XII) will be dealt with extensively in a separate document.

The Freedom Front is of the view that freedom of association in the present context is applicable inter alia to social, cultural, economic, religious and political associations. In our view the limitations placed on freedom of association by the International Covenant on Civil and Political Rights (see above) should also be written into the new bill of rights.

2. Application of the right

2.1 Nature of the duty to be imposed on the State

The state is bound to respect the general freedom of association of individuals, subject only to such restrictions as are laid down by international law as reflected in the International Covenant on Civil and Political Rights 1966, referred to above.

2.2 Application of the right to common law and customary law

The Freedom Front is of the opinion that the Roman-Dutch common law and indigenous customary law cannot deal adequately with freedom of association. The latter is a contemporary concept, which must be understood in the context of evolving norms of public international law and constitutional law of the twentieth century.

2.3 Should the right impose a constitutional duty on actors other than the state?

The Freedom Front considers that not only the state but all inhabitants of the country should respect the freedom of association of individuals and that a constitutional duty in that regard should be contained in a bill of rights. Freedom of association of individuals can be infringed not only by state action, but also by the conduct of fellow citizens. This right or freedom should therefore have vertical as well as horizontal application.

2.4 Who should be bearers of the right?

we are of the opinion that all natural persons who are citizens and all aliens lawfully admitted to the country should be bearers of this right. By reason of the fact that voluntary associations have juristic personality the right should be applicable also to juristic persons, ie. voluntary associations and juristic persons created by statute.

2.5 Should this right be capable of limitation by the legislature?

The Freedom Front is convinced that freedom of association is a fundamental right as important as the prohibition of unfair discrimination. We are accordingly of the view that this right should not be capable of limitation by the legislature, otherwise than in accordance with the international law limitations referred to above and the provisions of a general limitation clause applicable to all fundamental rights (at present section 33 of the transitional Constitution).

THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

SUBMISSIONS ON FREEDOM OF RELIGION, BELIEF AND OPINION

1. Content of the right

In the view of the Freedom Front this freedom comprises more than a single right. The relevant provisions Constitution in effect expound three different rights in this context.

The provisions of Constitutional Principle XII relating to collective rights of self-determination concern society are relevant in the present context. Moreover, section 8(2) of the transitional Constitution discrimination on the basis, inter alia of religion, conscience and belief. Section 32(c) protects certain religious context of education.

It is section 14 of the transitional Constitution, however, that clearly indicates that diverse rights have been in the present context. Section 14 guarantees the right to freedom of conscience, religion, thought, belief and stated to include academic freedom in institutions of higher learning. We are of the opinion that academic freedom coincide with freedom of religion: there is only a partial overlap. Moreover, freedom of religion does not coincide with freedom of thought and opinion. It is very difficult, if not impossible, to describe the content of this social comprehensive terms.

In view of the fact that the religious element is apparently the predominant element in the present context, this document will deal only with freedom of religion in this document.

The International Covenant on Civil and Political Rights in article 18.1 describes freedom of thought, conscience and religion as including everyone's 'freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching'. Controversial issues should be considered in this context.

1.2 Controversial issues

Aspects of religious freedom

The Freedom Front is of the opinion that the provisions of section 14(2) and 14(3) of the transitional Constitution are, in principle, acceptable. In our view these provisions reflect religious tolerance not only in the very broad context of section 14(1), but also in the context of state or state-aided institutions referred to in section 14(2).

We are in agreement with section 14(2) inter alia in so far as 'the appropriate authority' referred to should be able to make rules for religious observances, subject to the proviso that they are conducted on an equitable basis and that attendance at them is free and voluntary. In our view section 14(2) links up with the concept of collective rights of self-determination relating to organs of civil society (including cultural and religious associations) referred in Constitutional Principle XII, on the basis of non-discrimination and free association.

The Freedom Front is also generally in agreement with the provisions of the present section 14(3) recognising legislation relating to a system of personal and family law adhered to by persons professing a particular religion, as well as the validity of marriages concluded under a system of religious law subject to specified procedures. We are of the view, in broad context, that the plural nature of South African society and the scope of religious differences in South African society renders constitutional provisions of this nature necessary.

Despite our general agreement with the statutory provisions relating to religion set out above, we are of the opinion that the chapter on fundamental rights in the new Constitution should not (as section 8(2) of the transitional Constitution professes to do) prohibit a Person from taking into account the sexual orientation of another person where such sexual orientation (e.g. homosexuality or lesbianism) is contrary to the religious beliefs of the former person. We are of the opinion that the present section 8(2) may be interpreted as forcing a person to act contrary to his religious convictions. This, in our view, is an infringement of the concept of freedom of religion. (Compare the element of coercion referred to in the next paragraph).

We are of the opinion that the provisions of article 18.2 and 18.3 of the above-mentioned Covenant should be incorporated (with or without minor changes in wording) in the new Constitution. The former reads: 'No one shall be subject to coercion which would impair his freedom to have or to adopt a religion of his belief or choice'. The latter reads: 'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.

Academic Freedom

Academic freedom should, in our view, be treated in the context of fundamental rights relating to education (at present section 32 of the transitional Constitution), and not under the general heading "Religion, belief and opinion". Submissions in this regard will be submitted at the appropriate time.

2. Application of the right

2.1 Nature of the duty to be imposed on the State

The nature the duty imposed on the state is to give full reign to human conduct based on the diversity of religious convictions in South African society, thus fostering mutual tolerance between different religious groups.

2.2 Application of the right to common law and customary law

The Freedom Front is of the opinion that the general concept of freedom of religion, belief and opinion is not contrary to common law principles. In so far as customary law (indigenous law) is concerned we are of the opinion that any religious principles possibly in conflict with freedom of religion in the context above should make way for religious tolerance generally acknowledged by the international community.

2.3 Should this right impose a constitutional duty on actors others than the State?

We are of the opinion that the state as well as all lawful inhabitants of the country should be under a constitutional duty to respect the religious convictions, beliefs and practices of all other persons. Religious tolerance should, in our view, therefore have not only vertical but also horizontal effect. Any other view would lead to social conflict and discord.

2.4 Who should be the bearers of the right?

In view of the fact that a church can be a juristic person in our law, we are of the opinion that the bearers of the right should be natural persons (i.e. all citizens and all persons lawfully in the country), as well as churches or religious associations that have juristic personality.

2.5 Should this right be capable of limitation by the legislature?

In the view of the Freedom Front this right should not be capable of limitation by the legislature otherwise than by an amendment of the relevant provisions of the chapter on fundamental rights in the Constitution itself. It should not be capable of limitation by ordinary legislation. The nature of this right is such that it cannot exist in a truncated or inchoate form.

We do not believe that either the Constitution or any other law should determine what persons should believe. The only justifiable limitation we can think of would be a curtailment of religious activities that conflict with the religious activities of other persons or groups or that contravene some other fundamental interest protected by the Constitution, such as the public order and other interests mentioned in article 18.3 of the International Covenant on Civil and Political Rights, quoted above. The widest form of religious tolerance should, accordingly, be guaranteed by the Constitution.

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