

NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 4

BLOCK 5 ITEM 10: FREEDOM OF ASSOCIATION

1 Content of the right

The right to freedom of association protects contact with other people and co-operation among individuals for common purposes. As such, the right protects the freedom of the individual to associate with anybody and to form and join associations, as well as that of associations to freely pursue their goals. This right covers all forms of association, although specific rights with regard to political activities and parties, trade unions and employers' organisations and educational institutions based on common language, culture and religion are provided for in the transitional constitution.

1.2 Controversial issues

(a) Private discrimination

By implication, the freedom of association includes the right not to associate with another. The immediate question is whether the state may limit the grounds on which the individual or a private institution may refuse to associate with another and whether the individual or institution may be allowed to dissociate on any (rational or irrational) ground. May a club for men exclude women from membership? May a political party refuse members on the basis of language or culture? May a church refuse members on the basis of sexual orientation or race? These questions may become quite sensitive and in order to prevent abuse of this right, section 33(4) provides for legislation prohibiting private discrimination. This seems to be a practical approach to the problem. It must, however, be borne in mind that such legislation does not in itself have constitutional status and insofar as it limits the right to freedom of association, it will have to comply with the limitations clause. It should, therefore, for example, not be possible through such legislation to negate the essential content of the right to freedom of association.

(b) Trade union arrangements

These matters should be dealt with expressly in the provision on the right to fair labour practices.

2. Application of the right

2.1 Nature of the duty on the state

The state must respect the individuals' freedom of association and must refrain from restricting the right on grounds not covered by the limitations clause. Measures to prevent private discrimination as provided for in the present section 33(4) should, however, be possible.

2.2 Application to common law and customary law

The right should apply to common law and customary law.

2.3 Other actors

In principle, other actors are not bound by the right. In terms of the transitional constitution, private individuals and institutions will be bound only insofar as specific legislation prohibiting private discrimination (section 33(4)) applies to them.

2.4 Bearers of the right

This is one of those rights that obviously apply to natural as well as juristic persons such as clubs and other associations.

2.5 Limitation of the right

The right to freedom of association should be capable of limitation by the state. The state should be able to limit the right in the public interest as long as it complies with the limitations clause.

3 Wording

It is our view that the wording of the present section 17 should be followed unamended.