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THEME COMMITTEE 4  
FUNDAMENTAL RIGHTS

DEMOCRATIC PARTY [DP] SUBMISSION ON:  
TOPIC 6: FREEDOM OF EXPRESSION  
TOPIC 7: RIGHT OF ACCESS TO INFORMATION

FREEDOM OF EXPRESSION

1. CONTENT OF THE RIGHT

1.1 Section 15 of the Interim Constitution provides:-

- " 15 (1) Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research.
- (2) All media financed by or under the control of the State shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion. "

Subject to the specific comments hereunder, the DP strongly supports the inclusion of this section in the provisions of the new constitution. A constitutional guarantee of free speech, in the widest possible terms, coupled with a strong injunction against state intervention in the press are minimum prerequisites for a creative, vibrant, open democracy in South Africa. As will be apparent from a reading of the constitutional texts of recognized democracies, section 15(1) is consonant with the wording of the guarantees of freedom of expression contained in similar provisions in international covenants and the constitutions of other countries.

Section 15(2) is perhaps unusual, but in our view is a very necessary antidote to the repressive culture of state control exercised by the previous government over the public broadcasting and

television services. Since the new constitution is intended to remedy - in part - the ills of the past, it is essential that section 15(2) be retained in the final constitution.

## 1.2 Controversial Issues

The DP has also read the submission received from the Conference of Editors prepared by Advocate G J Marcus (27 June 1994), on the freedom of the press under the new constitution. We believe this document to be very carefully reasoned and we support its conclusions (pp.57-58 of the document).

On the other so-called "controversial issues" of hate speech, commercial speech and obscene speech, we are of the view that a suitably worded limitations' clause is the most effective manner of dealing with these matters. However, we urge that the constitution framers desist from the temptation of applying a wide basis of potential restrictions to free speech, however well-motivated such an intention might be. The lessons of our own past and the tortuous development of free expression in such a well-established democracy as the United States, for example, should serve as a necessary caution. In other words, free speech should be cherished and nurtured and is very easily chilled or subdued by excessive constitutional or judicial zeal.

## 2. APPLICATION OF THE RIGHT

### 2.1 Nature of the Duty to be imposed on the state

Section 15(2) imposes a specific obligation on the state to ensure that the media under its control reflect both impartiality and diversity of opinion. For the reasons stated above, we strongly support this obligation.

The state's obligations in respect of section 15(1) are more complex. In general terms it is to be hoped that the Constitutional Court will adopt a robust approach against any gratuitous attempts by the state to restrict free speech. However, the critical factor here is not section 15, but the limitation clause (section 33). In general terms, we strongly support the view of United States Justice Brennan in *New York Times Co v Sullivan* (376 US 254):-

"Thus we consider this case against the background of a profound national commitment to the principles that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. "

### 2.2 Application of the right to common law and customary law

2.3 Should the right under discussion impose a constitutional duty on actors other than the state. For the sake of convenience and brevity, we will consider these headings together, since they are interrelated. The crisp question here will depend on the resolution of the horizontal/vertical debate. The DP, per our previous submissions, believes that, subject to the crafting of suitable safeguards, the Bill of Rights should have horizontal as well as vertical application. Of all the constitutional rights enshrined, few could be more worthy of horizontal application than speech and expression.

In this respect, we believe the Editor's Memorandum (Advocate G J Marcus) provides an admirable summation of the issue at 30:-

"The issue of the application of the constitution to the common law is of vital importance to the press. The entire body of the law of defamation is regulated by the common law and it is this area in particular which poses particular hazards for the press... "

After considering the international jurisprudence on this issue, he concludes (at 36):-

"Adopting these canons of interpretation, it would lead to absurd results to leave common law rules of defamation insulated from the Bill of Rights. There is no logical distinction between a statutory limitation on the freedom of expression and one embodied in the common law. "

Although this issue will be resolved elsewhere, or indeed if not resolved in the new constitutional text, will be determined by the courts, we respectfully agree with the above opinion and urge that its approach be followed.

We are not aware of any specific customary law usages which do not fall under the common law.

## CONSIDERATION OF FREEDOM OF EXPRESSION

2.4 Who should be the bearers of the right?

Clearly, a meaningful right to free speech requires that both citizens and the media be entitled to its protection. It would be unduly restrictive, if not absurd, to restrict its protection to cases involving state action alone. Once again, this should be more fully considered when the issue on horizontal application is considered.

2.5 Should the right under discussion be capable of limitation by the legislature?

No country permits an absolute, unqualified right to free speech. It is the nature of the limitation which is important. We support the general wording of section 33 (limitation clause) since it

provides for legal criteria against which any limitation has to be considered. In our view "reasonableness" coupled with standards of justification consonant with the requirement of "an open and democratic society based on freedom and equality" provide important safeguards against rendering constitutional rights vulnerable to unjustifiable incursions by the legislature and judiciary.

The real debate here is the "higher protection" afforded to certain constitutional rights in chapter three which obliges any limitation to pass a further test of necessity. Thus, restrictions on rights relating to "free and fair political activity", must also be "necessary".

The Conference of Editors is concerned that limitation on free speech and the media, in all cases be both reasonable and necessary.

We agree with this proposition and would indicate that the current wording of section 33 - and the higher protection afforded to certain so-called "political rights" - is a direct consequence of drafting an interim constitution to cover, critically, the period of the 1994 election. Since we are now drafting a so-called "final" constitution there is no basis, in law or logic, why the "higher standard of protection, achieved by a limitation being tested on grounds of both necessity and reasonableness", be not applied to freedom of expression.

## RIGHT OF ACCESS TO INFORMATION

### 1. CONTENT OF THE RIGHT

The relevant provisions of the constitution are:-

#### 1.1 Principle IX

"Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government. "

#### 1.2 Section 23

"Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information of required for the exercise of protection of any of his or her rights. "

Principle IX imposes a peremptory obligation on the Constitutional Assembly, and requires no debate. The real issue is whether or not section 23 adequately provides the holder of the right with a suitable instrument to achieve the entitlement promised by principle IX.

Another issue is whether the constitution itself should simply provide the rare essence of right, to be supplemented - in due course - by a freedom of information status.

The DP believes that the citizen's right to information should be constitutionally secured. We believe that such information includes information used in the governance of the people and specific information - subject of course to the limitation clause - that the state possesses in respect of individual citizens. We do not believe the constitution should seek to capture all the relevant considerations that would ordinarily form part of a detailed statute, but rather should state the broad principle and leave its further development to the courts,

We do, however, regard the right to information as fundamental and freestanding. We believe the provisions of section 23 are unduly narrow and restrictive, since it makes the enjoyment of the right to information contingent on such access being necessary for the enforcement or protection of other rights. (See Marcus at 58).

In place of the current provisions of section 23, we propose the following substitution: -

"Every citizen shall have the right to obtain from the state, and from any organ of state or government, with due expedition, all information:-

(1) Concerning the organization of such organ, its decisions and decision-making procedures, its rules and policies;

(2) held by the state concerning such person. "

## 2. APPLICATION OF THE RIGHT

### 2.1 Nature of duty to be imposed on the state

This is apparent from the wording of the clause.

### 2.2 Application of the right to common/customary law

Would be applicable in so far as customary law institutions are "organs of the state. "

### 2.3 Constitutional duty imposed on actors other than the state

None

### 2.4 Who should be bearers of the right?

Citizens, rather than all natural persons.

It is possible for juristic persons to bear this right, but whether its application is feasible to corporate entities will require special consideration.

### 2.5 Limitation

Clearly the limitation clause is applicable.