

DEMOCRATIC PARTY (DP)

THEME COMMITTEE 4: FUNDAMENTAL RIGHTS REVISED DEMOCRATIC PARTY SUBMISSION ON "FREEDOM OF ECONOMIC ACTIVITY"

ECONOMIC ACTIVITY

1. Content of the Right

Section 26 of the Constitution provides:

- "(1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.
- (2) Sub-section (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality."

The Democratic Party has reconsidered its earlier submission on this right. We are concerned that this right is, in effect, doubly circumscribed, by a combination of s 26(2) and the limitation clause (s 33) which jointly render the right nugatory. It is significant, we submit, that Article 12 of the German Basic Law contains a provision in similar terms to s 26(1) (but not s 26(2)), the material part of which reads as follows:

"All Germans shall have the right to freely choose their trade, occupation or profession, their place of work and their place of training. The practice of trades, occupations and professions may be regulated by or pursuant to a law."

Although we believe that, ideally, as with any other right this right should only be circumscribed by the limitation clause, we accept that some measure of circumscription may be necessary in the interests of promoting a social market economy based on social justice. Whatever limitation is contained in s 26(2) should, however, not render the basic right meaningless, as would seem to be the case with the existing s 26(2).

With this in mind, we propose that while certain of the concepts underlying s 26(2) are retained, the phrase "basic conditions of employment, fair labour practices or equal opportunity for all" should be deleted, as all these concepts are covered by s 8 (equality) and s 27 (labour relations) of the Constitution and will undoubtedly be carried forward in the final Constitution.

As we believe it important to promote harmony between the two existing subsections, we suggest that s 26(1) be retained and that s 26(2) be re-formulated as follows:

- (2) In order to develop an open and democratic society based on freedom and equality, reasonable measures may be taken to protect or improve the quality of life, economic growth, human development and social justice. "

The advantage of this formulation is that it is complementary to and coextensive with (1), thus encouraging the development of a social market economy founded on social justice. Unlike the existing formulation of s 26 which is negative and contradictory, this formulation is positive and cohesive.

2. Application of the Right

The right should apply to natural as well as to juristic persons. Although this will have direct relevance in statutory or regulatory applications, it should also have application to the common law.

3. Limitations of the Right

The qualification described in 1 above should apply to the right, as well as to the limitation clause (s 33).