

# **NATIONAL PARTY PRELIMINARY SUBMISSION**

## **THEME COMMITTEE 4**

### **BLOCK 5 ITEM 9: FREEDOM OF RELIGION, BELIEF AND OPINION**

#### **1 Content of the right**

In terms of the transitional constitution, this right includes the right to freedom of conscience, religion, thought, belief and opinion, as well as academic freedom in institutions of higher learning (section 14). The right refers to the right of individuals to hold (and not to hold) any religious and secular conviction and to the right to express, profess, practise and propagate them publicly and in association with others. The right is, therefore, closely linked to the freedom of expression and of association and to political rights and should be retained as one of the most fundamental rights of the individual.

#### **1.2 Controversial issues**

##### **(a) Religion in state institutions**

The purpose of the right is, of course, inter alia to prevent the state from interfering in the personal beliefs of people and from favouring certain beliefs over others. This does not necessarily mean an absolute separation between church and state. As a matter of fact, an absolute separation would prevent the state from any action whatsoever, including fulfilling its duty to create the opportunity

and space for different religions to exist, practise and flourish. In this regard, two schools of thought exist. In terms of the American approach, based on the so-called "establishment" and "free exercise" clauses, a very strict separation is observed. In terms of the "establishment clause", all religious activities in schools and other state, state-aided and state-funded institutions are prohibited, irrespective of whether they are conducted voluntarily. The "free exercise clause" in turn, prohibits any state involvement in religious matters. This strict approach sometimes leads to rather absurd results not always concomitant with public opinion in America about religion, and has led, for example, to the so-called "neutrality dilemma", in terms of which the individual is protected against instruction favouring religious convictions, but not against instruction offending religious convictions. (See Valente Law in the Schools (1980)112.)

A different approach is followed in **Germany**. Freedom of religion is coupled with a duty by the state to promote religious observances in state institutions such as schools. The potential tension between freedom of religion and the right to practise it in schools with state assistance has been defused by the German Federal Constitutional Court by simply requiring such observances to be voluntary and inclusive. "Neutraliteit beteken dus nie soos in die VSA die staat se algehele weerhouding nie, maar die skep van gelyke geleenthede vir verskillende geloofsoortuigings" (Malherbe "In Handves van regte en Onderwys" 1993 TSAR 687 703. See also Malherbe "Die onderwysbepalings van die 1993 grondwet" 1995 TSAR 1 7.)

**The inclusion of section 14(2) reflects South African attitudes on this matter, subscribes to the German approach and we propose that it be retained unamended.** In the words of Du Plessis and Corder (Understanding South Africa's Transitional Bills of Rights (1994) 157): "Section 14(2) is a prime example of a provision attesting to the negotiators' unwillingness to

erect walls of separation between church and state". (See also Cachalia et al Fundamental Rights in the New Constitution (1994) 52.)

(b) Academic freedom

There is no compelling reason why academic freedom and the autonomy of institutions of higher learning must be included under this right. It is clear from Du Plessis and Corder 156-157 that, although analogous to the Namibian constitution, the present wording was a compromise. This created a number of problems. Firstly, aspects of academic freedom were included under different rights - freedom of scientific research under section 15 and the "remainder", under section 14. Apart from anything else, academic freedom at least includes the freedom to teach and conduct scientific research and reference in another section to such a basic component of academic freedom only creates confusion.

Secondly, as a mere component of freedom of religion, belief and opinion, some uncertainty exists as to whether academic freedom includes institutional autonomy. Although it could be argued that the autonomy of institutions of higher learning over matters of academic relevance is covered by academic freedom, any doubt in this regard should be removed.

Thirdly, inclusion of academic freedom under section 14 does not reflect the full scope of the right. It is often said that academic freedom is a collective term for a number of other rights such as the freedom of expression, conscience, and association, and an inference is possible that by including it

under section 14, the scope of the right has been limited. **These concerns can be eliminated by providing for academic freedom in a separate, substantive provision.** The argument that academic freedom is already covered by the freedom of thought, belief and opinion (Du Plessis and Corder 157), is refuted, firstly, by the fact that it was in any case thought necessary to include a particular element of academic freedom, namely the freedom of scientific research, under section 15 and, secondly, by the fact that express reference to particular matters already covered by broadly formulated rights appear in the bill of rights in respect of other rights as well, for instance in the case of the freedom of the press and other media (section 15(1)).

For the reasons advanced here, **we propose that academic freedom and related aspects be consolidated and protected in separate provision.** (See also the arguments by Malherbe "Die onderwysbepalings van die 1993 grondwet" 1995 TSAR 8-11 en "Die regsbeskerming van akademiese vryheid en universiteitsoutonomie in 'n nuwe Suid Afrika" 1993 TSAR 359 379-381). Such a provision should therefor refer to academic freedom as the right to teach and to do scientific research and it should further refer expressly to the right of institutions of higher learning to autonomy over matters of academic relevance.

#### (c) Systems of law of religious communities

The present section 14(3) only allows for legislation to be adopted in this regard without creating any constitutional right. Although a right in this regard can be created, it should not lead to the preservation of practices otherwise prohibited by the equality clause (section 8), the rights of children (section 30), and other rights such as those relating to human dignity (section 10), life

(section 9), freedom and security of the person (section 11), servitude and forced labour (section 12), privacy (section 13), and freedom of movement (section 180).

## **2. Application of the right**

### 2.1 Nature of the duty on the state

This matter has been dealt with under paragraph 1. The state has duty to refrain, but also a duty to provide opportunity and scope.

### 2.2 Application to common law and customary law

In principle, the right should apply to common law and customary law. Provision for the recognition of particular systems of religious law (paragraph 1.2(c)), may affect this matter.

### 2.3 Other actors

It has been shown that academic freedom binds the state as well as the institution (Malherbe 1993 TSAR 366). The individual teacher (and the institution, in the case of its autonomy or the academic freedom of its staff) enforces the right against the state, whereas the teacher enforces the right against the state and the institution. Of course, it can be argued that for this purpose the institution should be regarded as a state body, but one should never lose sight of the fact that the

institution may find itself in a position where it may act against the state for its own sake or for that of its staff.

In respect of the other aspects covered by the right, it seems as if only the state should be bound.

#### 2.4 Bearers of the right

It follows from the previous remark that natural as well as juristic persons can be bearers of academic freedom. In respect of religion, a church should also be able to act against the state whenever the latter discriminates against it, etc.

#### 2.5 Limitation of the right

The present section 14 contains two specific limitation provisions, namely religious observances in state or state-aided institutions provided that they are conducted on an equitable, free and voluntary basis, and recognition of systems of law of religious communities. Both have been discussed. In addition, the general limitations clause should apply to limitations placed on the free exercise of the right for the protection of community interests such as public order and health and public morals.

### **3. Wording**

We suggest the following wording for a substantive provision on academic freedom:

“(1) Every person has the right to academic freedom [Alternatively: freedom of scientific research and teaching] at institutions of higher learning.

(2) Every institution of higher learning shall be autonomous with regard to matters related to subsection (1) .”

The present sections 14(1) and 15(1) should be amended to accommodate the new provision.