

2/4/4/1/7/2

CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 4
FUNDAMENTAL RIGHTS**

PARTY SUBMISSIONS

- ADDITIONAL**
- Freedom of Expression
 - Right of Access to Information

**PLEASE NOTE:
THE SUBMISSIONS ATTACHED WERE
RECEIVED AFTER THE DEADLINE OF 7
APRIL 1995**

AFRICAN CHRISTIAN DEMOCRATIC PARTY

SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY THEME COMMITTEE FOUR

FREEDOM OF EXPRESSION

Content of the Right

The Christian Viewpoint

On April 27th, 1994, the people voted for a new South Africa; a new democracy. Therein they exercised their right of freedom of expression. The right in general was a political one, a partly political one. In terms of it's broader democratic sense, the elections were a political milestone.

However, in terms of it's moral basis, our democratic principles appear to be shaky.

On the one hand, we have been released from the claustrophobic structures of Apartheid, into a new era of enlightenment. However, this process of unshacklement, on the other hand, has destroyed those moorings that gave the political struggle a humanitarianism value, in that our present constitutional deliberations are being diluted by the contradictions of so called enlightened democracy. In other words, the political achievement of the past are being disconnected from it's noble moral values.

It is not too late for a mid-course correction. We will have to redirect our focus towards a balanced standard, determined along the lines of God's divine plan for humanity. The route of any other standard is capricious and whimsical and subject to the vicissitudes of human expediency.

Thus, it is also with reference o the right to freedom of expression. A new democracy and it's exotic appeal of enlightenment surely does not have to denigrate towards a system of senseless and abominable literature and activities.

By allowing such unbridled misconception, we are confusing the meaning of true democracy.

Democracy is built upon the desires of the people for righteous and moral justice, responsible civic duty, as well as the realisation that limitations exist especially on the recognition that human beings are sinful. Any form of activity outside of these understandings or medical research intended for indiscriminate manipulation; so is the right of expression was intended to fulfil the fantasies of the unscrupulous power lords.

Issues like pornography has, as it's object arm. the enforcing of blatant economism. Sex sells and the more we reduce the God endowed value of intimacy to a materialist level, we dehumanise people at the idolatry elevation of money.

The legacy of immorality and consequent chaos that we are leaving for the future generation is clearly explained in the Bible where the children will be punished for the sin of the fathers to the third and fourth generations (Exodus 20:5).

As Paul remarked: "Not one of us lives for himself." Accordingly, we are to see to it "that no one puts a stumbling stone or obstruction into his brother's path." (Romans 14:7,13). "Be careful lest in any way this liberty of yours becomes a stumbling stone to those that are weak." And 'shall the weaker brother for whom Christ died, perish on account of your better understanding/ For when you thus sin against the brethren, you sin against Christ" (1 Corinthians 8:9-12); and cf. 10:23-33). Especially those who would not protect little children from pornography, need to heed to solemn warning of the Saviour: "Whosoever offends one of these little ones which believe in me, it were better for him that a millstone were hanged about his neck, and that he were drowned in the depth of the sea" (Matthew 18:6).

The question is not whether we should have censorship. For some kind of censorship is inevitable, wherever we may live.

The real question is what kind of censorship should be applied? We need a censorship that is based upon biblical values where the rules laid down for civil law and government is based in Christian morality.

No Bible-believing person can deny the Scriptural imperatives to combat the anaesthetic, the immoral, the untrue and the treasonous. God's Word commands men to desist from letting any corrupt communication proceed from their mouths, (Ephesians 4:29). Instead, they should promote whatsoever things are true, honest, just, pure, lovely and of good report (Philippians 4:8). For the Lord enjoins us to hold fast to that which is good, and to abstain from everything which even appears to be evil. (1 Thessalonians 5:21-22).

We in the ACDP believes that freedom of expression should also include the right of censorship.

No nation can remain free once moral norms have been eroded. It is when obscenity, promiscuity, degeneracy, homosexuality and lesbianism, (Romans 1:8-32), are allowed to be represented to the public as healthy and normal phemonena, a moral vacuum is created.

So we need censorship. As the Bible says "where there is no counsel, people fall." (Proverbs 11:14 "Righteousness exalts a nation: sin is a reproach for any people, (Proverbs 14:36. "Without counsel, purposes misfire." (Proverbs 15:22. "Righteous lips are the delight of rulers, for the Government is established by righteousness. (Proverbs 16:13. "A wise ruler scattereth the wicked by if a ruler hearkens to lies, all servants are wicked." (Proverbs 29:12).

The ACDP is of the belief that the exercise of these freedoms carry with them duties and responsibilities and involves the application of restrictions and limitations.

We adhere to the principle that the right freely to create, speak, write and publish sentiments or expressions on all subjects, shall not be infringed.

We, however, deem as licentious, those expressions that can be classed as defamatory, obscene or profane, and which by its very nature, is an abuse of the right of expression. The body is the temple of God (1 Corinthians 6:19) and the word, written or spoken, reflects something of the Creator. We imitate our Creator by our various talents through artistic freedom of speech and the written medium, in that we have been supplied with the necessary physical prerequisites at creation.

That which is obscene, profane or defamatory is the distorted application of this right and because of its implicit polemic orientation, should be subject to civil redress.

It is imperative that, strict standards be enforced in determining what can be classified as defensible or indefensible. The ACDP reiterates that in determining said standards, portrayals of the horrors of child abuse, pornographic liberties, sacrilegious activities, desecration of state symbols, or any legislative provisions that may lead to these behaviour patterns, are deemed to forms of expression that are unacceptable to the ACDP.

In fact, the freedom of expression should be restated as the expression of freedom. In this sense, freedom will be understood as a value berthed in discipline and struggle, and expression as the responsible ethic emanating to protect the value of freedom. The ACDP wish to add to Section 15 of the interim Constitution, a paragraph which will state the following:

Section 15 (3): The right is proscriptive to the extent to which it brings into jeopardy "the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence..." (*Article 10 (2) of the European Convention for the protection of Human Rights and Fundamental Freedoms.*)

Application of the Right

2.1 Nature of the duty to be imposed on the State

- to protect the right as suggested.
- that the expression of authority by the State is subjected to God's law of morality and justice, and the respect to uphold the sovereignty of the constitution.
- to protect society against lawlessness and ethic depravity.

2.2 Application of the right to common law and customary law

Ultimately, the constitution must reflect the Law of the triune God and from that perspective, differences between customary, common and constitutional law must be addressed. The ACDP, however, notes with disfavour the move world-wide to abolish the common law, as it existed for several centuries.

Wherever any law will attempt to distract from the biblical basis of any customary or common law precept, this will not be tolerated.

Given the creative nature of humankind, and depending upon the responsible limitation attached to this right, the protection of this right of expression should permeate common and customary law, where it does not contravene Biblical Law.

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

Yes. Although the right is more creatively exercised by natural persons, all members of society and juristic persons should exercise this right, with the proviso that the fundamental right to dignity is respected.

The ACDP imposes those duties on state subjects, that is attendant to their position, as created beings and as custodians of God's laws and principles. Insofar as the constitution has a fixed moral content, not capable of arbitrarily being changed and adapted, according to the whims of an elite, by a pseudo legal system of positivism, that conforms to the Biblical Principles mentioned, it is submitted that, as equal subjects of God's law, all citizens should be burdened with the responsibilities and, at the same time, enjoy the benefit of this right.

2.4 Who should be the bearers of the right?

The limitations of this right should apply to natural and juristic persons.

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

It would be impossible to refer to the right to freedom of expression, without having regard to acceptable limits thereon. The ACDP is against abuse of the freedom of expression, whether it be hate speech, immoral 'acts' or obscenity in whichever form. No example of obscenity has such a clear impact on the fibre of society as has pornography.

The word, pornography means literally 'the writing of harlots' and even it's etymology depicts it's depraved nature.

In her excellently written and researched thesis, Dr Judith A. Reisman traces the history of pornographic acceptability in the United States of America, to the 'research' of Dr Alfred C. Kinsey. [Soft Porn plays Hardball, Huntington House, 1991]. In "Sexual Behaviour in the Human Male", he made public his so-called sexual 'outlet' theory in which he made the then unheard of claims that male sexual identity and maleness is directly related to the total numbers of his sexual 'outlets' or orgasms which he referred to as the 'total sexual outlet'. Sexual intercourse with a differentiated variety of people and animals of any age and gender was natural and even children needed multiple orgasm outlets to function healthy sexually.

These ideas were read and immediately found acceptable by an American College youth, who founded a sex-magazine industry, based on the concept that all men are merely boys playing at manhood with objects such as beautiful cars and sexually attractive women whom he dressed in topless bunny uniforms. The man was Hefner and his industry, Playboy Inc.

A look at the history of the porn industry in the USA is extremely helpful in two aspects:

1. It shows where the relaxation of censorship on obscene or sexually explicit materials may lead to; and
2. It provides the new South Africa with methods to counteract the social evils identified in the other leg of this exercise.

In 1948, Playboy pornographers had several problems in making Kinsey's finding of masturbation for health acceptable in American society:

To influence male society in future generations they had to reach college males. This target group, however, still clinging to the family values based on fixed Christian moral principles, considered 'girlie' magazines to be cheap trash, the majority saved themselves sexually for their future life mates - their wives considered prostitutes to be diseased, unrewarding and unacceptable as sexual partners and that pre-marital intercourse and masturbation was taboo.

By using an aggressive and attractively packaged marketing strategy, Playboy introduced Kinsey's findings as fact and by interspersing articles by nationally-known figures and presenting these individuals as approving of these philosophies 'harmless' paper dolls were made the stuff college men dreamed and fantasized about.

A frequently-heard reaction to the censorship of pornography is (like with gambling, smoking or drinking) that it is used all over the world and that it will, therefore, be impossible to prohibit the use thereof.

This argument fails to recognize that cocaine use or any other drug of it's like also has a number of users growing daily, with a snow-ball effect. The drug industry is successful because the dealers and suppliers know that either addictiveness will follow by progressing from, eg. cannabis to much stronger drugs, or will follow immediately after taking one of the stronger addictive substances - even if it is a first-time user.

Pornography is equally addictive and, yet, considered 'harmless' a la Kinsey et al.

In tracing the neuro-chemical addictive nature of pornography, Dr Judith Reisman notes the following:

"The human brain experiences conflicting and confusing images and information when viewing pornography. Airbrushed pictures of cosmetically and surgically 'perfect' nude women gaze with professional coyness at the consumer from pages that include jokes of male impotence and castration, rape, adultery, child sexual abuse, religious ridicule and even pictures and jokes of women and children being tortured or sacrificially murdered. Each month's sado-sexual stimuli is meshed with advertisements for autos, liquor and fashion.

Serious articles and interview with famous, authoritative male figures imply (by their appearance in the magazine) that pornography is acceptable and an important element in a powerful world. By definition, the collection of such a multitude of conflicting sexual and scary, value laden stimuli in one sitting would tend to disorient the human brain.

In such a state, how is it possible that a soft porn consumers could isolate and determine which image or idea is arousing him moment by moment, second by second? To have some idea of how boys and men respond to soft porn images, it is necessary to ask how boys and men respond to live women and girls provoking them in the same manner. Sex research, criminal record, classical and contemporary literature, and even the Bible all concur on how normal males respond to a teasing nude female.

Further, how does the brain of a man or a boy respond to murderous, or other anxiety-provoking images? Tragically, we would presume in light of the research by world renowned medical doctor Isadore Rosenfeld, who warned that "the stress and guilt' of illicit sexual conduct can be fatal: "80 percent of all deaths occurring during intercourse do so when the activity is extramarital".

The last few decades of research have produced massive discoveries in the field of neurology and brain studies have clearly established the fact that every human really of two brains: the 'left' and the 'right' hemisphere. The right hemisphere is often called our 'emotional' brain and the left, our 'thinking' or rational brain. Studies in split-brain behaviour established the rush of pornography as a neuro-chemical response experienced primarily by the right brain.

"Every second, 100 million messages bombard the brain carrying information from the body's senses." Only a few of these are headed by "the conscious mind." Only the most important - or exciting - sense information gets through. This suggests why pornography has such an impact on people - young and old. When one reaches a state of emotional arousal faster than the body can rally its adaptive reactions, a form of stress follows. Briefly, the male body is designed to respond - or adapt - to blatant female coital signals by engaging in sexual intercourse. Anything which increases sexual stress (eg. sexual signal, sexual shame, sexual fear) triggers known physiological mechanisms. In an instant, anxiety mobilises the body into a 'chain reaction of defences with a singly aim: to put the body in top physical condition to cope with the emergency." Chemicals seep into the pituitary gland, releasing a stress hormone known as adrenocorticotrophic hormone (ACTH). Scores of other neuro-chemicals are sped into action as well, notably adrenaline and nonadrenaline. The bronchial tubes relax and open for deeper breathing. Blood sugar is increased for maximum energy. The heart beats faster and contracts strongly; stress will "arouse [all] vital organs."

A vital organ is any single structure of the body that performs some specific function, like kidneys, lungs, heart and sexual organs. So anything that stresses the body, good or bad, will alert the gate keeping organs of sight, sound and sex.

Muscles contract and blood pressure rises. The eye pupils dilate 'widely' to improve vision as the body organizes to meet an emergency. At red-alert, in a light-or-fight mode, we can 'now perform feats of strength and endurance for beyond...normal capacity.' This high arousal-anxiety state would be a normal, although not always automatic, biochemical response of a male to a live or pictorial female coital sex cue.

So, let us consider what is happening to a man or boy turning the pages of Playboy, Penthouse, etc., or viewing a sado-sexual video. His brain is processing images and words of diverse sex signals and emotions, a composite of stimuli, which affects a neuro-chemical response throughout his entire body.

In a manner of speaking, if his left brain (rational hemisphere) had any control over the situation, it would be telling his right brain, "You dummy, that girl is only pretending to lust after you - infact, she's not even real. Why is your heart beating so fast, and why are your eye pupils dilating so wildly? She is only another man's creative fantasy. Get out of this sleazy strip joint or put those pictures away before your wife (mother, girlfriend) comes in!"

Along the same lines, Dr Victor Cline, a University of Utah psychologist notes the following chronological progress in pornography users in an address at the National Consultation on Pornography held in Cincinnati on 5th September, 1955:

Having, by then, treated 225 individuals who had had their lives disrupted one way or another, because of involvement with pornography, he identifies a special syndrome with four factors that repeat themselves over and over.

Firstly addiction, which grabs men in an analogous way to heroin or morphine. To get new sexual highs, they pursue it in such a single-minded purposefulness that it creates a lot of stress in tension.

The second stage is escalation - in time the individual comes to need "rougher, more mean, more bizarre, more deviant, more explicit or even anti-social sexual imagery" to be turned on.

Thirdly, the threshold of desensitisation is crossed and what had been perceived as awful, disgusting, taboo breaking and repulsive, and is now found to be commonplace and legitimized. It becomes acceptable and then attractive and with a searing of conscience, the individual becomes blind to its potential dangers and keen to repeat it in real life.

The last deadly stage is that men begin to act out what they have seen - an appetite has been cultivated, conscience immobilized and what was once shocking and wrong or immoral is legitimized - everyone does it if one believes the books and films portraying these 'acceptable' life styles.

Dr Cline ends by saying "[pornography] is a direct attack upon the family and the marriage relationship." These charges need to be substantiated and this can only be truly done by having recourse to the process followed by those spreading the alternative lifestyle.

To trace the attack on the family, one needs to go back to the data dissembled by Kinsey in his reports on male sexuality. He found that 86% of American men experienced sexual intercourse before marriage, 70% had intercourse with prostitutes and 40% indulged in extramarital intercourse.

The fact that Kinsey's figures were based on a sample disproportionately weighted by homosexuals, prisoners and other social deviants he conveniently did not publicise and, thus, his false statistics on masturbation, bi-sexuality, homosexuality, virginity, adultery (swinging) and child-adult sex was made acceptable through so-called soft pornography lead by Playboy. It must be kept in mind that Kinsey did not originally come up with all the ingredients in his new sexual ethics philosophy; this credit goes to his friend and colleague, paedophile and child-adult sex advocate, Rene Guyon, (The ethics of Sex Acts, 1948) writing on sex laws. The motto of the Rene Guyon Society, (an international paedophile organisation), was 'sex before eight or else it's too late'. (Reisman, p.37)

In 1953, Kinsey brought out his report on Sexual Behaviour on the American Female, where his respondents were, to a sizeable and significant number, working prostitutes, whom he referred to as married women.

The stage is thus set for the new South Africa, to choose between virtue and morality, based upon the Christian values that gave the USA one of the oldest and, yet, mostly unchanged constitutions in the Western world, or a morality based upon false statistics and role models of sexually deficient males and prostitute females.

The well-known argument is that one cannot legislate morality - this has been so frequently and smugly repeated that it has almost taken on the cloak of natural law. The counter to this surely must be that all laws have a moral content: if one considers theft, fraud, libel, rape, incest or murder to be illegal, one does so because of one's sense of morality.

Law simply codify moral values. The only issue that remains is whether we enforce Biblical law, in matters of freedom of speech and, therefore, in matters of 'art' and pornography or, whether we accept the results of humanist law. If we choose the latter route, the American example of accepting the Supreme Court's application of humanist law tenets on constitutional issues will become the norm - God forbid!

The ACDP, representing a large constituency of people of moral fibre, will not stand for having our tax-money used to fund images with sexual humiliation in it...too disgusting to write about with any enthusiasm. These depictions included photographs by U. S. artist, Robert Mapplethorpe, of a man's fist up his partner's rectum and another of a finger rammed in a penis. These and other disgusting exhibitions depicting explicit gay sado-masochistic scenes, were partly funded by the National Endowment of the Arts - a U.S. governmental organisation - (Leadership article on censorship, 1994, p32).

Following on it's child-adult sex foundation, it is small wonder that pornography depicts incest, group sex, pseudo child pornography and rape.

The number one consumer group of pornography in the USA is adolescent boys between the ages of 12 and 17 years; this combined with pornography teaching that women exist only for the sexual satisfaction, demands and deviance's for men, means that this powerful teacher of attitudes and values will indelibly print it's ugly influence on generations to come. (The Twelve steps to Victory - National Coalition against Pornography, 1991).

Writing in 1991, Dr Judith Reisman noted that the former U.S. Surgeon, Dr C. Everett Koop, declared pornography to be a "crushing health problem...a clear and present danger...blatantly anti-human...we must oppose it as we oppose all violence and prejudice". Referring to Ted Bundy's (serial rapist-murderer) acknowledgement that his deviant behaviour started with perusing soft-core pornography, namely, Playboy magazine - Penthouse (1969) and Hustler (1974), did not exist then. If his behaviour was shaped by Playboy, what effects can society await from exposing their young one's to more explicitly violent sexual images.

What sort of messages do these soft-core magazines - the initiation to hard-core pornography, (similar to cannabis leading to cocaine derivatives) send out?

On the 26th October, 1990, Police in Norman, Oklahoma called for Hustler to be removed for local store shelves after a nine-year old, whose genitals were mutilated and had an eye gouged out and it was discovered that a recent issues of the magazine featured a scene where a child endured similar torture.

The pornography industry thrives upon the emasculation of men. Kinsey, in his Rockefeller Foundation-sponsored researches set a standard that equalled males with orgasmic potential - sexual performance. In a process aimed at undermining long-term married heterosexual love and commitment - known as heterophilia, or love and trust for the opposite sex, the magazines exploit male fears of women and family commitment - the pure virgin is portrayed as a security haunting gold-digger going all-out to clip the man's wings of freedom. They offer themselves as reliable, comforting substitutes for two monogamous heterosexual love between a man and a woman.

The resulting male impotence spawned by pornography is characterized by men's decreased orgasm ability (often true for pornography users), and by the weakening in their desire, courage and ability to tackle the most significant relationships in a man's life. *Aristotle warned that when the family is weakened, the loss is felt in community, state and federal leadership.* After enough prolonged exposure to high-stress sado-sexual images and philosophy, regular consumers go from being initially excited and titillated to an unconscious sense of insecurity. In contrast to this, the man with the strength of internal convictions and moral fibre knows who he is and rejects the pornographers intimidation of woman and children, as well as the subtle imagery and methodology aimed at his emasculation.

The sort of images transplant normal, adult, heterosexual, monogamous family relationships are revealing in themselves. Especially taboo subjects are featured in cartoons and it is here where the almost subconscious stimuli is provided.

In 1954, Playboy has a toddler soliciting sex from a prostitute with him holding out a coin to her and with her having a hand over the till register reading "NO SALE". Child-adult sex is clearly hinted at and the prostitute replaces the familiar mother figure.

In 1976, the Hustler has "Chester the Molester", (a cartoon image of a dirty old man who would do anything to trap a young girl of ten to twelve years old), underwater, wearing goggles and a snorkel. His arm is outstretched before him and his fingers are wriggling through the water as he reaches up toward the crotch of an adolescent girl, standing with legs wide apart and reaching up to catch a beach ball.

Teenage sex and pregnancy is depicted in cartoons showing in 1971, parents shocked at youthful coitus, becoming more accepting of peer sex and incestuous participation themselves in 1977.

SCENE - PLAYBOY 1971

A young couple is nude, on the living room couch, as the parents of the girl enter the room. The boy, holding his pants up so that we do not see his phallus, signals the two-fingered "peace" sign to mom and dad, saying: "Peace."

Six years later, in January 1997:

SCENE: Mom and dad have burst into the living room where two youngsters are having sex on the couch. Mother, ugly and bizarre, is shouting to the girl: "Charlene! You promised to wait until we got slip covers."

Wits University Law lecturer, Joanne Fedler has strong views on the dangers of even soft-core pornography such as Hustler. In Leadership, p 30, she is quoted saying that Hustler is on the edge of the slide to increased misogyny starting with ..."naked women, then it's splayed beaver shots [uncovered and open female genitalia] and then self-penetration. After that, they want to see her having sex with animals and men."

The ACDP opposes the undemocratic and irresponsible method of approaching the right evidenced by Dr Mangosothu Buthelezi (YOU Magazine, 1.9.94, p.12), when he stated:

"No one in this country will ever again decide what other intelligent and rational beings may read, hear or look at," when he appointed a task group to review South Africa's censorship legislation. Contrast this with just a few of the large number of submissions received by the Constitutional Assembly from South African citizens, from all walks of life:

"The right inherent in Section 10 appears to us to be meaningless if Section 15 is interpreted to allow absolute freedom of speech and expression to the point of abusing individuals, or groups. The pornographic 'industry' is staking a claim to publish explicit hard-core pornography on the basis of such an interpretation. We are contending that such constitutes an assault upon womanhood, as this has been defined by Canadian Courts, and thus nullifies the protection afforded in Section 10." (Volume 10, Theme Committee Four)

"Pornography to be kept illegal. I suggest this as our youth should not be exposed to unclean pictures...If pornography is allowed, it will not prevent innocents being exposed by unscrupulous advertising, television involvement, theatre wall placards and media promotion. I urge you, please let's keep South Africa clean." (Volume 10, Theme Committee Four)

"[Freedom of Speech] should not mean that the media can write, print or display whatever they want to. I strongly object to the total abandonment of censorship and the impact of pornographic material to this country." (Volume 5, Theme Committee Four)

"We support freedom of speech, but this does not mean total abandonment of all standards, for example, in the fields of publishing i.e. Pornographic material. This actually corrupts a people, as studies in the Nordic countries show." (Volume 5, Theme Committee Four)

"I object strongly to the Legislation of Pornographic Magazines. It degrades the role of the women." (Volume 12, Theme Committee Four)

"Children should be brought up in healthy environments, and certainly should not be exposed to bad surroundings like pornography...[The] influence of reading bad magazines destroys a child's childhood including his adulthood. By wanting to read more of these magazines it urges a child to want to watch these women in the magazines, on television. In this way the women are exploited and a child learns to lack respect for their parents and other adults around them. (Volume 11, Theme Committee Four)

The ACDP takes a clear stand and states that it will accept clear moral boundaries of limitation of this right in that it must be exercised responsibly and not in manners and ways harmful to the family (note Aristotle's comment previously mentioned), and the attending and normal values of monogamy and marriage to one partner for life. The ACDP will not tolerate any abuses of the right transgressing the laws of God and levels of accepted decency.

10th April 1995

[FREEDOM1.WPS]

AFRICAN CHRISTIAN DEMOCRATIC PARTY

SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY THEME COMMITTEE FOUR

ACCESS TO INFORMATION

Content of the Right

Section 23 of the interim Constitution states that:

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

The unique feature of this right in our Constitution underlines our commitment to democracy and shows courageous visionary leadership, specifically geared to address South Africa's particular historical legacy.

The ACDP believes that transparency and accountability are biblical principles and this right is, therefore, to be entrenched as a hallmark of responsible government. When government is absolute, it is absolute to the point of corruption and secrecy.

A government with limited powers evokes the trust of its citizenry and an informed people predicated a stable society. Any breach of this contract of transparency and accountability will justify the removal of the government. Secrecy is conspiracy against the people and a denial of their rights and should not be the methodology of our governmental system.

As far as this right remains *beneficial* for the person(s) involved, the 'required' information should be made readily available.

The ACDP wishes to stress that unless the **duties and responsibilities** are clearly spelled out as *foundational values* to the application of fundamental rights, the right under discussion will suffer abuse and give rise to State control and authoritarianism.

Application of the Right

2.1 Nature of the duty to be imposed on the State

Given South Africa's notorious past in government not observing accountability to its citizens, the inclusion of this right is endorsed, especially in the period of transition. Government must, at all times, be responsible in its activities and, because the past tendency was to obscure immoral and unethical practices behind undefined State interest, it is submitted that citizens will only benefit from having easier access to operations that directly impact on individual lives, but, that it will also ensure sound governmental behaviour.

2.2 Application of the right to common law and customary law

The Party believes that all aspects of law are subject to God's Word. Should customary or common law hold precepts that will transgress this absolute truth, it is to be discarded. The same goes for any individual human rights or the application thereof. Where the right under discussion does not contravene divine law, referred to above, it should override contrary principles in common or customary law, should same be found to exist.

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

No, this right should be vertical in application only.

2.4 Who should be the bearers of the right?

The Party submits that all natural persons from conception to natural death should bear this right. Juristic persons have access to information through established processes of law. The individual does not have the leverage to obtain information and the individual is most likely to have this right denied.

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

The ACDP holds the view that this right should be capable of limitation as with any other right. The previous government hid behind "State Security" and a "State of Emergency" from being accountable to those they were supposed to serve. This should be avoided by having public structures, as open and accessible to the community as possible. Nevertheless, following the American notion of compellable state interest, methods must be found to limit the right of the individual in bringing about individual interests. The party, again, states that the only way to ensure against arbitrary limitations and infringements, is to have an absolute standard - God's principles - against which to test all circumstances.

State security has to be balanced against the individual's right to access to information and legal privileges, e.g. attorney-client privileges should be upheld in the interests of certainty of law.

10th April 1995

[ACCESS1.WPS]



VRYHEIDSFRONT

FREEDOM FRONT

THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

SUBMISSIONS ON FREEDOM OF EXPRESSION

1. Content of the right

1.1 Provisions of the transitional Constitution

The Freedom Front supports the general concept of freedom of expression as set out in section 15(1) of the transitional Constitution, but wishes to stress that the bill of rights should clearly provide that "freedom of artistic creativity and scientific research" should not be pretexts for modes of expression that are obscene or offensive to the public generally or to any group in society with lawful aims.

Participation in cultural life and the right to use the language of one's choice are examples of freedom of expression. (The provisions of that transitional Constitution relating to official languages, inter alia section 3) will be raised in Theme Committee 1, but there may very well be an overlap with other theme committees, including Theme Committee 4.)

Although the Freedom Front is in favour of ensuring impartiality and the expression of a diversity of opinion referred to section 15(2), it is convinced that such impartiality cannot be attained if the state is able to control the media (even though the state may to a certain extent have to finance media). This matter is dealt with below.

1.2 Controversial issues

Press freedom

The function of the press, according to professor JC van der Walt "is to serve the public interest. What does

the public interest embrace? The public interest is served by making available information and criticism which is relevant to the community about all aspects of the public, political and socio-economic activities and contributing to the formation of public opinion. This function guarantees the freedom of the press and at the same time sets the limits" (translation, from Gedenkbundel H L Swanepoel p 76).

The importance of the press in a democratic society can hardly be overemphasized: "Newspapers are not passive instruments. They are makers as well as selectors and dispensers of news. More than that; the role they play as an integral part of the connective tissue of South African society is exceptional when compared with the position of newspapers in any other free country. They are the one medium on which the literate and semi-literate population depends for guidance, its outlook on the world, entertainment, interpretative comment and informed opinion. For thousands of South Africans the newspapers are their sole literature". (Morris Broughton: Press and Politics of South Africa, Purnell and Sons, Cape Town and Johannesburg, 1961, at pp 12-13.)

Although press freedom is often much lauded, it should be remembered that this freedom is one of the most controversial in the context of human rights instruments. A formulation of the general principle should, therefore, be properly qualified. Freedom of expression will have to be weighed against other fundamental rights, including rights of dignity, privacy, etc.

On the one hand freedom of the press is one of the most important instruments of democracy. (See Cachalia et al Fundamental Rights in the New Constitution Cape Town; Juta 1993 at p 54.) In the first place, this freedom enables members of the general public to acquire information to enable them to exercise their democratic right of criticism of the government, opposition parties and public and private institutions and persons. Secondly, this freedom leads to informed public opinion necessary for a meaningful exercise of democratic voting rights in elections and/or referenda.

On the other hand, biased or prejudiced news may cause incalculable damage to society. Gullible and ignorant members of the public are particularly susceptible to a barrage of propaganda by the media, often inspired by political parties and particular or partisan interests.

Our statements above applying to the press are also applicable to other media.

A fine balance between the above-mentioned conflicting

interests must be maintained. It is not possible, however, for a bill of rights to spell out the details of this balance: it is the function of the courts to do so over the years in the course of their interpretation of the provisions of the bill of rights. At this stage it is recommended that the chapter on fundamental rights should contain only a brief statement of principle in support of freedom of the press, as an important component of freedom of expression generally.

A case has been made out for the statement that South African censorship laws and the Publications Act 42 of 1974 in particular are in need of revision. (See JWC van Rooyen " 'n Menseregte handves: Die toekomst van die Wet op Publikasies 1974" 1992 De Jure 110; "Publications Appeal Board: Court or inquisition?" 1991 SAJHR 342; "Censorship in a future South Africa: A legal perspective" 1993 De Jure 283.)

In the context sketched above the Freedom Front recommends:

- (a) that the existing section 15(2) be reformulated to read:

"All media, whether financed by or partly by the state or not, shall be regulated by an independent media commission in a manner which ensures maximum dissemination of news, impartiality and the expression of diversity of opinion, subject only to such restraints as may be imposed by law" ;

- (b) that a commission be appointed to consider existing common law and statutory restraints on press freedom and to make recommendations concerning their retention, amendment or repeal.

State controlled media

The Freedom Front is convinced that public media should not, generally, be under state control, as this would enable the government of the day to manipulate public opinion and gain support as a result of indoctrination of the public, at the expense of other parties, the public in general, the public interest and the cause of democracy. We realise that costly public media such as radio and television are to a large extent dependent on state financing. Even on the assumption that there should be some measure of regulation of the airwaves, the state should not generally control such media, for the reasons stated above.

We submit that the Constitution should, in favour of public media such as radio and television, contain a provision in the spirit of the present Constitutional Principle XXVI

(a constitutional right to an equitable share of revenue collected nationally). We are convinced that the creation of an independent, free press would be conducive to the public interest and in accordance with one of the basic elements of the concept of democracy, namely giving due weight also to the views of minorities.

The Freedom Front is also of the opinion that an independent free press would be one of the "checks and balances" necessary in a democratic society to restrain excessive use of government powers and that constitutional entrenchments are, therefore, necessary to guarantee this freedom.

Hate speech and obscene speech

The Freedom Front is of the opinion that statutory provision should be made to prohibit the exercise of speech or writing which incites hatred amongst people, whether of a racial or any other nature, as well as obscene speech and writing. We are not at this stage convinced, however, that such provisions should be entrenched in a bill of rights. In our view these matters could, as at present, be adequately dealt with in criminal or administrative statutes outside the Constitution.

Commercial speech

If the words "commercial speech" are meant to refer to commercial advertising campaigns, the Freedom Front wishes to point out that this is, internationally, a very controversial issue. It accordingly requests that this matter be either debated or otherwise clarified in Theme Committee 4.

Conduct as an expression

It has been suggested that conduct may be regarded as a form of freedom of expression, e.g. picketing. The Freedom Front is of the opinion, however, that conduct other than speech or writing should not be regarded as a form of freedom of expression. It should rather be dealt with under another appropriate heading in the bill of rights, e.g. in the case of picketing under the present section 27 (labour relations) of the transitional Constitution.

1.3 Other issues

The International Covenant on Civil and Political Rights

1966 in article 19 acknowledges that everyone has the right to freedom of expression, which includes the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

The Freedom Front supports the principle formulated in article 19 above, but wishes to stress that the exercise of the above-mentioned rights should be qualified, as set out below.

We agree with article 19.2 of the same Covenant, which provides that such exercise "carries with it special duties and responsibilities", and "may therefore be subject to certain restrictions". We are also in general agreement with the further provisions of article 19.2 to the effect that such restrictions shall only be such as are provided by law and are necessary (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order, or of public health or morals.

The Freedom Front is of the opinion that the restrictions mentioned above should be supplemented by further restrictions necessary in a democratic society (see Article 10 of the European Convention on Human Rights) in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for preventing the disclosure of information received in confidence, and for maintaining the authority and impartiality of the judiciary. The restrictions should include also the protection of languages, cultural values and interests appertaining to particular sections of the South African community, as guaranteed by Constitutional Principle XI.

2. Application of the right

2.1 Nature of the duty to be imposed on the state

The nature of the duty to be imposed on the state appears from the exposition above under Content of the right, especially 1.2 (Controversial issues).

2.2 Application of the right to common law and customary law

The Freedom Front is of the opinion that common law and customary law provisions in conflict with the right as defined in the bill of rights should be void. However, common law and customary law provisions that are supplementary to the right as defined in the bill of rights should be retained until competent courts have held such provisions not to be applicable in the context of the bill

of rights.

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

The Freedom Front is of the opinion that this question should be answered in the affirmative. Any other view would place an undue restriction on the exercise of this fundamental right.

2.4 Who should be bearers of the right?

We are of the opinion that natural persons, juristic persons, citizens and all persons lawfully in South Africa should be bearers of this right. Juristic persons are prevalent in the media. Maximum extension of this right is in accordance with democratic principle.

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

The Freedom Front submits that this right, properly qualified in the bill of rights, should not be capable of limitation by the legislature - not even in accordance with the provisions of a limitation clause in the bill of rights (at present section 33 of the transitional Constitution). Our motivation is that freedom of expression is one of the main pillars of democracy, to be securely entrenched in the Constitution and not subject to erosion by subsequent ordinary legislation.



VRYHEIDSFRONT

FREEDOM FRONT

THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

RIGHT OF ACCESS TO INFORMATION

1. Content of the right

1.1 Constitutional provisions

The agenda supplied to parties contains references to Constitutional Principle IX and section 23 of the transitional Constitution. The Freedom Front is of the opinion that section 23 goes further than Constitutional Principle IX in so far as it contains a specific reference to the purpose for which the information is required, viz. for the exercise or protection of any of the rights of every person.

We believe that the concluding words of section 23 are too widely phrased, as they refer (at least) to all the rights dealt with in chapter 3 of the transitional Constitution. It is not clear why this should be so. In our view the more general words of Constitutional Principle IX ('open and accountable administration') are more apposite in the context. By way of contrast it should be mentioned that the right of access to information is placed in a much clearer context by section 24(c) ('Administrative justice') than by section 23. The proper approach, we suggest, would be to have a very brief reference to a right to information in the Constitution, and to regulate its applicability to particular circumstances by ordinary legislation. This right should not be included in extended form in any future South African bill of rights.

The Freedom Front submits that the so-called right of access to all information held by the state or any of its organs at any level of government is not a 'universally accepted fundamental right' within the meaning of Constitutional Principle II. It is not specifically mentioned in section 19 of the International Covenant on Civil and Political Rights 1966, which can be taken as the embodiment of universally accepted fundamental rights. Moreover, it is not mentioned in an

important regional instrument such as the European Convention on Human Rights 1950. Another regional instrument, the African Charter on Human and Peoples' Rights 1981, recognises the right of the individual to receive information and to disseminate his opinions 'within the law' (stress supplied), which links up with our idea that such a right should be dealt with in legislation other than the Constitution, because this right can manifest itself in so many different forms (see below).

The so-called right of access to information is the flipside of the right to privacy. Rights of privacy, again, are of such a diffuse nature that it is impossible to draft either a brief or a totally comprehensive provision in a bill of rights in a manner that will deal adequately with the underlying concept.

Rights of privacy span private law, mercantile law, the law of civil procedure, criminal law, constitutional law, etc. These rights include, but are not limited to, personal privacy, privacy of home life, privacy of post and telecommunications, privacy of information relating to medical matters, financial matters (including banks and income tax, business data, etc.

In civil procedure these rights relate to privileged information in litigation (e.g. technical 'discovery' of documents and related so-called Anton Piller orders). In criminal law they relate to searches of persons and homes, possibly various rules relating to evidence, homosexual and lesbian acts, the viewing of pornographic material, etc. In constitutional law they relate, inter alia, to matters of intelligence and security as well as the general relationship between freedom of the person and the interest(s) of the state and society generally.

A so-called right of freedom of the media and free access to the media (e.g. television waves and radio waves) is sometimes mentioned as a manifestation of the so-called right of access to information. However, this purported right of free access to the media is already covered by other rights conferred by the chapter on Fundamental Rights, e.g. the practice of religion, language and culture, the expression of political conviction, free and equal participation in economic enterprise and freedom to engage in science and art, etc.

It stands to reason that, in the presence of such a plethora of rights relating to privacy as is set out above the flipside of the right to privacy, namely the so-called general right of access to information, consists of the same multitude of different rights relating to information. It is for this reason that the Freedom Front proposes that the right of access to information should be dealt with in detail in ordinary legislation, which the courts can then interpret in the light of the brief general principle of 'open and accountable administration' (see Constitutional Principle IX), entrenched in the Constitution.

It should be noted that, apart from the ordinary courts, there are also other mechanisms providing access to information, such

as the Public Protector (Ombudsman).

1.2 Controversial Issues

Controversial issues concerning this right have already been dealt with in 1.1 above.

2. Application of the Right

2.1 Nature of the duty to be imposed on the state

By reason of our opposition to the view that every person shall have a right of access to all information held by the state or any of its organs, we are of the opinion that the present section 23 should be completely reformulated, to reflect merely the concept of 'open and accountable administration at all levels of government' referred to in Constitutional Principle IX.

2.2 Application of the right to common law and statutory law

We are convinced that this right cannot be comprehensively set out in a constitution. The reasons for this conviction have been set out in 1.1 above. As the common law presumably does not acknowledge this right (administrative law being underdeveloped in our common law), there can be no question of the application of this right to common law rules. We are not certain what customary law (indigenous law) provides in this connection.

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

In our opinion this right does not have horizontal application. The very nature of the right is such that it is meant as a remedy against the state, not against fellow citizens. This also appears from the wording of Constitutional Principle XI ('administration') and from the wording of the present section 23 ('information held by the state or any of its organs').

2.4 Who should be bearers of the right?

If the suggestion of the Freedom Front is accepted, the right will not be extensively formulated in the Constitution but in other legislation. It will therefore depend on the nature of such legislation who the bearers of the right will be. Natural persons should, generally, be such bearers. Juristic persons may, depending on the legislation in question, also be such bearers. We believe that aliens who are lawfully in the country should have the same rights as citizens in this regard. Aliens who are allegedly unlawfully in the country should have a right

of access to such information as may assist them in proving that their presence in the country is not unlawful.

2.5 Should the right be capable of limitaion by the legislature?

We believe that this right should be capable of limitation and expansion by the legislature if, as we suggest, the right will be very briefly stated in the Constitution, but more extensively formulated in the various laws dealing with the right of access of information. Apart from this, the right should be capable of limitation by the legislature only under the general limitation section in the chapter on Fundamental Rights.
