

2/21/9/1/12

CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 4
FUNDAMENTAL RIGHTS**

**REPORT AND DRAFT
FORMULATION**

FREEDOM OF EXPRESSION

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THEME COMMITTEE 4

-FUNDAMENTAL RIGHTS

SCHEMATIC REPORT ON *FREEDOM OF EXPRESSION*

NO	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
1	II	Nature of the right	A universally accepted fundamental human right which should be included in the Constitution.		

NO	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
3		Application of the right (Nature of the duty)	Positive duty to be imposed on the state.	The expression of authority by the State is subject to God's law of morality and justice, and the respect to uphold the sovereignty of the constitution" (ACDP).	
4		Application of the right (to common and customary law)	To apply to common and customary law.		
5		Application of the right (Duties on private actors)	The right to apply vertically and horizontally.		

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
2		Content and Scope of right	Section 15(1) should be retained in its present form. All parties agreed that both freedom of speech and freedom of the press should be recognized and protected.	<p>The right should include the right to censorship (ACDP).</p> <p>There is disagreement over the retention of section 15(2) which provides that all media financed by the State shall be regulated to ensure impartiality and the expression of a diversity of opinion:</p> <p>i) Section 15(2) to be retained in its present form (NP, DP). ii) Section 15(2) to be amended which would ensure that the state does not control state-funded media (FF). iii) Section 15(2) should simply guarantee 'a right to access to a diversity of opinion' and leave it to the Independent Broadcasting Authority to ensure impartiality on the part of the State media (ANC). iv) Section 15(2) need not be expressly stated (PAC)</p> <p>The FF and PAC propose that special attention be directed to the question of commercial speech in the provision dealing with freedom of expression. Outstanding¹</p>	

¹ It should be noted that items marked "Outstanding" do not signify disagreement amongst political parties or contention. Parties felt that these matters could best be dealt with at the level of the Constitutional Committee, where negotiation could take place.

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
7		Limitations of the right	Freedom of speech and press freedom are not absolute rights. It is therefore permissible to place restraints on their exercise.	<p>1. Whereas some parties believe that limitations on this right should be included in a limitation clause, others argue for a limitation to be included in the provision recognizing this right.</p> <p>2. Section 33 of the Interim Constitution distinguishes between freedom of speech relating to political activity and freedom of speech in general. Restrictions on the former must be 'necessary', in addition to the other requirements of section 33, while the latter does not have to meet this test:</p> <ul style="list-style-type: none"> - The NP supports this distinction, while the DP proposes that all restrictions on freedom of expression should pass the test of 'necessity'. - The FF seems to favour a wider limitations clause for freedom of expression but to required 'necessity' as a criterion for restriction. 	

NO	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS/ OUTSTANDING ASPECTS	REMARKS
6		Bearers of the right	Right is one that at least belongs to all natural persons	<ul style="list-style-type: none"> -Only natural persons (ANC) -Natural persons and juristic persons (NP, ACDP) -Natural persons, juristic persons, citizens and all persons lawfully in South Africa (FF) -'both citizens and the media be entitled to its protection' (DP). - State, private persons and bodies (PAC) 	

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
7		Limitations of the right (cont)		<p>3. The ANC favours the inclusion in the Constitution of a special sub-clause allowing the restriction of freedom of expression in order to prohibit 'hate speech'. The FF, on the other hand, proposes that this matter be left to ordinary legislation. The NP and the DP are content to leave this speech to be limited by the general limitations clause.</p> <p>4. The PAC states that although there should be limits, they should be reasonable and flexible and most controls should be left to society's own conscience and standards. The PAC also states that advertising as a form of commercial speech should be permitted within "reasonable limits".</p> <p>5. The ACDP believes that the right should also include the right of censorship. The censorship to be based upon biblical values "where the rules laid down for civil law and government is based in Christian morality".</p>	

THEME COMMITTEE 4 FUNDAMENTAL RIGHTS

REPORT ON FREEDOM OF EXPRESSION

This report is drawn up on the basis of submissions received from political parties, organisations of civil society and individuals, the public participation programme and other activities of the Constitutional Assembly.

PART I

MATERIAL CONSIDERED BY THE THEME COMMITTEE

1. Submissions received from political parties (in alphabetical order):

- ACDP
- ANC
- DP
- FF
- NP
- PAC

2. Submissions received from the public and civil society

2.1 Individuals

Please see attached Appendix 1

2.2 Organisations (in alphabetical order)

- Africa Christian Action (595)
- African Civil Liberties Union (328)
- African Enterprise (76)
- Algemene Kommissie Leer en Aktuele Sake, Ned Geref Kerk (34)
- Baptist Theological College of South Africa (1776)
- Baptist Theological College of South Africa (1776)
- Catholic Women's League (1777)
- Christian Renewal Church (1958)
- Conference of Editors
- Conservative Party of South Africa (173)
- Evangelical Fellowship of South Africa (1618)
- Evangelical Fellowship of South Africa (1618)
- Fatwa Committee - Muslim Judicial Council (601)
- Foundation Ministries

- Freedom of Expression Institute
- Highway Community Church (1780)
- Highway Community Church (1780); Foundation Ministries; Vision Media; Hillcrest Baptist Church (1781)
- Islamic Council of South Africa (1624)
- Kloof Methodist Church (1626)
- Lugnos Congregation (1784)
- M L Sultan Technikon (Dr SM Qono) (486)
- Media Project - CALS
- Ninow & Associates (130)
- Protestant Association of South Africa (612)
- South African Anglican Theological Commission of the Church of the Province South Africa
- United Christian Action (39)
- University of Cape Town (2094)
- Vision Media
- World Conference on Religion and Peace: South African Chapter (106)

2.3. . Government structures\ institutions

None

3. Technical Committee reports

None to date on this item.

4. Relevant Constitutional Principles

II

PART II

1. NATURE OF THE RIGHT

1.1 Non-contentious issues

- 1.1.1 The right to Freedom of Expression is a universally accepted fundamental human right and should be specifically protected in the South African Constitution.

2. CONTENT AND SCOPE OF THE RIGHT

2.1 Non-contentious issues

- 2.1.1 Section 15(1) should be retained in its present form. All parties agreed that both freedom of speech and freedom of the press should be recognized and protected.

- 2.1.1.1 The ANC propose that scientific 'research' in the present section 15(1) should be expanded to include scientific 'activity'. This does not appear to be contentious.

2.2 Contentious\ Outstanding issues²

- 2.2.1 The right should also include the right to censorship (ACDP).

- 2.2.2 There is disagreement over the retention of section 15(2) which provides that all media financed by the State shall be regulated to ensure impartiality and the expression of a diversity of opinion.

- 2.2.2.1 Section 15(2) to be retained in its present form (NP, DP).

- 2.2.2.2 Section 15(2) to be amended which would ensure that the state does not control state-funded media (FF).

- 2.2.2.3 Section 15(2) should simply guarantee 'a right to access to a diversity of opinion' and leave it to the Independent Broadcasting Authority to ensure impartiality on the part of the State media (ANC).

- 2.2.2.4 Section 15(2) need not be expressly stated in the Constitution (PAC).

2. It should be noted that items marked "Outstanding" do not signify disagreement amongst political parties or conventions. Parties felt that these matters could best be dealt with at the level of the Constitutional Committee, where negotiation could take place.

2.2.3 The FF proposes that special attention be directed to the question of commercial speech in the provision dealing with freedom of expression. However, it does not make any concrete submission on this subject.

3. APPLICATION OF THE RIGHT (Nature of the duty)

3.1 Non-contentious issues

3.1.1 Positive duty to be imposed on the state.

3.2 Contentious\ Outstanding issues

3.2.1 The expression of authority by the State is subject to God's law of morality and justice, and the respect to uphold the sovereignty of the constitution" (ACDP).

4. APPLICATION OF THE RIGHT (Application to common\ customary law)

4.1 Non-contentious issues

4.1.1 The right applies to common and customary law.

5. APPLICATION OF THE RIGHT (Duties on private actors)

5.1 Non-contentious issues

5.1.1 The right to apply both vertically and horizontally.

6. BEARERS OF THE RIGHT

6.1 Non-contentious issues

6.1.1 The right is one that at least belongs to all natural persons.

6.2 Contentious\ Outstanding issues

6.2.1 Here parties express a wide range of opinions:

- Only natural persons (ANC)
- Natural persons and juristic persons (NP, ACDP)
- Natural persons, juristic persons, citizens and all persons lawfully in South Africa (FF)
- 'both citizens and the media be entitled to its protection' (DP).
- State, private persons and bodies (PAC)

7. LIMITATION OF THE RIGHT

7.1 Non-contentious issues

- 7.1.1 Freedom of speech and press freedom are not absolute rights. It is therefore permissible to place restraints on their exercise.**

7.2 Contentious\ Outstanding issues

- 7.2.1 Whereas some parties believe that limitations on this right should be included in a general limitation clause, others argue for a limitation to be included in the provision recognizing this right.**
- 7.2.2 Section 33 of the Interim Constitution distinguishes between freedom of speech relating to political activity and freedom of speech in general. Restrictions on the former must be 'necessary', in addition to the other requirements of section 33, while the latter does not have to meet this test.**
- 7.2.2.1 The NP supports this distinction, while the DP proposes that all restrictions on freedom of expression should pass the test of 'necessity'. The position of the ANC on this issue is not clear. The FF seems to favour a wider limitations clause for freedom of expression but to required 'necessity' as a criterion for restriction.**
- 7.2.3 The ANC favours the inclusion in the Constitution of a special sub-clause allowing the restriction of freedom of expression in order to prohibit 'hate speech'. The FF, on the other hand, proposes that this matter be left to ordinary legislation. The NP and the DP are content to leave this speech to be limited by the general limitations clause (section 33).**
- 7.2.4 The PAC states that although there should be limits, they should be reasonable and flexible and most controls should be left to society's own conscience and standards. The PAC also states that advertising as a form of commercial speech should be permitted within "reasonable limits".**
- 7.2.5 The ACDP believes that the right should also include the right of censorship. The censorship to be based upon biblical values "where the rules laid down for civil law and government is based in Christian morality".**

EXPLANATORY MEMORANDUM AND PROVISIONAL TEXT ON:

FREEDOM OF EXPRESSION

8. COMPLIANCE WITH CONSTITUTIONAL PRINCIPLE II

8.1 It is a Fundamental Right?

Freedom of expression is undoubtedly a 'universally accepted fundamental right' within the meaning of Constitutional Principle II. It is recognized in universal and regional human rights treaties and features prominently in national Bills of Rights. It is a freedom that constitutes the foundation of the political process and promotes individual fulfilment and the search for the truth through the exchange of ideas. Our courts have acknowledged that 'it is the freedom upon which all others depend' (*Mandela v Falati* 1995 (1) SA 25(W) at 259) and that it is 'an integral part of the process of transformation' (*Gardener v Whitaker* 1994 (5) BCLR 19 (E) at 34D).

Although it is a fundamental right it is not absolute. It is subject to limitation and must be interpreted in the context of the 'values which underlie an open and democratic society based on freedom and equality' (ss 35(1) and 33(1)).

8.2 Freedom of Expression in Chapter 3 of Act 200 of 1993

The right is recognized in s 15 of the Interim Constitution which provides:

- (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'.

Freedom of conscience, religion, thought, belief and opinion, academic freedom and access to information, which often appear as components of freedom of expression in other human rights instruments are treated separately in the Interim Constitution. See sections 14 and 23.

Whereas many human rights instruments attach a special limitation clause to freedom of expression itself, the Interim Constitution, like the Canadian Charter of Rights and Freedoms of 1982, subjects this right to a general limitations clause covering all rights.

9. INTERNATIONAL LAW

9.1 Nature of Right in International Law Instruments

Freedom of expression is recognized in the following international instruments:

9.1.1 Universal Declaration of Human Rights: Art 19:

'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.'

9.1.2 International Covenant on Civil and Political Rights (ICCPR) Art 19:

Similar to the Universal Declaration; but includes a special sub-clause allowing restrictions provided by law that are necessary for the rights and reputations of others and for the protection of national security, public order, public health or morals.

Art 20: Prohibits the advocacy of war and 'race hate speech' (as does Art 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1966).

The ICCPR has been interpreted to include commercial speech in freedom of expression (*Ballantyne & Others v Canada* CCPR/C/47/D/359/1989).

9.1.3 European Convention on Human Rights (ECHR): Art 10:

Similar to the Universal Declaration and ICCPR. It contains a special limitations clause along the lines of the ICCPR allowing restrictions that are 'necessary in a democratic society'.

9.1.4 American Convention on Human Rights: Article 13:

Follows the same approach as the ICCPR and ECHR. It recognizes the rights in terms similar to the Universal Declaration but then subjects it to special limitations. Like the ICCPR it allows war propaganda and the advocacy of 'race hate' to be prohibited.

Article 14 provides for a right of reply for anyone injured by inaccurate or offensive statements.

9.1.5 African Charter on Human and Peoples Rights: Act 9(2)

Provides that 'Every individual shall have the right to express and disseminate his opinions within the law'. Chapter II dealing with 'Duties' imposes general limitations on this right.

Ltd Que (AG) (1989) 58 DLR 4th 577 (SCC). Most jurisdictions extend the right to natural and juristic persons (*First National Bank v Bellot* 435 US 765 (1978) 777), to aliens and to citizen (*Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540).

11. SOUTH AFRICAN LAW

11.1 Analysis of Section 15 in the Interim Constitution Sections 15(1) and 15(2) require separate examination.

11.1.1 Section 15(1):

The inclusion of both 'expression' and 'speech' in s 15(1) makes it clear that constitutional protection is to be extended beyond mere speech to other forms of expression (e.g. symbolic acts such as flag burning and the wearing of armbands, and dancing). Unlike many human rights instruments it expressly includes press freedom and the freedom of 'artistic creativity and scientific research'. On the other hand, unlike several human rights instruments it fails to include the right to seek, receive and impart information or to expressly exclude war propaganda and 'hate speech' from its protection (see above para 2.1. (b) and (c)).

'Every Person' is entitled to enjoy this right. This clearly covers natural persons, whether citizens or aliens: *Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 (B) (sed contra, see the unreasoned and unsubstantiated judgement of Stafford J in *Xu v Minister van Binnelandse Sake* 1995 (1) SA 185 (T) dealing with s 24 of the Interim Constitution). Prisoners are also probably entitled to this right except is so far as the exercise of this right is inconsistent with the legitimate penological objectives of the correction system (*Woods v Minister of Justice and Others* 1995 (1) SA 703 (ZSC).)

Juristic persons are also entitled to exercise this right. This is clear from the recognition of 'freedom of the press and other media' as the media generally has juristic personality. It does not, however, follow from this that all juristic persons will enjoy this right in every instance.

Unlike international instruments s15(1) has no special limitations clause. Nor does it prohibit war propaganda and 'hate speech'. Instead all restrictions on the right are left to the general limitations clause. Consequently it will be for the courts to decide whether statutory or executive restrictions on freedom of expression in order to prohibit hate speech are reasonable, necessary etc within the meaning of s 33. Courts in Canada

9.2 Implications for South African Law

Section 15(1) of the Interim Constitution already captures the essence of the Freedom of Expression recognized in international instruments. It differs in three major respects:

- 9.2.1 Section 15(1) subjects the right to a general limitations clause rather than a special limitations clause;
- 9.2.2 Section 15(1) does not expressly provide for the prohibition of war propaganda or 'hate speech' but leaves this to the general limitations clause contained in s 33(1).
- 9.2.3 Section 15(1) omits the right 'to seek, receive and impart information and ideas of all kinds, regardless of frontiers' included in the Universal Declaration, the ICCPR, the ECHR and the American Convention on Human Rights. It is not clear why this component of freedom of expression was omitted from s 15(1). It is not covered by s 23 in the Interim Constitution.

10. COMPARATIVE LAW

10.1 The Freedom of Expression in Foreign Jurisdictions

Freedom of expression features prominently in every national Bill of Rights. It is included in the Bill of Rights of those Constitutions that have influenced the drafting of our own Interim Constitution: that is the constitutions of the Canada (Art 2(b)), the United States (First Amendment), Germany (Art 5), Namibia (Art 21) and India (Art 19).

10.2 The Nature of the Right in Foreign Jurisdictions

- 10.2.1 Freedom of expression is recognized as a right upon which others depend in foreign jurisdictions. See for example, the judicial decisions in *New York Time Co v Sullivan* 376 US 254 (1963) (United States); *Retail, Wholesale & Dept Stores Union Local 580 v Dolphin Delivery Ltd* (1986) 33 DLR (4th) 174 (Canada).
- 10.2.2 It is difficult to extract general conclusions from comparative experience on the key issues that trouble South African constitutional drafters in respect of freedom of expression - namely horizontally versus vertically, the bearer of the right, and the two-tier approach to restrictions. The US Supreme Court now adopts a horizontal approach (L Tribe *American Constitutional Law* 2nd ed (1988) 111), while does not (Art 32); see further *De Klerk v Du Plessis* 1995 (2) SA 40(T) at 48) The United States treats political speech as a higher value, worthy of greater protection than commercial speech (D Spitz in (1994) 10 SAJHR 301); Canada knows no such distinction (Irwin Toy

have allowed such curbs (*R v Keegstra* [1990] 3 SCR 697; the US Supreme Court has not (*Brandenburg v Ohio* 395 US 444 (1969); *Colin v Smith* 439 US 916 (1978)).

Section 15(1) is subjected to a two-tier or bifurcated limitations in s 33(1). While political speech may only be restricted if such restriction is 'necessary' in addition to the other requirements contained in s 33(1), 'non-political' speech is not so protected. This approach, which gives political speech greater protection than, say, commercial speech has been criticized by some parties which call for a unified approach to all 'expression'. The danger of this is that the protection presently accorded to political speech might be weakened if all expression is treated equally in respect of restrictions. The meaning of 'political' speech is not always clear but this is a determination correctly left to the courts for decision.

11.1.2 Section 15(2)

Section 15(2) does not enunciate an individual right but a constitutional principle designed to ensure an independent and impartial media which gives expression to a diversity of opinion. This provision does not really belong in a Bill of Rights, as it is not concerned with a right and is not a 'universally accepted fundamental right' within the meaning of Constitutional Principle II. It was inserted at a late stage in the Kempton Park drafting at the insistence of groups that wished to ensure that the principle of an independent media had constitutional endorsement and was not simply left to recognition in an ordinary statute. (See L Du Plessis and H Corder, *Understanding South Africa's Transitional Bill of Rights* (1994) 159).

It has been suggested that if s 15(2) is retained it should be amended to exclude the phrase 'under the control of'. As a result of the Independence Broadcasting Authority Act 153 of 1993 the SABC is no longer under 'the control' of the government but an Independent Board, despite government funding. Against this, it may be argued that the phrase does no harm and should be left in case certain media do come under the control of the government. It has also been suggested that it may be wise to expressly require independence in addition to impartiality.

In some quarters licensing of the media is seen as an interference with freedom of expression. In order to forestall such a complaint the following clause, borrowed from the European Convention on Human Rights (Act 10) has been suggested.

'This section shall not prevent the licensing and regulation of broadcasting and television in the public interest.'

This is, however, a matter that could equally well be left to a general limitations clause.

11.2 Recognition of Freedom of Expression in Legislation and Common Law

Freedom of speech is well recognized in our common law and has been reaffirmed by our courts in many decisions. It has not been given express statutory recognition on account of the fundamental position it occupies in the common law. Legislation has been employed to limit rather than reaffirm the right:

11.3 Impact of Right on Common Law

If freedom of expression is only vertical in its operation (as held in *Du Plessis v De Klerk* 1995 (2) SA 40 (T)) it will have a major impact on the common law offenses of criminal defamation, blasphemy and contempt of court. If, on the other hand, it is horizontal in its effect, it will have a still greater influence on our common law as it will result in a reassessment of our law of defamation which in recent years has been hostile to claims of press freedom (*Pakendorf v D Flamingh* 1982 (3) SA 146 (A); *Neethling v Du Preez* 1994 (1) SA 708 (A); *Financial Mail (Pty) Ltd v Sage Holdings* 1993 (2) SA 451 (a).) The better view is that it is horizontal in its operation. Both judicial decisions (*Mandela v Falati* 1995 (1) SA 251 (W) at 258; *Gardener v Whitaker* 1994 (5) BCLR 19 (E) at 30-31) and logic support such a conclusion. 'If a constitutional override applies to statutory enactments, notwithstanding their formulation through the political process, then it is difficult to see why rules of common law, which are so much less an expression of popular will, and which consequently cannot enjoy comparable democratic legitimacy, might be immune from scrutiny' (*Derek Spitz in* (1994) 10 SAJHR 317).

12. PROVISIONAL TEXT

- 12.1 Every person³, including the press and other media, shall have the right to freedom of speech and expression.
- 12.2 This right shall include the freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers.⁴
- 12.3 Any propaganda for war shall be prohibited.⁵
- 12.4 Any advocacy of racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited.⁶
- 12.5 All media financed by or under the control of the state shall be regulated in a manner that ensures independence, impartially and diversity of opinion.⁷

3 The word 'person' is to include juristic persons to the extent that the nature of the right so permits. Corporations will enjoy less protection in the exercise of commercial speech than persons who engage in political speech because of the bifurcated approach to limitations on this freedom. If freedom of commercial speech were omitted this would make it difficult for South Africa to comply with its obligations when it ratifies the ICCPR.

4 This phrase, which is taken from the European Convention on Human Rights, appears in most international human rights instruments. See above, para 2.1.

5 This clause is taken from art 20 (19) of the ICCPR.

6 This clause is taken from art 20(2) of the ICCPR and gives effect to the ANC proposal for such a clause. Alternatively, this limitation on freedom of speech (and the suggested clause (3)) may be left to regulation by the general limitations clause.

7 It has been suggested that the present clause 15(2) should be omitted. If, however, it is included, as some parties propose, it is suggested that it be drafted in this form. The explanation for this drafting appears above in para 4.1.

13. COMMENT

- 13.1** Freedom of artistic creativity and scientific research are included in a separate clause, together with academic freedom. See Explanatory Memorandum on this subject.
- 13.2** This right is to apply with horizontal effect. A general clause indicating which sections of the Bill of Rights are to operate horizontally will be submitted after we have considered all rights.
- 13.3** The question of limitations upon this right will be dealt with later after all rights have been considered. As indicated in para 4.1. it is suggested that the present two-tier approach be adopted towards free speech; that is, that political speech is to enjoy greater protection than other speech, particularly commercial speech.
- 13.4** Clause (3) and (4) are special limitations on freedom of expression and speech. They will therefore not be subject to limitations.

APPENDIX 1

PUBLIC SUBMISSIONS RECEIVED INDIVIDUALS (in alphabetical order)

- Abrahams HH (336)
- Abrahamson F (615)
- Amory V (499)
- Angel (763)
- Anonymous (340)
- Anonymous (267)
- Anonymous (500)
- Anonymous (501)
- April G (765)
- Arder R (502)
- Ashfield M (344)
- Atkinson (346)
- Ayithey GBN -Free Africa Foundation (311)
- Ball J (234)
- Banker R (503)
- Beere A (348)
- Benade S (350)
- Bennet K & M (773)
- Bevan N (280)
- Black C (355)
- Bolus C (268)
- Bornman JLR (504)
- Bornman LJ (778)
- Bornman O (505)
- Bosman D (506)
- Botes MC (507)
- Botha C (355)
- Botha H (508)
- Botha S (271)
- Brink N (94)
- Brown ACent (634)
- Buchanan S (365)
- Burger W (509)
- Calf AP (262)
- Callaghan L (510)
- Campbell G (782)
- Carlin S (369)
- Clapham E & B (202)
- Clark B (786)
- Coke Y (512)
- Collaros D (788)
- Concerned C (374)

- Concerned Citizen (251)
- Concerned Citizen (511)
- Creed S (278)
- Cruickshank A (513)
- Cuttler (514)
- Davies AL (515)
- De Villiers I (518)
- De Kock L (767)
- De Klerk E (282)
- De Villiers RC (519)
- De B Robert R (517)
- Deakin VA (516)
- Debonaire A & H (379)
- Dekenah R (105)
- Delacote CL (383)
- Diblasier M (521)
- Diedericks (796)
- Dimba MS (44)
- Docrat A (649)
- Dos Santos MJ (522)
- Dos Santos GA (800)
- Du Plessis H (802)
- Dubb S (386)
- Durham N (257)
- Durman K (1802)
- Durman K (1802)
- Egleton DM (388)
- Erasmus G (523)
- Ermitao E JL (524)
- Essop O (389)
- Essop O (525)
- Faillence B (526)
- Falam JA (809)
- Falck M (527)
- Fenwick DB (661)
- Ferreira PA (528)
- Fleischer K (810)
- Ford AEL (529)
- Gardner FE (530)
- Garnett A (393)
- Geale J (395)
- Germond IJ (531)
- Geyer FJ (532)
- Gibbon (397)
- Giendining L (665)
- Govender et al (1031)
- Gracie C (191)
- Granelli MA (398)
- Grayer F (399)
- Green J (813)

- Greyville DE (533)
- Grobler KJ and BJ (534)
- Grobler SL (1037)
- Grove JJ (535)
- Guerreiro A and P (536)
- Guerreiro J do C (799)
- Hague ES (222)
- Halland HE (537)
- Hammond A (817)
- Hanekom E (538)
- Harbour TE (540)
- Harbour R (539)
- Harris-Dewey LJ (1039)
- Hartley S (246)
- Heard KD (542)
- Henderson RG (1043)
- Hill B V (1807)
- Hurlin S (544)
- McMorran JA (17)
- Jacoby K (259)
- Jacoby K (1046)
- Jelbert M (1048)
- Jewell H (1049)
- John J (545)
- Johns J (546)
- Johnson C (1051)
- Johnson G (283)
- Johson B (284)
- Josephson M (867)
- Joubert (489)
- Joubert MF (547)
- Joubert A (489)
- Judge F (548)
- Karin (830)
- Karle JM (871)
- Katz J (549)
- Kennedy ME (832)
- Kerr T (270)
- Kingston B (836)
- Knocker R (550)
- Komen E (685)
- Kustner HGV (551)
- Kuyser J (1059)
- Kwocher C (837)
- Kyriacou S (552)
- Laizell BG (553)
- Lamprecht C (1061)
- Larsen SJ (294)
- Layzell, J
- Layzell J (842)

- Lehmann U (845)
- Lester B (423)
- Liang SM (136)
- Lindsay G (554)
- Lippert GOF (555)
- Louw L (423)
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- Lynn CA (556)
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PARTY SUBMISSIONS

- ACDP

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 its object aim: 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 phenomena, a moral vacuum is created.

So we need 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 rule scattereth the wicked by if a rule 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 its etymology depicts its 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 pomography users in an address at the National Consultation on Pomography 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 pomography, 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 it's 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 "[pomography] 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 pomography 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. To 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 did, 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]

- ANC

FREEDOM OF EXPRESSION

Content of the Right

The right is set out under Section 15 of Chapter 3 of the Interim Constitution.

The right to freedom of expression is closely related to free political activity. It is one of the foremost fundamental civil and political human rights that is universally accepted. It is advisable that the right should be reformulated to provide constitutional protection from racist, sexist or hate speeches calculated to cause hostility and acrimony, and, racial, ethnic or even religious antagonism and division. The right correctly includes artistic expression and scientific activity. The word "research" seems somewhat restrictive and could be substituted with the word "activity" which shall in any event, include research.

The following formulation of Section II (I) is suggested:

- 1). **Every one 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 activity.**
- 2). **This right shall not prevent the legislation from enacting legislation to prohibit any speech, expression or advocacy of racial, religious, gender, ethnic or other similar forms of hatred such as would constitute an incitement to violence or extreme**

hostility (or in compliance with South Africa's international law conventions).

It is our view that the establishment of the Independent Broadcasting Authority which secures impartiality of state media deals adequately with the concern of state financed or controlled media. We propose the following formulation:

There shall be a right of access to a diversity of opinion.

This formulation has a broader application than the existing 15(2) and provides the basis for groups, institutions and communities to have their viewpoints heard.

Application of the right

- 2.1. There shall be a positive duty on the part of the state to uphold such rights.
- 2.2. The right shall apply to all levels of civil society.
- 2.3. The right shall apply horizontally subject to the usual limitations.
- 2.4. Natural persons shall be the bearers of the right.
- 2.5. As under 2.5. of the Right to Freedom and Security above.

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**Demokratiese Party
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05.04.1995

**CONSTITUTIONAL ASSEMBLY
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."

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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 toekoms 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.

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NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 4

BLOCK 4 ITEM 7: FREEDOM OF EXPRESSION

1 Content of the right

Freedom of expression is a broader term than mere speech and protects all forms of communication in whatever manner, including ways not strictly amounting to speech. Of course, the right also includes the right not to communicate - in other words to remain silent. The right further protects the freedom with regard to the form in which communications are made and the people to whom they are addressed. Freedom of expression normally includes the freedom of the press and other media - which is expressly provided in section 15(1) of the transitional constitution. Section 15(1) also guarantees the freedom of artistic creativity and scientific research, which are obviously regarded as special forms of expression. However, they are strongly related to the freedom of religion, belief and opinion (the present section 14) and will be discussed there. Finally, another matter addressed in section 15, impartiality and the expression of a diversity of opinion in the regulation of State financed or State controlled media, could be included in the freedom of expression.

1.2 Controversial issues

We do not believe that the bill of rights should or could provide expressly for every controversial issue that may come up. That is why we support the broad and inclusive approach followed in drafting the present bill of rights. Specific issues should, therefore, be dealt with in terms of the general limitations clause. See the remarks in paragraph 2.5 below.

2 Application of the right

2.1 Nature of duty on State

Freedom of expression is one of the cornerstones of a democratic system. The State has a special duty to refrain from interfering with the freedom of expression. It appears, however, that there is no positive duty on the State to provide the individual with opportunities to express himself or herself. Of course, exercising the right often brings the individual into conflict with the bearers of other rights, such as the rights to privacy and human dignity. The State has the duty to regulate this conflict, for instance through the rules of law governing defamation.

2.2 Application to common law and customary law

In principle, the right should apply to common law and customary law. As the right involves aspects of private law, with which customary law may differ in this respect, the effect of this right on those branches of South African law is not clear.

2.3 Other actors bound

In principle, private persons should not be bound by the right. The rules of private law governing defamation, for example, are highly developed and the application of the bill of rights in respect of this right is unlikely. However, it is not inconceivable that cases may arise where a court may wish to refer to the "spirit, purport and objects" of the bill of rights (see the present section 35(3)) when applying private law concepts to relations between private persons.

2.4 Bearerers of the right

In the first place, all natural persons are bearers of this right. However, as newspapers, television companies etc may also lay claim to the freedom of expression, juristic persons should also be bearers of the right.

2.5 Limitation of the right

The freedom of expression does not seem to be an exception to the rule that rights do not apply absolutely. The right should be capable of being limited under certain circumstances. Controversial issues such as hate speech, commercial speech and obscene speech should be considered in this light. All limitations that may be placed on the freedom of expression with regard to one or the other of these issues must, of course, comply with the criteria contained in the general limitations clause.

With regard to the suggestion that the stricter limitation clause (that any limitation shall also be necessary - see the present section 33(1)(b)) should apply to the freedom of expression, we are not convinced that such an amendment is warranted. As crucial as the freedom of expression may be in an open and free democracy, there are many cases in which the freedom of expression comes into conflict with other rights such as human dignity, privacy, a fair trial, property, abuse of children (section 30(1)(d)), etc and where the freedom of expression must yield, not so much because it is necessary, but because it is deemed reasonable and justified. For example, it is possible that limitations on the freedom of the press to curb pornography may be deemed appropriate but, while in terms of existing public morals, it can be said to be reasonable and justifiable, it cannot really be said always to be necessary. Application of the stricter test when the freedom of expression relates to political activities is, however, appropriate - see section 33(1)(bb).

3 Wording

At this stage, we suggest that the wording used in section 15 of the transitional constitution be retained.

- PAC



24 April 1995

PRELIMINARY SUBMISSION OF THE PAC ON FREEDOM OF EXPRESSION

This is one of the most important of the fundamental freedoms. It is the hall-mark of a democratic society. However, this right is not absolute as Justice Holmes once observed that one may have the right to free speech but this does not allow one to "shout fire! fire! in a crowded theatre." This freedom would seem therefore to exclude racist statements and promotion of ethnic or racial hatred.

Content of the Right

The right of everyone to freedom of speech and expression which includes freedom of the press and artistic freedom.

Application and other Related Aspects.

1. We feel that the issue of state-financed and controlled media as covered by S15 (2) of the Interim Constitution need not be expressly stated in the final constitution. The Independent Broadcasting Authority Act of 1993 will deal with the issue of ensuring impartiality and the expression of a diversity of opinion in state media.
2. On the issue of obscene speech and pornography, we feel that the strict controls of a paternalistic Apartheid State, are not necessary. Although there should be limits, they should be reasonable and flexible and most controls should be left to society's own conscience and standards. The courts must however, get a clear impression that freedom of expression should be given sufficient weight, importance and protection.
3. This right binds the state and private persons and bodies. All should respect it.
4. Advertising has been recognised as some form of commercial speech. This should be permitted but of course within reasonable limits. Both the state and society have a right to regulate it and object to some advertisements. The issue will always be the degree of interference. We suggest this is part of the balancing act that the courts must do. Equally in the process of creating a culture of human rights, society will also develop its own standards and levels of tolerance.

R K Sizani - MP

