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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 4 FUNDAMENTAL RIGHTS

PARTY SUBMISSIONS

- Freedom of Expression
- Right of Access to Information
- Servitude and Forced Labour
- Freedom and Security of the Person

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- ANC

PRELIMINARY SUBMISSIONS OF AFRICAN NATIONAL
CONGRESS ON BLOCKS TWO AND THREE - THEME
COMMITTEE 4.

FREEDOM AND SECURITY OF THE PERSON

Content of the Right

The right is described under Section 11 of Chapter 3 of the Interim Constitution. Section 11 (1), apart from guaranteeing the freedom and security of the person, also deals with the right not to be detained without trial. In our view, it is consistent with human rights jurisprudence to rather provide for the right not to be subjected to arbitrary arrest and detention, which shall invariably violate the freedom and security of the person. Articles 3 and 9 of the Universal Declaration of Human Rights and Article 9(1) on the International Covenant on Civil and Political Rights deals with Section 11 (1) of the Interim Constitution in similar terms. We prefer the formulation of the right as follows:

Everyone has the right to freedom and security of the person. No one shall be subjected to arbitrary arrest or detention.

This is a broader formulation in that it covers both the element of arrest and detention and is also specific in that it relates to the arbitrariness of any arrest and detention.

Section 25 deals extensively with the rights of detained, arrested and accused persons.

Our understanding of the freedom and security expressed in this right is that it is not exclusively physical and deals with the broader mental and spiritual freedom of expression, religion, belief, opinion and conscience. Security of the person shall cover among other things, the physical, mental and psychological integrity of the human being that must be secured or guarded from torture and other forms of degrading, cruel or inhuman treatment.

Section 11 (2) outlaws cruel punishment, treatment and torture. The right is similar to that of Article 7 of the International Covenant on Civil, and Political Rights. It has been refined in that it specifically excludes torture of any kind, including mental and emotional torture. It is our view that the integrity, dignity and security of the person can be further protected by adding the following to Subsection 11 (2).

No one shall be subjected without his or her free consent to medical or scientific experimentation.

The above mentioned rights are fundamental and have to be protected. Their significance can be best understood against the background of the arbitrary arrests, detention without trial, and torture, in various forms perpetrated against political activists who fought for the "freedom and security of the person."

Application of the right

- 2.1. There shall be a positive duty on the state.
- 2.2. The right shall apply at all levels of civil society.
- 2.3. Yes, it should. It should apply horizontally and among third parties inter se.
- 2.4. Natural persons
- 2.5.1. Limitations shall be permissible only in accordance with the general provisions relating to rights being reasonably and/or necessarily limited in an open and democratic society.
- 2.5.2. The exception is Section 11(2) which should not be capable of limitation under any circumstances.
3. The nature of, and protection against the derogation from these provisions in a State of Emergency will be dealt with when this topic is treated later.

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.

RIGHT OF ACCESS TO INFORMATION

Content of the right

The primary objective of this right is to provide persons with the right to obtain information from state organs at any level of government; this is consistent with a transparent and accountable administration (government) in an open and democratic society. It is our view that the information must be provided in the exercise or protection of rights and that the right should bind private institutions and other legal persons. A framework for the exercise of these rights shall be set out in law.

In so far as the state is concerned, sensitive information may be protected in terms of the general limitation clause. Such limitations should apply to inter alia, information regarding state security, public safety, law enforcement, protection of free deliberation within the democratic process, and financial information, the disclosure of which, could lead to speculation or otherwise damage the national economy. Private persons or bodies will enjoy protections afforded by the limitation clause, as well as the right to privacy. The legislature may enact legislation to regulate the exercise of these rights.

The importance of this right must be seen against the backdrop of clandestine and secret methods of the past regime and the systematic concealment of relevant information. We therefore propose a construction which may be formulated as follows:

Everyone shall have the right of access to all information held by the state or any of its organs at any level or by private bodies, including individuals, in so far as such

information is required for the actual or potential exercise or protection of his or her rights under the constitution.

Application of the right

- 2.1. A positive duty is imposed on the state.
- 2.2. The right shall be subject to the reasonable limitations and shall apply to both common and customary law.
- 2.3. The right shall apply horizontally.
- 2.4. Natural persons shall be the bearers of the right.
- 2.5. As in 2.5. under the Right to Freedom and Security above.

- DP



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."

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

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

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

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

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

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

- (1) Concerning the organization of such organ, its decisions and decision-making procedures, its rules and policies;
- (2) held by the state concerning such person."

2. APPLICATION OF THE RIGHT

2.1 Nature of duty to be imposed on the state

This is apparent from the wording of the clause.

2.2 Application of the right to common/customary law

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

2.3 Constitutional duty imposed on actors other than the state

None

2.4 Who should be bearers of the right?

Citizens, rather than all natural persons.

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

2.5 Limitation

Clearly the limitation clause is applicable.

- NP

NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 4

BLOCK 4 ITEM 8: RIGHT OF ACCESS TO INFORMATION

1 Content of the right

The right of access to information is primarily directed at obtaining information held by any State body. The question whether it should extend to information held by private institutions will be addressed later. The right of access to information is a determining factor for the individual's ability to inform himself or herself and as an informed citizen effectively to take part in democratic processes. As such, the right is closely linked to the freedom of expression and other political rights. It should be noted that no other constitution guarantees such a right.

In view of the above, it could be said that the right should apply unqualified and that all information in the hands of the State should be open to the public. However, in section 23 of the transitional constitution access is confined to information *required for the exercise or protection of any other right*. The question is what are the implications and whether, in the light of the above remarks, it should be included in the final constitution. One implication, at least, may be that, contrary to the general approach in bill of rights, the burden of proof will be on the individual to establish that he or she requires the information. Furthermore, it could be argued that such a qualification is in conflict with the idea that, in order to participate meaningfully in the democratic process, the individual should be entitled to all government information. On the other hand, in view of the existence, for example, of information affecting State security, and which in many cases may have no bearing whatsoever on the exercise or protection of the

individual's rights, it should be equally clear that an unqualified right of access to information would be inappropriate. The real question is whether the right should be *qualified* in the constitution itself, or whether it could be guaranteed unqualified, the State simply to *limit* it by a law that complies with the criteria in the general limitations clause. (See paragraph 2.5 below). That would at least move the burden of proof back to the State to prove that the limitation complies with those criteria and the NP is in favour of the latter course.

1.2 *Controversial issues*

The question of access to privately held information is discussed in paragraph 2.3 below.

2 *Application of the right*

2.1 *Nature of duty on State*

Firstly, the State has the duty to furnish information at the request of the individual. Should the state refuse, its decision could be tested in terms of the general limitations clause. Secondly, it could be argued that in a democracy the State has a general duty to make information available as extensively and widely as possible. Even if access is confined to information required to exercise or protect other rights, the State should take it upon itself to ensure that all relevant information is made available. It is impossible for the public to request access to information the existence of which they know nothing about. In this sense it could be said that the rights imposes a positive duty on the State.

2.2 *Application to common law and customary law*

There is no reason why the right of access to information should not apply to common law and customary law.

2.3 *Other actors bound*

On the one hand, the right to privacy enables the individual to control all information about himself or herself in order to protect his or her privacy. Of course, where such information is in the possession of another individual or private institution, the individual should have the right of access to such information. The extent to which the individual can enforce access against such individual or institution is not clear. However, if it could be established that such information is required to exercise or protect other rights, it would be difficult to argue against access.

Of course, the interests of another individual or private institution may also be at stake, for instance with regard to trade secrets, unfair competition, etc, as well as its own right to privacy. Therefore, when it comes to the horizontal application of the right of access to information, there are competing interests which need to be balanced and which may require a more restricted application of the right.

2.4 *Bearers of the right*

Quite obviously natural as well as juristic persons should be bearers of the right of access to information.

2.5 *Limitation of the right*

As argued above, it should be possible to limit the right, for example, in the case of sensitive information affecting State security. Many other examples could be contemplated, including the case where the State possesses information that may violate the privacy of another person if made available. Every limitation must, however, comply with the criteria in the general limitations clause.

3 Wording

In view of the above remarks, the wording of the present section 23 of the transitional constitution could be retained, with the deletion of the phrase "in so far as such information is required for the exercise or protection of any of his or her rights".

4 Legislation

Special laws dealing extensively with access to information exist in a number of countries. We believe that such legislation is needed in South Africa as well, not only to supplement the relevant rights in the bill of rights, but *inter alia* to determine the precise relationship between the right of access to information and the right to privacy.

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 *Bearers 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

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Ref No.

3 April 1995

Preliminary Submissions of the Pan Africanist Congress on the Freedom from Servitude and Forced Labour.

This right, even as formulated in S12 of the Interim Constitution, is uncontroversial. It ensures that practices such as, forced labour, unfair labour practices, child labour and traffic in human beings, are prohibited. This right does not allow derogation.

Content

No person shall be subject to servitude or forced labour.

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NATIONAL ASSEMBLY
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3 April 1995

Preliminary Submissions of the Pan Africanist Congress on the Freedom and Security of the Person.

This is a very important right. It encompasses on the whole the so-called "legal rights" or "due process rights" of a person. It covers many issues, such as prohibition from torture, degrading treatment, detention without trial and so on. These are matters which are important to South Africans because of our recent past.

Content of this right.

1. A right to personal liberty including the right not to be detained without trial or be arbitrarily arrested.
2. Prohibition against torture, cruel, inhuman or degrading treatment or punishment.
3. South Africa has opened its doors to the world. There will be a temptation by some people to abuse this by using our people as guinea pigs for medical and scientific experimentation. This should be expressly prohibited.

Application

As stated above this clause protects mainly the legal rights or due process rights of human beings.

Mr R K Sizani

MP