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**CONSTITUTIONAL ASSEMBLY**

**CONSTITUTIONAL COMMITTEE  
SUB-COMMITTEE**

**MONDAY  
31 JULY 1995  
14H00  
V16**

**DOCUMENTATION - PART ONE  
(ACADEMIC FREEDOM)**



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(Constitutional Committee Sub-Committee - 31 July 1995)

## CONSTITUTIONAL ASSEMBLY

### MEETING OF THE CONSTITUTIONAL COMMITTEE SUB-COMMITTEE

Please note that a meeting of the above committee will be held as indicated below:

**DATE:** Monday 31 July 1995

**TIME:** 14H00 - 17H30

**VENUE:** V16

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#### DRAFT AGENDA

1. Opening
2. Functioning and schedule for meetings of Sub-Committee: Pages 2 - 5
3. Theme Committee Four - Academic Freedom: Pages 6 - 63
4. Theme Committee 6.1 - Public Administration: Pages 64 - 141
5. Any other Business
6. Closure

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**HASSEN EBRAHIM  
EXECUTIVE DIRECTOR  
CONSTITUTIONAL ASSEMBLY**

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*Enquiries: Ms MM Sparg, Tel 245031, page 4184616 Code 6970*

*Draft of interim Constitutional text  
with further reports.*

# CA SCHEDULE



**CONSTITUTIONAL ASSEMBLY  
DRAFT SCHEDULE OF MEETINGS**

**31 JULY 1995 -**

*Latest update - 26 June 1995*

Monday 31 July	Core Group/Theme Committee 1 Core Group/Theme Committee 2 Core Group/Theme Committee 3 <i>Chairpersons' Briefing</i> Core Group/Theme Committee 4 Core Group/Theme Committee 5 Core Group/Theme Committee 6 <i>CC Sub-Committee*</i>	08h30 - 13h00 08h30 - 13h00 08h30 - 13h00 <b>13h00 - 14h00</b> 14h00 - 18h00 14h00 - 18h00 14h00 - 18h00 <b>14h00 - 17h30</b>	M515* M46* E249*  M46* V227* E249*
Tuesday 1 August	Theme Committee 4 Theme Committee 5 Theme Committee 6* Theme Committee 1 Theme Committee 2 Theme Committee 3	08h30 - 13h00 08h30 - 13h00 08h30 - 13h00 14h00 - 18h00 14h00 - 18h00 14h00 - 18h00	M46 V227 E249 M515 M46 E249
Wed 2 August	Theme Committee 1 Theme Committee 2 Theme Committee 3 Theme Committee 4 Theme Committee 5 Theme Committee 6*	08h30 - 13h00 08h30 - 13h00 08h30 - 13h00 14h00 - 18h00 14h00 - 18h00 14h00 - 18h00	M515 M46 E249 M46 V227 E249
Thursday 3 August	<i>Management Committee</i> Party Caucuses <i>CC Sub-Committee</i> Theme Committee 4 Theme Committee 5 Theme Committee 6*	<b>08h00 - 10h00</b>  <b>14h00 - 18h00</b> 14h00 - 18h00 14h00 - 18h00 14h00 - 18h00	<b>V16</b>   M46 V227 E249
Friday 4 August	<i>Constitutional Committee</i>	<b>09h00 - 18h00</b>	<b>OAC</b>
Monday 7 August	Theme Committee 1 Theme Committee 2 Theme Committee 3 Theme Committee 4 Theme Committee 5 Theme Committee 6* <i>CC Sub-Committee*</i>	08h30 - 13h00 08h30 - 13h00 08h30 - 13h00 14h00 - 18h00 14h00 - 18h00 14h00 - 18h00 <b>14h00 - 18h00</b>	M515 M46 E249 M46 V227 E249
Tuesday 8 August	Theme Committee 4 Theme Committee 5 Theme Committee 6* Theme Committee 1 Theme Committee 2 Theme Committee 3	08h30 - 13h00 08h30 - 13h00 08h30 - 13h00 14h00 - 18h00 14h00 - 18h00 14h00 - 18h00	M46 V227 E249 M515 M46 E249
Wed 9 August	<i>Public Holiday</i>		



Thursday 10 August	<b>Management Committee</b> Party Caucuses Theme Committee 1 Theme Committee 2 Theme Committee 3 <b>CC Sub-Committee</b>	<b>08h00 - 10h00</b>  14h00 - 18h00 14h00 - 18h00 14h00 - 18h00 <b>14h00 - 18h00</b>	<b>V16</b>  M515 M46 E249
Friday 11 August	<b>Constitutional Committee</b>	<b>09h00 - 18h00</b>	<b>OAC</b>
Monday 14 August	Theme Committee 1 Theme Committee 2 Theme Committee 3* Theme Committee 4 Theme Committee 5 Theme Committee 6 <b>CC Sub-Committee*</b>	08h30 - 13h00 08h30 - 13h00 08h30 - 13h00 14h00 - 18h00 14h00 - 18h00 14h00 - 18h00 <b>14h00 - 18h00</b>	M515 M46 E249 M46 V227 E249
Tuesday 15 August	Theme Committee 4 Theme Committee 5 Theme Committee 6* Theme Committee 1 Theme Committee 2 Theme Committee 3	08h30 - 13h00 08h30 - 13h00 08h30 - 13h00 14h00 - 18h00 14h00 - 18h00 14h00 - 18h00	M46 V227 E249 M515 M46 E249
Thursday 17 August	<b>Management Committee</b> Party Caucuses	<b>08h00 - 10h00</b>	<b>V16</b>
Friday 18 August	<b>Constitutional Assembly</b>	<b>09h00 - 18h00</b>	<b>NAC</b>
Monday 21 August	Theme Committee 1 Theme Committee 2 Theme Committee 3 Theme Committee 4 Theme Committee 5 Theme Committee 6* <b>CC Sub-Committee*</b>	08h30 - 13h00 08h30 - 13h00 08h30 - 13h00 14h00 - 18h00 14h00 - 18h00 14h00 - 18h00 <b>14h00 - 18h00</b>	M515 M46 E249 M46 V227 E249
Thursday 24 August	<b>Management Committee</b> <b>Party caucuses</b>	<b>08h00 - 10h00</b>	<b>V16</b>
Friday 25 August	<b>Constitutional Committee</b>	<b>09h00 - 18h00</b>	<b>OAC</b>
Monday 28 August	Theme Committee 4 Theme Committee 5 Theme Committee 6* Theme Committee 1 Theme Committee 2 Theme Committee 3 <b>CC Sub-Committee*</b>	08h30 - 13h00 08h30 - 13h00 08h30 - 13h00 14h00 - 18h00 14h00 - 18h00 14h00 - 18h00 <b>14h00 - 18h00</b>	M46 V227 E249 M515 M46 E249
Thursday 31 August	<b>Management Committee</b> Party Caucuses	<b>08h00 - 10h00</b>	<b>V16</b>
Friday 1 September	<b>Constitutional Assembly/ Committee</b>	<b>09h00 - 18h00</b>	



Mon 4 September	Theme Committee 1	08h30 - 13h00	M515
	Theme Committee 2	08h30 - 13h00	M46
	Theme Committee 3	08h30 - 13h00	E249
	Theme Committee 4	14h00 - 18h00	M46
	Theme Committee 5	14h00 - 18h00	V227
	Theme Committee 6* <i>CC Sub-Committee*</i>	14h00 - 18h00 <i>14h00 - 18h00</i>	E249
Thur 7 September	<i>Management Committee</i> Party Caucuses	<i>08h00 - 10h00</i>	<i>V16</i>
Fri 8 September	<i>Constitutional Assembly/ Committee</i>	<i>09h00 - 18h00</i>	
Mon 11 September	Theme Committee 4	08h30 - 13h00	M46
	Theme Committee 5	08h30 - 13h00	V227
	Theme Committee 6*	08h30 - 13h00	E249
	Theme Committee 1	14h00 - 18h00	M515
	Theme Committee 2	14h00 - 18h00	M46
	Theme Committee 3 <i>CC Sub-Committee*</i>	14h00 - 18h00 <i>14h00 - 18h00</i>	E249
Thurs 14 September	<i>Management Committee</i> Party Caucuses	<i>08h00 - 10h00</i>	<i>V16</i>
Friday 15 September	<i>Constitutional Assembly/ Committee</i>	<i>09h00 - 18h00</i>	

**Please Note:**

- \* All Core Group Venues subject to confirmation
- \* All TC meetings and venues subject to confirmation
- \* Theme Committee 6 - These incorporate Sub-Theme meetings
- \* CC and CA - Flexibility exists in relation to which meetings are required.
- \* CC Sub-Committee - These are proposed dates, and have yet to be confirmed.



CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 4

**THEME COMMITTEE FOUR**

**ACADEMIC FREEDOM**

EXPLANATORY MEMORANDUM  
AND DRAFT FORMULATION

*ACADEMIC FREEDOM*

(21 July 1995)



# **CONSTITUTIONAL ASSEMBLY**

## **THEME COMMITTEE 4**

### **FUNDAMENTAL RIGHTS**

#### **EXPLANATORY MEMORANDUM AND DRAFT FORMULATION**

##### ***ACADEMIC FREEDOM***

**(21 July 1995)**





CONSTITUTIONAL ASSEMBLY

## MEMORANDUM

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**TO :** Constitutional Committee members

**FROM :** Technical Committee - Theme Committee 4

**DATE :** July 1995

**RE :** Explanatory Memorandum and Provisional Text on **Academic Freedom**

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The attached Explanatory Memorandum and Provisional Text on **Academic Freedom**, was compiled separately, as a result of contention on the placement of Academic Freedom, when the Theme Committee dealt with the right to Freedom of Religion, Belief and Opinion.

The parties views on Academic Freedom were as follows (as noted in the Theme Committee's Report on the right to Freedom of Religion, Belief and Opinion):

- (i) ... and educational preferences compatible with the freedom of religion and *should be included* as stated in section 32(c) of the Interim Constitution (**ACDP**). (From the ACDP's proposed formulation of the right it appears that "academic freedom in institutions of higher learning" to be retained with freedom of conscience, religion, belief and opinion, whereas the other aspects referred to, to be covered by educational rights.)
- (ii) ... are best dealt with under *freedom of expression* (**ANC**)
- (iii) ... to be placed with the *rights to education* (**DP; FF**).
- (iv) ... to be provided for in a *separate provision* (**NP**).

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Republic Of South Africa

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You've made your mark



Now have your say

THE NEW CONSTITUTION



- (v) ... to *include* freedom to study, learn and teach, prohibition on the state to shape education or culture in accordance with any particular political or ideological commitment; academic freedom of every university and similar institution of higher education to be guaranteed (**DP**).
- (vi) ... to *cover* the right to teach and do scientific research and the autonomy of all institutions of higher learning over matters of academic relevance (**NP**).



# EXPLANATORY MEMORANDUM AND PROVISIONAL TEXT ON:

## *ACADEMIC FREEDOM*

### 1. COMPLIANCE WITH CONSTITUTIONAL PRINCIPLE II

#### 1.1 Is it a Fundamental Right

Although Academic Freedom is not recognized as a separate and distinct right in any international human rights instrument it is viewed as a necessary component of freedom of conscience, thought, belief and opinion and of freedom of expression.

In South Africa it is of special importance as a result of the violations of academic freedom perpetrated by the apartheid state. Black students were denied access to the existing Universities in 1959 in terms of the cynically named Extension of University Education Act; university segregation lowered the quality and reputation of all universities; government interference made a mockery of university autonomy; and security laws were used to suppress freedom of opinion and expression on our campuses. In these circumstances the drafters of the Interim Constitution correctly decided that academic freedom warranted special attention.

#### 1.2 Academic Freedom in the Interim Constitution

Academic Freedom is recognized in s 14(1) of the Interim Constitution which provides that:

*'Every person shall have the right to freedom of conscience, religions, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.'*

Section 15(1) also recognizes a component of academic freedom when it guarantees 'the freedom of artistic creativity and scientific research'.



## 2. INTERNATIONAL LAW

Article 15(3) of the International Covenant on Economic, Social and Cultural Rights requires states to 'undertake to respect the freedom indispensable for scientific research and creative activity'. Apart from this provision international human rights instruments leave it to the provisions guaranteeing freedom of thought, opinion, expression, information, association and assembly to protect academic freedom.

In view of the fact that the academic community (students, teachers and researchers) has historically been a particularly vulnerable target of state repression, human rights non-governmental organizations have advocated the adoption of an international instrument on academic freedom. In 1993 the World Congress for Human Rights and Democracy sponsored by UNESCO and the UN Centre for Human Rights prepared a Draft Declaration on Academic Freedom which seeks to give treaty recognition to the various aspects of academic freedom.

## 3. COMPARATIVE LAW

In most foreign jurisdictions academic freedom is protected by a guarantee of freedom of speech. The first Amendments to the US Constitution which entrenches freedom of speech is seen as the bases for academic freedom in the United States. In **Keyishian v Board of Regents** 385 US 585 (1967) at 603 the Supreme Court declared:

*'Our nation is deeply committed to safeguarding academic freedom, which is of transcendental value to all of us and not merely to the teachers concerned. That freedom therefore is of special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom'.*

*(See further L Tribe **American Constitutional Law** 2nd ed (1988) 812-3).*

In a case heard by the US Supreme Court dealing with an investigation into the opinions of a university teacher during the McCarthy era, Justice Frankfurter in a concurring opinion stressed 'the dependence of a free society on free universities'. In support of the proposition he cited with approval a statement of protest published by South African scholars against the Extension of University Education Act which read:



*'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail the four essential freedoms of a university - to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study'*

*(Sweezy v New Hampshire 354 US 234 (1957) at 263)*

In some countries academic freedom is expressly guaranteed. Article 21(b) of the Namibian Constitution provides that 'all persons shall have the right to ... freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning'. This clause provided the model for section 14(1) of the Interim Constitution.

The German Basic Law provides in Art 5(3):

*'Art and scholarship, research and teaching shall be free. Freedom of teaching shall not absolve anybody from loyalty to the Constitution'.*

#### **4. ACADEMIC FREEDOM IN SOUTH AFRICAN LAW**

##### **4.1 Description of the Right in Chapter 3 of Act 200 of 1993**

4.1.1 Academic freedom is protected by two provisions of the Interim Constitution. Section 14(1) recognizes academic freedom as a component of the right to freedom of conscience, religion, thought, belief and opinion; while s 15(1) recognizes the freedom of artistic creativity and scientific research. Logically, as will be suggested, these two provisions should be moulded into a separate single provision.

The right is not absolute and is therefore subject to the limitation clause contained in 2 33(1). Section 14(1) enjoys greater protection as it may only be limited where such limitation is 'necessary', in addition to other requirements. The rights protected in s 15(1), on the other hand, only enjoy this higher level of protection if their exercise relates to free and fair political activity. This is an anomaly that flows from the separation of the rights in respect of the bearer of the right. The word 'person' in s 15(1) probably includes juristic persons. If freedom of scientific research is to be meaningfully projected it should extend to both the individual researcher and the research institution. The word 'person' in s 14(1) in respect of



academic freedom has a less certain meaning. While common sense dictates that the right should extend to the 'institution of higher learning' referred to in s 14(1), the coupling of this right with the freedom of conscience, thought, belief and opinion, which clearly do not extend to the juristic person, suggests that the right attaches to the natural person only.

It was anomalies of this kind which prompted political parties in Theme Committee 4 to suggest that the positioning of the right be reconsidered.

4.1.2 Like many of the rights contained in Chapter 3 the content of the right of academic freedom is not clearly fixed. Its outer limits will therefore be a matter for judicial determination. The accepted core content of this right includes the freedom of members of the academic community, individually or collectively, to pursue knowledge through research, study, discussion, teaching and writing. It also embraces the freedom of the university to decide on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study.

#### 4.1.3 Recognition of the Right in Legislation and Common Law

Universities and technikons have their own private statutes which seek to ensure the autonomy of the institution. In addition some University Acts contain a 'conscience clause' which seeks to ensure that no member of the university community will be discriminated against on grounds of religious belief. (See for example s 17 of the University of Cape Town (Private) Act 38 of 1959). Sadly the 'conscience clause' was omitted from the statutes that governed black universities in the apartheid years.

As a right associated with the freedom of conscience, belief, opinion, speech, assembly and association it enjoys the protection that the common law extends to these rights. On occasion courts have therefore intervened to protect this freedom. In **University of Cape v Minister of Education and Culture (House of Assembly and House of Representatives 1988 (3) SA 203(C)** the Cape Provincial Division struck down regulations which imposed obligations on the university to take disciplinary measures against students who engaged in protest action against apartheid.



## 5. PROVISIONAL TEXT

It is suggested that the present sections 14(1) and 15(1) dealing with issues of academic freedom should be combined in a separate clause to read:

- 5.1 Every institution of higher learning<sup>1</sup> and every person<sup>2</sup> within such an institution shall have the right to academic freedom.
- 5.2 Every person<sup>3</sup> shall have the freedom of artistic creativity and scientific research [activity<sup>4</sup>].

## 6. COMMENT ON APPLICATION AND LIMITATION

- 6.1 The rights contained in both sections (1) and (2) are to have horizontal effect. They may be exercised against both the State and institutions of higher learning and research institutes in which staff and students work. This will be made clear in a general application clause that will be included in the Bill of Rights.

The experience of the apartheid years stresses the importance of horizontal application. Students in many universities - particularly the historically black universities - were often denied their basic right of academic freedom by the university administration rather than the State.

- 6.2 The question of limitation upon this right will be dealt with later. At present academic freedom is subject to the stricter test of 'necessity' in the limitation clause. It is proposed that this strict test be retained for academic freedom and that it be extended to cover the rights of artistic creativity and scientific research.

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1 This will include universities, technikons and teacher training colleges and any other institution that a court determines to be an institution of higher learning.

2 In this context person clearly covers natural persons only. It includes both students and staff members of an institution of higher learning.

3 The word person here is to include juristic persons to the extent that the nature of the right so permits. While the right of artistic creativity will normally attach to the individual only, scientific research should be a right that attaches to both the individual researcher and research institutes.

4 The ANC has suggested that 'activity' replace 'research'. 'Activity' embraces 'research' but has a wider meaning.



**CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 4  
FUNDAMENTAL RIGHTS**

**REPORT AND DRAFT FORMULATION**

**- FREEDOM OF RELIGION, BELIEF  
AND OPINION**



**THEME COMMITTEE 4**  
**FUNDAMENTAL RIGHTS**

**SCHEMATIC REPORT ON FREEDOM OF RELIGION, BELIEF AND  
OPINION**



NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
1.	II, XII, Section 14	Nature of the right	Right to be included		



NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
2.		Content of the right	Freedom of worship. Tolerance of all religions and diverse beliefs. The right to hold (and not to hold) religious and secular convictions and to express, profess, practice and propagate them publicly and in association with other.	<p><i>Academic freedom and placement of the right. To be : (a) retained in s 14 (ACDP); (b) moved to freedom of expression (ANC); (c) moved to educational rights (DP, FF); (d) covered as a separate right (NP). -Outstanding<sup>1</sup></i></p> <p>ANC: Opinion to form part of expression. None to be barred from places of religious observance. <b>-Outstanding</b></p> <p>DP: Conscience and religion to be grouped with speech, belief, opinion, expression, assembly and association as a Right to Fundamental Freedoms. <b>-Outstanding</b></p> <p>FF: Prohibition on discrimination should not offend religious beliefs of individuals. <b>-Outstanding</b></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.



NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
3.		Application of the right (Nature of duty)	Positive duty to be imposed on state.	ACDP: Duty to be imposed on state in s 14(1) to ensure that religious practices uphold public order and Godly morals.	
4.		Application to common\ customary law	Right applies to common and customary law.		
5.		Application of the right (Duties on private actors)	Right to apply vertically and horizontally where applicable.	NP: State and academic institutions bound by academic freedom. Other aspects only state should be bound.	
6.		Bearers of the right	Natural and juristic person where applicable.		



NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
7.		Limitations		<p><u>Degree or level of limitation:</u></p> <p>Limitations to be imposed on beliefs that manifest themselves through ritual murders, enforced polygamy, violence etc -ACDP -<b>Outstanding</b></p> <p>The holding of a belief or thought (religious or otherwise cannot be limited -ANC <b>Outstanding</b></p> <p>The manifestations of the belief or thought can under reasonable circumstances be limited in an open and democratic society. Such limitations may be permissible in order to give effect to other rights in the Constitution particularly the right to equality -ANC -<b>Outstanding</b></p> <p>Rights subject to reasonable limitations such as S(33) - DP -<b>Outstanding</b></p>	

NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
7.		Limitations (cont)		<p>S(14(2) and (3) to be retained - FF, NP- <b>Outstanding</b></p> <p>The rights should not be capable limitation by the legislature otherwise than by an amendment of the constitution. The only justifiable limitation would be the curtailment of religious activities that conflict with the religious activities of other persons or groups or that contravene some other fundamental interest protected by the constitution, such as the public order and other interests mentioned in article 18.3 of the Interim Covenant on Civil and Political Rights ('public safety, order, health, or morals or the fundamental rights and freedoms of others') -FF <b>Outstanding</b></p>	



# THEME COMMITTEE 4 FUNDAMENTAL RIGHTS

## REPORT ON *FREEDOM OF RELIGION, BELIEF AND OPINION*

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
- IFP (original submission to T\C 4)
- NP

#### 2. Submissions received from the public and civil society

##### 2.1 Individuals (in alphabetical order)

- Africa (26)
- Ashfield M (344)
- Blignaut E (354)
- Blignaut J (630)
- Boyd D (299)
- Brink R (361)
- Brussow FA (82)
- Dekenah R (105)
- Du Preez PI (803)
- Egleton DM (388)
- Fenwick PC (662)
- Hague ES (222)
- Hattingh CJ (818)
- McMorrان JA (17)
- Jeftha AJ (248)
- Johnson V (247)
- Jordan EA (826)

- Khan AJ (682)
- Levitt C and co (638)
- Mahabeer (128)
- Martin P (558)
- Meyer V (866)
- Prozesky MH (19):
- Moodley I (185)
- Ndlovu N (442)
- Ndlovu TEJ (888)
- Ngidi DT (719)
- Nottingham C (445)
- Phathlane Naledi Ya (898)
- Pienaar N (735)
- Poole Z (737)
- Prinsloo E (73)
- Singery MAR (194)
- Stokes JE (182)
- Van Heerden (91)
- Van Rensburg N (953)
- Van der Merwe R vas S (941)
- Webster EC (964)
- Williams NR (968)
- Woodgate TW (972)

## 2.2 Organisations (in alphabetical order)

- African Enterprise (76)
- Ayittey GBN -Free Africa Foundation (311)
- Christian Science Committee on Publication for the Northern Province of South Africa
- Conscientious Objector Support Group (29)
- Conservative Party of South Africa (173)
- M L Sultan Technikon (Dr SM Qono) (486)
- National Assembly of the Baha'is of SA (165)
- Protestant Association of South Africa (612)
- Religious Society of Friends (326)
- South African Anglican Theological Commission of the Church of the Province of SA (81)
- The English Academy of South Africa (30)
- Underberg Christian Fellowship (205)
- United Christian Action (39)
- 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, XII,

## PART II

### 1. NATURE OF THE RIGHT

#### 1.1 Non-contentious issues

1.1.1 Right to be included in terms of Constitutional Principle II.

1.1.2 Constitutional Principle XII also involved (FF).

### 2. CONTENT OF THE RIGHT

#### 2.1 Non-contentious issues

Freedom of worship and tolerance of all religions<sup>2</sup>. The recognition and acceptance of diverse beliefs. The right of individuals to hold (and not to hold) any religious and secular conviction and to the right to express, profess, practice and propagate them publicly and in association with other.

#### 2.2 Outstanding issues<sup>3</sup>

##### 2.2.1 *Right to academic freedom and placement of right*

2.2.1.1 ... and educational preferences compatible with the freedom of religion and *should be included* as stated in section 32(c) of the Interim Constitution (ACDP). (From the ACDP's proposed formulation of the right it appears that "academic freedom in institutions of higher learning" to be retained with freedom of conscience, religion, belief and opinion, whereas the other aspects referred to, to be covered by educational rights.)

2.2.1.2 ... are best dealt with under *freedom of expression* (ANC)

2.2.1.3 ... to be placed with the *rights to education* (DP; FF).

2.2.1.4 ... to be provided for in a *separate provision* (NP).

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<sup>2</sup> The ACDP requests that Satanism to be excluded, due to the limitation of the right. See 7.1.1

<sup>3</sup> 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.



- 2.2.1.5 ... to *include* freedom to study, learn and teach, prohibition on the state to shape education or culture in accordance with any particular political or ideological commitment; academic freedom of every university and similar institution of higher education to be guaranteed (DP).
  - 2.2.1.6 ... - *further submission* to be submitted at the appropriate time (FF).
  - 2.2.1.7 ... to *cover* the right to teach and do scientific research and the autonomy of all institutions of higher learning over matters of academic relevance (NP).
- 2.2.2 Right to freedom of opinion is best dealt with under freedom of expression (ANC).
- 2.2.3 Places associated with religious observance to be respected and none shall be barred from entering them on grounds of race (ANC).
- 2.2.4 Freedom of conscience and religion to be grouped with speech, belief, opinion, expression (including freedom of the press and other media of communication), assembly and association as a single Right to Fundamental Freedoms - see also "academic freedom" in par. 2.2.1 (DP).
- 2.2.5 The new constitution should not prohibit a person from taking into account the sexual orientation of another person where such orientation is contrary to the religious beliefs of the person. The present section 8(2) may be interpreted as forcing a person to act contrary to his religious convictions. Provisions of article 18(2) of the International Covenant on Civil and Political Rights therefore to be included ("No one shall be subject to coercion which would impair his freedom to have or to adopt a religion of his belief or choice.")



### **3 APPLICATION OF THE RIGHT (Nature of the Duty)**

#### **3.1 Non-Contentious issues**

3.1.1 Positive duty to be imposed on state.

#### **3.2 Contentious\ Outstanding issues**

3.2.1 Section 14 to be revised to read: "Every person shall have the right to freedom of conscience, religion, though, belief and opinion, *which are consonant with public order and Godly morality*, which shall include academic freedom in institutions of higher learning." Inserted phrase imposes the duty on the State to ensure that religious practices uphold public order and Godly morals (ACDP).

3.2.2 The State's obligation to respect religious observances at sate or state-aided institutions "under rules established by an appropriate authority for that purpose", in present section 14(2) unacceptable because any state regulation of religious affairs is rejected (ACDP).

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

#### **4.1 Non-contentious issues**

4.1.1 The right applies to customary and common law.

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

#### **5.1 Non-contentious issues**

5.1.1 Right to apply vertically and horizontally where applicable.

#### **5.2 Contentious\ Outstanding issues**

5.2.1 Academic freedom binds the state as well as academic institutions. In respect of the other aspects covered by the right, it seems as if only the state should be bound (NP).

### **6. BEARERS OF THE RIGHT**

#### **6.1 Non-contentious issues**

6.1.1 Natural persons and juristic persons where applicable.



## 7. LIMITATION OF THE RIGHT

### 7.1 Outstanding issues

#### 7.1.1 Degree and level of limitation

- 7.1.1.1 Religious beliefs that manifest themselves through ritual murders, enforced polygamy, cultic expressions, or violence explicitly promoting public immorality, should have limitations imposed (ACDP).
- 7.1.1.2 The holding of a belief or thought (religious or otherwise) cannot be limited (ANC).
- 7.1.1.3 The manifestations of the belief or thought can under reasonable circumstances be limited in an open and democratic society. Such limitations may be permissible in order to give effect to other rights in the constitution particularly the right to equality (ANC).
- 7.1.1.4 Rights to be subject to reasonable limitations in a properly formulated limitations clause, such as provided for in the Interim Constitution in terms of section 33 (DP).
- 7.1.1.5 Sections 14(2) and (3) to be retained (FF; NP)
- 7.1.1.6 The right should not be capable of limitation by the legislature otherwise than by an amendment of the constitution. The only justifiable limitation would be the curtailment of religious activities that conflict with the religious activities of other persons or groups or that contravene some other fundamental interest protected by the constitution, such as the public order and other interests mentioned in article 18.3 of the Interim Covenant on Civil and Political Rights ('public safety, order, health, or morals or the fundamental rights and freedoms of others') (FF).



# EXPLANATORY MEMORANDUM AND PROVISIONAL TEXT

## *FREEDOM OF RELIGION, BELIEF AND OPINION*

### 1. COMPLIANCE WITH CONSTITUTIONAL PRINCIPLE II

- 1.1 The right to freedom of religion, belief, conscience and opinion is a fundamental right for the purpose of Constitutional Principle II.

### 2 PUBLIC INTERNATIONAL LAW

- 2.1 The right to freedom of religion, belief and opinion is a fundamental right which is reflected in all public law international instruments. The following are the most relevant examples:

#### 2.1.1 Universal Declaration of Human Rights (1948) article 18:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

#### 2.1.2 European Convention on Human Rights (1950) article 9:

2.1.2.1 Everyone has the right to freedom of thought, conscience and religion or belief and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief, in worship, teaching, practice and observance.

2.1.2.2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health, morals, or for the protection of the rights and freedoms of others.



### **2.1.3 International Covenant on Civil and Political Rights (1966) article 18:**

- 2.1.3.1 Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
- 2.1.3.2 No one shall be subject to coercion which would impair his freedom to adopt a religion or belief of his choice.
- 2.1.3.3 Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
- 2.1.3.4 The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

### **2.1.4 American Convention on Human Rights (1966) article 12:**

- 2.1.4.1 Everyone has the right to freedom of conscience and of religion. This includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs either individually or together with others, in public or in private.
- 2.1.4.2 No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.
- 2.1.4.3 Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.
- 2.1.4.4 Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.



### **2.1.5 African Charter on Human and People's Rights (AFR) (1981) article 8:**

- 2.1.5.1 Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

## **3 COMPARATIVE LAW**

Nearly all national bills of rights contain provisions on freedom of religion, belief conscience and opinion. The content of the right is formulated differently in the various constitutions. Its limitation is likewise treated differently depending mainly on the general approach regarding the limitation of rights in a particular constitution.

### **3.1 Namibian Constitution section 21(1):**

- 3.1.1 All persons shall have the right to ...
- (b) freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning.
  - (c) freedom to practice any religion and to manifest such practice.
- All freedoms guaranteed in section 21(1) are subject to a general limitation clause.

### **3.2 Constitution of the United States of America Amendment I:**

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof ...

The right is not subject to an explicit limitation clause, but the Courts have developed principles and criteria for its application.

### **3.3 Canadian Charter of Rights and Freedoms (1982) section 2:**

Everyone has the following fundamental freedoms: (a) freedom of conscience and religion...

The right is subject to the general limitation clause in section 2 of the Charter.

### **3.4 Constitution of India:**

Section 25(1) Subject to public order, morality and health and to other provisions of the Part, all persons are equally entitled to freedom of conscience and the right to freely to profess, practice and propagate religion

....



Section 26: Subject to public order, morality and health, every religious denomination or any section thereof shall have the right (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law.

These sections contain specific references to the limitations of the right.

### **3.5 German Constitution section 4:**

3.5.1 Freedom of faith, of conscience and freedom of creed (religious or ideological), shall be inviolable.

3.5.2 The undisturbed practice of religion is guaranteed.

3.5.3 No one may be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.

The right is subject to general formal provisions on its limitation, but, unlike most other rights in the German bill of rights, does not provide for its limitation for specific purposes. The Federal Constitutional Court decided that the right may be limited for the protection of the rights of others and values embodied in the Constitution.

## **4 EFFECT IN DOMESTIC LAW**

International and foreign case law clearly shows that the entrenchment of the right to freedom of religion, belief and opinion effects a very wide range of official and private conduct and relations, for example, the status of churches and religious organisations; determining what constitutes a religion and under what circumstances acts are influenced by religion and belief, the relationship between a church and its office bearers and members; conscientious objection to military service; religious instruction and practices in educational institutions; state support to churches and religious organisations; the law relating to blasphemy; compulsory membership of a health service; religious services in prisons and the armed forces; loyalty oaths. It is impossible to predict the exact implications of the right on such a wide range of issues.

## **5 RESPONSE TO REPORT**

### **5.1 Non-contentious issues - par 1.1 - 1.6**

We agree that the right to freedom of religion, belief and opinion is a universally accepted fundamental right that should be protected in the Constitution in terms of Constitutional Principles II and XII. The way in



which non-contentious issues are provided for in the draft text is commented upon in the footnotes to the draft text.

## **5.2 Suggestions on resolving outstanding issues**

### **Par 2.1 Content of the right**

2.1.1 Although freedom of religion, belief and opinion overlaps with facets of academic freedom, academic freedom also contains facets of various other rights (for example freedom of expression, scientific research, associational autonomy, and educational rights). Academic freedom is not commonly dealt with as part of the freedom of religion, belief and opinion in other systems (the Namibian Constitution being the exception). We propose that academic freedom be dealt with in a separate provision.

2.1.2 Although "freedom of religion, belief and opinion" is usually interpreted to include the expression and dissemination of religious and other beliefs and opinion, it also covers the free forming and undisturbed "holding" of such beliefs and opinions which is not necessarily covered by freedom of expression. We suggest that freedom of opinion be retained with freedom of religion and belief.

2.1.3 We suggest that respect towards places associated with religious observance constitutes part of the duties imposed by the general formulation and does not require explicit reference. A prohibition on refusing entrance to places of religious observance on grounds of race could possibly be dealt with in terms of a section similar to section 33(4) of the Interim Constitution.

2.1.4 Grouping freedom conscience and religion with other "freedoms" is a separate freedom or set of fundamental freedoms is a pattern followed in the Canadian and Namibian Constitutions. It need not have any substantive effect on the interpretation and application of the rights in question. Calling the rights and freedoms "fundamental" could, however, reflect on the fundamental nature of other core rights not included in the category and we suggest that they be dealt with separately.

2.1.5 The problem relating to offending the religious beliefs of individuals could be dealt with by an equality clause prohibiting discrimination on the ground of religion.



## **Para 2.2 Degree and level of limitation**

- 2.2.1 Imposing limitations on religious beliefs that manifest themselves through ritual murders, enforced polygamy, cultic expressions, or violence explicitly promoting public immorality, could be covered by generally formulated limitation clauses. We suggest that these matters need not be dealt with expressly.
- 2.2.2 Since the free formation and holding of beliefs, opinions or thoughts cannot empirically be prevented or prohibited by actors bound by the right, it may be unnecessary to provide explicitly that holding such beliefs, opinions or thoughts cannot be limited. This is the position in German law.
- 2.2.3 We propose that the issue be held over for the drafting of the limitation clause.
- 2.2.4 Whether sections 14(2) and sections 14(3) should be retained depends on decisions on how they relate to other limitation clauses and we propose that the issue be held over for the drafting of the limitation clause.
- 2.2.5 Providing for the justifiable limitations will probably require legislative measures other than amending the Constitution. Otherwise the suggestions follows the German approach to the limitation of this right (see par. 2 above). We propose that the issue be held over for the drafting of the limitation clause.

## **5.3 COMMENTS ON CONTENTIOUS ISSUES**

### **Par 3.1 Application of the right (nature of the duty)**

- 3.1.1 The proposed duty could be interpreted to imply that the state may impose limitations on religious practices that threaten public order and offend Godly morals and therefore relates to levels of limitation. The proposal on the regulation by the state of religious observances in state and state-aided institutions relates to outstanding issue on the retention of section 14(2) and (3) of the Interim Constitution - see par 2.2.4 above.

### **Par 3.2 Application of the right (duties on private actors)**

- 3.2.1 It is suggested that it be considered how the present common law protection of religion, opinions, convictions, thoughts, etc. in terms of the protection of *dignitas* (dignity), *fama* (reputation) and especially privacy already accommodates the horizontal application of the right, and what the effect of a prohibition on the horizontal applications of the right would be on the development of the common law in this regard.



## 6 PROVISIONAL TEXT<sup>4</sup>

6.1 "Every person <sup>5</sup> shall have the right to freedom of conscience, religion, thought, belief and opinion. <sup>6</sup>

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### Notes:

- a) Decisions on the insertion and formulation of clauses regarding the non-contentious issues of horizontal application, the application to common law and customary law and the duties of the state could be postponed until a clear picture has emerged on the extent to which they apply to other rights. The outcome could possibly require the formulation of general clauses.
- b) Decisions on the retention of the specific limitation clauses in section 14(2) and (3) of the Interim Constitution could be held over until the drafting of a general limitation clause is considered.

PARTY SUBMISSIONS

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<sup>4</sup> This draft is based on the assumption that elsewhere in the new chapter there will be provisions providing for academic freedom, the limitation of the rights, and the application of rights to the common law and customary law.

<sup>5</sup> Should it later be decided not to include a general provision similar to section 7(3) of the Interim Constitution, "every person" can be replaced with "Every individual and when applicable every juristic person".

<sup>6</sup> In view of the non-contentious content of the right a sentence could be added similar to the formulation in most of the international instruments (see a 18 Universal Declaration on Human Rights, a 9 European Convention on Human Rights, a 18 International Covenant on Civil and Political Rights and a 12 American Convention on Human Rights quoted in par 2 above), for example:

**This right shall include freedom to change his or her religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his or her religion or belief in teaching, practice, worship and observance.**



**PARTY SUBMISSIONS**

- ACDP

AFRICAN CHRISTIAN DEMOCRATIC PARTY  
SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY  
THEME COMMITTEE FOUR

FREEDOM OF RELIGION, BELIEF & OPINION

Content of the Bill

The ACDP is in full agreement that this right must be included in the Bill of Fundamental rights.

South Africa is a Christian country of up to 80% adherents, and this is besides the other religious faiths in our country.

We are of the opinion that a State represents the will of the people, and if the will of the people represents a large interest in religion, then South Africa is a State of religious people.

We, therefore, believe that South - **ACDP** defined as a secular State.

We believe that a secular State, by its very nature, will hold the following dangerous implications:

It creates a gulf between the human and State systems.

It reduces the meaning of humans as a disposable entity.

It stands outside of the imitation of God's authority.

A secular State is a distortion of the meaning of human society. Society is made up of a collective unit of people, each with a spirit nature that invests into the State its spiritual character.



# AFRICAN CHRISTIAN DEMOCRATIC PARTY SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY THEME COMMITTEE FOUR

## FREEDOM OF RELIGION, BELIEF & OPINION

### Content of the Right

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We are of the opinion that a State represents the will of the people, and if the will of the people represents a large interest in religion, then South African is a State of religious people.

We, therefore, believe that South Africa cannot be defined as a secular State.

We believe that a secular State, by its very nature, will hold the following dangerous implications:

- *it is an attempt to erase the belief that God is present in the interplay between the human and State spheres.*
- *it reduces the meaning of humans as-a disposable entity.*
- *it stands outside of the limitation of God's authority.*

A secular State is a distortion of the meaning of human society. Society is made up of a collective unit of people, each with a spirit nature that invests into the State its spiritual character.



By virtue of this religious value, human society offers its allegiance to the State by ascribing to it the recognition to protect its citizens against any irreverent prescriptions. In view of this *religious-normative* responsibility, the secular State is an anathema that usurps and denies the rights of the God-created individual to function within a non-secular State.

We further believe that the strength of the sovereignty of the constitution will lay in its recognition of God as sovereign over the state, be reflected in the preamble of the Constitution that states we are a nation under that authority of God.

As South Africa is blessed with a multitude of faiths and religions, such a preamble will provide for a great deal of religious tolerance.

As freedom of religion holds great advantages for the regular function of the State, with regards to responsibility, lawfulness, productivity, tolerance, etc., it is of equal right the religious observances should be tolerated in State and State-aided institutions, eg. schools, government institutions and others.

The Bible teaches us that Man does not live by bread alone, "but by every word that proceeds out of the mouth of God," (Matthew 4:4). It is certainly true that once our bodily needs for food, water, shelter and clothing have been satisfied, human beings also seek to have their physical, emotional, mental and spiritual needs met. This would involve acquiring of information, enquiring about destiny of life and the world, reflecting on religious questions, etc. However, these activities seem to create avenues of hostility among people, instead of harmony. Not only are we inclined to oppress, persecute, exploit and deprive each other from material gains, we are also inclined to persecute others who have a belief different to ours.

The ACDP is, however, against such types of authoritarianisms and despotism, but we will oppose any belief system that includes in its practise, activities such as murder rituals, cultic practises, witchcraft, or any form of repressive acts. Here we include practises of Satanism, anarchic belief, etc.



Government is instituted to uphold justice and moral integrity, and in instances where these principles are perverted, these should be prosecuted against.

Government authorities have been ordained by Almighty God for the preservation of law and order, for the punishment of criminals, for the rewarding of those who are good, and for the promotion of all godliness, morality and honesty (c.f. Genesis 6:5-6; Exodus 18:15-23; Romans 13:3-4; Timothy 2:1-2; Titus 2:1-2.)

Authority is to be feared by evil-doers and in as much as political government is a servant of God, which does not bear the sword as a mere ornament, but which, as God's servant, wields the sword and thereby wreaks vengeance and punishes evil-doers.

The ACDP believes that, any belief-system that stray from Godly morality and perform murderous rituals should be seen as evil-doers and such systems prohibited.

We further oppose any State interference in the normal function of religious practises or reject the idea of a State religious Ministry that regulates religious affairs.

Furthermore, no rule should be made to prohibit members of the clergy from holding public office, insofar as the role of the State and Church is not confused.

With regards to academic freedom and educational preferences, section 32(c) of the interim constitution proceeds to give "every person the right to establish, where practicable, educational institutions, based on a common culture, language or religion, provided that there shall be no discrimination on the grounds of race." The ACDP believes that this right is compatible with the freedom of religion and should be included as stated.

The ACDP accepts Section 14 of the Constitution on religion, belief and opinion as a whole, with S14 (1 & 2), to read as follows:



1. "Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, *which are consonant with public order and Godly morality*, which shall include freedom in institutions of higher learning."
2. "Without derogating from the generality of subsection (1), religious observances may be conducted at State or State-aided institutions, basis and attendance at them is free and voluntary."

### Application of the Right

#### 2.1 Nature of the Duty to be imposed on the State.

Section 14 (1), as revised by the ACDP imposes the duty upon the State to ensure that religious practises uphold public order and Godly morals.

The State's obligation in respect of section 14 (2) where it mentions that religious observances, which are conducted at State or State-aided institutions, should be regulated "under rules established by an appropriate authority for that purpose," is unacceptable and the ACDP rejects any State body that aims to regulate religious affairs.

#### 2.2 Application to common law and customary law

The right should apply to common laws and customary law.

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

The rights are applicable to all levels of Society in both a horizontal and vertical manner. Because of it's general definition, no-one is excluded in respect of this right. A moral responsibility is clearly attached to this right.



**2.4 Who should be the bearers of this right?**

All natural persons are bearers of this right, yet juristic persons, like churches, religion and academic institutions may also lay claim to the right.

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

Religious beliefs that manifest themselves through ritual murders, enforced polygamy, cultic expressions, or violence explicitly promoting public immorality, should have limitations imposed.

19th April 1995

[FREEDOM.R]

FREEDOM OF RELIGION, BELIEF, and OPINION

These rights are part of a cluster of core rights dealing with freedom of expression, association, language, culture and information. At the epicentre of the rights dealt with under section 14(1) of the Interim Constitution is the right to religion. We believe that the right to freedom of opinion and academic freedom are best dealt with under freedom of expression.

The ANC believes that there shall be freedom of worship and tolerance for all religions.

Freedom of religion shall be respected and none shall be barred from entering the grounds of race. Inherent in these rights is the recognition and acceptance of diverse beliefs. We propose the following constitution:

**- ANC**

Everyone shall have the right to freedom of conscience, religion, thought or belief.

We have no objection to the following provisions of the Interim Constitution: 14(2) and 14(3)

Application of the Right:

1.1 There shall be a positive duty to ensure that the rights are protected where violation occurs.

1.2 The freedom of religion, belief, and thought invariably impact on customary and religious rites and the laws as they apply to such customs and traditions.

1.3 The rights shall bind all individuals, institutions, and structures.



# **PRELIMINARY SUBMISSION OF THE AFRICAN NATIONAL CONGRESS- BLOCK 2 -**

## **A. FREEDOM OF RELIGION, BELIEF, and OPINION.**

1. These rights are part of a cluster of core rights dealing with freedom of expression, association, language, culture and information. At the epicentre of the rights dealt with under section 14(1) of the Interim Constitution is the right to religion. We believe that the right to freedom of opinion and academic freedom are best dealt with under freedom of expression.

The ANC believes that there shall be freedom of worship and tolerance of all religions. Places associated with religious observance shall be respected and none shall be barred from entering them on grounds of race. Inherent in these rights is the recognition and acceptance of diverse beliefs. We propose the following formulation:

" Everyone shall have the right to freedom of conscience, religion, thought, or belief."

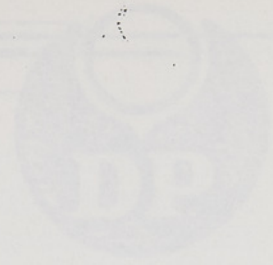
We have no objections to the provisions as set out in sections 14(2) and 14(3) of the Interim Constitution.

### **2. Application of the Right:**

2.1 There shall be a positive duty to ensure that the rights are protected where violation occurs.

2.2 The freedom of religion, belief, and thought invariably impact on customary and religious rites and the laws as they apply to such customs and traditions.

2.3 The rights shall bind all individuals, institutions, and structures.



Demokratiese Party  
Democratic Party

20.04.1975

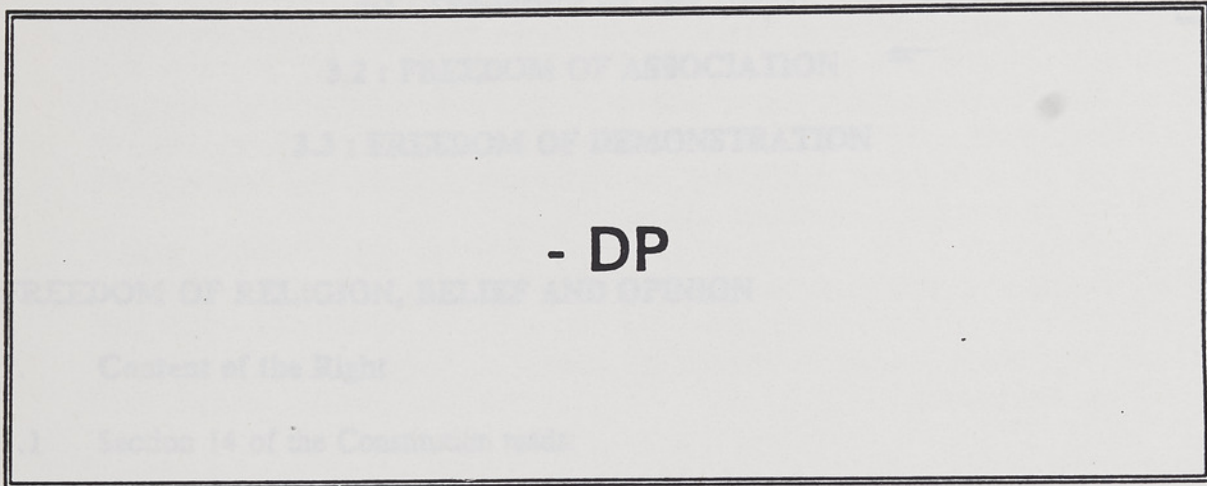
CONSTITUTIONAL ASSEMBLY  
THIRDS COMMITTEE &  
FUNDAMENTAL RIGHTS

DEMOCRATIC PARTY SUBMISSION ON:

2.1 - FREEDOM OF BELIEF

2.2 - FREEDOM OF ASSOCIATION

2.3 - FREEDOM OF DEMONSTRATION



- DP

FREEDOM OF RELIGION, BELIEF AND OPINION

Content of the Right

1 Section 14 of the Constitution reads:

- (1) Every person shall have the right to freedom of conscience, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.
- (2) Without derogating from the generality of subsection (1), religious observances may be conducted in schools or state-owned institutions under rules prescribed by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary.
- (3) Nothing in this Chapter shall preclude legislation recognizing:
  - (a) a system of personal and family law referred to by persons professing a particular religion; and
  - (b) the validity of marriage contracts under a system of religion law subject to specified procedures.





**Demokratiese Party**  
**Democratic Party**

20.04.1995

**CONSTITUTIONAL ASSEMBLY**  
**THEME COMMITTEE 4**  
**FUNDAMENTAL RIGHTS**

**DEMOCRATIC PARTY SUBMISSION ON:**

**3.1 : FREEDOM OF RELIGION**

**3.2 : FREEDOM OF ASSOCIATION**

**3.3 : FREEDOM OF DEMONSTRATION**

**FREEDOM OF RELIGION, BELIEF AND OPINION**

**1. Content of the Right**

**1.1 Section 14 of the Constitution reads:**

- "(1) Every person shall have the right to freedom of conscience, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.
- (2) Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary.
- (3) Nothing in this Chapter shall preclude legislation recognising-
- (a) a system of personal and family law adhered to by persons professing a particular religion; and
- (b) the validity of marriages concluded under a system of religious law subject to specified procedures."



The Democratic Party supports the broad nature of the rights entailed in the provisions of Section 14. However, we believe that they need to be rearranged fundamentally.

For example, we are of the view that freedom of conscience and religion, thought, belief and opinion should appear together with the provisions of free expression and speech. Likewise, we believe that the right to freedom of peaceful and unarmed assembly and to peaceful association could all be contained under a similar right, in other words, the right to fundamental freedoms.

In place of the current formulations of Section 14 (freedom of religion, etc), Section 17 (freedom of association) and Section 18 (freedom of demonstration, we would propose the following:

## 1.2 Right to Fundamental Freedoms

Every person shall have the right to:-

- (1) Freedom of conscience and religion, and consequently, the State shall not favour one religion over another:
- (2) Freedom of speech, thought, belief, opinion and expression, including freedom of the press and the other media of communication. In respect of the exercise of its control, if any, over any public media, the State shall ensure diversity of expression and opinion:
- (3) Freedom of peaceful and unarmed assembly:
- (4) Freedom of peaceful association, subject, however, to the provisions of (the equality clause):

We strongly believe, in addition, that the provisions in Section 14, as currently worded, protecting academic freedom are extremely valid and important. However, we question whether they would not be better placed together with the rights to education contained in Section 32 of the Interim Constitution.

Wherever the academic freedom clause is placed in the final constitution, we strongly believe that the right to academic freedom needs to be contained in the Charter of Rights. We believe a formulation, slightly expanded on the present one, could read as follows:

- (1) The freedom to study, learn and teach shall be guaranteed.
- (2) The state shall not try to shape education or culture in accordance with any particular political or ideological commitment.
- (3) The academic freedom of every university and similar institution of higher learning shall be guaranteed.



As regards the right to education, South Africa has a multitude of religious faiths and beliefs. One of the fortunate aspects of our history and tradition as a nation has been the presence of a great deal of religious tolerance.

However, freedom of conscience, religion and belief must be interpreted in the light of all the provisions of the Bill of Rights, and especially the limitation and equality clauses.

The Democratic Party supports a broad general formulation and believes it is the role of the courts to give practical effect and content to the right. We would, therefore, propose that instead of the somewhat tortuous formulation in the Interim Constitution that a broadly based right of religious freedom, together with its companion rights be formulated, along the lines suggested above.

As regards the necessity for a specific clause enshrining the right to academic freedom, we regard the light of learning as the torch of democracy. True learning, independent of political control, is the nemesis of tyranny. Recognizing that, the authors of apartheid twisted education into a means of repression. Never again can that be permitted. Democracy means that decisions are taken by persuasion, rather than coercion. True persuasion can only take place in a culture which respects learning. Unless learning flourishes, therefore, democracy cannot be attained. And without freedom, learning cannot flourish. The Bill of Rights should seek to guarantee the freedom and independence of learning.

During apartheid, among those who most constantly kept alive the idea of democracy, and indeed the values affirmed by any future Bill of Rights, were the independent universities. They became, in consequence targets for oppression. The Bill of Rights should seek to put them, and all institutions of higher learning like them, beyond further interference.

The formulation of the rights proposed in respect of freedom of peaceful and unarmed assembly and association will be dealt with separately below.

### 1.3. Application of the Right

A positive duty is imposed upon the State to adhere to the rights contained herein and not to interfere with either the belief of religious freedom, the belief and practice and propagation of religious viewpoints, nor the rights of academic freedom.

### 1.4 Constitutional Duty on Other Actors

Clearly, these rights would be appropriate for horizontal application, subject to suitable limitation in the appropriate clause.



## 1.5 Bearers of the Right

Clearly, a meaningful right to religious freedom should exist for both individual citizens and to institutions which practice both the expression of religious viewpoints (churches, synagogues, mosques and temples) and related juristic persons. In respect of the right to academic freedom, we believe that institutions, such as universities and technikons, should be able to enforce the right against individuals or the State itself.

## 1.6 Limitations

The right to freedom of religious expression and belief and opinion and academic freedom should be subject to reasonable limitations in a properly formulated limitations clause, such as that provided for in the Interim Constitution in terms of Section 33.

## 2. FREEDOM OF ASSOCIATION

Section 17 of the Interim Constitution provides:

"Every person shall have the right to freedom of association".

### 2.2 Content of the Right

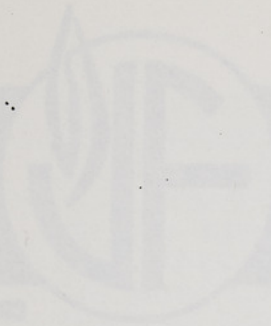
Freedom of association is a general capacity of citizens to join, without interference from the State or others, in associations, in order to attain various ends. This is an uncontroversial right which should be supported. For the reasons stated under 3.1 (freedom of religion) we believe this more properly belongs together with citizens rights to fundamental freedom and that would be the proper place for the right to appear.

In order to allay any fears, whether legally founded or not, that freedom of association could be used as a shield behind which privatised racism or discrimination can take place, we have proposed that freedom of peaceful association should be made subject to the provisions of the equality clause. In any event this is probably unnecessary since the constitution will be read as a whole (in other words, the equality clause will be read together with all other clauses such as that providing guaranteed right to association). It might be as well to dispel any fears on this count by making such provision explicit.

### 2.3 Application of the Right

A positive duty is imposed on the State which is apparent from the wording of the clause.





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## FREEDOM FRONT

### THINK COMMITTEE 4 (FUNDAMENTAL RIGHTS)

#### Content of the right

In the view of the Freedom Front this freedom comprises more than a single right. The relevant provisions of the transitional Constitution in fact enshrine three different rights in this context.

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The provisions of Constitutional Principle XII relating to collective rights of self-determination concerning organs of civil society are relevant in the present context. Moreover, section 2(3) of the transitional Constitution prohibits unfair discrimination on the basis, inter alia, of religion, conscience and belief. Section 22(a) protects

It is section 14 of the transitional Constitution, however, that clearly indicates that diverse rights have been grouped together in the present context. Section 14 guarantees the right to freedom of conscience, religion, thought, belief and opinion, which is stated to include academic freedom in institutions of higher learning. We are of the opinion that academic freedom does not coincide with freedom of religion; there is only a partial overlap. Moreover, freedom of religion does not coincide exactly with freedom of thought and opinion. It is very difficult, if not impossible, to describe the content of this so-called single right in comprehensive terms.

In view of the fact that the religious element is apparently the predominant element in the present context, the Freedom Front will deal only with freedom of religion in this document.



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## FREEDOM FRONT

### THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

#### SUBMISSIONS ON FREEDOM OF RELIGION, BELIEF AND OPINION

##### 1. Content of the right

In the view of the Freedom Front this freedom comprises more than a single right. The relevant provisions of the transitional Constitution in effect expound three different rights in this context.

The provisions of Constitutional Principle XII relating to collective rights of self-determination concerning organs of civil society are relevant in the present context. Moreover, section 8(2) of the transitional Constitution prohibits unfair discrimination on the basis, inter alia, of religion, conscience and belief. Section 32(c) protects certain religious rights in the context of education.

It is section 14 of the transitional Constitution, however, that clearly indicates that diverse rights have been grouped together in the present context. Section 14 guarantees the right to freedom of conscience, religion, thought, belief and opinion, which is stated to include academic freedom in institutions of higher learning. We are of the opinion that academic freedom does not coincide with freedom of religion: there is only a partial overlap. Moreover, freedom of religion does not coincide exactly with freedom of thought and opinion. It is very difficult, if not impossible, to describe the content of this so-called single right in comprehensive terms.

In view of the fact that the religious element is apparently the predominant element in the present context, the Freedom Front will deal only with freedom of religion in this document.



The International Covenant on Civil and Political Rights in article 18.1 describes freedom of thought, conscience and religion as including everyone's 'freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching'. Controversial issues should be considered in this context.

## 1.2 Controversial issues

### Aspects of religious freedom

The Freedom Front is of the opinion that the provisions of section 14(2) and 14(3) of the transitional Constitution are, in principle, acceptable. In our view these provisions reflect religious tolerance not only in the very broad context of section 14(1), but also in the context of state or state-aided institutions referred to in section 14(2).

We are in agreement with section 14(2) inter alia in so far as 'the appropriate authority' referred to should be able to make rules for religious observances, subject to the proviso that they are conducted on an equitable basis and that attendance at them is free and voluntary. In our view section 14(2) links up with the concept of collective rights of self-determination relating to organs of civil society (including cultural and religious associations) referred in Constitutional Principle XII, on the basis of non-discrimination and free association.

The Freedom Front is also generally in agreement with the provisions of the present section 14(3) recognising legislation relating to a system of personal and family law adhered to by persons professing a particular religion, as well as the validity of marriages concluded under a system of religious law subject to specified procedures. We are of the view, in broad context, that the plural nature of South African society and the scope of religious differences in South African society renders constitutional provisions of this nature necessary.

Despite our general agreement with the statutory provisions relating to religion set out above, we are of the opinion that the chapter on fundamental rights in the new Constitution should not (as section 8(2) of the transitional Constitution professes to do) prohibit a person from taking into account the sexual orientation of another person where such sexual orientation (e.g. homosexuality or lesbianism) is contrary to the religious beliefs of the former person. We are of the opinion that the present section 8(2) may be interpreted as forcing a person to act contrary to his religious convictions. This, in our view, is an infringement of the concept of freedom



of religion. (Compare the element of coercion referred to in the next paragraph).

We are of the opinion that the provisions of article 18.2 and 18.3 of the above-mentioned Covenant should be incorporated (with or without minor changes in wording) in the new Constitution. The former reads: 'No one shall be subject to coercion which would impair his freedom to have or to adopt a religion of his belief or choice'. The latter reads: 'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.

### Academic Freedom

Academic freedom should, in our view, be treated in the context of fundamental rights relating to education (at present section 32 of the transitional Constitution), and not under the general heading "Religion, belief and opinion". Submissions in this regard will be submitted at the appropriate time.

## 2. Application of the right

### 2.1 Nature of the duty to be imposed on the State

The nature the duty imposed on the state is to give full reign to human conduct based on the diversity of religious convictions in South African society, thus fostering mutual tolerance between different religious groups.

### 2.2 Application of the right to common law and customary law

The Freedom Front is of the opinion that the general concept of freedom of religion, belief and opinion is not contrary to common law principles. In so far as customary law (indigenous law) is concerned we are of the opinion that any religious principles possibly in conflict with freedom of religion in the context above should make way for religious tolerance generally acknowledged by the international community.

### 2.3 Should this right impose a constitutional duty on actors others than the State?

We are of the opinion that the state as well as all lawful inhabitants of the country should be under a constitutional duty to respect the religious convictions, beliefs and practices of all other persons. Religious tolerance should, in our view, therefore have not only vertical but also



horizontal effect. Any other view would lead to social conflict and discord.

2.4 Who should be the bearers of the right?

In view of the fact that a church can be a juristic person in our law, we are of the opinion that the bearers of the right should be natural persons (i.e. all citizens and all persons lawfully in the country), as well as churches or religious associations that have juristic personality.

2.5 Should this right be capable of limitation by the legislature?

In the view of the Freedom Front this right should not be capable of limitation by the legislature otherwise than by an amendment of the relevant provisions of the chapter on fundamental rights in the Constitution itself. It should not be capable of limitation by ordinary legislation. The nature of this right is such that it cannot exist in a truncated or inchoate form.

We do not believe that either the Constitution or any other law should determine what persons should believe. The only justifiable limitation we can think of would be a curtailment of religious activities that conflict with the religious activities of other persons or groups or that contravene some other fundamental interest protected by the Constitution, such as the public order and other interests mentioned in article 18.3 of the International Covenant on Civil and Political Rights, quoted above. The widest form of religious tolerance should, accordingly, be guaranteed by the Constitution.

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# NATIONAL PARTY PRELIMINARY SUBMISSION

## THEME COMMITTEE 4

### BLOCK'S ITEM 9: FREEDOM OF RELIGION, BELIEF AND OPINION

#### 1. Context of the right

In terms of the transitional constitution, this right includes the right to freedom of conscience, religion, thought, belief and opinion, as well as academic freedom in institutions of higher learning (section 14). The right

encompasses the right to hold (and not to hold) any religious and secular conviction and to use rights to express, profess, practise and propagate them publicly and in association with others. The right is, therefore, closely linked to the freedom of expression and of association and to political rights and is established as one of the most fundamental rights of the individual.

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#### 1.2 Contemporary issues

The purpose of the right is, of course, inter alia to prevent the state from interfering in the personal beliefs of people and from favouring certain beliefs over others. This does not necessarily mean an absolute separation between church and state. As a matter of fact, an absolute separation would prevent the state from any action whatsoever, including fulfilling its duty to create the opportunity and space for different religions to exist, practise and flourish. In this regard, two schools of thought exist. In terms of the American approach, based on the so-called "establishment" and "free exercise" clauses, a very strict separation is



# NATIONAL PARTY PRELIMINARY SUBMISSION

## THEME COMMITTEE 4

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

#### 1 Content of the right

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

#### 1.2 Controversial issues

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

The purpose of the right is, of course, *inter alia* to prevent the state from interfering in the personal beliefs of people and from favouring certain beliefs over others. This does not necessarily mean an absolute separation between church and state. As a matter of fact, an absolute separation would prevent the state from any action whatsoever, including fulfilling its duty to create the opportunity and space for different religions to exist, practise and flourish. In this regard, two schools of thought exist. In terms of the American approach, based on the so-called "establishment" and "free exercise" clauses, a very strict separation is



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

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

The inclusion of section 14(2) reflects South African attitudes on this matter, subscribes to the German approach and we propose that it be retained unamended. In the words of Du Plessis and Corder (*Understanding South Africa's Transitional Bills of Rights* (1994) 157): "Section 14(2) is a prime example of a provision attesting to the negotiators' unwillingness to erect walls of separation between church and state". (See also Cachalia et al *Fundamental Rights in the New Constitution* (1994) 52.)



(b) *Academic freedom*

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

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

Thirdly, inclusion of academic freedom under section 14 does not reflect the full scope of the right. It is often said that academic freedom is a collective term for a number of other rights such as the freedom of expression, conscience, and association, and an inference is possible that by including it under section 14, the scope of the right has been limited. These concerns can be eliminated by providing for academic freedom in a separate, substantive provision. The argument that academic freedom is already covered by the freedom of thought, belief and opinion (Du Plessis and Corder 157), is refuted, firstly, by the fact that it was in any case thought necessary to include a particular element of academic freedom, namely the freedom of scientific research, under section 15 and, secondly, by the fact that express



reference to particular matters already covered by broadly formulated rights appear in the bill of rights in respect of other

rights as well, for instance in the case of the freedom of the press and other media (section 15(1)).

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

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

The present section 14(3) only allows for legislation to be adopted in this regard without creating any constitutional right. Although a right in this regard can be created, it should not lead to the preservation of practices otherwise prohibited by the equality clause (section 8), the rights of children (section 30), and other rights such as those relating to human dignity (section 10), life (section 9), freedom and security of the person (section 11), servitude and forced labour (section 12), privacy (section 13), and freedom of movement (section 180).

## 2 Application of the right

### 2.1 Nature of the duty on the state

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



## 2.2 Application to common law and customary law

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

## 2.3 Other actors

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

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

## 2.4 Bearers of the right

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

## 2.5 Limitation of the right

The present section 14 contains two specific limitation provisions, namely religious observances in state or state-aided institutions provided that they are conducted on an equitable, free and voluntary basis, and recognition of



systems of law of religious communities. Both have been discussed. In addition, the general limitations clause should apply to limitations placed on the free exercise of the right for the protection of community interests such as public order and health and public morals.

### 3 Wording

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

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

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

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



- PAC





Ref No

24 April 1995

## PRELIMINARY SUBMISSION OF THE PAC ON FREEDOM OF RELIGION, BELIEF AND OPINION

### Content

This freedom guarantees the Rights to Religion, thought and conscience. This would therefore, with regard to freedom of Religion, protect theistic, non-theistic and atheistic beliefs. Academic Freedom is included in the phrase "thought, belief and opinion."

### Application And Other Related Aspects.

1. These rights are not absolute. They can be limited under certain strict circumstances.
2. The right is a negative one, for example, the state is under no obligation to build churches or supply bibles. It should only refrain from infringing rights protected in such a clause.
4. These rights cannot be suspended during a State of Emergency.
5. The PAC would support the retention of S14 (2) and (3) of the Interim Constitution.
  - (i) Religious observance in state or state-aided schools or even prisons can be allowed as long as it is voluntary and equitable.
  - (ii) We support the recognition of personal and family Law of persons professing a particular religion and the recognition of the validity of marriages concluded under such systems. We agree with Prof Dion Basson (South Africa's Interim constitution: Text and Notes, 1994) that if such system infringes other fundamental rights such as, gender equality, such infringements would have to pass the test set in a limitation clause.

R K Sizani - MP







