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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 4

FUNDAMENTAL RIGHTS

PARTY SUBMISSIONS

- Freedom of Religion, Belief and Opinion
- Freedom of Association
- Right of Assembly, Demonstration and Petition

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- ACDP

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

FREEDOM OF RELIGION, BELIEF & OPINION

Content of the Right

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 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]

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

FREEDOM OF ASSOCIATION

Content of the Right

Section 17 of the Constitution reads that "every person shall have the right to freedom of association."

The inclusion of this right is both constitutionally correct, yet politically controversial. It is dependent upon the character of our nation to allow this right as long as the rights of others are not infringed, or the stability of society attested.

Freedom of association or dissociation is a democratic right that caters for respect of individual privacy and for institutional cohesiveness and freedom.

As regards all rights, responsibility and the collective value to uphold the goodwill of all people are the cornerstones for effective exercise and manifestation of fundamental rights. The founding of voluntary or statutory associations rest on the assumption that individual and community (association) rights are protected, and that the fundamental rules that hold these diverse sectors together are the basic human values of love, respect, honesty, truthfulness, accountability and a divine spiritual bond.

Society demands that laws which encourage justice, transparency, peace, morality and social upliftment, should be maintained. These are requirements for social stability and neighbourliness. The right to freedom of association is limited to these.

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

**FREEDOM OF DEMONSTRATION &
PETITION**

Content of the Right

The ACDP proposes that section 16 of the Constitution remain as stated.

"Every person shall have the right to assembly and demonstrate with others peacefully, and to present petitions."

This right is intrinsically linked to the political and social values of a democratic society, and invests in the individual, the power to resist measures which may be deemed undemocratic.

The right, as worded, promotes healthy and peaceful protest, with the least amount of injury to the demonstrator, and requires of the authorities, a dignified response in handling the right in question.

It is imperative that as much assistance is given to protesters, by the State, in order that the right of peaceful demonstration and petitioning be made possible.

The ACDP is of the opinion that the dignity of the person is protected through the needs of this right.

If a demonstration intends to be provocative or induce violence or hatred, and where the security of the State and lives of the community threatened, the right should be withdrawn.

The right to assembly or to have public meetings is also subject to such stringent measures, with regards to the prohibition of arms or any type of weapon.

Any form of strike action or demonstration, that leads to violence should be penalised and the cost of damages incurred by such action should be paid for by those responsible for the creation thereof.

Any strike action or picketing that has as it's aim, the breakdown of political stability, or to bring the economy to it's knees, should be deemed as undermining State security and be classified as illegal. However, State security cannot be used as an argument against strikes where flagrant corruption, or dictatorial relationship are the order of the day.

The ACDP proposes that the resources of an independent public protector system, or similar persons, be made available to mediate on issues relating to demonstrations and petitioning. This will provide recourse to petitioners and protesters, and ensure uninterrupted functioning of the broader social machinery.

Application of the Right

2.1 Nature of the duty to be imposed on the State

A democratic society demands democratic responses from the State. It is the duty of the State to regulate that the right, as worded, is complied with, and to ensure that the right is not negatively infringed upon those of others. The content of the right implies morality and peace and this should be adhered to.

2.2 Application of the right to common law and customary law

In principle, the right should apply to both common and customary law.

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

No. The right to freedom of choice is an individual responsibility, eg. closed-shop, and the right under discussion is dependent upon such criteria as they present themselves.

That the right is constitutional, strengthens the democratic principles upon which our society is based.

2.4 Who should be the bearers of the right?

This right should apply to both individuals and juristic persons.

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

No right is absolute, nor can it be arbitrarily exercised. The right, as is worded, provides it's own specific limitation of being 'peaceful and unarmed', and should be imposed as such.

19th April 1995

[DEMON.WPS]

- ANC

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.

2.4 Natural persons shall be the bearers of the right.

2.5 The "holding" of a belief or thought (religious or otherwise cannot be limited. The manifestation 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 of equality.

B. FREEDOM OF ASSOCIATION:

The right of freedom of association includes the right to join religious, social, cultural, political bodies and to join trade unions, and to form and participate in non-governmental organisations. This core of rights protects free and fair political activity and impacts directly on labour law. Article 20 of the Universal Declaration of Human Rights, Article 22 of the International Covenant on Civil and Political Rights specifically deal with this right.

Given South Africa's history, there is concern that the right to freedom of association can be used as a shield that protects privatised apartheid or gender discrimination. In our view a strong "Equality" clause and a provision similar to section 33(4) in the Interim Constitution which specifically deals with the validity of laws designed to prohibit discrimination by private clubs, associations, or individuals is adequate to counter such threats. The right may be formulated as follows:

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

2. Application of the Right.

2.1 The state shall have a duty to protect the right against violation.

2.2 The right includes the rights of association with religious, customary or cultural institutions.

2.3 It shall bind private institutions, individuals and social structures.

2.4 Natural persons or natural persons as a group or collective e.g. a church organisation or labour union.

2.5 The usual criteria in an open and democratic society. However, where the association is of a political nature the limitation shall occur under stricter conditions. In addition, a provision similar to section 33(4) in the Interim Constitution should be a specific constitutionally permitted provision.

C. THE RIGHT TO ASSEMBLE, DEMONSTRATE AND PETITION.

1. These rights too are inter-related with freedoms of expression, free and fair political activity and other similar rights. All men and women shall have the right to assemble peacefully and without arms, and to submit petitions for the redress of grievances and injustices.

The exercise of the right occurs with due and proper consideration for the peace, safety and security of other people. Hence the qualifications of "peaceful" and "unarmed" assembly or demonstration. This right also finds expression in Article 20.1 of the U.N. Declaration of Human Rights.

The presentation and receiving of petitions has been frequently used in organised political activity in the past and continues to be an effective mechanism to articulate grievance or express support or opposition.

2. Application of the Right.

2.1 The state shall protect the right.

2.2 The right applies at all levels of civil society.

2.3 All persons, institutions and structures are bound by the right.

2.4 Natural persons shall be bearers of the right.

2.5 See 2.5 above.

2.6 Suspension under state of emergency under judicially controlled circumstances can occur.

The formulation of this right as it appears in the Interim Constitution is accepted.

- DP

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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 excise 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.

2.4 Application of the Right to Common/Customary Law

We believe that freedom of association is a fundamental democratic right which should, subject to resolution on the debate on the horizontal application of the Bill, be made applicable to the common law and customary law as well.

2.5 Bearers of the Right

Both natural and juristic persons should enjoy the right to freedom of association primarily because the rights of association itself implies a collectivisation of individual rights, such as the formation of organisations and associations to advance a particular cause. It would be unduly limiting and ineffectual if the right were to be confined to natural persons only.

3. FREEDOM OF DEMONSTRATION

Section 16 of the Interim Constitution provides:

"Every person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to present petitions."

3.1 Content of the Right

The Democratic Party regards the right to demonstrate, subject to the limitations contained in the above clause, as being fundamental and of social value to our democratic society. This is particularly true in South Africa, with our long history of public demonstrations against oppressive rule. However, like all rights, the right to demonstrate is subject to limitation. Aside from reasonable restrictions which the government would be able to place on demonstrations in order to maintain public order, which are provided for in terms of the general limitation clause of the Interim Constitution (Section 33), we particularly approve of the constitutional requirement (in terms of the current formulation) that any assembly or demonstration be both "peaceful" and "unarmed". Since a lawless or armed assembly of persons would completely negate the democratic and constitutional rights of others, and all too unfortunately in the recent history of South Africa has often become the norm of public demonstrations, we believe these limitations to be both necessary and democratic. These limitations are also consistent with similar provisions in other human rights instruments.

3.2 Application of the Right

The bearers of the right should be natural persons and juristic persons (collectivised associations of persons who are likely to demonstrate with a common objective in mind).

3.3 Limitation of the Right by the Legislators

This matter has been dealt with under the Content of the Right.

3.4 Application of the Right to Common/Customary Law

The Democratic Party believes that this right should be applicable in terms of both the common law and customary law.

- FF



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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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FREEDOM FRONT

THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

SUBMISSIONS ON FREEDOM OF ASSOCIATION

1. Content of the right

- 1.1 Constitutional Principle XII deals with so-called "Collective rights of self-determination in forming, joining and maintaining organs of civil society". Section 17 of the transitional Constitution contains the cryptic statement: "Every person shall have the right to freedom of association.

It is necessary to delineate the scope of the right of freedom of association in the present context, which is a general one. The Freedom Front is of the opinion that the relationship of a right of association as far as collective bargaining and other labour matters are concerned (also Constitutional Principle XXVIII), should be considered in the context of labour rights, which are specifically dealt with by the bill of rights and arise for discussion at a later stage.

The concept of freedom of association is, apparently, in conflict with various other principles. One of these is the general principle of non-discrimination, in respect of which we consider the contradiction to be more apparent than real. The motivation appears in 1.2 below. Another principle apparently contradictory to the principle of freedom of association is the principle of equality. Also in this case the alleged contradiction is more apparent than real: the fact that people are equal in human dignity or equal before the law does not mean that they can insist on equal treatment with others in the case of associations catering for the special needs of the latter and envisaged by the principle of freedom of association. This is in accordance with Constitutional Principle XI, which requires the acknowledgment and protection of the diversity of language and culture in South Africa.

The Freedom Front is of the opinion that the Roman-Dutch common law and indigenous customary law cannot deal adequately with freedom of association. The latter is a contemporary concept, which must be understood in the context of evolving norms of public international law and constitutional law of the twentieth century.

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

The Freedom Front considers that not only the state but all inhabitants of the country should respect the freedom of association of individuals and that a constitutional duty in that regard should be contained in a bill of rights. Freedom of association of individuals can be infringed not only by state action, but also by the conduct of fellow citizens. This right or freedom should therefore have vertical as well as horizontal application.

2.4 Who should be bearers of the right?

We are of the opinion that all natural persons who are citizens and all aliens lawfully admitted to the country should be bearers of this right. By reason of the fact that voluntary associations have juristic personality the right should be applicable also to juristic persons, i.e. voluntary associations and juristic persons created by statute.

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

The Freedom Front is convinced that freedom of association is a fundamental right as important as the prohibition of unfair discrimination. We are accordingly of the view that this right should not be capable of limitation by the legislature, otherwise than in accordance with the international law limitations referred to above and the provisions of a general limitation clause applicable to all fundamental rights (at present section 33 of the transitional Constitution).



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FREEDOM FRONT

THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

SUBMISSIONS ON FREEDOM OF DEMONSTRATION AND PETITION

1. Content of the right

- 1.1 Section 16 of the transitional Constitution provides:
"Every person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to present petitions".

The Freedom Front is of the opinion that the above-mentioned three rights, formulated without qualification, should be qualified as set out below.

By reason of the fact that one has to do with three rights in the present context it is not feasible to attempt to give an exposition of the content of 'the right'. The content of the various rights will appear from the discussion under 1.2 below.

1.2 Controversial issues

The right to assemble peacefully

The International Covenant on Civil and Political Rights 1966 provides in article 21 that no restrictions may be placed on the exercise of the right of peaceful assembly 'other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others'.

The restrictions referred to above reflect rules of international law generally accepted, as the above-mentioned Covenant is an international instrument

reflecting the views of the majority of states in the world. These restrictions on the right accordingly form part of 'universally accepted fundamental rights' within the meaning of Constitutional Principle II in Schedule 4 of the transitional Constitution.

The Freedom Front proposes that identical or similar restrictions should be introduced into the new Constitution, using the present section 16 as a basis. We are of the opinion that such restrictions are necessary in the public interest. Contemporary South African events have shown that large assemblies of people cannot be effectively controlled. Breaches of the peace, public violence and criminal actions by some flow from such assemblies, unless strict controls are exercised.

The restrictions proposed by us above ought to cover also state security and disruption of commercial and community life. An extended wording of the restrictions mentioned above may, therefore, be necessary to cover these cases. As far as picketing is concerned, we suggest that it should be dealt with not in the context of this right, but in the context of fundamental rights relating directly to labour relations (at present section 27 of the transitional Constitution), as the latter should be dealt with in one 'package'.

We would like to stress that the word "unarmed" should be retained in a future bill in respect of this right, as a potential breach of the peace or the invasion of private rights would otherwise be much more likely.

The right to demonstrate

The Freedom Front submits that the internationally accepted right of demonstration is closely allied to the right of peaceful assembly. Presumably because of this reason it is mentioned in section 16 of the transitional Constitution, together with the right to assemble. It is difficult, however, to draw a line between the two in particular circumstances.

An assembly is not necessarily a demonstration: it may have the purpose of a public discussion by persons not necessarily holding the same opinions. An assembly may, therefore, prove to be not be partisan in nature or aimed at the furthering of sectional interests. A demonstration is, however, partisan by its very nature. On the other hand, a demonstration will not necessarily imply an assembly of persons: it may be manifested by a single person or a small group of persons.

The significance of distinguishing between assemblies and demonstrations is that the latter are more likely to lead to a breach of the peace or public violence, and should

therefore perhaps be subject to different types of restrictions. Subject to this distinction our comments above relating to the right of peaceful assembly, together with the proposed restrictions relating to such peaceful assembly, are also applicable to peaceful demonstrations.

We would like to stress that the word "unarmed" should be retained in a future bill in respect of this right, as a potential breach of the peace or the invasion of private rights would otherwise be much more likely.

The right to present petitions

The practice in South Africa is that the exercise of a right of assembly and demonstration is often accompanied by the presentation of petitions to government officials.

The 'right' to present petitions, however, is not a universally recognised fundamental human right. The Freedom Front sees no need for the bill of rights to confer such a right. Consideration of a petition by the authorities will almost inevitably take place after a protest march or demonstration and not during it. There is no justification, in our view, for linking a right to petition authorities to a right of peaceful assembly or demonstration. If such a right were to be acknowledged, it would create the impression that there is an onus on the authorities receiving the petition to give effect to demands contained in it, which may be quite unjustified. Such an act is confrontational and not in the interest of amicable resolution of any differences that may exist in this connection.

2. Application of the right

2.1 Nature of the duty to be imposed on the state

The nature of the duty (in the sense of its scope and ambit) appears from paragraph 1.2 above.

2.2 Application of the right to common law and customary law

The Freedom Front is of the opinion that the above-mentioned proposals relating to this part of the proposed bill of rights is in conformity with the rules of South Africa's common law. We do not anticipate any conflict between this statutory right and the broad principles of the common law in this regard. If necessary, however, common law rules in this context may supplement the statutory provisions contemplated.

As far as indigenous law (customary law) is concerned we propose that the indigenous law should be repealed to the

extent of any conflict. Our motivation is that the right of peaceful assembly is a phenomenon of modern society and should therefore be seen in the context of contemporary conceptions of human rights as opposed to traditional or customary concepts.

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

The Freedom Front is of the view that there is a constitutional duty in this regard not only on the State but also on all inhabitants of the country. The proper exercise of this right can be effected not only when the State allows freedom of assembly but also when private persons allow it and do not disrupt such assemblies.

2.4 Who should be the bearers of the right?

Naturally juristic persons cannot exercise this right, which is by its nature confined to natural persons. All citizens and lawful inhabitants of the country should possess this right. In the case of persons performing essential services, however, a right of peaceful assembly (just like the right to strike) should be formulated in such a way that it is not capable of being used as a pretext for dereliction of their duties by such persons, as such conduct is against the public interest.

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

The Freedom Front believes that the right of peaceful assembly should be capable of limitation by the legislature only to the extent permitted by international law, as reflected in the exceptions to this right referred to in paragraph 1.2 above.

2.6 Other issues

The Freedom Front is convinced that the public interest requires that freedoms of assembly, demonstration and petition should not be permitted by the constitution in respect of 'essential services' in a wide sense. Special statutory provision should be made for the airing of grievances by soldiers, the police, medical personnel, etc., so that military discipline, law and order, the maintenance of health services, etc. can at all times be kept intact.

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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 at 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.

NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 4

BLOCK 5 ITEM 10: FREEDOM OF ASSOCIATION

1 Content of the right

The right to freedom of association protects contact with other people and co-operation among individuals for common purposes. As such, the right protects the freedom of the individual to associate with anybody and to form and join associations, as well as that of associations to freely pursue their goals. This right covers all forms of association, although specific rights with regard to political activities and parties, trade unions and employers' organisations and educational institutions based on common language, culture and religion are provided for in the transitional constitution.

1.2 Controversial issues

(a) *Private discrimination*

By implication, the freedom of association includes the right not to associate with another. The immediate question is whether the state may limit the grounds on which the individual or a private institution may refuse to associate with another and whether the individual or institution may be allowed to dissociate on any (rational or irrational) ground. May a club for men exclude women from membership? May a political party refuse members on the basis of language or culture? May a church refuse members on the basis of sexual orientation or race? These questions may become quite sensitive and in order to prevent abuse of this right, section 33(4) provides for legislation prohibiting private discrimination. This seems to be a practical approach to the

problem. It must, however, be borne in mind that such legislation does not in itself have constitutional status and insofar as it limits the right to freedom of association, it will have to comply with the limitations clause. It should, therefore, for example, not be possible through such legislation to negate the essential content of the right to freedom of association.

(b) *Trade union arrangements*

These matters should be dealt with expressly in the provision on the right to fair labour practices.

2. Application of the right

2.1 *Nature of the duty on the state*

The state must respect the individual's freedom of association and must refrain from restricting the right on grounds not covered by the limitations clause. Measures to prevent private discrimination as provided for in the present section 33(4) should, however, be possible.

2.2 *Application to common law and customary law*

The right should apply to common law and customary law.

2.3 *Other actors*

In principle, other actors are not bound by the right. In terms of the transitional constitution, private individuals and institutions will be bound only insofar as specific legislation prohibiting private discrimination (section 33(4)) applies to them.

2.4 *Bearers of the right*

This is one of those rights that obviously apply to *natural* as well as *juristic* persons such as clubs and other associations.

2.5 *Limitation of the right*

The right to freedom of association should be capable of limitation by the state. The state should be able to limit the right in the public interest as long as it complies with the limitations clause.

3 Wording

It is our view that the wording of the present section 17 should be followed unamended.