

CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 4
FUNDAMENTAL RIGHTS**

**REPORT ON
FREEDOM OF ASSEMBLY,
DEMONSTRATION *AND PETITION***



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THEME COMMITTEE 4
-FUNDAMENTAL RIGHTS

**SCHEMATIC REPORT ON
FREEDOM OF ASSEMBLY, DEMONSTRATION AND PETITION**



N O.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
1.	II	Nature of right (Application of Constitutional Principle II)	The rights to freedom of assembly and demonstration are universally accepted fundamental rights.	The right to petition is not a fundamental rights - FF	
2.		Content of right	The rights are essential for the democratic functioning of a constitutional state. They must however, be exercised peacefully and unarmed.	Picketing in labour disputes should be dealt with in the rights and freedoms concerning labour relations - FF Outstanding ¹ .	
3.		Application of the right (Nature of Duty)	The State must respect and protect the exercise of the rights.		
4.		Application of	Shall apply to common law		

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

N O.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
		the right (To common and customary law)	and customary law.		
5.		Application of the right (Duty on Private Actors)	All persons must respect the exercise of these rights.		
6.		Bearers of the right	Natural persons are the bearers of these rights.	Juristic persons should be included - DP, NP, ACDP.	
7.	Section 33	Limitation of right	Right can be limited	<p>The actual wording of the right should be a limitation in itself eg. peaceful and unarmed - ACDP.</p> <p>The rights may be limited provided the limitations are reasonable and justifiable in an open and democratic society - ANC & FF (in respect of the right to demonstration only).</p> <p>The rights may be limited only if "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" and the prevention of commercial and community disruption - FF (in respect of freedom of association only).</p>	

N O.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
				The general limitations clause to apply - DP	
8.		Other		The rights may only be suspended in a State of Emergency and under judicially controlled circumstances - ANC	

THEME COMMITTEE 4 FUNDAMENTAL RIGHTS

REPORT ON RIGHT TO FREEDOM OF ASSEMBLY, DEMONSTRATION AND PETITION

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

PART I

MATERIAL CONSIDERED BY THE THEME COMMITTEE

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

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

2. Submissions received from the public and civil society²:

- 2.1 Individuals (in alphabetical order)
- 2.2 Organisations (in alphabetical order)
- 2.3 Government structures\ institutions (in alphabetical order)

3. Technical Committee reports:

None to date

4. Relevant Constitutional Principles

² A complete listing of all submissions received from the public and civil society is included in the document entitled "Public Submissions". The document is being circulated separately.

PART II

1. NATURE OF THE RIGHT (Application of Constitutional Principle II)

1.1 Non-contentious Issues

1.1.1 The rights to freedom of assembly and demonstration are universally accepted fundamental rights.

1.2 Contentious issues

1.2.1 The right to petition is not a fundamental right - FF.

2. CONTENT AND SCOPE OF THE RIGHT

2.1 Non-Contentious Issues

2.1.1 The rights are essential for the democratic functioning of a constitutional state. They must, however, be exercised peacefully and unarmed.

2.2 Outstanding³ Issues

2.2.1 Picketing in labour disputes should be dealt with in the rights and freedoms concerning labour relations - FF

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

3.1 Non-contentious Issues

3.1.1 The State must respect and protect the exercise of the rights.

4. APPLICATION OF THE RIGHT (To common and customary law)

4.1 Non-contentious issues

³ 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.

4.1.1 The right must apply to the common and customary law.

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

5.1 Non-contentious issues

5.1.1 All persons must respect the exercise of the rights.

6. BEARERS OF THE RIGHT

6.1 Non-contentious Issues

6.1.1 Natural persons are the bearers of the right.

6.2 Contentious\ Outstanding Issues

6.2.1 Juristic persons should be included - ACDP, DP, NP.

7. LIMITATION OF THE RIGHT

7.1 Non-contentious Issues

7.1.1 Right can be limited.

7.2 Outstanding Issues

7.2.1 The actual wording of the right should be a limitation in itself eg., "peaceful and unarmed" - ACDP.

7.2.2 The rights may be limited provided the limitations are reasonable and justifiable in an open and democratic society - ANC & FF (in respect of the right to demonstration only).

7.2.3 The rights may be limited only if "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" and the prevention of commercial and community disruption - FF (in respect of freedom of association only).

7.2.4 The general limitations clause to apply to this right - DP

8. OTHER ISSUES

- 8.1 The rights may only be suspended in a state of emergency and under judicially controlled circumstances - ANC.

PART III

EXPLANATORY MEMORANDUM ON: *THE RIGHT TO FREEDOM OF ASSEMBLY, DEMONSTRATION AND PETITION*

9 COMPLIANCE WITH CONSTITUTIONAL PRINCIPLE II

The right to freedom of assembly (including the freedom to demonstrate) is a universally accepted right which should be included in the Constitution. The right to present petitions is not guaranteed in international instruments.

10 PUBLIC INTERNATIONAL LAW

10.1 The right to freedom of assembly is guaranteed in the following international and regional instruments:

- article 20 of the Universal Declaration of Human Rights;
- article 11 of the European Convention on Human Rights;
- article 21 of the International Covenant on Civil and Political Rights;
- article 15 of the American Convention on Human Rights;
- article 11 of the African Charter on Human and Peoples' Rights.

10.2 The **content of the right** is described as '*freedom of assembly*' or '*to assemble freely*'. In all instruments, except the African Charter, the guarantee only applies to '*peaceful*' assemblies. The American Convention adds the additional qualification '*without arms*'.

10.3 The **bearers** of the right to freedom of association are described as '*every individual*' in the African Charter and '*everyone*' in the Universal Declaration of Human Rights and the European Convention. The International Covenant on Civil and Political Rights and the American Convention on Human Rights do not describe the bearers of the right.

10.4 Levels of limitation

10.4.1 All treaties allow limitation of the right "imposed in conformity with", "prescribed by" or "provided for by" law.

10.4.2 In all cases these limitations must be "necessary" and (except for the African Charter) they must be necessary "in a democratic state". The limitations must be for the protection of national security, public safety, health and the rights and freedoms of others, and in some instances also ethics, morals, public order or the prevention of disorder and crime. The European Convention contains an exception for members of the armed forces, the police and the administration of the state.

11 COMPARATIVE LAW

11.1 The right to freedom of assembly is a fundamental right which is guaranteed in all national bills of rights. The following examples can be quoted:

- Section 8 of the German Constitution: The right have been deduced from various "(1) All Germans have the right to assemble peacefully and unarmed without notification or permission. (2) With regard to open-air meetings, this right may be restricted by or pursuant to a law."
- Section 19(1) of the Indian Constitution: "Everyone shall have the right to (d) assemble peacefully and without arms..."
- First Amendment Constitution of the United States of America: "Congress shall make no law ... abridging the ... the right of the people peaceably to assemble ...", applied to the federal state as "liberty" in the due process clause of the Fourteenth Amendment.

Foreign case law provides a useful comparative source for determining the conduct protected by the concept "to assemble peacefully and unarmed" and the application of limitation clauses to various situations in which the rights might be restricted (see Woolman and De Waal "Freedom of Assembly: voting with your Feet" in Van Wyk *et al Rights and Constitutionalism* (1994) 292-327).

12 SOUTH AFRICAN LAW

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."

Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 160 motivate the inclusion of the right to present petitions as follows: "While some might regard to right to petition as somewhat archaic, its importance historically as a means of registering grievances seems to have diminished little in present circumstances."

Assemblies and demonstrations are presently regulated by the Regulation of Gatherings Act 205 of 1993. Although this Act constitutes a dramatic departure from past framework of the constitutionally entrenched right to freedom of assembly and demonstration (Woolman and De Waal 299-298).

13 THEME COMMITTEE'S REPORT

13.1 Non-contentious issues

It is non-contentious that the rights to freedom of assembly and demonstration are universally accepted human rights, that they should exercise peacefully and unarmed, that the state must respect and protect the rights, that the rights should apply to common law land indigenous law, that all persons must respect the exercise of the rights, and that natural persons are the bearers of the rights.

13.2 Suggestions on resolving outstanding and other issues

13.2.1 Par 1.2

Although the right to petition is not guaranteed in international declarations and treaties, and in most bills of rights, this fact does not preclude its inclusion in the new Constitution. The FF sees no justification in linking the right to petition to the right to assemble and demonstrate, and opposes the inclusion of a right to petition because it would create the impression that there is an onus on the authorities to give effect to the demands contained in it. Guaranteeing the right to petition in the same section as the right to assemble will, however, not exclude any protection with regard to the submission of petitions within any other context than that of an assembly or demonstration. The right to petition cannot be interpreted to impose a duty on authorities to comply with petitions.

13.2.2 Par 2.2.1

Picketing in labour disputes is not dealt with in section 27 of the Interim

Constitution. If it were not to be included in a new section dealing with labour relations, it would be covered by the horizontal application of the proposed right which is a non-contentious issues.

13.2.3 **Par 6.2.1**

The proposal by the ACDP, DP and NP that juristic persons be bearers of the right, will be taken into account in preparing the Memorandum on the general application of the bill of rights.

13.2.4 **Par 7.1.1**

All international instruments and foreign bill of rights provide for the limitation of the right.

13.2.5 **Par 7.2.2**

The proposal that the rights may be limited provided the limitations are reasonable and justifiable in an open and democratic society could be covered in a general limitation clause.

13.2.6 **Par 8.1**

The suspension of the rights in a state of emergency under judicially controlled circumstances is provided for in section 34 of the Interim Constitution.

14 PROVISIONAL TEXT

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