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CONSTITUTIONAL ASSEMBLY
MEMORANDUM

TO: Members of the Constitutional Committee Subcommittee
FROM: Executive Director
DATE: 5 February 1996
RE: Memoranda from the Panel of Constitutional Experts

We enclose for your consideration two memoranda from the Panel of Constitutional Experts on:

- * Freedom and Integrity of Person (Section 11), and
- * Children

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PANEL OF CONSTITUTIONAL EXPERTS

MEMORANDUM

TO: CHAIRPERSONS AND EXECUTIVE DIRECTOR OF THE CA

DATE: 05 FEBRUARY 1996

RE: FREEDOM AND INTEGRITY OF PERSON (SECTION 11)

1. INTRODUCTION

At the CC Sub-committee meeting of 22 January 1996 the Panel was requested to provide an opinion on the inclusion of two phrases in section 11(2): **'bodily and psychological integrity'** and everyone's right to **'be secure in, and control their own body'**.

In particular we were asked what the second phrase adds to the protections granted in section 11.

2. SECTION 11

Section 11 reads:

Freedom and Security of the Person

(1) Everyone has the right to freedom of the person, including the right not to be -

(a) deprived of liberty arbitrarily or without just cause; or

(b) detained without trial.

(2) Everyone has the right to security of the person, [bodily and

psychological integrity] including the rights -

(a) to be free from all forms of violence; and

[(b) to be secure in, and control their own body.]

(3) No one may be -

(a) tortured in any way;

(b) treated or punished in a cruel, inhuman or degrading way; or

(c) subjected to medical experiments without that person's consent.

The right to freedom and security of the person appears in most international human rights instruments and in some national Bills of Rights. But it has been interpreted in varying ways. Sometimes it is interpreted to cover only freedom from arbitrary arrest and imprisonment, in other cases it has been given a wider meaning and is understood to cover both physical and mental integrity. (See CC Sub-Committee 'Draft Bill of Rights Explanatory Memorandum' for meeting of 9 October 1995 pp 30 - 31.)

The structure and wording of clause 11 shows that, in South Africa, protection is not to be merely procedural and is to extend beyond freedom from arbitrary arrests and detention by the state. This is done by distinguishing the right to freedom of the person and the right to security of the person and by providing an indication of the meaning of 'security of the person' in sub-clause (2).

3. SECURITY OF THE PERSON

On its own, the meaning of a right to 'security of the person' is not very clear. This is why the words have been given such different meanings by different courts. Sub-clause (2) addresses this problem by making explicit the range of violations that are intended to be covered. Some explanation of the meaning of this right seems important if we are to avoid much uncertainty and litigation.

3.1 Bodily and psychological integrity

The phrase 'bodily and psychological integrity' firstly emphasizes the difference between sub-clause (1) and sub-clause (2) by drawing attention to both the physical and psychological aspects of personhood. The right is concerned with issues that are not necessarily related to 'freedom' in the sense that it is used in sub-clause (1) and even people in prison who have legitimately been deprived of their freedom would enjoy the right to security of person, including bodily and psychological integrity.

The protection of bodily integrity in this clause ensures that an individual's body is not tampered with in any way. Assault is covered as are medical procedures carried out without a person's consent, for instance.

The specific reference to psychological integrity is a recognition that a person's integrity (or security of person) can be violated by mental

as well as physical means. It directs courts away from a narrow interpretation of security of person in terms of which only physical injury is covered and ensures, for instance, that people will be free from mental assault through verbal abuse as well as from physical assault. It would also cover a right not to be spied on. It guarantees freedom from coercion in the broadest sense and would encompass freedom in decision-making and a requirement that consent be informed consent. In addition, the notion of psychological integrity seems to cover the right to pursue one's particular goals and would overlap to some extent with the rights to freedom of conscience and religion. Insofar as it protects a person's right to pursue personal goals it is similar to the right protected in the German Basic Law 'to the free development of ... personality' (Basic Law Art 2).

Although 'bodily and psychological integrity' is not a phrase which appears in other Bills of Rights, its inclusion is consistent with international developments in the protection of human rights.

3.2 The right to be secure in, and control one's own body

Provisions (a) and (b) in sub-clause 11 provide a description of some of the matters that it covers. Provision (a), the right 'to be free from all forms of violence', places an obligation on others. This is balanced in provision (b) by an assertion of the right of individual autonomy through the words 'control their own body'.

Both phrases, like the reference to 'bodily and psychological security' provide a description of the meaning of 'security of person' ensuring that familiar but unclear phrase is clearly understood.

In particular, the elaboration of the meaning of the words 'bodily and psychological security' in the reference to 'control of one's body' emphasizes the important idea of human autonomy. It is the individual who is to take decisions regarding his or her body.

As we indicate above, the right to security of the person has been interpreted in many ways. A narrow interpretation of security of the person may mean that although bodily integrity is protected, society is entitled to define integrity. In other words, on a narrow interpretation, a right to bodily integrity might not extend to certain decisions individuals might want to make - such as decisions to engage in dangerous or hurtful activities.

The inclusion of the phrase 'control one's own body' would make it clear to courts that a narrow interpretation of security of the person which fails to allow individuals to make decisions about their own bodies is incorrect. Instead courts would have to take account of the fact that the Bill of Rights confirms individual agency.

For example, the wording would make it clear that no one could be

required to undergo medical treatment without their informed and un-coerced consent. A social interpretation of what the bodily or physical integrity of an individual requires could not replace that individual's decision. Similarly, decisions about burial or cremation or organ donation are protected by the clause.

The provision would be invoked in arguments about many complex issues such as surrogacy, sadomasochism, prostitution, safety regulations and abortion. The question of abortion and prostitution are dealt with below. However, two things are clear: First, the same arguments can be raised under a simple provision protecting security of person. Secondly, in all these cases, although the right to control one's own body would require attention to be paid to an individual's autonomy in decision-making, it would not be conclusive. In each case other rights would have to be considered and, if a rights infringement were found, its legitimacy would be tested under the limitation clause.

4. ABORTION AND PROSTITUTION

Two specific questions have been raised by political parties in connection with the wording of sub-clause (2). Parties have asked (i) whether the inclusion of the words 'control their own body' is equivalent to giving women a right to abortion on demand and (ii) whether it would require the legalization of prostitution.

4.1 *Abortion*

If the issue of abortion is not directly dealt with in the Bill of Rights a number of rights will be relevant to a decision on whether a woman has a right to an abortion or not. The list includes equality, dignity, life, privacy as well as freedom and security of person. No single right will produce an answer.

The words 'control their own body' draw attention to the limitation that restrictive abortion laws place on a woman's right to make decisions concerning her body. For this reason a court may interpret the words to support arguments in favour of liberalized abortion legislation. However, the words would never be conclusive and, as the word 'including' in the sub-clause shows, the right invaded is the right to security of the person both in its physical and mental sense - the restrictive legislation denies the woman the right to make and carry through decisions relating to her body.

The Canadian constitution protects in section 7 'life, liberty and security of the person'. The rights are not elaborated further. Both the right to liberty and the right to security of person were central in the Canadian Supreme Court's decision that Canadian abortion legislation was unconstitutional. Similarly, the 14th Amendment right to 'liberty' in the United States provides the basis for American women's right to abortion. In Germany, however, the more specific right to 'personal development' has not been interpreted to outweigh other

constitutional rights (such as the right to life) which are seen to protect a foetus.

In conclusion, the inclusion of the words 'control their own body' will not be conclusive. However, it would require a court in an abortion case to consider carefully the implications for women of limiting access to abortion. Moreover, even in the absence of these words, a Court is likely to pay attention to the implications of abortion legislation for women and their freedom and security of person.

4.2 Prostitution

As in the case of abortion, the inclusion of the words 'control their own body' draws attention to the limitation of personal autonomy that laws outlawing prostitution involve.

Should a court decide that legislation outlawing prostitution infringes this right, the matter will fall to be considered under the limitation clause. Although the terms of the limitation clause have not yet been decided, it will give the state an opportunity to explain why this particular rights infringement is necessary and what goal is to be achieved by it.

5. GENERAL

Every right in the Bill of Rights potentially covers matters which many people believe are not legitimately protected. The clause protecting freedom of

expression provides a good example. For instance, the recent legislation regulating tobacco advertising almost certainly violates the free expression provision but many people (and courts in other jurisdictions) accept that the legislation introduces a legitimate limitation of the right.

Similarly, provisions prohibiting the publication of the identity of the complainant in criminal cases involving sexual offences infringes the right to freedom of expression. In such cases the right to freedom of expression is deemed to be outweighed by other rights such as the rights to dignity and privacy.

The real question to be considered in formulating the right to security of the person is the extent to which the ambit of the right should be made clear in the Bill of Rights and what matters should be left to judicial interpretation.

6. 'PSYCHOLOGICAL INTEGRITY' OR 'MENTAL INTEGRITY'

It has been suggested that the words 'psychological integrity' *may* carry a narrower meaning than 'mental integrity' as the latter clearly covers both emotive and cognitive aspects in the medical context. This issue requires further investigation.

PANEL OF CONSTITUTIONAL EXPERTS

MEMORANDUM

TO: CHAIRPERSONS AND EXECUTIVE DIRECTOR OF THE CA

DATE: 05 FEBRUARY 1996

RE: CHILDREN

1.

INTRODUCTION

Parties in the Constitutional Assembly have periodically raised queries about certain aspects of those provisions contained in the draft constitutional text relating to children (**Clause 27**). The Panel seeks to pay some attention to these concerns in this memorandum. The concerns/queries/questions were expressed around the following issues namely:

- 1.1 whether the reference to parental care/family care in **27(1)(b)** of the draft has an impact on the vertical operation of the clause as a whole;
- 1.2 do the rights entrenched in **27(1)(c)** of the draft entitle the child to claim basic nutrition, shelter, etc from the State as a matter of right;
- 1.3 the suggestion that the concept of degradation must be added to the list of "evils" from which any child should be protected in **Clause 27(1)(d)** of the draft;
- 1.4 the possibility that the special protection of children in respect of detention encapsulated in **27(1)(f)** of the draft might place the State in an invidious position.

2.

PARENTAL CARE:

- 2.1 The way in which the clause has been drafted has not predetermined the question as to whether the clause will operate horizontally.
- 2.2 If the decision of the CA is that the clause (or sub-clause) is to have effect between the State and its citizens only, the State would become obliged:

- 2.2.1 to do everything possible to facilitate the creation of an environment in which parents are able to provide parental care;
- 2.2.2 to ensure that alternative care is provided in the event of the child being removed from its parents; and
- 2.2.3 not to take any legislative or other steps which would have the effect of depriving the child of parental care unless such action passes any test which might be laid down by an appropriate limitation clause.

3.

THE RIGHT TO BASIC NUTRITION, SHELTER, ETC

- 3.1 **Clause 27(1)(c)** of the draft gives every child the right to basic nutrition, shelter, basic health care services, and social services. The question has arisen as to whether the State becomes obliged to secure these rights and whether any child would be able to claim them as rights from the State.
- 3.2 The rights granted by this sub-clause can be said to be more in the nature of socio-economic rights. Some difficulty is accordingly said to arise because the socio-economic rights encapsulated in **Clauses 25 and 26** of the draft are treated very differently from those in the sub-clause presently under consideration. The rights in **Clause 25 and 26** are subject to the qualification that "**The State must take reasonable and progressive legislative and other measures to secure**" them. There is no such qualification in respect of similar rights when these concern children.
- 3.3 The international instruments dealing with children's rights do not limit the rights of children by requiring reasonable and progressive steps. This is because of the view that it is inappropriate for children's rights to be so qualified on account of two underlying reasons. The vulnerability, lack of maturity and comparative innocence of children render them deserving of more effective protection. Also, children cannot be expected to participate actively in the human rights discourse, in defining its scope, or articulating its social dimensions and implications, as adults can be expected to do. The difference in formulation means that the state would undertake to make a greater effort in order to secure the rights of children. The sub-clause will not permit children to make unreasonable demands on the state.
- 3.4 Its current formulation makes the subsection consistent with the United Nations Convention on the Rights of the Child, which South Africa intends to ratify if it has not done so already.

4.

DEGRADATION

- 4.1 There has been the suggestion that the concept of degradation be added to the list contained in **Clause 27(1)(d)** of the draft.
- 4.2 The Panel is of the view that the addition of this concept would add nothing to the protection already accorded in **Clause 27(1)(c)** in as much as degradation is more than amply covered by the reference to maltreatment, neglect, or abuse. It is impossible to conceive of degradation which would not amount to any or all of these. In any event children will also be protected by their right to dignity, a right which has been regarded by the Constitutional Court as a core right of pre-eminent significance.

5.

DETENTION

- 5.1 The concern here is that **Clause 27(1)(f)** perhaps goes too far in incorporating provisions which it may not be possible for the State to comply with. The first of the areas of concern in this respect relates to the requirement that any child should be detained only for the shortest possible period of time and that a child is not to be detained except as a matter of last resort. The suggestion has been made that the substitution of the word "**appropriate**" for the word "**possible**" in the draft might cure the perceived difficulty. We believe that there is no such difficulty and that the rights available to children here are the same as those which would be available to any adult in any case. Any person (even if that person were not a child) would be detained only as a matter of last resort and only for the shortest possible period.
- 5.2 The substitution of the word "**appropriate**" for the word "**possible**" does however represent a significant improvement in the draft.
- 5.3 The second of these concerns arises from the provision that every child must be kept separately from other detained persons over the age of eighteen (18) years. Examples have been given of remote areas in which facilities for separate detention are not available.
- 5.4 The sub-clause certainly does oblige the State to make every effort to ensure that this right is not invaded. The question of whether the lack of separate facilities in a particular case is lawful can be determined by the application of the limitation clause. Any administrative action giving rise to the detention of children will be lawful only if it is taken pursuant to a law of general application and passes the test laid down in the limitations clause.