

2/2/19/1/22

CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE**

**THEME COMMITTEE FOUR
FUNDAMENTAL RIGHTS**

REPORT ON PRIVACY

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THEME COMMITTEE 4
-FUNDAMENTAL RIGHTS

SCHEMATIC REPORT ON THE RIGHT TO PRIVACY

NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
1.	II, Section 13	Nature of the right	<p>The Bill of Rights should protect the right to privacy.</p> <p>The State must take the necessary measures, including the enactment of appropriate laws to ensure that the right is respected and protected.</p>		

NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
2.		Content\ Scope of the right	<p>The scope of this right includes protection against unlawful and arbitrary interferences in the personal lives, homes, private possessions and correspondence of persons.</p> <p>No search, entry, seizure, interference with private communications unless authorised by law in circumstances that are acceptable in an open and democratic society.</p>	<p>DP: Whether the issue of searches and seizures should be dealt with under the right to privacy or under the clause dealing with liberty</p> <p>ANC & IFP: Whether access to information (held by government agencies and private persons) should be an element of the right to privacy or a separate clause in the Bill of Rights Whether the right to privacy should also include protection against infringements of people's "honour and reputation"</p> <p>IFP & DP: Whether the right to privacy should protect the right of women to procreative choice</p> <p>ACDP: Whether the right to privacy should include protection of the elderly and "unborn" through prohibiting abortion and</p>	

NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
4.		<p>Application of the right (nature of the duty)</p>	<p>The state shall take the necessary measures, including the appropriate laws to ensure that the right is respected, guaranteed and protected.</p>	<p>The state shall protect the privacy of citizens from interference from private individuals and agencies (ANC and IFP). -Outstanding The right to include protection of private information as against information banks, media and employers (IFP). -Outstanding</p>	

NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
5.		Application of the right (to common customary law)	The right to privacy shall apply to customary and to common law		
6.		Application of the right (duties on private actors)	Right to privacy shall be applicable as against private actors.	Whether the obligation ought to apply directly or indirectly through the obligation on the state to enact legislation to prohibit the interference by private actors with the right to privacy.	
7.		Bearers of the right	Natural persons shall be bearers of the right.	The extent to which juristic persons can be bearers of the right. eg. the distinction between personal privacy rights to which only natural persons are entitled and "informational privacy rights" (right to information and protection of correspondence, to which juristic persons can also lay claim (DP and PAC). Person shall mean from "conception to point of natural death".	

NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
8.		Limitation of the right	Limitations to the right under normal circumstances are permissible provided that such limitations are prescribed by law and are reasonable and justifiable in an open and democratic society.	IFP: A stricter test of necessity is implied by the requirement of "compelling public need" . ACDP: Limitations justifiable only in accordance with Biblical principles.	
9.		Other: Application of the right to other rights		ANC & IFP: The relationship of the right to privacy with other socio-economic rights such as the right to housing and family rights	
				ANC: The right to privacy should not allow racial and other forms of organised prohibited discrimination where this involves access to neighbourhoods, schools and jobs	

THEME COMMITTEE 4 FUNDAMENTAL RIGHTS

REPORT ON *THE RIGHT TO PRIVACY*

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
- NP
- PAC

2. Submissions received from the public and civil society¹:

- 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 on this item.

4. Relevant Constitutional Principles

CP II and III

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

1.1 Non-contentious issues

1.1.1 The Bill of Rights should protect the right to privacy.

1.1.2 The State must take the necessary measures, including the enactment of appropriate laws to ensure that the right is respected and protected.

2. Content of the right

2.1 Non-contentious issues

2.1.1 The scope of this right includes protection against unlawful and arbitrary interferences in the personal lives, homes, private possessions and correspondence of persons.

2.1.2 No search, entry, seizure, interference with private communications unless authorised by law in circumstances that are acceptable in an open and democratic society.

2.2 Contentious\ Outstanding issues

2.2.1 Need to determine the appropriate point of intersection between the public and private spheres in order to insure that the right to privacy cannot be relied upon to justify racial and other forms of discrimination (ANC).

2.2.2 Constitutional regulation of search and seizure should be dealt with under the right to liberty (DP).

2.2.3 Access to information held by government agencies and private persons should be linked to the right to privacy or contained in a separate clause (ANC, ACDP, IFP).

2.2.4 The specific inclusion of protection against infringements of "honour and reputation" (ANC and IFP).

2.2.5 The right of women to procreative choice and whether the right to privacy should protect this right (IFP, DP).

2.2.6 The specific prohibition of abortion and euthanasia in the text of the right to protect the "unborn" and the elderly (ACDP).

- 2.2.7 The inclusion of provisions permitting the State to take reasonable steps to prevent domestic violence or abuse against vulnerable groups such as women and children (ANC).
- 2.2.8 The right to privacy cannot be divorced from the right to housing (ANC).
- 2.2.9 The right to privacy shall not justify the exercise of "harmful and immoral practices such as homosexuality, lesbianism, bestiality and paedophilia" (ACDP).

4. Application of the right (nature of duty)

4.1 Non-Contentious

- 4.1.1 The State shall take the necessary measures, including the enactment of appropriate laws to ensure that the right is respected, guaranteed and protected.

4.2 Contentious\ Outstanding issues

- 4.2.1 The state shall protect the privacy of citizens from interference from private individuals and agencies (ANC and IFP).
- 4.2.2 The right to include protection of private information as against information banks, media and employers (IFP).

5. Application of the right (application to common\ customary law)

5.1 Non-Contentious issues

- 5.1.1 The right to privacy shall apply to customary and to common law.

6. Application of the right (duties on private actors)

6.1 Non-Contentious issues

- 6.1.1 The right to privacy shall be applicable as against private actors.

6.2 Contentious\ Outstanding issues

- 6.2.1 Whether the obligation ought to apply directly or indirectly through the obligation on the state to enact legislation to prohibit the interference by private actors with the right to privacy.

7. Bearers of the right

7.1 Non-Contentious issues

7.1.1 Natural persons shall be bearers of the right.

7.2 Contentious\ Outstanding issues

7.2.1 The extent to which juristic persons can be bearers of the right, ie. whether a distinction can be made between personal privacy rights to which only natural persons are entitled and "informational privacy rights" (right to information and protection of correspondence to which juristic persons can also lay claim (DP and PAC).

7.2.2 Person shall mean from "conception to the point of natural death" (ACDP).

8. Limitation of the right

8.1 Non-Contentious issues

8.1.1 Limitations to the right under normal circumstances is permissible provided that such limitations are prescribed by law and are reasonable and justifiable in an open and democratic society.

8.2 Contentious\ Outstanding issues

8.2.1 Limitation may only be justified if in furtherance of "compelling public need" (IFP).

8.2.2 Limitations justifiable only in accordance with Biblical principles (ACDP).

9. Other: Application Limitation of the right to other rights

9.1 Contentious\ Outstanding issues

9.1.1 ANC & IFP: The relationship of the right to privacy with other socio-economic rights such as the right to housing and family rights.

9.1.2 ANC: The right to privacy should not allow racial and other forms of organised prohibited discrimination where this involves access to neighbourhoods, schools and jobs.

ADDENDUM

PARTY SUBMISSIONS

- ACDP

AFRICAN CHRISTIAN DEMOCRATIC PARTY

SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY THEME COMMITTEE 4 : FUNDAMENTAL RIGHTS

RIGHT TO PRIVACY

CONTENT OF THE RIGHT

Biblical Background

In 1 Timothy 2:2, the apostle Paul exhorts Timothy to pray "for kings and all who are in authority, that we may lead a quiet and peaceable life in all godliness and reverence." It is made clear that government has to ensure a quiet and peaceful life according to the precepts of Biblical morality and ethics, for all citizens. The quietness addressed in the passage is also translated with 'tranquillity' and bespeaks of privacy. Christians therefore, hold the notion of privacy very dear and commends the inclusion of the right in the Constitution.

Intelligence Services and State Security

The same passage implies that government has the task of defending the privacy of citizens as a group - that is, the privacy of the country as a whole as well as individual privacy.

To ensure the former the need for an institution to ensure the preservation of privacy for the country, becomes immediately apparent. As such, intelligence services are needed.

Past injustices, immoral and unethical behaviour of intelligence operators have recently been uncovered, showing the need for tighter reigns of control - both systemic and financial - to ensure that the intelligence service adheres to an unchanging code of ethics and morality.

An as immediate and logical corollary to the need for protection from outside influences, comes the necessity for internal security and policing. As has been seen, the preservation of the sphere of privacy and security for individual citizens, is an inherent part of the duty of government.

Searches and Seizure by police

The ACDP holds that a yardstick has to be found for the involvement of the police in the affairs of Man. The content of the right to Privacy, as with any other immutable and inalienable right, should not be infringed by the State outside of the perimeter of the mandate God has given governments over the affairs of men and women. This mandate is contained in Romans 13:4, where the apostle Paul states that the government "is God's servant to do [the citizens] good."

From this verse of Scripture we derive that the right to privacy must be protected by the State and the police, not to serve their own purposes, but within the confines of Biblical principles. This would include the lawful search, with a proper search warrant, of private property to prevent the distribution of prohibited substances harmful to society at large and in contravention of the law of God.

Protection of Vulnerable Persons

Flowing from the abovementioned Mandate, the duty of the State to protect the interests of it's citizens, has become apparent. The ACDP, in accordance with Biblical principles, holds the view that protection and assistance must be afforded to those vulnerable members of society who are most likely to have their interests discarded. This would include the negation of the rights of unborn persons and the elderly by abortion-on-demand and euthanasia respectively.

Vulnerability, however, should not be extended to those involved in sinful and immoral practices such as homosexuality, lesbianism, bestiality and paedophilia, as these practices destroy family values and lead to the moral decay of society.

Access to Private Information

It is self-evident to us at the ACDP that information should be protected for law-abiding citizens. Care should be taken to have private details be made available to unmonitored groups or institutions where it could be misused and abused. The emphasis should be on the sanctity of information in the private sphere, subject to violation of the privacy according to biblical ethics and morality when the non-violation thereof can lead to the violation of laws based on principles found in the Bible.

Thus, an infringement of this right would conceivably be necessary in order to, for example, prevent the distribution of child pornography through the private postal system.

APPLICATION OF THE RIGHT

Nature of the duty of the State

It is submitted that this aspect has been dealt with extensively above, save to reiterate by way of emphasis, that government serves God to the good of all citizens according to a fixed moral and ethical code which transcribes into fixed laws given by the Creator God to creation, Man, to regulate society. Any misuse of this position or the perceived power by an earthly government is rejected on biblical principles.

Application of the right to common law and customary law

By way of underlining, the ACDP restates it's position that where the constitutional contents or application of any right is interpreted or stated to overrule a biblical principle contained in any common or customary law precept and to transplant it with a non-Christian notion based on evolving social standards or ethical relativism or even comes about through a secular interpretation of existing law, including constitutional aspects thereof, by way of the erzals system, known as legal positivism, this will be opposed with unabated enthusiasm.

It is equally important that searches and seizure be subject to the test of whether it is done for the good, according to Biblical principles of society by a government who acts not in it's own interests, but the servant of the triune God, that it is or should be. The need for protection for those worthy of such protection, necessitates no further explanation than that which has been given above, subject to adding that the requirements or need for assistance of any person should never be understood to go against the laws of God.

One further aspect needs to be made very clear: the ACDP does not adhere to any philosophy that has, as a basic premise, that every human is a potential god and that, as such, every person makes up his own ethics and morality on the path of evolution. When we speak of the laws of God, then, we mean the omnipotent, omnipresent, all powerful, triune Creator of the known universe and the inhabitants thereof.

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

The ACDP believes that every right has a corresponding set of responsibilities - this is true also of the right to privacy. God created us with the ability to reason and think. Consequently, mankind received the ability to choose and the responsibility to carry the consequences of those choices. In order to have the full benefit of the right, the responsibility has to be taken up. It is for this reason that the ACDP holds the view that individuals who choose to operate outside of the protection of the law, should forfeit some of the privileges that the right bestows. A clear example of this will be the incarceration of a convicted criminal and the correlating infringement of his privacy.

This is on an individual level. On a national level, the ACDP holds the view that a global government, as it were, with control over the nation states as we know it, is an abomination in the eyes of God. As such, any moves to subdue the privacy of this nation to govern itself on Biblical principles, will be strongly and severely opposed.

Who should be the bearers of the right?

Subject to what has been said above and, specifically in 2.3, the ACDP has already made its viewpoint clear. God created Man and positioned him as a steward over creation. The basis of all human rights, in this instance, privacy, was received from God. As such, all persons from conception to the point of natural death has these rights, as long as they discharge the responsibilities that come with the rights. It cannot be stressed enough, however, that this is based on and founded in the relationship between God and human beings and the principles He instituted. Should the underlying philosophy be either that man is an evolved being and, therefore clothed with rights, or even that man is a potential god making up his own ethics and moral environment, then the picture changes drastically and these aspects will have to be critically revisited.

Should the right under discussion be capable of limitation by the legislature?

Again, this question can only be answered by having recourse to the philosophy on which government is founded. If government operates within the mandate given by God in Romans, then no limitations will be necessary. If government adheres to a basic philosophy of evolving morality and ethics or ethics and morality as an entirely individual choice, then curbs must be placed ^{on} government to ensure equity, justice, and fairness according to the righteousness of the Almighty God.

- ANC



RIGHT TO PRIVACY
PROVISIONAL SUBMISSION BY ANC
THEME COMMITTEE FOUR/BLOCK TWO

The ANC's approach to the question of the Right to Privacy is premised on the Universal norms and values as enunciated in articles 12 and 17 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, respectively.

These two articles basically state the same thing, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation".

Looking at the Security Institutions one finds that for several decades the past Government has relied on its formidable police, defence and intelligence structures to maintain the system of apartheid and minority rule and to suppress popular resistance to that system. Consequent upon this, the Right to Privacy of the majority of South Africans was grossly violated.

There has been a systematic interference with private communications, spying on persons regarded as opponents of that system and the compilation and keeping of secret files about them.

These actions have penetrated so violently and intrusively into the intimate lives of the majority of the people to an extent that normal family life has been unlawfully interfered with. Early morning raids have traumatised families especially children who are vulnerable innocent beings. Arbitrary laws have in the past infringed on the right to privacy to an extent of prescribing whom people should marry or not marry, who they should have as friends.

When dealing with the question of privacy it is important to determine where the Public domain ends and the private sphere begins. Constitutionally, this means determining the point of

Intersection between the fundamental right to equal protection and the fundamental right to personal privacy.

A Bill of Rights should not seek to prescribe whom people should marry or not marry, or whom they should have as their friends or dinner guests or companies, nor should it permit any official to dictate such matters. These are questions that belong exclusively to the individuals concerned, and the constitution will guarantee such rights of privacy. At the same time, a democratic constitution should not acknowledge a right to bar people from hotels or restaurant (as has happened to Minister Kader Asmal) or taxis or sports facilities because of the personal prejudices of the managers.

In the former case the right to privacy would take precedence, in the latter the right to equal protection would prevail. These latter cases involve institutions which, even if private in law, interact with the public.

What would be disastrous in this country would be to convert the right to privacy into an instrument for permitting organized and privatised discrimination.

It is important to integrate the rule of law and morality. For this reason the law should never again be utilised as a mechanism, for barring people from exercising their fundamental rights to privacy. It is one thing to say that the state should never interfere with matters that are truly intimate and personal. It is another to say that the state should defend the right to exclude people from neighbourhoods, or schools or jobs because they are blacks or whites or of Asian origin or Jews. This is an example of the situation where the right to be the same (Political Rights), that is not to be discriminated against, must override the right to be different (Cultural Rights).

The right to be different does not include the right to discriminate against others because they are different. Nor does it include the right to impose difference on others against their will.

It is a right of personal expression that can be exercised by individuals and groups for their own well - being and satisfaction, it should never be used aggressively to curtail the rights of others.

This matter will be further and more properly developed in our submission on the right to freedom of association.

Because of the inter - dependence, inter - relatedness and indivisibility of rights, the Right to a Normal Family life and Socio - Economic Rights, eg housing, cannot be divorced from the right to privacy.

Again without proper housing, for the majority of the people in this country, the right to privacy will remain a pipe dream. Parents and their children are forced by past deprivation to share single roomed houses. And sometimes different families share single roomed houses, eg hostels. This situation also affects the children's rights to education because way back home the situation is not conducive to the fulfilment of Educational Rights as children cannot study properly due to lack of proper and decent housing which accords privacy.

As a matter of principle, security institutions shall be bound by the principle of civil supremacy and subject to public scrutiny and open debate. The private security industry should also be regulated with a view to ensuring that the industry performs its function in a manner that is consistent with democracy.

We therefore strongly submit that:

- 1). No search or entry shall be permitted except for reasonable cause, as prescribed by law, and as would be acceptable in an open and democratic society.
- 2). Interference with private communications, spying on persons and compilation and keeping of secret files about them without their consent, shall not be permissible save as authorised by law in circumstances that would be acceptable in an open and democratic society.
- 3). A legal framework must exist so as to allow citizens to protect their privacy from agencies and individuals other than the State.

- 4). The right to privacy should not be capable of being used to shield violence and abuse which takes place in a private setting. We propose, therefore, that the privacy of the homes shall be respected, save that reasonable steps shall be permitted to prevent domestic violence or abuse against vulnerable groups such as women and children.

Freedom of Information and Privacy

The public shall have the right to information gathered by any intelligence agency subject to the limitations of classification consistent with an open and democratic society. This is because of the fact that the role of the intelligence service shall be to act in the interest of the country as a whole.

Our position is that "All men and women shall be entitled to all the information necessary to enable them to make effective use of their rights as citizens, workers or consumers.

It is therefore clear that juristic persons shall also be under a constitutional duty to allow access to information.

The information clause should be limited by legislation eg, "The Freedom of Information Act " or any other law whose limitation intention would be:

- 1) to respect the right or reputations of others
- 2) to protect national security or public order, public health or morals.
- 3) to promote effective government and which is consistent with an open and democratic society (This is to more fully developed in later submissions on the right to freedom of information.)

The bearers of the rights are natural born persons as stated in our earlier submissions. Also the use of the word 'EVERYONE' in the information clause of the Universal Declaration of Human Rights, Article 19, confirms this position.

- DP

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16.03.95

CONSTITUTIONAL ASSEMBLY : THEME COMMITTEE 4

SUBMISSION BY THE DEMOCRATIC PARTY

THE RIGHT TO HUMAN DIGNITY : BLOCK 3

1. HUMAN DIGNITY

Section 10 of the Interim Constitution reads:-

"Every person shall have the right to respect for and protection of
his or her dignity."

The Democratic Party agrees with the provision of this right in the Constitution. Generally national instruments protecting human rights do not expressly provide for such a provision. However, Article 1 of the German Basic Law does. Given the importance of dignity it should be emphasized in the preamble to the Constitution - that human dignity is a basic cornerstone of the Constitution as expressly provided for in Article 1 of the German Basic Law. We believe that the new Constitution requires a properly drafted clause which will join together the concepts of dignity and privacy.

To deal with the relevant questions posed by the Secretariat:-

1.1 Nature of the duty to be imposed on the state.

The approach here suggests the protection of this historically vulnerable area of individual and social freedom against state interference.

In the German Basic Law the right to dignity is protected in Article 1 of the Basic Law which is indicative of its paramountcy in the context of the constitution. The Article states that the dignity of man is inviolable and must be respected and protected by all state authorities.

We believe the concept of dignity should have a central place in the new constitution (together with the right to personal privacy) and should be interpreted as guaranteeing to each citizen an inviolable sphere of privacy beyond the reach of public authority.

1.2 Application of the right to common law and customary law.

The free development of the human personality and its dignity in the social community will be the leitmotif of the approach in respect of the common law.

The right to human dignity embodied in the new constitution will become an important measure and criterion in regard to realising the other aims of the constitution in respect of human freedom and equality.

The right to dignity should be a cornerstone of society and its protection should permeate the common law and customary law.

1.3 Should the right under discussion impose a constitutional duty on actors other than the state?

Yes. All members of society and all juristic persons, and not merely those who wield formal authority in society, should respect the dignity of others. The infringement of the dignity of one's fellow citizens should result in criminal sanctions. Natural persons bear this right more convincingly than others. But this will be a matter for judicial interpretation.

1.4 Who should be the bearers of the right?

Once again, the Constitutional Assembly will have to resolve the question of the applicability of the Bill of Rights to juristic persons. However, we note that the concept of "dignitas" generally will involve its application by, and use for, human beings, rather than corporations. However, juristic persons, community organizations and corporations probably have limited rights to dignity, particularly in the realm of expression. The dignity clause will be useful as an adjunct to more fundamental and substantive sections dealing with freedom of expression and the right to equality.

1.5 Should the right under discussion be capable of limitation by the legislature?

Most rights are subject to the general limitation clause but we do not believe that the right to dignity per se should be specifically limited, although aspects of the

right might well be capable of limitation.

2. SERVITUDE AND FORCED LABOUR

Section 12 - No person shall be subject to servitude or forced labour.

Application of the right

2.1 Nature of the duty to be imposed on the state

This should be self-evident and requires no elaboration.

2.2 Application of the right to common law and customary law

Clearly the provisions against servitude and forced labour should apply in all sectors of society and should override any contrary provisions in customary law.

We are not aware of any precepts in the common law which provide for either servitude or forced labour.

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

Clearly this right has to permeate all sections of the community and should be horizontally interpreted as well.

2.4 Who should be the bearers of the right?

Clearly, the right only applies to natural persons.

- 2.5 Should the right under discussion be capable of limitation by the legislature?**
- Save to the extent necessary to carry out the proper purposes of court ordered punishment and imprisonment, no person should be deprived of the right contained under this section.

3. RIGHT TO PRIVACY

Section 13 of the Interim Constitution reads as follows:-

"Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications."

We believe that this right has to be reformulated and reconsidered. We consider that the specific provisions dealing with searches and seizures of the home, as contained in section 13, above, should be separated from the general protection of privacy and should be included in a general clause dealing with liberty. The present draft forces the entire question of the constitutionality of searches and seizures to be dealt with in terms of the limitation clause (section 33). There is no reason why only one element of privacy should be singled out as is done in section 13. In other words, we would prefer to see a generally worded privacy clause under this heading, and a separate and detailed right against search and seizure contained in a clause dealing with the liberty of the individual.

We are of this view because the constitutional protection of privacy has been critical in dealing with, for example, the question of abortion.

In Roe v Wade 410 US 113 (1973) the US Supreme Court held that a pregnant woman's right to decide whether or not to terminate her pregnancy could be justified by means of a right to privacy (in this case the Court developed this right from the right to liberty in the 14th Amendment).

In Morgentaler, Smoling and Scott v The Queen 44 DLR (411) (385) the concept of dignity and liberty were used by at least two judges of the Canadian Supreme Court to justify setting aside restrictive abortion legislation on the basis that the autonomy of the woman was infringed. The right to personal autonomy in decisions of a private and intimate nature was recognized by the court as a constitutional right to privacy.

The Constitutional Assembly must decide whether section 13 should confer general protection of autonomy of the individual and leave it to the courts to determine whether or not this entitles a woman to use the provision in order to achieve a more liberalised regime for abortions, or whether the constitution itself should provide for a right to an abortion in a separate provision in the Bill of Rights.

3.1 Nature of the duty to be imposed on the state

We believe that Justice Brandeis has summed up the position admirably:-

"The makers of our constitution conferred as against the government, the right to be let alone...the most comprehensive of rights and the right most valued by civilized men."

In South Africa the right to privacy has, in the absence of a Bill of Rights, often been violated by the legislature and the executive through, for example, laws conferring wide powers of search and seizure on the police, the prohibition of interracial sexual intercourse and marriage and interference of professional correspondence without court authorization. Clearly, these require the strongest protection in the Bill of Rights.

It is for the courts, and not for the constitution, to determine the equitable balance which society requires between the protection of the private sphere of the individual on the one hand and the public interest on the other.

This further requires that the means adopted by the state to infringe a basic right in pursuit of a legitimate purpose must be strictly curtailed and must be suitable, necessary and proportional to the objective being pursued.

We concur with the approach of the American courts which have struck down various statutes because they infringe substantive privacy rights in the absence of "a compelling state interest".

3.2 Application of the right to privacy to common law and customary law

A broad and benevolent interpretation, giving full scope to the protection of the right to privacy should be the aim of the new constitution. Precisely because section 33(1) as a general limitation clause, applies to all fundamental rights safeguarded in chapter 3, the right to privacy clause should be invoked in order .o

determine whether a limitation to the right to privacy is justified and whether arbitrary limitations not envisaged by the constitution itself, will ever be countenanced.

The right to privacy is guaranteed explicitly in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights. It is also entrenched in most domestic bills of rights across the world.

In determining whether a particular privacy right ought to be recognized, the US Supreme Court usually asks itself the question whether such a right is "implicit in the concept of ordered liberty."

To give exact meaning to the protection of the right to liberty in our own constitution, we believe the following considerations should be the guidelines:-

- (1) The constitutional provisions safeguarding human rights and freedoms contained in chapter 3 of the constitution should be interpreted benevolently (i.e. in favour of those protected).
- (2) A provision guaranteeing a right or a freedom must be read within the context of the other sections in the chapter on fundamental rights and of the constitution as a whole.

We, therefore, come to the conclusion that the right to personal privacy should be given the widest protection possible - once again this being a function of the courts rather than the legislature.

3.3 Should the right under discussion impose a constitutional duty on actors other than the state?

Clearly, because of the importance and reach of the right to privacy, this should be applied to actors other than the state. Privacy of, for example, communication, should always limit the ability of others to gain, disseminate and use information against someone on the basis of violating this right.

In the German Basic Law the relevant articles which create a zone of personal privacy free from interference or violation, duties are imposed on actors other than the state, to uphold them.

3.4 Who should be the bearers of the right?

The right to privacy extends to the home, as well as to marriage, procreation, contraception, motherhood, family relationships, child rearing and education. These rights are said to be the substantive privacy rights distinguishable from informational privacy rights (e.g. privacy of communication). It is for this reason that we believe a proper separation should occur between these rights as stated in our introductory remarks on this section.

Substantive privacy rights immunise certain conduct of the person holding them. Because of the highly personal, and human nature of substantive privacy rights, the protection they afford appears to be primarily restricted to natural persons, whereas juristic persons seem to have a claim to certain informational privacy rights. The current wording of section 13 seems to restrict the protection of the right to privacy to natural persons. This is also implied by phrases such as "searches of his or her person, home or property", "the seizure of private possessions", and "the violation of private communications". It also suggests the exclusion of juristic persons from the operation of this section.

This seems to be further justification for a separation between a general right to privacy and a separate right (to be contained under the right to liberty to the right against unreasonable search and seizures, etc).

As currently formulated, the Interim Constitution provides a general limitation in respect of privacy, but does not impose the stricter limitation test in section 33(1)(a). The right to privacy can also be suspended as a consequence of the declaration of a state of emergency, but then only to the extent necessary to restore peace and order.

This appears to be a sensible approach which should probably be repeated in the final constitution. However, in imposing any limitations on the right to privacy, it is to be hoped that our courts will follow accepted human rights norms and that an interpretation in favour of individual liberty will always be paramount.

- FF



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THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

4. RIGHT TO PRIVACY

- 1) The Freedom Front is of the opinion that the AGENDA ITEMS setting out the format for submissions are not adequate for the purpose of dealing with the right to privacy. There should, in addition, be a list of various rights to privacy, to enable all parties in Theme Committee 4 to make submissions in respect of particular rights. We suggest that the technical experts compile such a list, for the guidance of the Theme Committee.

Motivation: Rights to privacy are of a very diffuse nature. They span private law, mercantile law, civil procedure, criminal law, constitutional law, etc. These rights include, but are not limited to, personal privacy, privacy of home life, privacy of post and telecommunications, privacy of information relating to medical matters, financial matters (including banks and income tax), business data, etc. Moreover, in civil procedure they relate to privileged information in litigation (e.g. technical 'discovery' of documents and related so-called Anton Piller Orders). In criminal law they relate to searches of persons and homes, possibly various rules relating to evidence, homosexual acts, the viewing of pornographic material, etc. In constitutional law they relate, inter alia, to matters of intelligence and security as well as the general relationship between freedom of the person and the interest

of the state and society generally.

- 2) In the absence of a list of particular rights, compiled by a small committee such as the technical experts, it will be very difficult, if not impossible, to obtain such a uniform response from the different parties as to obtain any degree of consensus on any substantial number of the issues involved.



INKATHA

Inkatha Freedom Party

IQembu leNkatha Yenkululeko

**THEME COMMITTEE No. 4
SUBMISSION FOR BLOCK No. 2
ON
HUMAN DIGNITY
RIGHT TO LIFE
PRIVACY**

HUMAN DIGNITY

1. The notion of human dignity should be entrenched in the constitution as:
 - (a) a fundamental parameter against which the actual protection of human rights is to be assessed;
 - (b) a qualification of the constitutionally mandated social goals of the state;
 - (c) a recognition of the individual nature of human rights protection and of the preeminence of the individual over society;
 - (d) a broadening of the scope of human rights protection to encompass the consideration of personal aspects of human experience (the bridge between law and *pietas*)
2. Dignity is a philosophical concept. In order to be accommodated within a constitution it must be qualified as "social dignity" so as to transform it into a social concept which can be taken into account in the process of constitutional adjudication as an interpretative parameter (i.e.: the "perception of the relevant segment of our society at this juncture of its development").
3. In a constitution the most relevant aspect of social dignity is related to the determination of tests and parameters employed in the structuring of the "substantive equality" clause. Reference is made to our submission on Equality in which we have proposed that social dignity be a parameter of equality (i.e.: equal social dignity ... irrespective of social status).
4. Social dignity may also be mentioned in the Preamble. Reference is made to the text of the IFP proposed preamble previously submitted which even if it does not contain the word "dignity" it subsumes that notion within other relevant constitutional notions employed therein.
5. Social dignity may also be mentioned in the sections on "Inherent Rights and Obligations" and "State Obligations". Reference is made to the text of the IFP proposal with respect to these two sections which were previously submitted and which even if they do not contain the word "dignity" they subsume that notion within other relevant constitutional notions employed therein.
6. Social dignity is relevant with respect to the right to "Privacy" (see *infra*) which ought to be characterised also as "personal dignity".

7. Dignity is also relevant with respect to family rights in which "both spouses shall have equal rights, obligations and dignity". With respect to family relations, the "dignity" aspect covers important constitutionally sensitive aspects which are not catered for merely in terms of "rights and obligations".

PRIVACY

1. "Everyone shall have the right to the protection of privacy, of his or her personal life, of his or her domicile, and to protection of his or her personal dignity and reputation".
 - 1.1 Please note in addition to the broad notion of "privacy" this text identifies four specific sensitive areas of constitutional protection.
 - 1.1.1. "Personal life" relates to the IFP proposed notion of an area of constitutionally protected autonomy for individuals, and social, cultural and economic formations defined by the interests that people acting alone or with others may regulate and administer by themselves and in respect to which government does not have a compelling public need to intervene. In simpler words, an area in which the individual is King!
 - 1.1.2. "Domicile" is preferable to "residence" as it indicates the place where a person conducts his/her private life.
 - 1.1.3. The constitutional entrenchment of the notion of "reputation" is fundamental and ties with matters to be discussed in further blocks related to freedom of the media.
 - 1.1.4. "Personal Dignity" is to be protected in all cases, even outside one's own "domicile" or "personal life", for instance in the job place.
 2. "All private communications and all aspects of private life shall be protected".
 3. "Search and seizure may be allowed only on the basis of a warrant issued on the basis of corroborated allegations, and in the cases and with the guarantees established by the law. Personal search shall be allowed as an incident to a legitimate arrest and detention".
 - 3.1 The "search and seizure" clause could be part of the "privacy" clause rather than the "liberty" clause since it is more a limitation of the right to privacy than of the freedom from unwarranted arrest.
 4. "Anyone has the right to access the information collected on him or her by the Government or by private data or information banks."
 - 4.1 This provision can be found in several modern constitutions (see 1978 Constitution of Spain or the US 1974 Privacy Act) and reflect a fundamental need in a society in which the life of people are increasingly controlled by information management and distribution.

5. Aspects related to intelligence and security services have been dealt with in Theme Committee No. 6.4. This Theme Committee should propose the text of the right to privacy, and if any exceptions are carved to accommodate intelligence and security services such proposals would come from Theme committee No. 6.4 and would operate and be assessed against the right to privacy as developed in this Theme Committee. At this juncture, we see no need to carve very dangerous exceptions in a very sensitive area such as privacy.
6. In the work schedule no provision has been made for Family Rights and the Freedom of Procreative Choice which the IFP requested to be tabled on our agenda. Since these two fundamental rights are related to the right to Privacy, we are now submitting our proposals. Incidentally, the IFP rejects the placement in the work schedule of the issue of abortion under the item "Right to Life" which is quite outcome-manipulative.
- 6.1 **Family rights**
 - a. Individuals have the right to join in marriage in accordance with the rituals and with assumption of the obligations and privileges of their choice.
 - b. However, spouses shall have equal rights. obligations and dignity.
 - c. Both parents shall share responsibility for the upbringing, formation and education of the children, even if born outside wedlock.
 - d. The law shall ensure that comparable rights and social protection shall be extended to children born outside wedlock as they shall be recognised to children born in wedlock.
 - e. Both parents have the right and the duty to exercise joint custody of the children unless a court otherwise decides in the interest of the children and on the basis of the specific circumstances of the case.
 - f. Both parents have the right and the duty to choose an acceptable formation and education for their children.
- 6.2 **Procreative Freedom**
 - a. All people who so desire shall enjoy the freedom of procreative choice, including the right to receive sexual education, to use contraception and terminate unwanted pregnancy when safe.
 - b. Anyone who finds these practices objectionable shall have the right to protect his or her own sphere of interests from any of these practices and from the exposure thereto.
- 6.2.1. As a note on our position on procreative freedom the following should be noted:
 - a. The constitution should reflect the fact that the best way of preventing abortions is sexual education and contraception, so that abortion is a last resort.
 - b. No woman would seek to have an abortion if she can avoid it.
 - c. The choice is not between having or not having abortions in our country, but it rather is between having legal or illegal abortions.

- d. Abortion is a highly emotive issue and like most other organisations the IFP is deeply divided about it. This issue is not reconcilable because what is a fundamental right to some is a fundamental crime for others. For those who believe in pluralism and freedom, the only solution is to allow each group to live by its own code of conduct and morality, without anyone being allowed to impose his/her views on others. No one should be forced or even pressurised to have or administer an abortion, and for this reason the second part of our proposal would prohibit the advertising [procurement] of abortions or even recommending it during medical consultations, also allowing doctors to refuse to administer one. However, our proposal also allow abortions for those who consider it a fundamental right.
- e. In almost all countries of Western democracy abortion is considered a fundamental right and those who hold this belief consider it to be a form of social violence in the extreme to turn a right into a crime.
- f. Technically, there are no middle ground solutions regarding the imposition of any common rule or standard, for abortion may not be half fundamental right and/or half a fundamental crime at the same time. The only possible solution is a personal solution to be found in the freedom and in the conscience of any woman concerned.

RIGHT TO LIFE

1. The Republic shall acknowledge and recognise that all individuals have the natural right to life, liberty and the pursuit of happiness. and to the enjoyment of the rewards of their own industry as inherent rights
2. The physical and psychological integrity of any individual shall be inviolable.
3. No one shall be authorised to inflict any type of violence on another individual or to take a life.
4. Capital punishment and any form of physical or psychological torture and punishment shall not be allowed.
5. No one shall be submitted to unusual or cruel punishment and all punishments shall aim at the personal and social rehabilitation of the person.
6. During imprisonment juvenile delinquents shall be kept separate from other delinquents and so shall men from women.
7. Failure by a public official to report any and all instances of physical or psychological violence on a person deprived of his or her liberty shall be a criminal offence.
8. The IFP position on capital punishment is fully detailed and motivated in the enclosed document.
9. The issue of euthanasia should be determined by means of constitutional interpretation or legislation, since in this rapidly changing subject matter there are no clear cut situations or principles which we can confidently propose.

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THEME COMMITTEE 4

NATIONAL PARTY PRELIMINARY SUBMISSION

BLOCK 2 : ITEM 4 THE RIGHT TO PRIVACY

1. CONTENT OF THE RIGHT

The right to privacy shall be recognised and protected by the Bill of Rights. The right is enshrined in Section 13 of the Constitution 1993 as follows:

"Privacy

13. Every person shall have the right to his or her personal privacy which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications" and should be retained

According to the principle of legality of conduct, provision can be made through ordinary legislation for searches of the person, home and property provided that:

- (a) the guidelines and formalities prescribed by law are in themselves compatible with the Constitution, e.g. with Section 33 and
- (b) that those guidelines and formalities are strictly adhered to by the relevant authority.

The same principle applies to matters pertaining to intelligence services and State security as well as the seizure of private documents, possessions or the violation of private communications. Access to privately held

information relates in fact to the right to information (Section 23 of the Constitution 1993) and will be dealt with more fully under that item in the work programme.

The National Party reserves the right to make further submissions in regard to the right to privacy when dealing with the right to information under Section 23 of the Constitution, 1993.

2. APPLICATION OF THE RIGHT

The State is accordingly subject to a duty to respect and protect every person's right to privacy. The right to privacy is, however, not absolute and may be limited provided such limitation is compatible with the Constitution, e.g. Section 33.

The horizontal application of the Bill of Rights will have serious implications for the right to privacy. This aspect deserves further debate in the Theme Committee.

The right to privacy as between actors other than the State can be regulated by legislation.

The right to privacy should be applicable to natural and juristic persons. A suitable amendment to the relevant text may be necessary to accommodate this.

- PAC



10 March 1995

PAC PRELIMINARY SUBMISSION ON THE RIGHT TO HUMAN DIGNITY

South Africa is emerging from a history of violation of individual rights and human dignity. The Interim Constitution in Chapter 3 concentrated on the whole, on those rights which sought to limit the abuse of power by the state and restore human dignity.

CONTENT OF THE RIGHT TO HUMAN DIGNITY

This right requires that natural persons should be treated with the respect and dignity that is inherent in all human beings.

APPLICATION

1. The right to human dignity is applicable only to natural persons. It binds all and sundry the state, private bodies and individuals. It is a right that all human beings possess by virtue of being human beings and regardless of any distinction, either race, gender or social status.
2. In addition, this is an omnibus right which can be invoked against most kinds of violations of human rights. It can be used as a shield against personal searches, inhuman treatment and torture, capital punishment, unfair discrimination, servitude and enforced labour, unlawful arrest and detention or even against poverty, disease and ignorance.

R K Sizani

MP



16 March 1995

PAC PRELIMINARY SUBMISSION ON THE RIGHT TO PRIVACY

In dealing with this right, it is important that we should take into account the recent history of our country and its political and socio-economic conditions. The police raids, tappings, searches of persons and their property and the interference of Apartheid Laws in personal relationships have not only violated the right of individuals to privacy but also their human dignity.

Content of the Right to privacy.

The protection of both personal privacy (eg. personal intimate relationships and family relationships) and private communications (e.g correspondence)

Application and other related aspects.

1. In principle, this right should apply only to natural persons because of the personal nature of some of its aspects, such as, motherhood, personal relationships, contraception, and so on.
2. It is in the area of private information or communication where an argument can be made for extending the right to privacy to Juristic persons. However, in the South African context we would be reluctant to support this because companies can use the right to undermine affirmative action programmes. Even in other areas, they may, whenever a dispute arises, invoke this right.

R K Sizani - MP

