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JOHN

CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 4
FUNDAMENTAL RIGHTS**

REPORT AND DRAFT FORMULATION

**- FREEDOM AND SECURITY OF THE
PERSON**

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THEME COMMITTEE 4
-FUNDAMENTAL RIGHTS

**SCHEMATIC REPORT ON FREEDOM AND SECURITY OF THE
PERSON**

N O.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
1.	II, XII, XIII	Nature of the right	A universally accepted fundamental human right which should be included in the Constitution.		

N O.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
2.		Content and Scope of right	<p>The scope of this right includes:</p> <p>i) protection against unlawful and arbitrary arrest and detention;</p> <p>ii) security of the person includes the physical, mental and psychological integrity and safety of the individual;</p> <p>iii) security of the person includes, <u>inter alia</u>, a prohibition against torture of any kind, whether physical, mental or emotional, and against all forms of cruel, inhuman or degrading treatment or punishment.</p>	<p>The concept of "freedom":</p> <p>i) to be restricted to physical deprivation of liberty - NP,ANC;- Outstanding¹</p> <p>ii) a broader concept potentially applicable to other situations, e.g. "freedom of movement, to participate in or abstain from lawful activities, etc -ANC, FF. - Outstanding</p> <p>The inclusion of the right to be protected against searches and seizures (currently under the right to privacy - s.13) - DP.- Outstanding</p> <p>Specific prohibition on medical and scientific experimentation without consent - ANC, NP, PAC. - Outstanding</p> <p>Include prohibitions on corporal and capital punishment or should these be left to the courts to interpret whether they fall within the scope of these rights - NP, IFP.</p>	

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

N O.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
				<p>Whether the grounds on which a person may be deprived of his or her liberty should be specifically enumerated, or be limited by a general qualifier such as "arbitrary", "just cause" -ANC, IFP, FF - <i>Outstanding</i></p> <p>The inclusion of specific prohibitions on corporal and capital punishment or should these be left to the courts to interpret whether they fall within the scope of these rights - NP, IFP - <i>Outstanding</i></p>	
3.		Application of the right (Nature of the duty)	The state shall take the necessary measures including the enactment of the appropriate laws (penal and civil) to ensure that the rights are respected, protected and guaranteed.		

N O.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
4.		Application of the right (to common and customary law)	Applicable to common and customary law (CP XIII). The courts should interpret and develop common law and customary law rules to be consistent with these rights.		
5.		Application of the right (Duties on private actors)	Right should apply as against private actors either directly, or through the obligation on the state to take positive steps to protect individuals from abuse of these rights.		
6.		Bearers of the right	Natural persons the sole bearers of the right.	Whether the right should only apply to persons lawfully in the country and not unlawful immigrants - FF Whether the right should apply to all persons "from conception to the point of natural death" - ACDP	

N O.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
7.		Limitations of the right	Freedom of the person may be subject to limitations that are reasonable, justifiable and necessary in an open and democratic society.	<p>Whether the right to security of the person, encompassing the prohibition against torture and cruel, inhuman or degrading treatment or punishment should be capable of limitation at all - ANC, DP, NP -<i>Outstanding</i></p> <p>Whether "compelling public interest" should be specified as a ground of limitation, and whether the proviso should be added that the law "must respect the essential content of the rights" - IFP. - <i>Outstanding</i></p>	

THEME COMMITTEE 4 FUNDAMENTAL RIGHTS

REPORT ON *FREEDOM AND SECURITY OF THE PERSON*

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 society

2.1 Individuals (in alphabetical order)

- B.M. Collier
- B. Deller
- M.S. Dimba
- A. Friedman
- H.J. Goodwin
- M.D. Jacobson
- J.A. McMorran
- C.R. Snyman
- A. Thabethe
- N.R. Zitha

2.2 Organisations (in alphabetical order)

- Algemene Kommissie Leer en Aktuele Sake, Ned. Geref. Kerk
- Community Law Centre (UWC), Conference Report on Gender and the Constitution

- Conservative Party of South Africa
- Rape Crisis (endorsed by various other organisations)
- South African Anglican Theological Commission of the Church of the Province of South Africa

2.3. Government structures\ institutions

None

3. Technical Committee reports

None to date on this item.

4. Relevant Constitutional Principles

II, XII, XIII

PART II

1. APPLICATION OF CONSTITUTIONAL PRINCIPLE

1.1 Non-contentious issues

- 1.1.1 The rights of freedom and security of person are universally accepted fundamental human rights and should be specifically protected in the South African Constitution.

2. CONTENT AND SCOPE OF THE RIGHT

2.1 Non-contentious issues

- 2.1.1 There should be a separate clause in the Bill of Rights protecting freedom and security of the person.

- 2.1.2 The scope of this right includes:

- 2.1.1.1 protection against unlawful and arbitrary arrest and detention.
2.1.1.2 security of the person includes the physical, mental and psychological integrity and personal safety of the individual;
2.1.1.3 security of the person includes, *inter alia*, a prohibition against torture of any kind, whether physical, mental or emotional, and against all forms of cruel, inhuman or degrading treatment or punishment.

2.2 Outstanding\ Issues requiring resolution²

- 2.2.1 The concept of "freedom":

- 2.2.1.1 to be restricted to physical deprivation of liberty (NP, PAC); or
2.2.1.2 a broader concept potentially applicable to other situations, e.g. freedom of movement; to participate in or abstain from lawful activities; mental and spiritual freedom of expression, religion, belief, opinion and conscience (ANC, FF).

- 2.2.2 Whether the grounds on which a person may be deprived of his or her liberty should be specifically enumerated, or be limited by a general qualifier such as "arbitrary," "just cause" (ANC; IFP; FF).

² It should be noted that items marked "Outstanding" do not signify disagreement amongst political parties or contention. Parties felt that these matters could best be dealt with at the level of the Constitutional Committee, where negotiation could take place.

- 2.2.3 The inclusion of the right to be protected against searches and seizures (currently included under the right to privacy - s.13) under the scope of this right (DP).
- 2.2.4 The inclusion of a specific prohibition on medical and scientific experimentation without consent (ANC, NP, PAC).
- 2.2.5 The inclusion of specific prohibitions on corporal and capital punishment or should these be left to the courts to interpret whether they fall within the scope of these rights (NP, IFP).

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

3.1 Non-contentious issues

- 3.1.1 The state shall take the necessary measures including the enactment of the appropriate laws (penal and civil) to ensure that the rights are respected, protected and guaranteed.

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

4.1 Non-contentious issues

- 4.1.1 Common law and customary law should be applied by the courts subject to these fundamental rights (CP XIII). The courts should interpret and develop common law and customary law rules to be consistent with these rights.

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

5.1 Non-contentious issues

- 5.1.1 The rights to freedom and security of person should apply as against private actors either directly, or through the obligation on the state to take positive steps to protect individuals from abuse of these rights by others (AND; IFP; NP).

6. BEARERS OF THE RIGHT

6.1 Non-contentious issues

- 6.1.1 Natural persons should be the sole bearers of the rights.

6.2 Contentious issues

- 6.2.1 Whether the right should only apply to persons lawfully in the country, and not unlawful immigrants (FF).
- 6.2.2 Whether the right should apply to "all persons from conception to the point of natural death" (ACDP).

7. LIMITATION OF THE RIGHT

7.1 Non-contentious issues

- 7.1.1 Freedom of the person may be subject to limitations that are reasonable, justifiable and necessary in an open and democratic society.

7.2 Outstanding issues

- 7.2.1 Whether the right to security of the person, encompassing the prohibition against torture and cruel, inhuman or degrading treatment or punishment should be capable of limitation at all (ANC; DP; NP).
- 7.2.2 Whether "compelling public interest" should be specified as a ground of limitation, and whether the proviso should be added that the law "must respect the essential content of the rights" (IFP).

8. PUBLIC SUBMISSIONS

8.1 The following main issues arise from the public submissions:

- 8.1.1 Express provision should be made for the right of protection of all persons from violence, particularly violence based on gender, race, sexual orientation, age, disability and language.
- 8.1.2 Habeas corpus and other due process rights as well as the prohibition on detention without trial should be entrenched.
- 8.1.3 Capital and corporal punishment must be outlawed.
- 8.1.4. More restrictive conditions should apply for the granting of bail.

EXPLANATORY MEMORANDUM AND PROVISIONAL TEXT:

THE RIGHT TO FREEDOM AND SECURITY OF THE PERSON

1. Compliance with Constitutional Principle II

- 1.1. We are of the view for the reasons set out in paragraphs 2 and 3 that the rights to freedom and security of the person are fundamental rights for the purposes of Constitutional Principle II.

2. Public International Law

- 2.1. The rights to freedom and security of the person are universally accepted human rights which are protected in various forms in a number of international human rights declarations and treaties, including: the Universal Declaration of Human Rights (1948) (articles 3 and 9); the International Covenant on Civil and Political Rights (1966) (article 9); the European Convention on Human Rights (1950) (article 5); the American Convention on Human Rights (1969) (article 7); and the African Charter on Human and Peoples' Rights (1981) (article 6).
- 2.2. In addition, all of the above instruments contain articles prohibiting torture and cruel, inhuman or degrading treatment or punishment.
- 2.3. The prohibition against torture is peremptory a (or ius cogens) norm of customary international law. No limitation or derogation of this right is permitted.
- 2.4. The International Court of Justice also regards the right to liberty and security of the person and the prohibition on arbitrary arrest and detention as part of general international law (Tehran Hostages Case, ICJ Rep. 1980, vol. 3 at para. 91).

3. Comparative Law

- 3.1. Various dimensions of these rights are also protected in the Constitutions of, amongst others: the United States (article V); Canada (section 7, 9 and 12); Germany (article 2 (2)); India (article 21 and 22); and Namibia (article 7, 8 and 11).

4. The Content and Scope of the Rights in International and Comparative Jurisprudence

- 4.1. The content and scope of these rights are not identical in the various international instruments and comparative constitutions. Sometimes these rights overlap with other rights such as the rights to dignity, and the specific

4.1.1 The Canadian Charter of Rights and Freedoms contains two provisions pertaining to the liberty and security of person. Section 7 provides:

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Section 9 deals specifically with detention or imprisonment:

"Everyone has the right not to be arbitrarily detained or imprisoned."

The Canadian courts have held that the principles of fundamental justice are not limited to procedural matters, but also have a substantive content. As a result the Court may review not only the procedure by which a person is deprived of liberty, but also the reason for the deprivation of life, liberty and security of the person.

Section 7 is deemed a basic right of which the other "due process" rights in sections 8 to 14 are elaborations. These due process rights in the area of the administration of justice are not exhaustive of the content of the 'principles of fundamental justice'. Thus rights which are not covered directly in sections 8 to 14 can then be found in section 7 [Reference re s. 94 (2) of Motor Vehicle Act (1985) 24 DLR (4th) 537 (SCC); Thomson Newspapers v Canada (1990) 1 SCR 425; Hogg Constitutional Law of Canada, 1992, 1035-1037].

The Canadian Supreme Court has held the following principles to form part of the principles of fundamental justice: the requirement of mens rea (intention) in criminal offences; the doctrine of void for vagueness; the pre-trial right to silence; the privilege against self-incrimination; the doctrine of abuse of power by the prosecution; the right to make full answer and defence, including the right to pre-trial discovery, and counsel at trial.

4.1.2 The Canadian Courts have confined the scope of liberty to physical restraint, and have rejected arguments that it covers economic freedom, such as selling goods on a Sunday [R v Edwards Books and Art (1986) 2 SCR 713]. It has also held that this right does not apply to legal persons [Irvin Toy v Quebec (1989) 1 SCR 927].

4.1.3 In Canada, the concept of security of the person covers physical and mental integrity of the person in the broad sense, including all forms of psychological trauma (R v. Videoflicks (1984) 14 DLR (4th) at 48). In certain cases a more expansive interpretation was given to this right to include elements of the right to dignity such as reputation, personal autonomy and privacy. The right to security of the person was also relied on to strike down provisions of the Federal Criminal Code which limited a woman's right to abortion (Morgentaler v The Queen (1988) 44 DLR (4th) 385).

- 4.1.4 In the international human rights treaties there are also differences in the scope and content of the rights. Both the International Covenant on Civil and Political Right and the European Convention on Human Rights limit the concept of 'liberty of the person' to physical deprivation of liberty (confinement of a person to a narrowly bounded location). Other forms of liberty, such as freedom of speech, religion, movement etc. are covered by other rights.
- 4.1.5 However, whereas the Covenant, the American Convention on Human Rights and the African Charter all prohibit "arbitrary" arrest and detention or imprisonment, the European Convention on Human Rights lays down a limited number of cases in which deprivation of liberty is permissible by law. These include imprisonment following conviction by a competent court, arrest and detention pending trial on "reasonable suspicion" of having committed an offence, and detention for public health and immigration-related reasons [article 5(1)]. In the context of the Covenant on Civil and Political Rights, the concept of 'arbitrariness' is broader than unlawful arrest or detention. Cases of deprivation of liberty provided for by law must not be "manifestly unproportional, unjust or unpredictable." [Nowak, CCPR Commentary, 1993, p.173].
- 4.1.6 Furthermore unlike the European Commission and Court of Human Rights, the Human Rights Committee has given an independent significance extending beyond personal liberty to the right to security of the person in article 9 of the Covenant. This right includes a claim against the state for "reasonable and appropriate measures" of protection against threats to the personal safety of persons by private parties [Delgado Paez v. Columbia, Applic. no. 195/1985, paras. 5.5, 5.6 and 6].

5. South African Law

- 5.1. In South Africa, the conditions subject to which a person may be deprived of his or her liberty on suspicion of committing a criminal offence is regulated by the Criminal Procedure Act 51 of 1977. There are a host of statutory and common law offences for which imprisonment may be imposed, including the common law offences of assault, murder, theft and rape.
- 5.2. Certain other statutes permit the detention of persons without trial, including the Mental Health Act 18 of 1973 (sections 16, 19 20 and sections 28 to 41); the Aliens Control Act 96 of 1991 (section 16(1)), the Criminal Procedure Act (section 185), the Drugs and Drug Trafficking Act 140 of 1992 (section 12) and the Internal Security Act 74 of 1982 (s. 50) [See Cachalia et al, Fundamental Rights in the New Constitution, 1994, p. 37].
- 5.3. Torture and certain physical forms of cruel, inhuman and degrading treatment would constitute a serious assault. Both criminal and civil remedies would be available at common law, including interdicts and actions for damages. Certain forms of degrading and demeaning treatment would also be covered by the common law remedy for iniuria (see explanatory memorandum on dignity).

5.4. The Constitutional Court is presently considering whether judicially imposed corporal punishment (ss. 292, 293 and 294 of the Criminal Procedure Act 51 of 1977) amounts to cruel, inhuman or degrading punishment under the interim Constitution. This right may also potentially affect the constitutionality of the death penalty [see Kirkwood v. United Kingdom, Applic. no. 10479/83, decision of the European Commission of Human Rights as to Admissibility (1984), 29.]

6. Theme Committee Report

6.1. We are of the view that the rights to freedom and security of the person are fundamental rights for the purposes of Constitutional Principle II, and should be included in the final constitution.

Suggested resolutions for contentious and outstanding issues:

6.2. One of the key issues that requires resolution arising out of the party submissions is whether the reasons for which deprivation of liberty is permitted should be specifically stated in this clause, e.g. the administration of justice, public health, immigration etc. or should it be covered by a general internal qualifier such as 'arbitrary', 'just cause', 'in accordance with the principles of fundamental justice' (see approach in Canada and under the Civil and Political Covenant above). The disadvantage of specifying the grounds of deprivation is that they may prove inflexible and have a limiting effect.

6.2.1 It is thus suggested that a person should not be deprived of his or her liberty arbitrarily or for an unjust cause. This means that detentions imposed for whatever reasons, including criminal justice, immigration, health, etc. would have to meet these criteria. The concept of 'unjust cause' allows the content of legislation authorising detention or imprisonment to be reviewed by the courts: for example, legislation which seeks to criminalise activities consistent with the fundamental rights in the Constitution, or permitting preventive detention or detention solely for the purposes of interrogation.

6.2.2 The internal qualifications of 'arbitrary' and 'just cause' are directed towards the specific nature and scope of the right, including cases which would not necessarily be covered by a general limitations clause. It would permit deprivations of liberty for the normal and acceptable reasons of the administration of justice, mental health, immigration etc. Cases falling outside this scope would have to be justified by the state in terms of the general limitations clause. These could include for example: the detention of witnesses (s. 185 of the Criminal Procedure Act), the detention of persons at roadblocks without a reasonable suspicion that they have committed an offence, preventive detentions to combat a "state of unrest" (e.g. s.50 of the Internal Security Act). We believe that these qualifications will meet the Freedom Front's concerns relating to unlawful immigrants.

- 6.2.3 The specific due process rights and other safeguards to detained, arrested and accused persons should then be elaborated in a separate section. (e.g. bail, access to court to challenge lawfulness of detentions etc.). These would also represent safeguards against arbitrary action. As the right to freedom is concerned with limiting the circumstances under which people may be physically deprived of their liberty, we recommend that the matter of searches and seizures either be dealt with under the right to privacy or the 'due process' section (see DP submission).
- 6.3 It is recommended that an independent significance should attach to the phrase 'security of the person', extending beyond deprivation of liberty and the prohibition on torture. As per the interpretation under the Covenant on Civil and Political Rights, it should not only include an obligation on state officials to refrain from threatening people's security, but also an obligation to protect their security against violations by private persons. This obligation will be primarily discharged through criminal laws and the administration of justice. Such an independent significance to security of the person is supported in the party submissions, and also provides a safeguard against all forms of violence against women which is the subject of a number of public submissions.
- 6.4 The ACDP's submission that the rights should apply from the point of conception represents a fundamental difference from other parties. This submission is inconsistent with both international and comparative approaches to the nature of these rights.
- 6.5 Whether capital and corporal punishment should be specifically prohibited in this section or other sections of the Constitution are issues requiring resolution. Both forms of punishment are the subject of forthcoming judgements of the Constitutional Court. These judgements, contemporary developments in international human rights law and in other democratic countries should inform the parties' consideration of their inclusion in the final Bill of Rights.
- 6.6 The inclusion of an express prohibition of medical and other scientific experimentation without consent should be uncontroversial (ANC, PAC). It is specifically prohibited in article 7 of the Covenant on Civil and Political Rights, and other human rights conventions.
- 6.7 The right against torture is a peremptory right under customary international law, and may never be justified by states. It is also a right to which all persons are entitled regardless of whether they are lawfully or unlawfully in the country. It is thus recommended that this right not be subject to any limitations.

7. PROVISIONAL TEXT

The Rights to Freedom and Security of the Person

- 7.1 Every person³ shall have the right to freedom.⁴ No person shall be arrested or detained arbitrarily or for an unjust cause.⁵
- 7.2 Every person shall have right to security of the person which shall be respected by all and protected by the state.⁶
- 7.3 No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.
- 7.4 No person shall be subject without his or her free consent to medical or scientific experimentation.⁷

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1. Person in the context of this section is restricted to natural persons, and includes all persons under the jurisdiction of the state (whether lawfully or unlawfully). It also includes both adults and children.
 2. The right to freedom refers in this context to physical deprivation of liberty, and not other dimensions of freedom which are protected by other rights, e.g. freedom of assembly, religion, conscience, speech etc. (see paras. 4.1.2 and 4.1.4, above)
 3. This right may be subject to certain limitations as prescribed in a general limitations clause. Such a clause should require all such limitations to be prescribed by law of general application. Specific due process rights and other safeguards for detained, arrested and accused persons should be dealt with in a separate section (see paras. 6.2.1- 6.2.3, above).
 4. The reasons for including this right in a separate sub-section is to emphasise the independent interpretation it should receive, i.e. it is not simply an element of freedom (see paras. 4.1.3, 4.1.6 and 6.3, above). It is envisaged that this right may be subject to limitations under the strict circumstances prescribed in the general limitations clause, e.g. the use of force in effecting arrests, crowd control etc.
 5. The rights in 7.3 and 7.4 should not be subject to limitation under any circumstances (see paras. 6.6 to 6.7).

8. Application of the rights and limitations

- 8.1. These rights are all to apply with horizontal effect as per the consensus position of the parties. The effect of the various rights will be indicated by a general applications clause which will be considered later in the Theme Committee's programme, once the content of the fundamental rights have been finalised.
- 8.2. The rights in 7(1) and (2) may be limited in compliance with a general limitations clause. The criteria for limitation will be dealt with when the limitations clause is considered in the programme. The rights in 7(3) and 7(4) should not be subject to limitation under any circumstances.

- Party Submissions

- ACDP

AFRICAN CHRISTIAN DEMOCRATIC PARTY

SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY THEME COMMITTEE 4 : FUNDAMENTAL RIGHTS

FREEDOM AND SECURITY OF THE PERSON

CONTENT OF THE RIGHT

The Constitutional Principles

It should be clear by now that the ACDP does not accept the Constitutional Principles on face value. Only once the philosophy behind the Principles has been uncovered, will these be accepted or revisited.

It must be kept in mind that, despite all talk of democracy and a free and open society, a set of regulations have been pre-drawn and imposed on the whole constitutional process by those in attendance at Kempton Park.

Two further aspects about these principles are disquieting:

- firstly, they are much more detailed and specific than their counterparts in other jurisdictions, and,
- secondly, because they are justiciable before the Constitutional Court, even political questions, as opposed to juridical ones, have to be decided upon by this body - again, a great rarity in current constitutions, and one that detracts greatly to the claim to true democracy made by the assemblies of the interim constitution and the constitutional principles.

Biblical Perspective

The ACDP adheres to an absolute ethic and morality, based on the unwavering foundation of the Lord Jesus Christ.

As such, the basis of the right to the freedom and security of the person, is the acceptance of mankind as a created being, created by the Father, Son and the Holy Spirit to subdue and rule over the rest of creation.

Because Christians believe that man has been created in the image of God, they also believe that each individual has value. Each individual is granted certain rights by God. These are inalienable and founded on an absolute moral standard. This view is reflected in the American Declaration of Independence and should be a part of the pre-amble of the new Constitution.

This is a crucial aspect of the Christian political world-view and where company is paled with all forms of humanist religion. The Rights of man are tied inextricably to the very character of God and as such, these cannot be arbitrarily assigned and denied according to the whims of each passing generation.

To the many forms of humanist thinking, by way of comparison, there are two aspects:

- The inalienability of rights and their being founded on the absolute morality of consistency with the character of God, as evidenced in the Bible - means that the State is a mere servant of God for the good of the people.
- The State does not grant rights, so it cannot take them away arbitrarily.

Under a Christian system, the aspect of detention without trial will be viewed as follows:

Detention without trial is one of the key instances where the State can become god, to serve it's own purposes. In a community ruled by situational ethics and where a legally-positivistic justification has merely to be found in "the needs or interest of the society", the totalitarian state to deny citizens their right to freedom and security of the person.

Only when absolute moral codes, proven over time, as evidenced in the Bible, is the yardstick to exercising State power, will citizens feel secure that their rights will not be touched upon, unless they transgress the known and unwavering moral code serving as the basis thereof.

Because freedom is such an important aspect of man's existence, the ACDP proposes that the right to a speedy trial, and all the other aspects of substantive and procedural due process of law must be strictly observed, in the interests of justice and worth of human existence.

A further vital aspect of the security of the person, is the right of every individual, from conception to natural death, to have his or her rights as granted by God, on the basis of merely being a created human being, observed, respected and protected by their peers.

Only when society somehow defines it's own needs and wants, without a fixed reference point to work from, can the sort of arbitrary decision-making occur that found Jews in the 1940's to be an execrable race and having three or more children viewed to be a gross disregard for the interests of the Chinese State, even today.

By way of contrast, a biblically principled approach to inalienable rights will give all citizens the unwavering security - physical and otherwise - that their integrity will be guarded within the four corners of a millennia old standard.

The physical and mental integrity of all human beings, at whatever age, will be preserved because these are not mere attributes of mankind, to be added and subtracted at will, but a reflection of the nature and character of the Creator.

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 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 freedom and security.

Who should be the bearers of the right?

Subject to what has been said above, the ACDP has already made it's viewpoint clear: God created Man and positioned him as a steward over creation. The basis of all human rights, in this instance, freedom and security of the person, 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, namely, to be servants of the Most High God to the good of all citizens, 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

PRELIMINARY SUBMISSIONS OF AFRICAN NATIONAL
CONGRESS ON BLOCKS TWO AND THREE - THEME
COMMITTEE 4.

FREEDOM AND SECURITY OF THE PERSON

Content of the Right

The right is described under Section 11 of Chapter 3 of the Interim Constitution. Section 11 (1), apart from guaranteeing the freedom and security of the person, also deals with the right not to be detained without trial. In our view, it is consistent with human rights jurisprudence to rather provide for the right not to be subjected to arbitrary arrest and detention, which shall invariably violate the freedom and security of the person. Articles 3 and 9 of the Universal Declaration of Human Rights and Article 9(1) on the International Covenant on Civil and Political Rights deals with Section 11 (1) of the Interim Constitution in similar terms. We prefer the formulation of the right as follows:

Everyone has the right to freedom and security of the person. No one shall be subjected to arbitrary arrest or detention.

This is a broader formulation in that it covers both the element of arrest and detention and is also specific in that it relates to the arbitrariness of any arrest and detention.

Section 25 deals extensively with the rights of detained, arrested and accused persons.

Our understanding of the freedom and security expressed in this right is that it is not exclusively physical and deals with the broader mental and spiritual freedom of expression, religion, belief, opinion and conscience. Security of the person shall cover among other things, the physical, mental and psychological integrity of the human being that must be secured or guarded from torture and other forms of degrading, cruel or inhuman treatment.

Section 11 (2) outlaws cruel punishment, treatment and torture. The right is similar to that of Article 7 of the International Covenant on Civil, and Political Rights. It has been refined in that it specifically excludes torture of any kind, including mental and emotional torture. It is our view that the integrity, dignity and security of the person can be further protected by adding the following to Subsection 11 (2).

No one shall be subjected without his or her free consent to medical or scientific experimentation.

The above mentioned rights are fundamental and have to be protected. Their significance can be best understood against the background of the arbitrary arrests, detention without trial, and torture, in various forms perpetrated against political activists who fought for the "freedom and security of the person."

Application of the right

- 2.1. There shall be a positive duty on the state.
- 2.2. The right shall apply at all levels of civil society.
- 2.3. Yes, it should. It should apply horizontally and among third parties inter se.
- 2.4. Natural persons
- 2.5.1. Limitations shall be permissible only in accordance with the general provisions relating to rights being reasonably and/or necessarily limited in an open and democratic society.
- 2.5.2. The exception is Section 11(2) which should not be capable of limitation under any circumstances.
3. The nature of, and protection against the derogation from these provisions in a State of Emergency will be dealt with when this topic is treated later.

- DP



Demokratiese Party
Democratic Party

29.03.95

CONSTITUTIONAL ASSEMBLY : THEME COMMITTEE 4
SUBMISSION BY THE DEMOCRATIC PARTY
SERVITUDE AND FORCED LABOUR AND FREEDOM AND
SECURITY OF THE PERSON

1. SERVITUDE AND FORCED LABOUR

The Democratic Party has already submitted its detailed viewpoint on this topic, under cover of submission on the Right to Human Dignity. Kindly refer to Party Submissions (green document) (unnumbered) dated 20 March 1995 at pp.25-26.

2. SECURITY OF THE PERSON

2.1 Content of the Right

We have already made submissions in respect of section 10 (Dignity) and we reiterate them here. Likewise, our standpoint on abortion is contained under cover of the same submission (see document, 20 March 1995 pp.26-27). We therefore discuss the meaning and content of section 11 - Freedom and Security of Person.

We are in respectful agreement with the generality and particularity afforded to detained, arrested and accused persons, save for the reservations noted below.

- 2.2 We believe that the wording of the Constitution should be rearranged to provide for a Right to Liberty, since the current composition of clauses 13 (which deals with searches and seizures under the Right to Privacy), and 11 (Freedom and Security of Person) should be recomposed to read:-

11. Right to Liberty

"Every person shall have the right:-

- 11.1 To liberty and security of person and shall not be deprived of such rights except in accordance with the law;
- 11.2 To be secure against unreasonable searches and seizures;
- 11.3 Not to be arbitrarily arrested, detained or imprisoned;
- 11.4 Not to be subject to torture or to cruelty, inhuman or degrading treatment or punishment".

These are the essential core of rights which a clause guaranteeing freedom and security of person should provide.

- 2.3 We do not understand why the Secretariat has placed section 25 under this head. The detailed rights of accused, detained and arrested persons require separate and particular attention. The Theme Committee should consider them only after general agreement on the above clause has been reached. For the purpose of the record, however, we are in general agreement with the wording of section 25, except for the provisions of section 25(2)(d) relating to bail.

2.4 While we believe that arrested persons are entitled to bail in carefully defined circumstances, we are extremely concerned with the extraordinary laxity of the lower courts in granting bail in clearly undesirable circumstances. Whether this is the fault of the general wording of 25(2)(d) or the failure of the courts or prosecuting authorities to apply properly the limitation clause (section 33), is unclear. We believe the matter is of sufficient importance and urgency for the committee of experts to prepare an opinion and for this section to be considered afresh, so that a proper balance may be struck between the interests of society and the criminal justice system in the context of our crime-ravaged country on the one hand, and the individual bail applicant on the other.

3. APPLICATION OF THE RIGHT

Since the rights contained under section 11 (and 25) clearly empower individual human beings with specific rights and impose specific obligations on the State, an elaborate consideration of the questions posed is unnecessary (2.1-2.4).

However, (2.5) "should the rights under discussion be capable of limitation" is adequately answered on the provisions of section 33 which invest these rights with a higher form of protection (see section 33(1)(aa)). We believe this to be appropriate save and except in respect of the question of bail for the reasons stated above.

- FF



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FREEDOM FRONT

THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

SUBMISSIONS ON FREEDOM AND SECURITY OF THE PERSON

1. Content of the right

The freedom of the person is regarded as one of the major civil liberties. It connotes freedom of movement, to participate in or abstain from lawful activities, the right not to be arrested or imprisoned, save on defined and limited grounds, etc. It is the belief in this liberty which lies at the basis of opposition to excessive police and governmental powers, to detention in concentration camps or otherwise, without trial, to torture of any kind, and to the infliction of cruel, inhuman or degrading treatment or punishment.

In respect of torture we are of the opinion that the definition of 'torture' in the United Nations Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 10 December 1984 is too narrow: it is confined to acts by public officials or other persons acting in an official capacity. The Freedom Front submits that the prohibition of torture should expressly apply to everyone, i.e. the present section 11(2) of the Constitution should also have horizontal application.

The concept of freedom of the person is a basic element of the concept of democracy. It is, however, necessary to impose some restrictions on personal freedom. Such restrictions should increase as society becomes more developed and has more regard for the protection of others. Freedom does not mean licence, and the freedom of one person must be limited to provide for the freedom of others.

It should be the function of courts of law to decide where to draw the line between 'conflicting' freedoms of different persons. In this context the public welfare may well demand that a person's physical freedom must be sacrificed in the public interest. This is so in criminal proceedings in particular. A person should not, for instance, have a right to be released from detention, with or without bail, 'unless the interests of justice require otherwise', as is presently provided in section 25(2)(d) of the transitional Constitution. This provision has already led to great differences of opinion in the administration of justice. If a prima facie case of commission of a serious crime by an accused has been made out, the burden of proof should be on the accused to satisfy the court that justice demands his freedom and not his incarceration, as the interests of society should be paramount in the administration of justice.

Even in civil law justice may require that a debtor about to abscond and flee from the jurisdiction of the court should be arrested suspectus de fuga, as it has been in Roman-Dutch law and in contemporary South African Law, to abide the judgment of the court and safeguard the rights of the plaintiff in the proceedings.

2. Application of the right.

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

The state should be legally obliged to give maximum effect to the concepts of freedom and security of the person, subject only to curtailment of such rights imposed by a limitation clause in the bill of fundamental rights. The present limitation clause (section 33 of the transitional Constitution) provides that limitation by law of the right of freedom and security of the person should, inter alia, also be necessary. The Freedom Front is convinced that the question of necessity should be determined by an independent judicial tribunal and not by any legislative or administrative body. Any other mechanism would render this right nugatory.

2.2 We are of the opinion that any conflict between common law or customary law rules relating to freedom and security of the person and the provisions of the bill of fundamental rights should be resolved in favour of the latter. This does not preclude, however, that common law or customary law provisions could be supplementary to the provisions of the bill of rights in these respects. We support this view.

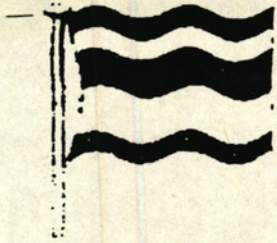
2.3 The Freedom Front is of the opinion that this right should impose a constitutional duty on actors other than the state, viz all inhabitants of South Africa. In other words, it should have vertical as well as horizontal application, otherwise the protection afforded by this right would be so inadequate that it would be ineffectual in protecting this fundamental freedom.

2.4 Juristic persons cannot be bearers of this right. All natural persons lawfully in the country should be protected by this right, but not unlawful immigrants.

2.5 The question of limitation of this right by the legislature has already been dealt with under 2.1 above.

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"Democracy means freedom to choose"



INKATHA

Inkatha Freedom Party

Iqembu leNkatha Yenkululeko

**THEME COMMITTEE No. 4
SUBMISSION ON
SERVITUDE AND FORCED LABOUR
FREEDOM AND SECURITY OF THE PERSON**

SERVITUDE AND FORCED LABOUR

CONTENT OF THE RIGHT

1. "No person shall be subject to servitude or forced labour"
- 1.1 The content of this right is a self-fulfilling prohibition which creates an entitlement in any person concerned.

APPLICATION OF THE RIGHT

2. This as well as all other rights entrenched in the Constitution shall be protected and enforced to the fullest extent possible in all judicial and administrative procedures as well as in interpersonal relations under the control of the Republic of South Africa.
- 2.1 It would be unconscionable if a private contractual arrangement for voluntary servitude or for working conditions which are tantamount to slavery could receive protection and enforcement in a court of law.
3. As a rule "the law may impose reasonable restrictions on the exercise of the rights set out in the Constitution to protect the rights of others and for compelling reasons of public interest. However, in such a case the law must respect the essential content of the rights, and the limitation on the exercise of the right must not have the practical effect of preventing or deterring the free exercise of the rights in their reasonable manifestations."
- 3.1 Against this rule, any limitation of the specific rights which originate out of the foregoing prohibition does not appear possible or likely.

FREEDOM AND SECURITY OF THE PERSON

CONTENT OF THE RIGHT

Physical and Psychological Integrity

1. "The physical and psychological integrity of any individual shall be inviolable."
- 1.1 This is a prescriptive constitutional principle capable of directing interpretative activities within constitutional adjudication. It is important to address both physical as well as psychological violence. The notion of "integrity" is a test which combines sufficient rigidity and flexibility to allow adjustment to changing needs and perceptions of society, as well as new potential forms of "mind control" or manipulation. For instance, a parent

- spanking her child would not necessarily violate the child's physical integrity and psychological, but could become so in cases of child abuse.
2. "No one shall be authorised to inflict any type of violence on another individual or to take a life. Capital punishment and any form of physical or psychological torture and punishment shall not be allowed."
 - 2.2 This is an unqualified and absolute prohibition.
 3. "No one shall be submitted to unusual or cruel punishment and all punishments shall aim at the personal and social rehabilitation of the person, and while in detention anyone shall be treated under conditions consonant with human dignity, which shall include at least the provision of adequate nutrition, reading material and medical treatment."
 - 3.2 These provisions contain some prohibitions the contents of which will be further defined in legislation subject to the interpretation by the Constitutional Court of the relevant text ("unusual" or "cruel" or "conditions consonant"). They also contain directive to be implemented by future legislation and which may be used as the parameters of legitimacy of present legislation ("rehabilitation" or "condition consonant")
 4. "During imprisonment juvenile delinquents shall be kept separate from other delinquents and so shall men from women."
 - 4.1 This is a straight prohibition
 5. "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 offense."
 - 5.1 This is the most effective technique to put an end to violation of physical and psychological integrity in prisons and places of detention.

Liberty

6. "No one shall be deprived of his liberty without cause and due process of law"
- 6.1 This is a fundamental principle which expresses both norms of immediate application as well as general interpretative guidelines and directives for the legislature.
7. "Unwarranted arrest and detention shall be allowed only on the basis of probable cause related to an offense punishable by imprisonment."
8. "Anyone arrested or detained shall be informed of his or her rights in a language that he or she understands, shall be informed of the reasons for the arrest and detention with an indication of the charges, and shall have a court hearing within twenty four hours from the time of his or her arrest, after which the detention may continue only by court order based on factually corroborated allegations."
9. "Anyone detained or accused has the right to remain silent."
- 9.1 The privilege against self-incrimination is usually limited to testimonial evidence.
10. "Anyone detained or charged with an offense punishable by imprisonment has the right to consult counsel, and if he or she can not afford one the court shall appoint one at government expense."
- 10.1 The right to counsel shall be limited to cases in which liberty is at stake and only for those who cannot afford legal representation. This right will need to be implemented by legislation, but in this as in other cases it would be a mistake to qualify this right with the usual notation "as provided by law" which would make the entitlement to such right

- contingent on a law being adopted.
- 11 "There shall be a right to counsel in any and all proceedings in which the accused participates."
 - 11.1 It is an important qualification, since the most crucial aspect of legal representation in criminal cases relates to the initial stage of investigation and interrogation. It is often useless to have a lawyer only at the trial stage.
 12. "Detention prior to sentencing shall be limited to cases established by law and shall not exceed three months."
 - 12.1 No greater risk exist for personal liberty than detention without trial. If the state may not timeously convict a suspected individual, the individual should be released. This is also a guarantee for a "speedy trial".
 13. "Anyone detained, arrested or condemned unlawfully shall have the right to be rehabilitated, to receive indemnification and other rights determined by law."
 - 13.1 This is a necessary element in the system of accountability of government with respect of the crucial aspects of personal liberty.
 14. "Any government authority shall inform anyone who is the subject of an investigation for any reason."
 - 14.1. Secret investigations are a violation of human rights. In countries in which this guarantee is provided for, the prosecutor or the judge is merely required to send a form letter to the suspected individual advising him/her that he/she is being investigated for a given crime.
 15. "No one may be tried twice for the same conduct."
 16. "No one shall be charged for a conduct which at the time was not an offense, nor shall a penalty be imposed exceeding that which was applicable at the time when the offense was committed."
 17. "There shall be no analogical or retroactive interpretation of criminal law."
 18. "Anyone has the right to a speedy, open and public trial and to confront his or her accusers at trial."
 19. "All trials shall be based on the accusatory principle and shall be subject to the right to appeal on the grounds of error of law."
 20. "No one shall be removed from the authority of the judge with jurisdiction over the specific offense at the time the offense was committed."
 21. "There shall be no special or *post facto* judges."
 22. "Any accused person shall have the right to be tried in an impartial, independent and competent court."
 23. "Anyone shall be presumed not guilty until proven guilty."
 - 23.1 It must be noted that the "presumption of innocence" is a misnomer, for, technically, no one may be presumed innocent, but he/she is rather presumed "not guilty".
 24. With respect to the issue of the trial by a jury in criminal cases, this important and desirable innovation could be introduced by law on the basis of graduality.

APPLICATION OF THE RIGHT

24. This as well as all other rights entrenched in the Constitution shall be protected and enforced to the fullest extent possible in all judicial and administrative procedures as well as in

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interpersonal relations under the control of the Republic of South Africa.

- 24.1 There are few conceivable cases in which some of these provisions could find application in interpersonal relations. Among them is the case of arrest and other limitation of personal freedom which would be constitutionally illegal even if not specifically prohibited by the law. For instance, this could apply to locking up of people in work camps, et similar cases.
- 25 As a rule: "the law may impose reasonable restrictions on the exercise of the rights set out in the constitution to protect the rights of others and for compelling reasons of public interest. However, in such a case the law must respect the essential content of the rights, and the limitation on the exercise of the right must not have the practical effect of preventing or deterring the free exercise of the rights in their reasonable manifestations."

NATIONAL PARTY SUBMISSION

THEME COMMITTEE 4

BLOCK 3. FREEDOM AND SECURITY OF THE PERSON

1 Content of the rights

Two rights are involved, namely freedom of the person, and security of the person. Briefly, it may be said that freedom of the person refers to the physical liberty of a person, which then refers directly to the unlawful deprivation of that liberty, for instance, by detention without trial. As a matter of fact, this right is closely linked to the procedural rights of detained, arrested and accused persons in section 25 of the Constitution, 1993. Although it could be argued that the right has a broader scope and should include all forms of freedom, it seems that in the context of the existing Chapter 3, which provides amply for other forms and aspects of freedom, the right should have this narrower meaning.

Security of the person refers to the physical, mental and psychological integrity of the individual. This right *inter alia* prohibits torture and cruel, inhuman or degrading treatment and punishment - which is explicitly prohibited by section 11(2) of the Constitution, 1993. It may also include a prohibition on medical experimentation without consent (see for instance Article 7 of the International Covenant on Civil and Political Rights). In Canada, for example, the right even covers various forms of psychological trauma. In addition, the competency of a pregnant woman to decide on an abortion might be involved here. We are opposed to an unqualified right in this respect and, if necessary, this should be spelled out in the bill of rights, probably under the right to life. Other issues to be considered are whether capital punishment and any form of corporal punishment is in conflict with this right. Since the Constitution 1993, is silent on this, the courts will have to decide.

2 Application of the rights

As a general remark we wish to point out that in principle we are in favour of the broad and inclusive terms in which the present bill of rights contained in the Constitution 1993, are couched. This implies that when we argue in favour of or against a particular aspect in the discussion below, it does not necessarily mean we believe it should be expressly addressed in the bill of rights. This, of course, also implies that wherever this approach creates uncertainty about the exact meaning of a provision, or where the bill of rights does not expressly mention a particular issue, the matter will have to be decided by the courts.

2.1 Nature of duty on state

In principle, the state must refrain from instituting any practice, law or other action that amounts to, promotes, or condones the violation of these rights. The detail in connection with the position of detained, arrested and accused persons will be discussed under the procedural rights presently contained in section 25 of the Constitution, 1993.

2.2 *Application to common and customary law*

The rights should apply to common law and customary law.

2.3 *Other actors bound*

In principle, the bill of rights binds the state (section 7(1)). That does not mean that the bill of rights will never bind private persons. As a matter of fact, in terms of section 35(3), such a development is to be expected.

Against this background, we believe that, on the one hand, the state as primary institution, bound by these rights, may not adopt legislation dealing with private relations which allows for the violation of the freedom and security of the person. In other words, the state cannot make a law in terms of which a private person may subject another human being to these practices. That law will be unconstitutional and, in this sense, the rights under discussion will apply horizontally. It could also be argued that the state's duty to protect persons against the violation of these rights could include a duty to protect the individual against any abuse by anybody else and that the state should take positive steps in this regard.

2.4 *Bearers of the rights*

By the nature of these rights natural persons should be the bearers of these rights.

2.5 *Limitation of the rights*

Freedom of the person can be limited in terms of section 33(1) of the Constitution, 1993. In this regard cognisance should again be taken of the rights of detained, arrested and accused persons contained in section 25, which assumes that persons may be detained under certain circumstances and, therefore, that the freedom of the individual may be limited. However, with regard to the security of the person, it is impossible to imagine circumstances under which torture and cruel, inhuman or degrading treatment or punishment could be reasonable, justifiable in an open and democratic society based on freedom and equality and, moreover, necessary (section 33(1)).

2.6 *Wording*

We believe that the present wording of section 11 of the Constitution 1993, should be retained.

- PAC

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3 April 1995

Preliminary Submissions of the Pan Africanist Congress on the Freedom and Security of the Person.

This is a very important right. It encompasses on the whole the so-called "legal rights" or "due process rights" of a person. It covers many issues, such as prohibition from torture, degrading treatment, detention without trial and so on. These are matters which are important to South Africans because of our recent past.

Content of this right.

1. A right to personal liberty including the right not to be detained without trial or be arbitrarily arrested.
2. Prohibition against torture, cruel, inhuman or degrading treatment or punishment.
3. South Africa has opened its doors to the world. There will be a temptation by some people to abuse this by using our people as guinea pigs for medical and scientific experimentation. This should be expressly prohibited.

Application

As stated above this clause protects mainly the legal rights or due process rights of human beings.

Mr R K Sizani

MP