

## DEMOCRATIC PARTY

### 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 emphasised 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 organisations 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 civilised 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 authorisation. 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 to 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.