

**CONSTITUTIONAL
ASSEMBLY**

**REFINED WORKING
DRAFT**
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**ADDITIONAL
DOCUMENTATION**

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MEMORANDUM

TO: Constitutional Assembly
FROM: Executive Director
DATE: 21 February 1996
RE: Memoranda from Technical Committee 4 on Aspects of the Bill of Rights

We enclose for your consideration three memoranda from Technical Committee 4 on:

- * Freedom and Security of the Person (Section 11 of the *Working Draft*)
- * Section 25 and 26 of the *Working Draft*, and
- * The Right to Language and Culture (Section 30)

H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY

TECHNICAL COMMITTEE 4

MEMORANDUM

TO: Chairpersons and Executive Director of CA
DATE: 15 February 1996
RE: Technical Committee 4 Memorandum on Section 11: Freedom and Security of the Person

1. Based on the discussion at the CC Sub-Committee meeting on 7 February 1996, the Panel of Experts and Technical Committee were requested to suggest an alternative formulation for section 11(2).

2. PROPOSED REVISED FORMULATION

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

- (a) deprived of liberty arbitrarily or without just cause; or**
- (b) detained without trial**

(2) Everyone has the right to security of the person, including the right -

- (a) to be free from all forms of violence;**
- (b) to psychological integrity;**
- (c) to make decisions concerning their body free of coercion.**

(3) No one may be -

- (a) tortured in any way;**
- (b) treated or punished in a cruel, inhuman or degrading way;**
- (c) subjected to medical or scientific experimentation without that person's consent;**

3. NOTES

3.1 As bodily integrity and the right to security of the person protect the same aspects of personal safety and autonomy, it was considered undesirable to use both phrases. However, the right to psychological integrity is an important dimension of security of the person. It is included in s. 11(2)(b) to avoid an unduly restrictive interpretation of security of the person which should not only be confined to physical infringements. It may find application in range of situations, particularly in relation to the psychological and psychiatric treatment of people.

3.2 Section 11(2)(c) has been drafted to protect the aspect of bodily autonomy - the right to make decisions concerning one's body free of coercion. This refers not only to decisions concerning sexuality and control of one's fertility. It also potentially applies to a wide range of other decisions such as forced marriages, enforced contraception programmes, organ donations, decisions concerning burial.

3.2 The basis of the rights protected in section 11(2) can be found in a number of international and comparative documents protecting human rights. For example:

The African Charter on Human and Peoples' Rights (1981) -

Article 4:

"Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

The American Convention on Human Rights (1969) -

Article 5:

(1) Every person has the right to have his physical, mental, and moral integrity respected.

(2) No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

...

The Basic Law of the Federal Republic of Germany

Article 2:

(1) Everyone shall have the right to the free development of his personality insofar as he does not violate the rights of other or offend against the constitutional order or morality.

(2) Everyone shall have the right to life and to physical integrity. The liberty of the individual shall be inviolable. Intrusion on these rights may only be made pursuant to a statute.

Constitution of the Portuguese Republic

Article 25

(1) The moral and physical integrity of the persons shall be inviolable.

(2) No one shall be subject to torture or to cruel, degrading or inhuman treatment or punishment.

Article 27

(1) Everyone shall have the right to freedom and security.

...

Convention on the Elimination of All Forms of Discrimination against Women (1979) [ratified by S.A.]

Article 16

(1) States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

...

(f) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights

International Conference on Population and Development - Programme of Action (Cairo Declaration) [September 1994]

Chapter VII, para. 7.3

“...reproductive rights embrace certain human rights that are already recognised in national laws, international human rights documents and other relevant United Nations consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. **It also includes the right of all to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights documents.**”

Beijing Declaration and Programme of Action (September 1995) [South Africa has committed itself to this document without reservations]

Paragraph 97

“The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its

consequences.”

TECHNICAL COMMITTEE 4

MEMORANDUM

TO: Chairpersons and Executive Director of CA
DATE: 19 February 1996
RE: Technical Committee 4 Memorandum on Section 30: The Right to Language and Culture

1. The Technical Committee was requested at the CC Sub-Committee Meeting of 7 February to research the position in international human rights instruments regarding guarantees of language and cultural rights for the purposes of the drafting of section 30.

2. Language and cultural rights in international human rights law

2.1 Article 27, International Covenant on Civil and Political Rights (1966)

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

The Human Rights Committee which is responsible for supervising States obligations under this Covenant has said the following in regard to article 27:

“The Committee observes that none of the rights protected under article 27 of the Covenant may legitimately be exercised in manner or to an extent inconsistent with the other provisions of the Covenant.”¹

2.2 UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities [UN General Assembly resolution 47/135 of 18 December 1992]

Article 4(2)

“States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.”

¹General Comment 23 (Fiftieth session, 1994) UN doc. CCPR/C/21/Rev.1/Add.5, para. 8.

Article 8(2)

“The exercise of the rights set forth in this Declaration shall not prejudice the enjoyment by all persons of universally recognised human rights and fundamental freedoms.”

2.3 Framework Convention for the Protection of National Minorities (Council of Europe, 8 November 1994) [not yet in force]

Article 20

“In the exercise of the rights and freedoms flowing from the principles enshrined in the present framework Convention, any person belonging to a national minority shall respect the national legislation and the rights of others, in particular those of persons belong to the majority or to other national minorities.”

2.4 UN Draft Declaration on the Rights of Indigenous Peoples [E/CN.4/Sub.2/1993/29]

Article 33

“Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognised human rights standards.”

2.5 Convention on the Elimination of all Forms of Discrimination against Women (1979) [ratified without reservations by South Africa]

Article 5

“States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

3. Conclusion

Although the Technical Committee recognises an overlap with the general limitations clause, it supports the inclusion of the phrase in section 30 of the Working Draft to make it clear, in view of international precedents, that the rights of others is a legitimate purpose for limiting the right to culture.

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