

FREEDOM FRONT

THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

SUBMISSIONS ON FREEDOM AND SECURITY OF THE PERSON

I. 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 express 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' freedom 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 transition 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 judgement 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 of the 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.

