

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.