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CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 4
FUNDAMENTAL RIGHTS**

**REPORTS
- *1st DRAFT***

8 May 1995

THEME COMMITTEE 4
-FUNDAMENTAL RIGHTS

**SCHEMATIC REPORT ON NATURE AND APPLICATION OF BILL
OF RIGHTS**

15 APRIL 1995

N O.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS ASPECTS	REMARKS
1.	II Other: I, II, III, IV, V, VIII, IX, XI, XII, XXVIII, XXXIV	Nature of Bill of Rights	Bill of Rights should be a comprehensive response to past of conflict, discrimination and apartheid. Should be anti- discriminatory, protecting and promoting human rights	Bill of Rights should be a document enforcing the "heritage of a divine authority" - ACDP	

2.	II	Rights contained in a Bill of Rights	<p>Primary emphasis must be given to the body of International Human Rights Law, including the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966).</p> <p>Rights contained in Chapter 3 should be given due and proper consideration.</p> <p>Parties are not limited to the rights in Chapter 3.</p> <p>In considering rights to be extended, changed or deleted, any alteration of the rights be subject to the requirements of Constitutional Principle II that everyone shall enjoy universally accepted fundamental rights.</p>		
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3.		Application of Bill of Rights		Vertical and Horizontal Application of Rights	Specific rights shall be examined and the implications or consequences in terms of horizontal application shall be evaluated. Expert advice can be sought by individual parties if required. This is at present being carried out as the Committee is deliberating individual rights separately.
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4.		Application of Bill of Rights		Application of Bill of Rights in terms of CP II as regards to the term "everyone".	<p>According to the opinion of the Technical Committee, in the context of Constitutional Principle II, whether the term "everyone" includes juristic persons, structured and unstructured groups, and organs of civil society, the reference is to natural persons. This does not exclude however, that in some of the rights, consideration may be given to juristic persons.</p> <p>Having noted the opinion of the Technical Committee, the parties agreed to give due consideration to the Technical opinion when considering each specific right. This is at present being carried out as the Committee is deliberating individual rights separately.</p>
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5.	Section 7(1)		Shall bind all levels and organs of government		
6.		Enforcement	The Bill of Rights should be entrenched, justiciable and enforceable, through a strong independent judiciary.		Other organs of enforcement be looked at eg. Human Rights Commission

THEME COMMITTEE 4 FUNDAMENTAL RIGHTS

REPORT ON *NATURE AND APPLICATION OF BILL OF RIGHTS*

This report is drawn up on the basis of submissions received from political parties, organisations of civil society and individuals, and follows the Report on Constitutional Principle II of the Committee already tabled before the Constitutional Committee. A number of the issues dealt with in this report were already covered by the Report on Principle II.

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)**
 - Alberts BJ
 - Anonymous (Nelspruit)
 - Black D
 - Brune EO
 - Cinamon DV
 - Drummond D
 - Galpin S
 - Hunter K
 - Innes M
 - Joyner FM
 - Lekhoda ME

- Maasdorp MH
- Makaula L
- Mnisi BJ
- Selikow GJ
- Tabor DI
- Webster GC

2.2 Organisations (in alphabetical order)

- African Enterprise
- Algemene Kommissie Leer en Aktuele Sake, Ned Geref Kerk
- ARAG (Abortion Rights Action Group)
- Community Peace Foundation
- Conference Report, Community Law Centre, UWC
- Conservative Party of South Africa
- Human Rights Institute of South Africa
- Pioneers Village Community
- Rape Crisis (endorsed by various other organisations)

2.3 Government structures\ institutions (in alphabetical order)

- Minister of Home Affairs - Dr Buthelezi MG

3. Technical Committee reports:

On the meaning of:

- i) ***Everyone shall enjoy ... "(Whether the term "everyone" includes juristic persons, structured and unstructured groups, and organs of civil society, etc)***
- ii) ***"after having given due consideration to inter alia the fundamental rights contained in Chapter 3"***

4. Relevant Constitutional Principles

Primarily CP II; Other I, II, III, IV, V, VIII, IX, XI, XII, XXVIII, XXXIV

PART II

1. Nature of Bill of Rights

1.1 Non-Contentious Issue(s):

1.1.1 The Bill of Rights should be a comprehensive response to address the inequalities and injustices of the past, seeking to be non-discriminatory, protecting and promoting human rights

1.1.2 The Bill of Rights should be entrenched, justiciable and enforceable, through a strong and independent judiciary.

1.1.3 In the enforcement of the Bill of Rights, other organs of enforcement such as the Human Rights Commission, should also be looked at.

1.2 Contentious Issue(s):

1.2.1 None

2. Rights to be included in Bill of Rights

2.1 Non-Contentious Issue(s):

2.1.2 There was agreement that primary emphasis be given to the body of International Human Rights Law, including the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966).

2.1.3 All the parties and the Technical Committee opinion agreed that the rights contained in Chapter 3 should be given due and proper consideration. Most of the parties also noted that they did not regard the rights in the Chapter as exhaustive.

2.1.4 The parties also agreed that they are not limited to the rights in Chapter 3.

2.1.5 It was agreed that in considering rights to be extended, changed or deleted, any alteration of the rights be subject to the requirements of Constitutional Principle II that everyone shall enjoy universally accepted fundamental rights.

3. Application of Bill of Rights

As identified in the Report on Constitutional Principle II, contention arose on the issue of applicability, with regards to the meaning of the term "everyone" in the phrase "Everyone shall enjoy...". and the horizontal\vertical application of the Bill of Rights.

3.1 Non-Contentious Issue(s):¹ "Everyone shall enjoy ... "(Whether the term "everyone" includes juristic persons, structured and unstructured groups, and organs of civil society, etc)

Suggestion: Having noted the opinion² of the Technical Committee, the parties agreed to give due consideration to the Technical opinion when considering each specific right.

¹ i) The ANC states that rights referred to are rights of born person(s) or natural persons. The Bill of Rights refers to rights enjoyed by human beings and even Chapter 3 refers primarily to rights of natural persons. The term "everyone" therefore excludes juristic person(s).

ii) The NP, DP and IFP stated that they believed "everyone" should include juristic persons.

iii) The ACDP stated that unborn persons should be included under the term "everyone".

² According to the opinion of the Technical Committee, in the context of Constitutional Principle II, whether the term "everyone" includes juristic persons, structured and unstructured groups, and organs of civil society, the reference is to natural persons. This does not exclude however, that in some of the rights, consideration may be given to juristic persons

- Opinion of Technical Committee to Theme Committee 4, for the purpose of discussion of Constitutional Principle II.

3.2 Contentious Issue(s): "Vertical and Horizontal Application of Rights"³

Suggestion: Specific rights shall be examined and the implications or consequences in terms of horizontal application shall be evaluated. Expert advice can be sought by individual parties if required.

4. General trends emerging from submissions received from organs of civil society and individuals.

4.1 The submissions from the public at public meetings or through the post, organisations of civil society and other interested bodies, in general supported the issues discussed by the parties in the Theme Committee and the conclusions noted above.

Only 3 issues however were not covered and these were as follows:

- i) A Bill of Rights should also include or be a Bill of Obligations and Duties. (Noted in the IFP submission).
- ii) A clear distinction be made between the rights of citizens and the rights of prohibited and illegal aliens (*Minister of Home Affairs - Dr MG Buthelezi*).
- iii) A Bill of Rights proposed for a Volkstaat within a confederal Southern Africa, the rights to stand for public service, political parties and activities, and immovable property to be reserved for citizens. Non-citizens will be bearers of other rights.

³ i) The ACDP, ANC, DP, IFP and PAC supported a vertical and horizontal application of the Bill of Rights in principle.

ii) The DP and FF said horizontal application should be approached cautiously.

iii) The NP primarily supported vertical application, but were not against a extension of the application of the Bill, at the same time noting concern about the possible disruption of South Africa's Private Law system.

THEME COMMITTEE 4
-FUNDAMENTAL RIGHTS

**SCHEMATIC REPORT ON FREEDOM OF RELIGION, BELIEF AND
OPINION**

4 May 1995

NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
1.	II, XII, Section 14	Nature of the right	Right to be included		
2.		Content of the right	Freedom of worship. Tolerance of all religions and diverse beliefs. The right to hold (and not to hold) religious and secular convictions and to express, profess, practice and propagate them publicly and in association with other.	<p><i>Academic freedom and placement of the right. To be : (a) retained in s 14 (ACDP); (b) moved to freedom of expression (ANC); (c) moved to educational rights (DP, FF); (d) covered as a separate right (NP).</i></p> <p>-Outstanding ANC: Opinion to form part of expression. None to be barred from places of religious observance.-Outstanding</p> <p>DP: Conscience and religion to be grouped with speech, belief, opinion, expression, assembly and association as a Right to Fundamental Freedoms.-Outstanding</p> <p>FF: Prohibition on discrimination should not offend religious beliefs of individuals. -Outstanding</p>	
3.		Application of the right (Nature of duty)	Positive duty to be imposed on state.	ACDP: Duty to be imposed on state in s 14(1) to ensure that religious practices uphold public order and Godly morals.	
4.		Application to common\ customary law	Right applies to common and customary law.		

NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
5.		Application of the right (Duties on private actors)	Right to apply vertically and horizontally where applicable.	ACDP; ANC; DP; FF: Right to apply horizontally. NP: State and academic institutions bound by academic freedom. Other aspects only state should be bound.	
6.		Bearers of the right	Natural and juristic person where applicable.		
7.		Limitations		<u>Degree or level of limitation:</u> <i>-Outstanding</i>	

FREEDOM OF RELIGION, BELIEF AND OPINION

PART II

1. NATURE OF THE RIGHT

1.1 Non-contentious issues

1.1.1 Right to be included in terms of Constitutional Principle II.

1.1.2 Constitutional Principle XII also involved (FF).

2. CONTENT OF THE RIGHT

2.1 Non-contentious issues

Freedom of worship and tolerance of all religions. The recognition and acceptance of diverse beliefs. The right of individuals to hold (and not to hold) any religious and secular conviction and to the right to express, profess, practice and propagate them publicly and in association with other.

2.2 Outstanding issues

2.2.1 *Right to academic freedom and placement of right*

- 2.2.1.1 ... and educational preferences compatible with the freedom of religion and *should be included* as stated in section 32(c) of the Interim Constitution (ACDP). (From the ACDP's proposed formulation of the right it appears that "academic freedom in institutions of higher learning" to be retained with freedom of conscience, religion, belief and opinion, whereas the other aspects referred to, to be covered by educational rights.)
- 2.2.1.2 ... are best dealt with under *freedom of expression* (ANC)
- 2.2.1.3 ... to be placed with the *rights to education* (DP; FF).
- 2.2.1.4 ... to be provided for in a *separate provision* (NP).
- 2.2.1.5 ... to *include* freedom to study, learn and teach, prohibition on the state to shape education or culture in accordance with any particular political or ideological commitment; academic freedom of

- every university and similar institution of higher education to be guaranteed (DP).
- 2.2.1.6 ... - *further submission* to be submitted at the appropriate time (FF).
- 2.2.1.7 ... to *cover* the right to teach and do scientific research and the autonomy of all institutions of higher learning over matters of academic relevance (NP).
- 2.2.2 Right to freedom of opinion is best dealt with under freedom of expression (ANC).
- 2.2.3 Places associated with religious observance to be respected and none shall be barred from entering them on grounds of race (ANC).
- 2.2.4 Freedom of conscience and religion to be grouped with speech, belief, opinion, expression (including freedom of the press and other media of communication), assembly and association as a single Right to Fundamental Freedoms - see also "academic freedom" in par. 2.2.1 (DP).
- 2.2.5 The new constitution should not prohibit a person from taking into account the sexual orientation of another person where such orientation is contrary to the religious beliefs of the person. The present section 8(2) may be interpreted as forcing a person to act contrary to his religious convictions. Provisions of article 18(2) of the International Covenant on Civil and Political Rights therefore to be included ("No one shall be subject to coercion which would impair his freedom to have or to adopt a religion of his belief or choice.")

3 APPLICATION OF THE RIGHT (Nature of the Duty)

3.1 Non-Contentious issues

- 3.1.1 Positive duty to be imposed on state.

3.2 Contentious\ Outstanding issues

- 3.2.1 Section 14 to be revised to read: "Every person shall have the right to freedom of conscience, religion, though, belief and opinion, *which are consonant with public order and Godly morality*, which shall include academic freedom in institutions of higher learning." Inserted phrase imposes the duty on the State to ensure that religious practices uphold public order and

Godly morals (ACDP).

3.2.2 The State's obligation to respect religious observances at state or state-aided institutions "under rules established by an appropriate authority for that purpose", in present section 14(2) unacceptable because any state regulation of religious affairs is rejected (ACDP).

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

4.1 Non-contentious issues

4.1.1 The right applies to customary and common law.

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

5.1 Non-contentious issues

5.1.1 Right to apply vertically and horizontally where applicable.

5.2 Contentious\ Outstanding issues

5.2.1 Academic freedom binds the state as well as academic institutions. In respect of the other aspects covered by the right, it seems as if only the state should be bound (NP).

6. BEARERS OF THE RIGHT

6.1 Non-contentious issues

6.1.1 Natural persons and juristic persons where applicable.

7. LIMITATION OF THE RIGHT

7.1 Outstanding issues

7.1.1 Degree and level of limitation

7.1.1.1 Religious beliefs that manifest themselves through ritual murders, enforced polygamy, cultic expressions, or violence explicitly promoting public immorality, should have limitations imposed (ACDP).

- 7.1.1.2 The holding of a belief or thought (religious or otherwise) cannot be limited (ANC).
- 7.1.1.3 The manifestations of the belief or thought can under reasonable circumstances be limited in an open and democratic society. Such limitations may be permissible in order to give effect to other rights in the constitution particularly the right to equality (ANC).
- 7.1.1.4 Rights to be subject to reasonable limitations in a properly formulated limitations clause, such as provided for in the Interim Constitution in terms of section 33 (DP).
- 7.1.1.5 Sections 14(2) and (3) to be retained (FF; NP)
- 7.1.1.6 The right should not be capable of limitation by the legislature otherwise than by an amendment of the constitution. The only justifiable limitation would be the curtailment of religious activities that conflict with the religious activities of other persons or groups or that contravene some other fundamental interest protected by the constitution, such as the public order and other interests mentioned in article 18.3 of the Interim Covenant on Civil and Political Rights ('public safety, order, health, or morals or the fundamental rights and freedoms of others') (FF).

THEME COMMITTEE 4
-FUNDAMENTAL RIGHTS

**SCHEMATIC REPORT ON RIGHT AGAINST SERVITUDE AND
FORCED LABOUR**

26 April 1995

N O.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS/ OUTSTANDING ASPECTS	REMARKS
1.	II, XII, XIII	Nature of the right	Is a universally accepted fundamental human right, which should be specifically protected in the South African Constitution.		
2.		Content and Scope of right	Clause in final Constitution protecting the right	<p><u>Formulation of right:</u></p> <p>The DP, NP, IFP and PAC favour the formulation of the right in s.12 of the interim Constitution - <i>Outstanding</i></p> <p>The ANC, FF and ACDP support a formulation (with various modifications) based on article 8 of the International Covenant on Civil and Political Rights, 1966 which allows the scope of the protection against 'forced or compulsory labour' to be qualified - <i>Outstanding</i></p>	
3.		Application of the right (Nature of duty)	Positive duty to be imposed on the state.		

4.		Application of the right to common\ customary law.	The right applies to all customary and common law rules, and supersedes them in the event of a conflict (CP XIII). The courts are also obliged to interpret all common and customary rules in the light of this fundamental right.		
5.		Application of the right (duties on private actors)	Imposes a direct duty on private actors to respect the right.		
6.		Bearer of the right	Only natural persons	FF: Possible application to unlawful immigrants.	

7.		Limitation of the right		<p><u>Degree\ level of limitation:</u></p> <p>-Parties favouring 'in-built' qualifications on the scope of the right, did not support additional provision for limitations (ANC, ACDP,FF).</p> <p>-Parties supporting a general formulation similar to s.12, supported provision for limitations to the rights.</p> <p>-DP envisages only permissible limitation to the right being "to the extent necessary to carry out the proper purposes of court ordered punishment and imprisonment".</p> <p>-IFP supports provision for "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".</p> <p>-PAC: The right does "not allow derogation".</p>	
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REPORT ON RIGHT AGAINST SERVITUDE AND FORCED LABOUR

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

The only submission specifically relating to the content of this right was that of the Conservative Party to South Africa. It envisages that force labour "shall only be permissible when it occurs in terms of a legal court order or as punishment after conviction by a court of law."

3. Technical Committee reports

None to date on this item.

4. Relevant Constitutional Principles

CP II, XII and XIII

PART II

1. NATURE OF THE RIGHT

1.1 Non-contentious issues

1.1.1 The right against servitude and forced labour is a universally accepted fundamental human right, which should be specifically protected in the South African Constitution.

2. CONTENT AND SCOPE OF THE RIGHT

2.1 Non-contentious issues

There should be a separate clause in the final Constitution protecting the right to be free of servitude and forced labour.

2.2 Outstanding issues

2.2.1 Formulation of the right:

2.2.1.1 The DP, NP, IFP and PAC favour the formulation of the right in s.12 of the interim Constitution.

2.2.1.2 The ANC, Freedom Front and ACDP support a formulation (with various modifications) based on article 8 of the International Covenant on Civil and Political Rights, 1966 which allows the scope of the protection against 'forced or compulsory labour' to be qualified.

These qualifications include:

a) labour performed pursuant to a sentence imposed by a competent court in countries where imprisonment with hard labour may be imposed as a punishment for a crime.

b) "work or service normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;"

c) military service or, in countries where conscientious objection is recognised, any national service required by law of conscientious objectors;

d) "any service exacted in cases of emergency or calamity threatening the life or well-being of the community;"

e) "any work or service which forms part of normal civil obligations."

2.2.2 Amongst the parties that support 'in-built qualifiers' to the scope of the right, not all support the qualifications in the abovementioned form. Thus the ANC does not include a) in its suggested formulation. The Freedom Front supports an entrenchment of the right to chose civilian national service on the basis of religious or conscientious objection. It also requires service exacted in the event of emergencies to be prescribed by law and for the emergency to have been "duly proclaimed." Finally it does not support e) above on the grounds that it is "too vague and opens the door for abuse."

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

3.1 Non-Contentious issues

3.1.1 A positive duty is to be placed on the state to respect the right, and to protect it by law from all forms of violation by public authorities and private parties.

3.1.2 The Freedom Front would prefer to have private violations of the right against servitude and forced labour to be dealt with under the heading, "Freedom and Security of Person."

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

4.1 Non-contentious issues

4.1.1 The right applies to all customary and common law rules, and supersedes them in the event of a conflict (CP XIII). The courts are also obliged to interpret all common and customary rules in the light of this fundamental right.

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

5.1 Non-contentious issues

5.1.1 In view of the nature and significance of this right, it should impose a direct duty on private actors to respect the right.

6. BEARERS OF THE RIGHT

6.1 Non-contentious issues

6.1.1 Only natural persons are entitled to be the bearers of the rights.

6.2 Contentious\ Outstanding issues

6.2.1 Freedom Front specifically referred to the possible application of the right to unlawful immigrants.

7. LIMITATION OF THE RIGHT

7.1 Contentious\ Outstanding issues

7.1.1 Degree and level of limitation

7.1.1.1 Generally those parties that favoured 'in-built' qualifications on the scope of the right, did not support additional provision for limitations to the right (see, e.g., ANC, ACDP and Freedom Front submissions).

7.1.1.2 The parties that supported a broad, general formulation along the lines of s.12, interim Constitution, supported provision for limitations to the rights. Thus the National Party regards certain of the abovementioned qualifications to the scope of the right against forced labour in the Covenant to constitute permissible grounds for the limitation of the right by the legislature. It does not support any limitations to the right against servitude.

7.1.1.3 The DP envisages the only permissible limitation to the right being "to the extent necessary to carry out the proper purposes of court ordered punishment and imprisonment."

7.1.1.4 The IFP as a rule supports provision for "reasonable restrictions [by law] 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, the "essential content of the right must be preserved". In the light of this rule, it does not regard any limitations to the right against servitude and forced labour being "possible or likely."

7.1.1.5 The PAC states that this right "does not allow derogation." It is not clear whether reference is being made in this context to limitations during normal circumstances, or a complete suspension of the right during a state of emergency.