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**CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 4**

**FUNDAMENTAL RIGHTS**

**REPORT AND DRAFT FORMULATION**

**-RIGHT AGAINST *SERVITUDE AND  
FORCED LABOUR***



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**THEME COMMITTEE 4**

***FUNDAMENTAL RIGHTS***

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



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 - <b>Outstanding</b><sup>1</sup></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 - <b>Outstanding</b></p>	

<sup>1</sup> It should be noted that items marked "Outstanding" do not signify disagreement amongst political parties or contention. Parties felt that these matters could best be dealt with at the level of the Constitutional Committee, where negotiation could take place.



3.		<b>Application of the right (Nature of duty)</b>	Positive duty to be imposed on the state.		
4.		<b>Application of the right to common\ customary law.</b>	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.		<b>Application of the right (duties on private actors)</b>	Imposes a direct duty on private actors to respect the right.		
6.		<b>Bearers of the right</b>	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<sup>2</sup>

##### 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

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2. It should be noted that items marked "Outstanding" do not signify disagreement amongst political parties or contention. Parties felt that these matters could best be dealt with at the level of the Constitutional Committee, where negotiation could take place.



- 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.



# EXPLANATORY MEMORANDUM AND PROVISIONAL TEXT

## RIGHT AGAINST SERVITUDE AND FORCED LABOUR

### 1. Compliance with Constitutional Principle II

- 1.1. The right not to be subject to slavery, servitude or forced labour is undoubtedly a "universally accepted fundamental" right as contemplated in Constitutional Principle II.

This prohibition has been adopted in all the universal and regional general human rights treaties, and in a number of specialised conventions. It is also found in article 4 of the Universal Declaration of Human Rights (1948).

The most significant treaties relating to slavery, servitude and forced labour are: the UN Slavery Convention (1926), amended by its 1953 Protocol, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956), the UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Other (1949), the International Labour Organisation Convention Concerning Forced or Compulsory Labour (1930), the ILO Convention Concerning the Abolition of Forced Labour (1957), and the International Covenant on Civil and Political Rights (1966).

In view of the absolute and universal character of the prohibition against slavery, it is a peremptory norm of customary international law (jus cogens).

The prohibition against slavery, servitude and forced labour is also reflected in a large number of national constitutions, including the United States, Germany, India, and Namibia.

- 1.2. In considering the inclusion of this right in the final constitution, due consideration has been given to the fundamental rights contained in Chapter three of the interim Constitution (Act 200 of 1993), particularly s. 12.



## 2. Nature of the rights in international human rights law

As referred to above, the prohibition against slavery, servitude and forced labour is internationally protected in a number of human rights treaties.

### 2.1 The scope of the rights

Although morally and philosophically it is not possible to draw rigid distinctions between slavery, servitude and other forms of forced or compulsory labour, such distinctions are made in international law.

One of the reasons for drawing these distinctions is that most of the international instruments allow a limited number of express exceptions to the concept of 'forced or compulsory labour'. These exceptions include the normal duties consequent upon a lawful order of detention or of a person during conditional release from such detention; service of a military character or national service required of conscientious objectors where this is recognised; service extracted in the case of serious emergencies or calamities; any work or service which forms part of "normal civil obligations." ( see, e.g., Art. 8(3)(c) of the International Covenant on Civil and Political Rights).

The term 'slavery' corresponds with its traditional meaning. It is defined in Art. 1(1) of the Slavery Convention of 1926, as the "status or condition of a person over whom any or all the powers attaching to the right of ownership are exercised."

The term 'servitude' is broader and covers many contemporary forms of slavery-like practices: debt-bondage, serfdom, enforced marriages, the delivery of children into child labour or exploitation; etc.<sup>3</sup> The essential nature of servitude is the exploitation and degradation of human beings by public or private parties. Such practices are prohibited even where consent is expressed. They can be regarded as contrary to public policy in South African law.

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<sup>3</sup>See the definitions of 'institutions and practices similar to slavery' in article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956.



In contrast, the key element in forced or compulsory labour is that it is involuntary. In addition to this subjective element of involuntariness, a State or private party violates this right when personal work or service is ordered and punishment or a comparable sanction is threatened if this order is not obeyed.<sup>4</sup> There would appear to be little justification for requiring, in addition to these elements, that the nature of the work must be "unjust, oppressive or particularly harsh labour". These additional criteria have been developed by the European Commission of Human Rights (applying article 4 of the European Convention on Human Rights) mainly in relation to compulsory professional services [*Iversen v. Norway*, applic. no. 1468/62, CD, vol. 12]. These further limits on the scope of application of the provision are not endorsed in the context of article 8 of the International Covenant on Civil and Political Rights.<sup>5</sup> The burdens placed on members of professions in the public interest (e.g. *Pro Deo* Counsel, medical care etc.) would seem to be most appropriately dealt with in terms of a general limitations clause

### 2.3 Horizontal effects

A further important dimension of the right in international law is its primary horizontal effect. The state is under a positive duty to take active steps to ensure that slavery, servitude and forced labour does not occur within its jurisdiction. This includes ensuring that the law prohibits all forms of slavery, servitude, debt bondage and other types of slavery-like practices, and to adopt effective judicial, administrative and other measures to enforce the prohibition. The criminal law has an important role to play in this regard.<sup>6</sup> However, the prohibition certainly does not exclude the state where the state is itself an employer or imposes a general duty to work through the threat of a criminal or other sanction.

There have been a number of cases before the European Commission and Court of Human Rights based on article 4 of the European Convention on Human Rights (similar to Art. 8 of the International Covenant on Civil and Political Rights). These cases have included a recidivist placed under supervision by administrative authorities, military service and the rendering of compulsory professional services.

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<sup>4</sup>Nowak, M., 1993, *UN Covenant on Civil and Political Rights: CCPR Commentary*, (N.P. Engel: Kehl) at pp. 147-151. Also see the definition in article 2(1) of the ILO Convention Concerning Forced or Compulsory Labour (1930): "...the term 'forced or compulsory labour' shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.'

<sup>5</sup>Nowak, *supra*, note 2, p.150.

<sup>6</sup>Nowak, *supra*, note 2, p. 145.



### 3. Nature of the right in comparative law

This right has differing formulations and qualifications in the various national constitutions where it is found. These formulations must be seen in the context of the particular constitution as a whole, and particularly the nature of the provision it makes (if any) for limitations to the rights.

For example, the Constitution of the United States which has no express 'limitations clause' has the following formulation:

#### Article XIII

1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
2. Congress shall have the power to enforce this article by appropriate legislation.

The German Constitution which allows for specific rights to be restricted by law (subject to the requirements of Art. 19) has the following provision:

#### Article 12

1. All Germans have the right freely to choose their occupation or profession, their place of work, study or training. The practice of an occupation or profession may be regulated by or pursuant to a law.
2. Nobody may be forced to do work of a particular kind except as part of a traditional compulsory community service that applies generally and equally to all.
3. Forced labour may only be imposed on people deprived of their liberty by court sentence.

[Article 12a of the Constitution expressly allows for compulsory military or alternative service]

The Namibian Constitution provides that "no persons shall be held in slavery or servitude" and that "no persons shall be required to perform forced labour" (Art. 9). It then contains a number of specific exclusions to the concept of forced labour which is similar to those contained in Art. 8(3) of the International Covenant on Civil and Political Rights and Art. 4(3) of the European Convention of Human Rights. No further limitation of this right is authorised.



#### 4. Effect in Domestic Law

Slavery, servitude and forced labour would be prohibited under the common law as contrary to public policy in South Africa. Slavery would also be prohibited under the common law as part of international customary law binding on South Africa (article 231 (4) of the interim Constitution). These practices would also contravene labour legislation, such as the Basic Conditions of Employment Act, the Labour Relations Act, the Wage Act and various Wage Determinations under the Wage Act.

However, despite these formal prohibitions, the practice of servitude or forced labour may continue to occur, especially in areas which are excluded from formal regulation by laws. These may include work in the informal sector and certain practices in farm labour. The notorious 'tot-system' of certain farm labour in South Africa whereby payment is in the form of alcohol thus generating a dependency from which the labourer cannot escape can be regarded as a form of servitude. Another example of servitude is debt-bondage, where workers are trapped to work off an ever-increasing debt in respect of basic supplies.

The authors of the Charter for Social Justice are of the view that the prohibition on slavery and servitude "may cover 'economic slavery', where someone is paid an extremely low wage or receives only accommodation and food in return for labour."<sup>7</sup> This view is endorsed in the South African Law Commission (SALC) Final Report on Group and Human Rights.<sup>8</sup> Provided that the features of servitude relating to degradation and exploitation of the human person are present, this argument may be sustainable.

#### 5. Response to the report

##### 5.1. Compliance with Constitutional Principles

The inclusion of the right against servitude and forced labour are essential for compliance with Constitutional Principle II. However, it is recommended that the right against slavery be included in the scope of the right. It is one of the oldest most universally accepted fundamental rights, and should be entrenched and made justiciable in the final Constitution. It is also a pre-emptory norm of customary international law. Although it is forbidden in South African law and its practice in the traditional form apparently non-existent, these do support arguments for its omission. Within the United Nations increasing attention is being given to 'contemporary forms of slavery' and the need for national and international measures of protection.

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<sup>7</sup>Corder et al, A Charter for Social Justice: A contribution to the South African Bill of Rights debate, 1992, UCT Printing Department, p.35.

<sup>8</sup>SALC, Group and Human Rights Final Report, October 1994, p.33.



These include, amongst others, traffic in women and children for the purposes of sexual exploitation the drug trade. These practices probably fall within the scope of the prohibition on servitude, but can also be regarded as 'a contemporary form of slavery.' It would be advisable to include slavery in the formulation of the right (following the Namibian precedent) to allow our courts to interpret and apply it to contemporary developments.

#### 5.2. Compliance with international law obligations

The inclusion of this right in the final constitution will assist in ensuring that South Africa complies with its international obligations both under customary international law, and in terms of its present and future treaty commitments.

#### 5.3. Implications of recognising the right

The recognition of the right will require the state to take all appropriate measures to ensure that the right is respected and protected both by private and public parties [see para. 2 above: 'Horizontal effects']. It will also require the courts to interpret all common and customary law rules subject to this fundamental right (CP XIII).

#### 5.4. Implications for existing law

It is impossible to predict the many different circumstances in which this right may potentially arise, and how the right will be applied to these circumstances. It may have implications for forms of labour performed by prisoners, the possible future introduction of compulsory military service, the rendering of compulsory professional services for social purposes (for example, by doctors and lawyers: emergency and Pro Deo Counsel).

#### 5.5. Suggested mechanisms for resolving outstanding issues

One of the major differences in approach between the parties is whether the scope of forced labour should be expressly limited to provide for exceptions such as military service, service during emergencies etc. or whether it should be broadly formulated.

The advantage of specifying specific qualifications in the section dealing with the right in question is that it establishes the scope of the right more clearly. These questions will not be left to litigation to solve. However, the disadvantage of including specific qualifications is that the list becomes too rigid and may no longer be appropriate as social values evolve and change. For example, compulsory military service in normal times may be interpreted by the courts to be in violation of the right against forced labour if it imposed for an excessively long period, thereby placing an unjustifiable burden on the individual.

A suggested resolution to this issue is to make the right against forced labour subject to a general limitations clause (such as s.33, interim constitution). The criteria for limitation and the formulation of this clause can



be dealt with under the agenda item dealing with the limitations clause. This will allow the court to interpret limits to the right against forced labour against the background of contemporary democratic values. However, because the rights against slavery and servitude involve a denial personal dignity and integrity, they should not be subject to limitation under any circumstances<sup>9</sup>.

The right of the state to demand that citizens perform emergency services (one of the proposed qualifications to the scope of the right) can also be accommodated through a limitations clause.

Finally, we are of the view that the issue of conscientious objection in relation to military service is more appropriately dealt with under the right to freedom of religion, belief and opinion (see Freedom Front submission).

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<sup>9</sup>See Corder *et al.*, *supra*, note 5, pp. 35-36; The SALC also endorses this approach in its Final Report on Group and Human Rights, *supra*, note 6, p. 35.



## 6. PROVISIONAL TEXT

### The Right Against Servitude and Forced Labour

- 6.1 No person shall be subject to slavery, servitude or forced labour. <sup>10</sup>
- 6.2 The right not to be subject to forced labour may be limited by law in accordance with the provisions of section ...[the general limitations clause]. <sup>11</sup>

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<sup>10</sup> "Person" is intended to cover all natural persons within the territory and subject to the jurisdiction of the South African government, whether legally or illegally in the country. It is also intended to apply to both adults and children.

<sup>11</sup> The law should be generally applicable, and should only restrict this right to the extent necessary in a democratic society. This will have to be more precisely formulated in the limitations clause.



**- Party Submissions**



- ACDP



# AFRICAN CHRISTIAN DEMOCRATIC PARTY

## SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY THEME COMMITTEE 4 : FUNDAMENTAL RIGHTS

### SERVITUDE AND FORCED LABOUR

#### CONTENT OF THE RIGHT

The ACDP agrees with the view, as stipulated in the *International Covenant on Civil and Political Rights (1966)*, article 8, which is also supported within the constitutions of Mauritius and Botswana, and states that:

- No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited.
- No one shall be held in servitude.
- a. No one shall be required to perform forced or compulsory labour;
- b. Paragraph 3(a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
- c. For the purpose of this paragraph, the term 'forced or compulsory labour' shall not include:
  - i. Any work or service, not referred to in sub-paragraph (b), 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.
  - ii. Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors.
  - iii. Any service enacted in cases of emergency or calamity threatening the life or well-being of the community.
  - iv. Any work or service which forms part of normal civil obligations.



The ACDP emphasize that it is through the revelation of Jesus Christ that the meaning of true freedom is clarified, and where the distinction between slave and master is cancelled. It is in this context that forced labour trivialises the meaning of labour and dehumanises the person involved in such labour. Honest work is ethics displayed, that deserves correlational compensation.

We are also constantly reminded of the sin-inclined nature of humanity with it's wanton and begrudging appetite that it would be wise for us to remember the two-fold responsibility we have. This was clearly expressed by that great slave abolitionist, William Wilberforce, who said:

*"Almighty God has set before me two great objectives;  
the abolition of the slave trade and the reformation of manners,"*

and, it is only within the second objective that the first finds proper perspective.

This should be the aim and challenge of the constitution. It is when we have freed people from the immoral motives of unscrupulous powerlords, who work against the dignity and well-being of men and women, that the constitution will prove it's worth. Anything short of this is of no consequence and will only provide unfettered incentives for despotic rulership.

## **APPLICATION OF THE RIGHT**

### Nature and duty to be imposed on the State

The State shall have the unlimited right to intervene where any form of slavery, servitude or forced labour is occurring, as well as to hold itself to this right, where applicable.

### Application of the right to common and customary law

The provisions against servitude and forced labour should be unequivocally applied in all sectors of society.



Should the right under discussion impose a constitutional duty on actors other than the State?

Yes - it has a horizontal applicable responsibility as well.

Who should be the bearers of the right?

This right should apply solely to natural persons.

Should the right under discussion be capable of limitation by the legislative?

Insofar as it is the duty of the State, and no other authority, customary or otherwise, to interpret the necessity of the enforcement of such action through court ordered provisions with regards to punishment or imprisonment, no person shall, therefore, be deprived of the right contained under this section.



**- ANC**





## **PRELIMINARY SUBMISSION OF THE ANC ON THE RIGHT TO HUMAN DIGNITY**

### **A. INTRODUCTION**

The right to human dignity for all individuals can only be assured if persons enjoy full access to and protection of their economic, civil, social, cultural and political rights. We believe that these rights are indivisible and inter-related. Furthermore they have been developed in order to give full effect and recognition to the worth and dignity of human beings.

The institutionalised racism that characterised all levels of South African society was a direct infringement, violation and impairment of the essential dignity of human beings. Positive steps toward eliminating all forms and manifestations of racial discrimination are welcomed by the ANC as they are essential for the restoration of the inherent dignity and respect that all human beings should have. In addition to recognising and promoting the full and equal enjoyment of all the accepted human rights, a special right to dignity is necessary in order to underline the inherent worth and dignity of all persons, and to limit conduct which dehumanises or humiliates people.

It is also our belief that the protection of the dignity of human beings has to include a positive duty on the part of the State to protect persons from violence, harassment and abuse. Consequently in dealing with the content of the right we shall propose the addition of a clause that incorporates protection against the abuses mentioned above.



## **B. HUMAN DIGNITY**

### **1. Content of the Right**

We propose that the main clause be phrased as follows:

*"The Dignity of all persons shall be respected and protected."*

In addition we propose the following provision:

*"Everyone shall have the right to appropriate protection by law against violence, harassment or abuse, or the impairment of his or her dignity."*

### **2. Application of the right**

- 2.1 The State has a positive duty to provide for the protection of the above right.
- 2.2 The right to human dignity must enjoy protection at all levels and within all social structures and institutions.
- 2.3 The right should bind human beings, public institutions and juristic persons. Furthermore the State should also provide for mechanisms or agencies that will monitor and report on the protection and promotion of human rights including the right to human dignity.
- 2.4 Only natural persons should be the bearers of the right.
- 2.5 Limitations of human rights shall not be inconsistent with a democratic and open society based on equality and shall be reasonable and justifiable.

## **C. SERVITUDE AND FORCED LABOUR**

### **1. Content of the right**

The ANC regards the provisions set out in 11(1) and (2) in Chapter 3 as rights that are relevant to the right to human dignity.

We suggest the following formulation:

*No-one shall be subjected to slavery, servitude or forced labour, provided that forced labour shall not include work normally required of someone carrying out a sentence of a court, nor military service or national service by a conscientious objector, nor services required in the case of calamity or serious emergency, nor any work which forms part of normal civil obligations.*



**2. Application of the right**

- 2.1 The State shall have a positive duty to intervene, where slavery, servitude or forced labour is occurring.
- 2.2 The right shall be protected at all levels of civil society.
- 2.3 Human beings, public institutions and juristic persons are obliged to ensure that they do not indulge in activities involving forced labour or other forms of servitude.
- 2.4 Only natural persons shall be the bearers of the right.
- 2.5 We refer to the limitations in the amended version of the right.

**D. DETAINED, ARRESTED AND ACCUSED PERSONS**

**1. Content of the right**

The right as described in Section 25 I (b) of Chapter 3 of the Constitution is accepted.

**2. Application of the right**

- 2.1 The State shall have positive duty to ensure that this right is respected.
- 2.2 This right shall apply to accused, detained and arrested persons.
- 2.3 The right refers specifically to the State and its officials.
- 2.4 Natural persons shall be bearers of the right.
- 2.5 Refer to C 2.5



- DP





29.03.95

**CONSTITUTIONAL ASSEMBLY : THEME COMMITTEE 4**  
**SUBMISSION BY THE DEMOCRATIC PARTY**  
**SERVITUDE AND FORCED LABOUR AND FREEDOM AND**  
**SECURITY OF THE PERSON**

**1. SERVITUDE AND FORCED LABOUR**

The Democratic Party has already submitted its detailed viewpoint on this topic, under cover of submission on the Right to Human Dignity. Kindly refer to Party Submissions (green document) (unnumbered) dated 20 March 1995 at pp.25-26.

**2. SECURITY OF THE PERSON**

**2.1 Content of the Right**

We have already made submissions in respect of section 10 (Dignity) and we reiterate them here. Likewise, our standpoint on abortion is contained under cover of the same submission (see document, 20 March 1995 pp.26-27). We therefore discuss the meaning and content of section 11 - Freedom and Security of Person.



We are in respectful agreement with the generality and particularity afforded to detained, arrested and accused persons, save for the reservations noted below.

2.2 We believe that the wording of the Constitution should be rearranged to provide for a Right to Liberty, since the current composition of clauses 13 (which deals with searches and seizures under the Right to Privacy), and 11 (Freedom and Security of Person) should be recomposed to read:-

**11. Right to Liberty**

"Every person shall have the right:-

- 11.1 To liberty and security of person and shall not be deprived of such rights except in accordance with the law;
- 11.2 To be secure against unreasonable searches and seizures;
- 11.3 Not to be arbitrarily arrested, detained or imprisoned;
- 11.4 Not to be subject to torture or to cruelty, inhuman or degrading treatment or punishment".

These are the essential core of rights which a clause guaranteeing freedom and security of person should provide.

2.3 We do not understand why the Secretariat has placed section 25 under this head. The detailed rights of accused, detained and arrested persons require separate and particular attention. The Theme Committee should consider them only after general agreement on the above clause has been reached. For the purpose of the record, however, we are in general agreement with the wording of section 25, except for the provisions of section 25(2)(d) relating to bail.



2.4 While we believe that arrested persons are entitled to bail in carefully defined circumstances, we are extremely concerned with the extraordinary laxity of the lower courts in granting bail in clearly undesirable circumstances. Whether this is the fault of the general wording of 25(2)(d) or the failure of the courts or prosecuting authorities to apply properly the limitation clause (section 33), is unclear. We believe the matter is of sufficient importance and urgency for the committee of experts to prepare an opinion and for this section to be considered afresh, so that a proper balance may be struck between the interests of society and the criminal justice system in the context of our crime-ravaged country on the one hand, and the individual bail applicant on the other.

### 3. APPLICATION OF THE RIGHT

Since the rights contained under section 11 (and 25) clearly empower individual human beings with specific rights and impose specific obligations on the State, an elaborate consideration of the questions posed is unnecessary (2.1-2.4).

However, (2.5) "should the rights under discussion be capable of limitation" is adequately answered on the provisions of section 33 which invest these rights with a higher form of protection (see section 33(1)(aa)). We believe this to be appropriate save and except in respect of the question of bail for the reasons stated above.



- FF





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## FREEDOM FRONT

### THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

#### SUBMISSION ON SERVITUDE AND FORCED LABOUR

1. Content of the right

The concept 'servitude' (also referred to as 'slavery' or 'serfdom') is a relic of the nineteenth century. The Congress of Vienna in 1815 condemned in principle the slave trade, which, together with the institution of slavery, was the object of large number of international treaties and national statutes during the next hundred years.

The concept 'forced labour' is narrower than that of 'servitude': a person can be subject to forced labour although he is not held in slavery or servitude. Nevertheless there is an overlap.

The subjection of one person to a state of servitude for the benefit of another is today prohibited by a universally accepted rule of customary international law and by the legal systems of many states.

The International Covenant on Civil and Political Rights



1966 contains the following brief prohibitions in article 8: '1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. 2. No one shall be held in servitude'. The same article deals more extensively with forced or compulsory labour (see below).

It would serve no purpose to attempt to describe the content of the phenomenon of servitude: it is historically outdated. The content of the phenomenon of forced labour is, however, of contemporary significance. It could arise in the context of detention by administrative measures not authorised by a court of law.

Section 12 of the transitional Constitution reads: 'No person shall be subject to servitude or forced labour'. This provision is too cryptic, and should be expanded.

The Freedom Front submits that the prohibition of forced labour should be subject to the following qualifications:

- (i) labour reasonably imposed as a punishment for a crime by a court of law of competent jurisdiction, to be performed during detention pursuant to an order by such court;
- (ii) reasonable military or civilian national service (of equal duration), the individual concerned having a choice between the two on the basis of religious or conscientious objection;
- (iii) any service exacted according to law during a duly proclaimed state of emergency.

This proposal is substantially in agreement with article 8 of the International Covenant on Civil and Political Rights



1966, save that we cannot subscribe to the view that the exception should extend to 'work or service which forms part of normal civil obligations', as this is too vague and opens the door for abuse.

2. Application of the right

- 2.1 The nature of the duty to be imposed on the state is that it should respect the content of the right as set out above and ensure its enforcement by independent courts of law.
- 2.2 The application of the right to common and customary law should be such that all rules of common and customary law in conflict with the right should be superseded by the provisions of the bill of rights in this regard.
- 2.3 In principle this right is, by its nature, applicable primarily to the vertical relationship (state versus subject). Any form of servitude or forced labour imposed by private citizens against one another should also be prohibited, but should rather be dealt with under the heading "Freedom and security of the person".
- 2.4 This right is not applicable to juristic persons. The bearers of the right should be all natural persons, citizens and aliens alike, and quite possibly even unlawful immigrants.
- 2.5 No, this right should not be capable of limitation by the legislature, as it would reduce the efficacy of the right as guaranteed in the bill of fundamental rights.
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- IFP



"Democracy means freedom to choose"



# INKATHA

Inkatha Freedom Party

Iqembu leNkatha Yenkululeko

**THEME COMMITTEE No. 4  
SUBMISSION ON  
SERVITUDE AND FORCED LABOUR  
FREEDOM AND SECURITY OF THE PERSON**

## **SERVITUDE AND FORCED LABOUR**

### **CONTENT OF THE RIGHT**

1. "No person shall be subject to servitude or forced labour"
- 1.1 The content of this right is a self-fulfilling prohibition which creates an entitlement in any person concerned.

### **APPLICATION OF THE RIGHT**

2. This as well as all other rights entrenched in the Constitution shall be protected and enforced to the fullest extent possible in all judicial and administrative procedures as well as in interpersonal relations under the control of the Republic of South Africa.
- 2.1 It would be unconscionable if a private contractual arrangement for voluntary servitude or for working conditions which are tantamount to slavery could receive protection and enforcement in a court of law.
3. As a rule "the law may impose 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. However, in such a case the law must respect the essential content of the rights, and the limitation on the exercise of the right must not have the practical effect of preventing or deterring the free exercise of the rights in their reasonable manifestations."
- 3.1 Against this rule, any limitation of the specific rights which originate out of the foregoing prohibition does not appear possible or likely.



- NP



NATIONAL PARTY SUBMISSION

THEME COMMITTEE 4

BLOCK 3. SERVITUDE AND FORCED LABOUR

1 Content of the rights

1.1 The two rights involved here, namely servitude or slavery on the one hand, and forced labour on the other, are not in dispute. They prohibit human beings from being used or traded as objects of property and from being kept in captivity for such purposes and for the purposes of forced labour. They prohibit the violation of the right to occupational freedom and they protect a person from being forced to perform unjust or oppressive work, or work involving unavoidable hardship, against his or her will. No open democratic society can countenance such practices and both rights should be guaranteed and protected in the Constitution.

2 Application of the rights

2.1 Nature of duty on state

The two rights could be distinguished. With regard to servitude, the state must refrain from instituting any practice, law or other action that amounts to, promotes, or condones servitude in any form. As a matter of fact, it could well be argued that no situation in which this right could be limited lawfully under section 33(1), can really be contemplated in a modern democratic society. With regard to forced labour, please refer to paragraph 2.5 below, where it is argued that some exceptions of lawful limitations may exist. Of course, with the exception of those cases, the state should be bound to respect and protect the rights.

2.2 Application to common and customary law

The rights should apply to common law and customary law.

2.3 Other actors bound

On the one hand, the state as primary institution bound by these rights, may not adopt legislation dealing with private relations which allows for servitude or forced labour. In other words, the state cannot make a law in terms of which private person may follow these practices. That law will be unconstitutional and, in this sense, the rights 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 legislation expressly prohibiting



servitude or forced labour in any form by any other actor might be promulgated. In view of the remarks in paragraph 2.5, regulatory legislation in respect of forced labour may also become necessary.

#### 2.4 *Bearers of the rights*

By the nature of the rights all natural persons should be the bearers of these rights.

#### 2.5 *Limitation of the rights*

As argued above, we find it difficult to contemplate a situation in which the freedom of servitude could be limited lawfully, in other words, in a manner which would be reasonable, justifiable in an open and democratic society based on freedom and equality, and necessary. On the other hand, it seems as if freedom of forced labour is capable of being limited lawfully. In view of certain provisions of the International Covenant on Civil and Political Rights (Article 8) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 4), at least military service, performance of labour by prisoners as part of a lawful sentence by a court of law, and civil service during an emergency or disaster, could serve as examples of the lawful limitation of the right.

### 3 **Wording**

We believe that the present wording of section 12 of the interim Constitution 1993, should be retained.



**- PAC**



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Ref No.

3 April 1995

**Preliminary Submissions of the Pan Africanist Congress on the Freedom from  
Servitude and Forced Labour.**

This right, even as formulated in S12 of the Interim Constitution, is uncontroversial. It ensures that practices such as, forced labour, unfair labour practices, child labour and traffic in human beings, are prohibited. This right does not allow derogation.

Content

No person shall be subject to servitude or forced labour.

R K Sizani

MP