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CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 4
FUNDAMENTAL RIGHTS**

ADDITIONAL PARTY SUBMISSIONS

- Servitude and Forced Labour
- Freedom and Security of Person

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.

AFRICAN CHRISTIAN DEMOCRATIC PARTY

SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY THEME COMMITTEE 4 : FUNDAMENTAL RIGHTS

FREEDOM AND SECURITY OF THE PERSON

CONTENT OF THE RIGHT

The Constitutional Principles

It should be clear by now that the ACDP does not accept the Constitutional Principles on face value. Only once the philosophy behind the Principles has been uncovered, will these accepted or revisited.

It must be kept in mind that, despite all talk of democracy and a free and open society, a set of regulations have been pre-drawn and imposed on the whole constitutional process by those in attendance at Kempton Park.

Two further aspects about these principles are disquieting:

- firstly, they are much more detailed and specific than their counterparts in other jurisdictions, and,
- secondly, because they are justiciable before the Constitutional Court, even political questions, as opposed to juridical one's, have to be decided upon by this body - again, a great rarity in current constitutions, and one that detracts greatly to the claim to true democracy made by the assemblies of the interim constitution and the constitutional principles.

Biblical Perspective

The ACDP adheres to an absolute ethic and morality, based on the unwavering foundation of the Lord Jesus Christ.

As such, the basis of the right to the freedom and security of the person, is the acceptance of mankind as a created being, created by the Father, Son and the Holy Spirit to subdue and rule over the rest of creation.

Because Christians believe that man has been created in the image of God, they also believe that each individual has value. Each individual is granted certain rights by God. These are inalienable and founded on an absolute moral standard. This view is reflected in the American Declaration of Independence and should be a part of the pre-amble of the new Constitution.

This is a crucial aspect of the Christian political world-view and where company is paled with all forms of humanist religion. The Rights of man are tied inextricably to the very character of God and as such, these cannot be arbitrarily assigned and denied according to the whims of each passing generation.

To the many forms of humanist thinking, by way of comparison, there are two aspects:

- The inalienability of rights and their being founded on the absolute morality of consistency with the character of God, as evidenced in the Bible - means that the State is a mere servant of God for the good of the people.
- The State does not grant rights, so it cannot take them away arbitrarily.

Under a Christian system, the aspect of detention without trial will be viewed as follows:

Detention without trial is one of the key instances where the State can become god, to serve it's own purposes. In a community ruled by situational ethics and where a legally-positivistic justification has merely to be found in "the needs or interest of the society", the totalitarian state to deny citizens their right to freedom and security of the person.

Only when absolute moral codes, proven over time, as evidenced in the Bible, is the yardstick to exercising State power, will citizens feel secure that their rights will not be touched upon, unless they transgress the known and unwavering moral code serving as the basis thereof.

Because freedom is such an important aspect of man's existence, the ACDP proposes that the right to a speedy trial, and all the other aspects of substantive and procedural due process of law must be strictly observed, in the interests of justice and worth of human existence.

A further vital aspect of the security of the person, is the right of every individual, from conception to natural death, to have his or her rights as granted by God, on the basis of merely being a created human being, observed, respected and protected by their peers.

Only when society somehow defines it's own needs and wants, without a fixed reference point to work from, can the sort of arbitrary decision-making occur that found Jews in the 1940's to be an execrable race and having three or more children viewed to be a gross disregard for the interests of the Chinese State, even today.

By way of contrast, a biblically principled approach to inalienable rights will give all citizens the unwavering security - physical and otherwise - that their integrity will be guarded within the four corners of a millennia old standard.

The physical and mental integrity of all human beings, at whatever age, will be preserved because these are not mere attributes of mankind, to be added and subtracted at will, but a reflection of the nature and character of the Creator.

APPLICATION OF THE RIGHT

Nature of the duty of the State

It is submitted that this aspect has been dealt with extensively above, save to reiterate by way of emphasis, that government serves God to the good of all citizens according to a fixed moral and ethical code which transcribes into fixed laws given by the Creator God to creation, Man, to regulate society. Any misuse of this position or the perceived power by an earthly government is rejected on biblical principles.

Application of the right to common law and customary law

By way of underlining, the ACDP restates it's position that where the constitutional contents or application of any right is interpreted or stated to overrule a biblical principle contained in any common or customary law precept and to transplant it with a non-Christian notion based on evolving social standards or ethical relativism or even comes about through a secular interpretation of existing law, including constitutional aspects thereof, by way of the system, known as legal positivism, this will be opposed with unabated enthusiasm.

It is equally important that searches and seizure be subject to the test of whether it is done for the good, according to Biblical principles of society by a government who acts not in it's own interests, but the servant of the triune God, that it is or should be. The need for protection for those worthy of such protection, necessitates no further explanation than that which has been given above, subject to adding that the requirements or need for assistance of any person should never be understood to go against the laws of God.

One further aspect needs to be made very clear: the ACDP does not adhere to any philosophy that has, as a basic premise, that every human is a potential god and that, as such, every person makes up his own ethics and morality on the path of evolution.

When we speak of the laws of God, then, we mean the omnipotent, omnipresent, all powerful, triune Creator of the known universe and the inhabitants thereof.

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

The ACDP believes that every right has a corresponding set of responsibilities - this is true also of the right to privacy. God created us with the ability to reason and think. Consequently, mankind received the ability to choose and the responsibility to carry the consequences of those choices. In order to have the full benefit of the right, the responsibility has to be taken up. It is for this reason that the ACDP holds the view that individuals who choose to operate outside of the protection of the law, should forfeit some of the privileges that the right bestows. A clear example of this will be the incarceration of a convicted criminal and the correlating infringement of his freedom and security.

Who should be the bearers of the right?

Subject to what has been said above, the ACDP has already made it's viewpoint clear: God created Man and positioned him as a steward over creation. The basis of all human rights, in this instance, freedom and security of the person, was received from God. As such, all persons from conception to the point of natural death has these rights, as long as they discharge the responsibilities that come with the rights. It cannot be stressed enough, however, that this is based on and founded in the relationship between God and human beings and the principles He instituted. Should the underlying philosophy be either that man is an evolved being and, therefore clothed with rights, or even that man is a potential god making up his own ethics and moral environment, then the picture changes drastically and these aspects will have to be critically revisited.

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

Again, this question can only be answered by having recourse to the philosophy on which government is founded .

If government operates within the mandate given by God in Romans, namely, to be servants of the Most High God to the good of all citizens, then no limitations will be necessary. If government adheres to a basic philosophy of evolving morality and ethics or ethics and morality as an entirely individual choice, then curbs must be placed on government to ensure equity, justice, and fairness according to the righteousness of the Almighty God.

"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.

FREEDOM AND SECURITY OF THE PERSON

CONTENT OF THE RIGHT

Physical and Psychological integrity

1. "The physical and psychological integrity of any individual shall be inviolable."
- 1.1 This is a prescriptive constitutional principle capable of directing interpretative activities within constitutional adjudication. It is important to address both physical as well as psychological violence. The notion of "integrity" is a test which combines sufficient rigidity and flexibility to allow adjustment to changing needs and perceptions of society, as well as new potential forms of "mind control" or manipulation. For instance, a parent

- spanking her child would not necessarily violate the child's physical integrity and psychological, but could become so in cases of child abuse.
2. "No one shall be authorised to inflict any type of violence on another individual or to take a life. Capital punishment and any form of physical or psychological torture and punishment shall not be allowed."
 - 2.2 This is an unqualified and absolute prohibition.
 3. "No one shall be submitted to unusual or cruel punishment and all punishments shall aim at the personal and social rehabilitation of the person, and while in detention anyone shall be treated under conditions consonant with human dignity, which shall include at least the provision of adequate nutrition, reading material and medical treatment."
 - 3.2 These provisions contain some prohibitions the contents of which will be further defined in legislation subject to the interpretation by the Constitutional Court of the relevant test ("unusual" or "cruel" or "conditions consonant"). They also contain directive to be implemented by future legislation and which may be used as the parameters of legitimacy of present legislation ("rehabilitation" or "condition consonant")
 4. "During imprisonment juvenile delinquents shall be kept separate from other delinquents and so shall men from women."
 - 4.1 This is a straight prohibition
 5. "Failure by a public official to report any and all instances of physical or psychological violence on a person deprived of his or her liberty shall be a criminal offense."
 - 5.1 This is the most effective technique to put an end to violation of physical and psychological integrity in prisons and places of detention.

Liberty

6. "No one shall be deprived of his liberty without cause and due process of law"
- 6.1 This is a fundamental principle which expresses both norms of immediate application as well as general interpretative guidelines and directives for the legislature.
7. "Unwarranted arrest and detention shall be allowed only on the basis of probable cause related to an offense punishable by imprisonment."
8. "Anyone arrested or detained shall be informed of his or her rights in a language that he or she understands, shall be informed of the reasons for the arrest and detention with an indication of the charges, and shall have a court hearing within twenty four hours from the time of his or her arrest, after which the detention may continue only by court order based on factually corroborated allegations."
9. "Anyone detained or accused has the right to remain silent."
- 9.1 The privilege against self-incrimination is usually limited to testimonial evidence.
10. "Anyone detained or charged with an offense punishable by imprisonment has the right to consult counsel, and if he or she can not afford one the court shall appoint one at government expense."
- 10.1 The right to counsel shall be limited to cases in which liberty is at stake and only for those who cannot afford legal representation. This right will need to be implemented by legislation, but in this as in other cases it would be a mistake to qualify this right with the usual notation "as provided by law" which would make the entitlement to such right

- contingent on a law being adopted.
- 11 "There shall be a right to counsel in any and all proceedings in which the accused participates."
 - 11.1 It is an important qualification, since the most crucial aspect of legal representation in criminal cases relates to the initial stage of investigation and interrogation. It is often useless to have a lawyer only at the trial stage.
 12. "Detention prior to sentencing shall be limited to cases established by law and shall not exceed three months."
 - 12.1 No greater risk exist for personal liberty than detention without trial. If the state may not timeously convict a suspected individual, the individual should be released. This is also a guarantee for a "speedy trial".
 13. "Anyone detained, arrested or condemned unlawfully shall have the right to be rehabilitated, to receive indemnification and other rights determined by law."
 - 13.1 This is a necessary element in the system of accountability of government with respect of the crucial aspects of personal liberty.
 14. "Any government authority shall inform anyone who is the subject of an investigation for any reason."
 - 14.1. Secret investigations are a violation of human rights. In countries in which this guarantee is provided for, the prosecutor or the judge is merely required to send a form letter to the suspected individual advising him/her that he/she is being investigated for a given crime.
 15. "No one may be tried twice for the same conduct."
 16. "No one shall be charged for a conduct which at the time was not an offense, nor shall a penalty be imposed exceeding that which was applicable at the time when the offense was committed."
 17. "There shall be no analogical or retroactive interpretation of criminal law."
 18. "Anyone has the right to a speedy, open and public trial and to confront his or her accusers at trial."
 19. "All trials shall be based on the accusatory principle and shall be subject to the right to appeal on the grounds of error of law."
 20. "No one shall be removed from the authority of the judge with jurisdiction over the specific offense at the time the offense was committed."
 21. "There shall be no special or *post facto* judges."
 22. "Any accused person shall have the right to be tried in an impartial, independent and competent court."
 23. "Anyone shall be presumed not guilty until proven guilty."
 - 23.1 It must be noted that the "presumption of innocence" is a misnomer, for, technically, no one may be presumed innocent, but he/she is rather presumed "not guilty".
 24. With respect to the issue of the trial by a jury in criminal cases, this important and desirable innovation could be introduced by law on the basis of graduality.

APPLICATION OF THE RIGHT

24. 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.

24.1 There are few conceivable cases in which some of these provisions could find application in interpersonal relations. Among them is the case of arrest and other limitation of personal freedom which would be constitutionally illegal even if not specifically prohibited by the law. For instance, this could apply to locking up of people in work camps, et similar cases.

25 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."