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CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 4
FUNDAMENTAL RIGHTS**

REPORT AND DRAFT FORMULATION

- RIGHT TO HUMAN DIGNITY

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THEME COMMITTEE 4
-FUNDAMENTAL RIGHTS

**SCHEMATIC REPORT ON THE
RIGHT TO HUMAN DIGNITY**

NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
1.	II, IX, XIII	Nature of right	The right is a universally accepted fundamental human right which should be specifically protected in the final Constitution.		

NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
2.		Content of right	<p>This right underlies and is at the core of almost all other fundamental human rights, eg. the right not to be subjected to inhuman or degrading treatment, unfair discrimination, the right not to be subject to servitude or forced labour; prisoner's rights etc.</p> <p>Present formulation and content of the right as per Section 10 of Interim Constitution the minimum.</p>	<p>ANC: the clause should specifically provide for the right of "everyone to appropriate protection by law against violence, harassment or abuse, or the impairment of his or her dignity". - <i>Outstanding</i> DP: the concepts of dignity and privacy should be joined together.- <i>Outstanding</i></p>	

NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
3.		Application of the right (Nature of Duty)	The right should be formulated to place a positive obligation on the State to respect and protect against any interference or infringement with the right by others.		
4.		Application of the right (To common and customary)	Shall apply to common law and customary law. In the absence of a suitable remedy to protect the right, the constitution should provide reasonable steps by way of legislation, etc.		

NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
5.		Bearers of the right	Primary bearers of right are natural persons.	DP: juristic persons, community organizations and corporations probably also have limited rights to dignity, particularly in the realm of expression. - <i>Outstanding</i>	

NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
6.	Section 33	Limitation of right		<p>DP: aspects of the right may well be capable of limitation, but not the right <u>per se</u>.</p> <p>NP: right should be absolute - no limitation or derogation allowable under any circumstances, even during a state of emergency.</p> <p>FF: no limitation by the legislature, although dependant on ultimate decision regarding the scope of the limitation clause.</p>	

REPORT ON *THE* RIGHT TO HUMAN DIGNITY

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 society¹:**

2.1 **Individuals (in alphabetical order)**

- Anonymous: Dignity should be protected in the Constitution.
- Diate WS: "Every culture must itself make some researches on their cultural proverbs with the aim of getting cultural proverb meanings relating exactly with meanings of the messages of the Bible".
- Egleton DM: Amendment proposed for Section 10: Every person shall have the right to respect for and protection of his or her dignity: * directly as an individual * indirectly as a member of a group or class of persons (eg women or children as regards pornography, prostitution etc.)

1. Please note that the submissions listed were those considered by the Committee at the time of the report. Subsequent overviews on submissions received since then will be included in a Supplementary report.

Maklia MJ: Everyone should be be treated equally and with dignity.
Pekeur JA: The five year period under which a creditor is punished for paying his debts must be reviewed because it is an infringement of human dignity and that it is a persons private affairs.
Spero CA: Women should not be forced to accept the multiple wife tribal laws. It is degrading to a woman's dignity. One man one wife should be the law.
Varkevisser D: State must be compelled to respect human dignity.

2.2 Organisations (in alphabetical order)

- Conservative Party of South Africa: Clause 11.2.1 of Draft Constitution: The human life is created by God and the dignity of every human shall be inviolate; the highest obligation on the government shall be to treat every human with respect and to protect him.
- Protestant Association of South Africa: The right to dignity should include sufficient protection for dignity with regards to degradation by pornography, etc.

3. Technical Committee reports:

None to date on this item.

4. Relevant Constitutional Principles

II, IX, XIII

PART II

1. Content of the Right to Dignity

1.1 Non-contentious issues

1.1.1 The right to dignity is a universally accepted fundamental human right which should be specifically protected in the South African Constitution.

1.1.2 This right underlies and is at the core of almost all other fundamental human rights, for example, the right not to be subjected to inhuman or degrading treatment, unfair discrimination, the right not to be subject to servitude or forced labour; prisoner's rights etc.

1.2 Outstanding issues

1.2.1 ANC: the clause protecting the right should specifically provide for the right of "everyone to appropriate protection by law against violence, harassment or abuse, or the impairment of his or her dignity".

1.2.2 DP: the concepts of dignity and privacy are related.

1.2.3 DP: individual sphere of privacy beyond the reach of public authority

2. Application of the right (Nature of the Duty)

2.1 Non-contentious issues

2.1.1 This right should be formulated to place a positive obligation on the State to respect and protect the right against any interferences by others.

3. Application of the right (To Common\ Customary Law)

3.1 Non-contentious issues

3.1.1 Should apply to common law and customary law.

3.1.2 In the absence of suitable remedy to protect the right, the constitution should provide reasonable steps by way of legislation etc.

4. Application of the right (Bearers of the right)

4.1 Non-contentious issues

4.1.1 Natural persons are the *primary bearers* of the rights.

4.1.2 The protection of the right should extend to violations by private persons.

4.2 Outstanding issues

4.2.1 DP: juristic persons, community organizations and corporations probably also have limited rights to dignity, particularly in the realm of expression.

5. Limitation of the right

5.1 Contentious\ Outstanding issues

5.1.1 ANC: limitations which are not inconsistent with a democratic and open society based on equality and which are reasonable and justifiable should be allowed.

5.1.2 DP: aspects of the right may well be capable of limitation, but not the right per se.

- 5.1.3 NP: right should be absolute - no limitation or derogation allowable under any circumstances, even during a state of emergency.
- 5.1.4 FF: no limitation by the legislature, although dependant on ultimate decision regarding the scope of the limitation clause.

EXPLANATORY MEMORANDUM AND DRAFT TEXT²:

THE RIGHT TO DIGNITY

1. COMPLIANCE WITH CONSTITUTIONAL PRINCIPLE II

- 1.1 We are of the view for the reasons set out in paragraph 2 and 3 that the right to dignity is a fundamental right for the purposes of Constitutional Principle II

2. PUBLIC INTERNATIONAL LAW

- 2.1 The right to dignity is a core fundamental human right which is reflected explicitly in many public international law instruments and constitutes the moral justification for many other universally accepted fundamental rights.
- 2.2 The Universal Declaration of Human Rights begins with the assertion that the 'inherent dignity' and the 'equal and inalienable rights' of all persons is the 'foundation of freedom and justice and peace' (Preamble)

See also:

African Charter on Human and Peoples' Rights - 'Every individual shall have the right to the respect of the dignity inherent in a human being' (s5)

American Convention on Human Rights - 'Everyone has the right to have his honour respected and his dignity recognised' (s11(1))

Universal Declaration of Human Rights - 'All human beings are born free and equal in dignity and rights ... (s1)

² Draft text was prepared by Technical Committee in consultation with the CA law advisors.

- 2.3 The right to dignity is also associated with other fundamental rights contained in public international law instruments namely equality, personality rights, the right to a name, the right to physical, mental and moral integrity.
- 2.4 The core right to dignity is not derogable under the relevant instruments while the ancillary rights may be derogable in exceptional circumstances.

3. COMPARATIVE LAW

- 3.1 The constitutions of the USA, India and Canada make no express mention of the right to dignity but aspects of this right have been evolved from other enumerated rights or from the moral justification of such rights such as equality, privacy, prohibition or cruel and inhuman punishment, prohibition of slavery, criminal justice, and social and economic rights.
- 3.2 In Germany and Namibia the right to dignity is specifically enumerated:
 - Germany** - 'The dignity of man is inviolable. It is the duty of the state to respect and protect the dignity of man' (Article 1(1))
 - Namibia** - 'The dignity of all persons shall be inviolable' (S8(1))
- 3.3 There is no clear content of the right in comparative jurisprudence. Its content is more often than not reflected in other enumerated rights such as cruel and unusual punishment (*Ex parte Attorney General, Namibia: In Re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NMS), *Life Imprisonment Case* 1977 45 BN. Verf. GE 187), liberty of the person (*R v Morgentaler* (1984) 12 DLR (4th) 502 (Ont. HC)), servitude, privacy and equality.
- 3.4 The German courts have interpreted the right to dignity in such a way as to include the right to one's good name and reputation.

4. SOUTH AFRICAN LAW

- 4.1 Our common law of delict provides a civil remedy for the infringement of dignity. In other words a person may approach the courts to remedy an impairment of his or her dignity by way of an interdict or an action for damages.
- 4.2 It draws a distinction between *dignitas* (dignity) and *fama* (reputation). The former is protected by the law governing actions for *injuria* the latter is protected by our law of defamation.
- 4.3 If the constitutional right to dignity includes the right to reputation (**Gardener v Whitaker** 1944 (5) BCLR 19 (E) then there are implications for our law of defamation (D Spitz 'The Right to Human Dignity' in Chasklason et al 'The Constitutional Law of South Africa' to be published.)
- 4.4 The impairment of dignity involves insult. It is the offensive and degrading treatment of another whether in private or public or the exposure of a person to ill-will, ridicule, disesteem or contempt. (See **Argus Printing & Publishing Company Ltd v Esselin's Estate** 1994 (2) SA 1 (A) at 23)
- 4.5 The courts have included the concept of privacy as part of the right to dignity (**O'Keefe v Argus Printing & Publishing Company Ltd** 1954 (3) SA 244 (C)). Because the Theme Committee has identified a separate (though related) right to privacy for inclusion in the Constitution, we have left this aspect of the common law right to dignity to elaboration in the explanatory memorandum on the right to privacy.
- 4.6 There is no closed list if impairment of dignity. The following (excluding the invasion of privacy) are broad categories that have emerged from the cases:
 - * insulting words (see **Mbillini v Minister of Police** 1981 (3) SA 493 (E) ("kaffir"); **S v Jana** 1981 (1) SA 671 (T) (""));
 - * insulting conduct (see **M v N** 1981 (1) SA 136 (T) (rape); **Boswell v Union Club of South Africa (Durban)** 1985 (2) SA 162 (d) (unlawful expulsion from a club));
 - * interference with parental authority (**Gordon v Barnard** 1977 (1) SA 887 (C) (father interdicting a married man from communicating with his 18 year old daughter);

- * breach of promise to marry;
- * adultery;
- * impairments of individual liberty such as unlawful arrest and detention, malicious prosecution or instigation of civil proceedings.

See generally Burchell **Principles of Delict** at 199 to 207.

- 4.7 Although the AD has held that a juristic person may be defamed (**Argus Printing & Publishing Co Ltd v Inkatha Freedom Party** 1992 (3) SA 579 (A)), the question as to whether a juristic person has a right to dignity or privacy has not been resolved (**Tommie Meyer Films (Edms) Bpk v Universiteit van Pretoria** 1979 (1) SA 441 (A))
- 4.8 In essence our common law recognizes the core of the right to dignity namely protection against degradation and demeaning conduct and its open ended nature provides an appropriate vehicle for the horizontal application of the constitutional right, where there is no legislative remedy provided.

5. **THEME COMMITTEE'S REPORT (Non-Contentious Matters)**

5.1 Para 1.1.1

We are of the view that the right to dignity is a fundamental right for the purposes of Constitutional Principle II.

5.2 Para 1.1.2

We agree that the right to dignity is a core right and that, although some of its facets may be incorporated in one section, certain of its facets are best dealt with by separate though inter-related rights such as equality and privacy and criminal justice. The specific right should however be expressly included to provide a residual basis for the development of protections against possible degrading and demeaning treatment in the future.

5.3 Para 1.2.1

Since the example raised by proposed wording are already unlawful, there seem to be no reason why the content of the right ought not to highlight these particular abuses. By making the common law and customary law subject to the right to dignity, there is no need to specifically require "protection by law". We propose that the outstanding issue be resolved by adding the word in so far as it goes to the content of the right, making the applicable rules of the common law, customary law and legislation subject to the right and the use of the phrase "protected by the State" in the draft text below.

5.4 Para 1.2.2 & 1.2.3

The concepts of dignity and privacy are related but because of the importance that the right to privacy has acquired in constitutional law and the implications for the application of the limitations clause, it is best to provide for a self standing right rather than a sub set of the right to dignity. We propose that we should defer this issue until the right to privacy is drafted for the DP to consider whether the textual separation of the two rights has any legal effect.

5.5 Para 3.1.2

We are of the view that there is a suitable remedy at common law if the common is made subject to the right to dignity. We should also propose that the courts be given the power to develop the common law and customary law to give effect to the values underlying the Bill of Rights along the lines of s25(3) of the Interim Constitution.

5.6 Para 4.2.1

It is our view that it is not necessary to include juristic persons as a rights bearer. It is not fundamental to juristic persons as it may be in respect of natural persons. The entrenchment of the right for natural persons does not place a legal bar on the courts from evolving such rights for juristic persons, as the courts have done in respect of the law of defamation.

5.7 Para 5

The differences in respect of the limitations may be resolved by the listing of the different aspects of the right and the final drafting of the limitation clause. We propose that these issues be held over for the drafting of the limitations clause.

6. PROPOSED DRAFT TEXT

6.1 "The Right To Dignity"³

6.1.1 The inherent dignity in every natural person⁴ shall be respected by all⁵ and protected by the state.

6.1.2 Every person⁶ shall have the right to a good name and reputation⁷.

6.2 Text to be included elsewhere in the Bill of Rights

6.2.1 The rights in 1(1) may not be limited under any circumstances. This should be reviewed when the limitations clause is being drafted.

6.2.2 The rights in 1(2) may be limited in compliance with a general limitations clause such as the one contained in 33(1) of the interim Constitution.

6.2.3 These rights apply to the common law and to customary law

3 This draft which is limited to the proposed wording of the right to dignity is based on the assumption that elsewhere in the new chapter there will be provisions providing for the limitation of rights and the application of rights to the common law.

It should also be noted that elements of style and language may change when the various rights are compiled into a Bill of Rights.

4 The use of the phrase 'natural person' is employed as a temporary measure. There will have to be a general approach adopted on how natural and juristic persons are to be distinguished. This does not in any way prevent the courts from developing such a right under the actio injuriarum under the common law as it has done in respect of law of defamation.

5 The requirement that everyone respect the dignity of others is to clearly indicate the horizontal application of the right. It is our view that the common law actio injuriarum is an appropriate vehicle for giving horizontal effect to this right where there is no legislation to that effect provided that these rules of the common law are subject to the provisions of this section of the Constitution.

6 The use of 'person' is opposed to 'natural person' is to include juristic person such as political parties, churches, trade union, corporations etc. It is also in line with the developments of our law (Argus Printing & Publishing Co Ltd v Inkatha Freedom Party 1993 (3) SA 579 (A))

7 The reasons for isolating the concept of reputation as a separate incident of the right to dignity are: to not leave this important component of the right to dignity to inference; to allow for the non-limitation of the right to dignity and to provide for the limitation of the right to reputation so that the courts when balancing that right with the right to freedom of speech, the right to reputation is not given primacy. (See the criticism of the formulation of the present s10 in D Spitz 'The Right to Human Dignity').

However this facet of the right to dignity should in no way detract from the generality of the right in 6.1.1

- 6.2.4 The concept of dignity must be included in the Preamble to the Constitution.
- 6.2.5 The concept of dignity shall be included in the interpretation provisions as a central value informing the interpretation of other rights.

- Party Submissions

- ACDP

**THE CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 4 : FUNDAMENTAL RIGHTS**

**AFRICAN CHRISTIAN DEMOCRATIC PARTY
SUBMISSION ON HUMAN DIGNITY**

1. CONTENT OF THE RIGHT

1.1 Constitutional Principles

Regarding the Constitutional Principles - the ACDP wishes, at the outset, to make clear that it does not simply accept the Principles at face value. The concept of basic rights and having them protected, is acceptable, but only as part of a very specific philosophy.

Quite naturally, the viewpoint one holds, dictates very definitely, the effect of applying the ideals spelt out in the constitutional principles.

1.2 The Christian Viewpoint

Interpreting the principles from a Bible-believing, creationist, Christian perspective, brings about that only those attributes that God gave to Man, can be considered 'universal' and worthy of protection. The choices that men and women make, that are in direct opposition to the Word of God, are called sin, and not rights, freedoms or civil liberties.

This is where Christianity draws the line - it will accept behaviour that is consistent with the character and nature of God, but not against it. In His divine providence, God gave men and women the first set of laws by which to live and chief among these is that He is the only God.

1.3 Impact on the right to Human Dignity

The ultimate indignity that a human can suffer is to be seen as a mere species - no better or more advanced than an amoeba. This means that an amoeba should receive equal protection with a living thinking human being. To top this, humanists believe that the human brain, despite having originated space ships and Macbeth, is potentially less capable than a computer programmed to process information faster and, they say, more efficiently.

If this is what a human being is, having no absolute rights, no responsibility for his or her own actions, who is no better than an amoeba and potentially worse than a computer, then it is inconceivable to Christians what could be done to or ascribed to humans in order to detract more from their Dignity.

The Christian sense of Dignity is clear. Man was entrusted by the Creator - God with the responsibility to care for the earth and all it's inhabitants. He gave laws to Man to regulate society after the reference point in history, known as, The Fall, which is when mankind chose to believe a lie, rather than the truth. Man, as a fallen being, needs these regulations because of his tendency to miss the purpose predestined for every individual, by making choices contrary to God's nature and, therefore, in defiance of Him.

2. APPLICATION OF THE RIGHT

2.1 Nature of the duty to be imposed on the state

The nature of the duty to be imposed on the state in order to preserve the dignity of man, as seen from a Christian perspective, is that of being a guardian of Godly Principles, as evidenced in the Bible. Nothing more and nothing less than a custodian of the truly universal principles and morality that God has bestowed on mankind.

2.2 Application of the right to common law and customary law

Ultimately, the constitution must reflect the Law of the triune God and from that perspective, differences between customary, common and constitutional law must be addressed. The ACDP, however, notes with disfavour the move world-wide to abolish the common law, as it existed for several centuries. Wherever any law will attempt to distract from the biblical basis of any customary or common law precept, this will not be tolerated.

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

The ACDP imposes those duties on state subjects, that is attendant to their position, as created beings and as custodians of God's laws and principles. Insofar as the constitution has a fixed moral content, not capable of arbitrarily being changed and adapted, according to the whims of an elite, by a pseudo legal system of positivism, that conforms to the Biblical Principles mentioned, it is submitted that, as equal subjects of God's law, all citizens should be burdened with the responsibilities and, at the same time, enjoy the benefit of this right.

2.4 Who should be the bearers of the right?

The ACDP holds that human beings have a responsibility - a response ability - to choose, in whatever circumstances, between right and wrong. What is right and wrong has already been revealed millennia ago by God in His Word - the most widely read and widely published book of all times.

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

The ACDP holds that the state must have the duty to govern according to God's laws and according to God's principles and this must be the basis for the protection of the dignity of man as set out above. No right should take prevalence over God's law.

Should the notion, however, be to make all laws and rights subject to the tenets of legal positivism, then the ACDP holds that Christians will not accept being dominated in the exercise of their principles by allowing a constitution to be enacted that will, in effect, willy-nilly and arbitrarily grant and take away rights as though they were privileges granted to a rat or a blade of grass in the Amazon Jungle.

3. **BIBLICAL REFERENCE**

Human dignity is a value that cannot be measured and evaluated within secularist, scientific terms, nor understood as an evolutionary process that materialised through human interaction.

Human dignity is not an utilitarian concept which expands the idea that human value is dispensable and temporal; and dependent on the expedient worth and usefulness of human life.

On the contrary, human dignity finds expression in that spiritual relationship that exists between God and mankind. *"The Spirit testifies with our spirit that we are God's children" (Romans 5:16).*

It is within this *unity context* that respect and protection of dignity is to be understood. Human dignity is protected on the grounds that it is circumscribed within the following qualities: that it is:

- critical: it questions all things

1 John 4:1 - "Dear friends, do not believe every spirit, but test the spirits to see whether they are from God, because many false prophets have gone out into the world."

- rational: it discerns all things

Hebrews 5:14 - "But solid food is for the mature, who by constant use have trained themselves to distinguish good from evil."

- spiritual: humans reflect the image of God

Genesis 1:26 - "Then God said, Let us make man in our image, in our likeness, and let them rule over the fish of the sea and the birds of the air, over the livestock, over all the earth and over all the creatures that move along the ground."

- disciplined: it values truthfulness

Hebrews 12:11 - "No discipline seems pleasant at the time, but painful. Later on, however, it produces a harvest of righteousness and peace for those who have been trained by it.

- righteous: it respects the law of God

Matthew 22:37-40 - "Jesus replied, 'Love the Lord your God with all your heart and with all your soul and with all your mind. This is the first and greatest commandment. And the second is like it: Love your neighbour as yourself. All the Law and the Prophets hang on these two commandments."

Any deviation from qualities like these brings into question the value of dignity and disturbs the balance that controls the levels between *tolerance* and *dignity*.

In other words, intolerance is justified when deviation from an accepted norm is too large and threatens the balance between tolerance and dignity and destroys a value normally understood to constitute human dignity.

Here we can include acts of criminality, authoritarianism, all forms of non-acceptable perversions and any of those acts that are deemed unlawful.

We in the ACDP, therefore, believe that although human dignity is a universal value, the right to uphold that dignity is determined by the degree of tolerance allowed in order for a society to function responsibly and effectively, but should the security of this function be threatened by actions that do not constitute a dignity, intolerance against such an action will be justified and will invariably affect the nature of human dignity. This will apply to both the state and the people.

The law will ensure that the dignity of the human being is maintained, while limitations are placed upon the tolerance that will be allowed in order to determine how far the right of dignity is to be protected.

Thus, a limit is placed upon the right to uphold one's dignity where upon it is understood that an unlawful act is punishable and is to be disciplined, yet, where the value of human dignity is kept in check.

- 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

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Democratic Party

16.03.95

CONSTITUTIONAL ASSEMBLY : THEME COMMITTEE 4

SUBMISSION BY THE DEMOCRATIC PARTY

THE RIGHT TO HUMAN DIGNITY : BLOCK 3

1. HUMAN DIGNITY

Section 10 of the Interim Constitution reads:-

"Every person shall have the right to respect for and protection of his or her dignity."

The Democratic Party agrees with the provision of this right in the Constitution. Generally national instruments protecting human rights do not expressly provide for such a provision. However, Article 1 of the German Basic Law does. Given the importance of dignity it should be emphasized in the preamble to the Constitution - that human dignity is a basic cornerstone of the Constitution as expressly provided for in Article 1 of the German Basic Law. We believe that the new Constitution requires a properly drafted clause which will join together the concepts of dignity and privacy.

To deal with the relevant questions posed by the Secretariat:-

1.1 Nature of the duty to be imposed on the state.

The approach here suggests the protection of this historically vulnerable area of individual and social freedom against state interference.

In the German Basic Law the right to dignity is protected in Article 1 of the Basic Law which is indicative of its paramountcy in the context of the constitution. The Article states that the dignity of man is inviolable and must be respected and protected by all state authorities.

We believe the concept of dignity should have a central place in the new constitution (together with the right to personal privacy) and should be interpreted as guaranteeing to each citizen an inviolable sphere of privacy beyond the reach of public authority.

1.2 Application of the right to common law and customary law.

The free development of the human personality and its dignity in the social community will be the leitmotif of the approach in respect of the common law.

The right to human dignity embodied in the new constitution will become an important measure and criterion in regard to realising the other aims of the constitution in respect of human freedom and equality.

The right to dignity should be a cornerstone of society and its protection should permeate the common law and customary law.

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

Yes. All members of society and all juristic persons, and not merely those who wield formal authority in society, should respect the dignity of others. The infringement of the dignity of one's fellow citizens should result in criminal sanctions. Natural persons bear this right more convincingly than others. But this will be a matter for judicial interpretation.

1.4 Who should be the bearers of the right?

Once again, the Constitutional Assembly will have to resolve the question of the applicability of the Bill of Rights to juristic persons. However, we note that the concept of "dignitas" generally will involve its application by, and use for, human beings, rather than corporations. However, juristic persons, community organizations and corporations probably have limited rights to dignity, particularly in the realm of expression. The dignity clause will be useful as an adjunct to more fundamental and substantive sections dealing with freedom of expression and the right to equality.

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

Most rights are subject to the general limitation clause but we do not believe that the right to dignity per se should be specifically limited, although aspects of the

right might well be capable of limitation.

2. SERVITUDE AND FORCED LABOUR

Section 12 - No person shall be subject to servitude or forced labour.

Application of the right

2.1 Nature of the duty to be imposed on the state

This should be self-evident and requires no elaboration.

2.2 Application of the right to common law and customary law

Clearly the provisions against servitude and forced labour should apply in all sectors of society and should override any contrary provisions in customary law.

We are not aware of any precepts in the common law which provide for either servitude or forced labour.

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

Clearly this right has to permeate all sections of the community and should be horizontally interpreted as well.

2.4 Who should be the bearers of the right?

Clearly, the right only applies to natural persons.

- FF



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THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

3. RIGHT TO HUMAN DIGNITY

1) Content of the right

1.1 The Freedom Front is of the opinion that human dignity is one of the most fundamental human rights and, as such, one requiring entrenchment virtually without qualification in a bill of rights. We agree, accordingly, with section 10 of the transitional Constitution.

1.2 Controversial issues

Section 12

We suggest that the present section 12 of the transitional Constitution should be amended to provide for (i) hard labour in pursuance of a sentence to such imprisonment by a competent court; and (ii) certain types of work or service referred to in the motivation below.

Motivation: Such amendment would bring section 12 in agreement with article 8 of the International Covenant on Civil and Political Rights, not only in respect of (i) above, but also in respect of (ii) above, as the said article 8 excludes certain types of work or service from the concept 'forced or compulsory labour'.

Section 25

The Freedom Front agrees with section 25 as presently phrased, except that the reference to 'reading material' should be qualified (see the motivation below) as far as sentenced prisoners are concerned.

Motivation: The question of 'adequate reading material' could be very controversial. While it may be regarded as in accordance with human dignity to provide, for example, religious books and newspapers, we do not believe sentenced prisoners should be entitled to, for instance, a library to study at state expense.

2) Application of the right

- 2.1 The nature of the duty imposed on the state should be to take such steps as are reasonable in the circumstances to provide, by way of legislation and administrative directions and practice, for all persons to be treated with dignity, i.e. (i) general treatment of all persons; and (ii) treatment of particular individuals in a manner which is in agreement with their station or rank in civil, military or religious life, etc.

Motivation: While all persons are entitled to the protection of their dignity, the scope of the obligation may differ, depending on the circumstances.

- 2.2 The application of the right to common law and customary law requires certain adaptations. At common law there are, of course, already remedies for infringement of a person's dignity, such as: (i) a delictual action in civil law for infringement of dignitas; (ii) a criminal prosecution for

crimen injuria. The bill of rights in the new Constitution should not detract from these common law rules and remedies, but may bolster them and even expand their scope.

If the words customary law are not tautologous for the words 'common law', but are meant to refer to indigenous law, we are of the opinion that legislative provision should be made in the bill of rights obliging courts to apply indigenous law concepts relating to dignity where such concepts are relevant to the litigation in question.

Motivation: Constitutional Principle XIII does provide, to a certain extent, for the recognition and application by the courts of indigenous law rules.

- 2.3 Yes, we are of the opinion that the right to dignity imposes a constitutional duty on actors other than the state. It should be applicable to all human relationships.

Motivation: It would be illogical and inconsistent to require the state or state officials to respect the dignity of persons, but allow other persons to infringe this fundamental human right.

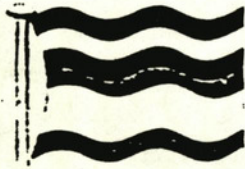
- 2.4 In our view the bearers of the right should be natural persons only. This right should extend to all citizens as well as aliens and even illegal immigrants, but not to juristic persons.

Motivation: This human right is so fundamental and inalienable that no derogation should be permitted. Juristic persons do not, however, have the attributes of personality which would enable them to claim this right. It is a human right par excellence.

2.5 The right to human dignity should, in the view of the Freedom Front, not be capable of limitation by the legislature. This statement is, however, subject to the ultimate decision as to the scope of the limitation clause (at present section 33(1) of the transitional Constitution), which at present reads as follows: 'The rights entrenched in this Chapter may be limited by law of general application, provided'

Motivation: This human right is so fundamental and inalienable that no derogation should be permitted.

- IFP



INKATHA

Inkatha Freedom Party

IQembu leNkatha Yenkululeko

THEME COMMITTEE No. 4
SUBMISSION FOR BLOCK No. 2
ON
HUMAN DIGNITY
RIGHT TO LIFE
PRIVACY

HUMAN DIGNITY

1. The notion of human dignity should be entrenched in the constitution as:
 - (a) a fundamental parameter against which the actual protection of human rights is to be assessed;
 - (b) a qualification of the constitutionally mandated social goals of the state;
 - (c) a recognition of the individual nature of human rights protection and of the preeminence of the individual over society;
 - (d) a broadening of the scope of human rights protection to encompass the consideration of personal aspects of human experience (the bridge between law and *pietas*)
2. Dignity is a philosophical concept. In order to be accommodated within a constitution it must be qualified as "social dignity" so as to transform it into a social concept which can be taken into account in the process of constitutional adjudication as an interpretative parameter (i.e.: the "perception of the relevant segment of our society at this juncture of its development").
3. In a constitution the most relevant aspect of social dignity is related to the determination of tests and parameters employed in the structuring of the "substantive equality" clause. Reference is made to our submission on Equality in which we have proposed that social dignity be a parameter of equality (i.e.: equal social dignity ... irrespective of social status).
4. Social dignity may also be mentioned in the Preamble. Reference is made to the text of the IFP proposed preamble previously submitted which even if it does not contain the word "dignity" it subsumes that notion within other relevant constitutional notions employed therein.
5. Social dignity may also be mentioned in the sections on "Inherent Rights and Obligations" and "State Obligations". Reference is made to the text of the IFP proposal with respect to these two sections which were previously submitted and which even if they do not contain the word "dignity" they subsume that notion within other relevant constitutional notions employed therein.
6. Social dignity is relevant with respect to the right to "Privacy" (see *infra*) which ought to be characterised also as "personal dignity".

7. Dignity is also relevant with respect to family rights in which "both spouses shall have equal rights, obligations and dignity". With respect to family relations, the "dignity" aspect covers important constitutionally sensitive aspects which are not catered for merely in terms of "rights and obligations".

PRIVACY

1. "Everyone shall have the right to the protection of privacy, of his or her personal life, of his or her domicile, and to protection of his or her personal dignity and reputation".
 - 1.1 Please note in addition to the broad notion of "privacy" this text identifies four specific sensitive areas of constitutional protection.
 - 1.1.1. "Personal life" relates to the IFP proposed notion of an area of constitutionally protected autonomy for individuals, and social, cultural and economic formations defined by the interests that people acting alone or with others may regulate and administer by themselves and in respect to which government does not have a compelling public need to intervene. In simpler words, an area in which the individual is King!
 - 1.1.2. "Domicile" is preferable to "residence" as it indicates the place where a person conducts his/her private life.
 - 1.1.3. The constitutional entrenchment of the notion of "reputation" is fundamental and ties with matters to be discussed in further blocks related to freedom of the media.
 - 1.1.4. "Personal Dignity" is to be protected in all cases, even outside one's own "domicile" or "personal life", for instance in the job place.
 2. "All private communications and all aspects of private life shall be protected".
 3. "Search and seizure may be allowed only on the basis of a warrant issued on the basis of corroborated allegations, and in the cases and with the guarantees established by the law. Personal search shall be allowed as an incident to a legitimate arrest and detention".
 - 3.1 The "search and seizure" clause could be part of the "privacy" clause rather than the "liberty" clause since it is more a limitation of the right to privacy than of the freedom from unwarranted arrest.
 4. "Anyone has the right to access the information collected on him or her by the Government or by private data or information banks."
 - 4.1 This provision can be found in several modern constitutions (see 1978 Constitution of Spain or the US 1974 Privacy Act) and reflect a fundamental need in a society in which the life of people are increasingly controlled by information management and distribution.

- NP

NATIONAL PARTY SUBMISSION

THEME COMMITTEE 4

BLOCK 2 : THE RIGHT TO HUMAN DIGNITY

A Content of the Right

It is difficult to view this fundamental right in isolation because it bears a direct relationship to the right to equality dealt with in our previous submission. It must also be borne in mind that the right to dignity stands in close relationship to the concept of "freedom" or "liberty".

It is self evident that the right to human dignity entails a fundamental right which is enshrined in Section 10 of the Constitution, 1993. The NP believes that the concept of human dignity is so fundamental that it should be broadened by elevating the reference to "the dignity and value of mankind" to a position of an inviolable and pre-positive value. This would provide the right with a greater impact in the whole Constitution. This could be achieved by way of a preamble to the bill of rights or by formulating the opening sections of the bill in such a way that such an effect is attained.

In addition to such a broadening, the bill of rights itself must retain the "ordinary" fundamental right itself.

The interrelatedness between human dignity, equality and freedom is perhaps best illustrated by saying that the dignity of mankind is the point of reference for the ideas of equality and freedom. In its basic substance the right to human dignity allows the ideas of equality and freedom to be attributed to the guarantee of human dignity.

There can be no greater violation of human rights (except the violation of life itself) than the violation of a person's human dignity. It is for this reason that our present bill of rights specifically prohibits slavery or forced labour in Section 12 and provides for the protection of the human dignity of detained persons in Section 25(1)(b) of the Constitution, 1993.

The NP's view is that this fundamental right is self-evident and universally accepted and should be non-contentious.

B Application of the Right

This fundamental right imposes the vertical application of a duty on all organs of State as contemplated in Section 7 and must apply at Central, Provincial and Local Government level.

A culture of respect and protection of the right to human

dignity must be encouraged, developed and nurtured throughout South African Society.

All law, legislation, common law and customary law must be scrutinized and applied by the courts in a spirit which ensures the maintenance of human dignity. Accordingly, this fundamental human right should have complete vertical and horizontal application and should apply to individual persons or groups or classes of persons as provided in Section 7(4) of the Constitution, 1993.

The right to human dignity should not be limited in any manner whatsoever, but should be absolute. This principle should apply even during a State of Emergency.

- PAC



10 March 1995

PAC PRELIMINARY SUBMISSION ON THE RIGHT TO HUMAN DIGNITY

South Africa is emerging from a history of violation of individual rights and human dignity. The Interim Constitution in Chapter 3 concentrated on the whole, on those rights which sought to limit the abuse of power by the state and restore human dignity.

CONTENT OF THE RIGHT TO HUMAN DIGNITY

This right requires that natural persons should be treated with the respect and dignity that is inherent in all human beings.

APPLICATION

1. The right to human dignity is applicable only to natural persons. It binds all and sundry the state, private bodies and individuals. It is a right that all human beings possess by virtue of being human beings and regardless of any distinction, either race, gender or social status.
2. In addition, this is an omnibus right which can be invoked against most kinds of violations of human rights. It can be used as a shield against personal searches, inhuman treatment and torture, capital punishment, unfair discrimination, servitude and enforced labour, unlawful arrest and detention or even against poverty, disease and ignorance.

R K Sizani

MP