

2/4/4/1/7/4

JOHN

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 4 FUNDAMENTAL RIGHTS

PARTY SUBMISSIONS

- Privacy (additional)
- Servitude and Forced Labour
- Freedom and Security of Person

TABLE OF CONTENTS

No.	Detail	Page
1.	ANC	1 - 10
2.	DP	11 - 23
3.	FF	24 - 31
4.	NP	32 - 36

**PLEASE NOTE:
THIS PACK INCLUDES ALL THE PARTY
SUBMISSIONS RECEIVED AS AT THURSDAY
30 MARCH 1995, 1.30PM**



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

PRELIMINARY SUBMISSIONS OF AFRICAN NATIONAL CONGRESS ON BLOCKS TWO AND THREE - THEME COMMITTEE 4.

FREEDOM AND SECURITY OF THE PERSON

Content of the Right

The right is described under Section 11 of Chapter 3 of the Interim Constitution. Section 11 (1), apart from guaranteeing the freedom and security of the person, also deals with the right not to be detained without trial. In our view, implicit in the content of (or antecedent to) freedom and security is the right not to be subjected to arbitrary arrest, which shall invariably violate the freedom and security of the person. Articles 3 and 9 of the Universal Declaration of Human Rights and Article 9(1) on the International Covenant on Civil and Political Rights deals with Section 11 (1) of the Interim Constitution in similar terms. We prefer the formulation of the right as follows:

Everyone has the right to freedom of security of person. No one shall be subjected to arbitrary arrest or detention.

This is a broader formulation in that it covers both the element of arrest and detention and is also specific in that it relates to the arbitrariness of any arrest and detention.

Section 25 deals extensively with the rights of detained, arrested and accused persons.

Our understanding of the freedom and security expressed in this right is that it is not exclusively physical and deals with the broader mental and spiritual freedom of expression, religion, belief, opinion and conscience. Security of the person shall cover among other things, the physical, mental and psychological integrity of the human being that must be secured or guarded from torture and other forms of degrading, cruel or inhuman treatment.

Section 11 (2) outlaws cruel punishment, treatment and torture. The right is similar to that of Article 7 of the International Covenant on Civil, and Political Rights. It has been refined in that it specifically excludes torture of any kind, including mental and emotional torture. It is our view that the integrity, dignity and security of the person can be further protected by adding the following to Subsection 11 (2).

No one shall be subjected without his or her free consent to medical or scientific experimentation.

The above mentioned rights are fundamental and have to be protected. Their significance can be best understood against the background of the arbitrary arrests, detention without trial, and torture, in various forms perpetrated against political activists who fought for the "freedom and security of the person".

Application of the right

2.1. There shall be a positive duty on the state.

2.2. The right shall apply at all levels of civil society.

2.3. Yes, it should. It should apply horizontally and among third parties inter se.

2.4. Natural persons

2.5. Only in terms of the provisions relating to rights being reasonably and/or necessarily limited in an open and democratic society.

FREEDOM OF EXPRESSION

Content of the Right

The right is set out under Section 15 of Chapter 3 of the Interim Constitution. It is our view that the establishment of the Independent Broadcasting Authority which secures impartiality of state media deals adequately with the concern of state financed or controlled media. Therefore, we are of the opinion that subsection (2) should not be included in the Bill of Rights.

The right to freedom of expression is closely related to free political activity. It is one of the foremost fundamental civil and political human rights that is universally accepted. It is advisable that the right should be reformulated to provide constitutional protection from racist, sexist or hate speeches calculated to cause hostility and acrimony, and, racial, ethnic or even religious antagonism and division. The right correctly includes artistic expression and scientific activity. The word "research" seems somewhat restrictive and could be substituted with the word "activity" which shall in any event, include research.

The following formulation of Section II (I) is suggested:

- 1). Every one shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific activity.**
- 2). Any speech, expression or advocacy of national, racial, ethnic, religious or other forms of hatred that constitutes incitement to racial, ethnic or gender discrimination, hostility or violence is forbidden**

We draw your attention to our comments in respect of 15(2), but state that, if at all included, it should be formulated as follows:

All media shall express a diversity of opinion.

The effect of this reformulation is to guide the media to reflect the diversity of opinion and thereby contribute to the social and cultural welfare of the country as a whole.

Application of the right

2.1. There shall be a positive duty on the part of the state when such rights are suppressed.

2.2. The right shall apply to all levels of civil society.

2.3. The right shall apply horizontally subject to the usual limitations.

2.4. Natural persons shall be the bearers of the right.

2.5. As under 2.5. of the Right to Freedom and Security above.

RIGHT TO ACCESS TO INFORMATION

Content of the right

The primary objective of this right is to provide persons with the right to obtain information from state organs at any level of government; this is consistent with a transparent and accountable administration (government) in an open and democratic society. It is our view, firstly, that the information must be provided in the general exercise or protection of rights and that the right should bind private institutions and other legal persons.

In so far as the state is concerned, sensitive information may be protected in terms of the general limitation clause. This will also apply to state security or law enforcement details. Private institutions or juristic persons such as companies will obviously be protected by the limitation clause, as well as the law in so far as it has a bearing on this aspect. The right shall obviously be read with the right of privacy.

The importance of this right must be seen against the backdrop of clandestine and secret methods of the past regime and the systematic concealment of relevant information. We therefore propose a construction which may be formulated as follows:

Everyone shall have the right of access to all information held by the state or any of its organs at any level or by social organisations or institutions in so far as such information is required for the actual or potential exercise or protection of any of his or her rights.

Application of the right

2.1. A positive duty is imposed on the state.

2.2. The right shall be subject to the reasonable limitations and shall apply to both common and customary law.

2.3. The right shall apply horizontally.

2.4. Natural persons shall be the bearers of the right.

2.5. As in 2.5. under the Right to Freedom and Security above.



Demokratiese Party
Democratic Party

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.



Demokratiese Party
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.

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

Save to the extent necessary to carry out the proper purposes of court ordered punishment and imprisonment, no person should be deprived of the right contained under this section.

3. RIGHT TO PRIVACY

Section 13 of the Interim Constitution reads as follows:-

"Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications."

We believe that this right has to be reformulated and reconsidered. We consider that the specific provisions dealing with searches and seizures of the home, as contained in section 13, above, should be separated from the general protection of privacy and should be included in a general clause dealing with liberty. The present draft forces the entire question of the constitutionality of searches and seizures to be dealt with in terms of the limitation clause (section 33). There is no reason why only one element of privacy should be singled out as is done in section 13. In other words, we would prefer to see a generally worded privacy clause under this heading, and a separate and detailed right against search and seizure contained in a clause dealing with the liberty of the individual.

We are of this view because the constitutional protection of privacy has been crucial in dealing with, for example, the question of abortion.

In Roe v Wade 410 US 113 (1973) the US Supreme Court held that a pregnant woman's right to decide whether or not to terminate her pregnancy could be justified by means of a right to privacy (in this case the Court developed this right from the right to liberty in the 14th Amendment).

In Morgentaler, Smoling and Scott v The Queen 44 DLR (411) (385) the concept of dignity and liberty were used by at least two judges of the Canadian Supreme Court to justify setting aside restrictive abortion legislation on the basis that the autonomy of the woman was infringed. The right to personal autonomy in decisions of a private and intimate nature was recognized by the court as a constitutional right to privacy.

The Constitutional Assembly must decide whether section 13 should confer general protection of autonomy of the individual and leave it to the courts to determine whether or not this entitles a woman to use the provision in order to achieve a more liberalised regime for abortions, or whether the constitution itself should provide for a right to an abortion in a separate provision in the Bill of Rights.

3.1 Nature of the duty to be imposed on the state

We believe that Justice Brandeis has summed up the position admirably:-

"The makers of our constitution conferred as against the government, the right to be let alone...the most comprehensive of rights and the right most valued by civilized men."

In South Africa the right to privacy has, in the absence of a Bill of Rights, often been violated by the legislature and the executive through, for example, laws conferring wide powers of search and seizure on the police, the prohibition of interracial sexual intercourse and marriage and interference of professional correspondence without court authorization. Clearly, these require the strongest protection in the Bill of Rights.

It is for the courts, and not for the constitution, to determine the equitable balance which society requires between the protection of the private sphere of the individual on the one hand and the public interest on the other.

This further requires that the means adopted by the state to infringe a basic right in pursuit of a legitimate purpose must be strictly curtailed and must be suitable, necessary and proportional to the objective being pursued.

We concur with the approach of the American courts which have struck down various statutes because they infringe substantive privacy rights in the absence of "a compelling state interest".

3.2 Application of the right to privacy to common law and customary law

A broad and benevolent interpretation, giving full scope to the protection of the right to privacy should be the aim of the new constitution. Precisely because section 33(1) as a general limitation clause, applies to all fundamental rights safeguarded in chapter 3, the right to privacy clause should be invoked in order to

determine whether a limitation to the right to privacy is justified and whether arbitrary limitations not envisaged by the constitution itself, will ever be countenanced.

The right to privacy is guaranteed explicitly in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights. It is also entrenched in most domestic bills of rights across the world.

In determining whether a particular privacy right ought to be recognized, the US Supreme Court usually asks itself the question whether such a right is "implicit in the concept of ordered liberty."

To give exact meaning to the protection of the right to liberty in our own constitution, we believe the following considerations should be the guidelines:-

- (1) The constitutional provisions safeguarding human rights and freedoms contained in chapter 3 of the constitution should be interpreted benevolently (i.e. in favour of those protected).
- (2) A provision guaranteeing a right or a freedom must be read within the context of the other sections in the chapter on fundamental rights and of the constitution as a whole.

We, therefore, come to the conclusion that the right to personal privacy should be given the widest protection possible - once again this being a function of the courts rather than the legislature.

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

Clearly, because of the importance and reach of the right to privacy, this should be applied to actors other than the state. Privacy of, for example, communication, should always limit the ability of others to gain, disseminate and use information against someone on the basis of violating this right.

In the German Basic Law the relevant articles which create a zone of personal privacy free from interference or violation, duties are imposed on actors other than the state, to uphold them.

3.4 Who should be the bearers of the right?

The right to privacy extends to the home, as well as to marriage, procreation, contraception, motherhood, family relationships, child rearing and education. These rights are said to be the substantive privacy rights distinguishable from informational privacy rights (e.g. privacy of communication). It is for this reason that we believe a proper separation should occur between these rights as stated in our introductory remarks on this section.

Substantive privacy rights immunise certain conduct of the person holding them. Because of the highly personal, and human nature of substantive privacy rights, the protection they afford appears to be primarily restricted to natural persons, whereas juristic persons seem to have a claim to certain informational privacy rights. The current wording of section 13 seems to restrict the protection of the right to privacy to natural persons. This is also implied by phrases such as "searches of his or her person, home or property", "the seizure of private possessions", and "the violation of private communications". It also suggests the exclusion of juristic persons from the operation of this section.

This seems to be further justification for a separation between a general right to privacy and a separate right (to be contained under the right to liberty to the right against unreasonable search and seizures, etc).

As currently formulated, the Interim Constitution provides a general limitation in respect of privacy, but does not impose the stricter limitation test in section 33(1)(a). The right to privacy can also be suspended as a consequence of the declaration of a state of emergency, but then only to the extent necessary to restore peace and order.

This appears to be a sensible approach which should probably be repeated in the final constitution. However, in imposing any limitations on the right to privacy, it is to be hoped that our courts will follow accepted human rights norms and that an interpretation in favour of individual liberty will always be paramount.



VRYHEIDSFRONT

P.O. Box 74693
Lynnwood Ridge
0040
Tel. (012) 47-4477
47-4375
47-4450/54/14/58

1st Floor Atrium 4
Perseus Park
cor. Camelia and Priory Roads
Lynnwood Ridge
Fax (012) 47-4387

FREEDOM FRONT

4. RIGHT TO PRIVACY (ADDITIONAL SUBMISSION)

1. Content of the right

1.1 Constitutional Principle IX (freedom of information) should be added to the short list, as publication of information can infringe the privacy of individuals concerned.

1.2 Controversial issues

See comment under Application of the Right below.

2. Application of the right

2.1 Nature of the duty to be imposed on the state. The State should be obliged by law to respect the privacy of the individual to the maximum extent that can be reconciled with effective and democratic government.

2.2 Common law and customary law provisions protecting the right to privacy should not be repealed, subject to the qualification that contemporary generally accepted rules relating to privacy in a modern democratic society must necessarily supersede any outdated concepts.

2.3 No, a right to privacy should not, in the bill of rights, impose a constitutional duty on actors other than the state. The common law, customary law and ordinary statute law (as opposed to the bill of rights) should provide adequate protection and remedies in the event of invasion of privacy by private persons. The reason why invasion of privacy by the state should be protected in all bill of rights is that the state is in an very strong position as against the individual, capable in many instances of subjecting the citizen to its will, and possibly abusing its position of power. For this reason the privacy of the individual should be entrenched in a bill of rights, which would be the only effective bulwark against invasion by the state of the right of privacy of the individual.

2.4 All natural persons, whether they be citizens or persons admitted to lawful residence in South Africa, should be bearers of the right to privacy. Suspected unlawful immigrants should not have this right, as

- (i) such a right might impede any inquiry into the legality of their sojourn in South Africa; and
- (ii) the unlawfulness of their entry into South Africa should entitle them to be treated only with dignity (as opposed to privacy).

Juristic persons should also have a right of privacy, but this right would naturally differ in content from the right of privacy of a natural person and its ambit would be dictated by the nature and functions of the juristic person concerned.

2.5 The answer to the question whether the right to privacy should be capable of limitation by the legislature depends on

- (i) principle; and
- (ii) the scope of the limitation clause in the new constitution (at present section 33(1) of the transitional Constitution, which provides "The rights entrenched in this chapter may be limited by law of general application, provided...')

As far as principle is concerned it is at least arguable that legislation should be able to limit or curtail a right to privacy, as the circumstances in which privacy may be in issue are diverse.

As far as the scope of the limitation clause is concerned it should be noted that at present all the fundamental rights in the present chapter 3 are capable of limitation. If the same premise is to apply to the limitation clause of the new constitution the question 'Should the right under discussion be capable of limitation by the legislature?' should not be answered in respect of each individual right at this stage, but at the stage when the limitation clause is discussed.



VRYHEIDSFRONT

P.O. Box 74693
Lynnwood Ridge
0040

Tel. (012) 47-4477
47-4375
47-5165
47-5162
47-5142
47-4454/50/58

1st Floor Atrium 4
Perseus Park
cor. Camelia and Priory Roads
Lynnwood Ridge
Fax (012) 47-4387

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.
-



VRYHEIDSFRONT

P.O. Box 74693
Lynnwood Ridge
0040

Tel. (012) 47-4477
47-4375
47-5165
47-5162
47-5142
47-4454/50/58

1st Floor Atrium 4
Perseus Park
cor. Camelia and Priory Roads
Lynnwood Ridge
Fax (012) 47-4387

FREEDOM FRONT

THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

SUBMISSIONS ON FREEDOM AND SECURITY OF THE PERSON

1. Content of the right

The freedom of the person is regarded as one of the major civil liberties. It connotes freedom of movement, to participate in or abstain from lawful activities, the right not to be arrested or imprisoned, save on defined and limited grounds, etc. It is the belief in this liberty which lies at the basis of opposition to excessive police and governmental powers, to detention in concentration camps or otherwise, without trial, to torture of any kind, and to the infliction of cruel, inhuman or degrading treatment or punishment.

In respect of torture we are of the opinion that the definition of 'torture' in the United Nations Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 10 December 1984 is too narrow: it is confined to acts by public officials or other persons acting in an official capacity. The Freedom Front submits that the prohibition of torture should expressly apply to everyone, i.e. the present section 11(2) of the Constitution should also have horizontal application.

The concept of freedom of the person is a basic element of the concept of democracy. It is, however, necessary to impose some restrictions on personal freedom. Such restrictions should increase as society becomes more developed and has more regard for the protection of others. Freedom does not mean licence, and the freedom of one person must be limited to provide for the freedom of others.

It should be the function of courts of law to decide where to draw the line between 'conflicting' freedoms of different persons. In this context the public welfare may well demand that a person's physical freedom must be sacrificed in the public interest. This is so in criminal proceedings in particular. A person should not, for instance, have a right to be released from detention, with or without bail, 'unless the interests of justice require otherwise', as is presently provided in section 25(2)(d) of the transitional Constitution. This provision has already led to great differences of opinion in the administration of justice. If a prima facie case of commission of a serious crime by an accused has been made out, the burden of proof should be on the accused to satisfy the court that justice demands his freedom and not his incarceration, as the interests of society should be paramount in the administration of justice.

Even in civil law justice may require that a debtor about to abscond and flee from the jurisdiction of the court should be arrested suspectus de fuga, as it has been in Roman-Dutch law and in contemporary South African Law, to abide the judgment of the court and safeguard the rights of the plaintiff in the proceedings.

2. Application of the right

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

The state should be legally obliged to give maximum effect to the concepts of freedom and security of the person, subject only to curtailment of such rights imposed by a limitation clause in the bill of fundamental rights. The present limitation clause (section 33 of the transitional Constitution) provides that limitation by law of the right of freedom and security of the person should, inter alia, also be necessary. The Freedom Front is convinced that the question of necessity should be determined by an independent judicial tribunal and not by any legislative or administrative body. Any other mechanism would render this right nugatory.

2.2 We are of the opinion that any conflict between common law or customary law rules relating to freedom and security of the person and the provisions of the bill of fundamental rights should be resolved in favour of the latter. This does not preclude, however, that common law or customary law provisions could be supplementary to the provisions of the bill of rights in these respects. We support this view.

2.3 The Freedom Front is of the opinion that this right should impose a constitutional duty on actors other than the state, viz all inhabitants of Spouth Africa. In other words, it should have vertical as well as horizontal application, otherwise the protection afforded by this right would be so inadequate that it would be ineffectual in protecting this fundamental freedom.

2.4 Juristic persons cannot be bearers of this right. All natural persons lawfully in the country should be protected by this right, but not unlawful immigrants.

2.5 The question of limitation of this right by the legislature has already been dealt with under 2.1 above.

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.

NATIONAL PARTY SUBMISSION

THEME COMMITTEE 4

BLOCK 3. FREEDOM AND SECURITY OF THE PERSON

1 Content of the rights

Two rights are involved, namely freedom of the person, and security of the person. Briefly, it may be said that **freedom of the person** refers to the physical liberty of a person, which then refers directly to the unlawful deprivation of that liberty, for instance, by detention without trial. As a matter of fact, this right is closely linked to the procedural rights of detained, arrested and accused persons in section 25 of the Constitution, 1993. Although it could be argued that the right has a broader scope and should include all forms of freedom, it seems that in the context of the existing Chapter 3, which provides amply for other forms and aspects of freedom, the right should have this narrower meaning.

Security of the person refers to the physical, mental and psychological integrity of the individual. This right *inter alia* prohibits torture and cruel, inhuman or degrading treatment and punishment - which is explicitly prohibited by section 11(2) of the Constitution, 1993. It may also include a prohibition on medical experimentation without consent (see for instance Article 7 of the International Covenant on Civil and Political Rights). In Canada, for example, the right even covers various forms of psychological trauma. In addition, the competency of a pregnant woman to decide on an abortion might be involved here. We are opposed to an unqualified right in this respect and, if necessary, this should be spelled out in the bill of rights, probably under the right to life. Other issues to be considered are whether **capital punishment** and any form of **corporal punishment** is in conflict with this right. Since the Constitution 1993, is silent on this, the courts will have to decide.

2 Application of the rights

As a general remark we wish to point out that in principle we are in favour of the broad and inclusive terms in which the present bill of rights contained in the Constitution 1993, are couched. This implies that when we argue in favour of or against a particular aspect in the discussion below, it does not necessarily mean we believe it should be expressly addressed in the bill of rights. This, of course, also implies that wherever this approach creates uncertainty about the exact meaning of a provision, or where the bill of rights does not expressly mention a particular issue, the matter will have to be decided by the courts.

2.1 Nature of duty on state

In principle, the state must refrain from instituting any practice, law or other action that amounts to, promotes, or condones the violation of these rights. The detail in connection with the position of detained, arrested and accused persons will be discussed under the procedural rights presently contained in section 25 of the Constitution, 1993.

2.2 *Application to common and customary law*

The rights should apply to common law and customary law.

2.3 *Other actors bound*

In principle, the bill of rights binds the state (section 7(1)). That does not mean that the bill of rights will never bind private persons. As a matter of fact, in terms of section 35(3), such a development is to be expected.

Against this background, we believe that, on the one hand, the state as primary institution, bound by these rights, may not adopt legislation dealing with private relations which allows for the violation of the freedom and security of the person. In other words, the state cannot make a law in terms of which a private person may subject another human being to these practices. That law will be unconstitutional and, in this sense, the rights under discussion will apply horizontally. It could also be argued that the state's duty to protect persons against the violation of these rights could include a duty to protect the individual against any abuse by anybody else and that the state should take positive steps in this regard.

2.4 *Bearers of the rights*

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

2.5 *Limitation of the rights*

Freedom of the person can be limited in terms of section 33(1) of the Constitution, 1993. In this regard cognisance should again be taken of the rights of detained, arrested and accused persons contained in section 25, which assumes that persons may be detained under certain circumstances and, therefore, that the freedom of the individual may be limited. However, with regard to the **security of the person**, it is impossible to imagine circumstances under which torture and cruel, inhuman or degrading treatment or punishment could be reasonable, justifiable in an open and democratic society based on freedom and equality and, moreover, necessary (section 33(1)).

2.6 *Wording*

We believe that the present wording of section 11 of the Constitution 1993, should be retained.