

# Chapter 64

## Slavery, Servitude and Forced Labour

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### 64.1 Introduction

No one may be subjected to slavery, servitude or forced labour.<sup>1</sup>

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<sup>1</sup> Section 13 of the Constitution of the Republic of South Africa Act 108 of 1996 ('FC' or 'Final Constitution').

The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only [by] positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory.<sup>2</sup>

The truth of the independent consciousness is accordingly the servile consciousness of the bondsman. This, it is true, appears at first outside of itself and not as the truth of self-consciousness. But just as lordship showed that its essential nature is the reverse of what it wants to be, so too servitude in its consummation will really turn into the opposite of what it immediately is; as consciousness forced back into itself; it will withdraw into itself and be transformed into a truly independent consciousness.<sup>3</sup>

Traditional forms of slavery and the positive law that condoned such practices have been almost completely abolished.<sup>4</sup> But given the estimated 200 million people in the world subject to coeval forms of bondage, Hegel's attribution of subjecthood to the slave may seem self indulgent, Lord Mansfield's indictment of the institution quaint.<sup>5</sup> The international trafficking of people for prostitution, prison labour, the sale of women for marriage, and the exploitation of domestic

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workers, agricultural workers and children are deeply entrenched, if not ineradicable, features of the South African landscape.

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2 *Sommersett v Steward* 99 Eng Rep 499, 510 (KB 1772)(Mansfield CJ)

3 GWF Hegel *The Phenomenology of Spirit* (1807, trans AV Miller, 1977) 117. Hegel was certainly correct to attribute to the slave a 'truly independent consciousness'. The cost of consciousness earned through such labour can be quite high. As Hegel notes, 'if a man is a slave, his own will is responsible'. See GWF Hegel *Philosophy of Right* (1821) § 57A, 239. Some might demur from a cosmology in which a slave is understood to participate in her enslavement by choosing to submit rather than risk death by resisting. However, as we shall see, deciding when an individual is to be held culpable for her condition is not an academic enquiry.

4 Despite having committed themselves through municipal law and international convention to the elimination of chattel slavery, Sudan and Mauritania represent two of the most notorious examples of regimes knowingly complicit in the perpetuation of the slave trade. Sudan — up to and through the genocide in Dafur — has been repeatedly remonstrated by UN officials and human rights NGOs for aiding and abetting slavery on a massive scale. See M Kaye *Forced Labour in the 21st Century* (2002) 3-4 ('In 1999, the United Nations Special Rapporteur on Human Rights in Sudan reported that militias, some-times with the support of forces directly under the control of the Sudanese authorities, systematically raid villages, torch houses, steal cattle, kill men and capture women and children as war booty. These women and children, whether captured in the course of the civil war or as a result of longer term conflict between communities, are often taken to the North where they are forced to work either for their captors or sold on to other people. Many of the people enslaved in this way have been subjected to physical or sexual abuse . . . In June 2000, the ILO's Committee on the Application of Standards . . . expressed deep concern at continuing reports of abductions and slavery.') See also *Report of the Working Group on Contemporary Forms of Slavery* (1996) United Nations ESCOR [48th Session] paras 96-100; *Preliminary Observations of the Committee on the Rights of the Child* (1996) Committee on the Rights of the Child [3rd Session] at para 12. As of 1997, Mauritania was home to 90 000 descendants of slaves. These persons worked without compensation and were not free to marry or to educate their children without the consent of their owners. See E Burkett 'God Created Me To Be A Slave' *The New York Times* (12 October 1997) 56; 'Mauritania Country Report on Human Rights Practices for 2002' *United States Department of State Country Reports on Human Rights* (2003).

5 Y Rassam 'Contemporary Forms of Slavery and the Evolution of Slavery and the Slave Trade under International Customary Law' (1999) 39 *Virginia J of IL* 303, 305 (Rassam compares the estimated 20 million slaves bartered in the Atlantic slave trade over 350 years with estimates of numbers currently in bondage.)

Domestic case law has yet to meaningfully engage these contemporary forms of bondage. However, a spate of recent legislation, the ratification of international instruments and a burgeoning body of foreign case law provide the requisite scaffolding for an emergent constitutional doctrine. This chapter marries this nascent jurisprudence on slavery, servitude and forced labour to recent fieldwork by government departments, academics and CBOs in an attempt to distinguish those economic, social and legal relationships that warrant constitutional censure from those pernicious practices that must be engaged in some other way.

## 64.2 Doctrinal dilemmas

The Constitutional Court's corpus of dignity, equality, socio-economic rights, freedom and security of the person and customary law jurisprudence, as well as the foreign and international learning on slavery, servitude and forced labour, provide our exploration of FC s 13 with a substantial amount of traction. The absence of case law that engages FC s 13 directly means that much of our analysis remains speculative.

While the three conditions proscribed by the FC s 13 possess distinct content, the three terms do not lend themselves to the articulation of bright line rules. Each of these three terms can, with enough creativity, be used to challenge many a practice that might fit more comfortably within the ambit of one of the other terms. The concatenation — and the inevitable elision — of these three appellations has its uses. Read together 'slavery, servitude and forced labour' mark an entire spectrum of constitutionally suspect legal, social and economic practices: from those that rob human beings entirely of their physical autonomy to those that conspire to deny human flourishing through more subtle forms of exploitation. This last point suggests that the presence of a clear textual proscription of slavery means that one can, via the proscriptions on servitude and forced labour, attend in a somewhat more nuanced manner to coercive relationships that impair individual dignity even as they offer the illusion of autonomy.

The social practices most apt to satisfy the requisite desiderata for slavery, servitude and forced labour are those in which the state can remedy a problem by 'simply' ensuring that an individual's autonomy is not so readily violated. We are all justifiably naïve enough to believe that the state can eliminate sexual slavery by arresting the traffickers, end the servitude of women by withdrawing state sanction for *lobola*, and abolish forced labour by denying wardens the power to use work as a tool of prison discipline. But the trajectory of this injunction to free ourselves from the most pernicious forms of physical coercion leads, almost ineluctably, to a desire to rid our society of those practices that constrain us socially, psychologically, economically and emotionally. In short, our understanding of FC s 13 reflects the evolution of our polity from a night watchman state committed to ensuring *freedom from* undue interference with an individual's autonomy to a social welfare state that provides individuals with the material conditions of *freedom to* govern themselves and to shape meaningfully their lives.

This evolution of the right's extension creates a number of difficulties.

As we move away from degradation to optimization, from brute force to more subtle forms of coercion, many state policies meant to further the common good attract constitutional scrutiny. Community service programmes often employ coercive practices that 'force' individuals to work for the common good. The state's

emphasis on improving the material conditions of its citizens through such forced labour clashes with quite fundamental concerns about the extent to which the state can use individuals as mere means to further its ends. A right concerned, at bottom, with eliminating physical coercion and rather adamant structures of domination may yet endorse remedies that rely upon intentional state-sponsored physical coercion. That the very same right can be both the disease and the cure demonstrates the extent to which our understanding of slavery, servitude and forced labour is bound up with contested notions of the common good.<sup>6</sup>

The synonymy and the alterity of the terms slavery, servitude and forced labour generates significant tension in attempts to expand the extension of the

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three discrete prohibitions beyond their easily cognisable core. Contemporary forms of 'slavery' that do not entirely offend our ethical sensibilities may not seem substantially different from the most pernicious forms of modern 'servitude'. A rather odious form of 'forced labour' may seem experientially equivalent to rather temperate manifestations of 'servitude'. So while we might prefer to plot along a single continuum all of FC s 13's suspect practices, the open texture of these three terms, and our inclination to prescribe the most obviously offensive practices captured by each of the three prohibitions, seems to militate against the creation of any such metric. We may find that FC s 13 produces the somewhat uncomfortable result of proscribing the lesser of two evils.

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6 Seemingly abstract inquiries as to how much we owe our fellow citizens have a direct bearing on very concrete legal findings with respect to slavery, servitude and forced labour. In the course of her now classic article, 'A Defence of Abortion', JJ Thomson asks us to imagine a world-renowned, but diabetic, violinist who requires the use of your kidneys — as a synecdoche for dialysis — in order to stay alive and to keep filling the world with her beautiful music. (1971) 1 *Philosophy & Public Affairs* 47. JJ Thomson claims, and I think that most of us would agree, that 'having a right to life does not guarantee having either a right to be given the use of or a right to be allowed continued use of another's body — even if one needs it for life itself.' *Ibid* at 56. You would be well within your rights to deny her such access. Few people believe human solidarity entitles others — especially strangers — to make this type of demand on our person. Most readers would consider such a coercive relationship to be exactly the kind of state of affairs that FC s 13 forbids. The point of this intuition pump, however, is not to force the reader to reflect upon 'easy' and 'obvious' cases of slavery, servitude and forced labour. Thomson's violinist-kidney-as-dialysis thought experiment is designed to force her readers to reconsider the relationship between a woman and the foetus she carries. The thought experiment possesses the obvious virtue of eliminating arguments about whether or when a foetus counts as a person. The only question that remains is whether the foetus can demand, at any moment prior to viability, that the woman continue to carry her to term. A reader who agrees that the violinist has no right to demand use of the reader's kidneys in manner that radically curtails her physical autonomy is now asked to distinguish — if she can — ostensibly similar demands made on her behalf of a foetus with respect to the woman carrying it.

Clever as this intuition pump may be, it begs as many important questions as it answers. Sure, criminal sanctions that force a woman to bring a foetus to term does look a lot like 'forced labour'. See § 64.3(c) *infra*. See also A Koppelman 'Forced Labour: A Thirteenth Amendment Defense of Abortion' (1990) 84 *Northwestern University Law Review* 480 (Argues that State cannot carry burden of justification for infringement of the right to be free of involuntary servitude because the State cannot prove that a foetus possesses the requisite indicia for personhood that would at least serve as the initial foundation for any justificatory exercise.) But what the violinist/ foetus analogy forces us to ask — and cannot answer — is exactly how much we owe to fellow members of our community? Progressive taxation schemes, social welfare programmes and other forms of both public and private insurance mediate the redistribution of wealth in a manner that avoids charges of forced labour that direct redistribution would inevitably elicit (Few complain about taxes being used to build toilets; many would complain if they had to dig a pit latrine). With respect to many forms of redistribution — compulsory prison labour, community service requirements *qua* qualifications for entry into a profession and military conscription — there can be no masking of the coercion required to effect the desired end. To what extent are these programmes the moral and the constitutional equivalent of the provision of a kidney for the violinist and a womb for the foetus? See § 64.5(f), (g) and (h) *infra*.

The economic exigencies of South African life place other kinds of limits on constitutional construction. All South African lawyers know that the language of the Final Constitution only requires that the state undertake reasonable steps to realize progressively various socio-economic rights.<sup>7</sup> Although the language of FC s 13 suggests that similar internal limitations ought not to read into FC s 13, we could still employ *Grootboom*-like criteria to determine under FC s 36 whether, say, the state had crafted a comprehensive programme to redress the problem of farm worker servitude. The real problem is this: structural employment is so high and so resistant to neo-liberal macro-economic policy interventions that only the most extravagant government programme may be able to manumit farm workers.<sup>8</sup> If this is so — and we do not wish to be misunderstood as maintaining such at this juncture — then it might well constrain our assessment as to whether or not the state has discharged its duty to eliminate all constitutionally suspect forms of slavery, servitude or forced labour. Put somewhat differently, the kinds of social conditions in an advanced western democracy that might lead us to declare unequivocally that a violation of FC s 13 has occurred might not warrant a similar assessment here: not because we are disinclined to view the conditions as morally deficient or constitutionally suspect, but because we lack currently the capacity to alter them.<sup>9</sup>

This last observation — with which some may well differ — is underwritten by a certain modesty that experience imposes upon constitutional lawyers. Much as we might like the courts to be engines of social change in the service of ends we believe noble and true, they lack the requisite authority to bring about — on their own — radical transformation. Courts are good at the resolution of discrete disputes and putting parties on notice that they have not discharged their duties. What we try to

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suggest in the following account is that many individuals — from prostitutes to prisoners, domestic workers to farm labourers, comfort women to conscriptees — toil in conditions of slavery, servitude and forced labour. Appropriately crafted FC s 13 challenges could put the government on notice that it needs to create

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7 See, eg, S Liebenberg 'Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33; D Brand 'Food' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 56C.

8 See § 64.6(c) *infra*, for an analysis of the conditions of farm workers in terms of FC s 13's prohibition of servitude.

9 The ethically ambiguous condition of the slave identified by Hegel and Weber is also a central feature of South African liberation discourse. See M Weber 'Politics as Vocation' in HH Gerth & C Wright Mills (eds) *Essays in Sociology* (1988) 77, 120 ('[A]n ethic of responsibility, ... [requires] one to give an account of the foreseeable results of one's action.') Consider Nelson Mandela's justification for the armed struggle: 'Without violence there would be no way open to the African people to succeed in their struggle against the principle of white supremacy. All lawful modes of expressing opposition to this principle had been closed by legislation, and we were placed in a position in which we had either to accept a permanent state of inferiority, or to defy the Government' — 'I am Prepared to Die' Statement from the Dock at the Opening of the Defence Case in the Rivonia Treason Trial, Pretoria Supreme Court (20 April 1964). Mandela's statement ratifies an ethic in which all persons are held accountable and sounds a cautionary note with regard to those who would make the state alone culpable for conditions of slavery, servitude and forced labour. Mandela understands that to do so robs entirely the individual — whether subordinated or subordinating — of the agency upon which any meaningful notion of citizenship is predicated. This account of agency is, it must be said, political, not metaphysical. See S Woolman & L Yu 'The Selfless Constitution: Flourishing & Experimentation as the Foundations of the South African State' (2006) 21 *SA Public Law*.

comprehensive and coordinated programmes designed to restore the dignity of these individuals.

### 64.3 Drafting history

Despite the long history of legally-sanctioned physical, social and economic coercion in South Africa, the drafters of the Interim Constitution did not see fit to include a prohibition on slavery. Section 12 of the Interim Constitution read: 'No person may be subject to servitude or forced labour.'<sup>10</sup>

Advocates of a broader prohibition were fortunate to come away with the language of IC s 12.<sup>11</sup> The African National Congress ('ANC') initially proposed placing the above guarantee under the right to dignity.<sup>12</sup> The ANC's preferred rendering would have also carved out a number of express exceptions to 'forced labour'.<sup>13</sup> After much deliberation at the Multi-Party Negotiating Forum, both proposals were dropped.

During the drafting of the Final Constitution, several different formulations of the right were considered by the Constitutional Assembly.<sup>14</sup> The Technical Committee with responsibility for this right eventually decided to add slavery to the list of prohibited activities. That decision was ratified by the Constitutional Assembly.

### 64.4 Definitions

This section addresses the extension of each of the three terms found in FC

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- 10 Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution').
- 11 Only on the most aridly textual reading would IC s 12's formulation have not prohibited slavery.
- 12 See *A Bill of Rights for a Democratic South Africa: Working Draft for Consultation* (1991) 7 SAJHR 110. The Draft Bill was prepared by the Constitutional Committee set up by the ANC's National Executive Committee.
- 13 The enumerated activities were: work carried out during a prison sentence; military or national service by a conscientious objector; services required in an emergency; and work required as part of normal civil obligations. This formulation of the exceptions to forced labour mirrors those exceptions found in many international human rights instruments. See § 64.4(c) *infra*.
- 14 Submissions to the Constitutional Assembly by political parties, CBOs and other interested parties are housed at [www.law.wits.ac.za](http://www.law.wits.ac.za).

s 13: 'slavery', 'servitude' or 'forced labour'.<sup>15</sup> Each subsection concludes with a working definition that delineates the ambit of the particular prohibition.

## (a) Slavery

Article 1(1) of the Slavery Convention of 1926 reads:

Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.<sup>16</sup>

This gloss on 'slavery' means that a slave need not be subject to forced labour, or indeed, required to do any labour at all. The definition treats the bundle of entitlements that make up slave ownership much as we would treat any of the

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15 However much the concepts of slavery, servitude and forced labour overlap and therefore over-determine the proscription of various practices, the distinction between the terms retains its relevance in times of national emergency. FC s 37(5), States of Emergency, reads in relevant part: 'No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise '(c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table'. In terms of the table, the rights to be free from slavery and servitude remain non-derogable. Legislation passed in terms of FC s 37 may allow for some forms of forced labour.

Slavery and servitude may, on occasion be non-derogable. But are they non-amendable? The Constitutional Court has intimated that some provisions could be so fundamental, so 'basic' to the Final Constitution, that they may not be removed by constitutional amendment. See *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 204 ('[T]here are certain features of the constitutional order so fundamental that even if parliament followed the necessary amendment procedures, it could not change them'); *Premier of Kwa-Zulu Natal & Others v President of the Republic of South Africa* 1996 (1) SA 769 (CC), 1995 (12) BCLR 1361 (CC) at para 64 ('[A] purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and re-organizing the fundamental premises of the Constitution might not qualify as an 'amendment' at all'); *United Democratic Movement v President of the Republic of South Africa* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC) at para 17 (Basic structure argument foregrounded, but not dispositive.) The 'basic structure argument' poses at least three related formal problems for constitutional analysis: (1) the identification of those first 'principles' deemed so basic to our constitutional democracy that they cannot be altered, but not so basic as to have been declared immutable at the time the Final Constitution was drafted; (2) the presence of rules that can be amended by normal constitutional procedures but which are deemed so inextricably linked to the basic structure of constitutional democracy that they are, simultaneously, immune from amendment; and (3) the legitimacy of a judicial decision in which a court charged with securing compliance with the basic law refuses to enforce a textual provision of the basic law because a deeper non-textual source of basic law precludes it from doing so. For more on the extent to which a commitment to constitutional supremacy inevitably involves a justification for the basic law that goes beyond the text of the basic law, see F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11. For the technical differences between, and the numerical requirements for, the amendment processes established by FC ss 74(1) and 74(2), see S Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 17. See also Z Motola & C Ramaphosa *Constitutional Law: Analysis and Cases* (2002) 96 (Despite the obvious difficulties with the basic structure argument, the authors suggest that if some version of the argument were accepted, then the prohibition of slavery and servitude would be one of the provisions of the Final Constitution immune to amendment.)

16 Slavery Convention (1926) 60 LNTS 253 (Ratified by South Africa on 18 June 1927).

entitlements of normal property ownership. Neither normal property ownership property nor slave ownership requires that the owner's entitlements be exercised.<sup>17</sup>

The standard notion of property rights as a bundle of discrete entitlements only does so much work with regard to this definition of slavery. The Convention's take on slavery does not contemplate disaggregating the bundle of entitlements in the self into 'slave-entitlements' and 'non-slave entitlements'.<sup>18</sup> It prohibits the ownership of *any* entitlement in another.<sup>19</sup> Moreover, the Convention's definition embraces those instances where the state of slavery is entered into voluntarily.<sup>20</sup>

The virtue of the Convention's definition is that it does not reduce slavery to 'a relatively limited and technical notion' dependent upon the 'destruction of the juridical personality.'<sup>21</sup> Too many contemporary forms of slavery would elude such a narrow construction.<sup>22</sup>

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17 J Asher 'How the United States is Violating International Agreements to Combat Slavery' (1994) 4 *Emory International LR* 215, 238-9 ('If the convention was aimed solely at pure slavery, the word 'any' would not have been included since chattel slavery was ownership of humans, pure and simple. The use of the word 'any' is a significant departure from chattel slavery. The word suggests that a person can be held in servitude or slavery so long as the 'employer' engages in any of the typical behaviours common to owners. Such behaviour could be as simple as keeping a person in place against his or her will.')

18 Slave ownership *qua* property ownership entails the control of *any* aspect of a person's right to dispose of herself as she chooses — not just control over movement and commercial usage. C Argibay 'Sexual Slavery and the Comfort Women of World War II' (2003) 21 *Berkeley J of IL* 375, 375 ('Slavery is often equated with forced labor or deprivation of liberty; however, sexual autonomy is a power attaching to the right of ownership of a person, and controlling another person's sexuality is, therefore, a form of slavery.')

See *Prosecutor v Kunarac* Application Nos IT-96-23-T and IT-96-23/1-T (Appeals Chamber ICTY, 12 June 2002), available at <http://0-www.un.org.innopac.up.ac.za/icty/kunarac/appeal/judgement/kun-aj020612e.pdf> (accessed on 15 January 2005)(Appeals Chamber of the ICTY considers 'control of sexuality' as a factor to be considered when determining whether the crime of enslavement was committed. The other factors listed are control of movement, control of physical environment, psychological control, measures to prevent escape, force or threat of force, duration assertion of exclusivity, cruel treatment and forced labour.) See also P Bridgewater 'Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence' (2001) 7 *Washington and Lee Race and Ethnic Ancestry Journal* 11 (The use of people for reproduction constitutes 'involuntary servitude' under US Constitution, 13th Amendment.)

19 Asher (*supra*) at 239.

20 See Argibay (*supra*) at 379-80:

Slavery is the antithesis of freedom. As a basic principle of the rule of law, freedom cannot be relinquished. It is not an exercise of paternalism to say that no one can consent to enslavement; it is fundamental to the nature of freedom itself. Freedom and equality under international law are based on a concept of the human being as free and able to fulfil his or her capabilities. Freedom requires protection of individual autonomy, respect for every person's potential and development, and the presence of enabling economic social and cultural conditions. Consent, to be valid, must be based on knowledge and sustained by reason and the ability to make free and informed choices. Consent is not valid when it is not knowingly and freely given; when there is deceptive or distorted information, or no information at all; when there is coercion, violence, or the threat thereof; when the victim is subject to inhumane and debilitating conditions, kept isolated from social support or denied the means of survival and without access to means of communication, assistance, or redress; or when there is exploitation of the victim's vulnerability. Consent is not free when the victim fears retaliation in the form of physical or mental abuse.

See also Rassam (*supra*) at 334, fn 141.

The difficulty with the Convention's definition is that it has the potential to draw too many complex relationships — from the workplace to the homestead to the bed — into its orbit. We should be able to say with confidence that control over another person's reproductive capacity or sexual activity reflects an abuse of a normal 'power of ownership', but that such incidental infringements of autonomy as 'curfew' for a teenager are not captured by our definition of slavery.

When then is the exercise of 'entitlements of ownership' of one person by another sufficient to trigger the protection afforded by FC s 13? Justice O' Regan's oft quoted dictum in *Dawood* provides a useful departure point:

Human . . . dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman and degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected. In many cases however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.<sup>23</sup>

One would like to be able to say that entitlements that would infringe the dignity of those over whom they are exercised (control of reproductive capacity) amount to slavery and those that do not infringe a person's dignity (curfew) do not amount to slavery. Unfortunately, the use of dignity as the linchpin for slavery analysis is not an entirely straightforward matter. The *Dawood* dictum intimates that it is the infringement of FC s 13 (slavery) that establishes an infringement of FC s 10 (dignity) — and not the other way around. This relationship reflects the first rule of South African dignity jurisprudence. Where a court can identify the infringement of a more specific right, FC s 10 will not add to the enquiry.<sup>24</sup>

21 M Bossuit *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (1987) 167 as cited in Asher (supra) at 246.

22 MC Bassiouni 'Enslavement as an International Crime' (1991) 23 *New York University Journal of Law and Politics* 445. Too narrow a definition of slavery also increases the pressure to broaden the meaning of 'servitude'. Bossuit (supra) at 167 ('[S]ervitude [is] a more general idea covering all possible forms of man's domination of man.') The danger with such a failsafe approach to slavery and servitude is that it seems to diminish the suffering associated with those kinds of bondage classified as servitude rather than those identified with the more invidious term slavery. While this definitional exercise may appear rather academic, its consequences are not. The eradication of contemporary forms of slavery is contingent on the priorities of law enforcement officials. Rassam (supra) at 349 (Arguing for a more inclusive definition that would enable historically disadvantaged groups to challenge oppressive social and economic practices under both domestic and international customary law.) Law enforcement officials tend to devote more time to crime that captures the imagination of politicians and the electorate.

23 *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) ('*Dawood*') at para 35.

24 *Ibid.*

However, the *Dawood* Court's characterization of dignity as a residual right that 'may' give expression to international human rights norms belies the heavy lifting that it actually does. In *Ferreira*, Justice Ackermann wrote:

Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their 'humanness' to the full extent of its potential. Each human being is

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uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.<sup>25</sup>

Dignity is meant to secure the space for self-actualisation.<sup>26</sup> (Self-actualisation describes a political and not a metaphysical state.) Dignity as the condition for self-actualisation can inform our understanding of slavery in number of ways.<sup>27</sup> Dignity *qua* slavery underwrites the proscription of those practices where the exercise of 'entitlements of ownership' in one person by another 'impair substantially' the ability of a person to develop optimally her unique talents.<sup>28</sup> The exercise of entitlements of ownership in the context of a curfew for persons below the

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age of majority would not impair significantly the development of unique talents. The exercise of entitlements of ownership in the context of sexual trafficking and exploitation would.

Our dignity jurisprudence does more than merely proscribe the constitutionally repugnant practice. It also seeks to purge our legal system of all those rules of law that give aid and comfort to the repugnant practice. In *Dawood*, the Constitutional Court noted that it was not simply laws that prevented persons from entering into a married relationship that constituted an impairment of individual dignity. The *Dawood* Court concluded that 'any legislation that significantly impairs the ability of

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25 *Ferreira v Levin* 1996 (1) SA 984 (CC), 1013-1014, 1996 (4) BCLR 1 (CC) ('*Ferreira*') at para 49.

26 The majority in *Ferreira* rejected Justice Ackermann's view that IC s 11(1) and FC s 12(1) contain a residual freedom right. *Ibid* at paras 170-185. The current Constitutional Court has, however, accepted Justice Ackermann's notion that dignity is meant to secure the space for self-actualisation. It is important to note that self-actualisation is not, on this account, realized through political participation, but rather through a commitment to negative liberty. *Ferreira's* dignity as freedom is developed in a long line of cases. See, eg, *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41 ('[D]ignity is at the heart of individual rights in a free and democratic society'); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at paras 28-30 (Court, finding the common law criminalization of sodomy a violation of the right to dignity, wrote: '[I]t is clear that the constitutional protection of dignity requires us to acknowledge the value and the worth of all individuals as members of society.' The language echoes Justice Ackermann's emphasis in *Ferreira* on the inextricable link between dignity and the need for individual freedom from state intervention. Individual freedom — negative liberty — thus becomes the foundation for dignity. Dignity, in turn, becomes the basis for equality.)

27 The link between dignity and slavery is buttressed by the drafting history of the Final Constitution. See § 64.3 *supra*.

spouses to honour their obligations to one another would also limit that right.<sup>129</sup> Given that the immigration laws under scrutiny in *Dawood* made it effectively impossible for the couples in question to cohabit, and that cohabitation forms a central part of a married relationship, immigration laws that significantly impaired the capacity of permanent residents to live with their spouses in South Africa were understood to constitute an unjustifiable limitation of the right to dignity.<sup>30</sup>

Assume that sexual trafficking was deemed to be a violation of the prohibition against slavery.<sup>31</sup> As we show below, where immigration legislation has the consequence of forcing sexual trafficking victims to choose between bondage and deportation, then the provision at issue may violate the prohibition against slavery.<sup>32</sup> To make the prohibition against slavery meaningful under these conditions

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28 While this distinction between curfews and concubines is fairly stark, it does not tell us when the exercise of entitlements of ownership in one person by another actually amounts to slavery. Again, the method of analysis that informs the construction of the constitutional norm of dignity can assist us in discriminating between conditions of slavery and non-slavery. Dignity, unlike equality, does not much depend on our ability to identify invidious differentiation between classes of persons. Dignity rests instead on the recognition of a core set of entitlements that are the necessary, if not sufficient, conditions for self-actualisation. For the most part, current South African dignity jurisprudence does not specify those *positive* goods that a person requires for self-actualisation. See *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) (Court finds violation of FC s 26 and grounds the entitlement to adequate housing in the right to dignity. But while Court describes the entitlements secured through socio-economic rights as essential components of a just political order because they are necessary for self-actualisation, it is loath to tell the government exactly how it should go about making provision of those goods.) Our extant dignity jurisprudence identifies an ever-expanding list of practices that prevent self-actualisation. The Constitutional Court has begun the compilation of this list by identifying those practices that are 'universally' accepted as ethically repugnant. Quite often the universe of these repugnant practices in international human rights documents consists of the aspirational, rather than actual. However, once the Constitutional Court imports a discrete international human rights norm into our municipal law, the stage is then set for the expansion of the list of repugnant practices. The Constitutional Court augments this list of internationally designated repugnant — and now constitutionally infirm — practices by identifying analogous practices. So, for example, in *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* the Constitutional Court held that statutory provisions that did not accord same-sex partners the same set of entitlements to permanent residence violate the right to dignity. 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC). In *Satchwell v President of the Republic of South Africa & Another*, the Constitutional Court found that statutory provisions withholding spousal survivor benefits to the survivors of same-sex relationships were analogous to statutory provisions that did not accord same-sex partners the same set of entitlements to permanent residence. 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC). As a result, the refusal to grant spousal survival benefits to the survivors of same-sex relationships constitutes a violation of the right to dignity.

29 *Dawood* (supra) at paras 35–7.

30 Ibid.

31 Human trafficking, forced prostitution, debt bondage, forced labour and exploitation of domestic workers are 'obvious candidates for inclusion in the term "modern forms of slavery".' Rassam (supra) at 320. Rassam offers two criteria, consistent with our own, when attempting to determine whether a practice qualifies as a modern form of slavery: (1) extreme direct physical or psychological coercion that gives an individual or the state control over every aspect of another person's life; and (2) the presence of state complicity in the practice or a failure to adequately enforce domestic laws prohibiting the practice. Ibid.

32 See Bassiouni (supra) at 458–459. As Bassiouni observes, slavery-like practices operating under colour of law are relatively commonplace:

requires that a person prosecuted under immigration laws, after having escaped a slave-like state, possess a reasonably robust form of legal protection.<sup>33</sup>

*Definition of Slavery*

1. Slavery is the exercise by one person of any or all of another person's rights of ownership in her self. This definition does not contemplate disaggregating the bundle of entitlements in the self into the ownership of slave-entitlements and the ownership of non-slave entitlements. It prohibits the ownership of any entitlement in another.
2. Application of the term 'slavery' should be limited to those practices in which the exercise of entitlements of ownership of one person by another 'impair substantially' the ability of that original owner to pursue the development of 'her unique talents'.
3. A slave need not be subject to forced labour, or indeed, any labour at all to secure the protection of this prohibition.
4. A person may not consent, contra of or enter voluntarily a relationship of slavery. A person who so contracts or consents remains a slave for the purpose of FC s 13.
5. The prohibition of slavery proscribes those rules of law that directly and indirectly support the practice of slavery.

## **(b) Servitude**

Traffic in children for adoption, a lucrative operation which has grown significantly over the years, has resulted in a large number of children from Asia and Latin America being brought into North America and Western Europe. The lack of legislation and/or legal controls in the countries of origin or the possibility of evading the law in the destination countries has allowed these practices to continue under some color of law. . . . Technically, the child in this case is not a slave, but since the child has no physical control over his person and, in terms of legal capacity, no control over his treatment, for all intents and purposes such activity is slave-like. The primary reason for these still prevalent manifestations of slavery and related practices is that the basic legal element in international instruments on slavery is the total physical control by one person over another. Whenever the control is less than total, such as when it is partial and limited in time, it is removed from the system of protections developed by these international instruments.

See Bassiouni (supra) at 458-459.

33 See § 64.6(a) infra (Analysis of the extent to which our immigration laws offend FC s 13.) See also S Drew 'Human Trafficking: A Modern Form of Slavery' (2002) 4 *European Human Rights LR* 481, 490 ('Organisations frequently state that an approach to human trafficking must be seen as human rights based. What this means in practice is that action against human trafficking must involve not only affirmation and enforcement of its illegality through the criminal law — which law acts to protect the interests of society — but positive protection of the rights of the adults and children who are trafficked. In adopting such a human rights based approach, any strategy to deal with human trafficking must involve legalisation in a number of senses. First, a degree of legalisation of the entry of unskilled labour is required since it is impossible to ignore that there is an association between restricting legal immigration and the recent growth in trafficking.')

The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery ('Supplementary Convention') provides a useful departure point for defining servitude.<sup>34</sup> Article 1 identifies the following prohibited practices as servitude (whether or not they are similarly captured in the Slavery Convention):

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- (a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined<sup>35</sup>;
- (b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;
- (c) Any institution or practice whereby:
  - (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
  - (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
  - (iii) A woman on the death of her husband is liable to be inherited by another person;
- (d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.<sup>36</sup>

How does servitude differ from slavery? On our account, slavery consists in the exercise of the entitlements of ownership in a person (the slave) by another (the slave-master) and operates through the overt exercise of force or coercion. Servitude is dominion underwritten by 'law, custom or agreement'.<sup>37</sup> But neither law, nor custom or nor agreement ought to be construed to mean consent by the bondsman to her abject conditions. Consider the caste conditions of an 'untouchable' in India. Members of higher castes do not exercise rights of ownership.

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34 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956) 226 UNTS 3 (Not yet ratified by South Africa) ('Supplementary Convention'). Although South Africa has not ratified this convention, it still reflects the international community's understanding of the concept of servitude and thereby informs our process of constitutional interpretation. See FC ss 232 and 233. See also J De Waal, I Currie & G Erasmus *The Bill of Rights Handbook* (4th Edition, 2001) 265.

35 Debt bondage or bonded labour occurs when persons work in conditions of servitude to pay off a debt. That debt is often incurred by another. Worse still, the debt is rarely paid off because of high interest rates charged by the 'lender/owner'. Debt bondage often looks like slavery not only because the debt becomes permanent but because the debt is often passed down to the next generation.

36 See also Supplementary Convention, Article 7(b): 'A person of servile status [is] a person in the condition or status resulting from any of the institutions or practices mentioned in article 1 of this Convention.'

The untouchable appears to work 'voluntarily' for all those above her. However, she is not free to change her status as an untouchable because of the nature of the caste system. In sum, servitude is about status.<sup>38</sup>

In *Coetzee v Government of the Republic of South Africa*, the Constitutional Court held that a provision of the Magistrates Court Act<sup>39</sup> that permitted incarceration

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without trial of a civil debtor constituted an unjustifiable infringement of the right to freedom and security of the person.<sup>40</sup> Had the *Coetzee* Court not had IC s 11(1) upon which to rely, it could have characterized these civil imprisonment provisions as a species of servitude. The debtor was obliged to stay in prison because of his status — his inability to pay off a debt. The debtor's condition was not one in which the incidents of ownership were exercised by another. Moreover, his failure to remain solvent led to a further reduction in status: imprisonment. The *Coetzee* Court did away with these civil imprisonment provisions largely because incarceration for 'status' — and not crime — is out of step with contemporary mores.<sup>41</sup>

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37 See *W, X, Y & Z v The United Kingdom* (1968) 11 *Yearbook of the European Convention on Human Rights* 562 (European Commission on Human Rights held that the inability of a minor to leave voluntary military service did not amount to servitude. The Commission did not, however, offer a definition of 'servitude'.)

38 *Ibid* (Applicant argued that because servitude deals with the status of a person, objective characteristics such as gender, race and age are relevant to servitude analysis in ways that might not be not relevant when a court must engage in forced labour analysis.)

39 Act 32 of 1944.

40 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC) ('*Coetzee*'). IC s 11(1) read, in relevant part, as follows: '[E]very person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.'

41 *Ibid* at paras 66–67. Sachs J wrote:

The essence of civil imprisonment, even in its milder forms, has always been that the debtor pays with his or her body. The Afrikaans word *gyselaar* (hostage) comes from the contract recognised in Roman-Dutch law in terms of which a freeman pledged his person as suretyship for performance. . . . The broad question before us would be whether, in the open and democratic society contemplated by the Constitution, it could ever be appropriate to use imprisonment as a means of ensuring that creditors got paid in full, bearing in mind that the amount to be collected would often fall below the costs of collection, not to speak of the costs to the taxpayer of keeping the debtor in prison. It is evident from the statistical data presented to us that committal to prison is in reality mainly for relatively small amounts and largely for debt in respect of goods purchased, services rendered and money borrowed . . . The persons most vulnerable to committal orders would be precisely those who were unemployed, and thus could not be subject to emoluments orders, and those who did not have any property which could be attached. To penalise the workless and the poor so as to frighten those a little better-off would be exactly the kind of instrumentalising of human beings which the concept of fundamental rights was designed to rebut.

The line taken by the *Coetzee* Court is consistent with our view that since apartheid was consciously designed to result in both public and private forms of servitude, FC s 13 must, consequently, have as its target the elimination of all public and private manifestations of servitude.

Not all courts construe 'servitude' in a manner that engages the social status of a person.<sup>42</sup> In *US v Kozminski*, the US Supreme Court held that the Thirteenth Amendment prohibited only 'involuntary servitude enforced by the use or threatened use of physical or legal coercion.'<sup>43</sup> Such a cramped definition fails to capture the myriad ways in which social conventions radically constrain individual autonomy.<sup>44</sup> Prohibitions against servitude exist in order to disrupt social arrangements that perpetuate domination without overt resort to legal sanction or physical punishment. Contrary to the holding in *Kozminski*, the Final Constitution's prohibition against servitude is meant to roll back the quiet occupation of the body.

<i>Definitions of Servitude</i>
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| 1. Broad definition: Servitude is about caste or status. Persons in conditions of servitude occupy a social station that does not allow them to alter the |
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The history of the Thirteenth Amendment of the US Constitution supports such a construction of FC s 13. The 13th Amendment was originally construed, though not necessarily intended, to apply only to state action. See *The Slaughter-House Cases* (1873) 83 US 36 (Limited 13th Amendment to prohibition of the institution of African slavery); *The Civil Rights Cases* (1883) 109 US 3, 24 (Court rejects proposition that social or private discrimination was an incident of slavery captured by the 13th Amendment.) According to most American legal historians, however, the drafters of the 13th Amendment understood that free blacks lived under conditions virtually identical to that of slaves. The Amendment was viewed by its proponents as a Declaration of Independence for former slaves — a constitutional guarantee that the emancipation brought about by the Civil War would ensure that all men are not only created equal, but would be treated as such. See J tenBroek 'Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and the Key to the Fourteenth Amendment' (1951) 39 *Cal L Rev* 171, 179-180; D Colbert 'Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges' (1990) 76 *Cornell L Rev* 1, 33-34. Ultimately the US Supreme Court did extend the reach of the 13th Amendment to some forms of private conduct. See *Bailey v Alabama* (1911) 219 US 243 (State may not enforce laws that directly or indirectly result in compulsory service; whether a debt is voluntary or involuntary does not effect determination of whether servitude exists); *US v Reynolds* (1914) 235 US 133 (Statute assessed fines for criminal convictions which could be paid by a 3rd party and that convict was obliged to work for the surety for period determined by that court. US Supreme Court found that the constant threat of arrest and imprisonment for failure to pay timeously the 3rd party debt, turned the obligation to work into compulsory or forced labour designed to satisfy a debt, and thus a violation of the prohibition against servitude.)

- 42 Early on, the United States Supreme Court found the extension of the term 'involuntary servitude' to be broader than that of slavery. See *The Slaughter-House Cases* (supra) at 69 ('[T]he word servitude is of larger meaning than slavery.') In *Plessy v Ferguson*, the Court wrote that involuntary servitude encompasses 'the control of the labour and the services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services.' (1896) 163 US 537, 542.
- 43 (1988) 487 US 931. See CM Page '*United States v Kozminski: Involuntary Servitude — A Standard At Last*' (1989) 20 *U of Toledo LR* 1023; Asher (supra) at 252 (Criticizes *Kozminski* definition for falling short of international standards for servitude and argues for a more expansive definition). See also R Goluboff '*The 13th Amendment and the Lost Origins of Civil Rights*' (2001) 50 *Duke LJ* 1609 (General analysis of 13th Amendment jurisprudence.)
- 44 The US Supreme Court originally held that involuntary servitude (or 'peonage') existed only when the worker was forced to work in order to discharge a debt. See, eg, *Clyatt v United States* (1905) 197 US 207, 215 ('[T]he basic fact of [peonage] is indebtedness. . . . The essence of [peonage] is compulsory service in payment of a debt.') This narrow construction of servitude is consistent with the foundational nature of 'freedom of contract' in the US Supreme Court's jurisprudence at the turn of the 20th Century. See *Lochner v New York* (1905) 198 US 45. Peons, those labouring under conditions of involuntary servitude, could not contract to alienate freely their labour and enjoyed the protection of the 13th Amendment and the Peonage Act. The definition of 'involuntary servitude' expanded gradually to include services rendered for reasons apart from indebtedness.

conditions of their existence. Persons in positions of servitude appear to work voluntarily for those above them. Servitude often appears voluntary because this form of dominion of man over man is underwritten by tradition, custom or agreement and not by a particular legal relationship of control of one person over another. Such tradition, custom or agreement refers to social understandings and not necessarily, to any consent by the bondsman to her abject conditions.

2. Narrow definition: Debt bondage occurs whenever a person is compelled to work in order to pay off a debt. However, the concept of involuntary servitude may embrace services rendered for reasons other than indebtedness.

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### (c) Forced labour

Article 2(1) of the Forced Labour Convention of the International Labour Organization ('ILO') defines forced labour as follows:

[A]ll work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.<sup>45</sup>

FC s 13 prohibits expressly only forced labour. The loose denotation of this term — married to the equally loose constructions of slavery and servitude — might suggest that the extension of forced labour in FC s 13 embraces all forms of non-voluntary labour. That would constitute far too generous a reading. Not all non-voluntary labour is forced labour.

One form of non-voluntary labour that should not be considered forced labour is that which flows from a back-to-work order in the context of an industrial action. In *Botswana Railways' Organization v Setsogo*, the Botswana High Court held that although s 6(2) of the Botswana Constitution prohibits forced labour, s 6(3)(a) of the Botswana Constitution states that 'forced labour' does not include labour required in consequence of an order of court. As a result, a back-to-work order by a court during an industrial action does not constitute forced labour.<sup>46</sup> The rationale for the holding is as follows. The court is not compelling a party to work. No one has to obey the court order. The court is simply requiring the employer-employee relationship to continue as usual while the negotiations between the parties continue. Should an employee not wish to follow the court's back-to-work order, her behaviour is governed by the normal rules of employment. Should her absence be grounds for dismissal, any consequent termination cannot be attributed to the allegedly coercive background conditions of the court's order.<sup>47</sup>

The centripetal forces at work in *Setsogo* narrow our construction of 'forced labour'. But as several foreign courts have noted, centrifugal forces generate a broader construction.<sup>48</sup> The European Court of Human Rights ('ECHR Court')

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45 Convention Concerning Forced or Compulsory Labour (1932) ILO No 29, 39 UNTS 55 (Ratified by South Africa on 5 March 1997).

46 (1995) BLR 758, 764.

distinguishes forced labour from compulsory labour. That, distinction, however, is a function of the express language of the European Convention itself.<sup>49</sup> For the purposes of FC s 13 analysis, the ECHR's take on compulsory labour informs — or fleshes out — our understanding of forced labour. In *Van der Musselle v Belgium*, the ECHR Court depicts forced labour as a condition that 'brings to mind the idea of physical or mental constraint.'<sup>50</sup> It characterizes compulsory labour as work done 'against the will of the person' and 'under the menace of any penalty.'<sup>51</sup> Labour — forced or compulsory — is not limited to physical or manual labour. Moreover, forced labour and compulsory labour can be compensated or uncompensated. The mere fact of compensation does not affect the attribution of 'force' or 'compulsion'.<sup>52</sup> Furthermore, work entered into voluntarily but which a person is compelled to continue may amount to forced labour. After establishing these various parameters, the *Van der Musselle* Court concluded that legislation requiring aspirant attorneys to accept a certain number of pro bono clients as a condition for entry into the legal profession did not constitute unjustifiable forms of forced labour and compulsory labour.<sup>53</sup>

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47 See, eg, *South African Municipal Workers Union v Jada and Others* 2003 (6) SA 294 (W), 305 (A general right to strike does not insulate parties participating in an unauthorized industrial action from the normal ramifications of a refusal to report. Failure to comply with the terms of the Labour Relations Act puts employees in legitimate danger of termination. The offer by the town council to arbitrate — provided the plaintiffs returned to work — and the plaintiffs' rejection of that offer was the ultimate cause for their dismissal.) For a more general discussion of the interaction between constitutional labour rights and the effects of a back-to-work order, see C Cooper 'Labour' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, August 2005) Chapter 53.

48 In terms of s 48 of the Basic Conditions of Employment Act, forced labour is a criminal offence punishable by a fine and up to three years imprisonment. Act 75 of 1997 (Section 48 read with Section 93). Neither slavery nor servitude is subject to a similar statutory proscription. To the extent that a practice engages a labour relationship — and not a relationship of status — the term 'forced labour' in the Basic Conditions of Employment Act ought to capture incidents of slavery and servitude. The need to broaden the use of the term 'forced labour' in the Basic Conditions of Employment Act to cover incidents of slavery and servitude serves as a reminder that the terms slavery, servitude and forced labour mark a range of exploitative practices and that within this range of repugnant practices, the three terms can often be used interchangeably.

49 Article 4.

50 (1984) 6 EHRR 163, 183.

51 Ibid. The European Commission on Human Rights and the European court on Human Rights have a fairly well-developed forced labour jurisprudence. See, eg, *X v Federal Republic of Germany* (1978) 17 *Yearbook of the European Convention on Human Rights* 148 (Pro bono services required of lawyer); *Gussenbauer v Austria* (1975) 15 *Yearbook of the European Convention on Human Rights* 448 (Pro bono services required of lawyer); *Van Droogenbroeck v Belgium* (1892) 4 EHRR 443 (Prison labour); *W, X, Y & Z v The United Kingdom* (supra) (Inability of minors to leave voluntary military service); *Grandruth v Federal Republic of Germany* (1967) 10 *Yearbook of the European Convention on Human Rights* 626 (Refusal of Jehovah to witness to perform community service); *Iversen v Norway* (1963) 6 *European Yearbook of the European Convention of Human Rights* 327 (Dentist sent to remote part of country to practice.) See also R Gordon, T Ward & T Eicke *The Strasabourg case law: Leading Cases from the European Human Rights Reports* (2001) 197–207 and A Naidu 'The Right to be Free from Slavery, Servitude and Forced Labour' (1987) 20 *CILSA*108, 111–3.

52 *Van der Musselle* (supra) at 173, 177.

In *W, X, Y & Z v The United Kingdom*, the European Commission on Human Rights ('ECHR Commission') became a forum for debate about the degree of degradation associated with slavery, servitude and forced labour. The applicants contended that 'it is wrong to conclude that [either] slavery or servitude constitute a more oppressive condition' than forced.<sup>54</sup> While slavery and servitude are 'condition[s] different conceptually from forced labour, the applicants averred, they 'may or may not be more oppressive.'<sup>55</sup> The ECHR Commission accepted the applicants' argument that it is the lived experience of slavery or forced labour that determines how oppressive the condition is and not its classification. The ECHR

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Commission also agreed with the applicants' assertion that military service could amount to forced labour.<sup>56</sup>

Similarly, the Indian Supreme Court has noted that forced labour is often a function of other social conditions just as apt to exhaust individual identity as slavery and servitude. In *People's Union for Democratic Rights & Others v Union of India & Others*, the Indian Supreme Court, in concluding that any work done for less than the minimum wage amounts to forced labour, wrote:

[I]t may be physical force which compels a person to provide labour or service to another or it may even be compulsion arising from hunger or poverty, want and destitution. Any factor which deprives a person of a choice of alternatives and compels him to adopt a particular course may properly be regarded as 'force' and if labour or service is compelled as a result of such 'force' it would be 'forced labour'.<sup>57</sup>

The virtue of such a broad definition of forced labour under FC s 13 would be that it would enable South African courts to engage effectively such problems as trafficking, child labour, farm labour and domestic labour. The danger is that such a definition of forced labour casts too wide a net and captures labour relations that we would not, as yet, wish to view as constitutionally infirm.

For us the critical heuristic distinction is that limited options and demeaning work alone are necessary, but not sufficient, conditions, for a constitutional finding of forced labour. Forced labour only occurs where the employer uses the existence of limited options and demeaning work to abuse her employees. Objective manifestations of such abuse include sub-minimum wage remuneration and horrific

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53 For a more detailed discussion of *Van der Mussele* in the context of community service requirements for entry into a profession, see § 64.5(g) infra.

54 *W, X, Y & Z* (supra) at para 9.

55 Ibid.

56 *W, X, Y & Z* (supra) at 596 ('[A]lthough [servitude and forced labour] must in fact often overlap, they cannot be treated as equivalent.'). For all the conceptual overlap of the three terms, the Final Constitution does appear to take slavery and servitude somewhat more seriously than forced labour. See § 64.3 supra (Discussion of non-derogation.) FC s 37 permits forced labour in states of emergency. Slavery and servitude are non-derogable.

57 [1983] 1 SCR 456, 491 (Workers were paid substantially below minimum wage for their work and were obliged to accept employment). See also *Van der Mussele* (supra) at 174-5 (ECHR Court found that a person who voluntarily took up a profession could still claim that community service performed in order to secure admittance to the profession constitutes forced labour.)

working conditions. So even though a person may enter 'voluntarily' into demeaning work, she may still have her dignity impaired by (a) the demeaning nature of the work and (b) her inability to insist on better conditions or better pay. Conversely, a person forced physically or forced by menace of penalty to do 'good' work on behalf of the commonweal has her dignity impaired when she loses complete control over her labour. The presence of either set of conditions will support a finding of forced labour.

<i>Definition of forced labour:</i>	
1.	Forced labour is all work or service: (a) exacted from any person under the menace of any penalty or by dint of physical force and (b) for which the said person has not offered himself voluntarily.
2.	Forced labour is not limited to physical or manual labour.
3.	Forced labour can be compensated or uncompensated.
4.	Work entered into voluntarily, but which a person is forced to continue, may amount to forced labour.
5.	Forced labour denotes those labour practices where an employer is able to exploit an employee's radically constrained options in order to induce her to work for pay and in circumstances that fall far below acceptable labour standards. Such unacceptable standards may mean sub-minimum wage pay, or horrific working conditions, or both.
6.	FC s 13 contains no internal modifiers with respect to forced labour. All exceptions to the definition of forced labour must be justified. Some generally accepted exceptions include: (a) normal civic obligations; (c) military service; (d) national service by a conscientious objector; (e) community service required in an emergency.

## 64.5 International law obligations

### (a) Customary international law

The prohibition of slavery is an obligation *erga omnes* under international customary law.<sup>58</sup> It may have even acquired the status of *jus cogens*<sup>59</sup>. As Rassam writes:

[E]very state has illegalized institutionalized slavery and the slave trade and no state dares assert that it does not have an international legal obligation to outlaw slavery and the slave trade.<sup>60</sup>

58 See *Case Concerning the Barcelona Traction Light and Power Company (Belgium v Spain)* (1970) ICJ Reports 3.

59 See J Dugard *International Law: A South African Perspective* (2nd Edition, 2000) 40.

Slavery, as an international crime, attaches individual criminal liability to private persons irrespective of state involvement or the location of the crime. It also creates the basis for universal jurisdiction.<sup>61</sup> The reach of the enabling legislation for the International Court of Justice<sup>62</sup> and the International Criminal

Court,<sup>63</sup> when read together with FC ss 231 and 232, place South Africa's obligation to enforce FC s 13's prohibition of slavery beyond doubt.<sup>64</sup>

### **(b) General conventions**

The Slavery Convention imposes on South Africa as a state party the positive obligation to 'bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.'<sup>65</sup>

South Africa recently ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ('Palermo Protocol').<sup>66</sup> The Palermo Protocol requires all state parties to criminalize trafficking in persons.<sup>67</sup> The Protocol's broad definition of trafficking<sup>68</sup> and the removal of consent of the victim as a bar to prosecution<sup>69</sup> ought to augment our existing taxonomy of slavery, servitude and forced labour.

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60 Rassam (supra) at 311.

61 Bassiouni (supra) at 454.

62 See Statute of the International Court of Justice, Article 36 (2)(a)-(c) (Gives the court the power to decide disputes concerning 'the interpretation of a treaty', 'any question of international law' and 'the existence of any fact, which if established, would constitute a breach of an international obligation.')

63 Rome Statute of the International Criminal Court, Article 7(1)(c), UN Doc. A/CONF.183/9, 2187 UNTS 90 (Ratified by South Africa on 27 November 2000).

64 FC s 231(4) reads, in relevant part: 'Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.' FC s 232 reads, in relevant part: 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.' For more on the role of international law under the Final Constitution, see K Hopkins & H Strydom 'International Law and Agreements' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2005) Chapter 30.

65 Slavery Convention (1926) 60 LNTS 253, Article 2 (Ratified by South Africa on 18 June 1927).

66 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (2000) UN Doc. A/55/383 (Ratified by South Africa on 20 February 2004).

67 Article 5(1). Article 5(2) further requires the criminalization of (a) attempted trafficking, (b) acting as an accomplice to trafficking, and (c) organizing or directing trafficking. The South African Law Commission's recent report on trafficking anticipates legislative enactment of the Protocol in domestic law within the next few years. South African Law Commission Report Trafficking in Persons (2004) Issue Paper 25, Project 131.

The International Labour Organization ('ILO') Forced Labour Convention obliges all state parties to abolish forced labour<sup>70</sup> and to criminalize and to prosecute any occurrences of it.<sup>71</sup> The ILO Abolition of Forced Labour Convention requires

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states to 'suppress and not to make use of any form of forced or compulsory labour.'<sup>72</sup> Prohibitions on forced labour with respect to children can be found in the Convention on the Rights of the Child<sup>73</sup> and the ILO Convention on the Worst Forms of Child Labour.<sup>74</sup>

### (c) Human rights instruments

Most international human rights instruments prohibit both slavery and servitude. The Universal Declaration of Human Rights prohibits slavery<sup>75</sup> and protects everybody's right to 'free choice of employment'.<sup>76</sup> The African Charter on Human and Peoples' Rights prohibits slavery and the slave trade.<sup>77</sup> The International Covenant on Civil and Political Rights<sup>78</sup>, the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>79</sup> and the Inter-

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68 Article 3(a) reads as follows: 'For the purposes of this Protocol: (a) 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation. Exploitation shall include at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery or the removal of organs.' See § 64.6(a) *infra* for a detailed discussion of sexual slavery and human trafficking.

69 Article 3(b) reads as follows: 'The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.'

70 Convention Concerning Forced or Compulsory Labour (1932) ILO No 29, 39 UNTS 55, arts 10, 18 (Ratified by South Africa on 5 March 1997).

71 *Ibid* at arts 1, 4, 5, 10, 18 and 25.

72 (1959) ILO No 105, 320 UNTS 291, Article 1 (Ratified by South Africa on 5 March 1997).

73 (1989) UN Doc A/44/49 (Ratified by South Africa on 16 June 1995). Article 32 requires states to 'recognize the right of the child to be protected from economic exploitation and from performing work that is likely to be hazardous.'

74 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) ILO No 182, 38 ILM 1207 (Ratified by South Africa on 19 November 2000). Article 1 states: 'Each member which ratifies this Convention shall take *immediate* and effective measures to secure the prohibition and *elimination* of the worst forms of child labour as a matter of urgency.' (Our emphasis.)

75 Article 4.

76 Article 23.

American Convention on Human Rights<sup>80</sup> all contain similar provisions that prohibit slavery and servitude *tout court* and most instances of forced labour. The prohibition on forced labour is generally subject to the following exceptions: (a) work done during lawful detention; (b) military service; (c) service in case of emergency or calamity; and (d) normal civic obligations.<sup>81</sup>

## 64.6 Slavery, servitude and forced labour in context

### (a) Sexual slavery and human trafficking

At least 800 000 to 900 000 people are trafficked annually around the globe.<sup>82</sup> Human trafficking stands third on international organized crime's year-end earnings list — after drugs and armaments — at \$7 billion.<sup>83</sup>

While hard data on the actual scale of human trafficking for the purposes of

sexual exploitation in South Africa remains limited,<sup>84</sup> recent reports from the International Organization for Migration ('IOM') and South African Law Commission

77 Article 5. The African Commission on Human and Peoples Rights has heard only one such complaint. See *SOS Esclaves v Mauritania* 198/97 (1997)(Complaint was found to be inadmissible.) The Commission then considered the state of slavery in Mauritania in its Tenth Annual Activity Report. It found that contrary to the contentions of the NGO representing the SOS slaves that there remained only vestiges of slavery and that the government was complying with its obligations to abolish all forms of slavery. 'Tenth Activity Report of the African Commission' in R Murray & M Evans (eds) *Documents of the African Commission on Human and Peoples' Rights* (2001) 546-50. That account appears inconsistent with other contemporaneous accounts of slavery in Mauritania. See § 64.1 supra.

78 Article 8 reads, in relevant part, as follows:

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. 3. (a) No one shall be required to perform forced or compulsory labour; (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court; (c) For the purpose of this paragraph the term 'forced or compulsory labour' shall not include: (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention; (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors; (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community; (iv) Any work or service which forms part of normal civil obligations.

79 Article 4 reads as follows:

(1) No one shall be held in slavery or servitude. (2) No one shall be required to perform forced or compulsory labour. (3) For the purposes of this article the term 'forced or compulsory labour' shall not include: (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this convention or during conditional release from such detention; (b) any service of a military character or, in the case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service; (c) any service exacted in case of an emergency or amity threatening the life or well-being of the community; (d) any work or service that forms part of normal civic obligations.'

80 Article 6 reads as follows:

('SALC')<sup>85</sup> provide a fairly comprehensive, if grim, picture of South African-based trafficking activities. The IOM and the SALC both note that while South Africa serves as both source and transit hub for sexual trafficking activities, it functions primarily as a final market for tens of thousands of women and children.<sup>86</sup> Terms such as 'source', 'transit hub', 'market' and 'organized crime' mask the brutality of an 'industry' whose one and only good is rape. Moreover, the use of such terms as 'prostitution' shifts responsibility for the repeated rape

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of women and children from the criminals engaged in this 'trade' to the women and children themselves.<sup>87</sup> Such legal obfuscation of what would — in times of war — be described as crimes against humanity conceals the high degree of state complicity that makes this most ancient and yet coetaneous form of chattel slavery possible. So

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(1) No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women. (2) No one shall be required to perform forced or compulsory labour. This provision shall not be interpreted to mean that in those countries in which the penalty established for certain crime is deprivation of liberty or forced labour, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labour shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner. (3) For the purposes of this article, the following do not constitute force or compulsory labour: (a) work or service normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent judicial authority. Such work or service shall be carried out under the supervision and control of public authorities, and any persons performing such work or service shall not be placed at the disposal of any private party, company or juridical person; (b) military service and, in countries in which conscientious objectors are recognised, national service that the law may provide for in lieu of military service; (c) service extracted in time of danger or calamity that threatens the existence or well-being of the community; or (d) work or service that forms part of normal civic obligations.

See *IACHR Report on the Situation of Human Rights in Panama* (1978) (The Inter-American Commission on Human Rights reviews allegations of unfair prison labour.) See also S Davidson 'The Civil and Political Rights Protected in the Inter-American Human Rights System' in DJ Harris & S Livingstone (eds) *The Inter-American System of Human Rights* (1998) 231-2.

- 81 The Constitutional Assembly, in line with these international instruments, considered including these four exceptions. It eventually rejected them in favour of a crisp construction of FC s 13. Although the grounds for not incorporating these internal qualifiers is unclear, this silence should not be read to mean that the Final Constitution regards any of these 'unlisted' practices either as a *prima facie* abrogation of or a permissible limitation of FC s 13. The drafters' decision to leave FC s 13 open-ended permits the courts to respond to ever-evolving understandings of slavery, servitude and forced labour and the novel exigencies that might demand the relaxation of the section's prohibitions. See § 64.3 supra.
- 82 US Department of State 'Trafficking in Persons Report: Trafficking Victims Protection Act of 2000' (2003) 7.
- 83 J M Maciej, M Pieczkowski & B van Vuuren-Smyth 'Seduction, Sale and Slavery: Trafficking in Women and Children for Sexual Exploitation in Southern Africa' International Organization for Migration, Regional Office for Southern Africa (3rd Edition, 2003) 16 ('IOM *Trafficking Report*') quoting FT Miko 'Trafficking in Women and Children: The US and International Response' *Congressional Research Service Report 98-649 C* (2000), available at [http://iom.org.za/site/index.php?option=com\\_docman&task=cat\\_view&gid=21&Itemid=50](http://iom.org.za/site/index.php?option=com_docman&task=cat_view&gid=21&Itemid=50), (accessed on 10 March 2009).
- 84 South African Police Service Child Protection Unit statistics suggest that some twenty-eight thousand children are trafficked for the purposes of commercial sexual exploitation in South Africa's cities. However, even the SAPS acknowledges the inevitability of underreporting in this setting. See K Fitzgibbon 'Modern Day Slavery: The Scope of Trafficking in Africa' (2003) 12(1) *African Security Review* 81, 83.

while the disturbing prevalence of human trafficking in Southern Africa is variously attributed to extreme poverty, unemployment, war, lack of food<sup>88</sup> and traditional practices that commodify women and make their sale acceptable,<sup>89</sup> such 'causes' are really no more than enabling conditions. They only make trafficking easier. The demand for sex-workers, the existence of organized criminal syndicates and the failure of legal imagination and political will drive the South African market.<sup>90</sup>

*S v Jordan & Others* evinces just such a failure of legal imagination.<sup>91</sup> In *Jordan*, the Constitutional Court rejected equality, dignity, privacy and freedom of profession challenges to provisions of the Sexual Offences Act that criminalize prostitution.<sup>92</sup> The majority reasoned as follows:

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85 South African Law Commission Report *Trafficking in Persons* (2004) Issue Paper 25, Project 131 ('SALC *Trafficking Paper*').

86 *Ibid* at 11. Most women and children sold into sexual slavery in South Africa are refugees from around the continent. The remainder of South African sex slaves are sourced primarily from Lesotho, Mozambique, Malawi, Thailand, China; and Eastern Europe. The methods of conniving and coercion employed to 'recruit' women and children to South Africa are as varied as their source. Some are enticed by promises of better jobs or marriage. Others are abducted. But perhaps the most distressing fact of all is that most are sold down the river by members of their family. M Songololo *The Trafficking of Children for Sexual Exploitation* (2000) 11; IOM *Trafficking Report* (*supra*) at 16, 65.

Refugees from other African countries already in South Africa often arrange for close female relatives to join them. Once these women receive asylum-seeker status, their male relatives force them into prostitution. The victims are generally unable to speak the language, do not know the lay of the land and face unsympathetic, if not exploitative, immigration officials. Even when women are able to overcome these impediments, an extensive criminal network often tracks down and recaptures them. The fortunate few able to access the law are then placed in the unenviable position of choosing between deportation to an inhospitable home or remaining 'enslaved' but 'with' their family. *Ibid* at 20-34. The Lesotho-South Africa slave trade takes the following form. Boys and girls as young as 13 are abducted, or lured, from the streets of Maseru or other border towns. They are taken to private homes in nearby Free State towns where they are repeatedly raped for extended periods. These children are often returned to Lesotho or simply abandoned. The IOM report contends that the brazen nature of this practice reflects high degrees of police and immigration official complicity. *Ibid* at 34-47. Approximately 1000 Mozambiquan girls and women are trafficked annually in South Africa. *Ibid* at 63. Some young girls are actively recruited with promises of a lucrative job in a big South African city. Others are picked up at taxi ranks while searching for a lift. After crossing the border illegally, most are subjected to an 'initiation' — rape — at transit houses near the border. The girls are then sold as 'wives' to men on the mines in the West Rand for R650 — see § 64.6(b)(ii) *infra* — or to South African brothels for R1000. *Ibid* at 47-64. The trafficking of girls and women from Malawi is underwritten by a custom called *kuhaha*. *Ibid* at 65. This set of coercive sexual initiation practices — intended to drive young women into early marriage — make young Malawi women particularly vulnerable to South African truckers and Malawian businesswomen who promise them jobs and marriage in South Africa. Most are raped en route. They are then sold to a brothel or retained as personal sex-slaves and rented out to friends. *Ibid* at 64-7, 85-93. Almost 1000 Thai women and girls are tricked each year into coming to South Africa with promises of high-wage restaurant work. Upon arrival, these women are auctioned off at restaurants for R15 000 to R25 000, have their passports confiscated, kept in closely guarded private homes in Johannesburg and are then forced into sex work to repay their 'debt'. *Ibid* at 93-108. Chinese Triads bring young women into South Africa to work in exclusive and well-known Chinese clubs. Most of these victims are relatively well-educated and have been convinced that a legitimate market exists for their skills. As with most cases of such bondage, 'debts' of R75 000 make discharge almost impossible. *Ibid* at 108-123.

87 See C Argibay 'Sexual Slavery and the Comfort Women of World War II' (2003) 21 *Berkeley J of IL* 375, 386-7 ('[T]he terms 'prostitute' and 'prostitution' reflect profoundly discriminatory attitudes toward women, the situation of [victims of trafficking] is more accurately termed "sexual slavery" rather than "forced prostitution". "Forced prostitution" reflects the male view; "sexual slavery" reflects the victim's view.')

If the public sees the recipient of reward as being 'more to blame' than the 'client', and a conviction carries a greater stigma on the 'prostitute' for that reason, that is a social attitude and not the result of the law. The stigma that attaches to prostitutes attaches to them, not by virtue of their gender, but by virtue of the conduct they engage in. That stigma attaches to female and male prostitutes alike. I am not persuaded by the argument that gender discrimination exists simply because there are more female prostitutes than male prostitutes just as I would not be persuaded if the same argument were to be advanced by males accused of certain crimes, the great majority of which are committed by men.<sup>93</sup>

The majority's very strong commitment to a form of metaphysical autonomy that makes all individuals morally and legally culpable for those actions that issue ineluctably from their circumstances fails dramatically the victims of sexual trafficking. Sexual trafficking is about the sale and exploitation of women and female children — of people who have little chance, and no choice, in life's wheel of fortune. *Jordan* has nothing to say about state complicity in a legal regime that condones institutionalised rape. Perhaps this characterization of *Jordan*'s weltanschauung seems unfair. We think the majority judgment speaks for itself:

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It was accepted that they have a choice but it was contended that the choice is limited or 'constrained'. Once it is accepted that [the criminalization of prostitution] is gender-neutral and that by engaging in commercial sex work prostitutes *knowingly* attract the stigma associated with prostitution, it can hardly be contended that female prostitutes are discriminated against.<sup>94</sup>

The minority, although sympathetic, offers more of the same:

Their status as social outcasts cannot be blamed on the law or society entirely. By engaging in commercial sex work, prostitutes *knowingly* accept the risk of lowering their standing in the eyes of the community. In using their bodies as commodities in the marketplace, they undermine their status and become vulnerable.<sup>95</sup>

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88 IOM *Trafficking Report* (supra) at 15-21.

89 SALC *Trafficking Paper* (supra) at 27-28.

90 See B Balos 'The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation' (2004) 27 *Harvard Women's LJ* 137. Balos argues that customers buy victims of trafficking mainly as an exercise in power that invariably results in the objectification of the woman involved. Article 9(5) of the Palermo Protocol requires state parties to 'adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.' Although such measures can be legislated, whether they can be effectively implemented is unclear.

91 2002 (6) SA 642 (CC), 1997 (6) BCLR 759 (CC) ('*Jordan*').

92 Sexual Offences Act 23 of 1957, s 20(1)(aA).

93 *Jordan* (supra) at paras 16-17.

94 See *Jordan* (supra) at para 16 (emphasis added) (How and why knowing that stigma attaches to a practice or an event — that takes place under conditions of duress and compulsion — creates culpability remains unclear.)

The *Jordan* majority and minority's approach may hold in the context of some 'voluntary' forms of prostitution. It cannot be applied, without real violence being done to the word 'voluntary', to victims of trafficking and sexual slavery.<sup>96</sup>

The language of many international instruments also obscures the two-fold nature of this crime. Article 3(a) of the Palermo Protocol states that trafficking is proscribed when it occurs for one of the following purposes: 'exploitation of

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the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>97</sup> No South African jurist ought to lose sight of the fact that trafficking in persons or their parts is, in itself, a violation of FC s 13.<sup>98</sup> That this sale of human flesh is married to a state-enabled,<sup>99</sup> and thus acceptable, form of rape,<sup>100</sup> simply makes it the most abhorrent form of contemporary slavery.<sup>101</sup>

The IOM and the SALC reports suggest that the conditions of sale of women and children for sexual exploitation in South Africa easily satisfy the criteria for trafficking set out in the Palermo Protocol.<sup>102</sup> However, the Protocol's pre-

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95 Ibid at para 66 (Sachs and O'Regan JJ)(emphasis added). As one of the authors has written elsewhere, all of us gainfully employed, constitutional court judges included, commodify our bodies in exchange for remuneration. S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44, § 44.3(c)(ix).

96 A recent judgment hints at a way out of the Constitutional Court's autonomy bind. See *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC). In *Khosa*, the Constitutional Court found unconstitutional, as a violation of both FC s 9 and FC s 27 (1), the exclusion of permanent residents from the classes of person entitled to a variety of social security grants: old age, disability, veterans, child-support and foster care. Mokgoro J writes:

The exclusion of permanent residents in need of social-security programmes forces them into relationships of dependency upon families, friends and the community in which they live, none of whom may have agreed to sponsor the immigration of such persons to South Africa. . . . Apart from the undue burden that this places on those who take on this responsibility, it is likely to have a serious impact on the dignity of the permanent residents concerned who are cast in the role of supplicants.

Ibid at 76. Mokgoro J could well have added that permanent residents are, as supplicants, not merely dependent on family members, but quite literally at their mercy. Sex slaves — prostitutes — would consider themselves fortunate to be supplicants. They are not just excluded from the protection of the law. Many prostitutes, as we noted above, do not speak the language, do not know the lay of the land, do not have the resources to engage corrupt immigration officials or to escape criminal syndicates. Many are enslaved by their own family. The point is not that sex slaves are excluded from some particular benefit to which another class of persons is entitled. *Khosa* stands for the broader proposition that FC s 7(2) places the state under an obligation to protect and to fulfil the rights of all persons in South Africa. As the *Khosa* Court rightly recognizes, legal regimes that offer incentives to become members of the political community but that punish persons who cannot act on such incentives — by withholding benefits or through incarceration — are perverse. These disincentives deny the affected person exactly that which the state is obliged to provide. The *Khosa* Court indicates that where all meaningful choice is extinguished, the state bears a much greater burden with respect to the entitlements of the persons within its midst. For children, the aged and the disabled, the inability to work underwrites their claim for state support. The current inability of sex slaves to liberate themselves requires the creation of a comprehensive and coordinated state programme designed to realize their emancipation.

97 See SALC *Trafficking Paper* (supra) at 18-21 (Identifies adoption, forced marriage and domestic work as practices that could qualify as exploitation.)

occupation with the elimination of trans-national organized crime limits its efficacy as a both a model for and a tool in efforts to eradicate sexual slavery.<sup>103</sup>

FC s 13 can play a dual role in combating human trafficking. Firstly, it can be read to require that the state produce a comprehensive plan to eradicate, to prevent and to punish trafficking.<sup>104</sup> Secondly, it can be read to require that the state 'protect and assist the victims of . . . trafficking, with full respect for their human rights.'<sup>105</sup> Such protection demands: (a) adequate physical security;<sup>106</sup> (b) the

98 See F Gold 'Redefining the Slave Trade: The Current Trends in the International Trafficking of Women' (2003) 11 *University of Miami International and Comparative LR* 99, 100 (Gold explains the conditions that reinforce this practice in terms of the objectification of the victim: '[The victims] know their own purchase price, and understand that the purchaser demands strict obedience, and will ensure such behaviour through coercive tactics. The height of objectification is illustrated by the women's belief that it is the employer's ultimate right to resell the women at the employer's discretion.')

99 State complicity may take the form of a failure to adequately enforce domestic laws prohibiting the practice. See Rassam (*supra*) at 320.

100 See Argibay (*supra*) at 375. See § 64.4(a) *supra* (Definition of slavery).

101 While the nature and the extent of suffering in the sex trade itself may vary, sexual trafficking must be understood in terms of both slavery and rape. No meaningful volition exists. The absence of volition in the context of sex is rape. See NK Katyal 'Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution' (1993) 103 *Yale LJ* 791, 826 ('If forced prostitutes today are not slaves, then neither was half of the Southern black population in 1850.'). See also Gold (*supra*) at 101('[E]ven the term voluntary is contentious because most women who engage in prostitution do so as a result of their own particular financial and societal situations. They may voluntarily choose to engage in prostitution, but external factors leave prostitutes no other option. Furthermore, once they have 'chosen' a life of prostitution, they may fear the threat of violence if they attempt to change their lifestyle.')

102 Article 3 of the Palermo Protocol defines trafficking as follows:

(a) 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) 'Child' shall mean any person under eighteen years of age.

Under the Protocol, the prosecution must establish the presence of 3 elements in order prove a person is a trafficker. First, the trafficker must perform one of the listed actions: namely

opportunity for victims to seek reparations from their traffickers;<sup>107</sup> and (c) sufficient safeguards in our immigration laws to enable victims to seek asylum.<sup>108</sup> The present legal regime fails to provide such protection<sup>109</sup> and may even exacerbate

the dangers to which trafficking victims are exposed.<sup>110</sup> An immigration regime that sanctions automatic deportation places victims in an untenable position: remain a sex slave or face deportation without compensation or protection.<sup>111</sup>

## **(b) Marriage and servitude**

### **(i) Lobola**

*Lobolo*, or bride-wealth, is an amount paid by the husband or his family to the family of the woman in return for the reproductive capacity of the woman.<sup>112</sup> The Recognition of Customary Marriages Act, which regulates customary marriages in

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'recruitment, transportation, transfer, harbouring or receipt of persons.' These activities embrace all of the component parts of a trafficking operation — save for the client. However, in order to realize fully the right to be free from slavery, a client who knowingly solicits the services of a trafficked and sexually exploited person must be brought to book. Legislation must engage both the demand and the supply. Second, the trafficker must use threat of force, coercion, abduction, fraud, deception, abuse of power or the vulnerability of another person in order to achieve her ends. The *Travaux Préparatoires* states that 'abuse of power' refers 'to any situation in which the person involved had no real and acceptable alternative but to submit to the abuse involved.' See *Travaux Préparatoires* (Interpretative Notes) for the Negotiation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, UN Doc A/55/383/Add.1 at para 63. Almost all victims of trafficking — once ensconsed at their ultimate destination — find that they have no means of communicating, no money, no friends, no travel documents, no access to the law. Moreover, the fear of physical punishment and further sexual abuse often creates insuperable barriers to flight. Third, the trafficking must have been undertaken for the purpose of exploitation. Exploitation includes such practices as exploitation of another for the purposes of making money from the sale of another's sexual capacity. This definition of exploitation seems sufficiently elastic to cover such practices as pornography and forced marriages.

103 For example, the Protocol only applies to trafficking over borders (article 4) by a group of at least 3 people (article 2(a)). As Anti-Slavery International observes, these provisions may be necessary to combat international crime, but are irrelevant to a victim who has been trafficked by a single person or within national borders. D Weissbrodt & Anti-Slavery International 'Abolishing Slavery and its Contemporary Forms' for the Office of the United Nations High Commissioner for Human Rights HR/PUB/02/4 (2002) 21. As the IOM and SALC reports note, the proportion of trafficking that occurs within South Africa — especially within existing refugee communities — constitutes a substantial percentage of the total. The efficacy of the Protocol is further undermined by making the articles that deal directly with victims purely discretionary.

104 Such a programme has several essential features. One facet is detailed legislation criminalizing trafficking in persons. IOM *Trafficking Report* (supra) at 133. In theory, traffickers can be prosecuted for kidnapping, abduction and rape under the common law and various statutes. Statutory offences include violations of the Sexual Offences Act 23 of 1957, the Immigration Act 13 of 2002 and the Basic Conditions of Employment Act 75 of 1997. But they cannot be punished for the act of trafficking itself. SALC *Trafficking Paper* (supra) at 54. The proposed legislation should draw on the Palermo Protocol and give the Protocol the force of law. However, a more nuanced piece of legislation aimed specifically at traffickers is required in order to take account of practices unique to the South African sex slave trade and the capacity of existing law enforcement structures. A second aspect is the creation of a national task force on trafficking in persons. See IOM *Trafficking Report* (supra) at 134. Such a task force has already been established in Gauteng. SALC *Trafficking Paper* (supra) at 45. A third component is educating communities on the dangers of trafficking. *Ibid* at 39.

South Africa, does not require *lobolo* to be paid for a customary marriage to be valid.<sup>113</sup> It does, however, demand that 'the marriage be negotiated and entered into or celebrated in accordance with customary law.'<sup>114</sup> *Lobola* therefore remains an

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essential condition for a valid marriage if the customary law of the parties so compels.<sup>115</sup>

Does the practice of *lobola* infringe a woman's right to be free from slavery, servitude and forced labour?<sup>116</sup> International law censures practices similar to *lobola*. The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and

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- 105 Article 2(b) of the Palermo Protocol. Attention to the human rights of victims can also aid in minimising the problem. See J Fitzpatrick 'Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking' (2003) 24 *Michigan J of IL* 1143, 1165 ('Only when states commit themselves to tackle human rights violations across the entire spectrum of the traffic, will we begin to see a diminution in this serious human rights violation.')
- 106 The nature of this care can be found in article 6(3) of the Palermo Protocol. Article 6(3) requires state parties to 'consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of: (a) Appropriate housing; (b) Counseling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand; (c) Medical, psychological and material assistance; and (d) Employment, educational and training opportunities.' The Law Commission recommends that the services offered to victims of trafficking should include at least 'health care services, shelter, counseling, education and vocational training.' SALC *Trafficking Paper* (supra) at 35. See also Gold (supra) at 132 ('Overall, victims need to feel empowered after a situation in which control was stripped from them. The ability to file private civil actions, obtain proper medical attention, and receive proper repatriation will slowly allow a victim to regain power in her own life.')
- 107 The current legal regime governing the victims of trafficking neither affords victims an opportunity to press criminal charges nor allows victims to institute a claim for compensation. SAHRC *Lindela: at the Crossroads for Detention and Repatriation* (2000) 68 ('SAHRC Lindela Report')(The Human Rights Commission's investigation into the conditions at the Lindela detention centre found that people awaiting deportation there have no opportunity to press civil or criminal charges) The SALC has suggested that in terms of s 300 of the Criminal Procedure Act 51 of 1977 and s 30 of the Organized Crime Act 121 of 1998, a person is found guilty of a crime related to trafficking could have his assets sold to compensate the victim. SALC *Trafficking Paper* (supra) at 62. However, even the Law Commission recognizes the current inadequacies in these provisions: (1) trafficking is not a crime; (2) they only cover patrimonial loss, not pain and suffering; (3) any patrimonial loss is likely to be lost earnings from prostitution — and a court is unlikely compensate the victim for illegal earnings.
- 108 The Constitutional Court and the Supreme Court of Appeal have handed down a number of judgments recently on the level of constitutional solicitude afforded undocumented persons in the face of singularly inhospitable immigration laws. The Supreme Court of Appeal, in *Minister of Home Affairs v Watchenuka*, found unconstitutional regulations issued by the Minister and rules emanating from the Standing Committee for Refugee Affairs that visited blanket prohibitions with respect to employment and study on asylum seekers. 2004 (4) SA 326 (SCA), 2004 (2) BCLR 120 (SCA)('Watchenuka'). The *Watchenuka* Court held that such prohibitions constituted a violation of the right to dignity because the state refused to offer support to asylum seekers and left persons exercising their right to apply for asylum no alternative but to turn to crime, begging or foraging. The Court also held that such prohibitions constituted a violation of the right to education because children lawfully in the country to seek asylum may not be deprived of such resources at critical period of their development. The *Watchenuka* Court recognizes that a right to asylum only becomes meaningful if immigration laws actually permit a person to seek asylum. In *Lawyers for Human Rights & Another v Minister of Home Affairs & Another*, the Constitutional Court construed several provisions of the Immigration Act in a manner that expands the level of due process to

Institutions and Practices Similar to Slavery identifies as servitude '[any] institution or practice whereby [a] woman, *without the right to refuse*, is promised or given in marriage on payment of consideration in money or in kind to her parents.'<sup>117</sup> If we accept the force of the Supplementary Convention's definition, then when a bride has been denied the right to refuse to enter a union and *lobolo* has been paid, a *prima facie* violation of FC s 13's prohibition against servitude is established.

The Customary Marriages Act requires both parties' consent for a customary marriage to be valid.<sup>118</sup> The Act thereby avoids the most obvious basis for a FC s 13 challenge. But the requirement of consent and a right of refusal alone should be insufficient to enable the Act and the practise of *lobola* to escape contestation. First,

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which undocumented persons on board ships are entitled. 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC) ('*Lawyers for Human Rights*'). The *Lawyers for Human Right* Court described the basis for this expansion as follows:

[We are] concerned with a delicate issue that has implications for the circumstances in and the extent to which we restrict the liberty of human beings who may be said to be illegal foreigners. The determination of this question could adversely affect not only the freedom of the people concerned but also their dignity as human beings. The very fabric of our society and the values embodied in our Constitution could be demeaned if the freedom and dignity of illegal foreigners are violated in the process of preserving our national integrity.

Ibid at para 20. Read together, the decisions support the dual proposition that our immigration laws must be construed in a manner that permits the actual, and not merely theoretical, exercise of every person's fundamental rights and that our immigration laws cannot be used to exact non-judicial penalties in order to further domestic policies aimed at blunting the influx of illegal immigrants.

- 109 The Immigration Act states that all illegal foreigners shall be deported. Act 13 of 2002, s 32(2). Immigration officers are also entitled to arrest an illegal foreigner and cause her to be deported, without a warrant. Section 34(1), reads, in relevant part, as follows: 'Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General.' An 'illegal foreigner' is defined in s 1 as 'a foreigner who is in the Republic in contravention of this Act' The Act criminalizes employing and aiding 'illegal foreigners' save for the provision of 'necessary humanitarian aid.' The Act ostensibly makes provision for suspected illegal foreigners to be fairly treated once arrested. Immigration Act, s 34(1)(a)-(e). However, neither the conditions of detention centres such as Lindela nor the legal process to which they are generally subject meet internationally accepted standards. SAHRC *Lindela Report* (supra) at 20-25. Because most detainees are not addressed in a language they can understand, they have little prospect of making use of the limited due process rights to which they are entitled let alone the benefits of substantive law that might accrue to them. See also SAHRC 'Report into the Arrest and Detention of Suspected Undocumented Migrants' (1999); SALC *Trafficking Paper* (supra) at 35 (Notes that 85% of victims spoke Portuguese, Swahili, French, an East Asian or Eastern European language. Few could converse in an official South African language.) Almost all are returned to their country of origin where they are once again vulnerable to being trafficked.
- 110 Traffickers often use the opportunities afforded by South Africa's asylum regime to coerce their own family members into becoming sex workers. IOM *Trafficking Report* (supra) at 28.
- 111 See § 64.4(a) supra. Creating a legal regime to protect and to compensate the victims of trafficking poses significant challenges. The state cannot be expected to investigate and to prosecute every plausible claim of sexual slavery. SALC *Trafficking Paper* (supra) at 50. The American 'T Visa' system offers one possible solution. See Victims of Trafficking and Violence Protection Act of 2000. For a detailed analysis of the T Visa, see T Hartsough 'Asylum for Trafficked Women: Escape Strategies Beyond the T Visa' (2002) 13 *Hasting's Women's LJ* 77. The T Visa is a category of visa created specifically for victims of trafficking. If these victims are deemed to be persons of 'good moral character' after 3 years, they may even be given permanent residence. The T Visa is a promising concept. However, one of the requirements for T Visa is that the victim must comply

despite the 'paper law' requiring consent, one must ascertain whether the 'living law' ensures something more than mere acquiescence. Where the consent of a woman is not properly obtained, the paying of *lobolo* must be deemed a 'practice similar to slavery' that impairs FC s 13.<sup>119</sup> Second, in circumstances under which a woman is unable to exercise meaningful choice — where she

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cannot vote with her feet — more than consent is required. The court must interrogate the contractual environment to determine whether the woman has been coerced into matrimony.

Even with these two provisos, it seems fair to ask whether *lobola* survives FC s 13 — or FC s 9 or FC s 10 — analysis. *Lobola* perpetuates the systemic disadvantage to

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with any reasonable request for assistance in the prosecution of the traffickers. This requirement conflates the state's obligation to the victim and its obligation to eradicate trafficking. The fear associated with such confrontations, and trauma visited upon a person repeatedly subject to rape at the hand of the person being charged, diminishes the attractiveness of the T Visa programme. See 'Informal Note by the UN High Commissioner for Human Rights' UN Doc A/Ac.254/16 (1999) 5 ('[I]t is important in this context to note that victim protection must be considered separately to witness protection, as not all victims of trafficking will be selected to act as witnesses in criminal proceedings.')

- 112 RM Jansen & AJ Ellis 'The South African Common Law and *Lobolo* — Another Perspective' (1999) 24(2) *J for Juridical Science* 41, 42.
- 113 Recognition of Customary Marriages Act 120 of 1998 ('Customary Marriages Act').
- 114 Section 3(1)(b). But see Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 8(d)('Any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men' may amount to unfair discrimination.)
- 115 See *Mabena v Letsoalo* 1998 (2) SA 1068 (T), 1073 ('[C]ustomary marriage comprises two distinct legal actions: there is on the one hand the marriage itself. On the other hand there is the *lobolo* agreement with the handing over of the bride.'). See also JG Horn & AM Janse van Rensburg 'Non-Recognition?: *Lobolo* as a Requirement for a Valid Customary Marriage' (2002) 27(2) *J for Juridical Science* 170, 176; JG Horn & AM Janse van Rensburg 'Practical Implications of the Recognition of Customary Marriages' (2002) 27(1) *J for Juridical Science* 54, 59; IP Mathuifi & JC Bekker 'The Recognition of the Customary Marriages Act of 1998 and Its Impact on Family Law in South Africa' (2002) 35 *CILSA* 182, 187. Customary law normally requires only agreement on the amount of *lobolo*, and not actual payment, in order for the marriage to be declared valid.
- 116 Our courts have not, as yet, been asked to consider the constitutionality of *lobola*. They have pronounced on the constitutionality of a number of other customary law doctrines. See, eg, *Bhe v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)('Bhe')(Succession based upon male primogeniture held by Constitutional Court to be unconstitutional); *Mhlekwana v Head of the Western Transvaal Regional Authority & Another* 2001 (1) SA 574 (Tk)(Power of Regional Authority Court to apply customary law did not justify limitations of the right to a fair trial and the right to equality. Selective process of applying legislation, and thus customary law, found to be unconstitutional); *Mabuza v Mbatha* 2003 (4) SA 218 (C), 2003 (7) BCLR 743 (C) ('Mabuza') (Development of customary law in light of the Constitution's commitment to an open and democratic society based upon equality, dignity and freedom means that siSwati custom of *ukumekeza* (the formal integration of bride into bridegroom's family) can be waived by both parties to marriage and cannot be used to coerce bride.) Cf Jansen & Ellis (supra) at 46 (Authors ask whether *lobola* 'strengthens the authoritative position of husbands, and [reinforces] the subordination of women.' They conclude that s 6 of the Customary Marriages Act diminishes any deleterious consequences of *lobola* by ensuring that husband and wife in customary marriages have equal status.)

which black South African women have been historically subject and impairs the dignity of the complainant. Ought it to matter that a woman in a traditional community may not experience the exchange of her body for *lobolo* as an impairment of her dignity? One way to engage the problem of false consciousness is to begin by drawing the line at physical coercion.<sup>120</sup> The South African Law Reform Commission notes that:

Bride-wealth may have a more concrete effect on individual rights and freedoms by binding women to unwanted marriages. If a wife seeks a divorce, her family is usually obliged to return bride-wealth, and, rather than do so, they may force her to put up with an unhappy relationship.<sup>121</sup>

The Law Commission refuses to draw the logical conclusion: namely, that the exchange of bride-wealth constitutes debt bondage that creates conditions of servitude from which women struggle to escape. Instead it observes that:

[U]ndue pressure cannot be remedied by legislation. Women have the freedom to end their marriages when they wish, and the law cannot control all economic and social circumstances that might compel or persuade them to remain married.<sup>122</sup>

But it simply does not follow that because the law cannot eliminate subtle forms of coercion, it must endorse institutions that create conditions of servitude. That *lobola* may continue even when a constitutional or statutory provision is understood to prohibit the practice hardly constitutes an argument in favour of it. The Law Commission itself describes a contemporary system of *lobola* in which (a) bridewealth represents 'consideration for a wife's reproductive potential' and 'compensates the wife's family for the loss of a daughter'; (b) transfers no longer serve as assurance for the long-term familial security of the wife and her family, but may be used to fund the unrelated needs of family members, such as the purchase of furniture; and (c) requests for a divorce may trigger a demand for repayment of bride-wealth. Some women may feel that a good price for their body enhances their dignity. The fact remains that the practice functions as a real

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117 Article 1(c)(i)(Emphasis added).

118 Section 3(1)(b).

119 See C Rautenbach 'Some Comments on the Status of Customary Law in Relation to the Bill of Rights' (2003) 14 *Stell LR* 107 (General discussion on how the Bill of Rights applies to customary law and the difference between the 'paper law' and the 'living law'.)

120 S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44. See also M Matsuda 'Pragmatism Modified and the False Consciousness Problem' (1990) 63 *S Cal L Rev* 1763, 1765 (Matsuda notes that structures of subordination both inhibit the very recognition of domination and blunt its expression once that recognition occurs.)

121 South African Law Commission, Project 90, *The Harmonisation of the Common Law and the Indigenous Law, Discussion Paper 74, Customary Marriages* (August 1997) ('SALC Report on Customary Marriage I') at para 4.3.3.5

122 *Ibid.*

constraint on the ability of women to negotiate their own terms of entry and to engineer their own departure.

Despite the obvious physical, legal and economic encumbrances imposed upon women for whom *lobolo* is paid, the Law Commission asserts that since 'it would be impossible to demonstrate that payment of bride-wealth was the condition precedent to the unfavourable treatment of wives,' *lobola* neither directly nor indirectly discriminates against women in terms of FC s 9. 'After all', the Commission reasons, 'men have to pay, not women.'

Will the courts accept such tortured logic with respect to FC ss 9, 10 and 13 challenges to *lobola*? Several recent decisions give us reason to believe that an appropriately chosen attack might result in its removal as a rule of customary law. In *Bhe v Magistrate, Khayelitsha & Others*, the Constitutional Court found that the customary law rule of male primogeniture — and several statutory provisions that reinforced the rule — unfairly discriminated against the deceased's wife and her two children because the rule and the other impugned provisions prevented the children from inheriting the deceased's estate.<sup>123</sup> The *Bhe* Court's disabling strategy with respect to this rule of customary rule is instructive.

The *Bhe* Court begins with the following bromide. While customary law provides a comprehensive vision of the good life for many South African communities, the new-found constitutional respect for traditional practices does not immunize them from constitutional review.<sup>124</sup> The *Bhe* Court locates any ongoing justification of customary law in the provisions of the Final Constitution. The *Bhe* Court then goes on to characterize the customary law of succession in terms that validate its spirit without necessitating that the Court be beholden to its letter. The customary law of succession is, according to the Court, a set of rules

designed to preserve the cohesion and stability of the extended family unit and ultimately the entire community . . . . The heir did not merely succeed to the assets of the deceased; succession was not primarily concerned with the distribution of the estate of the deceased, but with the preservation and perpetuation of the family unit. Property was collectively

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owned and the family head, who was the nominal owner of the property, administered it for the benefit of the family unit as a whole. The heir stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the

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123 *Bhe v Magistrate, Khayelitsha & others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) ('*Bhe*').

124 *Ibid* at paras 42–46. ('At the level of constitutional validity, the question in this case is not whether a rule or provision of customary law offers similar remedies to the Intestate Succession Act. The issue is whether such rules or provisions are consistent with the Constitution. This status of customary law has been acknowledged and endorsed by this Court.') See also *Alexkor Ltd & Another v Richtersveld Community & Others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) ('*Richtersveld*') at para 51 ('While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution'); *Pharmaceutical Manufacturers Association of SA & Another: In re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 44; *Mabuza v Mbatha* 2003 (4) SA 218 (C), 2003 (7) BCLR 743 (C) at para 32 ('[These rules] provide a setting which contributes to the unity of family structures and the fostering of cooperation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as *ubuntu*. These valuable aspects of customary law more than justify its protection by the Constitution. It bears repeating, however, that as with all law, the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights.')

family head. He inherited the property of the deceased only in the sense that he assumed control and administration of the property subject to his rights and obligations as head of the family unit. The rules of the customary law of succession were consequently mainly concerned with succession to the position and status of the deceased family head rather than the distribution of his personal assets.<sup>125</sup>

By recasting the justification for customary rules of succession in terms of family and community stability, rather than patriarchy and property, the *Bhe* Court softens its critique of this traditional way of life. It then notes that the conditions of family and community which gave rise to the challenged rules no longer obtain. The *Bhe* Court writes:

Modern urban communities and families are structured and organised differently and no longer purely along traditional lines. The customary law rules of succession . . . determine succession to the deceased's estate without the accompanying social implications which they traditionally had. Nuclear families have largely replaced traditional extended families. The heir does not necessarily live together with the whole extended family which would include the spouse of the deceased as well as other dependants and descendants. He often simply acquires the estate without assuming, or even being in a position to assume, any of the deceased's responsibilities. In the changed circumstances, therefore, the succession of the heir to the assets of the deceased does not necessarily correspond in practice with an enforceable responsibility to provide support and maintenance to the family and dependants of the deceased.<sup>126</sup>

Customary law has not, the *Bhe* Court ruefully observes, evolved to meet the changing needs of the community. It fails African widows because '(a) . . . social conditions frequently do not make living with the heir a realistic or even a tolerable proposition; (b) . . . the African woman does not have a right of ownership; and (c) the prerequisite of a good working relationship with the heir for the effectiveness of the widow's right to maintenance', as a general matter, no longer exists.<sup>127</sup> Again the Court takes care to note that the fault for this arrested development lies outside traditional communities. Ruptures within traditional ways of life — caused by apartheid, the hegemony of western culture and capitalism — have prevented the law's evolution.<sup>128</sup> This aside actually sets the stage for delivery of the *Bhe* Court's coup de grace: that 'the official rules of customary law of succession are no longer universally observed.'<sup>129</sup> The trend within traditional communities is toward new norms that 'sustain the surviving family unit' without re-inscribing male primogeniture.

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125 *Bhe* (supra) at para 75.

126 *Ibid* at para 80.

127 See South African Law Reform Commission *The Harmonisation of the Common Law and the Indigenous Law: Succession in Customary Law* Issue Paper 12, Project 90 (April 1998) 6-9. See also TW Bennett *Human Rights and African Customary Law under the South African Constitution* (1997) 126-7.

128 See, eg, *Richtersveld Community and Others v Alexkor Ltd & Another* 2003 (6) SA 104 (SCA) at paras 85-105.

129 *Bhe* (supra) at para 84.

By having shown that the spirit of succession lies in its commitment to family cohesion, that the traditional family no longer coheres as it once did, and that the 'distorted' rules of customary law, as frozen in time by apartheid-era statute and case law, that 'emphasise . . . patriarchal features and minimise . . . communitarian ones,' the *Bhe* Court closes the gap between constitutional imperative and customary obligation.<sup>130</sup> Had customary law been permitted to develop in an 'active and dynamic manner,' it would have already reflected the *Bhe* Court's conclusion that 'the exclusion of women from inheritance on the grounds of gender is a clear violation of . . . [FC s] 9(3).'<sup>131</sup> Had customary law not been fossilised, traditional communities would have noted how male primogeniture entrenched 'past patterns of disadvantage among a vulnerable group' and endorsed the *Bhe* Court's re-working of customary understandings of the competence 'to own and administer property' in a manner that vindicates a woman's right to dignity under FC s 10.<sup>132</sup>

Judge Hlophe employs a similar disabling strategy in *Mabuza v Mbatha*.<sup>133</sup> He recognizes the supremacy of the Final Constitution at the same time as he asserts the protean features of customary law that enable it to conform, as necessary, to the dictates of the Bill of Rights. His nuanced assessment of the role of *ukumekeza* reconfigures siSwati marriage conventions in a manner that (a) refuses to allow *ukumekeza* to be used by the groom's family as a means of control over the bride and (b) consciously places the husband and wife on an equal footing with respect to subsequent determinations of whether a valid marriage under siSwati customary law has taken place.

Constitutional challenges to *lobola* should be able to exploit the schema developed in *Bhe* and *Mabuza*. Those familiar with and committed to customary law acknowledge that: (a) the conditions under which *lobola* served to unite families and create security for women and their children no longer obtain; (b) cash lobolo transactions, which result in the purchase of such transient goods as home furnishings, can hardly be said to benefit the clan or the community; and (c) the present practice of *lobola* serves the pecuniary interests of a few men. By showing that the spirit of *lobola* lies in its commitment to family cohesion and that the 'distorted' rules of customary marriage emphasise male domination at the expense of communitarian concerns, a party challenging the centrality of *lobola* in customary marriages can close the gap between constitutional imperative and customary obligation. Following *Bhe*, a court can feel confident that in so far as *lobolo* remains an obstacle either to an exchange of vows or to the disengagement from a failed relationship, the practice constitutes a violation of a woman's rights to equality and dignity. More importantly for our immediate purposes, *Bhe* supports the proposition that neither the living customary law nor the Final Constitution can be squared with an institution that ultimately reduces to the purchase of a women's reproductive capacity or to compensation for the loss of female labour

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130 *Bhe* (supra) at para 89.

131 *Ibid* at para 83.

132 *Ibid* at para 84.

133 *Mabuza* (supra) at paras 9–32.

in the father's household. Following *Mabuza*, a court can ameliorate the burden of *lobola* by making its legal status as a marker of marriage contingent upon evidence of genuine mutual consent. The requirement of genuine mutual consent introduced by *Mabuza* means that *lobolo* can be waived as a condition for recognition of marriage.<sup>134</sup> The *Mabuza* Court makes clear that traditional institutions such as *lobola* can only survive as legally binding rites of marriage when shorn of all those asymmetries that reduce women to chattel.<sup>135</sup>

## (ii) Religious marriages

Our analysis of religious marital rites largely tracks the analysis of *lobola* above. Any religious rite that constrains radically the ability of a person to disengage from a failed relationship constitutes a violation of that person's rights to equality, to dignity and to be free from conditions of servitude. Such institutions should

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only survive as traditions shorn of all asymmetrical legal consequences.<sup>136</sup> The actual analysis of religious rites of marriage, and the extent to which they are entitled to judicial solicitude, is covered at length elsewhere in this work.<sup>137</sup>

## (iii) Mine wives

A recent report by the International Migration Organization identifies the sale of illegal immigrants as wives to workers on mines in the East Rand as an especially

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134 The decisions in both *Bhe* and *Mabuza* courts manifest the related virtues of reliance on objective characterizations of the subordinate position of women in traditional communities and avoidance of thorny issues of false consciousness. As one of the authors has written in this work's chapter on Freedom of Association:

It seems trite, but still worth noting, that when faced with physical coercion, the rights of women to freedom and security of the person, to freedom from servitude, to equality and to dignity all trump any and all benefits that might accrue from sustaining traditional ways of life that re-inscribe such abuse. Female genital mutilation and forced labour are obvious candidates for the trash-heap of history. But polygamy and *lobola*? It is easy — and in most cases quite right — to identify such practices with the continued subordination of women. . . . The more difficult question is whether such practices can be reconfigured so as to sustain legitimately both intimate familial associations and cultural practices. . . . With adults, one difficulty is the paternalistic presumption that government can substitute its judgment of what is best for that of its citizenry. Inquiries into non-physical coercion of children and adults are united by considerations of exit. One must take great care, however, when we interfere in associational life that we are not too quick to allow attributions of 'false consciousness' to masquerade as concerns about the inability of children or adults to vote with their feet.

S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44, §§ 44.3(c)(ii) and 44.2(d). Caution with respect to such attributions does not mean abdication. Where reliable qualitative and statistical analysis can show that *lobolo*-like exchange correlates closely with lower levels of education, higher incidents of domestic violence, lower wages, higher rates of morbidity and lower levels of life expectancy for women in such relationships than in those without, then the grounds for caution may be overcome.

135 Even the South African Law Reform Commission recognizes the possibility that 'payment or non-payment of bridewealth' can be removed as a matter of legal consequence when assessing the validity of marriage, the spouses' marital obligations or the custodial rights to children. The Law Reform Commission observes that in customary law, payment of bridewealth is often deferred and the status of a marriage is seldom placed in doubt through failure to pay timeously. SALC *Report on Customary Marriage I* (supra) at para 4.3.1. It further observes after promulgation of the General Law Fourth Amendment Act husbands lost the traditional marital power they exercised over their wives. Act 132 of 1993, s 29.

vital market for human trafficking in South Africa.<sup>138</sup> This selling of wives possesses none of the communitarian virtues associated with such traditional practices as *lobola*. The wife is chattel property — a slave pure and simple.<sup>139</sup>

The subsequent inability of the 'wife' to alter her status amounts to servitude.<sup>140</sup> Bondage or deportation is Hobson's choice.

In addition, mine wives generally perform both basic domestic labour and much more strenuous non-remunerative work under highly coercive conditions. The wife's powerlessness to contest these conditions and to secure compensation brings this work within the definition of forced labour.<sup>141</sup>

### (c) Farm labour

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136 The facts and the holding of *Republic v Kadhi, Kisumu Ex Parte Nasreen* provide a useful departure point for analysis of religious rites of marriage. [1973] EALR 153 (High Court of Kenya). The High Court of Kenya was asked to enforce a Kadhi order that held that Islamic law required the return of a wife to her husband. The High Court rejected the request on the grounds that the 'Kadhi order would . . . subject the [wife] to the effective dominion of the plaintiff to an extent constituting "servitude" . . . and in a manner inconsistent with the intendment of s 73(1) of the [Kenyan] Constitution.' *Ibid* at 161. While South African courts must treat non-Christian religious rites with a relatively high degree of solicitude, a South African court would, we think, be obliged to reach an identical conclusion under the Final Constitution. Compare *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA) and *Ryland v Erdos* 1997 (2) SA 690 (C), 1997 (1) BCLR 77 (C) (Holding that Muslim religious rites of marriage are not presumptively *contra bonos mores*) with *Ismail v Ismail* 1983 (1) SA 1006 (A) (Holding that Muslim religious rites of marriage are *contra bonos mores*). The Final Constitution reflects the Lockean discomfort with using the profane power of the state to alter what others believe to be the contours of sacred space by subjecting its protection of customary law to FC s 31(2)'s proviso that a rule of customary law inconsistent with a provision of the Bill of Rights is *prima facie* unconstitutional, but not forcing a rule of religious law protected by FC s 15 to operate under any such disability. See also *Taylor v Kurstag* [2004] 4 All SA 317 (W) (Court upheld the right of the Beth Din to issue a Cherem — an excommunication edict — against a member of the Jewish community who had violated the terms of the Beth Din's child maintenance order, but refused to enforce the maintenance order itself.)

137 P Farlam 'Religion' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 41.

138 J Martens, M Pieczkowski & B van Vuuren-Smith 'Seduction, Sale and Slavery: Trafficking of Women and Children for Sexual Exploitation in Southern Africa' International Organization for Migration, Regional Office for Southern Africa (3rd Edition, 2003) 127-8 available at [http://iom.org.za/site/index.php?option=com\\_docman&task=cat\\_view&gid=21&Itemid=50](http://iom.org.za/site/index.php?option=com_docman&task=cat_view&gid=21&Itemid=50), (accessed on 10 March 2009). The IOM paints the following dispassionate, but still harrowing, account of the provenance and the fate of mine wives on the West Rand:

[The] victims come from rural and urban backgrounds, from Maputo and Nampula provinces. . . Victims are recruited by Mozambican women, working in partnership with Mozambican and South African men responsible for transportation of victims and exploitation. . . Upon arrival in Johannesburg, victims who were expecting restaurant jobs are taken to transit houses in Soweto and Lenasia before being sold. Sex worker victims are sold to brothels in Johannesburg central business district (CBD) for ZAR 1000. Victims who were promised restaurant jobs are sold on private order, or sold as 'wives' to mine-workers on the West Rand for ZAR 850. IOM estimates that at least 1000 Mozambican victims are recruited, transported, and exploited in this way every year, earning traffickers approximately ZAR 1 million annually.

139 See § 64.6(a) *supra* (Analysis of sex slaves and human trafficking.)

140 See § 64.4(b) *supra*, for a definition and a discussion of servitude.

According to s 1 of the Basic Conditions of Employment Act ('BCEA'), a farm worker is:

An employee who is employed mainly or in connection with farming activities, and includes an employee who wholly or mainly performs domestic work in a home on a farm.<sup>142</sup>

The BCEA provides for a sectoral determination that deals comprehensively with the specific working conditions of farm labourers: Sectoral Determination 8.<sup>143</sup> Sectoral Determination 8 rehearses the constitutional prohibition against forced labour<sup>144</sup> and then adds the following language: '[n]o person may for their own benefit or for the benefit of someone else cause, demand or impose forced labour.'<sup>145</sup> Read together the BCEA and Sectoral Determination 8 provide a comprehensive scheme for farm worker protection.<sup>146</sup> Any farm labour performed at standards significantly below those laid down by the sectoral determination will constitute forced labour.<sup>147</sup>

Forced labour may be the most obvious problem in farm labour. However, the history of farm work in South Africa is a history of servitude. Farm labourers still

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often live their entire lives on a farm. The *de jure* feudal order of farm work under apartheid has given way to *de facto* serfdom. Even without pass laws, today's farm workers have few options to go elsewhere and do other:

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141 See § 64.4(c) supra, for a definition and a discussion of forced labour.

142 Act 75 of 1997. Sectoral Determination 8: Farm Worker Sector, South Africa GN R1499, Government Gazette 24114 (2 December 2002) ('Sectoral Determination 8') states: 'Without limiting its meaning, 'farming activities' includes primary and secondary agriculture, mixed farming, horticulture, aqua farming and the farming of animal products or field crops excluding the Forestry Sector.'

143 Sectoral Determination 8. The determination was enacted in terms of the Basic Conditions of Employment Act, s 51. Section 51 allows for the regulation of a specific field of labour. The sectoral determination contains detailed provisions on minimum wages, manner of payment, leave and overtime work.

144 Sectoral Determination 8, s 25(4).

145 Sectoral Determination 8, s 25(5). It accords child farm workers a substantially higher degree of solicitude. See Sectoral Determination 8: s 25(1) (no child under 15 or still at school may be employed); s 25(2) (no child may do work that is inappropriate or possibly detrimental); 25(3) (employer must retain records of child's employment); s 25(7)(a) (no work for children between 18h00 and 6h00); s 25(7)(b) (no child may work more than 35 hours a week); and s 25(7)(c) (no child may work with agro-chemicals). It contains terms that criminalize forced labour. Sectoral Determination 8 s 25(6).

146 See South African Human Rights Commission *Inquiry into Human Rights in Farming Communities* (2003) ('SAHRC Farming Inquiry') 25-6 (The most common areas of non-compliance with the BCEA are: non-adherence to working hours; overtime (54% of labourers continue work after the day officially ends without compensation); work on Sundays and public holidays; annual leave (92% of male farm workers do not receive any paid annual leave); and maternity benefit provisions.)

147 See § 64.4(c) supra.

Farm workers usually live in houses that do not belong to them. A central component of the arrangements on farms is that many workers not only work on the farms but also live there, with housing being either a form of payment in kind, or part of the terms of their contract. Thus, for many farm workers, the loss of their job means the loss of their house. The farmer is able to exercise control over the farm workers' daily bread, as well as over the roof over their heads. This increases farm workers' dependence on the farmer, and contributes significantly to the imbalance of power.<sup>148</sup>

The vast majority of farm workers in South Africa are unable to change their status<sup>149</sup> and thus rather easily satisfy the Supplementary Convention's definition of a serf:

A tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status.<sup>150</sup>

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A prohibition on servitude makes complete sense only against a background in which people are generally free to move and to alienate their labour. But what might it mean under conditions in which alternative employment and housing is scarce, education and skill levels are low, *and* farms fail to meet statutory standards? Who would bear the burden of vindicating the rights of those millions living in servitude? Everyone. The servitude of most farm workers can no longer be viewed solely through the prism of employer-employee relations. Take the synoptic view and it becomes clear that the problem of farm workers in South Africa is a problem of caste.

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148 A Isaacs 'Trapped Farm Labour: Obstacles to Rights and Freedom' (2003) *Development Update* 27, 36. The *SAHRC Farming Inquiry* identifies both the threat and the prevalence of evictions of farm workers as one of the primary problems in the sector. As a result, farm workers worry far less than they ought about changing their status, and far more than they should about maintaining what little security they enjoy on the farms. *SAHRC Farming Inquiry* (supra) at 9.

149 In March 2004, Statistics South Africa estimated that there were 930 000 people employed in commercial agriculture. Statistics South Africa *Labour Force Survey* (2004), available at [www.statssa.gov.za](http://www.statssa.gov.za). Approximately 914 473 farm workers live with their families on farms. M Wegerif 'Creating Long-Term Security of Tenure for Farm Dwellers' paper Department of Land Affairs' National Land Tenure Conference (Durban 2001) 3. The five to six dependents of each worker have led researchers to conclude that approximately six million people live on farms. See K McKay, 'Farm Workers in the Karoo: Isolation=Exploitation' (23 April 2003)(manuscript on file with authors)('Farm workers earn the equivalent of \$100 Canadian per month and support an average of five dependants on that amount . . . Statistics South Africa predicts that the number of dependants will rise due to . . . HIV/AIDS. . . . [F]arm . . . employees are the most destitute and least educated group in South Africa. . . . According to Statistics South Africa, people employed in agriculture are worse off than those in every other major sector of the economy. For black and coloured workers on farms, wages are low, housing is poor, access to education difficult or non-existent, and health indicators are bad.') Although figures vary widely, the SAHRC has estimated that there are around 250 000 labour tenants in South Africa. *SAHRC Farming Inquiry* (supra) at 13. A labour tenant is defined in s 1 of the Land Reform (Labour Tenants) Act as a person who resides on a farm with a right to sharecropping and provides labour in return and whose parents resided on the farm under a similar agreement. Act 3 of 1996. This definition fits precisely that of a serf. The *SAHRC Farming Inquiry* concludes that: 'Farming communities are characterised by skewed power dynamics between farm dwellers and farm owners.' *SAHRC Farming Inquiry* (supra) at 170. The report further asserts that: 'The power of farm owners extends to ownership of land, employment and access to economic and social needs. Farm dwellers are dependent on employers for employment and tenure security, and in some cases, their basic economic and social rights. This pervades all aspects of life resulting in gross power imbalances between parties.' *Ibid* at 172. See also Isaacs (supra) at 51 (Argues that while government has made an effort to deal with '[t]rapped farm labour . . . legislative changes . . . have not substantially altered conditions on the ground.')

150 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956) 226 UNTS 3 Article 1 (Not yet ratified by South Africa).

Recasting the problem of farm workers in terms of caste makes it slightly less amenable to resolution in the adversarial setting of a court. To remedy this problem of caste one must engage *all* of the social conditions that reinforce such deprivations.<sup>151</sup> It requires a concerted effort to not only enforce basic employment conditions but also to invest in education, to redistribute land and to create jobs. Described thus, this violation of FC s 13's prohibition of servitude turns as much on the state's failure to provide access to adequate housing, health care, food, education, legal representation and social security, as it does on any given farmer's refusal to abide by the BCEA.<sup>152</sup> Described thus, it is the state — in concert with private parties — that must develop a comprehensive programme designed to realize progressively the manumission of South Africa's farm workers.<sup>153</sup>

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This burden is not insuperable. In *Grootboom*, the Constitutional Court set out the criteria by which it would assess whether the state had discharged its duty to develop a comprehensive programme designed to realize progressively a right.<sup>154</sup> In sum, a state programme to eliminate servitude (1) must ensure that 'the appropriate financial and human resources are available'; (2) 'must be capable of facilitating the realisation of the right'; (3) must be reasonable 'both in their conception and their implementation'; (4) must attend to 'crises'; (5) must not exclude 'a significant segment' of the effected population; and (6) must 'respond to the urgent needs of

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151 Many farmers do not compensate their employees at the rates required nor do they create the work environment contemplated by the BCEA, Sectoral Determination 8 or other applicable legislation. See *SAHRC Farming Inquiry* (supra) at iv-vi ('[D]espite constitutional provisions and the promulgation of legislation such as ESTA and LTA to protect those whose tenure on land is legally insecure, there is a clear lack of support for the legislation . . . and widespread lack of compliance.')

152 *SAHRC Farming Inquiry* (supra) at 7-56. The *SAHRC Farming Inquiry* details the Government's comprehensive failure to alter the current social, economic and legal status of farm labourers. It notes that workers lack: (a) legal representation when rights are violated; (b) effective child labour structures to eradicate abuses; (c) meaningful protection from violence perpetrated by owners and other members of the community; and (d) access to service delivery from the State and a basic understanding of their entitlements. The *SAHRC Farming Inquiry* decries the State's abdication of responsibility for service delivery to farm workers and their families. Few housing units have been built in farming communities because both the Department of Land Affairs and the Department of Housing have each decided that the other department must provide housing for farm workers. The Department of Health has not yet devised a comprehensive programme to enable farming communities to secure adequate health-care. The Primary School Nutrition Programme operates nowhere near optimal levels. The Department of Home Affairs bears some responsibility for the inability of farm dwellers to secure social security grants — many farm dwellers do not possess the requisite ID documents and have no idea how to procure them.

153 Scott's neologism 'diagonality' speaks to circumstances in which both the state and private actors are responsible for creating unconstitutional conditions. In such circumstances, the Bill of Rights will require analysis and may require remedies that address the respective duties imposed upon both state and private actors. See C Scott 'Social Rights: Towards a Principled Pragmatic Judicial Role' (1999) 1 (4) *ESR Rev* 4, 6 ('There is an important category of cases in which the most effective process would require a joinder of private and state parties in order to facilitate a legal analysis of how to allocate constitutional obligations as between private entities and the State . . . This conceptualisation has considerable potential for promoting a more holistic analysis of human rights violations that are located within a field of overlapping state and non-state power structures.')

154 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) ('*Grootboom*').

those in desperate situations.<sup>155</sup> A state programme that meets these criteria would constitute the remedy appropriate for a violation of FC s 13's prohibition against servitude.<sup>156</sup>

The *Grootboom* criteria provide a useful rubric for appraising the reasonableness of the government's efforts to ameliorate conditions of servitude. However, our use of these socio-economic rights criteria is not meant to suggest that only the state can violate FC s 13. They simply draw our attention to the multi-dimensional nature of the problem of farm worker servitude. Where individual instances of servitude are a consequence of the relationship between private

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parties, the private party responsible for creating the conditions of servitude is the party that must bear the burden of setting things right.<sup>157</sup>

#### (d) Domestic workers

The condition of the roughly one million domestic workers in South Africa bears more than a passing resemblance to that of farm workers.<sup>158</sup> Although the state has made significant efforts to turn this historically inhospitable informal sector of the economy into a substantially more formal and equitable sector, domestic workers are often only notionally 'free' to alter their conditions of employment.<sup>159</sup>

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155 Ibid at paras 39–46, 52, 53, 63–69, 74–83. For a similar analysis in terms of the state's obligations vis-à-vis the right to food, see D Brand 'Food' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 56C.

156 But what if conditions are such that even a properly conceived and fully executed state programme failed to enable farm labourers to move off the land into employment? This question has more than rhetorical force. Given the high levels of structural unemployment in our economy, it is certainly plausible that well-serviced farm workers and their families might still lack new and meaningful work opportunities. See M Legum 'Livelihoods, Not Employment' (2003) 3 (22) *South African New Economics* 1 ('First, unemployment is world-wide; and new jobs everywhere, including the US, are casualised, low-paid, low-skilled and often temporary. Second, ... with few exceptions, skills are not the problem. More education and more skills means more skilled and educated unemployed people.') See also M Legum 'Does this Explain Rejection of the BIG?' (2003) 3 (23) *South African New Economics* 1 (Gap between jobs and job-seekers is growing.) We would argue that under such conditions the state would have discharged its duty. For although the farm workers and their families would still 'belong' to the land, the actual improvement in the quality of life would have elevated their status well above that of a serf. The state's first obligation is the dignity of its citizens. A comprehensive programme that addresses the education, health care, physical security and land tenure needs of farm workers would give them that dignity.

That freedom through work cannot be the threshold test for a programme designed to eradicate servitude does not mean that the state ought not to devise public works programmes where possible. See I Friedman 'Basic Income and/or Public Works?' (2003) 3 (24) *South African New Economics* 1 (Arguing that 'fears that the wages for public works programmes would undermine the struggle for a living wage are unfounded' and that 'public works wages . . . set at the minimum wage . . . establish these as *de facto* rather than theoretical levels.') It only means that neither the availability of private employment nor the creation of EPWP jobs ought to be the measure of success for a state programme designed to eradicate farm worker servitude.

157 Our use of socio-economic rights' justification criteria is not meant to suggest that an internal limitation ought to be read into FC s 13. The general limitation clause remains the appropriate vehicle for justification of any rule of law that impairs the right. But see *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) (Majority and minority use rationality and reasonableness tests, respectively, to determine whether or not the government had discharged its obligations under FC s 19.)

Other jurisdictions have analysed the hostile working environment of domestic servants in terms of slavery and servitude. In *United States v Ingalls*, a US federal district court extended the accepted definitions of slavery and servitude beyond the specific form of ante-bellum slavery towards which the 13th Amendment had been directed.<sup>160</sup> The *Ingalls* court wrote:

There is an abundance of evidence which establishes that the defendant Elizabeth Cocker kept one Dora L Jones, a Negro woman, in her household as a servant during a period in excess of twenty-five years. . . . that . . . said servant was required to . . . perform practically all of the household labour . . . was forbidden to leave the household except for the commission of errands and performed drudgery of the most menial . . . type without compensation. There is evidence that the food furnished to her by the defendant was of a substantially lower quality than that common to servants generally . . . [that] she was denied the right to have friends and was required to send away relative[s] who called upon her.<sup>161</sup>

Combined with threats of imprisonment and institutionalisation, this hostile work environment created conditions that led Ms Jones to believe that she was not free to leave. The *Ingalls* court likewise concluded that Ms Jones was wholly subject to the will of the defendant, had no freedom of action and lived in a state of enforced compulsory service. As Goluboff notes, the case signals a shift in the

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doctrine of servitude from one anchored in clear manifestations of physical constraint and indebtedness to one focused on the actual lived experience of workers.<sup>162</sup> It also signalled a shift in the role of government — from that 'of policing contracts to one of ensuring labourers their freedom.'<sup>163</sup>

Many domestic workers in South Africa find themselves in an *Ingalls*-like environment. Their hostile work environment coupled with an absence of alternative employment, limited education and low skills conspire to keep a large number of women in conditions of servitude.

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158 See Statistics South Africa *Labour Force Survey* (2004), available at [www.statssa.gov.za](http://www.statssa.gov.za). Approximately 1 013 000 women work as housekeepers, cooks and nannies. *Ibid* at v. About 218 000 men work as gardeners and security guards. *Ibid* at 31. Most of these workers are of African and Coloured descent. *Ibid* at vi. Domestic workers represent roughly 9% of all formal and informal employment in South Africa. However, they reflect 18.6% of female employment and only 0.6% of male employment. *Ibid* at v.

159 Under the Basic Conditions Act, s 1, a domestic worker is 'an employee who performs domestic work in the home of his or her employer and includes — (a) a gardener; (b) a person employed by a household as driver of a motor vehicle; and (c) a person who takes care of children, the aged, the sick, the frail or the disabled.'

160 73 F Supp 76, 77-79 (SD Cal 1947).

161 *Ibid* at 78.

162 R Goluboff 'The Thirteenth Amendment and the Lost Origins of Civil Rights' (2001) 50 *Duke Law Journal* 1609.

163 *Ibid* at 1667-1668.

What then should we make of recent econometric research which suggests that the situation of domestic workers may not be as dire as that of farm workers? The government has attempted to improve the labour conditions for domestic workers through BCEA, Sectoral Determination 7.<sup>164</sup> This sectoral determination contains detailed provisions on minimum wages,<sup>165</sup> working hours,<sup>166</sup> leave,<sup>167</sup> and termination of employment.<sup>168</sup> The determination also includes a prohibition on child labour and forced labour.<sup>169</sup> Hertz contends that these regulations benefit many domestic workers and, thankfully, do them very little harm.<sup>170</sup> Wages for domestic work have gone up faster than the CPI and faster than wages in demographically comparable occupational sectors.<sup>171</sup> The regulations, Hertz suggests,

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have had a palpable effect on non-wage labour conditions as well. Hertz writes that:

The proportion of domestics who report having a written contract with their employer rose from 7% in February of 2002 to 25% in September of 2003; and the number who report UIF deductions rose from 3% to 25%.<sup>172</sup>

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164 Government Notice R1068 Government Gazette 23732 (15 August 2002).

165 Part B. In November of 2002, a schedule of minimum wages, including time-and-a-half provisions for overtime work, went into effect. As Hertz observes 'The minima were set *above* the median hourly wages that prevailed at the time, making this a significant intervention in the domestic worker labour market.' T Hertz 'Have Minimum Wages Benefited South Africa's Domestic Service Workers?' *African Development and Poverty Reduction Forum Paper 4* (13 October 2004).

166 Sectoral Determination 7, Part D.

167 Sectoral Determination 7, Part E.

168 Sectoral Determination 7, Part G.

169 Section 23.

170 Hertz (*supra*) at 1-22. Hertz traces the effects of multiple changes in the legal regime that governs domestic workers. He notes that:

[I]n September of 2002 South Africa's . . . domestic workers were granted formal labor market protection, including the right to a written contract with their employers, the right to paid leave, to severance pay, and to notice prior to dismissal. Employers were . . . required to register their domestic workers with the Unemployment Insurance Fund (UIF) and to withhold UIF contributions from their paychecks. In November of 2002, a schedule of minimum wages, including time-and-a-half provisions for overtime work, went into effect. The minima were set *above* the median hourly wages that prevailed at the time, making this a significant intervention in the domestic worker labour market.

*Ibid* at 2.

171 *Ibid* at 1 ('The regulations do appear to have raised wages: Average nominal hourly wages for domestic workers in September of 2003 were 23% higher than they had been in September 2002, while for demographically similar workers in other occupations the nominal wage increase was less than 5%. Econometric evidence supports the conclusion that the wage increases were caused by the regulations, since the largest increases are seen in places where the greatest number of workers were initially below the minimum wage.')

Even proponents of these minimum standards feared that these laws might have the unintended consequence of driving down both employment figures and real wages for domestic workers. Two years of statistics allay these concerns. While hours of work among domestic workers employed 'fell by about 4%', this change was largely consistent with hours worked in other occupations. Moreover, while domestic worker employment levels also fell by 3%, Hertz concluded that that the decrease was not 'causally connected to the wage changes,' and that the decrease was in line with 'the rate of decline of the employment-to-population ratio for demographically similar workers in other occupations.'<sup>173</sup>

As Hertz concedes, such news is not really all that cheery. Only 25% of workers have a written contract and have UIF deducted. Only 22% receive paid leave. Just over 10% have a pension. Less than 2% have any health insurance. In light of such substantial non-compliance with the statutory and the regulatory framework governing domestic employees, Hertz tells us that we ought to be pleased that conditions for domestic workers are not worse and that the law has not made them so.

Given Hertz's analysis, the crisp question is whether the presence of this regulatory framework is sufficient to discharge the state's obligations under FC s 13. As Brand notes in his analysis of the government's efforts to fulfil its duties under FC s 27, the government must do more than simply craft a reasonable response to a constitutionally suspect set of practices. It must execute effectively its policies.<sup>174</sup> FC s 13 along with the Basic Conditions Act and Sectoral Determination 7 offer some consolation to those individual workers, who, with access to representation, can liberate themselves from their immediate conditions of confinement. But neither FC 13 nor BCEA Sectoral Determination 7 protect the vast majority of domestic workers who lack both access to counsel and meaningful employment alternatives. To discharge its duty to promote and to fulfil the rights of domestic workers, the state must develop a more comprehensive and coordinated programme to realize progressively the manumission of South Africa's domestic workers.<sup>175</sup>

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172 Hertz (supra) at 2.

173 Ibid at 6-9.

174 See D Brand 'Food' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 56C, § 56C.3.

175 The elasticity of the term 'servitude' tempts us to extend the reach of FC s 13 to hostile work environments in which the woman harassed has no choice but to accept sexual harassment as a deleterious condition of employment. See J Conn 'Sexual Harassment: A Thirteenth Amendment Response' (1995) 28 *Columbia J Law & Social Problems* 519, 548-556 (Conn argues that the 13th Amendment not only 'freed female slaves,' but also 'forbade the sexual exploitation that accompanied slavery.') See also J McConnell 'Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment' (1992) 4 *Yale J Law & Feminism* 207. (Given that Courts have found that 13th Amendment prohibits any practice characteristic of chattel slavery, and sexual exploitation was a characteristic of chattel slavery, severe forms of sexual exploitation are the kinds of practice that the 13th Amendment was designed to eliminate.) One common objection to expanding the ambit of the 13th Amendment to capture sexual harassment is that servitude cannot take place in the context of a voluntary labour environment. A second objection is that the attempt to squeeze sexual harassment into this particular legal category hampers the development of more nuanced understandings of this offence and actually raises the threshold for demonstrating that sexual harassment has occurred.

## (e) Child labour

According to the law, child labour ought not to exist in South Africa. The Child Care Act, s 52A(1), prohibits any employment of a child under 15 without a special exemption from the Minister.<sup>176</sup> This prohibition is repeated in BCEA, s 43.<sup>177</sup> The soon to be enacted Children's Bill characterises child labour as a form of abuse and exploitation.<sup>178</sup> Section 28(1) of the Final Constitution reads, in relevant part, that '[e]very child has the right (e) to be protected from exploitative labour practices; (f) not to be required or permitted to perform work or provide services that — (i) are inappropriate for a person of that child's age; or (ii) place at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development.'<sup>179</sup> South Africa is also a signatory to a number of international instruments that tightly regulate child labour.<sup>180</sup>

Despite such comprehensive regulation, more than one out of every three

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children work.<sup>181</sup> Poverty and adult unemployment are the primary drivers of illegal child labour.<sup>182</sup> Most adults who worked as children do not possess a proper education and cannot command a living wage. Ultimately, they come to rely upon their children to supplement family income. A large pool of child labourers forced by parents to work on the cheap creates incentives for employers in labour intensive industries to hire children.<sup>183</sup>

The social and economic conditions that reinforce this vicious cycle 'require interventions above and beyond [legal prohibitions] directed to the employment

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176 Act 74 of 1983.

177 Act 75 of 1997.

178 Bill 70 of 2003, s 1(1).

179 For a detailed discussion of FC s 28, see A Friedman & A Pantazis 'Children's Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 47. BCEA, s 43 rehearses the prohibitions of FC s 28(1)(f).

180 See Convention on the Rights of the Child; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) ('Worst Forms of Child Labour Convention'). The Worst Forms of Child Labour Convention, Article 3, defines the worst forms of child labour as (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; (d) work which . . . is likely to harm the health, safety or morals of children.' For the obligations imposed by these conventions on state parties, see § 64.4(b) supra. See also Convention Concerning Minimum Age For Admission to Employment ILO No 138 (Ratified by South Africa on 30 March 2000) ('Minimum Age Convention'). Minimum Age Convention, Article 1, obliges South Africa to 'undertake to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons.' The number of international instruments regulating child labour is partially explained by the fact that of the 250 million children who work, 60 million children work in 'especially horrific circumstances'. See UNICEF 'Beyond Child Labour: Affirming Rights' (2001), available at [www.unicef.org](http://www.unicef.org), (accessed on 14 May 2004).

context.<sup>184</sup> Sufficient welfare entitlements would be a start. However, the government currently fails to provide 'social security . . . for children older than six years.'<sup>185</sup> Because the current under-inclusive and under-financed child support entitlements programme supports children financially only until they are six years old but prohibits them from working until they are 15, many children above the age of six are therefore obliged to work illegally and under conditions tantamount to forced labour. Only a more inclusive benefits scheme will diminish the susceptibility of child labourers to exploitation.<sup>186</sup>

As our previous analysis suggests, child labour violates FC s 13 in two distinct ways.<sup>187</sup>

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- 181 South African Law Commission *Review of the Child Care Act* Discussion Paper 103 (2001) ('SALC *Review of the Child Care Act*') 592 citing Network Against Child Labour and the Child Labour Intersectoral Group 'Child Labour in South Africa' (March 2001). This statistic is somewhat inflated. The definition of 'child labour' used was 'at least three hours per week per child being spent in economic activities, at least seven hours per week in domestic chores, or at least five hours per week in school labour (i.e. cleaning or improvement of school premises).' However, the study found that '551 000 children spent at least 8 hours per week in economic activities. For 95 000 of them, 36 or more hours were spent in such work. For 23 000, time at work exceeded 50 hours per week.' The effect of such work — however limited — ought not to be discounted. It impairs learning. The main sectors for child labour are prostitution — see § 64.6(a) supra — commercial agriculture — see § 64.6(c) supra — domestic service — see § 64.6(d) supra — street trading, the taxi industry and brickyards. See SALC *Review of the Child Care Act* (supra) at 592. Finally, the Law Commission found that the law does little to control this problem: '[B]oth section 52A of the Child Care Act and section 43 of the BCEA are ignored on a wide scale.' SALC *Review of the Child Care Act* (supra) at 602.
- 182 See J Loffell 'Child Labour: Economic Exploitation as a Form of Child Abuse' (1993) 43 *Critical Health* 38. See also SALC *Review of the Child Care Act* (supra) at 591 ('[I]mproving schooling for the poor is often identified as the single most effective way to prevent children from entering abusive forms of work.')
- 183 See NGO Group for the CRC Sub-Group on Child Labour 'The Impact of Discrimination on Working Children and on the Phenomenon of Child Labour' (June 2002) 1.
- 184 SALC *Review of the Child Care Act* (supra) at 594.
- 185 Ibid at 606. However, according to an announcement by the Department of the Treasury in March 2005, the government will immediately extend benefits to children up to 13 years of age. The Department of Social Development states that the current scheme will be extended, by the end of 2006, to children up to 14 years of age. See Department of Social Development 'Child Grants 2004' (2004), available at [www.socdev.gov.za](http://www.socdev.gov.za), (accessed on 15 December 2004).
- 186 There are two general approaches to the eradication of child labour. The abolitionist school asserts the need for a complete ban of child labour. See SALC *Review of the Child Care Act* (supra) at 593. See A Bequere 'The Effective Elimination of Child Labour: Challenges and Opportunities' Conference Paper, ISPCAN Congress (Durban 2000) as cited in SALC *Review of Child Care Act* (supra) at 593 (Argues that some nations advocate a total ban because they are interested in protecting local jobs and markets from the effects of cheap, child-produced goods.) The regulation school recognizes that poverty necessitates child labour and that only a well-conceived regulatory framework can minimise its negative impact. The regulation school advocates flexible school hours to allow children to work and to study, children's trade unions, skills training, and programmes to promote awareness of poverty eradication programmes. SALC *Review of the Child Care Act* (supra) at 594-5.

Child labour may amount to forced labour.<sup>188</sup> While a fairly well-developed regulatory framework for child labour places obvious limits on the need for constitutional challenges under the Bill of Rights,<sup>189</sup> an FC s 13 challenge can meaningfully supplement existing statutory remedies. First, enforcement efforts by state officials are plagued by 'gaps or excessive complexity in legislation, inadequate penalties, ignorance of the law and of the hazards of child labour, and problems related to inspectorates as causative factors.'<sup>190</sup> The institutions charged with oversight of child labour laws — the inspectorates — 'tend to have capacity problems; they may lack legal access to sites of child labour; or they may be affected by low motivation, poor pay and/or corruption.'<sup>191</sup> Second, the statutory framework is not as comprehensive as it ought to be. No protection is afforded children who complain to the authorities.<sup>192</sup> No plans exist to prevent children from returning to an exploitative labour environment after they have been removed from it.<sup>193</sup> An FC s 13 forced labour challenge ought to put the state

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187 Some commentators argue that certain forms of child labour are so abusive as to be tantamount to slavery. See A Amar & D Widawsky 'Child Abuse as Slavery: A Thirteenth Amendment Response to *Deshaney*' (1992) 105 *Harvard LR* 1359. Child labour is, quite often, a form of child abuse. See Children's Bill, s 1 (Defines 'abuse' as including 'committing an exploitative labour practice in relation to a child.'). See also A Bequele 'The Effective Elimination of Child Labour: Challenges and Opportunities' Paper Presented at ISPCAN Congress, Durban (2000)(Suggests that child labour is the most prevalent form of child abuse.) Fieldwork in South Africa, and experiences around the continent, support affording parents of families in difficult straits the freedom to arrange for their children to engage in light work. Moreover, Amar and Widawsky's 13th Amendment slavery argument appears to be motivated primarily by the absence of an express constitutional prohibition on forced labour. Slavery arguments ought to be reserved for those transactions in which the child is transformed into a piece of property to be exploited for the benefit of third parties and is forced into employment that extinguishes most, if not all indicia of individual autonomy. See § 64.4(a) supra.

188 See § 64.4(c) supra. Recall that the term 'forced labour' captures work by dint of physical force or menace of penalty. But it also denotes those labour practices where an employer is able to exploit an employee's radically constrained options in order to induce her to work for pay and in circumstances that fall far below acceptable labour standards. The labour standards found in the manifold statutory prohibitions on child labour provide a useful departure point for FC s 13 analysis.

189 It is trite law to assert that where sufficient statutory or common law remedies exist to address pressing social problems, courts should not resort to the creation of novel constitutional doctrines to effect the same ends. See *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (2) SACR 277 (CC), 1995 (7) BCLR 793 (CC) at para 59 ('[W]here it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.'). See also *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC), 1995 (10) BCLR 1424 (CC) at para 8; I Currie 'Judicious Avoidance' (1999) 15 *SAJHR* 138. But see *SALC Review of Child Care Act* (supra) at 608 ('A disadvantage of this approach is that the enforcement of labour regulations does not *ipso facto* involve action to address the social context of the child in illegal employment and his or her family. Neither does it offer any remedies for the situation of such a child once the employer has been dealt with and the illegal practice ended.')

190 *SALC Review of the Child Care Act* (supra) at 604.

191 *Ibid.*

192 *Ibid* at 604-5.

193 *Ibid* at 608 ('Neither does [regulating child labour under labour law] offer any remedies for the situation of such a child once the employer has been dealt with and the illegal practice ended.')

on notice that its failure to enforce existing law and to develop policy initiatives to deal with the extant law's inadequacies have risen to the level of a constitutional offence.<sup>194</sup>

Child labour can also be viewed as a form of servitude.<sup>195</sup> The Supplementary Convention extends 'servitude' to:

Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.<sup>196</sup>

The current entitlements regime for children conspires with conditions of poverty and poor law enforcement to create a hostile and a coercive work environment from which poor children cannot extricate themselves. The virtue of identifying child labour as a form of servitude is that it holds both private parties and state actors responsible for the perpetuation of exploitative child labour practices.<sup>197</sup>

### (f) Prison labour

Compulsory prison labour raises two issues for the purposes of FC s 13 analysis. Is forced labour a necessary consequence of incarceration? Is there any rehabilitative benefit to forced prison labour?

194 See *Grootboom* (supra) at 42 (State obliged not simply to devise a comprehensive plan but to execute it); *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzo* 2001 (4) SA 1184 (SCA) at paras 14 – 16 (While not the function of courts to criticize construction of social policy by state, the courts are obliged to create adequate remedies where the state 'impede[s] the rightful claims of its citizens.'). See also *SALC Review of the Child Care Act* (supra) at 608 (Noting that the existing set of remedies for exploitative child labour practices constitute too blunt a cudgel, and that a far more polycentric approach to the social, economic and legal conditions that fuel child labour practices is required.)

195 See § 64.4(b) supra.

196 Article 1(d).

197 The Child Labour Action Program ('CLAP') illustrates the kind of comprehensive and co-ordinated plan required to eliminate child labour as a form of servitude. See Department of Labour, South African Child Labour Action Programme (6 May 1998). CLAP demands broad public and private participation: it creates distinct roles for government departments, NGO's, trade unions and employer organizations. *SALC Review of the Child Care Act* (supra) at 602. The Department of Labour, the Department of Education and the Department of Welfare must collectively devise a plan that enhances existing employment law, education policy, access to adequate social security, programmes to alleviate child poverty, and social mobilisation. CLAP is meant to address the very conditions that give rise to and perpetuate exploitative child practices.

Ghana has implemented such a programme. Children's Act of 1998. The carefully calibrated provisions of the Act distinguish appropriate work for children in both formal and informal economies from inappropriate work, and establish minimum age requirements for light work (13), normal work (15), and hazardous work (18). *Ibid* at ss 89-91. These age limits take seriously the need for some children to engage in the small amount of work required to ensure the survival of the household. Indeed, South Africa's own Children's Bill, s 16, recognises that: 'Every child has responsibilities appropriate to the child's age and ability towards his or her family, community and the state.'

De Jonge has argued that prison labour should not be compulsory.<sup>198</sup> Despite the now 'conventional wisdom' on the subject,<sup>199</sup> he claims that:

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A prison sentence means no more and no less than a deprivation of liberty ... [I]t does not implicitly licence prison administrations to rob the prisoner of his only remaining asset: the value of his labour.<sup>200</sup>

De Jonge's position derives some support from recent case law. Prisoners retain all rights not necessarily removed by incarceration.<sup>201</sup> At a minimum, they possess a *prima facie* right not to be subject to forced labour. Section 36 of the new Correctional Services Act ('CSA') reads:

With due regard to the fact that the deprivation of liberty serves the purpose of punishment, the implementation of a sentence of imprisonment has the objective of enabling the sentenced prisoner to lead a socially responsible and crime-free life in the future.<sup>202</sup>

The CSA does not characterize labour as a punishment. The above language from the CSA suggests that labour serves the purposes of incarceration only when it advances rehabilitative ends. In addition, while the correctional services regime in South Africa currently requires all sentenced prisoners to perform labour,<sup>203</sup> the CSA places significant restrictions on the exercise of this power by prison administrators. Sick prisoners may not be forced to work.<sup>204</sup> More importantly for our purposes, prisoners may 'never be instructed or compelled to work as a form of punishment or disciplinary measure.'<sup>205</sup>

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198 G De Jonge 'Still 'Slaves of the State': Prison Labour and International Law' in D van Zyl Smit & F Dünkler (eds) *Prison Labour: Salvation or Slavery* (1999) 329.

199 Ibid at 329.

200 De Jonge (*supra*) at 330.

201 *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A); *August & Another v Electoral Commission & Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 18 ('It is a well established principle of our common law, predating the era of constitutionalism, that prisoners are entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they have been placed.' Courts hold that prisoners retain the right to register to vote and the right to exercise franchise); *Minister of Home Affairs v Nicro & Others* 2004 (5) BCLR 445 (CC)(Court held that prisoners could not, without compelling justification, be divested of their constitutional rights, generally, and their right to vote, in particular); *Thukwane v Minister of Correctional Services & Others* 2003 (1) SA 51 (T)(Prisoners retain their right to education, although this right is limited by their circumstances.) See also D van Zyl Smit 'Sentencing and Punishment' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 49.

202 Act 111 of 1998 ('CSA').

203 CSA ss 37 and 40(1). CSA s 40(1) reads, in relevant part: 'Sufficient work must as far as is practicable be provided to keep prisoners active for a normal working day and a prisoner may be compelled to do such work.' (Our emphasis). This section recently replaced similar provisions in the Correctional Services Act 8 of 1959, s 77.

204 CSA s 37(1)(b).

The general prohibition on the use of labour as punishment is undercut by CSA s 16. CSA s 16 holds that it is a disciplinary infringement if a prisoner 'fails or refuses to perform *any labour* or other duty imposed or authorised by this Act.'<sup>206</sup> So although labour itself may not be meted out as punishment, a prisoner may be punished for refusing to do it.<sup>207</sup> By ensuring that prison labour takes place 'under the menace of . . . penalty,' CSA s 16 turns prison labour into a species of forced labour.<sup>208</sup>

Assume, for the sake of argument, that CSA s 16 was repealed. Would the CSA's compulsory prison labour provisions still infringe FC s 13? Most international human rights instruments that prohibit forced labour make an exception for labour imposed on people detained by an order of court.<sup>209</sup> FC s 13 makes no such exception.<sup>210</sup>

Assume that opponents of prison labour succeed in establishing that the impugned provisions of the CSA constitute a *prima facie* infringement of FC s 13. Can the impugned provisions be justified by reference to FC s 36? While this is not the space for a detailed analysis of the CSA, we can offer a number of general observations.

Advocates of prison labour generally proffer five justifications for prison labour: (1) rehabilitation; (2) restitution; (3) prison order; (4) prison costs; and (5) the mental and physical well-being of the incarcerated population. Of these, the discipline and the skills needed to survive in the post-prison work-place are said to constitute the strongest justification for compulsory prison labour.<sup>211</sup> In South Africa, this justification has little purchase. For although all prisoners

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205 CSA s 40(5).

206 CSA s 23(1)(d)(Our emphasis.)

207 Penalties range from a reprimand (CSA ss 24(3)(a) and 24(5)(a)) to a restriction of amenities of up to 42 days (CSA ss 24(3)(c)) and 24(5)(c)) to 30 days solitary confinement (CSA s 24(5)(d)).

208 *Van der Musselle v Belgium* (1984) 6 EHRR 163, 173.

209 See ICCPR, Article 8(3)(c)(i); ECHR, Article 4(3)(a); American Convention on Human Rights Article, 6(3)(a) and the ILO Forced Labour Convention, Article 2(1)(c). See, in particular, *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443 (Belgian prisoner contended that the prison labour system of Belgium violated the Article 4 of the European Convention. The applicant would only be eligible for parole after saving 12 000 Belgian Francs through his prison work. The court dismissed the claim based upon the exception for prison labour found in Article 4(3)(a).)

210 See D van Zyl Smit & F Dunkel 'Conclusion: Prison Labour Salvation or Slavery' in D van Zyl Smit & F Dunkel (supra) at 337 ('[T]he principle that sentenced prisoners have a formal duty to work is so well established in South Africa that this particular provision of the Constitution is likely to be regarded as subject to an implicit limitation.') But see Van Zyl Smit 'Sentencing' (supra) at 35 (Contends that a challenge to prison labour based on FC s 13 might succeed. The existence of different ends for incarceration — retributive and rehabilitative — and the purpose of different kinds of labour — kitchen work as necessity, rock quarry as punitive — suggests that not every kind of prison labour constitutes a *prima facie* infringement of FC s 13. Even if a particular form of prison labour is found to fall within the ambit of forced labour, the state may have an opportunity to justify its work programme under FC s 36.) See, generally, S Woolman & H Botha 'Limitation' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2005) Chapter 34.

may be required to work, few are given the opportunity to do so.<sup>212</sup> This absence of work and skills development opportunities in prison may be one of the reasons for the high rate of recidivism in South Africa.<sup>213</sup>

This gulf between ideal and reality with respect to prison job training opportunities raises a related limitations question. Can the state justify a compulsory prison labour programme when only 8.8% of prisoners are offered any kind of employment?<sup>214</sup> The answer should be a qualified yes. Assuming that the state is able to demonstrate a correlation between prison labour and rehabilitation, and assuming that the state is able to show that prison labour is not used as a penalty over and above sentencing, the mere fact that only some prisoners are required to work is not, alone, sufficient to undermine the justification for the state's prison labour initiatives.

### (g) Community service and public works

211 See K Hafner & E Zurcher *Schweizerische Gefängiskunde* (1925) 160-1, as quoted and translated in A Baechtold 'Switzerland' in Van Zyl Smit & Dunkel (supra) at 260:

Prison labour is no longer a punishment, even if individual prisoners might take it to be practically the same thing. Work and movement are the bases of physical and psychological vitality. Work helps to make discipline more pleasant, promote a sense of security, and improve a prisoner's chances of coping after their release. Its highest goal, however, is to contribute to the improvement of the prisoners; to convey the conviction that it is only hard work which both provides the individual with a basis for personal satisfaction and a livelihood-in other words, his happiness- as well as providing the foundation for the well-being of the nation.

Baechtold himself offers an opposing view of the Swiss commitment to state enforcement of this strict work ethic in prison. He writes:

[I]ncreasingly, the duty to work as part of a prison sentence is a contradiction in the wider world of work. The ordinary worker, as a result of not only economic but also structurally related unemployment, sees a job as a rare advantage, while the convicted prisoner receives work from the state. This conflicts with the widely accepted criminological viewpoint that the environment inside the prison should reflect the environment outside the prison as much as possible.

Ibid at 265-6.

212 See South African Human Rights Commission *Report of the National Prisons Project* (1997) ('SAHRC Report on Prisons'). As of 31 December 1997, for 100 975 sentenced (able to work) prisoners, only 8 895 (8.8% of sentenced and able to work prisoners) work opportunities per day were offered. Only 1 270 prisoners (1.25%) were involved in vocational training. Only 7 108 prisoners (7.03%) received career-directed skills training. See also Department of Correctional Services 'Statistics' *Annual Report on Prisons* (1997). Although these statistics are dated, no current exists to suggest any significant improvement.

213 *SAHRC Report on Prisons* (supra) at 25 ('The acquisition of adequate skills very often is the key to successful rehabilitation. The problem of recidivism in the SA prison system is exacerbated by the reality that our prisons have simply been unable to prepare prisoners meaningfully for release or to cope in the outside world. The available statistics show a negligible proportion of the prison population as beneficiaries of training.') Many more South African prisoners complain of idleness and lack of work opportunities than of forced labour. Ibid at 24.

214 Ibid at 9-23.

'Normal civic obligations' are generally excluded from most international documents prohibiting forced labour.<sup>215</sup> Despite this exception, the ECHR Court and the ECHR Commission have heard several challenges to compulsory community service programmes. While all of these challenges have failed, the cases have refined our understanding of forced labour in the context of compulsory community service.

In *Van der Mussele v Belgium*, a pupil *avocat* challenged legislation that obliged him to represent a certain number of clients without payment or compensation for expenses. The *Van der Mussele* Court first asked whether the labour was performed under the menace of any penalty and whether it was involuntary.<sup>216</sup> It found that refusal of admittance to a profession amounted to 'any penalty' and

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that the choice of profession did not amount to consent to perform community service. The *Van der Mussele* Court then asked whether the burden imposed by the labour was 'so excessive or disproportionate to the advantages attached to the future exercise of that profession that the service could not be treated as having been voluntarily accepted beforehand.'<sup>217</sup> The *Van der Mussele* Court held that the burden of the labour did not outweigh the benefit of entry into the profession. The community service was, therefore, not forced labour.<sup>218</sup>

*Van der Mussele* offers a useful model for analyzing community service in terms of forced labour under FC s 13. The first step of a court's enquiry should be to determine whether the community service was involuntary and performed under the menace of any penalty. If so, then the court ought to view the community service programme as a *prima facie* infringement of FC s 13.<sup>219</sup> Assuming that the community service programme has been effected in terms of a law of general application, the court may then weigh the societal benefits of community service against the burdens imposed upon the person forced to engage in a particular kind of labour.

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215 See ICCPR, Article 8(3)(c)(iv); European Convention of Human Rights, Article 4(3)(d), American Convention of Human Rights, Article 6(3)(d) and the ILO Forced Labour Convention, Article 2(1)(b).

216 *Van der Mussele v Belgium* (supra) at 173-4. The ECHR Commission had adopted a somewhat different approach to the case. It held that for labour to qualify as forced labour, it must be performed: (a) against the will of the person; and (b) must be 'unjust', 'oppressive' or constitute an 'unavoidable hardship'. The ECHR Commission followed this approach in *X v Federal Republic of Germany* (1978) 17 *Yearbook of the European Convention on Human Rights* 118; *Gussenbauer v Austria* (1975) 15 *Yearbook of the European Convention on Human Rights* 148; and *Iversen v Norway* (1963) 6 *Yearbook of the European Convention on Human Rights* 327.

217 *Van der Mussele v Belgium* (supra) at 175. Requiring a person to do work completely unrelated to his profession (such as requiring a medical student to work on a building site) could constitute a 'disproportionate use' of services.

218 The ECHR Court did not consider whether, under ECHR, Article 4(3)(d), the community service at issue fell within 'normal civic obligations' exception. It left open the question as to whether labour required only of a specific class of people is still saved by this exception. *Ibid* at 178.

219 See § 64.4(c) supra.

Community service as a pre-condition for plying a trade is not an abstract issue in South Africa. Community service is required for aspiring doctors<sup>220</sup> and pharmacists.<sup>221</sup> Lawyers may soon be added to the list.<sup>222</sup>

Community services programmes can occur in contexts other than entry qualifications for professions. Community service programmes often feature as part of secondary school education and may even constitute a condition for graduation. These programmes are justified on the grounds that they promote awareness and acceptance of the responsibilities of citizenship.<sup>223</sup>

Objections to such community service programmes as educational tools take two forms. First, these programmes and classes are said to violate the freedom of expression by forcing students to endorse a particular understanding of citizenship. Second, any component of community service programmes that requires students to work for the benefit of others — or the commonwealth — constitutes servitude or forced labour.

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A civics programme certainly reflects a particular conception — however thin — of what citizenship requires. Whether participation in the programme constitutes expressive conduct that is transformed into coerced expression by graduation requirements is another question. Our inclination is to view the students' participation in such classes as a symbolic act designed to convey a message to the rest of the community.<sup>224</sup> That such coerced expression constitutes a *prima facie* violation of FC s 16 does not mean it cannot be justified under FC s 36.

Duties of citizenship constitute notable exceptions to the prohibition against servitude and forced labour. Courts in other jurisdictions regard the duties of citizenship, however burdensome, as inescapable conditions for political liberty.<sup>225</sup> Should community service programmes that constitute part of a civics curriculum be regarded as inescapable conditions for an open and democratic society committed to human dignity, equality and freedom? The United States Supreme Court has

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220 Health Professions Act 56 of 1974, s 24A.

221 Pharmacy Act 53 of 1974, s 14A.

222 Legal Practitioner's Bill [B-00] 2000, s 13(b)(i).

223 One reason a community service programme as part of a civics curriculum is to be preferred to classroom instruction alone is that most studies confirm the commonplace pedagogical verity that learning is most effective where a student is called upon to perform a concrete task. See M Csikszentmihali & I Csikszentmihali (eds) *Optimal Experience: Psychological Studies of Flow in Consciousness* (1990). Community service is, in this regard, much like laboratory training in one of the natural sciences. Indeed, studies demonstrate that the most effective learning takes place when the community service is followed by a period of disciplined reflection — in class — on the experience. D Rutter & G Newman 'The Potential of Community Service to Enhance Civic Responsibility' (1989) 53 *Social Education* 371.

224 See *Spence v Washington* (1974) 418 US 405, 410-411 (Whether conduct possesses sufficient communicative elements so as to attract constitutional protection is contingent upon '[a]n intent to convey a particular message' and whether 'the likelihood was great that the message would be understood by those who viewed it.'). See also *Texas v Johnson* (1989) 491 US 397, 404. For more on expressive conduct and freedom of expression, see Dario Milo & A Stein 'Expression' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2005) Chapter 42.

suggested as much. In *Bethel School District No. 403 v Fraser*, the US Supreme Court wrote:

The role and the purpose of the . . . public school system were well described by two historians, who stated: 'Public education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness, and as indispensable to the practice of self-government in the community and the nation.' . . . The process of educating our youth for citizenship in public schools is not confined to books, the curriculum and the civics classes; schools must teach by example the shared values of a civilized social order.<sup>226</sup>

Community service programmes are an effective method — and perhaps the most narrowly tailored means — of teaching students the requirements of citizenship.

The role of community service programmes in secondary school civics classes suggests how the state might justify community service programme requirements for professionals. First, as the Final Constitution makes clear in FC 3(2), all citizens are 'equally subject to the duties and responsibilities of citizenship.' Community service programmes articulate those responsibilities. Second, those

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persons who benefit from the education they receive from the state ought to appreciate that they incur an obligation to the state and their fellow citizens.<sup>227</sup>

Unlike community service requirements for professional qualifications — where the professional retains a high degree of autonomy — state public works programmes that require that welfare grant recipients actually work for their grants come dangerously close to satisfying the conditions for both servitude and forced labour. 'Workfare', writes Bailey, like peonage or debt bondage, 'exact[s] mandatory labour as satisfaction for a debt, and imposes legal sanctions for non-performance.'<sup>228</sup> In this relationship, the state replaces the 'employer' as the holder of the debt and the debt to be repaid by the workfare recipient is the welfare grant. To put it slightly differently, when a person receives a welfare grant through a mandatory workfare program, the grant is transformed into a debt, and the debt can

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225 See *Butler v Perry* (1916) 240 US 328, 333 (Upholding compulsory military service and requirements that able-bodied men build public roads. Such burdens are not without limit. Supreme Court granted the state a citizenship exception only for those public activities without which liberty itself could not be secured.)

226 (1986) 478 US 675, 681, 683.

227 Given that public service, in one form or another, is an essential condition for the maintenance of a truly democratic republic, the state can make a compelling argument that the doctors, lawyers and pharmacists it trains must not only learn what citizenship demands but reflect that learning in the practice of their profession. One rejoinder might be that students who wish to become doctors, lawyers and pharmacists are being singled out from amongst the larger student body. The appropriate riposte is that no student is obliged to become a doctor, lawyer or pharmacist nor is the state precluded from attaching similar conditions for qualification in other professions. The state must take care, however, that an unintended consequence of its actions is not a significant diminution in either the quantity or the quality of professionals made available to the public — especially in those areas that are in greatest need. Such an outcome could not be justified given that these programmes are designed to increase the quantity and the quality of professionals available to serve those in the greatest need.

228 C Bailey 'Workfare and Involuntary Servitude: What You Wanted to Know But Were Afraid to Ask' (1995) 15 *Boston College Third World LJ* 285, 316.

only be discharged by the recipient if she engages in the work which the programme compels her to undertake. Workfare creates conditions of involuntary servitude because the only choice the recipient has is to work or to starve.

The status of such public works programmes is a live issue in South Africa. In April 2004, the South African Government launched its Expanded Public Works Programme ('EPWP').<sup>229</sup> The rationale for such work is simple. The DPW notes that as of September 2003:

4.6 million people were unemployed in terms of the strict definition and 8.3 million in terms of the broad definition ... The unemployment rate has been growing by 1% to 2% per annum, reaching 30.7% by September 2002. To reach government's target of halving unemployment by 2014 (i.e. reducing the unemployment rate from 30% to 15%),

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546,000 new jobs would have to be created each year — 276,000 more than has hitherto been the case.<sup>230</sup>

Unlike workfare programmes in the United States, the EPWP is not meant to supplant other forms of government assistance. Nor are persons who might qualify for EPWP work threatened with the termination of existing benefits should they refuse to make themselves available for work. The EPWP provides a mechanism for income transfer to poor households and for skills development for the heretofore unemployed. The conditions under which a workfare programme might create conditions of servitude do not obtain in South Africa under the EPWP.

### (h) Conscription

Conscription in South Africa was abolished in 1993 by the Defence Second Amendment Act.<sup>231</sup> However, various constitutional provisions — eg, FC s 37 — anticipate future exigencies that might require re-enactment of a draft.

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229 See Department of Labour, Ministerial Determination: Special Public Works Programmes, Basic Conditions of Employment Act, 1997, Government Gazette No 23045 (25 January 2002). Under the auspices of the Department of Public Works ('DPW'), the Department of Labour ('DOL'), Department of Social Development ('DSD'), Department of Environmental Affairs and Tourism ('DEAT'), Department of Trade and Industry ('DTI'), Department of Public Enterprises ('DPE') and South African Local Government Association ('SALGA'), the EPWP created almost 38 000 work opportunities during the first quarter of the financial year 2004/05. See Department of Public Works 'Expanded Public Works Programme' (2004) available at [www.epwp.gov.za](http://www.epwp.gov.za), (accessed on 19 December 2004).

230 See Department of Public Works 'Expanded Public Works Programme' (2004) available at [www.epwp.gov.za](http://www.epwp.gov.za), (accessed on 19 December 2004). Most of the unemployed — some 59% — have never worked at all. Amongst youth — defined as persons age 16 to 34 — 70% report never having worked. Such high levels of unemployment married to grinding poverty make the EPWP a necessary addition to the government's armoury of poverty alleviation programmes.

231 Act 134 of 1993. See *End Conscription Campaign v Minister of Defence* 1993 (1) SA 589 (T) (Court hears challenge to whites-only conscription. The applicant argued that the Population Registration Act Repeal Act 115 of 1991, which removed the definition of 'white person' in s 1 of the Population Registration Act 30 of 1950, necessarily implied the repeal of whites-only military service under Defence Act 44 of 1957, s 2(1). The court rejected this argument. It held that that: (a) a repeal statute did not repeal provisions of the repealed statute incorporated in another statute; and (b) if the legislature had intended to abolish conscription, it would have done so explicitly.) For a general account of the campaign to abolish conscription, see J Sarkin 'Conscription' (1993) 4 *SAHR Yearbook* 37; R Louw 'Conscription' (1994) 5 *SAHR Yearbook* 33.

Most international and regional human rights treaties exclude expressly conscription from the ambit of their forced labour provisions.<sup>232</sup> FC s 13 does not. As with prison labour and community service, this structured silence should not be read as acquiescence. A criminal sanction attached to a failure to heed a call up would qualify conscription as labour performed under the menace of penalty and satisfy the test for forced labour.<sup>233</sup>

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When asked to assess the state's justification for its conscription regime, the courts will pay particular attention to the length and the conditions of the military service. In *W, X, Y & Z v United Kingdom*, the ECHR Commission went so far as to recognize the possibility that significant restrictions on the inability to leave voluntary military service could amount, not simply to forced labour, but to servitude.<sup>234</sup>

Let us assume that, as a general matter, the state's regime of conscription is not so oppressive as to constitute a violation of the right to be free from forced labour. Can a conscientious objector still rely on FC s 13 and its prohibition of forced labour? Under international law, the right to be free from forced labour excludes conscription 'and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors.'<sup>235</sup> So even if a conscientious objector could make the case that FC s 13 prohibited the forced labour that conscription entails — which is by no means clear — he or she would be hard pressed to rebuff the state's entreaties to spend a comparable period of time working for the betterment of the commonwealth.<sup>236</sup>

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232 See § 64.5(c) supra. Under international law, states retain the power to conscript. E Marcus 'Conscientious Objection as an Emerging Human Right' (1998) 38 *Virginia Journal of International Law* 507, 510; M Mthombeni 'Forced Recruitment, A Violation of Human Rights?' (1991-2) 17 *SA Yearbook of International Law* 12, 14. This power is considered necessary in order to preserve the territory and the political sovereignty of the state. See Mthombeni (supra) at 17 (States retain the right to self-defence in terms of UN Charter, s 2(4). Does a rebel force have a right to conscript in order to overthrow the government? Despite the absence of an expression provision in the Charter, Mthombeni argues that a democratic opposition force representing the people derives a right to conscript from the right to self-determination.) This general power is subject to two provisos. Children under fifteen may not be conscripted. See Article 3(c) of the Second Protocol to the Geneva Convention. In South Africa, the Basic Conditions of Employment Act prohibits any employment of children under 15. Recruitment into the armed forces may not be arbitrary or discriminatory. See, eg, Universal Declaration of Human Rights (1948); International Covenant on Civil and Political Rights (1967).

233 See §64.4(c) supra (Definition of forced labour.)

234 See *W, X, Y & Z v The United Kingdom* (1968) 11 *Yearbook of the European Convention on Human Rights* 562.

235 ICCPR Article 8(3)(c)(ii).

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236 Conscientious objectors are likely to find greater succour in FC s 15 — freedom of religion, belief and opinion. See Marcus (supra) at 514. FC 15 reads: 'Everyone has the right to freedom of conscience, religion, thought, belief and opinion.' See, generally, P Farlam 'Religion, Belief and Opinion' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, A Stein & S Woolman (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 41. The strength of the FC s 15 claim is contingent upon the basis for the objection. Courts are often predisposed to vindicate claims grounded in accepted religious practice and less inclined towards the protection of identical claims shorn of their religious moorings. As Farlam correctly observes, however, the text of FC s 15 provides cover for both religious and non-religious practices. It privileges neither one nor the other. See Farlam (supra) at 41-13 — 41-15. See also *Prince v President Cape Law Society* 2002 (2) SA 794 (CC), 2002 (1) SACR 425 (CC), 2002 (3) BCLR 231 (CC); *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC); *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC).

The right to conscientious objection can also be derived from the rights to life, to association, and to expression. Marcus (supra) at 518 — 524. While this freedom was, at international law, initially construed to exclude conscientious objection, the UN Human Rights Committee notes that although '[t]he Covenant does not explicitly refer to a right to conscientious objection, . . . the Committee believes that such a right can be derived from Article 18.' UN Human Rights Committee, ICCPR, General Comment 22, U.N. Doc. HRI/GEN/1/Rev.3 (1997) 11. Conscientious objection is still not recognised under the ECHR. But see D Decker & L Fresia 'The Status of Conscientious Objection Under Article 4 of the European Convention on Human Rights' (2001) 33 *NYU J of Int'l Law and Politics* 379, 414-6 (Describing moves towards recognition.) For the early position of the UN Human Rights Committee refuses to ground conscientious objection in Article 18, see *LTK v Finland* Communication No 185 (1984)(Failure to recognize right to conscientious objection not a violation of freedom of religion, belief and opinion); *Aapo Järvinen v Finland* Communication No 295 (1988)(Longer civil service than military service not a violation of right to freedom from forced labour or right not to be discriminated against). The European Commission on Human Rights trod a similar path in *Grandrath v Federal Republic of Germany* (1967) 10 *Yearbook of the European Convention on Human Rights* 626 (Jehovah's Witness leader not exempted from alternative civilian service); *X v Austria* Application number 5591/72 (1973) (Roman Catholic required to perform military service). These ECHR Commission's decisions rely on the wording of Articles 8(3)(c)(ii) and 4(3)(b), respectively, to find that conscientious objection falls outside the scope of the right to freedom of religion, belief and opinion. For an excellent summary of the Committee's and Commission's case law on conscription, see M Major 'Conscientious Objection to Military Service: The European Commission on Human Rights and the Human Rights Committee' (2001) 32 *California Western International LJ* 1. See also H Gilbert 'The Slow Development of the Right to Conscientious Objection to Military Service Under the European Convention on Human Rights' (2001) 5 *European Human Rights LR* 554.