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PENAL LABOUR IN THE CONSTITUTIONAL CONTEXT:

A COMPARISON OF SOUTH AFRICA AND GERMANY

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I. Introduction

One of the most important reasons for doing comparative work in the field of law, is to get a better understanding of the legal jurisdictions of other countries. Studying the law of another country also enables one to understand one's legal jurisdiction in a better way. It helps one to see well-established principles in a new light and to ask questions about the continued applicability of such principles.

In this comparative work relating to how different legal systems deal with the issue of penal labour, I will focus on two different jurisdictions; namely those of South Africa and Germany. As a result of the forces of history the first country was ruled by the doctrine of parliamentary supremacy and the English common law - whilst the latter one is dominated by the constitutional state principle ('Rechtsstaat') and a statute law system .

The focus of this paper is to establish how the above mentioned countries and their legal systems deal with penal labour and in particular to focus on the constitutional issues.

This subject and its importance came into my mind because of the decision of the German BVerfG of the 1st of June 1998 in which it declared the German approach whereby the prisoners get renumerated for their work unconstitutional.
This was my starting point to elaborate the constitutional foundations of penal labour in Germany as well as in South Africa.
Important in this context is the history of prisons and the sentencing to work in each of the countries and the difference between forced labour and penal labour - if there is one.
It is significant for a country and its legal status if forced or penal labour is mentioned in the constitution and how it is realized.
I aim to elaborate the similarities and differences between

Germany and South Africa and try to show possible tendencies in the future.

II. South Africa

First of all, I will deal with the South African history and then with its situation today concerning penal labour.

A. History

Dealing with the history is strikingly important because of South African's colonial roots and its unique invention of the apartheid system and its consequences until now.

1. The colonial heritage

The arrival of Europeans in southern Africa was by far the most traumatic experience the resident communities had ever encountered. Western Europe was, of all the major power centres in the world, the least likely to succeed in any grandiose attempt at territorial conquest. However, it had three assets which proved, in combination, to be world beaters; a religious outlook which made proselytising mandatory; a capacity to assimilate the inventions of others, such as map-making, sailing close to the wind, and the use of gunpowder, and a hunger for wealth and sustenance arising out of a lack of these things.[1]
This led governments to rationalise their need by setting up marine merchant enterprises under charter - first the Portuguese, whose early experiences of southern Africa were discouragingly violent, and later the Dutch, English and French, all of whom saw the value of the Cape as a strategic outpost on the route to empires in the East. Only the Dutch set up a mainland base for their East India Company (VOC), in 1652[2], to provide passing ships with food, water and hospitalization for sick sailors.[3] They would probably have been satisfied with that if a base alone had been sufficient.

Production was intended to supply these ships as well as the reproduction of those who migrated to staff the colony, and so

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[1] http://www.learner.org./exhibits/southafrica/europeans, p.2

[2] van Zyl Smit in "South African Prison Law and Practice", p.7

[3] Miles, p.118

commodity production for export was poorly developed prior to British intervention at the end of the eighteenth century.

The European settlers were officials of the Company, subsequently supplemented by a small number of independent settlers. The latter were permitted to lease land under an annual licence, but the process of land occupation was largely uncontrolled, and Dutch cattle-herders continuously extended the boundaries of the settlement, contrary to the wishes of the local government.[4]
Dutch settlement led to contact with the Khoikhoi and San (known collectively as Khoisan) peoples whose subsistence was gained by a nomadic pastoralism and hunting and gathering respectively, and whose economic and social existence were interactive.
However, the Khoikhoi realised from the building of a stone castle and settlement of farmers on the land that the Dutch intended to stay, and began to resist barter and to fight off attempts by VOC expeditions to take their livestock by force.[5]
The Dutch were either repelled by Khoikhoi social habits, or admired them as 'noble savages', and gradually overwhelmed them by seizing their streams, land and cattle, and incorporating them as peons on the land or in their militia. The political structure of the Khoikhoi clans was simply not strong enough to resist. [6]
The break-up of the economic and social organization of the Khoikhoi during the seventeenth and eigthteenth centuries was accompanied by the incorporation of their labour power into agricultural and pastoral production established by Dutch settlers.[7]

The VOC's need for labour was so urgent that there was also a trade in human beings from Africa and Asia who were bought and sold as slaves from 1658. And slave labour was the predominant means of labour exploitation throughout the eighteenth century.
By 1795 there were 16.839 slaves in the Cape colony. [8] The limited and primarily subsistence production of the Cape colony was therefore dependant upon the institutionalisation of different forms

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[4] Miles, p.119

[5] http://www.learner.org./exhibits/southafrica/europeans, p.3

[6] Miles, p.119

[7] Miles, ibid

[8] SESA at:Slavery at the Cape", p.658

of unfree labour, and particularly upon slave labour.[9]

This controversial decision cast a long shadow. A slave had no legal rights, and, unlike slaves in America, almost no chance of liberation through conversion to Christianity. At the Cape the obligatory freeing of converts acted as a barrier to conversion - a fact which made conversion to Islam attractive for political as well as religious reasons. Slaves owned by the company or residents in the town had some opportunity to practice trades. Others, especially those owned by farmers, were more tightly controlled.

The Cape had become a society composed of distinct and unequal legal groups, and free blacks were never numerous or strong enough to break down the barriers. Servants of the VOC and white land-owners, even if they quarrelled with one another, established a dominance upheld by law. A kind of campaign, led by pressure groups in Britain with local missionary support, was set in motion to free the serf and the slave. Even though, at its most rational, this was an attempt to balance freedom with the need to keep the emancipated in remunerative employment, it did not win much support from local employers of labour. Therefore, though the Khoikhoi obtained a 'charter of liberties' in 1828, and the slaves were freed after a four-year period of 'apprenticeship'[10] in 1838, employers' pressure on the courts curbed the effectiveness of both these measures to a considerable extent.
In this process of gradual abolition, the powers of punishment of individual slave owners were eventually restricted severely. In their stead, slave-owners could turn their slaves over to the magistrate for punishment in the form of whipping or detention in stocks.[11]
The State thus became actively involved in disciplining part of the labour force that had previously been left to private surveillance.

The exploitation of prison labour can be related quite specifically to a series of major social reforms introduced in the first half of the nineteenth century.[12] Before that imprisonment was not a major

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[9] Miles, ibid

[10] SESA at "Slavery at the Cape", p.660

[11] v. Zyl Smit in "South African Prison Law and Practice", p.9

[12] v..Zyl Smit, in: "Prison Labour — Salvation or Slavery", p.206

form of punishment. Offenders were rather put to death or were banished from the colony.[13] Forced labour occurred rather in the form of slave labour than as a systematic exploitation of sentenced offenders.

During the early nineteenth century, fixed terms of imprisonment began to feature more prominently in sentences imposed on convicted offenders. The reason lay in the increasing demand for labour in a growing colony.

In 1843, when John Montagu was charged with the control of the local penal system, provisions were invented for techniques designed to rehabilitate prisoners. Rehabilitation became a positive goal of punishment, which could be achieved by 'useful' labour.[14]
Montagu invented so-called convict stations in which all convicts serving sentences of hard labour of longer than three months were sentenced. Normally, they were used to build roads or mountain passes.
Regardless of race, life in these convict stations was highly organized. Prisoners were divided into three classes - a punishment class, a probationary class, and a good conduct class. They could be promoted from one group to another for good behaviour and could even earn small cash payments, privileges and a limited reduction of sentence. This system of classifying prisoners was a sophisticated innovation and is similar to that in use today in South African prisons.[15]

Major changes were taking place in the penal context after diamond mining became more and more successful and a need arose for more labour than was freely available.[16]
In 1885, the De Beers Diamond Mining Company became the first non-state corporate entity to employ convicts on a regular basis.[17]
In the two decades after 1885, the employment of convict labour on the diamond fields increased. De Beers built a branch prison which

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[13] v.Zyl Smit in "South African Prison Law and Practice", p.7

[14] v.Zyl Smit, ibid at p.11

[15] v.Zyl Smit, ibid at p.209

[16] http:/www.learner.org./exhibits/southafrica/diamonds; p.1

[17] v. Zyl Smit, in: "Prison Labour — Salvation or Slavery", p.211

it staffed and where prisoners were housed, fed and controlled by the company.[18]

The use of convict labour in the mines had strong influences in other sectors as well. Prisoners had been hired out to individuals since early in the nineteenth century, but this had taken place on an ad hoc basis.[19] In 1887, these procedures were re-organized and placed on a more systematic footing. Provision was made for convict labour to be made available, at standard rates of payment, to bodies such as municipalities and to private persons such as farmers.

Another aspect of penal policy that emerged in the 1880s was the first systematic attempt to segregate prisoners on racial lines.

2. *The Union of South Africa - the apartheid era*

After the Union of South Africa was established in 1910, the administrations of the various territorial prison systems were overhauled.[20] Major changes in the internal use of labour took place with the gradual development of prison workshops and the establishment of farm prisons, which were designed to produce food for the prisoners in the system. Allocation of prisoners to these programmes was done on a specifically racial basis. Inside work, that is work in workshops, was reserved for "Europeans", and work outside prisons for "natives" (Department of Justice 1917).

Prison labour policy in South Africa was reviewed comprehensively for the first and only time this century by a judicial commission in 1947. The Landsdown Commission on Prison and Penal Reform noted prominently that "stone-breaking by hand to provide necessary occupation has been a feature in many prisons and goals in the Union"[21].

In all, the Report may be viewed as presenting an ideal of a prison labour system suitable to a liberal democratic society — in 1947 South Africa was not such a society.[22]

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[18] v.Zyl Smit in "South African Prison Law and Practice", p.15

[19] v.Zyl Smit ibid., p.16

[20] v.Zyl Smit ibid., p.20

[21] Landsdown Commission 1947, para 823

[22] v.Zyl Smit, in "Prison Labour — Salvation or Slavery", p.214

The National Party after 1948 bonded itself to the apartheid ideology.This plunged South African politics into a dark age, arising out of the conviction of a few prominent leaders, some of them ideologues and others amoral pragmatists, that they had found a formula which could ensure the future of the white minority into the next century. The plan was to fabricate a permanent white political majority by purging the voter's role of all blacks; and by creating 'homelands' for Africans (and perhaps coloured people) where alternative political provision could be made for them, leading up to self-government and a form of independence. It included enforcement of total segregation (subject to economic necessity according to the pragmatists but not the ideologues), so that nearly every town was carved into separate 'group areas', sorting people by racial categories, as shown in their identity books and entered in a national register.[23]
The aim was to eliminate irregular categories by a total ban on 'mixed' (i.e. inter-racial) marriages. Apartheid also included the retention of economic power in white hands, by tightening the job colour bar and directing skilled blacks into their own areas. For a time this was linked to a policy of industrial decentralisation, so that centres of industry could be set up on the borders of homelands, to which black and white employees could travel from opposite sides without infringing group areas delimitations or necessitating too much long-distance migrancy for blacks.[24]

During the 1950s the use of prison labour on private farms even increased by allowing "bona fide Farmers Associations" to build "prison farm outstations" which were then handed over to the Department of Prisons to manage. Farmers who contributed were entitled to employ a number of convicts.

The government was not unconcerned about the legitimacy of its prison system. In 1959 prison legislation in South Africa was modernized[25] and, in as far as the policy of apartheid allowed, formally brought in line with the United Nations Standard Minimum

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[23] http://www.learner.org./exhibits/southafrica/apartheid; p.1

[24] ibid.

[25] Act 8 of 1959 ("Prison Act of 1959")

Rules for the Treatment of Prisoners. In the course of these legislative changes the sentence of imprisonment with hard labour was removed from the statute block.

Since 1959 changes in prison labour patterns have been piecemeal. Most dramatic has been the relatively steep decline in the significance of prisoners working in commercial agriculture. The reason is to be seen in the warning that the production of goods for export using forced labour was a contravention of the General Agreement on Tariffs and Trade and that the convict labour from the outstations was such labour.[26]

Patterns of labour used inside prison have been far more resistant to change. Accounts of conditions experienced by political prisoners in the 1960s and 1970s are full of descriptions of stone breaking and other hard and relatively pointless labour being performed by prisoners under harsh conditions.[27]

The increased number of political detainees and prisoners also meant that for the first time there was a body of prisoners with the skills and the resources to mount direct legal challenges to the decisions of the prison authorities.[28]
In a series of decisions in the 1960s and 1970s the various divisions of the Supreme Court, including the Appellate Division, handed down judgments which were unsympathetic to the cause of prisoner's rights.[29]
In the Goldberg case[30] the rights of prisoners were defined extremely narrowly and its reasoning was made applicable to sentenced prisoners with the result that the rights of all sentenced prisoners were restricted [31] ("political" prisoners were not recognized as an analytical category).

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[26] Corry, p.157

[27] Mandela in "A long walk to freedom", p.390

[28] v.Zyl Smit in "South African Prison Law and Practice", p.35

[29] for example: Roussow v Sachs 1964 2 SA 551 (A); Goldberg v Minister of Prisons 1979 1 SA 14 (A)

[30] Supra 27 D-F

[31] v.Zyl Smit in "Criminal Justice Ethics", p.42

An important reversal of the almost total racial segregation which had existed in South African prisons for more than a century, had begun in 1988 when a number of regulations were amended in order to exclude all references to race.[32]

In 1991, a far-reaching revision of the 1959 Prisons Act was undertaken.[33] Substantive legislative changes were introduced as well. These gave effect to the newly announced policy of running the prison system on business principles by removing many of the restrictions on the use of prison labour.[34]

3. The Interim Constitution of 1994

Radical transformations in South African society and its political and legal system led to the interim Constitution of April 27, 1994. Its effect on the South African legal system can justifiably be described as revolutionary. Basically, the interim Constitution brought about three fundamental changes:

1. for the first time in South Africa's history, the franchise and associated political rights were accorded to all citizens of a single, unitary state without racial qualification.
2. The strong central government of the past was replaced by a state with federal features. The Westmister-style electoral system was replaced by a system based on proportional representation.
3. The doctrine of parliamentary supremacy was replaced by the doctrine of constitutional supremacy. A Bill of Rights was put in place to safeguard human rights, ending centuries of state-sanctioned abuse.[35]

It is the third of these changes that is most important for the purposes of this work. Before 1994 effective protection of human rights through the courts was virtually impossible. Constitutional

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[32] Government Gazette 11360 GN R1229 of June 1988

[33] by the Correctional Services and Supervision Matters Amendment Act 122 of 1991

[34] see 26 and 27 of the amending Act

[35] The Bill of Rights Handbook 1998, p.3

law was dominated by the doctrine of parliamentary supremacy which means that Parliament is the supreme law-making authority in the state. All other organs of the state, including the courts, are subservient to parliament.

The common law provided some protection for individual rights but legislation could amend the common law in whatever way Parliament thought fit. Moreover, as opposition to apartheid grew, the government frequently proclaimed 'states of emergency' which saw the suspension of the few civil liberties that had survived years of cutting back by 'security' legislation.[36]

It must be emphasized that the interim Constitution was a transitional constitution. One of its principal purposes was to set out the procedures for the negotiation, drafting and implementation of a final Constitution.

B. The Constitution of 1996

The 1996 Constitution all but completes South Africa's negotiated revolution. Whereas the interim Constitution was not the product of a democratically-elected body, the 1996 Constitution was drafted and adopted by a Constitutional Assembly, in effect, consisting the Members of Parliament elected in the 1994 elections.

Entrenched in the Constitution are 34 Constitutional Principles which compose a framework for the creation of a democratic state with a supreme constitution in which the fundamental rights and freedoms of all citizens are protected.

1. The Development of prisoner's rights in South Africa

Before turning to an examination of the Constitution I will demonstrate in general the development of prisoner's rights in South Africa.

The law relating to prisoner's rights has changed quite remarkably

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[36] ibid., p.4

during the last 35 years. 1964, in the case of Rossouw v Sachs[37] the Appellate Division of the Supreme Court was prepared to deny reading and writing materials to a prisoner detained for purposes of interrogation. Similarly, in Goldberg v Minister of Prisons[38] a majority of the Appellate Division denied that prisoners had any rights, other than the most basic. At this stage, the courts left prison officials with almost total discretion to decide on every aspect of how prisoners should be treated.[39]

The turning point for the Appellate Division was a decision involving Mr. Nelson Mandela, then a political prisoner. Although he lost the case, the Appellate Division recognized that any basic right of a prisoner "survives incarceration except in so far as it is attenuated by legislation, either expressly or by necessary implication, and the necessary consequences of incarceration"[40].

However, until the decision in Minister of Justice v Hofmeyr[41], the approach adopted by the majority in Goldberg remained binding law. In Hofmeyr's case the judicial approval was finally given to the generous recognition of prisoners' rights.

These judicial developments are being consolidated. The Interim Constitution contains an entrenched bill of rights. Amongst its clauses are fairly detailed provisions dealing with the rights of all detainees (s.25(1) of the Constitution of the Republic of South Africa 1993).
The new Constitution contains a similar provision. The clause (section 35) has not been controversial. "Its adoption reflects perhaps the extent to which many of the current members of government, who had been incarcerated themselves, entered into this legal, rights-based discourse about prisons."[42]

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[37] 1964 92) SA 551 (A)

[38] 1979 (1) SA 14 (A)

[39] v.Zyl Smit "Normal Prisons in an 'Abnormal' Society? A Comparative Perspective on South African Prison Law and Practice", p.22

[40] Mandela v Minister of Prison, 1983 (1) SA 938 (A) at 957 E-F

[41] 1993 (3) SA 131 (A)

[42] v.Zyl Smit in: "Change and Continuity in South African Prisons". In: R.Weiss & N South (eds) 'Comparing Prison systems' (forthcoming)

The question now arises as to how the new South Africa deals with the issue of penal labour and forced labour and whether the Constitution gives any guidelines. Do South African prisoners have a constitutionally valid duty to work?

2. Section 13 of the Constitution

Section 13 of the Constitution states simply and without exception: "no one may be subjected to slavery, servitude or forced labour."
This has to be valid for prisoners as well (see above).
On the other hand the formal legal position is that the duty of prisoners is expressly enacted by primary legislation. In the case of sentenced prisoners, s.77 of the Correctional Services Act (1959) obliges prisoners to perform "such labour, tasks and other duties as may be assigned to [them] by the Commissioner [of Correctional Services]".
Does the wording of the Constitution mean that a prisoner could mount a constitutional challenge to the lawfulness of legislation compelling prisoners to work or of instructions seeking to enforce such legislation in specific cases?
Does the wording of section 13 of the Constitution mean that penal labour - if it is unvoluntary - is in any case unconstitutional

The rule is that legislation which conflicts with a constitutionally entrenched fundamental right is unconstitutional unless it can be justified by the limitation clause of the Constitution.
Before turning to a detailed examination of the Constitution one has to determine whether 'penal labour' falls under the scope of the guaranteed right in section 13.

3. Interpretation of the Bill of Rights

Constitutional interpretation is the process by which the meaning of a constitutional provision is determined. The meaning of some of the provisions of the Constitution is likely to give rise to controversy. They are quite likely to be the subject of argument about their proper meaning. Certain provisions, notably the rights in the Bill of Rights, are formulated in general and abstract terms.
Mostly, human rights are formulated with a high degree of

abstraction and, because they are so broadly conceived, the process of interpretation becomes particularly important.[43]

The proper application in particular circumstances will necessarily be a matter for argument and controversy. The rights are not set formulated as detailed sets of rules designed to deal with specific, envisaged situations. Sometimes the apparently obvious meaning of a provision will conflict with the meaning that emerges once it is read with other provisions or in the context of the Constitution as a whole.[44]

Does section 13 of the Constitution then contain a prohibition of penal labour?
In order to answer this question, the right to be free from 'forced labour' must be interpreted in order to determine its content. In other words, the kind of activities that are prohibited or protected by the right must be identified.

The Constitution does not prescribe how it should be interpreted. Section 39 of the Constitution contains an interpretation clause which pertains to the Bill of Rights and section 293 contains certain definitions which apply to the interpretation of the Constitution as a whole. However, the instructions contained in these sections, important as they may be, are vague, incomplete or refer to specific tools of interpretation which apply only in certain situations.[45]

The interpretation, application and limitation of fundamental rights can never be regulated completely by the text of the Constitution.
The Constitutional Court has therefore laid down guidelines as to how the Constitution in general and the Bill of Rights in particular should be interpreted.[46]

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[43] A Commentary on the South African Constitution, p.96

[44] The Bill of Rights Handbook 1998, p.97

[45] ibid., p.98

[46] ibid., p.98

a) Literal Interpretation

The obvious starting point for the determination of the meaning of any provision of the Constitution, including the Bill of Rights, is the text itself.[47] In this regard, Kentridge AJ commented as follows in S v Zuma[48]: "While we must always be conscious of the values underlying the Constitution ... it cannot be too strongly stressed that the Constitution does not mean whatever we may wish it prohibits".

Literally, 'forced labour' means 'compulsory hard work usually under harsh conditions'[49]. No link is given to penal servitudes.

It is not possible to determine, by literal interpretation only, whether 'forced labour' in its purest sense contains the duty to work in prisons as well. It is not clear whether it only deals with the situation outside prisons or if 'forced labour' contains the situation of a sentenced prisoner whose sentence obliges him to work.
However, constitutional disputes can seldom be resolved with reference to the literal meaning of provisions alone.

b) Purposive Interpretation

The Constitutional Court has, on several occasions[50], committed itself to a way of interpretating the Bill of Rights usually referred to as 'purposive', but sometimes also as 'value orientated' or 'teleological'.
Purposive interpretation tells us that once we have identified the purpose of a right in the Bill of Rights we will be able to determine the scope of the right.[51]

The identification of the values or interests protected by the rights in the Bill of Rights is a difficult task.

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[47] A Commentary on the South African Constitution, p.98

[48] 1995 (4) BCLR 401, 1995 w SA 642 (CC)

[49] Oxford Dictionary Of Current English, 1991

[50] See S v Makwanyane 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC) para 9; S v Zuma (supra) para 15

[51] The Bill of Rights Handbook 1998, p.100

Does the right to be free from forced labour have the purpose of protecting prisoners from being sentenced to work?

The purposive approach to interpretation therefore inevitably requires a value judgment to be made about which purposes are important to and protected by the Constitution and which are not.

It is more than doubtful that section 13 of the Constitution intends to prohibit a duty to work for prisoners as a whole. A country in which the duty to work plays a decisive role in the rehabilitative and resocializing purpose of sentences will not 'protect' prisoners of this sentencing goal[52].
The Correctional Services Bill currently before Parliament underlines this point. Chapter 4 of the Bill, which deals with sentenced prisoners, is introduced by a clause that specifies an overall objective for the implementation of the sentence of imprisonment. It provides:

> *'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.*[53]

c) Historical Interpretation

The Constitution is a consequence of and a reaction to South Africa's peculiar political history. It goes without saying that this history plays an important part in the interpretation of the text.
According to the Constitutional Court:

> *'Fundamental to [the Constitution's] spirit and tenor was the promise of the equal protection of the laws to all people of this country and a ringing and decisive break with the past which perpetuated inequality and irrational discrimination and arbitrary*

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[52] The Correctional Services Bill B 65-98

[53] Clause 36

governmental and executive action.[54]

If the historical intention of the legislature is in any way provable, and should it be in conflict with the literally discovered meaning of the text then the latter ought to prevail.[55]

In consideration of the cruel history of penal labour in South Africa (see above), it might be possible that section 13 of the Constitution intends to protect prisoners from being forced to work. On the other hand, as mentioned above, there is also — if not mainly — a rehabilitative purpose to be seen in a sentencing to work which has nothing to do with stone-breaking or exploiting of labour as in South Africa's inglorious past.

Because of the changed circumstances and purposes of penal labour today it is not convincing that section 13 of the Constitution seeks to prohibit a duty to work.

d) Contextual Interpretation

In Makwanyane[56] the Court stated that sections of the Bill of Rights must not be interpreted in isolation, but in context. The history and background to the adoption of the Constitution is one form of context, but the Court also uses other constitutional provisions and, in particular, the other provisions of the Bill of Rights, to provide the context for the interpretation of individual provisions of the Bill of Rights. The contextual form of constitutional interpretation recognises that it is not individual provisions, read in isolation, which are supreme, but the whole of the Constitution, read in context.[57]

In the case of penal labour it might not be advisable to see the debate only in the context of 'forced labour' but also in a contextual relationship with the right to equality (section 9 of the Constitution),

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[54] S v Mhlungu 1995 (3) SA 391 (CC); 1995 (7) BCLR 793 (CC) para 8

[55] Du Plessis/Corder, p.46

[56] S v Makwanyane (supra) para 10

[57] De Waal in "The Bill of Rights Handbook 1998, p.106

together giving meaning to the prohibition of forced labour.
In other words, evidence of the infringement of the equality clause (for example, the finding that forced labour outside prisons is prohibited but an involuntary duty to work in prisons is not) could lead to the conclusion that the imposition of a sentence to work is an infringement of the prohibition of 'forced labour'.

Since the right to equality can also be restricted by the limitation clause in section 36 of the Constitution (see below) the same conclusion is likely to be found.
In this respect, the contextual interpretation does not give any guidance.

e) The Interpretation Clause, section 39 of the Constitution

Certain instructions relevant to the interpretation of the Bill of Rights are contained in section 39 of the Constitution.

Section 39 (1) demands an interpretation which promotes the values which underlie an open and democratic society based on freedom and equality.

It seems as if the society referred to is not necessarily the present South African society, but an abstract and ideal one.[58]
In other words, an exercise is required that is analogous to that of applying the 'boni mores' or legal convictions of the community standard in the law of delict. The realities of South African society will therefore not feature as much in the interpretative stage of the fundamental rights analysis, when the scope of the right is determined, but may prove to be decisive in the next stage, when the constitutionality of limitations of the right is considered (see below).

Section 39 (1) refers to the use of public international law and foreign law. In S v Makwanyane[59] the Court stated that both binding and non-binding public international law may be used as tools of

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[58] Ibid. at p.108

[59] S v Makwanyane (supra) paras 36-7

interpretation:

> *'International agreements and customary international law provide a framework within which [the Bill of Rights] Chapter 3 can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions.'*

The expression 'forced labour' is not defined in any of the major instruments but Article 2 of the Convention Concerning Forced Labour of the International Labour Office[60] defines forced labour to mean:
"all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".
As is clear from this definition, the key element in forced labour is that it is involuntarily.[61]
But the concept of 'forced labour' cannot be interpreted solely by reference to the literal meaning of the words. In addition to the fact that the work must be performed by the worker against his or her will, the work to be performed must be unjust, oppressive, or involve unavoidable hardship.[62]

Prison labour - if it is a duty to work and not done voluntarily - conceivably fall within the ambit of forced labour[63] and might be prohibited.

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[60] ILO Convention No.29, Art.2 I, 1930

[61] De Waal in "The Bill of Rights Handbook 1998", p.209

[62] Iverson v Norway (1468/62) CD 12 80

[63] A Commentary on the South African Constitution, p.54

4. *The general limitation clause, section 36 of the Constitution*

Fundamtental rights and freedoms are not absolute. Their boundaries are set by the rights of others and by the legitimate needs of society.[64] Generally, it is recognized that public order, safety, health, morals and democratic values justify the imposition of limitations on the exercise of fundamental rights.

It is widely accepted in the domestic law of most states, in international law, and according to international and other human rights documents, that only a very limited number of rights, if any[65], are absolute.[66] These include freedom from torture, the abuse and exploitation of children and possibly freedom from servitude, freedom of conscience, belief, thought and opinion.[67]

The overwhelming majority of human rights and liberties are of necessity restricted by the inherent duty, to respect the rights of others.
The curial adjudication of the content and justifiable limitation of rights in a democratic society is always a significant issue in any legal system.

In the South African Constitution a general limitation clause sets out specific criteria for the restriction of the fundamental rights in the Bill of Rights, section 36 of the Constitution.
A law which limits a right infringes that right. However, the infringement will not be unconstitutional if it takes place for a reason that is recognized as a justification for infringing rights in an open and democratic society based on human dignity, equality and freedom. In other words, not all infringements of fundamental rights are unconstitutional.[68]
Where an infringement can be justified in accordance with the

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[64] De Waal in "The Bill of Rights Handbook 1998", p.113

[65] see S v Williams 1995 3 SA 632 (CC) pars 55-56, which leaves open the question whether there are indeed rights that, despite the apparant universality of the limitation clause, cannot be limited

[66] Devenish in "A Commentary on the South African Constitution", p.89

[67] Ibid.

[68] Ibid., p.90

criteria in section 36 it will be constitutionally valid.[69]

The rights entrenched in Chapter 2 may be limited only:

(a) in terms of a law of general application;
(b) to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including
- the nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relationship between the limitation and its purpose; and
- less restrictive means to achieve the purpose.

These requirements were adopted from a dictum of Chaskalson P in S v Makwanyane & Another[70].

One consequence of the inclusion of a general limitation clause in the Bill of Rights is that the process of considering the limitation of fundamental rights must be distinguished from that of the interpretation of the rights. As was pointed out above, if it is argued that conduct or a provision of the law infringes a right in the Bill of Rights, it will first have to be determined whether that right has in fact been infringed.

There is an additional important difference between the stage of considering the interpretation of a right and that of considering its limitation. The question of whether an infringement of a right is a legitimate limitation of that right involves a far more factual inquiry than the question of interpretation. Appropriate evidence must be led to justify a limitation of a right in accordance with the criteria laid down in section 36.[71]

I will now examine whether section 77 of the Correctional Services Act is a legitimate limitation of the prohibition of 'forced labour'.

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[69] De Waal in "The Bill of Rights Handbook 1998", p.113

[70] (1995) (3) SA 391 (CC)

[71] De Waal in "The Bill of Rights Handbook 1998", p.114

a) Law of general application

Only 'law of general application' can validly limit a right in the Bill of Rights. This is a minimum requirement for the limitation of a right. A limitation must be authorized by a law, and the law must be of general application.

This requirement is also known as the rule of law. There are two components to this principle. The first is that the power of the government derives from the law. The second component relates to the character or quality of the law which authorizes a particular action. This means that it must apply to all and must not be arbitrary.

The duty of prisoners to work is expressly enacted by statute. In the case of sentenced prisoners, section 77 of the Correctional Services Act (1959) obliges every prisoner to perform "such labour, tasks and other duties as may be assigned to [them] by the Commissioner [of Correctional Services]". What may be assigned to such a prisoner by the Commissioner is limited by the provisions of the Correctional Service Act.
Because of its validity for all prisoners, section 77 is a law of general application.

b) Reasonableness and justifiability in an open and democratic society based on human dignity, equality and freedom

This part of the limitation test requires a law that restricts a fundamental right to do so for reasons that are acceptable to an open and democratic society based on human dignity, equality and freedom.
In addition, the law should not invade rights any further than it needs to in order to achieve its purpose.
In other words, it must be shown that the law in question serves an acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits it is designed to achieve (the purpose of the law).

The limitation of fundamental rights as sanctioned by section 36 involves a judicious weighing up of competing societal and ethical values, using an assessment based on proportionality.[72]

(1) Proportionality

Different rights have different implications for democracy[73] with the result that "there is no absolute standard which can be laid down for determining reasonableness and necessity.[74]

Principles must therefore be established and articulated, but the application of these to particular circumstances can only be assessed on a case by case basis.[75]

In this process one has to include the nature of the fundamental right that has to be limited and its import for society; the purpose for which the right is being restricted and the significance of that purpose to such a society; the extent of the limitation and its efficacy - whether indeed the coveted ends could reasonably be achieved by other means less deleterious to the right in question.[76] This standard reference of the Constitutional Court in the Makwanyane case was summerized as follows in S v Bhulwana[77]:

> *"In sum, therefore, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be."*[78]

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[72] See Makwanyane (supra) para 104

[73] Devenish in "A Commentary on the South African Constitution", p.91

[74] See Makwanyane (supra) para 104

[75] See Makwanyane ibid.

[76] See Makwanyane ibid.

[77] S v Bhulwana 1995 (12) BCLR 1579 (CC); 1996 (1) SA 388 (CC)

[78] See Bhulwana (supra) para 18

(2) The importance of the purpose of the limitation

At the very least, reasonableness requires the limitation of a right to serve some purpose. Justifiability requires that purpose to be one that is worthwhile and important in a constitutional democracy.[79]

A limitation of rights that serves a purpose that does not contribute to an open and democratic society based on human dignity, equality and freedom cannot therefore be justifiable.

An involuntary duty to work in prison violates the prohibition of forced labour. To justify the infringement of this right one has to demonstrate that penal labour serves a purpose that this society would consider worthwhile and important.

Therefore, one has to elaborate the purpose of section 77 of the Correctional Services Act, more precisely, the purpose of penal labour in South Africa.
This is not to be confused with the purpose of punishment or sentencing in general.

In modern correctional policies, the key word appears to be rehabilitation, meaning penal work has a predominantly rehabilitative content (although not the only one: the Department recognizes, as a matter of general policy, that prisoners ought to be employed also as a means of ensuring safe custody by reducing the risk of gang activities and riots which are perceived as being encouraged by idleness[80]).

There is not only a rehabilitative function but also a safe custodial function recognized in the purpose of a duty to work.
The limitation of imprisonment to the deprivations inherent in the loss of liberty is a hallmark of modern civilized punishment. To avoid the harmful effects of incarceration on the mental and social health of the inmate, some positive action toward rehabilitation is essential.[81] The purpose of a duty to work is definitely a

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[79] De Waal in "The Bill of Rights Handbook 1998", p.124

[80] v.Zyl Smit in: South African Prison Law and Practice, p.219

[81] Rotman, p.111

rehabilitative one. It is hoped to release offenders who are enabled to survive without having to turn to criminal activities again. Work relates the closed world of the prison to the demands and economic realities of society outside. Thus it is a useful instrument for bringing prison life closer to the open environment.

The goal of penal labour is to reduce the noxiousness of imprisonment and to prepare inmates to live as normal members of society after their release.
Prison work should be meaningful, useful, productive and realistic, and should meet the requirements of the market.[82]
Educational and formative in nature, rehabilitative prison work is a way to learn how to work and is an occupation and a preparation for the world 'outside' as well.

After all, the rehabilitative purpose of section 77 of the Correctional Services Act is more than likely to be in line with the democratic values of society of South Africa.

(3) The nature and extent of the limitation

This factor requires the court to assess the way in which the limitation affects the right concerned. Is the limitation a serious or relatively minor infringement of the right?

To determine whether the limitation does more damage to rights than is reasonable for achieving its purpose, first requires an assessment of how extensive the infringement is.[83]

The infringement of the right to be free from forced labour could not be more severe than being involuntarily obliged to work.
As stated above, the key element of forced labour is the involuntariness. If there is no choice and no possibility of avoiding working in prison, the infringement is absolute.

(4) The relationship between the limitation and its purpose

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[82] Rotman, p.150

[83] De Waal in "The Bill of Rights Handbook 1998", p.125

To serve as a legitimate limitation of a right, a law that infringes the right must be reasonable and justifiable. This means that there must be good reasons for the infringement. It also means that there must be proportionality between the harm done by the infringement and the beneficial purpose that the law is meant to achieve.[84] Logically, this requires there to be a causal connection between the law and its purpose: the law must tend to serve the purpose that it is designed to serve. If the law does not serve the purpose it is designed to serve at all, it cannot be a reasonable limitation of the right. If the law has only a marginal impact on its purpose it cannot be an adequate justification for an infringement on fundamental rights.[85]

As elaborated above the duty to work in section 77 of the Correctional Services Act is designed to serve the purpose of rehabilitation of the prisoners.

This seems to be a legitimate justification for the infringement of the right to be free from forced labour. The question is whether there is a rational connection between the ends of rehabilitation and the means chosen to achieve these ends. In other words, does the duty to work in section 77 of the Correctional Services Act serve to promote rehabilitation and prevent the recurrence of violent crime.

Certainly, the duty to work helps to prepare the inmates for a crime-free life because it enables them to work and improve their earning abilities. It also engender habits of labour in them.[86]
The duty to work also ensures a certain kind of discipline and accountability which are basic requirements for a working morale in 'normal' life.
Furthermore, it also prevents inmates to stay isolated in their cells and develop odd behavioral patterns and more and more deprived from social lifes.
In the writer's opinion, the duty to work is an appropriate

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[84] Davis in "Fundamental Rights in the Constitution", p.312/ See Brink v Kitschoff 1996 BCLR 752 at para 46

[85] Davis, ibid.

[86] v.Zyl Smit, ibid.

instrument/means to serve to rehabilitate prisoners.

(5) Less restrictive means to achieve the purpose

To be legitimate, a limitation of a fundamental right must achieve benefits that are in proportion to the costs of the limitation. The limitation will not be proportionate if other means could be employed to achieve the same ends that will either not restrict rights at all, or will not restrict them to the same extent.[87]
If a less restrictive alternative method exists to achieve the purpose of the limitation, then that less restrictive method must be preferred.[88]

The purpose of a duty to work is rehabilitation (and to some extent safe custody). The question is, whether this duty, in the course of achieving this end, imposes considerable costs? The duty to work violates completely the prohibition of forced labour.
Where other methods of achieving these purposes exist that do not impose the same costs, it becomes difficult to claim that the method chosen is reasonable and justifiable.[89]

In question is, whether another means could as well serve the goal of rehabilitation.
It is imaginable that the are not obliged to work but are free to work if they want to. That means that the legislator would not force them to work but provide them with the possibility to work.

Though, it remains doubtful, whether this 'free to choose' approach would be as effective as a general duty without any exceptions and would lead to the same result. One of the exact purposes of section 77 of the Correctional Services Act is to reach every prisoner, to make them work, and with the help of a continuing obligation to work, lead them back into a law-abiding life.
It seems to be evident that the duty to work without exceptions serves the purpose of rehabilitation more effectively than a work that is voluntarily performed.

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[87] De Waal in "The Bill of Rights Handbook 1998", p.126

[88] Devenish "Fundamental Rights in the Constitution", p.320

[89] See Makwanyane (supra) para 104

There does not seem to be a less restrictive means to achieve the goal.

Summing up, section 77 of the Correctional Services Act is a reasonable and justifiable limitation of section 13 of the Constitution.

5. Principle of legality

At first sight, the imposition of a duty to work is a development which is to be welcomed, but there may nevertheless be constitutional limitations or at least doubts on the constitutionality of a duty to work in relation to the principle of legality.

Constitutional norms address themselves to the question of whether the legislative framework of the sentencing system is constitutionally valid. In this specific context that means whether the imposition of a duty to work can be brought into line with the constitution.

The general principle of legality in respect of punishment states that all penalties should be precisely defined and that the imposition of such penalties should be governed by clear legal rules which again have to conform to the principle of legality. These prerequisites are a derivation of the common principle of '*nulla poena sine lege*'.

Up to now, the scope of a 'duty to work' is not defined precisely. This implies that work imposed on prisoners might contravene the principle of legality.

On the other hand, the duty to work is not a punishment but has the objective of enabling the sentenced prisoner to lead a socially responsible and crime free life in the future.[90]

On the contrary, the duty to work is a part of the attempt to resocialize the offender and is absolutely not to be seen as a punishment on its own. Even more, it is not possible to implement the duty to work as a penalty for misbehaviour in prison.

The question arises whether a legally imposed 'duty' still has to

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[90] The Correctional Services Bill, B 65-98

meet the prerequisites of the principle of legality.

Why should there be a difference between a punishment and a duty? Shouldn't everyone know in advance what will happen, what his 'treatment' will be alike?

In the writer's opinion, the duty to work prescription of section 77 of the Correctional Services Act does not meet the requirements of legality.

Legally speaking this form of provision is not at all defined precisely. It is not clear what the mentioned duty to work entails. Taking the vagueness of this type of provision into account, the duty to work does accordingly not meet the standards of legality.[91]

To solve this problem would be a task for the legislature by providing for a limited number of work possibilities and by defining the nature of each of these relatively closely.[92]

C. Outlook on the future (developments)

The danger, though, is that all reforms will be overwhelmed by the weight of numbers and the lack of resources. The difficult question is whether it is going to be possible to deal with the numbers with which, it appears, the correctional system will have to cope in the next future.[93] In the continued absence of an overall sentencing policy it is likely that the prison population will grow greatly in the short term and that the ratio of prisoners to the population may again reach the levels of twenty years ago.[94]

A criminal justice system which would meet the standards of a liberal democracy and a reduction in the crime rate in general and violent crime, in particular, was envisaged.

The protection and fostering of human dignity is a key point of departure in the constitution, and while there is no direct equivalent of the German right to development of one's own personality, there

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[91] v.Zyl Smit in "Sentencing and Punishment",p.3

[92] Canadian Sentencing Commission,p.338

[93] v.Zyl Smit in : "Some Features of Correctional Reform in South Africa", p.54

[94] v.Zyl Smit in "Comparing Prison Systems", p.20 (R.Weiss & N.South (eds))

are many indications that the South African Constitution has a developmental focus aimed particularly at disadvantaged groups.

Though the new Constitution is entrenched with a Bill of Rights, there have not been major changes in the way the criminal justice system operates.[95]
One look at the daily news shows that the rate of reported crime has also not responded as favorably as had been hoped. Crime, on the contrary, has increased.
Public perception of crime as a social problem is very important in this context. Surveys indicate that members of the wider public regard crime control as the single most important item on the political agenda.
Even though a framework may have been set up to treat prisoners in a rehabilitative and resocializing way, the interest and the means to realize it, do not exist.
The reality of the system is that there is not enough work of any description available for prisoners.
Furthermore, prison labour in South Africa is even characterized by a declining number of prisoners who are employed.

There can be no doubt that most prisoners in South Africa come from severely deprived social backgrounds. The pronouncements of the German Federal Constitutional Court that the state has a duty to care for those members in the community who, because of personal weakness or fault, incapacity or social disadvantage, were retarded in their development[96] (see below), should also apply in South Africa.[97]
In the writer's opinion this will take some time.

III. Germany

In Germany, one faces an almost completely different situation

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[95] v.Zyl Smit/Schaerf/Pinockl in 'South African Criminal Justice and Criminology in Transition', p.4

[96] BverfGE 35, 202 at 235-6

[97] v.Zyl Smit/Schaerf/Pinnockl in: South African Criminal Justice and Criminology in Transition, p.4

than in South Africa. Forced labour is prohibited (Art.12 II of the Basic Law[98]) but in Art.12 III of the Basic Law one finds a constitutionally sanctioned exception for people deprived of their liberty by court sentence. In other words, Germany's basic law provides an exception of this prohibition for prisoners.

The German Bill of Rights does not have a limitation clause. As in Art.12 III of the Basic Law specific limitation clauses are attached to most of the rights.
Therefore, one doesn't have to question whether 'penal labour' falls into the scope of 'forced labour' and whether the duty to work for prisoners is a constitutionally valid limitation.

Furthermore, German and South African history doesn't have much in common, at least not for the past 50 years.
This different situation naturally leads to different key problems.

As I said, the question in Germany is not whether penal work is a valid limitation but that the question of remuneration dominates the current debate about prison labour in Germany.

Nevertheless, I will first focus on the German penal history and the constitutional basis for penal work to provide a much more detailed overview of the German situation today.

A. History

1. Penal policy until 1961

Academic writers and legal practitioners have been clamouring for a comprehensive legislative regulation of prison policy since well before the adoption of the Penal Code of the German Reich which came into force on 1 January 1871.[99] As a basis for their belief that the content and the execution of the punishment of imprisonment should be regulated by the legislature and not by the prison

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[98] Promulgated by the Parliamentary Council on 23 May 1949 (Version in effect since 15 November 1994)

[99] Huber, p.230

bureaucracy, they advanced constitutional arguments based on notions concerned with the rule of law.

Two of their major demands were that prison authorities must be bound to precise and fixed principles concerning the execution of criminal judgments and that the judge must be aware of the exact content of the punishment.

Parliamentary initiatives and academic contributions culminated finally in 1879 in the "Bill on the Execution of Prison Sentences"[100], which was, however, never enacted. The same fate befell the next attempt to enact a common statute to replace the last bit of customary criminal law; this latter attempt, a Bill of the Reichsgovernment of 1927, was consciously inspired by the basic principles of the *Reichsrat* of 1923 in which the concept of rehabilitation was stressed, in which the principle of gradation in punishment was retained and in which finally the participation of the public in prison life was guaranteed in the form of the appointment of prison assistants.[101] This Bill which was highly promoted by legal scholars for its principle of reformation and for the extension of legal guarantees towards the convict was, however, never enacted (like the Draft Penal Code to which it was linked).

In the period that followed, the reformation principle of penal justice was ousted by the heavily stressed principles of atonement and deterrence. These principles concerning the execution of prison sentences were contained in the "Order concerning the execution of prison sentences and of means for security and treatment", which was promulgated by the then minister of justice in 1934[102].

During the 1930s and 1940s, prison labour became a very prominent way to treat prisoners — but not only prisoners. It would exceed the size of this work to demonstrate what, and in which way, prisoners of all kinds were exploited.
In short, German authorities invented concentration and work

[100] published in 6 Materialien zur Strafrechtsreform 81954)

[101] Huber, ibid.

[102] RGBl I 383

camps, in which 'work' was provided within the camps or outside the camp grounds (the hardest work was construction works, street and trail track work, river regulations, work in the quarry and in penal companies, etc.). Another kind of work for the inmates was assignment in private, public or SS-owned industries (like IG-Farben): Firms could 'rent' singular prisoners and dispose of their working power freely. In return, they had to pay the SS between 3 and 6 Reichsmark per day.[103]
Generally, the education or profession of a prisoner did not influence the allocation in whichever labour assignment.

After the Second World War the, Allied High Command adopted a number of interim measures which were superseded by prison regulations adopted by executive order by some of the provincial governments, in which an attempt was made to hark back to incorporate the Weimar traditions.[104]

2. before 1976

In 1961, all the German provinces or *Länder* adopted a joint set of regulations on the prison service (DvollzO) which applied in the entire Federal Republic and which, in fact, constituted the legal basis of the prison service from 1961 to 1976.

The object of the joint prison regulations (DvollzO) was, in its own words, "to protect society and to assist the convicted prisoner to come to the realization that he has to atone his misdeeds, and to re-integrate him into society". This set of regulations were never intended to be final. Criticism of these regulations was directed especially at the provisions concerning the legal position of the prisoner. These prison regulations were suspected by many to be contrary to the basic rights enshrined in the German Constitution.[105]
Until less than 30 years ago, prisoners in Germany were barely supposed to have constitutional rights at all.

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[103] http://www.wsg-hist.uni-linz.ac.at/auschwitz

[104] Huber, p.231

[105] Wuertenberger, p.237

This approach to prisoner's rights is clearly expressed in a decision of the *Kammergericht* of Berlin to which the convict appealed. He was serving a life sentence and applied to give a press interview. His application was turned down, therefore, he appealed. The court was of the opinion that there had been no unlawful infringement of the convict's basic rights here, since the "nature of the particular penalty excludes the full enjoyment of many basic rights":

> *'With the loss of his personal freedom as punishment, the prisoner in fact loses, in principle, all those basic rights, for the exercise of which he needs his personal freedom. In terms hereof the only uninfringed basic rights he will continue to enjoy is the right to life and the right to bodily integrity. The fundamental right of freedom of expression, including preliminary activities such as visits by journalists, is therefore likewise limited'.*[106]

This approach was justified by an appeal to the doctrine of the *'besonderes Gewaltenverhaeltnis'* (special authority relationship). According to this doctrine persons in certain institutions, such as the armed forces, schools or prisons, stand in a particularly close relationship to the state. In this relationship normal constitutional principles do not apply and the individual, while not without some rights, does not have the full range of constitutional rights at his disposal.[107]

As far as work was concerned, prisoners were obliged to work and they did not receive anything like wages. The obligation to work was written into the Penal Code and was therefore construed as part of the punishment.
The obligation was not an absolute one, but subject to the discretion of the prison director. Attempts by reform directors to give prisoners productive work, were frequently critiziced by trade unions as unfair competition for free labour.

With the commencement of work on the reform of the penal code a

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[106] KG NJW 1966, 1088

[107] v.Zyl Smit, "Leave of Absence for West German Prisoners", p.2, in: "The British Journal of Criminology", Vol.28, 1988, p.1-18

start was also made by a commission that submitted its recommendations in the form of a draft Bill in 1971. The preliminary work was given additional impetus by the Federal Constitutional Court by the latter's effective ultimatum in 1972 to the Legislature to produce a new law before the autumn of 1973.[108]
The Court affirmed that the rights of sentenced prisoners could be limited only by, or on the basis of, an Act of Parliament.[109]
The entire existing system of prison law was therefore unconstitutional.

In addition, the Court held that the basic rights of sentenced prisoners could only be limited when this was essential for the purpose of achieving what would be compatible with the values of the Basic Law and the good of the community.[110]

In the famous *Lebach* case[111] in 1973 the Federal Constitutional Court went even further. It held that the key point of departure in deciding whether the rights of a sentenced prisoner had been infringed was the value attached 'to the reintegration of the offender into the community, to his resocialization'[112]. Moreover the prisoner had an interest in resocialization, which developed out of his constitutional rights.[113] The court explained that the principle of the *'Sozialstaat'* required public care and assistance for those groups in the community who, because of personal weakness or fault, incapacity or social disadvantage, were retarded in their development. Prisoners, the Court emphasized, also belong to such groups.[114]
On the basis of the Commission's Draft Bill and the judgments[115] the Government submitted its own Bill as early as 1972. After these preliminary steps, the Prison Act was enacted on March 16 1976.

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[108] BverfE 33,1 of 14 March 1972

[109] BerfGE 33, p.1

[110] BverfGE ibid.

[111] BverfGE 35, 202 of June 1973

[112] BverfGE ibid. at 235

[113] Ibid. at 236

[114] Ibid.

[115] See also BverfGE 40, 276 of 29 October 1975

3. *Prison Act (Strafvollzugsgesetz)*

Already in the 1920, legal scholars formulated the requirements that must be met to improve the legal situation of prisoners.
The rule of law[116] requires, as far as penal policy is concerned, the fixing of the exact constitutionally tenable boundaries of conduct towards the state on the one hand, and towards the prisoner on the other, as far as the latter's enjoyment of his constitutional rights are concerned.
As a premise concerning this fixing of constitutional boundaries, there is the principle that the basic rights of the constitution are available also to convicts, since in terms of Article 1 III of the Constitution, these basic rights are directly binding on the legislature, the executive and the judiciary. Since the prison administration is part of the executive, the fundamental rights are also applicable there. The prisoner, in other words, is not merely the object of a treatment pre-determined by others, but is, in fact the subject of duties and the subject also of rights.

Until the enactment of the Prison Act, there has always been a measure of uncertainty about the extent of the limitations of the fundamental rights of the prisoner since these limitations did not derive from the statute but from the purpose of the imprisonment. This means that the rights of the convict could be infringed in so far as such infringement was necessitated by the purpose of imprisonment. This led to the consequence that the prison administration could take all measures, whether in relation to all convicts or to a particular convict, which were necessary for the achievement of the purposes of imprisonment — principles which were outlined but not precisely defined by law.[117]

Before the enactment of the Prison Act, several objectives of imprisonment were apparent, as is expressed in DVollzO No 57:

> *It is the aim of the prison sentence to protect the community, to assist the prisoner's understanding of his responsibility for his offence and to re-integrate him into the community. The*

[116] In German: 'Rechtsstaatlichkeit'

[117] OVG Hamburg of May 31 1957

execution shall create and strengthen the prisoner's resolve and ability to lead a law-abiding and orderly life in the future.

The uncertainty in this field has been largely eliminated by the Prison Act of 1976 which endeavours to regulate and to balance the rights and duties of prisoners on the one hand, and the competence of the prison authorities on the other, to subject prisoners to certain limitations of their rights. The prison authorities aren't competent, on the basis of the purposes and objectives of punishment, to regulate the legal position of the prison by administrative orders. Any limitations of the prisoner's right which are not detailed in the Act can only be adopted in order to ward off a situation of actual danger.[118]

The precise legal position of the prisoner is contained in detail with regulations concerning the planning of the imprisonment, accommodation, diet, contact with the outside world, work, education and study, religious practice, health services, recreation and social services.

The rights and duties of the individual prisoner during his imprisonment is laid down in the prison plan in which his accommodation, work, possible education or study, special methods of treatment and preparation for release are sketched out. This plan is elaborated after a personality study of the prisoner, and the latter is entitled to be informed and to be heard about its content.

The principle that the prison industries had to endure that they did not compete unfairly with the free market outside the prison system was abolished. The Prison Act of 1976 obliges the prison authorities to provide economically productive prison labour that suits the prisoner's abilities, skills and inclinations and which should develop these abilities, etc. in order to assist prisoners when they are released (ss. 37(1) and (2) of the Prison Act). Therefore the prison authorities are obliged to create enterprises (run by themselves or by private entrepreneurs), facilities for vocational training and therapeutic working institutions (s. 149(1) of

[118] Section 4(2) StVollzG

the Prison Act). Work was not seen any more as punishment, but as part of resocialization, rehabilitation and treatment.

There is also a clause in the prison law, demanding that prison conditions should, as far as possible, be assimmilated into the relevant conditions outside (s. 3(1) of the Prison Act).
Furthermore, prisoners were promised fair wages as well as inclusion in the national unemployment plan, the health plan, and the pension plan. All of this very much along the lines of normalization.

4. Situation in the German Democratic Republic

There also was a second German state: the German Democratic Republic. It also shared the common legacy of unpaid prison work.[119] In 1977, when the West German Prison Act became operative, they also produced such a law, which includes some interesting features:
Every prisoner of the GDR had the right to work. This right to work was not only enshrined in the Prison Act but also occurred in practice. It meant paid work with all the normal social security benefits.[120]
Prison industries became an important part of the East German economy. While prisoners were placed on an equal footing with workers outside with respect to social security, this was not the case with respect to wages: prisoners received only 18 percent of the take-home pay a normal worker would get for performing the same task. But even that was clearly above international and West German standards.
The East German prison law was mainly a propaganda measure, as can also be seen from the fact that prisoners were not given the text. But as a propaganda measure it was quite effective and influenced the Western reformers as well.

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[119] Arnold, p.83

[120] Arnold, p.85

B. Basic Rights in the Constitution

Basic rights in the German Bill of Rights are not listed at random, but constitute a system of values and rights.[121] Paragraph 1 of the Article 1 proclaims the objective value of the protection of human dignity [the state exists for Man's sake]. This dominating principle of the constitution is converted into the legal category of rights, i.e. entitlements in paragraph 2.

The basic rights are directly valid laws, not mere proclamations or slogans. And moreover, legislature, executive, and judiciary are bound by these basic rights.

I will now demonstrate in more detail how the German Constitution deals with the issue of 'forced labour'.

1. Article 12 II of the Constitution

In Article 12 II of the Basic Law one finds a general prohibition of 'forced labour'. It states that:

> *'nobody may be forced to do work of a particular kind'.*

This provison is a reflection of the duty to work in the 1930s and 1940s during the Nazi regime in which people were recruited for all different kinds of work. This method led to a degradation of the personality which was now aimed to be made impossible.[122]

2. Article 12 III of the Constitution

In Article 12 III, however, the Constitution provides an exception from the prohibition to be forced to work. It states that:

> *Forced labour may only be imposed on people deprived of their liberty by court sentence.*

Accordingly, forced labour is legal as long as it is imposed by a

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[121] Duerig in "An Introduction to the Basic Law of the Federal Republic of Germany", p.13; In: R.Karpen (ed.) 'The Constitution of the Federal Republic of Germany'

[122] BverfGE

court within the scope of a sentence.[123] In other words, a prerequisite of the constitutionality of the exception is the court order.[124]

Nevertheless, because of its impact on human dignity, a general and unlimited duty to work is — even within the scope of a sentence — not permissible[125]

3. Differences between 'to be force to work' and 'forced labour'

Neither through a literal interpretation nor through the historical development of Article 12 of the Constitution is it possible to demonstrate unmistakably the differences between 'to be forced to work' in Article 12 II and 'forced labour' in Article 12 III.[126]

Though, it seems to be clear that the legislator intended to regulate two different areas.[127]

- 'to be forced to work' means that someone is seconded for a duty on an obligatory basis, usually, for a certain work[128]
- on the contrary, 'forced labour' is believed to mean that someone has to provide his capacity for work on an unlimited basis.[129]

Nevertheless, some of the proponents of this way of distinction put an emphasis on the imposition of a sentence.
After all, every form of forced labour or a duty to work is prohibited as long as it is not within the scope of a court sentence.

4. European Convention for the Protection of Human Rights and

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[123] BverfGE 74, 102 ff.

[124] Scholz Art.12 para 494, in: Maunz/Duerig 'Grundgesetz Kommentar'

[125] Schmidt-Bleibtreu/Klein, Art.12 para 29

[126] v.Muench, Art.12 para90; Scholz in M/D Art.12 para 492

[127] v.Muench, ibid.

[128] V.Muench, ibid.

[129] V.Muench, ibid.

Fundamental Freedoms

Article 12 III of the Constitution is also in line with the European Convention for the Protection of Human Rights and Fundamental Freedoms[130], which prohibits 'forced labour' as well. But as in Article 12 III there is also an exception made for the duty to work within the scope of a court sentence. Article 4 III lit.a states that the prohibition of forced labour does not come into force in the case of a court sentence.
Furthermore, this convention does not have the same constitutional status as the German Constitution.[131]

C. The duty to work, s. 41 of the Prison Act

As mentioned above, in terms of section 41 of the Prison Act, the prisoner is obliged to work. Prison labour can therefore be regarded as forced labour, although, according to Article 12 III of the Basic Law, it is permitted as an exception.

Section 41 obliges the prisoner to undertake a work that is suitable to his physical condition. He violates this duty in case of refusal.
A culpable violation of the duty to work results in disciplinary measures.

Prisoners carry out everyday chores as 'domestic workers' or work in prison-owned or public industrial enterprises.
In terms of section 37 of the Prison Act the work done should be profitable, it should suit the prisoner's abilities, skills and inclinations and should develop these further to assist prisoners when they are released.

Unfortunately, these goals are not yet achieved. Work in industrial enterprises is mostly simple and dull[132]. Cleaning and sorting chores are frequently imposed as interim measures.[133]

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[130] Scholz in M/D Article 12 para 495

[131] Scholz, ibid.

[132] Duenkel/Roessner, p.221, in: v.Zyl Smit/Duenkel (eds.) 'Imprisonment Today and Tomorrow'

[133] Duenkel/Roessner, ibid.

The prison service makes both the space and the prisoners' labour power available to entrepreneurs who, in turn, have the authority to direct the enterprise, and who bear the financial risk.
Section 41 III of the Prison Act provides that the prisoners have to consent to this form of labour. For fiscal reasons, however, this provision has not come into operation yet.[134]
The prisoners can also be granted permission to work outside prison without supervision (*Freigang*)[135].

In line with the objective of resocialization, the prisoner should at least be freely employed outside the prison towards the end of his term of imprisonment (work release in terms of section 39 of the Prison Act). The institution may assist in the transition from internal to external work.

Although the Prison Act still obliges the prisoner to work, prison labour may not be of a punitive nature. Again, reality often does not meet this goal. One has to keep in mind that suspension from work is seen as an additional penalty. Hence there is the risk of prison labour being used quite arbitrarily; sometimes as a privilege, at other times as a disciplinary tool.[136]

Prison labour is seen as one of several means of rehabilitation. Therefore the legal rules concerning prison labour are included in the same chapter as the regulations on education and vocational training. Such programmes take place during the normal working day and prisoners participating in such educational and training programmes get the same remuneration as those prisoners who work.[137]

Prison labour can, however, not be seen as an opportunity to earn sufficient money and as an opportunity to really advance in terms of rehabilitation. The main problem is, that wages are still not adequate.[138]

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[134] Duenkel/Roessner, ibid.

[135] section 11 I of the Prison Act

[136] Duenkel in "Prison Labour — Salvation or Slavery", p.78

[137] See section 38 II of the Prison Act

[138] Duenkel/Roessner, p.221

The prisoner's average wage amounts to a mere 5% of the average wage of al persons who contributed to a pension scheme during the previous calendar year (section 200 I). The average income totals about 200,- DM per month[139].

D. Constitutional demands relating to prison labour

The basic rights and constitutional principles establish an objective and obligatory standard of values for all areas of law.[140]
This standard of values leads to consequences for the imposition and implementation of sentences. For instance, a solely preventive detention is not permissable. Neither is a detention permissable which degrades the prisoner as an object for therapeutical or medical experiences.[141]

Furthermore, a purely retributive approach in sentencing is prohibited by the values underlying the Constitution.[142]

Nevertheless, the value standard of the Constitution does not only prohibit various kinds of penal actions, but also provides positive goals where the provisions of the Prison Act have to be orientated.
In this context, basic rights like the right of human dignity, the right of free development of the personality and the "*Sozialstaatsprinzip*" (principle of social justice and the welfare state) take priority.

This was laid down in the famous *Lebach* case[143] (see above). Consequently, the *'Sozialstaatsprinzip'* is a key principle in the implementation of prison sentences. It influences the goals of prison sentences and their execution. Correspondingly, the Court explained that the principle of the *'Sozialstaat'* required public care

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[139] Deutscher Juristischer Nachrichtendienst "BVerfG: Verguetung der Gefangenenarbeit entspricht nicht dem Resozialisierungsgebot";
http://www.djn.de/djn/nachrichten/rechtsprechung/r98222.shtml; p.3

[140] See BVerfGE 35, 75,114

[141] Calliess/Mueller-Dietz, p.13

[142] Ibid.

[143] BVerfGE 35,202

and assistance for those groups in the community who were retarded in their development.[144] Prisoners and ex-convicts were considered handicapped in their personal and social development, and thus entitled to social welfare, including provisions for their aftercare. In this way, the Court accepted the arguments affirming the right to resocialization as an essential element within the social welfare state.[145]

Resocialization is the main purpose of the implementation of imprisonment. The prisoner should obtain the ability to lead a responsible and crime free life, he is supposed to learn how to live under the conditions of the free world without breaking the laws, to take advantage of the chances and to deal with the dangers.[146]
According to the Court, this is the consequence of a society that puts human dignity in the focus of its value system and devotes itself to the *'Sozialstaatsprinzip'*.

From the point of view of the prisoner, the right to be resocialized[147] derives from Article 2 I, which foresees a right to free personality development, in combination with Article 1, protecting human dignity.
Consequently, the Court emphasized that the influences on the prisoner itself as well as the prison conditions should enable him to lead a life within law-abiding society. In other words, life in penal institutions should resemble the general conditions of life in free society as far as possible.[148]

The underlying constitutional doctrine of resocialization is based on the need to compensate for an insufficient socialization process, not through a repressive, intimidating discipline, but through internalization of the values embodied in the prohibitions and commands of the Fundamental law. Moreover, the freedom of conscience, guaranteed on Article 4 I of the Constitution, excludes a brainwashing coercive rehabilitation and restricts its goals to

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[144] Ibid at 236

[145] Rotman, p.74

[146] Ibid at 235

[147] BVerfGE 45,187,239

[148] See section 3 I of the Prison Act

ensuring compliance with the minimal demands of the basic system of social values.[149]
Irrespective of financial restraints or organisational problems, the state has to implement the sentence in a manner that fulfills its goal.[150]

The '*Grundgesetz' (Basic Law)* compels the legislator to develop an effective concept of resocialization and to build the implementation of the sentence of imprisonment on it.
In particular, the state is obliged to undertake measures preventing, to the greatest possible extent, the disadvantages resulting from a life in prison.

The various specific provisions of the Act, both those allowing sentenced prisoners to do things, such as taking home leave or studying further, or compelling them to do others, such as participating in the planning of their own prison programmes or working, were all to be interpreted in the light of the overall purpose of resocialization.[151]

Labour is a key concept in our society. The value of a man and his 'right' to claim for comforts and appreciation is measured by his contribution to social welfare.
Labour is also a kind of human communication and an analysis of his environment. Consequently, labour is a part of being human.[152]
Labour provides some kind of sense, for instance, of achievement. It enables one to create products which give one a sense of pride. Usually, labour is teamwork and leads to connections with others.
Prison labour, accordingly, has several purposes. It is meant to improve the inmate's chances of finding a job (qualifying purpose). Closely connected to this purpose is the social aspect of labour which provides sensations of working together, making an effort together (organization, agreements, etc.) as well as providing some

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[149] Rotman, 9.74

[150] BVerfGE 35,202,235

[151] Caliess/Mueller-Dietz, p.16

[152] Hagemann, p.115 in: Hammerschick/Pilgram (eds.) 'Arbeitsmarkt, Strafvollzug und Gefangenenarbeit'

kind of appreciation.[153]
The duty to work also offers the possibility of obtaining discipline - from the point of view of prison discipline, as well as from the point of view of the prisoner himself, who is forced to cope with being obliged to work. Labour becomes normal, in this respect. It provides routine.
Finally, it also offers a kind of distraction. Inmates usually suffer from being incarcerated with a lot of other people, from not being able to retire from all the other inmates; from being handicapped in their freedom in general. Labour in this context provides the opportunity to meet different people and to have some distraction from doing nothing.[154]
To sum up, the main purpose of prison labour is to resocialize offenders into the community.

Nevertheless, the principles that provided the impetus for the enactment of the Prison Act, have sometimes appeared to have been forgotten.

1. Problem of adequate remuneration

In a recent decision the Federal Constitutional Court tested the question of adequate remuneration of prisoners, section 200 of the Prison Act, against the Constitution[155], more precisely against constitutional standards.

Section 200 of the Act provides that prisoners should be remunerated at the rate of five hundreths of the income of the average government official. This was to be a temporary measure (section 200 II laid down, that by the end of 1980 further legislation should be passed to increase the remuneration). The legislator did not react and prisoners are still not remunerated adequately.

In fact, it has been blocked repeatedly by the finance ministers of

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[153] Ibid.

[154] Ibid.

[155] BVerfGE of 1 July 1998, published in 'Zeitschrift fuer Strafvollzug und Straffaelligenhilfe', 1998, 242

the federal states. In Germany, the cost of prisons burdens the budgets of the federal states, which are responsible for the execution and implementation of the Prison Act.

In 1990 the Constitutional Court started to select cases for a possible landmark decision.
It also organized a public hearing. Experts were heard on the relationship between prison labour and resocialization. In addition, the Court heard legal experts on the legal consequences of including prisoners in social security.
The experts emphasized the impact of work on the rehabilitation of prisoners and asserted that the present level of wages was insufficient.

According to the Court the Basic Law compels 'the legislator to develop an effective concept of resocialization and to build the implementation of the sentence of imprisonment on it' (guiding principle 1). The Court held that work is an effective method of resocialization only if the work that is done is recognised appropriately. This appreciation does not necessarily have to be financial. What is important, is that it is capable of demonstrating the value of regular work for a self-determined and crime free life in the future (guiding principle 2.a).

Furthermore, it held that penal work, as a legal concept of resocialization, has to be remunerated in a way that the prisoner can be made aware that gainful employment makes sense in order to restore the basis of his life (guiding principle 2.b).

Interestingly, the Court also proposed an appreciation for the work by a system according to which 'a prisoner by working could have his term of imprisonment reduced, that he be granted 'good time' or could be granted other privileges'.

In summary, the Federal Constitutional Court has ruled that the present remuneration of prisoners in Germany violates the Constitution.
The Court stated that at the present level the remuneration cannot contribute to the constitutionally required resocialization, because

the prisoner cannot be convinced by the remuneration that gainful employment is a sensible way of improving his life chances.

The Court asked the legislator to come up with a better system of remuneration by the end of the year 2000.
Until then, the old system, though unconstitutional, will have to do.

2. *Working outside prison*

The Constitutional Court, in the same decision, also dealt with the difficult question of the position of prisoners working outside prison.

Permission to work outside prison without supervision is regulated in sections 39 and 11 of the Prison Act. The opportunity to work outside prison under conditions applicable to free workers shall be given to a prisoner when this seems appropriate "to impart, maintain or promote professional abilities or skills which will be useful after release from prison"[156].

The Court approved this practice by emphasizing the relationship to the resocialization precept and held that permission should be granted wherever the relevant conditions were met.

In this context the Court examined the Bavarian concept of the so-called false work release. This is a practice whereby a prisoner, who qualifies for work release, is allowed to work outside prison - however, his work contract is not negotiated by himself. The prison authorities make the employment arrangements.[157]

Furthermore, these prisoners were paid only the minimal remuneration that prisoners who work inside prison earn instead of the full wage for that kind of work in the open market.
The Court firmly condemned this practice in the judgment and gave the authorities until 31 December 1998 to end this practice.[158]

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[156] Section 39 I of the Prison Act

[157] v.Zyl Smit in "Anchoring the Treatment of Sentenced Prisoners in a Rights Discourse: The Example of the Rewards for Prison Labour in Germany", p.11

[158] Ibid. at IV.2.

3. *Transfer of responsibility*

The Court held unconstitutional the practice to lease prisoner to firms outside the prison; this was held to be admissable only in exceptional cases, when regular labour contracts were not feasible (and under the condition that the prison administration retained sufficient control over the work situation).

According to the Court, in general the duty to work is constitutional as long as the work is performed under the responsibility of the prison authorities.[159]
Consequently, the complete transfer of responsibility to third parties, especially if the prisoner is put under the exclusive command of a third party, is not constitutional and therefore not permissible.

4. *Social Security*

The Court also dealt with the issue of whether prisoners are entitled to some form of social security or not.
Supporting arguments were always based on the holding that the law was in violation of the equal protection clause of the Basic Law.
The Court rejected the argument that there was a constitutional obligation to include working prisoners into the security system.
Here the Court argued that this was violating neither the resocialization principle, nor the equal protection clause.[160]
On the contrary, the Court stated that if the state were to include prisoners, it might be infringing the equality principle of other persons who are excluded[161] (e.g. housewives, students, etc.).

5. *Separate Judgment of Judge Kruis - further constitutional approaches*

Interestingly, one of the judges (Judge Kruis) who concurred with

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[159] Ibid. at 7b

[160] BverfGE ibid. at C.III.3.

[161] Ibid.

the judgment, provided an unnumbered *'Sondervotum'*[162] in which he found an even more direct constitutional basis for evaluating questions of rewarding prison labour.

In his opinion, with regard to Article 1 I of the Basic Law, the Court did not sufficiently take into account the anthropological impact of labour. According to him, this was what the Court did, in only focusing on the constitutional purpose of resocialization.
He stated that a man who is exposed to a system, in which the relationship between work and just reward is abrogated, is questioned in his existential essence. Furthermore, such a man is reduced to a mere object, and, anthropologically, it makes no difference whether the just relationship of labour and reward is abrogated by social forces or the state. This has to be kept in mind when the legislator uses the permissible exception of forced labour in Article 12 III of the Basic Law.

Judge Kruis points to the fact that the Constitutional Court, in a decision in 1987[163], recognized the close relationship between labour and human dignity, and, accordingly, prohibited unjust labour.
This serves as a beginning for an appropriate reward. Standard wages may provide a reference point.

E. Perspectives of prison labour in Germany

1. The 'Hamburger Modell'

In Germany, about 12 percent of all prisoners are allowed to work outside prison with a normal contract for normal wages.[164]
This is extended on an experimental basis, also to some prisoners inside prison.[165] They are employed inside prisons under normal working contracts and get renumerated on the basis of normal wages.

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[162] special vote at the end of the decision

[163] BVerfGE 74, 102,120

[164] See section 11 I(1) of the Prison Act; so-called 'Freigang'

[165] so-called 'intramuraler Freigang'

This so-called *'Hamburger Modell'* exists in two small enterprises situated within the prison estate.[166]
In contrast to the usual prison labour, these prisoners are not supervised by prison officers while working. In this regard their status resembles the one of *'Freigaengern'* (those who are allowed to work outside prisons).

The aim of this experiment is to improve the inmate's chances of reintegration, to improve the effectiveness and the organization of prison labour and to ameliorate the economic and social conditions of prisoners.[167]

This project leads to an adequate remuneration due to the work done by the prisoners and terminates the injustices in this regard, which are widely seen as a second punishment.
Due to the new decision of the Constitutional Court, this experiment can only be valid if it is not a form of 'leasing out' prisoners or 'making' them available to private enterprise.[168]
It could be problematic that there is no supervision by the prison authorities. In other words, there is a shift of responsibility in this area to third parties.
On the other hand, *'Freigaenger'* are also allowed to work without supervision. Furthermore, the enterprises of this project are located on the prison estate.
According to the latest decision, this project seems to be bordering constitutionality.
In my opinion, the resocialization efforts and the encouraging results[169] justify the possible infringement. Especially since the inmates have to consent to this kind of prison labour.

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[166] Hagemann in "Leistungsgerechte Entlohnung im Strafvollzug: das Hamburger Modell", p.343; In: Monatsschrift fuer Kriminologie und Strafrechtsreform 77, 341

[167] Hagemann, ibid.

[168] BVerfGE at III.1.c)aa)

[169] Hagemann, ibid. at 350

2. *Good Time*

The Constitutional Court also indicated in the discussed decision that it would be acceptable to recognize work by a system whereby 'a prisoner by working could have his term of imprisonment reduced, that is be granted 'good time', or be granted other privileges.[170]

It stated that the reward for prison labour does not necessarily have to be monetary. Instead of, or in combination with a wage, it is possible to help them in repaying debts, in building social insurance benefits or granting them 'good time' in shortening their sentences.[171]

Although such 'good time' arrangements are increasingly the exception rather than the rule internationally, they could make an interesting contribution as a counterweight to the average long prison sentences in Germany.[172]
However, this suggestion was largely hypothetical, as German prison law does not provide for such a system.[173]

3. *Deregulation Model*

Another possibility is to give up the principle of a duty to work in prisons. In France, for instance, this has already happened. There, obligatory work was abolished in 1987. In other countries, this has happened de facto because of their very low employment rates (e.g. Belgium, Greece, Italy).

Their approach is to let prisoners work if they want to and to provide them with paid work (according to availability).
It is interesting that those who don't want to work do not have to.
This can be seen as a substantial normalization, since in the free world, forced labour is prohibited.

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[170] BVerfGE at C.I.4.b.

[171] Ibid.

[172] Duenkel, ibid. at p.81

[173] v.Zyl Smit in: "Anchoring the Treatment of Sentenced Prisoners in a Rights Discourse: The Example of Rewards for Prison Labour in German Law", p.9

On the other hand, one could also say that luckily, prison labour is still obligatory. It can still be able to provide the inmates with extra skills, and prepare them for life outside prison.

F. Conclusion

Germany, as South Africa, faces a lot of difficulties concerning prison labour. In general, even the labour situation in the free world is rather discouraging. The unemployment rate is high (actually, more than 4 million people are registered unemployed) and a solution is not in sight.
Therefore, the labour market does not need further participants. Skills like communication, competence, continual learning and flexibility become more and more important. Unfortunately, these are skills not normally associated with prisoners.

Prisoners have to compete directly with employees in the free world. Because of them being stigmatized as 'criminals' they have to find different niches. The integration of prisoners in the normal labour process is extremely difficult and by now not very successful.

In this regard, the decision of the Constitutional Court of 1 July 1998 shows that, while sentenced prisoners need not always be treated in the same way as other persons, it must be recognized that their particular status gives them claims in respect of the state that others may not be entitled to make by right.
The decision of the Constitutional Court of the 1 July 1998 is in line with this perception. It provides evidence that the right of prisoners to be remunerated adequately is still an issue in the debate about prisoners' rights.

Unfortunately, although being a 'rich' country, Germany lacks the financial means to realize the legal framework of providing the inmates with all their rights.

It will be of interest how the legislator will react and how the reality will be, in connection with prisoner remuneration.
The decision of the Constitutional Court has left a lot of room for

speculation about the direction in which the new German government and parliament will be going.

Hopefully, the changes will lead to the once stated intention of the 1977 Prison Act that:
'a genuine wage is to be regarded as an essential element of treatment, as it allows the prisoner to see the fruits *of his labour.'*

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