

2/21/9/1/24

CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE**

**THEME COMMITTEE 4
FUNDAMENTAL RIGHTS**

**REPORT ON
REPRODUCTIVE RIGHTS**

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THEME COMMITTEE 4 FUNDAMENTAL RIGHTS

REPORT ON REPRODUCTIVE RIGHTS

This report is drawn up on the basis of submissions received from political parties, organisations of civil society and individuals; the public participation programme and other activities of the Constitutional Assembly.

PART I

MATERIAL CONSIDERED BY THE THEME COMMITTEE

1. **Submissions received from political parties (in alphabetical order):**
 - ACDP
 - DP
 - IFP¹
 - NP

2. **Submissions received from the public and civil society²:**
 - 2.1 Individuals (in alphabetical order)
 - 2.2 Organisations (in alphabetical order)
 - 2.3 Government structures\ institutions (in alphabetical order)

3. **Technical Committee reports:**

None to date

4. **Relevant Constitutional Principles**

II

1. Have indicated in submission to the Constitutional Assembly of 23 January 1995 that they support the inclusion of a right to 'Procreative Freedom' in the Bill of Rights.

2. A complete listing of all submissions received from the public and civil society is included in the document entitled "Public Submissions". The document is being circulated separately.

PART II

PARTY POSITIONS

1. ACDP:

* Oppose the inclusion of a specific clause dealing with reproduction rights in the Constitution.

The Constitution should instead contain a clause protecting the 'right to family life' as follows:

"Every person shall have the right to family life and to the recognition and protection of the family as the basic unit of society."

2. DP:

* Oppose a specific clause dealing with reproductive rights in the Constitution.

Such a clause could lead to "insurmountable difficulties", for example, a claim against the state to provide medical care at its expense for a woman who wishes to have an abortion. If a procreative choice clause is based on the International Covenant on Economic, Social and Cultural Rights and the UN Convention on the Elimination of All Forms of Discrimination against Women, detailed consideration might have to be given to the question of appropriate services in connection with pregnancy, confinement and the post-natal period. The question of reproductive rights should thus be left to legislation to regulate in terms of the Abortion and Sterilization Act which can in turn be tested for constitutional validity by the Constitutional Court in terms to the rights to life ("insofar as that is applicable at all"), equality and equal protection, dignity, security of the person and privacy.

The Constitutional Court will thus be "the final determinator of the extent, validity and precise limitations on a woman's right to choose and the unborn's right to life."

3. FF

* Oppose a specific clause dealing with reproductive choice in the Constitution.

The Freedom Front submits that "according to international law there is no right vesting in anyone wantonly to destroy unborn human life." International

law and common law supports the contention that the foetus has the right to life. To decriminalize abortion "could wreck family life."

The Freedom Front has no objection to the inclusion of voluntary sterilization as a reproductive right in the Constitution, provided it takes place in accordance with the rules and ethics of the medical profession and is controlled by it. "The right of a woman to have herself sterilized concerns only herself, and does not infringe any rights of an unborn child."

5. NP

* Oppose a specific clause dealing with reproductive rights in the Constitution.

The debate on the substance and policy relating to reproductive rights both domestically and internationally "have not yet reached a stage where they should form part of our Bill of Rights." The National Party believes that reproductive health and rights are matters better dealt with in legislation. It is preferable to leave any legislation dealing with reproductive rights to be adjudicated on by the Constitutional Court in relation to the other rights in the Bill of Rights, such as the rights to life, to basic health services, to privacy, to security of the person as well as the limitation clause.

In view of the abovementioned party positions on reproductive rights, the normal format of this report has not been used.

ADDENDUM

PARTY SUBMISSIONS

- ACDP

**AFRICAN CHRISTIAN DEMOCRATIC PARTY
SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE FOUR**

REPRODUCTIVE RIGHTS

The ACDP believes that what is referred to as the right to procreation is a right limited to a consenting family unit, and as such, cannot be isolated as a singular independent right.

We subscribe to the formulation which states that:
"Every person shall have the right to family life and to the recognition and protection of the family as the basic unit of society."

Married life is a sanctified covenant between a man and a woman, built upon reciprocal responsibilities and who submit themselves to the divine authority and rule of God.

Biblical norms and principles underscore the immense value of both the role of women and men. The Bible is neither pro or anti male or female.

If we interpret biblical teaching correctly, we first have to realise that we are all made in the image of God; each with their own distinctive creative abilities and contributions to life. It is through the bond of marriage that this distinct spiritual component merges to establish a unit that becomes advisory and co-responsible by nature. The meaning of womanhood and manhood finds its expression in this union.

However, there is also a spiritual responsibility unto God, whose precepts and ordinances dictate the morality of family life.

The Bible teaching therefore clearly states that judgement will be brought upon anyone who defiles the marriage covenant, either through family violence or all forms of family abuse, whether it be through emotional, role manipulation, immorality, etc.

"Has not the Lord made them one? In flesh and spirit they are his. And why one? Because he was seeking godly offspring. So guard yourself in your spirit, and do not break faith with the wife of your youth. I hate divorce, says the Lord God of Israel, and I hate a man's covering himself with violence, as well as with his garment, says the Lord Almighty. So guard yourself in your spirit, and do not break faith." Malachi 2:15-16

Parenthood is ordained for government of a family unit to instil spiritual and social values in order to effectively instruct and facilitate each member of fulfil the demands placed upon them by the broader social environment.

Both the mother and father have certain distinct priority values that they bring together to utilise in family relations. It is from these values that children gain the equal effect of both parents on their lives, and which in turn nurture them in ways of stability and discernment. The significance of this is shown when in fact, a single parent has to be both mother and father for the proper nurturance of the child.

The ACDP therefore believes that the idea of reproductive rights is too singular in it's intent and lays itself open to all sorts of misinterpretation and abuse.

Reproductive rights lends itself to too much ambiguities and unethical practises, that the divine judgement upon such activities will be borne more so by the procreated, rather than the facilitator.

Reproductive rights can lead to all sorts of social ills, in that a mindset is developed, which is based on the *selection or treatment* option. In other words, what you do not want, you dispose of. The philosophy is guided more along material determinism, than on spiritual dimensionality.

For example: when we talk about the pre-embryo stages of development, we adjudge human beings according to certain categories of life, and depending on our meaning of life we determine when life begins, and whatever existed before the point of reference is disposable. However, the Bible teaches that life starts at conception, but even before that it's origin is in the *command* of God: *"Before I formed you in the womb, I knew you, before you were born, I set you apart."* Jeremiah 1:5

Reproductive rights sets itself to gain absolute control, not only of nature, but also of posterity. It's ideology pertains to manipulation and towards all sorts of genetic engineering results.

We live in an age where the family, as instituted by God, is being threatened.

It is a known fact that embryos are becoming more accessible to the market, and as a result, we are now entering a stage where new forms of slavery will exist.

In the cases of surrogacy, the idea of motherhood is non-existent and child bearing becomes subjected to a numeracy value, and consumerism.

The whole idea of reproductive rights may end up disconnecting people from a sense of purpose and belonging. This will eventually have dire consequences on the moral well-being and psycho-social stability of the child and the family. It should be no surprise then that an increase in abortion, suicides and family killings, intolerances to physical disabilities, euthanasia, etc., could take place. In other words, life is seen more as a commodity that should either be discarded or manipulated - whatever suits the request of the applicant.

The ACDP therefore, cannot accept reproductive rights as a legitimate independent human right, because of its vast ethical consequences, and we believe that families have ample access to family planning organisations in order to assist in the moral development of family life.

The ACDP is of the opinion that reference to procreation should be understood within the context of the family unit and based upon a biblical dependable morality.

We therefore, in context of the right in question subscribe to the formulation which states that :

"Every person shall have the right to family life and to the recognition and protection of the family as the basic unit of society."

Application of the right

2.1 Nature of the duty of be imposed upon the state

It is the responsibility of the State to ensure that all capable assistance be provided unto the individual to enable his/her effective development within a family unit.

2.2 Application of the right to common law and customary law

Insofar as the right elucidated above is understood as a right to life within the family unit, and subscribe to ethical boundaries, the right should apply to common law and customary law.

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

The family has the responsibility to uphold the value to an ethical protection of procreation, which provides the basis of a stable environment for the spiritual and psycho-social development of the complete family unit.

2.4 Who should be the bearer of the right?

All natural persons are entitled to life and an ethical and biblical moral value to the procreative means of life.

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

The ACDP believes that reproductive rights cannot be afforded the status of a singular or independent right. This right is neither mentioned within the South African law commission report on Group and Human Rights, or alluded to in the interim Constitution.

Reproductive rights contain ethical repercussions and it's meaning can be too widely interpreted.

We are further of the opinion that no suitable ethical reference exist to adequately regulate the operational procedures of reproductive rights, and that the clause on limitation in Section 33 of the Interim Constitution does not adequately protect against the misuse or abuse of the right in question. We are of the belief that the right to a family unit is the most relevant reference available to provide clarity on the cases of procreation, and the right to an ethical standard of life.

25th May 1995
[REPRO.R]

- DP



18 May 1995

CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 4
FUNDAMENTAL RIGHTS

DEMOCRATIC PARTY SUBMISSION ON:

REPRODUCTIVE RIGHTS

1. CONTENT OF THE RIGHT

- 1.1** The Interim Constitution contains no specific provision dealing with reproductive rights.
- 1.2** DP Policy

The Democratic Party resolved, per resolution at its Federal Congress in Durban on 23 October 1994 that women should have the right to choose or reject safe, legal termination of her pregnancy, preferably within the first twelve weeks, by a willing qualified medical practitioner.

The Party is acutely aware of the great moral and religious question posed by the reproductive question, particularly on the abortion issue. We certainly are sensitive to the rights and considerations of the community - but we are equally concerned in striking the right balance between a woman's right to procreative autonomy and the State's interests in protecting the sanctity of human life. In other societies where these concerns are paramount, such as The Federal Republic of Germany, it has been possible in a country deeply divided on the question of abortion to reach an accommodation by enacting legislation permitting abortion in the very early months of pregnancy, and outlawing it, except in extreme cases and with strict procedures, in the later months.

1.3 The Position in South Africa

It is equally clear that the South African Abortion and Sterilization Act 2 of 1975 permits abortion only in the narrowest of circumstances. The preliminary procedures that must be complied with are so cumbersome that they effectively deny access to abortion even when it is countenanced by law. (See Professor June D Sinclair, *Rights and Constitutionalism: Family Rights* at 530). Grounds for legal abortion at any stage of pregnancy are: the continued pregnancy must endanger the life of the woman or constitute a serious threat to her physical or mental health: or there must exist a serious risk that the child will suffer physical or mental defect that will render it irreparably seriously handicapped: or the foetus must have been conceived as a result of unlawful intercourse, defined as rape or incest, or as a result of illegitimate intercourse, entailing that the woman was, due to a mental handicap, unable to comprehend the implication of coitus.

Sinclair avers:-

"On the spectrum of western law, South Africa would be grouped with countries that permit abortion only on "hard grounds" and in terms of highly restrictive procedures."

The author further indicates that the social problem of illegal abortion remains utterly unaddressed by our current legislation, not only because of the restrictive grounds but also because of the inhibiting and intrusive bureaucratic procedures that must be followed before a legal abortion can be performed. While aspects of customary law regard abortion as taboo, the instance of illegal abortion among African women is alarmingly high.

See for example the report on Baragwanath Hospital where 25 women are admitted each day with incomplete illegal abortions, three of them die: a significant number are under the age of 20 years (The Star 21 November 1990). Precisely because of the current concern about the status and purpose of current abortion legislation, a Parliamentary Select Committee is now considering the question.

1.4 The position according to the Interim Constitution

The Interim Constitution provides, in chapter 3, for an equality clause that is coupled with equal protection of the law, a right-to-life clause, a clause guaranteeing human dignity, one guaranteeing security of the person and a privacy clause. It is silent on the question of abortion. Therefore the Constitutional Court will be faced with the conventional conflict between protagonists of free choice and those who seek protection of the foetus as a person. It will have to grapple with the division of opinion about the true source of reproductive rights and the proper interpretation of clauses that appear to conflict with the right to life.

The Democratic Party accepts the interpretation of Professor June D Sinclair on the question of whether a foetus, *per se*, is a bearer of constitutional rights. She reminds us (at 526-7) that the Roman Dutch Law incorporates a special fiction of the Roman Law, the nasciturus rule, to overcome the absence of legal personality of the foetus in order to permit it, for example, to inherit from a person who dies prior to its birth. This fiction protects special interests. It would not be required, nor would the crime of abortion exist, if the foetus were ordinarily a bearer of rights in our law. Abortion would simply be murder. Furthermore our courts have in, for example, *Christian League of Southern Africa v Rall* (1981)(2) SA821 held that an unborn child has no legal personality.

The Interim Constitution does not take this question any further.

In sum, therefore, it is in interpretation of other clauses of the Constitution, mentioned above, such as equality and equal protection, dignity, security of the person and privacy that the abortion debate should occur and the constitutional issue should be settled.

Sinclair concludes:-

"And the debate, on this analysis, does not entail a competition between the constitutional rights of the pregnant woman and those of the foetus. There can be no such competition until the fundamental proposition of our law that rights and obligations accrue only from birth, is altered expressly to accommodate the foetus."

1.5 Precedents from other jurisdictions

The approach on abortion contained in the South African Interim Constitution mirrors, in large part, the constitutional approach of the United States and Canada.

In the United States, for example, in the locus classicus Roe v Wade 410 US113(1973), the United States Supreme Court held that a woman's constitutional right to privacy prevented the State from forbidding abortion. This recognition of woman's autonomy in the "private sphere" of reproduction has been enforced negatively - in other words, it has not come to mean that there is a positive claim to safe subsidised abortion facilities in the United States.

Equally, it is argued that the State has an interest in regulating abortion but if it recognises a woman's fundamental right to procreative choice, then such regulation has to be balanced. Thus, for example, in the United States the constitutional right of the pregnant woman to choose an abortion becomes less powerful and the State's interests more powerful at the point of viability.

The consequence of this line of judicial decision in the United States obliges the woman to exercise her right to abortion during the first three months of pregnancy. Whether or not there is a true scientific basis for such a legal cut-off is a controversial issue.

1.6 Democratic Party proposal

The Democratic Party is of the opinion that it is the Constitutional Court which should be the final determinator of the extent, validity and precise limitations on a woman's right to choose and the unborn's right to life. Any attempt to elaborate, in detail, on an abortion provision or a procreative choice provision in the Constitution could lead to insurmountable difficulties. For example, if the Constitution allows procreative autonomy then arguably the Constitution should also impose a duty on the State to provide proper medical care, at its expense, to a woman who has an abortion. This has been the subject of considerable debate in the United States where the failure to provide medial facilities has, according to certain viewpoints, relegated the rights obtained by a woman through the decision of Roe v Wade (above) as a right only exercisable for those who can afford it.

Furthermore, if a procreative choice clause is based on, for example, the Covenant on Economic, Social, Cultural Rights and the Convention of Elimination of All Forms of Discrimination Against Women, then detailed consideration might have to be given, in the Constitution, to the question of appropriate services in connection with pregnancy, confinement and the post-natal period to include adequate nutrition during the period of pregnancy and lactation.

In summary, then, it becomes extremely complicated and in our view, constitutionally undesirable to attempt to formulate a specific constitutional clause to deal with the question of reproductive rights. This, in our view is a matter which is best settled after the completion of the current specialist examination being given to the matter by the Parliamentary Committee. Thereafter it will be open to Parliament to amend the existing Abortion and Sterilization Act, which in turn can be tested for constitutional validity by the Constitutional Court. This will then allow the Constitutional Court to give proper consideration to the location of reproductive and procreative choices in the context of the constitutional rights which already exist, including the right to life, (insofar as that is applicable at all) and equality and equal protection, dignity, security of the person and privacy. In our view that is the proper context for the finalisation for the issue on abortion to occur. It is not the province of the Constitution to attempt to regulate this issue with the close scrutiny and detail which it deserves. Parliament and the courts should and must do so.

This does not derogate from the DP's policy on the issue which we will advance, in Parliament, when the legislature considers amending the existing legislation on abortion. Equally, the existing constitutional provisions (on privacy, dignity, equality, security of the person, etc) will allow the courts to consider the precise constitutional meaning of reproductive rights.

2. OTHER ISSUES

The normal questions which arise in respect of submissions to the Constitutional Assembly, namely, Application of the Right, Bearers of the Right and Limitations, do not apply in this instance.

- FF



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FREEDOM FRONT

THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

SUBMISSIONS ON RIGHTS RELATING TO REPRODUCTION

Two rights relating to reproduction are dealt with in this document, viz. the 'right' to abort a human foetus and the right to sterilize a woman.

1) Content of the rights

ABORTION

Abortion: the current South African law

The Abortion and Sterilization Act, 2 of 1975

According to South African common law an abortion could validly be performed only where the life of the mother-to-be was threatened by the pregnancy. The common law was impliedly repealed by the Abortion and Sterilization Act, 2 of 1975, as amended to date.

The contemporary law relating to abortion is governed by the above-mentioned Act, which, according to its long title, is an Act to define the circumstances in which an abortion may be procured on a woman or in which a person who is incapable of consenting or incompetent to consent to sterilization, may be sterilized, and to provide for incidental matters.

Act 2 of 1975 provides in section 2 that no person shall procure an abortion otherwise than in accordance with the provisions of the Act. The circumstances in which an abortion may be procured are set out in section 3. According to this section an abortion may be procured by a medical practitioner only, and then only --

(a) where the continued pregnancy endangers the life of the woman concerned or constitutes a serious threat to her physical health, and two other medical practitioners have certified in writing to

this effect and abortion is necessary to ensure the life or physical health of the woman;

(b) where the continued pregnancy constitutes a serious threat to the mental health of the woman concerned, and two other medical practitioners have certified in writing that, in their opinion, the continued pregnancy creates the danger of permanent damage to the woman's mental health and abortion is necessary to ensure the mental health of the woman;

(c) where there exists a serious risk that the child to be born will suffer from a physical or mental defect of such a nature that he will be irreparably seriously handicapped, and two other medical practitioners have certified in writing that, in their opinion, there exists, on scientific grounds, such a risk; or

(d) where the foetus is alleged to have been conceived in consequence of unlawful carnal intercourse [i.e. rape or incest - section 1], and two other medical practitioners have certified in writing after such interrogation of the woman concerned as they or any of them may have considered necessary, that in their opinion the pregnancy is due to the alleged unlawful carnal intercourse; or

(e) where the foetus has been conceived in consequence of illegitimate carnal intercourse, and two other medical practitioners have certified in writing that the woman concerned is due to a permanent mental handicap or defect unable to comprehend the consequential implications of or bear the parental responsibility for the fruit of coitus.

Parliament, when it enacted these provisions, regarded unlawful abortions in such a serious light that the procuring of an abortion contrary to the provisions of the Act was made an offence subject to a heavy fine or to imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment (section 10(1)).

The Freedom Front submits that abortions are adequately dealt with in the statutory provisions set out above, and is strongly opposed to the repeal of Act 2 of 1975, which repeal would mean, inter alia, that abortions could henceforth lawfully be performed on demand. We submit that the new Constitution should neither render lawful abortion on demand nor should it extend the grounds for a lawful abortion as at present stipulated in section 3 of Act 2 of 1975. In this regard we find it completely anomalous that some of those who would abolish capital punishment on the basis of the sanctity of human life should simultaneously advocate the wanton destruction of the potential human life.

The transitional Constitution in perspective

The chapter on fundamental rights in the transitional Constitution does not deal expressly with abortion. Section 9 of the transitional Constitution reads: 'Every person shall have the right to life'. The question arises whether or not the unborn human being is a 'person' within the meaning of section 9.

Section 9 of the transitional Constitution is based on and is identical with section 2(2) of the German Basic Law. In respect of the latter section professor M Herdegen of the University of Bonn says: 'In 1975 the [German] Federal Constitutional Court had to rule on the constitutionality of an act of parliament which exempted abortions carried out within the first 12 weeks of pregnancy from criminal liability. The court held this statute to be unconstitutional in the light of article 2(2) of the Basic Law. This article provides that "everyone shall have the right to life". The court extended the scope of this provision to the life on the embryo and developed an obligation of the state to protect unborn life' ('The Activist Judge in a "positivistic" environment -- 'European experiences', 1990 Stellenbosch Law Review Volume 3 at page 342). The Freedom Front agrees with this view, which also covers the point that life starts at conception.

The Freedom Front is opposed to the repeal or amendment of the existing statute governing abortion, on the following grounds:

i) The Constitutional Assembly is bound to give effect to 'all universally accepted fundamental rights' (Constitutional Principle II). The question arises whether abortion on demand is universally accepted within the meaning of this phrase in Constitutional Principle II. The Freedom Front submits that it is not. On the contrary, the evidence (see below) is that international law does not expressly acknowledge a general right to procure an abortion.

The International Covenant on Civil and Political Rights, 1966, does not deal expressly with abortion (see Articles 23.4 and 24), but merely with the inherent right to life of 'every human being' (Article 6). However, the Convention on the Rights of the Child 1989, to which 62 states have become parties, in its preamble refers to unborn children, in the context of the Convention, as follows: 'The States Parties to the present Convention, ... Bearing in mind that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth...' (stress supplied), Have agreed as follows...'

The Freedom Front submits that, according to international law there is no right vesting in anyone wantonly to destroy unborn human life. On the contrary, the evidence is that an unborn

human being has a right to life and that it would be contrary to international law to destroy such being arbitrarily. In a slightly limited context the Inter-American Commission of Human Rights has expressed the view that 'the use of abortion to help solve economic and subsistence problems resulting from the population explosion would be a manifest and grave violation of human rights' (The International Law of Human Rights, by Paul Sieghart 1983 at page 132.

ii) The reasons why the common law did not allow abortion for centuries, unless the life of the pregnant woman concerned was in danger, are still valid today. The extension of the single legitimate ground for abortion at common law to the five grounds enumerated in section 3 of Act 2 of 1975 was rendered necessary by the moral convictions of the community in the modern era and the development of medical science during the last few decades. We submit that there is no reason whatsoever, either on social or medical grounds, why the grounds for lawful abortions should be further extended to render lawful that which has for centuries been a serious crime.

Moreover, legal protection of the foetus is not confined to criminal law provisions. According to South African private law the foetus is the potential carrier of rights other than life i.e. property rights, provided it is born alive, in other words, rights vesting at the birth of a child are predated to conception. For reasons of avarice a foetus could be destroyed with impunity by potential heirs who stand to lose their inheritances or part thereof upon the birth of a child.

iii) Abortion on demand is contrary to the religious convictions of the members of a number of communities in South Africa.

Moreover, to decriminalize abortion could (and in many instances would) lead to a serious conflict between the law allowing abortion and a number of religious communities in South Africa disapproving of abortion. This could wreck family life, contrary to article 23.1 of the International Covenant on Civil and Political Rights, 1966, which reads: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State' (stress supplied).

2) Application of the right

2.1 Nature of the duty imposed on the state

The state should be bound to protect the unborn life to the extent set out above, i.e. subject only to the exceptions mentioned in section 3 of Act 2 of 1975.

2.2 Application of the right to common law and statute law

This right should be protected in the Constitution, and neither common law nor statute law should detract from it.

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

Yes, all persons should be subject to the duty to preserve the unborn life.

2.4 Who should bear this right?

All unborn persons and, on their behalf, mothers-to-be, their closest family members, as well as curators appointed by the court should be bearers of this right.

2.5 Should this right be capable of limitation by the legislature?

No, the legislature should not be capable to limit this right, otherwise it would be nugatory and not constitutionally entrenched. The general limitation clause would not apply to this right.

STERILIZATION

Sterilization: the current South African law

It has been pointed out above that the Abortion and Sterilization Act, 2 of 1975, regulates only sterilization of persons not consenting thereto. Sterilization generally is not dealt with by the Act. This means that the legislature intended sterilization, unlike abortion, to be generally lawful, provided there is proper consent to it.

In the view of the Freedom Front there is a fundamental difference between sterilization and abortion, in so far the protection of a foetus arises only in the case of an abortion. The right of a woman to have herself sterilized concerns only herself, and does not infringe any rights of an unborn child. In this sense only the right to sterilisation can be described as a reproductive right (i.e. a right of the woman concerned) and not the so-called 'right' to an abortion. Provided sterilization takes place in accordance with the rules and ethics of the medical profession and is controlled by it, the Freedom Front at present has no objection to this practice.

2) Application of the right

2.1 Nature of the duty imposed on the state

The state should respect the right of a woman to be sterilized, as regulated by Act 2 of 1975 (see above).

2.2 Application of the right to common law and statute law

A terse statement to the effect that such a right (based on consent) exists, should occur in the Constitution, together with a provision that details could be set out in legislation. The constitutional right should supersede the common law.

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

Yes, no one should interfere with the exercise of this right.

4.4 Who should bear this right?

The woman concerned should be the primary bearer of this right, but where she is not capable of consenting some responsible person or persons being in a close relationship to her (and, ultimately, someone appointed by the court) should be bearers of this right.

2.5 Should this right be capable of limitation by the legislature?

No, the legislature should not be capable of limiting this right, as it is, by its nature, very personal and fundamental.

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National Party
Nasionale Party

Federal Council
Federale Raad

18 May 1995

Mr John Tsalamandris
Room 906
Constitutional Assembly
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Adderley Street
CAPE TOWN

Dear Mr Tsalamandris

Enclosed please find the National Party submission to Theme Committee 4 in respect of the Work Programme, Item 15 on Reproductive Rights.

Yours faithfully

pp Senator Ray Radue

NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 4

ITEM 15: REPRODUCTIVE RIGHTS

Content of the Right

In considering the introduction of a clause on "reproductive rights" into the Bill of Rights account should be taken of the fact that this is not a right that has been included in the international instruments which Theme Committee 4 recognize as source documents for a Bill of Rights. It is a topic that has given rise to fierce debate at the Cairo Conference on Population and Development last year.

In the Interparliamentary Union's report to Parliament on the conference this section in the chapter on reproductive rights and reproductive health was summarised descriptively as follows: "This right rests on the recognition of the basic rights of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so and the right to attain the highest standard of sexual reproductive health." To date, however, no agreement has been reached on such a socio-economic right being incorporated in an international document or declaration of the UN.

The right is also extensively dealt with in the draft Platform for Action which will serve before the 4th UN Conference on Women in Beijing in September and is at present being discussed in all participating countries. All the sections in this draft report on reproductive rights are bracketed which means that they have not been agreed by all the participating countries. Accordingly the right remains controversial.

The possible inclusion of reproductive rights has a bearing on a number of

other rights such as the right to life, the right to privacy, the right to security of the person, in particular in relation to abortion, the use of contraception, surrogate motherhood, in vitro fertilisation, etc.

The National Party believes that reproductive health and rights are matters better dealt with in legislation. The issue of amendments to our abortion law is currently being debated in a committee of Parliament. Similarly the whole question of surrogate motherhood is being debated in a Parliamentary Committee. Parliament should be entrusted to enact legislation once the full implications of these matters have been investigated and a measure of consensus has been reached.

Accordingly the NP submits that the debate on the matter and policy approaches both domestically and internationally on reproductive rights have not yet been reached a stage where they should form part of our Bill of Rights.

Accordingly the NP does not support the inclusion of reproductive rights as specific rights.

The NP believes that, subject to the relevant legislation, the issue can be accommodated in terms of other rights in the Bill such as the right to life, the right to basic health services, the right to privacy and to security of the person as well as the limitation clause.

Application of the rights

The introduction of reproductive rights in the Bill of Rights would place an extremely onerous burden on the state. The abortion issue is a complex one with far reaching moral, ethical, religious, legal and constitutional implications.

It would cast the state in an interventionist role in the eyes of many citizens which we believe would be undesirable and inappropriate. It would be preferable to leave it to the Constitutional Court to adjudicate on any statutes passed by Parliament in relation to the rights in the Bill of Rights referred to above.

The other headings are not specifically dealt with in view of the fact that the NP does not agree with the inclusion of the right.

