

26/4/96

CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 4
FUNDAMENTAL RIGHTS**

8 August 1995

Room M 46

REPORTS:

8. CHILDREN

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THEME COMMITTEE 4
-FUNDAMENTAL RIGHTS

SCHEMATIC REPORT ON
CHILDREN'S RIGHTS

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
1.	II	Nature of right (Application of Constitutional Principle II)	Children's rights to be included.		
2.		Content of right	Several separate rights to be included.	<ul style="list-style-type: none"> - <i>General Approach</i> - <i>Name and Nationality</i> - <i>Parent care</i> - <i>Security, basic nutrition and basic health and social services</i> - <i>Neglect or abuse</i> - <i>Labour</i> - <i>Detention</i> - <i>Best interest</i> - <i>Family</i> - <i>Environment and development</i> - <i>Discrimination</i> - <i>Disabled children</i> - <i>Thought, conscience and religion</i> - <i>Education</i> - <i>Culture</i> <p>¹ (for details on the above please see report)</p>	
3.		Application of the right (Nature of Duty)	The right has to be respected and protected by the State.		

¹ It should be noted that items marked "Outstanding" do not signify disagreement amongst political parties or contention. Parties felt that these matters could best be dealt with at the level of the Constitutional Committee, where negotiation could take place.

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
5.		Application of the right (Duty on Private Actors)		<p>The rights should apply horizontally and vertically but the rights of institutions (family units, educational, church, etc) necessary for the development of the child cannot be interfered with - ACDP.</p> <p>All public or private social welfare institutions, courts, legislative bodies, and other structures shall be bound by this right - ANC.</p> <p>All actors other than the state - DP.</p> <p>Parents, the "extended family", schools, churches, penal institutions, as well as related social institutions - FF.</p> <p>The right, for instance, to parental care is enforceable against parents, whereas the right not to be maltreated, neglected or abused, is enforceable against any person - NP.</p> <p>Depending on appropriateness, vertically and horizontally - PAC.</p>	

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
5.		Application of the right (Duty on Private Actors)		<p>The rights should apply horizontally and vertically but the rights of institutions (family units, educational, church, etc) necessary for the development of the child cannot be interfered with - ACDP.</p> <p>All public or private social welfare institutions, courts, legislative bodies, and other structures shall be bound by this right - ANC.</p> <p>All actors other than the state - DP.</p> <p>Parents, the "extended family", schools, churches, penal institutions, as well as related social institutions - FF.</p> <p>The right, for instance, to parental care is enforceable against parents, whereas the right not to be maltreated, neglected or abused, is enforceable against any person - NP.</p> <p>Depending on appropriateness, vertically and horizontally - PAC.</p>	

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
7.	Section 33	Limitation of right		<p>Rights of adults to pursue activities in child pornography, child abuse, abortion, etc should be subject to limitations providing for parental supervision based on family standards of decency - ACDP.</p> <p>The freedom of expression and the right to information of all kinds of children should be subject to limitations providing for parental supervision based on family standards and decency - ACDP.</p> <p>The freedom of thought, conscience and religion of children should be subject to limitations providing for parental control of the introduction of beliefs by outsiders - ACDP.</p>	

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
				<p>The freedom of association of children should be subject to limitations providing for parental rights to pose undesirable relationships - ACDP.</p> <p>The limitation of children's rights should be understood within a protectionist paradigm - ACDP.</p> <p>Limitations should be reasonable and permissible in an open and democratic society - ANC.</p> <p>Provisions of section 33 of the Interim Constitution should apply - DP, NP.</p> <p>General limitation clause (present section 33) and provisions on state of emergency (present section 34) should apply - FF.</p>	

THEME COMMITTEE 4 FUNDAMENTAL RIGHTS

REPORT ON RIGHT TO FREEDOM OF ASSOCIATION

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

PART I

MATERIAL CONSIDERED BY THE THEME COMMITTEE

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

- 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

2. This section will be completed once all the submissions received have been processed.

PART II

1. NATURE OF THE RIGHT (Application of Constitutional Principle II)

1.1 Non-contentious Issues

1.1.1 Children's rights to be included.

2. CONTENT AND SCOPE OF THE RIGHT

2.1 Non-contentious issues

2.1.1 Several separate rights to be included.

2.2 Contentious\ Outstanding³ Issues

2.2.1 *General Approach*

2.2.1.1 The rights in section 30(1) of the Interim Constitution to be extended to all persons including children so that separate guarantees do not seem necessary - doubt as to whether the "right to parental care" can be enforced effectively via the constitutional mechanism - only section 30(2) to be retained - DP.

2.2.1.2 Express provision requiring that children shall enjoy the protection provided in international agreements which safeguard their rights, especially the Convention on the Rights of the Child and the Declaration of the Rights of the Child - PAC.

2.2.2 *Name and Nationality*

2.2.2.1 Present formulation - "Every child shall have the right to a name and nationality as from birth" - ACDP, ANC, FF, PAC.

2.2.2.2 Omit "as from birth" from present formulation - NP.

³ It should be noted that items marked "Outstanding" do not signify disagreement amongst political parties or contention. Parties felt that these matters could best be dealt with at the level of the Constitutional Committee, where negotiation could take place.

2.2.3 *Parent care*

- 2.2.3.1 Present formulation - "Every child shall have the right to parental care" - ANC, FF, PAC.
- 2.2.3.2 Add "education and nurturance" - ACDP.
- 2.2.3.3 "Every child shall have the right to live with and be cared for by his or her parents, unless the interests of the child require some other arrangement. Any child deprived of the family environment shall have the right to appropriate alternative care" - NP.

2.2.4 *Security, basic nutrition and basic health and social services*

- 2.2.4.1 Present formulation - "Every child shall have the right to security, basic nutrition and basic health and social services" - ACDP, ANC, PAC.
- 2.2.4.2 Inclusion of a right to social security not supported - FF.
- 2.2.4.3 "Security" dealt with under *neglect or abuse* - NP.

2.2.5 *Neglect or abuse*

- 2.2.5.1 Present formulation - "Every child shall have the right not to be subject to neglect or abuse" - ACDP, ANC, FF, PAC.
- 2.2.5.2 "Every child shall have the right to security and to be protected from all forms of maltreatment, neglect or abuse.
Every child shall have the right to be protected from sexual exploitation and drug abuse" - NP.

2.2.6 *Labour*

- 2.2.6.1 Present formulation - "Every child shall have the right not to be subject to exploitative labour practices not to be required or permitted to perform work which is hazardous or harmful to his or education, health or well-being" - ACDP, FF, PAC.

- 2.2.6.2 Age limits to be set below which the paid employment of child labour should be prohibited and punishable by law - ANC, FF.
- 2.2.6.3 Present provision be expanded to comply with all aspects of article 32.2(a) of the Convention of Rights of the Child - FF.
- 2.2.6.4 "Every child shall have the right not to be compelled to perform work or to render services for the benefit of the employer of the parents of the child or any other person or to be subject to any other exploitative labour practices. Every child shall have the right not to be required or permitted to perform work or to render services which are hazardous or harmful to his or her physical or mental health or well-being, education, or spiritual, moral or social development." - NP.

2.2.7 Detention

- 2.2.7.1 Present formulation - "Every child who is in detention shall, in addition to the rights which he or she has in terms of section 25, have the right to be detained under conditions and to be treated in a manner that takes account of his or her age" - ACDP, ANC, PAC.
- 2.2.7.2 More safeguards for children in detention e.g. measures to promote the child's reintegration and the child's assuming a constructive role in society, express provision for alternatives for institutional care, and the following provision: "Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication - FF.
- 2.2.7.3 Protection to be extended - "Every child in conflict with the law shall have the right, in addition to the rights which he or she has in terms of section 25, to treatment which promotes the child's sense of dignity and worth, takes the child's age into account and aims at his or her reintegration into society" - NP.

2.2.8 *Best interest*

2.2.8.1 Present formulation - "... in all matters concerning such child his or her best interest shall be paramount" - ANC, FF, NP, PAC.

2.2.8.2 "Best interest" be replaced with "beneficial interest" - ACDP.

2.2.9 *Family*

2.2.9.1 Every child shall have the right to enjoy moral and spiritual leadership from family, social and governmental levels - ACDP.

2.2.9.2 The rights and responsibilities of parents and the extended family or community to provide guidance for the child which is appropriate to his or her evolving capacities - FF.

2.2.10 *Environment and development*

2.2.10.1 Every child shall have the right to a healthy, moral and clean environment, to develop physically, mentally, socially and spiritually (ACDP).

2.2.11 *Discrimination*

2.2.11.1 No negative label such as "legitimacy", should apply to children - reference to article 24(1) of the International Covenant on Civil and Political Rights - "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State" - ANC.

2.2.11.2 No discrimination against children born out of wedlock - NP, PAC.

2.2.12 *Disabled children*

2.2.12.1 Every disabled child shall have the right to special care, education and training in order to achieve the greatest degree of dignity, self-reliance and social integration - NP.

2.2.13 *Thought, conscience and religion*

- 2.2.13.1 The right of a child to freedom of thought, conscience and religion, subject to appropriate parental guidance - FF.

2.2.14 *Education*

- 2.2.14.1 The liberty of individuals and bodies to establish and direct educational institutions, subject to certain principles mentioned in article 29 of the Convention on the Rights of the Child and minimum standards laid down by the state - FF.
- 2.2.14.2 The rights of parents to ensure education and teaching in conformity with their own religious and philosophical convictions - FF.
- 2.2.14.3 The issue of free and compulsory education up to 18 years or Std 10 whichever comes first should be addressed - PAC.

2.2.15 *Culture*

- 2.2.15.1 The fostering of respect of the child's parents, his or her own cultural identity, language and values, and for the cultural values of others - FF.
- 2.2.15.2 The right of children or minority communities and indigenous populations to enjoy their own culture and to practice their own religion and language - FF.

3. APPLICATION OF THE RIGHT (Nature of the duty on the state)

3.1 Non-contentious Issues

- 3.1.1 The right has to be respected and protected by the State.

4. APPLICATION OF THE RIGHT (To common and customary law)

4.1 Non-contentious issues

- 4.1.1 Particular rights apply to the common and customary law.

4.2 Contentious\ Outstanding issues

4.2.1 *Rights that promotes* for discipline, accountability and propose and human dignity are applicable to common law and customary law - ACDP.

4.2.2 *All children's rights* apply to common and customary law - ANC, FF, NP.

5. APPLICATION OF THE RIGHT (Duty on private actors)

5.1 Contentious\ Outstanding Issues

5.1.1 The rights should apply horizontally and vertically but the rights of institutions (family units, educational, church, etc) necessary for the development of the child cannot be interfered with - ACDP.

5.1.2 All public or private social welfare institutions, courts, legislative bodies, and other structures shall be bound by this right - ANC.

5.1.3 All actors other than the state - DP.

5.1.4 Parents, the "extended family", schools, churches, penal institutions, as well as related social institutions - FF.

5.1.5 The right, for instance, to parental care is enforceable against parents, whereas the right not to be maltreated, neglected or abused, is enforceable against any person - NP.

5.1.6 Depending on appropriateness, vertically and horizontally - PAC.

6. BEARERS OF THE RIGHT

6.1 Non-contentious Issues

6.1.1 Children / natural persons under the age of 18 years.

6.2 Contentious\ Outstanding Issues

6.2.1 All children, with (possibly) some exceptions in the case of children of aliens unlawfully in the country - FF.

6.2.2 Juristic persons created for the benefit of children should also be empowered by law to act in the best interest of children - FF.

6.2.3 18 years of age and below or of whatever age of majority and below.

7. LIMITATION OF THE RIGHT

7.1 Non-contentious Issues

7.1.1 Rights in principle subject to limitation.

7.2 Contentious\ Outstanding Issues

7.2.1 Rights of adults to pursue activities in child pornography, child abuse, abortion, etc should be subject to limitations providing for parental supervision based on family standards of decency.

The freedom of expression and the right to information of all kinds of children should be subject to limitations providing for parental supervision based on family standards and decency.

The freedom of thought, conscience and religion of children should be subject to limitations providing for parental control of the introduction of beliefs by outsiders.

The freedom of association of children should be subject to limitations providing for parental rights to pose undesirable relationships.

The limitation of children's rights should be understood within a protectionist paradigm ACDP.

7.2.2 Limitations should be reasonable and permissible in an open and democratic society - ANC.

7.2.3 Provisions of section 33 of the Interim Constitution should apply - DP, NP.

7.2.4 General limitation clause (present section 33) and provisions on state of emergency (present section 34) should apply - FF.

ADDENDUM

PARTY SUBMISSIONS

- ACDP

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

CHILDREN'S RIGHTS

Content of the Right

The ACDP is of the opinion that children, by their definition and position in society, are to remind the adult society of those core tenets that constitute human values and development. These are innocence, humility, teachability and authority.

The gift of children is, among other things, a *social grace* from God upon society to regulate itself along values that perpetuate prudence, care, morality, responsible rule and accountability.

We believe that, insofar as society is turned towards the *beneficial interest* of the child, it can then be explained as a properly ordered social environment. Children are inclined, primarily, to be influenced than to be responsible. Their fields of access and influence falls within their need to be loved, to learn and to follow - these can be considered the beneficial interest of the child.

It is then the priority of society to ensure a secure environment for the balanced nurturance of the child. the neglect in this duty is to threaten the future of our nation. The pride of a nation is directly determined in proportion to the values it passes on to it's ensuing generations. It is one thing to spend ludicrous amounts of money to clothe, feed and entertain our children, but we should not be fooled that this would be enough to make them human. It is when they *learn* self-control, discipline, purpose and Godliness that children discover their genuine character and release an energy of true humanity. On the one hand, a society is encouraged to pursue whatever is true, noble, righteous, pure, admirable and praiseworthy and, to love God (Philippians 4:8), secondly, to ensure that these commands are taught and nurtured unto the children, (Deuteronomy 6:4-8).

In support of this, we read in the *Declaration of the rights of the Child (1959)*, that the protection and nurture of children is encouraged through special care and assistance, that they should grow up in a family environment and in an atmosphere of happiness, love and understanding and that the "*child, by reason of physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before, as well as after birth.*"

The ACDP, therefore, believes that:

- i. laws that protect adult rights to pursue activities in child pornography, child abuse, abortion, etc., work against the benefit of the child; and that such a society is, in fact, insensitive to child protection.
- ii. if children are asked to assume too many rights, it disregards the child's need for discipline, education and development. We hereby refer your attention to the following articles from the *Convention on the rights of the Child (1989)*, of which South African is a signatory:
 - Article 13 grants freedom of expression and the right to seek, receive and impart information and ideas of all kinds...either orally, in writing or in print - in the form of art, or through any other media of the child's choice. No allowance is made for possible parental supervision based on family standards of decency.
 - Article 14 guarantees children freedom of 'thought, conscience and religion.' The parental role is only to provide state-monitored influence. If a neighbour or teacher introduces a child into beliefs of devious character, the parent would be powerless to redirect 'his/her interests.'

- Article 15 "prohibits any restrictions on a child's freedom of association except as necessary for national security, public safety or order, public health or morals, or to protect the rights and freedoms of others." no parental right to oppose undesirable relationships is mentioned.

- Article 16 grants children the right of privacy. Surely there should be limits imposed?

The ACDP, therefore, states their objection to an over-extensive right of the child that denies the growth sequence towards physical and mental maturity as highlighted with reference to articles such as the above.

The ACDP believes that:

- i. Every child shall have the right:
 - a. to a name and nationality as from birth.
 - b. to parental care, *education and nurturance*.
 - c. *to enjoy moral and spiritual leadership from family, social and governmental levels.*
 - d. *to a healthy, moral and clean environment, to develop physically, mentally, socially and spiritually.*
 - e. to security, basic nutrition and basic health and social services.
 - f. not to be subject to violence, neglect or abuse, and
 - g. not to be subject to exploitative labour practises, nor to be required or permitted to perform work which is hazardous or harmful to his or her education, health or well-being.

- ii. Every child who is in detention shall, in addition to the right which he or she has in terms of section 23, have the right to be detained under conditions and to be treated in a manner that takes account of his or her age.

- iii. For the purpose of this section, a child shall mean a person under the age of 18 years and in all matters concerning such a child, his or her *beneficial* interest shall be paramount.

Application of the Right

2.1 Nature of duty to be imposed upon be the State

The State should take such steps as are necessary to ensure that child benefits within an environment that allows for security, safety and holistic development in all manner relating to dignity and morality.

2.2 Application of the right to common law and customary law

The rights of children, that promotes for discipline, accountability and purpose and human dignity, are applicable to both common law and customary law.

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

This right should be applied both horizontally and vertically. However, institutions like the family unit, educational, church, etc., have certain authoritative rights that are necessary for the development of a child. These rights, as long as they are legal and morally sound, cannot be interfered with.

2.4 Who should be the bearer of the right?

The right would apply to natural person as defined within the said requirements.

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

All rights are subject to limitation. we argue that children's rights should be understood within a protectionist paradigm, rather than liberationist. In other words, protective rights provide children with a protected period in which he or she acquires life tools to become able managers of the future. The Bible talks about laying down a solid foundation early in life, as this is more prudent than to renege and face insurmountable problems that will affect the whole society.

2nd May 1995

[CHILD.WPS]

- ANC

PRELIMINARY SUBMISSION OF ANC ON ITEM 12 OF THE WORK PROGRAMME

CHILDREN'S RIGHTS

1. Content of the Right

This right gives attention to Section 30 of the Interim Constitution which reads as follows:

- (i) Every child shall have the right:-
 - (a) to a name and nationality as from birth;
 - (b) to parental care;
 - (c) to security, basic nutrition and basic health and social services;
 - (d) not to be subject to neglect or abuse; and
 - (e) not to be subject to exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to his or her education, health or wellbeing.

- (ii) Every child who is in detention shall, in addition to the rights which he or she has in terms of Section 25, have the right to be detained under conditions and to be treated in a manner that takes account of his or her age.

- (iii) For the purpose of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interest shall be paramount.

The ANC accepts this formulation of the right, although as indicated below, further clauses may be necessary in order to ensure that the equality and rights of children are fully addressed by such a clause.

- 2.2. The right applies at all levels and any provision through common or customary law would have to be consistent with the rights provided by the clause dealing with children's rights.
- 2.3. All public or private social welfare institutions, courts, legislative bodies, and other structures shall be bound by this right.
- 2.4. Natural persons below the age of 18 years will be the bearers of this right.
- 2.5. The right should not be open to limitation except in so far as our proposed limitation should accord with such limitations as are reasonable and permissible in an open and democratic society.
- 2.6. There should be an obligation upon the state to pass legislation setting age limits below which the paid employment of child labour should be prohibited and punishable by law.

- DP



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Demokratiese Party
Democratic Party

25 April 1995

CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 4
FUNDAMENTAL RIGHTS

DEMOCRATIC PARTY SUBMISSION ON:

ITEM 12 : CHILDREN'S RIGHTS

ITEM 13 : LIFE

CHILDREN'S RIGHTS

1. Content of the Right

Section 30 of the Constitution reads:

- "(1) Every child shall have the right -
- (a) to a name and nationality as from birth;
 - (b) to parental care;
 - (c) to security, basic nutrition and basic health and social services;
 - (d) not to be subject to neglect or abuse; and
 - (e) not to be subject to exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to his or her education, health or well-being.
- (2) Every child who is in detention shall, in addition to the rights which he or she has in terms of section 25, have the right to be detained under conditions and to be treated in a manner that takes account of his or her age.

- (3) For the purpose of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interest shall be paramount."

The Democratic Party has no objection to any of the rights contained in the above formulation; indeed we accept the proposition of the United Nations Children's Fund (UNICEF) that children are especially vulnerable. However, we would prefer a holistic approach to the rights which are granted to the child in respect of the above formulation: In other words, we believe that to specify special rights for children, as opposed to including children among all people who are subject to the constitution, could lead to unforeseen and unfortunate consequences.

The Democratic Party is of the view that with the exception of the rights formulated in terms of 30(2) above, i.e. the special protection against juvenile incarceration, all the aforementioned rights (name, nationality, security, basic nutrition, basic health and social services) should be extended properly to cover all citizens of the Republic of South Africa, including children. Likewise, the Democratic Party is of the view that a clause in the final constitution dealing with labour rights will, by obvious implication, cover children as well and will, in any judicial interpretation, prevent exploitative labour practices (section 30(1)(e)).

The South Africa Law Commission final report on Group and Human Rights (October 1994) notes at 4.213 -

"It is true - and this matter is fully debated in the Commission's Interim Report - that in view of our approach and all the other provisions of a Bill of Rights, it may be unnecessary to refer to the rights of children specifically."

While the Democratic Party does not object to the inclusion of children's rights and indeed regards the provisions contained in section 30(2) as being necessary, we do not believe that the rights enumerated in section 30 should be confined to children per se. They should be extended to all natural persons.

We also doubt whether the "right to parental care" can be enforced effectively via the constitutional mechanism.

2. Application of the Right

A positive duty is imposed upon the state and on other actors, including especially parents, and other persons acting *in loci parentis* or those exercising temporary or custodial control over children.

3. **Bearers of the Right**

Children

4. **Limitations**

The provisions of section 33 should apply to this right, with the higher form of protection accorded to section 30 maintained in the final constitution.

LIFE

1. **Content of the Right**

Section 9 of the Constitution provides -

"Every person shall have the right to life."

The right to life is a core fundamental of the Bill of Rights together with equality, liberty and democracy itself. Its retention is, therefore, utterly central to a meaningful Bill of Rights.

In addition to the above formulation the Democratic Party believes the clause should be amended to read as follows:-

"Every person shall have the right to life, and no person shall be deprived arbitrarily of his or her life."

The Democratic Party believes that this formulation recognises the right to life as fundamental and, in addition, prevents the arbitrary or capricious termination of life except in carefully and considered circumstances such as those with which the appropriate court (the Constitutional Court in our instance) will be seized.

The formulation of the right leaves it to the court to deliver (in the words of the SA Law Commission: 1991 at 277) "a finely balanced judgement in the light of, *inter alia*, empirical evidence."

The General Council of the Bar of South Africa has also, recently, endorsed this approach (May 1993).

Parliament will therefore be able to legislate on the issue of capital punishment and it will be for the Constitutional Court to determine whether such an enactment complies with, or infringes, this Bill of Rights.

Consistent with this approach, the legality of abortion (and any limitations thereon) and any provisions regarding euthanasia will also be the province of the courts as a final determinator. The courts will then have to adjudicate upon the constitutionality of such measures with due regard to other provisions in the Bill of Rights which will include a balancing of the various rights provided in it and the demands of society at the time of judgement. These include the right to equality (section 8): life (section 9): human dignity (section 10), and privacy (section 13).

However, for the reasons elaborated upon below, we would prefer to deal with the question of abortion under block 15 (i.e. reproductive rights).

2. Application of the Right

A positive duty is imposed on the State and other persons to respect the right to life. In application of the right to life to common/customary law, it is clear that this right must trump any contrary provisions in common law and customary law as well.

3. Bearers of the Right

This right obviously applies only to natural, and not juristic, persons. As to whether a foetus is protected by the right to life, this matter will be dealt with in respect of reproductive rights.

4. Limitations of the Right

The normal limitations contained in section 33 shall apply.

- FF



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FREEDOM FRONT

THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

SUBMISSIONS ON CHILDREN'S RIGHTS

1. Content of children's rights

- 1.1 Children's rights are briefly set out in section 30 of the transitional Constitution. South Africa recently ratified the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1989.

In view of the fact that the above-mentioned Convention contains extensive provisions relating to children, it is not possible to give any description of the content of children's rights.

The Freedom Front attaches great importance to the family as 'the natural and fundamental group unit of society' as is acknowledged by article 10 of the International Covenant on Economic, Social and Cultural Rights 1966 as well as article 23 of the International Covenant on Civil and Political Rights 1966. The Freedom Front accordingly agrees generally with the provisions of the Convention of 1989, which is certain to have important effects on the quality of life of children in this country. We support in almost all respects the contents of the four main groups of rights dealt with in this Convention, viz. survival rights, development rights, protection rights and participation rights.

We are of the opinion that the provisions of section 30 of the transitional Constitution should be expanded to make provision for a slightly more comprehensive treatment of children's rights in the new Constitution. In this regard we wish to draw attention to a few specific provisions of the 1989 Convention, as well as some provisions of other international instruments (see the note under (iii)(b) below), which provisions should, in our view, be

incorporated in the chapter on fundamental rights in the new Constitution.

The successor to the present section 30 of the transitional Constitution should, in our view, contain specific provisions dealing with the following matters that appear in the Convention of 1989:

- (i) the rights and responsibilities of parents and 'the extended family or community' (stress supplied) to provide guidance for the child which is appropriate to his or her evolving capacities (article 5 of the Convention);
- (ii) the child's right to freedom of thought, conscience and religion, 'subject to appropriate parental guidance' (article 14 of the Convention);
- (iii) the aims of education as set out in article 29 of the Convention, including, in particular,
 - (a) the fostering of respect for the child's parents, his or her own cultural identity, language and values, and for the cultural values of others;
 - (b) the liberty of individuals and bodies to establish and direct educational institutions, subject to certain principles mentioned in article 29 and minimum standards laid down by the state.

NOTE: The Constitution should also provide for the right of parents to ensure education and teaching 'in conformity with their own religious and philosophical convictions' (article 2 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950).
- (iv) the right of children of minority communities and indigenous populations to enjoy their own culture and to practise their own religion and language (article 30 of the Convention of 1989);
- (v) the consideration that children need special safeguards and care, including appropriate legal protection, before as well as after birth (preamble of the Convention of 1989).

1.2 Controversial issues

Juvenile justice and detention of children

The Freedom Front is of the opinion that, in the context of the administration of juvenile justice, the provisions of

section 30(2) of the transitional Constitution (children in detention) are too cryptic. In the new Constitution the successor to section 30 should be an expanded version of section 30(2), making provision for greater safeguards for children in detention, e.g. measures to promote 'the child's reintegration and the child's assuming a constructive role in society' (article 40.1 of the Convention of 1989) and express provision for 'alternatives for institutional care' (article 40.4 of the Convention of 1989). Moreover, we propose that the Constitution should also contain the following provisions: 'Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication' (article 10(2)(b) of the International Covenant on Civil and Political Rights) and 'Juvenile offenders shall be segregated from adults' (portion of article 10(3) of the same Convention).

Child labour

In our view the provisions of section 30(2) of the transitional Constitution are inadequate to deal effectively with the regulation of child labour. We propose that it should be expanded, to provide inter alia for a minimum age or minimum ages for admission to employment (see article 32.2(a) of the Convention) and to comply in other respects with the wording of article 32.1 of the Convention. In this context we wish to point out that the International Covenant on Economic, Social and Cultural Rights 1966 in article 10.3 provides: 'States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law' (stress supplied).

Social security

Article 26 of the Convention of 1989 makes provision for children to have the right to benefit from social security, including social insurance.

The Freedom Front adheres to the view that, laudable as it may be in principle, statutory provision for a right to social security (including social insurance) will prove to be an empty gesture, in so far as the country does not have the resources to implement the principle. Such a right would, accordingly, not be justiciable, i.e. effectively enforceable by courts. In this connection it should be noted that the Constitution and all fundamental rights must be enforced by the courts (Constitutional Principle VII). The Freedom Front cannot support this so-called 'right to social security'.

2. Application of the right

2.1 Nature of the duty imposed on the state

The nature of the duty imposed on the state is to take such legislative and administrative steps in terms of the principles set out in the international instruments and the proposed provisions of the new Constitution as are at all times in the best interests of children.

2.2 Application of the right to common law and statutory law

In view of advanced contemporary concepts relating to the duties of society towards children this collection of rights will have a statutory basis. Virtually all common law and statutory law rules will be superseded by statutory law.

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

These rights naturally impose constitutional duties not only on the state but, by their nature, also on parents, the 'extended family' (see 1.1 (i) above), schools, churches, penal institutions, as well as related social institutions.

2.4 Who should bear these rights?

All children within the country should be bearers of these rights, with (possibly) some exceptions in the case of children of aliens unlawfully in the country. Juristic persons created for the benefit of children should also be empowered by law to act in the best interests of children.

2.5 Should these rights be capable of limitation by the legislature?

At this stage it seems that these rights should be capable of limitation by the legislature only in accordance with the general limitation clause (at present section 33 of the transitional Constitution) and in the case of a state of emergency (see section 34 of the transitional Constitution).

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NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 4

ITEM 12: CHILDREN'S RIGHTS

1 Content of the right

The National Party has always advocated the inclusion in the bill of rights of more extensive provisions dealing with children's rights. While supporting the rights provided for in section 30 of the transitional constitution, we therefore believe that section 30 needs to be fleshed out. In this regard we suggest that the contents of the International Convention on the Rights of the Child should, *inter alia*, be taken into consideration.

We propose that the following rights be considered for inclusion, some of which are already provided for in the transitional constitution:

(a) *Every child shall have the right to a name and nationality.* This right applies to all children born of South African parents, and implies that a stateless child born or resident in South Africa also has a claim to South African citizenship.

(b) *Every child shall have the right to live with and be cared for by his or her parents, unless the interests of the child require some other arrangement. Any child deprived of the family environment shall have the right to appropriate alternative care.* It is, of course, a right against the state and not the parents (the latter is governed by private law) and it prohibits actions by the state that may prevent a child from enjoying parental care and home life. If a child has no parents, or if the state severs the relationship between parent and child in the interests of the child, the child has a right against the state to make suitable alternative arrangements for his or her care. It is a question whether the right does not create or imply a reciprocal right of parents to guardianship and custody of and access to

their children. Du Plessis and Corder (*Understanding South Africa's Transitional Bill of Rights* 1994 186) seem not to think so, but we propose that we be further advised on this question. In general, we are unsure of the impact of this right on the private law relationship between parents and children and advice on these matters by the Technical Committee would be helpful.

(c) *Every child shall have the right to basic nutrition and basic health, medical and social services.* We believe that the provision of basic services in this regard is a fair claim on state resources. What *basic* exactly entails will have to be determined, but we believe it should at least mean such nutrition and health, medical and social services as to prevent deprivation, malnutrition, neglect and disease.

(d) *Every child shall have the right to security and to be protected from all forms of maltreatment, neglect or abuse.* The right obliges the state to respect and protect the security of the child, and places a duty on the state to intervene in cases of maltreatment, neglect or abuse by parents, guardians, custodians or any other person.

(e) *Every child shall have the right not to be compelled to perform work or to render services for the benefit of the employer of the parents of the child or any other person or to be subject to any other exploitative labour practice.* We refer to article 32 of the International Convention on the Rights of the Child.

(f) *Every child shall have the right not to be required or permitted to perform work or to render services which are hazardous or harmful to his or her physical or mental health or well-being, education, or spiritual, moral or social development.* This also refers to article 32 of the International Convention on the Rights of the Child.

(g) *Every child shall have the right to be protected from sexual exploitation and drug abuse.*

(h) *Every disabled child shall have the right to special care, education and training in order to achieve the greatest degree of dignity, self-reliance and social integration. See article 23 of the International Convention on the Rights of the Child.*

(i) *Every child in conflict with the law shall have the right, in addition to the rights which he or she has in terms of section 25, to treatment which promotes the child's sense of dignity and worth, takes the child's age into account and aims at his or her reintegration into society. These rights are created in addition to the rights of detainees (section 25) and address special problems pertaining to detained children. See article 40 of the International Convention on the Rights of the Child.*

2 Application of the right

2.1 Nature of the duty on the state

This right obviously does not expect from the state merely to refrain from certain actions, but imposes a duty to act positively in certain cases. As such, this is a typical socio-economic right. Examples are the duty to provide facilities to register the names of children, the duty to provide basic nutrition and basic health, medical and social services, the duty to intervene when parents or other persons maltreat, neglect or abuse children and the duty to provide suitable care in the absence of parents.

2.2 Common law and customary law

The right should apply to common law and customary law.

2.3 Other actors

This is primarily a right against the state, but the child's right, for instance, to parental care is enforceable against parents, whereas the right not to be maltreated, neglected or abused, is enforceable against any person involved.

2.4 Bearers of the right

By definition only children can be bearers of this right. In terms of section 30(3) of the transitional constitution, children are defined as persons under the age of 18 years, a necessary definition that should be retained. No distinction is made, and rightly so, between children born in and out of wedlock.

2.5 Limitation of the right

The right can be limited in terms of the general limitations clause. In addition, the qualification in section 30(3) that in all matters falling under section 30 concerning a child, the best interests of the child shall be paramount, may, in a particular case, also serve as a limitation on the right. An example would be where a child is deprived of parental care because the state deems it to be in the best interests of that child.

3 Wording

The wording of the present section 30(1) should be amended as contemplated in paragraph 1(a) to (h), section 30(2) should be substituted as contemplated in paragraph 1(i) and section 30(3) can be retained unamended.

- PAC



24 April 1995

PRELIMINARY SUBMISSION OF THE PAC ON CHILDREN'S RIGHTS

We support the inclusion of such a clause in our Final Constitution. Our country has had a bad history of ill-treating children, such as, abuse, neglect, child labour especially on farms, the spectre of street kids and gaols full of children and so on.

Content

1. We support the provisions of s30 of the Interim Constitution. This section protects children against child labour, abuse, hunger, neglect disease and so on. These should be included in the Final Constitution.
2. In addition, we feel that a section in the Final Constitution dealing with children's rights should address expressly the issue of free and compulsory education up to 18 years or Std 10 whichever comes first and also the right of illegitimate children not to be discriminated against.

Application

1. These rights, depending on appropriateness, do apply both vertically and horizontally.
2. Some of these rights, such as, rights of children not to be neglected or abused or subjected to exploitative labour practices, cannot be suspended and may only be limited under very strict conditions.
3. Bearers of these rights are children of 18 years and below or of whatever age of majority and below, the Final Constitution will set.
4. The PAC will also favour an express provision requiring that children shall enjoy the protection provided in International Agreements which safeguard their Rights, especially, the Convention on the Rights of The Child (1990) and the Declaration of the Rights of the Child (1959).

R K Sizani - MP

circumstances, where it may be necessary that a patient or a person may be assisted to die. There are, for instance, today the so-called living wills - where a person may state that should he/she be in a certain state of health, he/she should be allowed to die. This may be respected.

R K Sizani - MP