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CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 4
FUNDAMENTAL RIGHTS**

7 August 1995

Room M 46

REPORT:

1. RIGHT TO LIFE

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THEME COMMITTEE 4

-FUNDAMENTAL RIGHTS

**SCHEMATIC REPORT ON THE
RIGHT TO LIFE**

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
1.	II	Nature of right (Application of Constitutional Principle II)	The right to life is a fundamental human right which should be included in the final Constitution.		

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
2.		Content of right	Right protects physical existence	<p>Right also covers improvement of quality of life (ANC, PAC), but matter to be covered by socio-economic rights (ANC) <i>Outstanding</i>¹.</p> <p><u>Capital Punishment</u></p> <p><u>Contentious issues</u></p> <p>(i) Capital punishment to be abolished in the Constitution - ANC, PAC.</p> <p>(ii) Matter not to be dealt with in Constitution - DP, NP.</p> <p><u>Outstanding issues</u></p> <p>(i) Death penalty be retained - ACDP (Remark: not clear whether it should be done in the Constitution)</p> <p>(ii) Matter not to be discussed while under consideration by Constitutional Court - FF</p>	

1. It should be noted that items marked "*Outstanding*" do not signify contention amongst political parties. 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
		Content of right (cont)		<p><u>Abortion</u></p> <p><u>Contentious issues</u></p> <p>(i) Constitutional provision that right does not preclude legislature from providing for and regulating abortion.</p> <p>(ii) Not to be dealt with in Constitution - DP, NP, PAC.</p> <p><u>Outstanding issues</u></p> <p>(ii) To be considered with regard to 'reproductive rights' - DP, FF.</p> <p>Euthanasia</p> <p><u>Outstanding issues</u></p> <p>(i) Matter not to be dealt with in the Constitution - ANC, DP, NP.</p> <p>(ii) Matter to be referred to a commission of inquiry - FF.</p> <p>(iii) Allowed under certain circumstances - PAC (Remark: not clear whether it be provided for in the Constitution)</p>	

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
3.		Application of the right (Nature of Duty)	Duty on the state not to violate the right and to protect it.		
4.		Application of the right (To common and customary law)	Shall apply to common law and customary law.		
5.		Application of the right (Duty on Private Actors)	Binding the state and all private actors - ACDP, ANC, DP, PAC	Binding only the state - criminal law deals with the position of individuals - NP Outstanding. (Remark: the criminal law position could be interpreted as implying that individuals are bound)	
6.		Bearers of the right	Only natural persons	Life of unborn children to be protected - ACDP Outstanding. Status of foetus to be dealt with in respect of reproductive rights - DP Outstanding. Status of foetus not to be dealt with in Constitution - NP Outstanding.	

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
7.	Section 33	Limitation of right	Right in principle subject to limitation.	<p>No-one shall be arbitrarily deprive of his/her life,' to be added - ANC, DP</p> <p>(Remark: this is a specific limitation clause implying that the right may be limited non-arbitrarily. In relationship with a general limitation clause could be discussed when the latter is considered.)</p> <p>Limitations in section 33 should apply - DP, NP.</p> <p>Right non-suspendible, only to be limited in strictest of circumstances, such as, self-defence - PAC.</p>	

THEME COMMITTEE 4 FUNDAMENTAL RIGHTS

REPORT ON RIGHT TO LIFE

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
- IFP
- 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

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

4. Relevant Constitutional Principles

II

PART II

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

1.1 Non-contentious Issues

1.1.1 The right to life to be included as a fundamental right.

2. CONTENT AND SCOPE OF THE RIGHT

2.1 Non-Contentious Issues

2.1.1 Right protects physical existence.

2.2 Outstanding³ Issues

2.2.1 Right also covers improvement of quality of life (ANC, PAC) but matter to be covered by socio-economic rights (ANC)

2.2.2 Capital Punishment

2.2.2.1 Contentious issues

- (i) Capital punishment to be abolished in the Constitution - ANC, PAC.
- (ii) Matter not to be dealt with in Constitution - DP, NP.

2.2.2.2 Outstanding issues

- (i) Death penalty be retained - ACDP
(Remark: not clear whether it should be done in the Constitution)
- (ii) Matter not to be discussed while under consideration by Constitutional Court -FF

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 Abortion

2.2.3.1 Contentious issues

- (i) Constitutional provision that right does not preclude legislature from providing for and regulating abortion.
- (ii) Not to be dealt with in Constitution - DP, NP, PAC.

2.2.3.2 Outstanding issues

- (ii) To be considered with regard to 'reproductive rights' - DP, FF.

2.2.4 Euthanasia

2.2.4.1 Outstanding issues

- (i) Matter not to be dealt with in the Constitution - ANC, DP, NP.
- (ii) Matter to be referred to a commission of inquiry - FF.
- (iii) To be allowed under certain circumstances - PAC
(Remark: not clear whether it be provided for in the Constitution)

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

3.1 Non-contentious Issues

3.1.1 Duty on the state not to violate the right and to protect it.

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

4.1 Non-contentious issues

4.1.1 The right must apply to the common and customary law.

- ACDP

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

THE RIGHT TO LIFE

1. Content of the Right

"And the Lord God formed man of the dust of the ground and breathed into his nostrils the breath of *life*; and man became a living being." (Genesis 2:7 (NKJV))

It has been said correctly that without this right, no other is relevant. Once the importance of the right to life has been compromised, civilisation must come to a fall.

So strong is that notion in ancient minds, that killers were themselves killed before they could have a chance to pollute other's minds with homicidal thoughts.

There always had been a tendency in mankind, however, to subdue someone on a lower scale - whatever the terms of measurement. The way to do this was to set up criteria that allowed a non-human, a non-person to be killed. In ancient times, to kill a slave was simply dealing with one's "property". In Nazi Germany, to kill a Jew was to rid the nation of worthless entities.

Yet, modern civilisations were so appalled by the callous murdering of innocents in the concentration camps that they vowed that never again will they permit this to happen.

The United Nations Declaration of Human Rights was the first significant document that set standards in the dealings with men by men, but the idea of a standard originated in modern form with men like John Locke (1632-1704). He wrote at a time when Protestants challenging the Roman Catholic Church, were outlawed in the true sense of the word and several million died as a result of this Inquisition.

Keeping in mind, the horror of this large scale execution, it is understandable that Locke wanted to achieve two main objectives:

1. Ensure that this sort of massacre does not ever happen again;
2. Keep the Roman Catholic Church as far apart from the process as possible.

The stage is thus set for a standard to be found outside of what the Roman Catholic Church stood for.

That standard, the Enlightenment Humanists found in themselves. Man would become the standard in dealings with man. But one person could not be better than another - that was the whole point that the church had been making - if an individual did not believe what the church demanded, he or she had to be disposed of. A natural outflow of this was that one man could not set standards for another - that would have meant that the one setting the standard was somehow more elevated than the other.

Enters the idea that the collective, in the form of society, will set the standards. Society, however, keeps changing and this means that the standards must keep changing and, thus, situational ethics or ethical relativism was born.

Thus humanist thinking has itself right back where it started - making arbitrary decisions based on changing standards: the Roman Catholic Church did it in the name of "the Faith" and now society is doing it to themselves and calling it "evolution".

However well-intentioned, the result could mean the end of civilisation as we know it.

1.1 Abortion

It continues to amaze that the very people who call for an environment devoid of inhibiting structures that will hamper the ultimate liberation of mankind and the quantum leap into a perfect society, will make completely arbitrary decisions restricting others from liberating themselves.

A case in point being the question of abortion: The already mentioned UN Declaration of Human Rights states that all human beings have the right to life - an open statement with no limits. This is supported by the UN Declaration on the Rights of the Child that declares that "a child requires protection before as well as after birth."

It therefore comes as a surprise to find the United Nations International Children's Emergency Fund defining "High-risk pregnancy" as "becoming pregnant before the age of 18, ... before the last-born child is two years old, ... after having more than two children, or after reaching the age of 35. Babies born during these periods can be perfunctorily aborted by their mothers and UNICEF will fully support this decision, even though it contradicts two Declarations of the Human Rights genre pertaining to the most crucial of right, by the very same organisation.

Section 9 of the Interim Constitution determines that "Every person shall have the right to life".

It is the view of the ACDP that the unborn child should also be protected by this right, because:

- a. Life begins at conception, and
- b. Every unborn child is a person

In order for us to determine who has the right to life, we must first define what life is and when it begins. Scientifically and medically, the question of when life begins has been answered conclusively and unanimously.

Dr Bernard Nathanson, former director of the world's largest abortion clinic and personally responsible for 75,000 abortions, said: "I am often asked what made me change my mind. How did I change from prominent abortionist to pro-life advocate? In 1973, I became director of obstetrics of a large hospital in New York and had to set up a perinatal research unit, just at the start of a great new technology, which we now use every day to study the fetus in the womb. A favourite pro-abortion tactic is to insist that the definition of when life begins is impossible; that the question is a theological or moral or philosophical one, anything but a scientific one.

Fetology makes it undeniably evident that life begins at conception and requires all the protection and safeguards that any one of us enjoy...As a scientist, I know, not believe, know that human life begins at conception!

Life does not begin at birth. Birth merely changes the environment of the child. It is an unscientific notion that children who cannot be seen are not alive. In reality, a 'born child' is no different to an unborn child, except for it's place of residence."

We do not support the view that the unborn child can only be considered to be alive and human if it has the potential to live outside the womb, i.e. viability. One problem with the concept of viability is that nobody can agree when it begins. As a result of the advances of medical science over the past few decades, doctors have been able to preserve the lives of younger and younger prematurely born babies.

Today, viability has been reduced to 19 - 23 weeks. At present, the main limitation to viability is the development of the child's lungs and thus, the child's ability to breathe. If medical science continues to progress in this area, viability may be reduced to 12 - 15 weeks, possibly even earlier.

In the future, it may be possible to maintain new human beings in a totally artificial environment outside the womb, right from the time of conception, thus removing the issue of viability completely.

It is, therefore, clear that viability cannot be used as a measure of the humanity of the unborn child, because it is constantly changing. Thus, no clear line can be drawn by viability in deciding when life begins. Rather, it is a measure of the sophistication of external life support systems, scientific knowledge and the ability of doctors and nurses.

The Personhood of the Unborn Child

Because Section 9 of the Constitution allows "every person" to have the right to life, we must determine who or what constitutes a 'person'. The ACDP believes every unborn child is a person; to regard the unborn child as a 'non-person' is to discriminate against it on the grounds of age. If certain members of the human race (i.e. the unborn) are declared non-persons by those who are born on the grounds of age, the danger of this argument is that it could be used to question the 'personhood' of anyone.

It is illogical to argue that the unborn child is a 'non-person' because it is dependent on it's mother for support until viability. Since when is our right to life determined by our dependence on other people? As infants, we were also dependent on our parents for our safety and nutrition. Did this give them the right to kill us?

Likewise, there are many others in our society who are dependent on others; the aged, institutionalised, the disabled, etc. If killing is justified simply because people are dependent on others and unwanted by society, then who knows who else will be considered unfit to live in future.

In defence of the unborn child's right to life, the ACDP wishes to conclude what we understand the biblical teaching to be on the sanctity of the life of the unborn child: the Bible teaches that God created all people in his own image. All human life, therefore, is sacred: "So God created man in his own image, the image of God he created him; male and female He created them." Genesis 1:27

This teaching is also the fundamental basis of other Christian values in our society, for example, the equal dignity of people of different races and of men of women.

The fact that medical or scientific evidence could never disprove that life starts at conception is conveniently glossed over with horrific effects:

The Hippocratic Oath (450 B.C.) required doctors to devote their skills exclusively to healing and to the preservation of human life. It, thus, set the moral and ethical standards in the medical profession.

The German medical profession during the Nazi regime abandoned Hippocratic Ethics and accepted the role of exterminators of fellow human beings in the German Euthanasia program. Of the doctors who did not themselves practice elimination techniques, the majority simply kept quiet. The State did the thinking - it set new standards according to its perceived needs.

Handicapped German children and adults were firstly found to be unwanted and then the practise was expanded to eliminate those who were deemed to be racially, socially or religiously handicapped.

A very evil process of dehumanisation occurred in terminology that made Nazi's think of non-Aryans as non-human: terminology along the lines of "sub-humans", "useless eaters" and "oxygen wasters" assisted in this process.

Similar tactics are employed by the medical and scientific exponents of abortion practices today: "Termination of pregnancy" is widely being accepted as a term for killing an unborn child in the womb. Yet one normally would not expect a termination of a marriage (divorce) or of a partnership to involve killing of a spouse or a partner. Through the use of this "non-violent" word-choice, the blow is softened.

But why would it be necessary to speak of "termination of a foetus" rather than "murder of an unborn child". For precisely the same reason that Nazi's denoted humans as sub-humans through terminology to alienate emotions and feelings that another human is being killed.

Yet the human mind and psyche is not easily fooled: a mother knows she has killed her baby and thus, one more illness is forced upon an already traumatised Western Civilisation: Post-abortion syndrome of which the following is only some of the aspects:

- a. intense psychological distress at exposure to events that symbolise **or resemble the abortion experience** (eg. clinics, pregnant mothers, subsequent pregnancies.)
- b. anniversary reactions of intense grieving and/or depression on **subsequent anniversary dates of the abortion** or on the projected due date of the aborted child.
- c. efforts to avoid activities, situations or information that might arouse recollections of the abortion;

- d. restricted range of effect - eg. unable to have loving or tender feelings;
- e. exaggerated startle response to intrusive recollections or re-experiencing of the abortion trauma.
- f. depression or suicidal ideation. (Syndrome)
- g. guilt about surviving when one's unborn child did not.

The psychological damage due to abortion may last for more than a month or may even be delayed, due to shock, for more than six months after the abortion.

1.1a The Quality of Life and Abortion

Those who claim that abortion is a quality of life issue would do well to note these statistics:

Legal abortions are now the most commonly performed surgical procedure in the United States of America, and in monetary terms, abortion has become one of America's biggest industries.

In 1972, the year before the legalisation of abortion on request in the United States of America, the number of maternal deaths caused by illegal abortions amounted to 48, and 10 women died as a result of legal abortions. A ratio of 1 maternal death from legal abortions to 1,8 deaths from illegal abortions.

Debates concerning the numbers of legal versus illegal abortions, and the risks to the life of the mother in legal versus illegal, did not deal with the fact that, with every abortion, a child is deliberately killed.

Medically induced abortion is the only procedure in which a doctor routinely and deliberately kills a human being, and abortion is the only operation which always causes death. Abortion is always fatal for the baby!

The threat of suicide to the pregnant woman is often called upon to substantiate the need for abortion.

Although the threat of suicide is used by women, often on the advice of their doctors, as a ploy to obtain abortions, the facts reveal that suicide is an extremely rare event during pregnancy.

To illustrate this point, between 1938 and 1958, over 13,500 Swedish women were refused abortions, - of which number, three committed suicide. In Birmingham, England, in seven years, 119 women under 50 committed suicide. None of these women were pregnant.

Suicide is, however, common amongst women who have had abortions. A report of "Suiciders Anonymous" to the Cincinnati City Council, September 1st, 1981, revealed that of 4000 women who had attempted suicide, 1800 of these women had undergone abortions. Another report describes cases of attempted suicide by teen-age women on the anniversaries of the dates on which their aborted babies would have been born.

Thus, once an arbitrary line has been drawn, saying a human being is not human until he or she complies with certain qualifications - in this instance, being born, the line can be redrawn.

The child firstly has to be born healthy. Already on the 16th April, 1989, the Sunday Star reported that there is growing acceptance for the practice of infanticide - killing newly-born babies, by denying them food and medical attention, because they were being born prematurely and were very small or were badly deformed.

This follows Nobel Prize-winning scientist, Dr. James D. Watson stating in 1973 that consideration should be given to withholding legal status from an infant until three days after his birth. Parents who suspect foetal abnormalities may now legally obtain abortion in the USA, he pointed out; but most birth defects are not observed until birth: Watson said that "the doctor could allow the child to die if the parents so chose and save a lot a misery and suffering. I believe this view is the only rational, compassionate attitude to have!"

1.2 Euthanasia - The Justification for Murder

"The most merciful thing that a large family does to one of its infant members is to kill it." This shocking statement comes from Margaret Sanger, Founder of Planned Parenthood, who initiated the process of abortion in the USA just three years after the USSR became the first country in the world to legalise abortion in 1920.

Her legacy lives on in the role that Dr A. Guttmacher, President of Planned Parenthood, is playing in the founding of the euthanasia movement in the United States.

In 1994, the State of Oregon in the USA passed the nation's first euthanasia law that will allow physicians to assist their willing patients in killing themselves. This follows the exploits of Dr "Death" Jack Kevorkian, who travelled the American countryside with a mobile killing unit in the form of a rusty van with a home-made "self-execution" machine.

On 4th June 1990, he killed for the first time, although his interest in killing is already exhibited in an article he wrote to a German journal, suggesting the use of infants, children, the severely disabled and the senile for medical experimentation.

He suggested that "if the *subject's* body is alive at the end of experimentation, final biological death could be induced by "removal of organs for transplantation or "a lethal dose of a new or untested drug, to be administered by an official lay executioner" (**Medicine and Law, Vol. 5 (1986)**, page 195, quoted in Marker, 1991, page 12 (our emphasis).

To further establish the link between abortion and mercy killing, it is worthy to note what the father of situational ethics, mentioned above, Joseph Fletcher, had to say: "Why stop with the unborn?" The only difference between the infant and the fetus is the infant breathes with lungs...Now then, if through ignorance or neglect or sheer chance...the damage has not been ended pre-natally, why should it not be accordingly ended post-natally?"

The above two paragraphs illustrate vividly the differences and similarities between voluntary and involuntary euthanasia.

Voluntary euthanasia or assisted suicide is somehow seen to be more respected because the "patient" simply exercises own free will in terminating pain and a hopeless medical prognosis. However, once it becomes acceptable to "aid" terminally ill patients in dying, other "useless" members of society, particularly the elderly is targeted. The Netherlands is a case in point. A country where the law still prohibits so called mercy killing, but where the offenders are not acted against.

For nearly three decades, the Dutch have been subjected to propoganda in favour of death: calling the act of a death request "brave", "wise" and "progressive".

Efforts are made to convince people that it is what they ought to do, what society expects of them, what is best for themselves and their families with a result the Dutch Attorney General, T. M. Schalken stated in 1984 that "elderly people begin to consider themselves a burden on society and fall under an obligation to start conversations on euthanasia, or even to request it". (quoted in Fenigsen, 1989)

There is thus a very fine line between "voluntary" and involuntary euthanasia. Coercion might force an elderly Dutch person to accept "dignified death" in the interests of society and there is no reason to believe that if introduced into South Africa, the pattern will be any different.

In the Netherlands, the next step was crypthanasia (active euthanasia on sick people without their knowledge), which can only be cold blooded murder. The Dutch experience, however, shows otherwise: A doctor in The Hague killed twenty inhabitants of an old-age home. He pleaded guilty to five, was accused of four and then was convicted of three killings.

These victims were not ill but only senile and querulous. Witnesses testified that the doctor was simply impatient with elderly people, reluctant to treat them, frequently absent and left many decisions to a male nurse who murdered by untraceable intravenous injections of insulin and who threatened other inhabitants of the rest home with similar action.

1.2a The Quality of Life and Euthanasia

The name Persistent Vegetative State is given to the syndrome which affects people who have survived very severe brain damage. They are not on a life support machine, but they are totally dependant on others for nursing care. Because of the unfortunate use of the term "vegetative", rather than "non-responsive" or "non-communicative" implying a lack of humanness, there is unrelenting pressure to end the lives of people with PVS by withdrawing food and fluids, because their situation appears hopeless and because of the emotional strain on caring staff and relatives.

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

5.1 Non-Contentious issues

5.1.1 Binding the state and all private actors (ACDP, ANC, DP, PAC)

5.2 Outstanding Issues

5.2.1 Binding only the state - criminal law deals with position of individuals - NP (Remark: the criminal law position could be interpreted as implying that individuals are bound)

6. BEARERS OF THE RIGHT

6.1 Non-contentious Issues

6.1.1 Only natural persons.

6.2 Outstanding Issues

6.2.1 Life of unborn children to be protected - ACDP

6.2.2 Status of foetus to be dealt with in respect of reproductive rights - DP

6.2.3 Status of foetus not to be dealt with in Constitution - NP.

7. LIMITATION OF THE RIGHT

7.1 Non-contentious Issues

7.1.1 Right in principle subject to limitation.

7.2 Contentious\ Outstanding Issues

7.2.1 No-one shall be arbitrarily deprive of his/her life,' to be added - ANC, DP (Remark: this is a specific limitation clause implying that the right may be limited non-arbitrarily. In relationship with a general limitation clause could be discussed when the latter is considered.)

7.2.2 Limitations in section 33 should apply - DP, NP.

7.2.3 Right non-suspendible, only to be limited in strictest of circumstances, such as, self-defence - PAC.

ADDENDUM

PARTY SUBMISSIONS

Yet, Dr Keith Andrews stated that he had at least two patients who have been in a coma for six months and who are walking...There are several cases of people being in PVS for over a year and who have made a significant recovery. (The Guardian, 7.4.1990).

A recent Texas study indicates that PVS may often be misdiagnosed in patients with severe brain injuries. Of 49 patients diagnosed with PVS, who were referred to the Healthcare Rehabilitation Center in Austin, Texas, 18(38%) responded to stimuli during subsequent neurological examinations. Investigators were able to identify three-quarters of the erroneously diagnosed patients within 3 days of their admittance. In most cases, the patients responded to movement commands, others answered yes or no to questions by mouthing the words or eye blinking. A few even smiled at jokes.

According to the researchers, diagnostic errors are often the result of misunderstanding as to what constitutes PVS. They indicated that there has been a proliferation of ambiguous terms used describe conditions resulting from brain injury. (The AMA defines "persistent" as lasting more than a few weeks, and "vegetative state" as a condition where "the body cyclically awakens and sleeps, but expresses...no evidence of possessing cognitive function or being able to respond in learned manner to external events or stimuli.") Researchers added that such misdiagnoses are also the result of clinicians not spending the time to watch patients carefully or long enough to spot often sporadic signs of cognitive awareness. (American Journal of Nursing, 2/94:11)

Granting a right to kill on similar aspects of quality of life, will of necessity cause this reduction in the effectiveness of medical practitioners. One of the strong motivators of curative medicine that enables a doctor to grasp and memorise a great number of facts relevant to a case, is the need to save lives, whereas euthanasia dispenses the doctor from this necessity. Euthanasia does not just change medicine or extend it's range; it replaces medicine.

A case in point being Dr Lorber of Sheffield, England, who saves 25% of the hundreds of "spina bifida" children who come to his centre yearly. He practices selection.

In contrast, Dr Freeman of Baltimore, refuses to practice selection and saves 95% of the children who come to him by treating them all. Dr Freeman accepts that some of his patients may walk only with assistance or braces or may be paraplegic, while Dr Lorber reasons that a child who cannot walk without assistance should not live. Once a child has been selected to die, the doctor gives no antibiotics, provides no medicines, treatment or incubator and drugs the babies with morphine to keep them from crying to be fed.

At a Montreal Symposium in November 1986, he commented that when he began his "program" , not enough children died because the babies were not being given the full program when they were returned to their local hospitals. He now keeps all the death selected infants at the centre and says that his practice is uncontested and popular in Britain - which could well be because the parents bringing their children for treatment are unaware of his hidden agenda.

A popular argument in favour of euthanasia is financial in nature: According to the IAETF update of March/April 1994, quoting Ron Winslow, Wall Street Journal, 24/2/94 it was found that contrary to current beliefs, limiting life-sustaining treatment for the terminally ill would cut health care costs in the U.S. by no more than 3.3%, according to researchers from the Dana-Farber Cancer Institute and Harvard Medical School. "That is under the most wildly optimistic, best-case scenario," and cancer specialist and medical ethicist Ezekiel J. Emanuel, who, along with his wife, Linda L. Emanuel, published this finding in the 2/24/94 issue of the New England Journal of Medicine.

"We must stop deluding ourselves that...less aggressive care at the end of life will solve the financial problems of our health-care system," the Emanuels wrote.

Other previously published reports have projected that there would be more than \$100 billion saved if futile end-of life care was eliminated. Not so, say the Emanuels. At most, there would only be about \$30 billion in savings, and "That best-case scenario would be impossible to realise." [Ron Winslow, "Curtailing Care for the Dying Saves Less Money Than Believed, Report Says," Wall Street Journal, 2/24/94]

1.3 Capital Punishment

The campaign to abolish the death penalty was started only in 1764 by Desare Beccaria, in a single chapter of his unusually influential book, *On Crimes and Punishments*. He argued that only the expressed or tacit compacts of men should be legally enjoined. He further opinioned that "enlightened" individuals would not make a tacit compact ratifying all the laws of Moses. He continues by stating that the laws and only the laws form the "basis of human morality."

He begins his chapter on the death penalty by denying that the sovereign is endowed with the power to impose the punishment of death. He says that there was never anyone who can have wished to leave to another man the choice of killing him. It must be noted immediately that this goes directly against all the arguments in favour of abortion and euthanasia. Does the simple fact that he is dealing with the criminal law and not with medicine or any other social field mean that "the law" arbitrarily decides when these rights are granted and when they are not?

If the cost of keeping unresponsive patients alive outweigh their usefulness to society to the point of exterminating them, why would the cost of keeping a convicted murderer or rapist alive in jail - a useless member of society who can in fact render society much harm - not dictate similar action. This is so arbitrary that it makes a mockery of the term 'common sense'. Beccaria buttressed his argument by stating that the only purposes of punishment are incapacitation and deterrence.

What is sufficient to deter is just and no more. Unable to prove that imprisonment is a sufficient deterrent, since he was writing at a time when empirical social science was unknown, he originated the most frequently used argument against the death penalty - namely, that it is unnecessary. This, he did by pointing to countries where the death penalty was not imposed for a time and where the murder rate had not increased.

In this age, abortionists do not begin with a deterrence argument by resorting to it in order to meet the assertion of retentionists that death is the only penalty sufficient to deter heinous crimes, especially murder. The point is made that the homicide rate varies from place to place and from time to time, but that the imposition of the death penalty, rather than a long-term prison sentence is not a factor in these variations or has not been shown to be a factor.

The writers of the American Constitution provided specifically in the Fifth Amendment that no person "shall be held to answer for a capital...crime, unless on a presentation or indictment of a Grand Jury." Later in the same passage, they provided that no one shall, for the same offence "be twice put in jeopardy of life and limb."

Undeniably, public opinion in South Africa follows the same trend as in the USA in polls on the question of the death penalty. This prompted Supreme Court Judge Marshall to acknowledge that public opinion polls show that, on the whole, capital punishment is supported by a majority of Americans.

He denies, however, the validity or "utility" of ascertaining opinion by simple polling. It is in his own words, not a question of whether the public accepts the death penalty, but if, when "fully informed as to the purposes of the penalty and its liabilities, would find [it] shocking, unjust and unacceptable."

Again, the arbitrariness with which a judge who would have no qualms giving an innocent unborn baby the Death Penalty condemns giving a convicted murderer or rapist the same treatment, defies comprehension.

Reformers, particularly those of the rehabilitation ideal, are quick to blame the "system" for what we call crime, but, in fact, their responsibility for it cannot be ignored nor minimized.

These days, what the dean of the University of Michigan Law School, Francis Allen, calls the concentration of interest on the nature and needs of the criminal, has resulted in a remarkable lack of interest in the crimes that have been committed and of the victims of those crimes.

In a Canadian debate on the Abolishment of the Death Penalty, Prime Minister Trudeau said to opponents of the bill, that if they succeed "some people are going to be hanged." This does not take into account those who have died because of the actions of "some people."

In prescribing punishments, it is natural to look at the crime. In prescribing treatment, one looks at the "patient", (the criminal) and ignores his crime.

This aspect is summed up well by Walter Berns in his book: **For Capital Punishment**: p81, "The sight of crime and the criminal arouses anger, but the sight of someone suffering with a disease arouses compassion for the victims of crimes, and this is as it should be: persons who are angry with crime and criminals and feel sorry for the victims of crime are likely to be law-abiding citizens.

And the legal system that allows them to express that anger (or expresses it in their name) and to express that compassion is a legal system when it blames immorality, or crime, and when it praises morality, or obedience to law. The system favored by the modern reformers is the opposite of a moral legal system."

Finally, it behoves us to return to the question whether the death penalty is unnecessary. In Spring 1975, the solicitor general of the US., Robert H. Bork, filed with the Supreme Court, the findings of a study done by Isaac Ehrlic, a econometrician from the University of Chicago.

Taking into account, amongst other things, improvement in medical technology to prevent victims dying and working on statistics between 1938 and 1967, in the US., he concluded that each execution deters as many as eight murders - this from a man who stated that he opposed capital punishment. (Berns, p 980. Subsequently he was riled for this opinion.

Nearly ten years later, Prof. Stephen Lawson of the University of North Carolina in 1985 concluded that the deterrence ratio is neared to 1:18.

The right to life is so vital, that any curbs thereon must be on very well-defined lines. The ACDP states that killing the elderly, those who cannot defend themselves and those whose life expectancies at best can only be guessed at is murder and these practices we will strongly oppose - inside and out of the constitutional process.

It is beyond comprehension how killing an elderly person involuntary or even a young person with a debilitating illness - both innocent, law-abiding citizens could be acceptable and taking the life of someone who has already taken another's, not. If the reasoning is the last-mentioned case has anything to do with the fact that society will have to kill those people who commit the killing in the first two circumstances, this is to abhorrent to entertain and yet, possibly true.

2. Application of the Right

2.1 Nature of the duty to be imposed on the State?

The State has a twin duty concerning this right: protecting all human life from conception to natural death, and thus to protect the unborn against abortion, the "unfit" against euthanasia and infanticide. On a par with this, is the duty to defend society against criminality by the effective and speedy use of capital punishment.

2.2 Application of the right to common law and customary law.

Whenever common law or customary law, detracts from the sanctity of life, it has to be overruled: This includes any forms of customary law that calls for abolishing the death penalty. It would be interesting to note that common law holds this right to be of almost limitless importance, including the killing of those who thoughtlessly take life. The foundation stone of this is to be found in the scriptural basis of the common law.

"Whoever sheds the blood of man, by man shall his blood be shed; for in the image of God has God made man." GENESIS 9:6

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

All humans must realise the necessity of esteeming this right above most others to the point that the individual who transgresses on this right of another's, will forfeit his or her life.

2.4 Who should be the bearers of this right?

This right is so personal that only natural persons are capable of having it.

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

The ACDP contends that life is so vital that those who wantonly take it must suffer the same consequence for the deed.

8th May 1995

[LIFE.WPS]

- ANC

**PRELIMINARY SUBMISSION OF THE
AFRICAN NATIONAL CONGRESS
THEME COMMITTEE FOUR**

Life

1. Content

1.1 Introduction

The ANC regards the right to life as the single most important pillar upon which all other rights are dependent. Without life, no rights can be enjoyed by human beings - the bearers of the rights contained in a Bill of Rights. Therefore the right to life is the first cornerstone of any Bill of Rights. Hence the importance attached by the United Nations to Articles 3 and 6 of the UDHR and ICCPR, respectively.

1.2 Capital Punishment

Capital punishment undermines the enjoyment of life by human beings as it gives the State an immoral and indefensible licence to commit a pre-meditated and cold-blooded murder in the name of the entire nation under the pretext of protecting society. Far from protecting society, capital punishment brutalises it. Society needs to be built on different values from those it condemns. If society condemns the act of murder by an individual or group of individuals, there is no way it can condone the murder committed by the State no matter how appealing the reasons cited for such an act might appear.

Capital Punishment has never been shown to have any special power to meet any genuine social need. Nor has it been proved as a deterrent. A survey conducted for the United Nations in 1988 on the relationship between the death penalty and homicide rates concluded that **"this research has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment. Such proof is unlikely to be forthcoming. The evidence as a whole still gives no positive support to the deterrent hypothesis"**.

The ANC holds the view that the only conclusive evidence available throughout the world is that the death penalty is applied disproportionately to the disadvantaged and the death sentence imposed on people at the lower end of the social scale who would not have faced the death penalty if they came from a more favoured sector of society.

Our country, South Africa, is a classical example of this disproportionate and discriminatory use of the death penalty. Many blacks lost their lives as a result of sentences passed by a predominately white judiciary. This is evidenced by the research carried out by Professor Barend van Niekerk of the University of Natal. His research has shown that black defendants stand a greater chance than white defendants of receiving the death penalty, especially when the victim is white. For example, between June 1982 and June 1983, of 81 blacks convicted of murdering whites, 38 were hanged; of 52 whites convicted of murdering whites, only one was hanged, None of the 21 whites convicted of murdering blacks were hanged, but 55 of the 2 208 blacks convicted of murdering blacks were hanged.

The ANC believes that there is no such thing as judicial truth and that the judicial system is free of errors. Capital punishment is irreversible by nature and offers no opportunity to rectify errors in judgement nor does it offer the victim a chance to rehabilitate.

In virtually every legal system, severest sanctions are provided for the deliberate and premeditated killing of another human being; but no killing is more premeditated or cold blooded than an execution; and just as it is not possible to create a death penalty system free of caprice, discrimination or error, so it is not possible to find a way to execute a person which is not cruel and degrading no matter what method of execution is used.

Apart from violating the right to life (section 9), the cruelty of the punishment would certainly be in violation of section 11(2) of the interim constitution and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or punishment (1984), irrespective of the waiting period between the passing of the sentence and the actual execution.

1.3 Abortion

On the question of abortion, we believe that this is best dealt with through legislation. Already, there exists an Adhoc Committee on Abortion and Sterilisation. Public debate is currently engineered through this committee on the issue of abortion. We would however, like to stress that the Right to Life shall not preclude legislature from providing for and regulating the right to an abortion by legislation, which legislation shall be a product of vigorous public debate.

1.4 Euthanasia

Also with regard to the question of Euthanasia, the public debate currently going on in the country should take its course as there are moral, cultural, legal, ethical and medical issues involved.

1.5 Other issues

It is the ANC's long held view that the right to life does not only refer to the right to the physical existence, but also the improvement of the quality of life itself. Hence our insistence on the constitutionally guaranteed minimum floor of socio-economic rights so as to give meaning to life itself. This issue will be further developed in our submission on socio-economic rights.

We also note the Indian Supreme Court decision in the case of the State of Himachal Pradesh vs Umed Ram Sharma in which it interpreted the right to life in such a way as to recognise certain social and economic rights.

1.6 Proposed Formulation

Because the ANC believes that the right to life is inherent in every human being and that it is not a favour granted by the government or politicians to citizens for good behaviour and withdrawn at will for bad behaviour, we propose the following:

- 1) **Everyone has the right to life**
- 2) **No-one shall be arbitrarily deprived of his/her life**
- 3) **Capital punishment is abolished and no further executions shall take place**
- 4) **This should not preclude the legislature, if it so chooses, from providing and regulating the right to abortion**

2. Application of the Right

- 2.1 The State shall protect the right and not be allowed to violate it
- 2.2 The right applies to all levels of civil society
- 2.3 All persons, institutions and structures are bound by the right
- 2.4 Natural persons shall be the bearers of the right
- 2.5 This right should not be subject to limitations save those acknowledged in international law relating to war, rebellion, and the proportionate and necessary force in self-defence and defence of life.
- 2.6 The right to life is the supreme right from which no derogation is permitted even in time of public emergency.

- 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. **Bearerers 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)

PRELIMINARY SUBMISSIONS ON THE RIGHT TO LIFE

1) Content of the right

The right to life is often described as the fundamental human right or one of the most fundamental of human rights. In a certain sense this appears to be true, but, fundamentally speaking, this is not correct, because the right to life is in quite a few respects qualified in the legal systems of many countries. The exceptions detract from the so-called immutable or fundamental nature or character of the right. The right to human dignity is far more unqualified than the right to life. (See the Freedom Front's submissions relating to human dignity.)

Section 9 of the transitional Constitution provides:
" Every person shall have the right to life". The circumstances under which this provision was drafted were such that the controversy concerning this right was not resolved at the negotiating table, but was left to be dealt with by the democratically elected Constitutional Assembly. This illustrates the controversial nature of this right, due to some important qualifications of this right.

The most important qualifications to the right to life appear from many diverse views concerning capital punishment, abortion and euthanasia, as well the phenomenon in many legal systems that killing in self-defence or killing in an attempt to effect an arrest in respect of certain serious crimes is permissible. The content of the right cannot be described without considering these qualifications. Before embarking upon an exposition of this right and its qualifications, the Freedom Front considers that Theme Committee 4 should first give consideration to a preliminary submission, set out below.

2) Preliminary submissions relating to treatment of the right to life

The right to life generally

The Freedom Front believes that it would be premature (and even improper - see the quotation below) to consider the right to life at this critical moment, even though the opportune moment for such consideration may soon arise.

The question whether or not capital punishment (and related matters) infringes (or infringe) certain of the provisions of the chapter on fundamental rights in the transitional Constitution is at present under consideration by the Constitutional Court. In this connection the South African Law Commission in its recent Final Report on Group and Human Rights (1994), referring to section 9 and related sections of the transitional Constitution, said in respect of the death penalty that the matter had been referred to the Constitutional Court, 'and in the circumstances it would be improper for us to express an opinion on it' (paragraph 4.22, at p 25 of the report).

We agree with the above-mentioned view of the South African Law Commission. Our view is not necessarily based on considerations of a possible contempt of court or other interference with the administration of justice (see S v Van Niekerk 1972 (3) SA 711 (A), especially at p 724 and K W Stuart: The Newspaperman's Guide to the Law, 4th edition, at p 88), but on the impropriety of considering a matter at present under consideration by the Constitutional Court.

Abortion

As far as abortion is concerned, we believe that it should be dealt with under the heading 'Reproductive Rights', for which special provision has been made in the work programme of Theme Committee 4.

Euthanasia

As far as euthanasia is concerned, we believe the matter should be referred to a commission of inquiry, consisting of experts in various relevant fields, drawn from, inter alia, medicine, religion, law, philosophy, etc.

If the preliminary submissions above are not upheld, the Freedom Front will forthwith make submissions on these matters, and reserves the right to do so.



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FREEDOM FRONT

THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

SUBSTANTIVE SUBMISSIONS ON THE RIGHT TO LIFE

1) Content of the right

The right to life is often described as the fundamental human right or one of the most fundamental of human rights. Fundamentally speaking, however, this is not correct, because the right to life is in some respects qualified in the legal systems of many countries. The exceptions detract from what can be called the immutable or fundamental nature or character of the right. However, there are some other rights (such as the right to human dignity) that are, in our view, more immutable or unqualified than the right to life. (See the Freedom Front's submissions relating to human dignity.)

Section 9 of the transitional Constitution provides:
" Every person shall have the right to life". The circumstances under which this provision was drafted were such that the controversy concerning this right was not resolved at the negotiating table, but was left to be dealt with by the democratically elected Constitutional Assembly. This accentuates the controversial nature of this right, which controversy is to a large extent due to the number of important qualifications of this right.

The most important qualifications of the right to life appear from many differing views concerning capital punishment, abortion and euthanasia, as well as provisions in many legal systems that it is permissible to kill in self-defence (or even in defence of property, in some circumstances) or in an attempt to effect an arrest in respect of certain serious crimes. The content of the right cannot be described without considering these qualifications. The cryptic provisions of the present section 9 do not in any way indicate the content of the right, as no qualifications are mentioned.

2) Application of the rightAbortion

The Freedom Front is of the opinion that abortion could be considered under 'the right to life', but that it would be more feasible to deal with it under the heading 'Reproductive Rights', for which special provision has been made in the work programme of Theme Committee 4.

Our main reason for adopting this view is that it is clear that abortion concerns not only the potential life of the foetus itself (and the life and health of the mother-to-be), but also other interests than life, such as the social or medical desirability of abortion in the case of pregnancy resulting from rape or incest.

Euthanasia

The Freedom Front believes that the question whether the bill of rights should authorise euthanasia should not at this stage be dealt with in the constitutional process. It should be referred to a commission of inquiry, consisting of experts in various relevant fields, drawn from, inter alia, medicine, religion, law, philosophy, sociology, etc.

It is only after this extremely contentious matter has been dealt with by specialists drawn from a number of fields and after a large measure of consensus has been obtained from them that the Constitutional Assembly should attempt to formulate a general principle, which will probably contain a number of very cautiously phrased qualifications.

Capital punishment

The Freedom Front makes the following submissions in connection with capital punishment:

- (i) An expert commission of inquiry, similar to that referred above to in respect of euthanasia, should advise the Constitutional Assembly in respect of capital punishment. The motivation is the same as that advanced above in the case of euthanasia. In the absence of a report by such a commission the justification for the policy statement of the ANC that 'Capital punishment is abolished and no further executions shall take place' lacks scientific basis.

The report of a commission of inquiry should be subject to a free vote by all members of Parliament, who should not be constrained by party discipline in this connection. There are precedents overseas and in South Africa for this.

ALTERNATIVELY, and only in the event of such a commission not being appointed, the Freedom Front contends as follows in favour of the retention of capital punishment:

- (ii) In view of the fact that Constitutional Principle II requires that 'Everyone shall enjoy all universally accepted fundamental rights' (stress supplied), it is necessary to determine whether capital punishment is contrary to general international law (or, what amounts to the same thing, whether there is a universally accepted and unqualified fundamental right to life). The Freedom Front submits that this is not so.

Article 6 of the International Covenant on Civil and Political Rights 1966, being in this context a very comprehensive multi-party treaty reflecting the view of the general world community, expressly recognises that the death penalty is not categorically prohibited by international law. The relevant part (stress supplied) reads:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be only for the most serious crimes in accordance with the law in force at the time of the commission of the crime'

Professor Dugard in his recent work International Law - A South African Perspective (1994), referring to the International Covenant on Civil and Political Rights, 1966 says (at p 206):

'Although it proclaims the right to life (article 6), the death penalty is not prohibited except in respect of persons below the age of 18 and pregnant women. In 1989 a second Optional Protocol was adopted which outlaws the death penalty completely. To date this Protocol has been accepted by only a small number of states'.

- (iii) Apart from the position in general international law, the position in respect of the national law of particular states can also be referred to. In that great democracy, the United States of America, the death penalty was recently reinstated in the 38th state over a period of about twenty years. In the European mother of democracies, Great Britain, the death penalty has been abolished for murder, but not for high treason. There are other examples as well of democratic states that still have capital punishment. In 1989 an international survey showed that 100

countries and territories still retain and use the death penalty for ordinary crimes.

- (iv) It is often argued that it has not been proved that the death sentence serves as a deterrent to commit murder. The Freedom Front submits that this argument is not persuasive, as it may as well be argued that it has not been proved that capital punishment is not a deterrent. In any event a survey in this connection in one country cannot be taken as proof of the position in another country: much depends on whether the population of the country concerned is highly civilized or sophisticated or not, rich or poor, etc.

The Freedom Front finds it inconceivable that at least some potential murderers in South Africa have not been deterred from committing murder by the prospect of ending their own lives on the scaffold. If, however, it is assumed that the prospect of a death sentence never or almost never deters anyone from committing murder, this would only go to show that murderers attach little or no value to any life, their own or those of others.

Since the introduction in 1989 of the moratorium on executions the spate of murders in South Africa is, in the view of the Freedom Front, entirely disproportionate to the increase in population, which is a strong indication that capital punishment has a deterrent effect.

- (v) The Freedom Front is of the opinion that, quite apart from the question of deterrence, a person who has committed the supreme or ultimate crime, murder, should pay the supreme or ultimate penalty: death. The punishment must fit the crime.
- (vi) The argument is often raised that the possibility of judicial error and the finality of the execution of a person sentenced to capital punishment is sufficient reason to abolish the death sentence.

To the best of the knowledge and belief of the Freedom Front it has not been proved that any innocent persons have been executed in South Africa since 1910. The system of appeals and the recently introduced automatic right of appeal is a sufficient safeguard against judicial error. Moreover, The President's power of extending clemency serves as a final protection against a miscarriage of justice.

- (vii) The so-called 'right to life' of a person accused of murder cannot be more sacrosanct than that of his victim. For this reason many religions acknowledge the death penalty for murder.
- (viii) In any event there cannot be an unqualified fundamental right to life for a murderer, as this would mean that self-defence against a threat of murder would not be permissible. Once a single qualification of the right to life is admitted, it becomes possible, and it is indeed imperative, to consider other possible qualifications.
- (ix) In recent years the law relating to capital punishment in South Africa has been ameliorated. An accused no longer has to prove the existence of extenuating circumstances in order to escape the death penalty. The death penalty can, according to the present law, be imposed only if it is the only proper sentence. To abolish capital punishment would mean that what has hitherto been regarded as the only proper sentence would henceforth be improper and legally forbidden. This is totally incongruous.
- (x) By way of summation the Freedom Front contends that the retention of capital punishment for murder (and for that matter, for other serious crimes as well) would not be contrary to international law, but in accordance with international law (see article 6.2 of the International Covenant on Civil and Political Rights, cited above), and also in accordance with the position in many countries (see (iii) above).

NOTE: The comments below are confined to the right to life, as abortion and euthanasia have not been dealt with here.

2.1 Nature of the duty imposed on the state

Although the state is bound, generally, to respect the right to life, it may (and in certain circumstances should) impose qualifications in respect of such right, as is shown above.

2.2 Application of the right to common law and statute law

The common law relating to self-defence and (in some cases) necessity should be retained. A statutory provision such as that in the Criminal Procedure Act, 1977, relating to justifiable homicide in effecting an arrest (section 49) should also be retained.

3.3 Should the right to life impose a constitutional duty on actors other than the state?

Yes. The right to life should have vertical and horizontal application, subject to the qualifications mentioned above.

3.4 Who should bear this right?

All natural persons should be bearers of this right.

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

No, except (possibly) in accordance with the general limitation clause and the clause regulating a state of emergency.

- IFP



INKATHA

Inkatha Freedom Party

IQembu leNkatha Yenkululeko

THEME COMMITTEE No. 4
SUBMISSION FOR BLOCK No. 2

ON
HUMAN DIGNITY
RIGHT TO LIFE
PRIVACY

HUMAN DIGNITY

1. The notion of human dignity should be entrenched in the constitution as:
 - (a) a fundamental parameter against which the actual protection of human rights is to be assessed;
 - (b) a qualification of the constitutionally mandated social goals of the state;
 - (c) a recognition of the individual nature of human rights protection and of the preeminence of the individual over society;
 - (d) a broadening of the scope of human rights protection to encompass the consideration of personal aspects of human experience (the bridge between law and *pietas*)
2. Dignity is a philosophical concept. In order to be accommodated within a constitution it must be qualified as "social dignity" so as to transform it into a social concept which can be taken into account in the process of constitutional adjudication as an interpretative parameter (i.e.: the "perception of the relevant segment of our society at this juncture of its development").
3. In a constitution the most relevant aspect of social dignity is related to the determination of tests and parameters employed in the structuring of the "substantive equality" clause. Reference is made to our submission on Equality in which we have proposed that social dignity be a parameter of equality (equal social dignity ... irrespective of social status).
4. Social dignity may also be mentioned in the Preamble. Reference is made to the text of the IFP proposed preamble previously submitted which even if it does not contain the word "dignity" it subsumes that notion within other relevant constitutional notions employed therein.
5. Social dignity may also be mentioned in the sections on "Inherent Rights and Obligations" and "State Obligations". Reference is made to the text of the IFP proposal with respect to these two sections which were previously submitted and which even if they do not contain the word "dignity" they subsume that notion within other relevant constitutional notions employed therein.

6. Social dignity is relevant with respect to the right to "Privacy" (see *infra*) which ought to be characterised also as "personal dignity".
7. Dignity is also relevant with respect to family rights in which "both spouses shall have equal rights, obligations and dignity". With respect to family relations, the "dignity" aspect covers important constitutionally sensitive aspects which are not catered for merely in terms of "rights and obligations".

PRIVACY

1. "Everyone shall have the right to the protection of privacy, of his or her personal life, of his or her domicile, and to protection of his or her personal dignity and reputation".
 - 1.1 Please note in addition to the broad notion of "privacy" this text identifies four specific sensitive areas of constitutional protection.
 - 1.1.1. "Personal life" relates to the IFP proposed notion of an area of constitutionally protected autonomy for individuals, and social, cultural and economic formations defined by the interests that people acting alone or with others may regulate and administer by themselves and in respect to which government does not have a compelling public need to intervene. In simpler words, an area in which the individual is King!
 - 1.1.2. "Domicile" is preferable to "residence" as it indicates the place where a person conducts his/her private life.
 - 1.1.3. The constitutional entrenchment of the notion of "reputation" is fundamental and ties with matters to be discussed in further blocks related to freedom of the media.
 - 1.1.4. "Personal Dignity" is to be protected in all cases, even outside one's own "domicile" or "personal life", for instance in the job place.
 2. "All private communications and all aspects of private life shall be protected".
 3. "Search and seizure may be allowed only on the basis of a warrant issued on the basis of corroborated allegations, and in the cases and with the guarantees established by the law. Personal search shall be allowed as an incident to a legitimate arrest and detention".
 - 3.1 The "search and seizure" clause could be part of the "privacy" clause rather than the "liberty" clause since it is more a limitation of the right to privacy than of the freedom from unwarranted arrest.
 4. "Anyone has the right to access the information collected on him or her by the Government or by private data or information banks."
 - 4.1 This provision can be found in several modern constitutions (see 1978 Constitution of Spain or the US 1974 Privacy Act) and reflect a fundamental need in a society in which the life of people are increasingly controlled by information management and distribution.

5. Aspects related to intelligence and security services have been dealt with in Theme Committee No. 6.4. This Theme Committee should propose the text of the right to privacy, and if any exceptions are carved to accommodate intelligence and security services such proposals would come from Theme committee No. 6.4 and would operate and be assessed against the right to privacy as developed in this Theme Committee. At this juncture, we see no need to carve very dangerous exceptions in a very sensitive area such as privacy.
6. In the work schedule no provision has been made for Family Rights and the Freedom of Procreative Choice which the IFP requested to be tabled on our agenda. Since these two fundamental rights are related to the right to Privacy, we are now submitting our proposals. Incidentally, the IFP rejects the placement in the work schedule of the issue of abortion under the item "Right to Life" which is quite outcome-manipulative.
 - 6.1 **Family rights**
 - a. A man and a woman have the right to join in marriage in accordance with the rituals and with assumption of the obligations and privileges of their choice.
 - b. However, both spouses shall have equal rights, obligations and dignity.
 - c. Both parents shall have responsibility for the upbringing, formation and education of the children, even if born outside wedlock.
 - d. The law shall ensure that comparable rights and social protection shall be extended to children born outside wedlock as they shall be recognised to children born in wedlock.
 - e. Both parents have the right and the duty to exercise joint custody of the children unless a court otherwise decides in the interest of the children and on the basis of the specific circumstances of the case.
 - f. Both parents have the right and the duty to choose an acceptable formation and education for their children.
 - 6.2 **Procreative Freedom**
 - a. All people who so desire shall enjoy the freedom of procreative choice, including the right to receive sexual education, to use contraception and terminate unwanted pregnancy when safe.
 - b. Anyone who finds these practices objectionable shall have the right to protect his or her own sphere of interests from any of these practices and from the exposure thereto.
 - 6.2.1. As a note on our position on procreative freedom the following should be noted:
 - a. The constitution should reflect the fact that the best way of preventing abortions is sexual education and contraception, so that abortion is a last resort.
 - b. No woman would seek to have an abortion if she can avoid it.
 - c. The choice is not between having or not having abortions in our country, but it rather is between having legal or illegal abortions.
 - d. Abortion is a highly emotive issue and like most other organisations the IFP is deeply divided about it. This issue is not reconcilable because what is a fundamental right

to some is a fundamental crime for others. For those who believe in pluralism and freedom, the only solution is to allow each group to live by its own code of conduct and morality, without anyone being allowed to impose his/her views on others. No one should be forced or even pressurised to have or administer an abortion, and for this reason the second part of our proposal would prohibit the advertising [procurement] of abortions or even recommending it during medical consultations, also allowing doctors to refuse to administer one. However, our proposal also allow abortions for those who consider it a fundamental right.

- e. In almost all countries of Western democracy abortion is considered a fundamental right and those who hold this belief consider it to be a form of social violence in the extreme to turn a right into a crime.
- f. Technically, there are no middle ground solutions regarding the imposition of any common rule or standard, for abortion may not be half fundamental right and/or half a fundamental crime at the same time. In the freedom and in the conscience of the people a solution needs to be found.

RIGHT TO LIFE

1. The Republic shall acknowledge and recognise that all individuals have the natural right to life, liberty and the pursuit of happiness, and to the enjoyment of the rewards of their own industry as inherent rights
2. The physical and psychological integrity of any individual shall be inviolable.
3. No one shall be authorised to inflict any type of violence on another individual or to take a life.
4. Capital punishment and any form of physical or psychological torture and punishment shall not be allowed.
5. No one shall be submitted to unusual or cruel punishment and all punishments shall aim at the personal and social rehabilitation of the person.
6. During imprisonment juvenile delinquents shall be kept separate from other delinquents and so shall men from women.
7. Failure by a public official to report any and all instances of physical or psychological violence on a person deprived of his or her liberty shall be a criminal offence.
8. The IFP position on capital punishment is fully detailed and motivated in the enclosed document.
9. The issue of euthanasia should be determined by means of constitutional interpretation or legislation, since in this rapidly changing subject matter there are no clear cut situations or principles which we can confidently propose.

- NP

NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 4

ITEM 13: THE RIGHT TO LIFE

1 Content of the right

Section 9 of the transitional constitution states simply "every person shall have the right to life".

The right to life protects the physical existence of human beings and is, as such, the most basic human right. The right prohibits the state from intentionally terminating the individual's life, but it could also be argued that the right imposes a limited obligation on the state to protect the individual from intentional deprivation of his or her life.

1.1 Controversial issues

Issues that immediately come to mind in this regard are capital punishment, abortion and euthanasia. Questions involved are whether the state may, under certain circumstances, intentionally terminate the life of a criminal in execution of a sentence, whether the right to life applies to a human being from its inception, (thus prohibiting abortion) and whether life may be terminated in order to spare a person prolonged suffering. These matters are closely related to moral, ethical and religious considerations which cannot be dealt with satisfactorily in the constitution. It is the opinion of the National Party that, as in the transitional constitution, they be left open for the courts to determine in terms of the general limitations clause.

2 Application of the right

2.1 Nature of duty on the state

As mentioned above, the right prohibits the state from intentionally depriving life, but it also imposes a duty on the state to protect the individual's life. Although this could be regarded as an unlimited duty (see e.g. Van Dijk en Van Hoof *Theory and Practice of the European Convention on Human Rights 1990 217*), the state should exercise reasonable vigilance and provide appropriate measures for the protection of individuals. Thus, if abortion is allowed only under certain prescribed circumstances, this duty would include, for instance, the passing and enforcement of laws governing the matter.

2.2 Common law and customary law

The right should without doubt apply to common law and customary law.

2.3 Actors other than the state

The right to life applies between the individual and the state and it binds only the state. The relationship between individuals in this regard is governed by criminal law and will, in principle, not be affected.

2.4 Bearers of the right

Every natural person is a bearer of the right to life. As mentioned above, the question whether the right extends to human life from its inception and whether an unborn foetus is or should be the bearer of the right, may be determined in terms of statute and be left to the courts to determine.

2.5 Limitation of the right

It is interesting to note that in terms of the transitional constitution, the stricter limitation test of section 33(1), namely that the limitation must also be necessary, does not apply to the right to life. The same approach is found in various other human rights instruments, where the right to life is not enforced as strictly as, for example, the freedom from torture and other rights pertaining to the *quality* of life - see the comments by Sieghart *The International Law of Human Rights* -(1983) 130. The international approach seems to be to allow the limitation of the right to life. For this purpose the general limitations clause should apply. Also note that all the controversial issues around abortion, capital punishment, euthanasia, etc., may eventually have to be resolved in terms of the general limitations clause.

3 Wording

We propose that the wording of the present section 9 be retained.

- PAC



4 March 1995

PAC PRELIMINARY SUBMISSION ON THE RIGHT TO LIFE

Content

The protection of human life is the essence of the fundamental right to life.

Other aspects of this right

1. It requires the prohibition of capital punishment.
2. On abortion: This is a very difficult issue legally, morally, ethically, medically and politically. There is a balancing Act to be done here. We would favour the right of the woman to choose whether or not she wants to have the child. This will also respect the right of a woman to privacy and personal security.

The Constitution should enable Parliament through legislation to permit the right of the woman to choose.

3. Euthanasia: This is another difficult matter. A lot of discussion still has to take place in developing this area of the law. We would favour a situation where, under certain clear categories/ circumstances, a patient may have the right to choose to die.
4. The right to life may impose positive obligations on the state to provide basic necessities of human life or existence.
5. Its non-derogability in cases of state's of emergency and so on.

R K Sizani - MP