

# VRYHEIDSFRONT

## THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS) SUBMISSIONS ON SOCIO-ECONOMIC RIGHTS

### SUBMISSIONS ON THE RIGHT TO PROPERTY

Submissions on the right to property have already been made in a separate document. We refer to that document, and request that it be regarded as incorporated in this document.

### SUBMISSIONS ON THE RIGHT TO EDUCATION

#### 1) Content of the right

Section 32 of the transitional Constitution reads as follows:

Every person shall have the right -

- (a) to basic education and to equal access to educational institutions;
- (b) to instruction in the language of his or her choice where this is reasonably practicable; and
- (c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.

The Government's White Paper on Education and Training (Notice No 196 of 1995 of 15 March 1995), in chapter 7 deals extensively with 'Fundamental rights to education and training, and within education and training'. Under the heading 'The right to education' it discusses the provisions of section 32 (a), (b) and (c), quoted above. The Freedom Front finds it necessary to comment on some aspects of this chapter.

#### (a) The right of every person to basic education (section 32(a))

The Freedom Front agrees with the proposition that basic education is a legal entitlement to which every person has a claim (paragraph 11). However, the content of basic education may to the age and education level of different people. The Freedom Front agrees with the statement that 'the Ministry of Education accepts that state authorities have a continuing obligation under the Constitution to take purposeful and effective action which would enable all persons to achieve the satisfaction of this right' (paragraph 16).

The Freedom Front also agrees with the statement that the cost of the provision of schooling for all children to the proposed General Education Certificate level, at an acceptable level of quality, must be borne from public funds, and that the cost of the provision of basic education programmes for all young people and adults who require them cannot be borne by public funds alone, but must be shared among a variety of funding partners. We wish to stress, in this regard, that constitutionally this financial obligation should extend to all educational institutions whether they be created and controlled by the state or by private enterprise.

(b) The right of every person to equal access to educational institutions (section 32 (a))

The White Paper states in paragraph 18 that the precise intention of this provision must be to establish a condition of equality and non-discrimination with respect to access to educational institutions. It then continues: 'It is a provision which can only be satisfied by the exercise of equal and non-discriminatory admissions policies on the part of educational institutions. It is therefore reasonable to read this provision with section 8 of the Constitution, the right to equality.....' (paragraph 18).

In this context (see paragraph 21 of the White Paper) it is stated that '... section 8(3) specially permits the application of measures which would include special admissions regulations, which are designed to remedy the effects of past discrimination. The Ministry is of the view that the equality and anti-discrimination provisions of the Constitution should be observed and resolutely applied when an application is considered'. This statement is nothing else than affirmative action applied in a manner that amounts to reverse discrimination. The Freedom Front does not agree with the view that 'special admissions regulations' could 'remedy the effects of past discrimination'. Such special admissions regulations as are contemplated by paragraph 21 could form a cloak for admission not based on merit or potential, but on racial discrimination

Paragraph 19 of the White Paper also states that '.....the exercise of equal and non-discriminatory admissions policies cannot be interpreted to mean that any educational institution is obliged to admit every person who applies to enter. Regulation of admissions to educational institutions must be permissible in terms of the limitation provision of the Constitution (section 33), ... ' The Freedom Front tends to agree with this statement in so far as the limitation clause is concerned, although all the implications are not yet clear at this stage. The first sentence of paragraph 19 (quoted in this paragraph) is, however, cryptic and needs to be expanded and the expanded statement incorporated in the Constitution.

The White Paper states in paragraph 20 that the constitutionally permissible exceptions to the right of equal access will need to be defined by legislation. It then mentions a number of 'limiting factors'. The Freedom Front is convinced that constitutionally permissible exceptions to the right of equal access to education should be contained in the chapter of fundamental rights in the Constitution itself, otherwise it would be possible for Parliament to make

exceptions to these rights by ordinary legislative process, while the rights themselves are entrenched in the Constitution. A guarantee of this nature should be effectively entrenched.

- (c) The right to instruction in the language of every person's choice, where this is reasonably practicable (section 32(b) )

The present constitutional provision for the right to instruction in the language of a persons's choice 'where this is reasonably practicable' is regarded by the White Paper (paragraph 27) as an extension of the general right accorded to every person 'to use the language .... of his or her choice' (section 31).

The Freedom Front is of the opinion that the choice of mother tongue instruction, or that of any other preferred language of instruction is purportedly protected by this section, but the protection is watered down by the proviso that such instruction should be 'reasonably practicable for the educational institution concerned', as the particular educational institution would be given a free hand to discriminate on arbitrary grounds.

In the same context the White Paper states in paragraph 28 that the right of equal access and the constitutional prohibition of unfair discrimination on any ground, specifically including language, 'appear to ensure' (stress supplied) that preference for a particular language medium of instruction cannot be a reason to refuse admission, provided the condition of 'reasonable practicability' can be met. A more definite guarantee than this 'apparent ensuring' is necessary.

- (d) The right to establish, where practicable, educational institutions based on a common culture, language, religion, provided that there is no discrimination on the grounds of race (Section 32(c))

### Common culture and language

The White Paper in paragraph 30 states that the use of the phrase 'based on a common culture, language or religion' implies that the culture, language or religion is the defining characteristic of the educational institution and its prospective clientele. It proceeds to state 'the interpretation of the right of equal access to educational institutions is affected by the right to establish institutions of this type' (stress supplied). The Freedom Front agrees with this statement: the right to establish institutions based on a common culture, language or religion is a qualification the broad-general principle of equal access, a qualification rendered necessary by the provisions of Constitutional Principle XI, according to which the diversity of language and culture shall be acknowledged and protected and conditions for their promotion encouraged.

In paragraph 31 the White Paper states (inter alia): 'the owner's competence to set admission policy cannot be disputed' . The Freedom Front submits that the word 'owner' does not necessarily mean that the owner of the buildings is also the owner of the school. The principle

is that a school is conducted by a community. In this regard state responsibility should be reduced and management autonomy of the school must be increased.

The White Paper in paragraph 39 states : 'the Ministry of Education encourages schools, which are willing and able to offer more than one language medium in order to accommodate parental or learners' preferences, to do so, in order to provide for the learner's right of choice of language medium' (stress supplied). The Freedom Front is of the opinion that there should be a stronger obligation than mere encouragement, in order to provide for the learner's right of choice of language medium.

## Religion

The White Paper in paragraph 46, dealing with the circumstances under which religious observances may be conducted in state and state-aided educational institutions, merely says that these are covered by section 14(2) of the transitional Constitution.

The Freedom Front submits that the words 'an appropriate authority', occurring in section 14(2), as the body establishing rules for religious observances, is ambiguous. It should be clarified in order to give effect to the concept of freedom of religion. In this regard the Freedom Front wishes to subscribe to the provisions of article 18(4) of the International Covenant on Civil and Political Rights, 1966, which reads: 'The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions'. (Stress supplied). (A similar provision occurs in article 13.3 of the International Covenant on Economic, Social and Cultural Rights, 1966.)

### 2) Application of the right

#### 2.1 Nature of the duty imposed on the state

The nature of the duty imposed on the state appears from the exposition above.

#### 2.2 Application of the right to common law and statute law

Common law and statute law relating to education will be repealed by implication (if not expressly) to the extent of any conflict with the provisions of the Constitution contemplated above.

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

Yes. There should be a constitutional duty to provide education on all communities and, through them, on all schools and other educational institutions concerned with child and adult education.

#### 2.4 Who should bear this right?

In our view the children concerned should be the direct bearers of the right to education. However, the right to education of children should also be capable of enforcement at the instance of the parents of such children, as well as at the instance of schools and other educational institutions, conducted under the auspices of state authorities or communities.

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

It is difficult to tell at present whether this right should be capable of limitation by legislation. The only limitation which comes to mind at present is limitation by reason of insufficient financial resources.

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### SUBMISSIONS ON FREEDOM OF LANGUAGE AND CULTURE

#### 1. Content of the right

The transitional Constitution deals in the chapter on Fundamental Rights with a single right relating to language and culture, viz . section 31, which reads as follows: 'Every person shall have the right to use the language and to participate in the cultural life of his or her choice'.

Section 3 of the transitional Constitution contains extensive provisions relating to languages in South Africa, but this section does not form part of the chapter on Fundamental Rights. On the assumption that it will not form part of the chapter on Fundamental Rights in the new Constitution, it will not be discussed here.

Constitutional Principles relevant to freedom of language and culture are : Principles XI, XII, XX, XXXIV. Principle XI reads: 'The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged'. Principle XX deals with the allocation of powers between different levels of government on a basis which, inter alia, acknowledges 'cultural diversity'. Principle XII reads : 'Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on a basis of non-discrimination and free association, be recognised and protected' (stress supplied). Principle XXXIV, dealing with a notion of the right to self-determination by communities, provides that 'any community sharing a common cultural and language heritage' shall have such a right.

In view of the very specific nature of the provisions of the transitional Constitution and of the Constitutional Principles referred to above, the content of the concept of freedom of language and culture must be gleaned from these provisions and not from the more general provisions of international covenants or conventions dealing with matters of language and culture.

The content of rights of language and culture can only be described in very general terms. This is illustrated by the general provisions section 31, as well as the very general provisions of Constitutional Principle XI. It should be noted that the present section 31 only applies to social intercourse between subjects of the state and not to the use of official languages, which is at present dealt with in section 3 of the transitional Constitution and which falls outside the chapter on Fundamental Rights. It is clear that the transitional Constitution makes a clear distinction between freedom of language and culture on a social level and language rights that individuals may have vis-&-vis the state. In these circumstances we believe it will be fruitless to attempt to ascertain precisely what the content of rights of language and culture is.

## 2. Application of the right

### 2.1 Nature of the duty imposed on the state

By reason of the fact that freedom of language and culture as envisaged by section 31 of the transitional Constitution applies only to social intercourse between subjects amongst themselves, the duty imposed on the state in this regard by Constitutional Principle XI is limited to the protection of the diversity of language and culture and the encouragement of conditions for their promotion. The precise scope of these vague obligations will have to be determined by judicial interpretation in future.

### 2.2 Application of the right to common law and statute law

Common law and statute law will to very large extent, if not completely, be supplanted by the provisions of the new Constitution relating to this right.

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

Yes, if a provision corresponding to the present section 31 is inserted in the new Constitution it will impose a constitutional duty on all persons to tolerate and not to interfere with the use of language and participation in the cultural life chosen by the person concerned.

### 2.4 Who should bear this right?

All natural persons lawfully in the country and all lawful cultural associations, whether of a statutory nature or not, should be bearers of this right.

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

No, we do not believe that the legislature should be empowered to limit the exercise of language and cultural rights, as such rights form the very essence of a people. Moreover, we do not believe that the general limitation clause (at present section 33 of the transitional Constitution) or provisions in the new Constitution relating to a state of emergency (at present section 34 of the transitional Constitution) should have any application to the exercise of language and cultural rights per se.

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SUBMISSIONS ON THE RIGHT FREELY TO ENGAGE IN ECONOMIC ACTIVITY

1. Content of the right

Section 26 (1) of the transitional Constitution provides: 'Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory'. Section 26 (2) contains an affirmative action provision, subject to the proviso that the measures authorised by this sub-section 'are justifiable in an open and democratic society based on freedom and equality'. The Freedom Front reiterates its view already expounded in earlier submissions, viz. that affirmative action should only be allowed to the extent that it creates equal opportunities and that implementation should be on the basis of merit only.

The transitional Constitution contains two provisions of fundamental importance to economic activity. None of these, however, is to be found in the chapter on Fundamental Rights. The one is section 126, dealing with the legislative competence of provinces, and the other is Constitutional Principle XXI, paragraph 5, which lays down the requirement that the determination of national economic policies, inter alia, should be allocated to the national government.

By virtue of the fact that section 126 does not fall under the chapter on Fundamental Rights, it would be, strictly speaking, out of place to deal with those provisions in any submission to Theme Committee 4. The South African Law Commission in its Final Report on Group and Human Rights (at page 106) points out that this right does not appear in any major international instrument, but is not unknown to some national constitution. It also points out that this right affords very limited protection at present, as it is subject to double circumscription.

2. Application of the right

Application of the right is not discussed here, as the terse provisions of section 26 of the transitional Constitution, if re-enacted in the new Constitution, will have to be interpreted by the courts.

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## SUBMISSIONS ON RIGHTS IN RESPECT OF LABOUR

### 1. Content of the right

Rights relating to labour are contained in section 27 of the transitional Constitution. Constitutional Principle XXVIII contains principles substantially similar to the content of section 27.

Labour rights are in a state of flux at present, and until some fundamental principles have crystallised it is very difficult to propose provisions relating to labour for the new Constitution. In this connection the South African Law Commission in its Final Report on Group and Human Rights states (at page 139): 'It is evident that the debate in South Africa concerning the inclusion and protection of labour rights in a Bill of Rights is still a lively one'. The same report at page 140 states: 'the Constitutional protection of labour rights is not a general phenomenon'. In these circumstances the Freedom Front does not at this stage wish to make any general submissions relating to labour rights. We shall confine ourselves to two submissions, set out below.

The Freedom Front submits that a provision such as section 27(4) of the transitional Constitution, which reads 'Workers shall have the right to strike for the purpose of collective bargaining' should, if re-enacted in the new Constitution, be amended to exclude such a right in respect of workers in essential services such as hospitals, etc. This does not mean that the legitimate grievances of such workers should not be dealt with in some other statutory way than by way of general provisions relating to collective bargaining.

Secondly, if the concept of a right to work is introduced in the new Constitution, the Freedom Front would submit that the proposal of the South African Law Commission qualifying such right, should be implemented. This proposal reads: 'Every person shall have the right to work, under proper conditions, and to follow his or her vocation freely, in so far as existing conditions of employment permit'. The Freedom Front wishes to stress, however, that this is only an alternative submission, as it does not believe that a right to work can be a justiciable right, to be inserted in a bill of rights, the provisions of which must be capable of enforcement in a court of law in accordance with Constitutional Principles II and VII.

### 2. Application of the right



In view of our submissions above we make no recommendations relating to the application of the right.

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## SUBMISSIONS ON ENVIRONMENTAL RIGHTS

### 1. Content of the right

Section 29 of the transitional Constitution provides : 'Every person shall have the right to environment which is not detrimental to his or her health or well-being'.

The South African Law Commission in its Final Report on Group and Human Rights (page 108) has proposed that this provision should be rephrased to read as follows: 'Every person shall have the right to an environment which is not detrimental to the public health or well-being (stress supplied)'. The Freedom Front supports the latter formulation (as opposed to that of the present section 29 of the transitional. Constitution), as section 29 would confer this constitutional right also to a person who is particularly susceptible to a harmful physical environment. The Freedom Front proposes that the test should rather be 'public health or well-being'.

### 2. Application of the right

#### 2.1 Nature of the duty imposed on the state

The nature of the duty imposed on the state cannot be expounded in the Constitution, but will have to be set out in legislation.

#### 2.2 Application of the right to common law and statute law

Common law and statute law can supplement a general right to an environment which is not detrimental to the public.

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

Yes. In our view it is obvious that a constitutional duty should rest on all natural persons and fictitious persons who conduct any activities that could be harmful or detrimental to the public health or well-being.

#### 2.4 Who should bear this right?

In our view all natural persons should be the primary bearers of this right. We consider, however, that statutory provision should be made for class actions to facilitate enforcement, this right in the courts, as the financial resources of individuals would in many cases be inadequate to cover the costs of such proceedings. Secondly, a class action is appropriate where the interest infringed is not limited to a particular individual, but is detrimental to the public generally.

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

We believe that this right should be capable of limitation by the legislature, but only in accordance with the provisions of the general limitation clause (at present section 33 of the transitional Constitution) and the section of the transitional Constitution dealing with a state of emergency (section 34).