

25 April 1995
THEME COMMITTEE 4
FUNDAMENTAL RIGHTS

DEMOCRATIC PARTY SUBMISSION ON :

ITEM 12 : CHILDREN'S RIGHTS
ITEM 13 : LIFE

CHILDREN'S RIGHTS

1. Content of the Right

Section 30 of the Constitution reads:

- (1) Every child shall have the right -
 - (a) to a name and nationality as from birth;
 - (b) to parental care;
 - (c) to security, basic nutrition and basic health and social services
 - (d) not to be subject to neglect or abuse; and
 - (e) not to be subject to exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to his or her education, health or well-being.
- (2) Every child who is in detention shall, in addition to the rights which he or she has in terms of section 25, have the right to be detained under conditions and to be treated in a manner that takes account of his or her age.
- (3) For the purpose of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interest shall be paramount. "

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

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

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

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

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

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

2. Application of the Right

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

3. Bearers of the Right

Children

4. Limitations

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

LIFE

1. Content of the Right

Section 9 of the Constitution provides -

"Every person shall have the right to life."

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

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

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

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

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

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

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

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

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

2. Application of the Right

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

3. Bearers of the Right

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

4. Limitations of the Right

The normal limitations contained in section 33 shall apply.