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CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 4
FUNDAMENTAL RIGHTS**

**ADDITIONAL PARTY SUBMISSIONS:
- CRIMINAL JUSTICE RIGHTS
- PROPERTY**



5 September 1995

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 4

**NEW DRAFT SUBMISSION TO REPLACE EXISTING
DEMOCRATIC PARTY PROPOSAL ON CRIMINAL JUSTICE RIGHTS**

1. **Section 25 of the interim Constitution reads as follows:**

- "(1) Every person who is detained, including every sentenced prisoner, shall have the right -
- (a) to be informed promptly in a language which he or she understands of the reason for his or her detention;
 - (b) to be detained under conditions consonant with human dignity, which shall include at least the provision of adequate nutrition, reading material and medical treatment at state expense;
 - (c) to consult with a legal practitioner of his or her choice, to be informed of this right promptly and, where substantial injustice would otherwise result, to be provided with the services of a legal practitioner by the state;
 - (d) to be given the opportunity to communicate with, and to be visited by, his or her spouse or partner, next-of-kin, religious counsellor and a medical practitioner of his or her choice; and
 - (e) to challenge the lawfulness of his or her detention in person before a court of law and to be released if such detention is unlawful.

2. Every person arrested for the alleged commission of an offence shall , in addition to the rights which he or she has as a detained person, have the right -
- (a) promptly to be informed, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;
 - (b) as soon as it is reasonably possible, but not later than 48 hours after the arrest or, if the said period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an ordinary court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released;
 - (c) not to be compelled to make a confession or admission which could be used in evidence against him or her; and
 - (d) to be released from detention with or without bail, unless the interests of justice require otherwise.
- (3) Every accused person shall have the right to a fair trial, which shall include the right -
- (a) to a public trial before an ordinary court of law within a reasonable time after having been charged;
 - (b) to be informed with sufficient particularity of the charge;
 - (c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;
 - (d) to adduce and challenge evidence, and not to be a compellable witness against himself or herself;
 - (e) to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights;
 - (f) not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;

- (g) not to be tried again for any offence of which he or she has previously been convicted or acquitted;
- (h) to have recourse by way of appeal or review to a higher court than the court of first instance;
- (i) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her; and
- (j) to be sentenced within a reasonable time after conviction."

2. There are two obvious deficiencies in the formulation of this section. The first is that the adherence to the categories of detained, arrested and accused persons constitutes an impoverished rendering of the rights here in issue and leads also to unnecessary ambiguity, some of which has already occupied the attention of the Constitutional Court.

3. In this regard, the Democratic Party makes two proposals. The first is to state plainly the right to a fair trial, both civil and criminal. The right to a fair civil trial is not expressly dealt with in the interim Constitution. Secondly, the present section is deficient in that it gives inadequate recognition to the procedural rights that are a necessary part of the process of having disputes determined by courts of law in a fair fashion. What is required is a clause that recognises that a fair trial is the outcome of fair procedures leading up to the trial, and is not simply concerned with fairness in the courtroom itself. The following additions to the existing s 25 of the interim Constitution are proposed:

- "(1) Every person shall have the right to a fair trial
- (2) Every person shall have the right to due process of law
- (3) Every person shall have the right to the privilege against self-incrimination."

4. APPLICATION OF THE RIGHT

The duties contemplated by the proposal rest upon the State and its organs of Government in its widest sense which would include, for example, insolvency inquiries.

5. APPLICATION OF COMMON LAW AND CUSTOMARY LAW

In so far as civil and criminal procedure has a common law foundation as does the inherent jurisdiction of the Supreme Court, the rights proposed confirm the common law position.

6. BEARERS OF THE RIGHTS

The bearers of the rights contained in this provision are natural persons and juristic persons.

7. LIMITATION OF THE RIGHTS

The rights fall for consideration and the general provision of the limitation clause.

DEMOCRATIC PARTY

NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 4

ITEM 14: SOCIO-ECONOMIC RIGHTS

14.1 RIGHTS IN PROPERTY

1 Content of the right

Section 28 of the Constitution 1993 provides for the entrenchment of rights in property including their acquisition, tenure and disposal by every person. It also prohibits deprivation of these rights otherwise than in accordance with a law and provides for expropriation of rights in property for public purposes only and subject to the payment of agreed or just and equitable compensation determined by a court of law.

While the NP in the interests of a settlement accepted the full text and wording of Section 28(3) at the World Trade Centre, subsequent developments have shown that many of the additional factors set out in that section have proved to be controversial and can lead to legal uncertainty. Furthermore, legislation contemplated in Section 121 to 123 of the Constitution 1993 has been enacted during 1994 catering for most, if not all, of these concerns.

Accordingly the NP proposes that Section 28(3) should be redrafted and updated as follows:

"28(3) No law referred to in subsection (2) shall provide for expropriation of any rights in property unless:

- (i) Such expropriation is for public purposes only;

property and the claims of those dispossessed of property, particularly land, since 1913 under racially based laws.

2 Application of the rights

2.1 Nature of the duty imposed on the State

Primarily the rights apply against the State including all organs of State at every level of government and therefore impose a positive duty on the State. The position has already been further regulated by legislation. The holder of rights in property is also protected by other legislation and the common law against the illegal action of other persons.

2.2 Common law and customary law

The rights should be applied to common law and to customary law (provided the term "rights in property" is retained). The NP supports respect for various customary usages of land such as lease agreements, traditional communal tenure, time-share schemes and usufruct. These usages inter alia can be beneficially employed to assist the disadvantaged who do not have the immediate capital to purchase their own property.

2.3 Actors other than the State

The right applies vertically against the State. The relationship between the holder of the right and other persons is regulated by statute and common law.