

DEMOCRATIC PARTY (DP)

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.

