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DEMOCRATIC PARTY SUBMISSION ON:
SOCIO-ECONOMIC RIGHTS

Property
Education
Environment
Economic Activity
Labour Relations
Freedom of Language and Culture
Other Socio-Economic Rights

PROPERTY RIGHTS

Content of the Right

Section 28 of the Constitution provides:

- " (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.
- (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.
- (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the

payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which

the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected. "

The Democratic Party regards the provision of a property rights clause in the constitution as essential. It is one of the pillars of a democratic order. The debate on the inclusion of a property rights clause should not be confused with the apartheid legal orders deprivation of certain groups' ability to acquire property, or indeed their wrongful dispossession of property. The fact that section 28 of the Constitution is accompanied, elsewhere in the Constitution by a land restoration provision, should be noted. All discriminatory impediments to the acquisition, retention, ownership of property and means of production of any kind are explicitly outlawed by other provisions in the Bill, such as the equality clause.

The right to property is a universal fundamental right which is to be found in, for example, article 17 of the Universal Declaration of Human Rights: Articles XXIII and XXXVI of the American Declaration of Rights and the Duties of Man: Article I of the First Protocol of the European Convention of Human Rights: Article 21 of the American Convention of Human Rights: Articles 14 and 29(6) of the African Charter on Human and Peoples' Rights.

We also believe the argument advanced by the SA Law Commission (October 1994) at 147, is persuasive. It states:-

"A third argument in favour of the inclusion of property rights in the Bill of Rights sees a constitutional right to property as a way of protecting the propertyless. There must be a right to property to live an adequate human life. A right to property, properly conceived, would provide for those who do not own property rather than protecting the assets owned by those who currently do have property. This is the argument which seems to undermine the property clause in the ANC draft Bill of Rights. "

There is also nothing in the property clause in the Bill of Rights, per se, which protects the concept in absolutely inalienable terms. The current clause, as with other rights-based jurisdictional systems, makes provision for routine restrictions by the legislature, provided that the right as such is not vitiated.

The fundamental amendment which the Democratic Party would propose to the existing property clause (section 21) is in respect of section 28(2) which we believe should be amended to read.-

"No deprivation of any rights and property shall be permitted otherwise than in accordance with the law of general application. "

The reason for this proposed amendment is that it will prevent any arbitrary, capricious or partial enactment of a law and will oblige the legislators to apply general considerations when imposing any limitations on property rights.

2. Application of the Right

The Democratic Party believes that the right to property should be applicable to the common law and customary law as well, particularly where women are disqualified, according to certain customary norms, from acquiring or owning property.

3. Bearers of the Right

Both natural and juristic persons should enjoy property rights because properties are often acquired by corporate entities, such as closed corporations, companies or other juristic persons.

4. Limitations of the Right

The property right is limited by the provisions of section 28(3) which limitation is supported, as well as by the overall limitation clause (section 33).

(ii) EDUCATION RIGHTS

(iii) ENVIRONMENT RIGHTS

(vii) OTHER SOCIO-ECONOMIC RIGHTS

1 . Content of the Right

Section 32 of the Constitution provides:-

"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. "

Section 29 of the Constitution provides: -

"Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights. "

The above mentioned rights to education and environment are in our view the essential socioeconomic rights currently provided for in the Interim Constitution. The argument advanced, at the time of enactment, was that any substantial elaboration upon socioeconomic rights should await the drawing of a final constitution.

The Democratic Party believes that the aforementioned right to education and environmental rights should be replaced by a clause which provides a basic minimum floor of socioeconomic rights. We believe that any detailed, beyond a minimum floor, elaboration of socioeconomic rights will fail for two reasons:-

- (1) We regard the courts as a singular inappropriate forum for matters of redistribution, policy and budget to be considered and evaluated.

- (2) The Bill of Rights must not freeze parliament or the legislature into a situation where a certain socioeconomic policy is rigidified regardless of changing circumstances. Even more inappropriate, for the reasons stated above, is the idea that there should be some form of judicialisation of economic policy, which will be the precise effect of providing an elaborate array of socioeconomic rights in the Bill of Rights.

However, in the view of the Democratic Party, a constitution, and especially its Bill of Rights, must aspire to guarantee the conditions necessary for democracy. Without that it is impossible to exercise one's democratic rights. We therefore propose that the constitution enact a minimum floor of rights which will ensure the essence of survival for all persons in South Africa but which will not, in any sense, prevent parliament from elaborating and expanding upon these as circumstances and economic conditions permit. Therefore, the Democratic Party proposes the following clause under the heading -

"Entitlement to the Essentials of Life."

- (1) Every citizen shall be entitled to the food and water necessary for survival; to shelter from the elements; to basic health care; to a basic education; and to a clean and healthy environment;
- (2) It is the province of parliament, and of any other authority lawfully exercising power for the purpose, to decide how these entitlements are to be realised. Consequently, any such a decision which is justifiable shall be considered to comply with this article. A decision which is reasonable and practicable and which respects the limitations on the resources available to realise the relevant entitlement, shall be considered justifiable. "

A Bill of Rights enacting such a clause, would acknowledge also that the manner in which that entitlement is realised is a matter for the legislature and the executive: to make the choices necessary to realise the entitlement calls for a kind of expertise that only those branches of government, and not the judiciary, command, and for electoral accountability which only those branches enjoy. The Bill of Rights should therefore recognise all such legislative and executive choices, as long as they are justifiable. which is to say, that they are made honestly and rationally.

But where the choice is not justifiable, the court enforcing the Bill of Rights will conclude that its authors are not taking the entitlement to the essentials of life affirmed here, seriously, and it will set aside the decision. This does not require - or permit - the court to make policy choices. It requires

the court to review policy choices made by legislators, cabinet ministers and officials; a function comfortably within the judicial province and one that good judges are well qualified to discharge. The necessity that such review imposes upon the legislature and the executive to justify their decisions, moreover, will also foster thoughtful decision-making and good judgement.

2. Application of the Right

The bearers of the right would be natural persons, rather than juristic persons. However, the right to a clean and healthy environment in the above right formulation should, subject to suitable safeguards, be enforceable against juristic persons and corporate entities.

3. Limitations of the Right

The right drafted by the Democratic Party has inbuilt limitations which are elaborated in detail above. In addition, the general limitations clause contained in section 33 would be applicable.

OTHER SOCIO-ECONOMIC RIGHTS

ECONOMIC ACTIVITY

1. Content of the Right

Section 26 of the Constitution provides:-

" (1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.

(2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality. "

The Democratic Party is extremely doubtful as to whether any meaningful protection is afforded by the inclusion of this right. For example, a review of this provision by the SA Law Commission (1994) at 106 states:-

"4.205 - This right does not appear in any major international instrument but is not unknown to some national constitutions (for example, Article 12, The German Basic Law). This right affords very limited protection at present as it is subject to double circumscription. Subsection 26(2) firstly limits the right in question and so does the general limitation clause. "

The Democratic Party believes that if subsection (1) were to be retained and allowed to stand alone, i.e. "the right freely to engage in economic activity and to pursue a livelihood" there would be some protection afforded by the clause. However, we have no doubt that other parties, will insist on the provisions of subsection (2) which for all intents and purposes renders the illusory protection afforded by section 26(1) fairly nugatory.

In any event, we are not certain that economic policy should be provided for in a Bill of Rights. For the reasons stated in respect of and consistent with our policy viewpoint contained in the section dealing with socioeconomic rights above, we believe that neither the Bill of Rights nor the judiciary are the appropriate instruments for adjudicating on economic policy considerations.

3. Application of the Right Not applicable.
4. Limitations of the Right Not applicable.

LABOUR RELATIONS

1. Content of the Right

Section 27 of the Constitution provides:-

- " (1) Every person shall have the right to fair labour practices.
- (2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.

- (3) Workers and employers shall have the right to organise and bargain collectively.
- (4) Workers shall have the right to strike for the purpose of collective bargaining.
- (5) Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to section 33(1). "

Section 33(5) of the Constitution provides:-

- " (a) The provisions of a law in force at the commencement of this Constitution promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain of full force and effect until repealed or amended by the legislature.
- (b) If a proposed enactment amending or repealing a law referred to in paragraph (a) deals with a matter in respect of which the National Manpower Commission, referred to in section 2A of the Labour Relations Act, 1956 (Act No. 28 of 1956), or any other similar body which may replace the Commission, is competent in terms of a law then in force to consider and make recommendations, such proposed enactment shall not be introduced in Parliament unless the said Commission or such other body has been given an opportunity to consider the proposed enactment and to make recommendations with regard thereto. "

The above two provisions represent the core of labour relations' rights contained in the Interim Constitution.

The Democratic Party broadly supports the core rights contained in section 27, save and except, for the items mentioned hereunder. The idea that every person shall have the right to fair labour practices will not only protect working adults, but will also protect children against exploitative practices. It should therefore render the protection against the exploitation of children, contained in a separate provision of the Bill of Rights, unnecessary.

It is also clear that a review of contemporary instruments (for example, the German Basic Law) as well as certain supra-national instruments, in particular, conventions and recommendations of the International Labour Organization (ILO), often contain specific provisions as regards the recognition of minimum labour rights and standards.

However, the Democratic Party believes that the provisions of section 33(5) of the Interim Constitution which insulates existing labour law legislation from enquiry under the Bill of Rights, is not appropriate in a final Bill of Rights document since same was specifically intended as an interim measure. The interim nature of the Bill of Rights does not apply to the final document and, therefore, the provisions of section 33(5) should be scrapped. We do not believe that certain areas of our society or polity should be cordoned off or screened from the equal protection clause of the Bill of Rights and it is inappropriate to insulate labour relations from the provisions of the Bill of Rights as such.

In addition, the Democratic Party believes that section 27(3)&(4) needs to be amended by the deletion of the terms "bargain collectively" and "collective bargaining". We do not believe that the concept of collective bargaining as a constitutional issue, has any place in the Bill of Rights. There should be no mandatory requirement for collective bargaining across the country. The concept of collective bargaining is an outflow of the constitutionally enshrined right to either strike or lock-out. The very provisions of a right to strike or lock-out should be sufficient. Collective bargaining flows from the power relationship in a particular situation, which should not be constitutionally mandated.

To the extent that the other clauses of the constitution already protect the rights elaborated upon in the labour relations clause, it might be unnecessary to enact any protection of the rights elaborated upon in section 27. For example, freedom of association implies, in the labour field, according to ILO Convention 87 of 1948: -

- The right of all employees and employers to establish organisations of their choice and to join such organisations;

- The right of organisations to function independently without control or

interference;

- The exclusion of the suspension or dissolution of organisations by the government;

- The establishment of, and affiliations with federations, as well as affiliations with international organisations.

However, we are mindful of the potential limitation imposed by the statutory nature of the labour relations regime in South Africa. For example, at 5.46 the SA Law Commission notes (at 141): "As far as the employees collective rights and rights to formal equality are concerned, it is clear that employees and their unions are only entitled thereto if and to the extent that the rights are guaranteed. Mere legislative regulation thereof does not suffice: Once legislation is repealed, any statutory basis for their protection falls away. On the basis of principle, therefore, ample justification exists for the inclusion of at least the following employee rights in a Bill of Rights: The right to associate freely, the right to organise, the right to bargain collectively and the right to strike. It goes without saying that circumstances may be present where any or all of the rights can be restricted. "

Clearly, therefore, a compelling case can be made for the constitutional protection of a labour relations right and with the modifications noted above, the Democratic Party supports their retention.

2. Application of the Right

Obviously because of the collective nature of the exercise of labour rights, the bearers of the right should include juristic persons such as trade unions and employer organisations. The application of the right in common and customary

law: Clearly for the right to have meaning and content, it must extend to the common law as well.

3. Limitations of the Right

The ordinary limitations contained in section 33 of the Interim Constitution should apply to this clause and the temporary limitations imposed by section 33(5) should not be applicable.

FREEDOM OF LANGUAGE AND CULTURE

1. Content of the Right

Section 31 of the Constitution provides:

"Every person shall have the right to use the language and to participate in the cultural life of his or her choice. "

Also relevant to the provision relating to language and culture is portion of section 32 (the right to education). It reads, in part:-

11 every person shall have the right -

(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, common language, or religion, provided that there shall be no discrimination on the grounds of race. "

The Democratic Party supports the essential core of both aspects of the right enumerated above.

We regard the provision and enshrinement of such a right as being essential to give constitutional protection to the diversity of language, culture and tradition in South Africa.

We believe it might be necessary, in order to avoid the perception being created that this right creates a shelter behind which racial or unfair discrimination might flourish, to make this clause subject to the equality provisions of the Bill of Rights. In our view the provisions of the equality clause should trump the provision which implies an irrational or unjustifiable separation on the grounds of language and culture.

Application of the Right

- The State shall have a duty to protect the right against violation;
- Individuals and juristic persons shall have the right to enforcement;
- Other persons shall have a general duty to respect the rights of others in respect of language and culture, but the right shall primarily operate in a vertical fashion.

Limitations of the Right

The current wording of section 32 contains an additional limitation to the general limitations clause which might well be necessary. The normal limitations contained in section 33 shall also apply.