

2/24/4/4/17

CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE 4
FUNDAMENTAL RIGHTS**

8 August 1995

Room M 46

REPORTS:

9. ADMINISTRATIVE JUSTICE

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THEME COMMITTEE 4
-FUNDAMENTAL RIGHTS

SCHEMATIC REPORT ON
ADMINISTRATIVE JUSTICE

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ¹ ASPECTS	REMARKS
1.	II, VI, IX	Nature of right (Application of Constitutional Principle II)	Right to be included in the Constitution.		

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ¹ ASPECTS	REMARKS
2.		Content of right	There should be a separate clause in the Constitution recognizing a right to administrative justice.	<p>Although all parties agree that the clause should be retained there is no agreement on the precise form this clause should take. This does not reflect a lack of consensus about the nature of the right but rather disagreement about the formulation of the right.</p> <p>The PAC and NP support the present formulation of the right in the Interim Constitution.</p> <p>The NP requires clarification from the Technical Committee on the scope of subsections 24 (c) and 24 (d).</p> <p>Both the ANC and the DP suggest that the reference to "legitimate expectations" in section 24 (b) should be excluded.</p> <p>The ACDP would like the clause to include express mention of natural justice, including the <u>audi alteram partem</u> principle.</p> <p>The ANC proposes that the right to reasons in section 24 (c) should be limited to administrative action affecting rights, but not interests.</p>	

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ¹ ASPECTS	REMARKS
		Content (cont)		<p>The DP suggests a reformulation of section 24(c) which would exclude reference to both "rights" and "interests" and would simply require reasons for administrative action.</p> <p>The DP proposes a reformulation of subsections 24(a) and (b) which excludes the words "rights", "interests" and "legitimate expectations".</p> <p>The FF proposes that s 24(a) be retained; s 24(b) be rephrased; s 24(c) be deleted or severely restricted; and s 24(d) be deleted.</p>	
3.		Application of the right (Nature of Duty)	The state is obliged to enforce this right.		
4.		Application of the right (To common and customary law)	Shall apply to common law and customary law.	The right not applicable to common and customary law in all cases - FF.	

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ¹ ASPECTS	REMARKS
5.		Application of the right (Duty on Private Actors)	The right is primarily applicable against the state.	<p>Right should operate against bodies that exercise "public power" - DP, NP.</p> <p>Right should apply to "juristic person and social bodies" - PAC.</p> <p>Right should apply to "banks, multinational and corporate bodies" - ACDP.</p>	
6.		Bearers of the right	Natural persons are the bearers of the right.		
7.	Section 33	Limitation of right	The right should be subject to the general limitation clause (s 33) and the emergency measures clause (s 34).	<p>The present bifurcated approach to limitations, which requires limitation to be "necessary" for administrative action involving free and fair political activity but not in other cases, should be abandoned. The test of "necessity" should apply in all cases -DP.</p> <p>This clause should be subjected to a special limitation that it be subject to the "necessary practicalities of governance" - ANC.</p>	

THEME COMMITTEE 4 FUNDAMENTAL RIGHTS

REPORT ON RIGHT TO ADMINISTRATIVE JUSTICE

This report is drawn up on the basis of submissions received from political parties, organisations of civil society and individuals; the public participation programme and other activities of the Constitutional Assembly.

PART I

MATERIAL CONSIDERED BY THE THEME COMMITTEE

- 1. Submissions received from political parties (in alphabetical order):**
 - ACDP
 - ANC
 - DP
 - FF
 - NP
 - PAC

- 2. Submissions received from the public and civil society:**
 - 2.1 Individuals (in alphabetical order)
 - 2.2 Organisations (in alphabetical order)
 - 2.3 Government structures\ institutions (in alphabetical order)

- 3. Technical Committee reports:**

None to date

- 4. Relevant Constitutional Principles**

II, VI, IX

PART II

1. NATURE OF THE RIGHT (Application of Constitutional Principle II)

1.1 Non-contentious Issues

1.1.1 The right to be included in the Constitution.

2. CONTENT AND SCOPE OF THE RIGHT

2.1 Non-Contentious Issues

2.1.1 There should be a separate clause in the Constitution recognizing a right to administrative justice.

2.2 Contentious\ Outstanding¹ Issues

2.2.1 Although all parties agree that the clause should be retained there is no agreement on the precise form this clause should take. This does not reflect a lack of consensus about the nature of the right but rather disagreement about the formulation of the right.

2.2.1.1 The PAC and NP support the present formulation of the right in the Interim Constitution.

2.2.1.2 The NP requires clarification from the Technical Committee on the scope of subsections 24 (c) and 24 (d).

2.2.2 Both the ANC and the DP suggest that the reference to "legitimate expectations" in section 24 (b) should be excluded.

2.2.3 The ACDP would like the clause to include express mention of natural justice, including the audi alteram partem principle.

2.2.4 The ANC proposes that the right to reasons in section 24 (c) should be limited to administrative action affecting rights, but not interests.

1 It should be noted that items marked "Outstanding" do not signify disagreement amongst political parties or contention. Parties felt that these matters could best be dealt with at the level of the Constitutional Committee, where negotiation could take place.

2.2.5 The DP suggests a reformulation of section 24(c) which would exclude reference to both "rights" and "interests" and would simply require reasons for administrative action.

2.2.6 The DP proposes a reformulation of subsections 24(a) and (b) which excludes the words "rights", "interests" and "legitimate expectations".

2.2.7 The FF proposes that s 24(a) be retained; s 24(b) be rephrased; s 24(c) be deleted or severely restricted; and s 24(d) be deleted.

3. APPLICATION OF THE RIGHT (Nature of the duty on the state)

3.1 Non-contentious Issues

3.1.1 The state is obliged to enforce this right.

4. APPLICATION OF THE RIGHT (To common and customary law)

4.1 Non-contentious issues

4.1.1 The right must apply to the common and customary law.

4.2 Outstanding issues

4.2.1 The right not applicable to common and customary law in all cases - FF.

5. APPLICATION OF THE RIGHT (Duty on private actors)

5.1 Non-contentious issues

5.1.1 The right is primarily applicable against the state.

5.2 Contentious\ Outstanding Issues

5.2.1 Right should operate against bodies that exercise "public power" - DP, NP.

5.2.2 Right should apply to "juristic person and social bodies" - PAC.

5.2.3 Right should apply to "banks, multinational and corporate bodies" - ACDP.

6. BEARERS OF THE RIGHT

6.1 Non-contentious Issues

6.1.1 Natural persons are the bearers of the right.

7. LIMITATION OF THE RIGHT

7.1 Non-contentious Issues

7.1.1 The right should be subject to the general limitation clause (s 33) and the emergency measures clause (s 34).

7.2 Contentious\ Outstanding Issues

7.2.1 The present bifurcated approach to limitations, which requires limitation to be "necessary" for administrative action involving free and fair political activity but not in other cases, should be abandoned. The test of "necessity" should apply in all cases - DP.

7.2.2 This clause should be subjected to a special limitation that it be subject to the "necessary practicalities of governance" - ANC.

ADDENDUM

PARTY SUBMISSIONS

- ACDP

**AFRICAN CHRISTIAN DEMOCRATIC PARTY
SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE FOUR**

ADMINISTRATIVE JUSTICE

Content of the Right

This right is mostly not included in a Bills of Rights due to it's being incorporated in matters such as equality before the law.

The ACDP recognises, however, that a traumatic history of non-transparency in executive dealings has to be addressed in the process of transformation for the South African society.

It is for this very reason, that we favour this right being entrenched in the forthcoming constitution. This right is grounded for us in honesty - an aspect much addressed and discussed in biblical law. It is therefore, no surprise that the rules of natural justice, which forms the cornerstone of administrative justice, originated with legal philosophers with sound biblical teaching.

The ACDP again cannot convey strongly enough, the absolute necessity to have a public service staffed with equity-minded, moral and ethical men and women.

Being potentially a faceless cog in an intricate wheel of great power, calls for individuals with sound principles of honesty, fairness and reasonableness to be employed in the whole of civil government, but particularly in the executive.

By incorporating the principles of natural law, the drafters of the interim constitution with all those before them who developed administrative justice, attempted the impossible: to find that law common to all that would apply in a perfect state of nature. We know that this is not such a state. Mankind is anything but perfect.

Society now wants to recreate laws that would apply in such a perfect society and incorporate it and apply it in the present one.

This will ultimately not succeed. God created the universe to operate on certain laws - these are natural laws in essence operating over and above and through society. Either God is recognised as the author and, thus, the authority of all law, or man is. It is impossible to have God's law form the basis of administrative justice and, yet, to reject the author of those laws.

The ACDP states that if man is the author and authority of law, man, being in a changing environment, will change his law to suit his changing needs and requirements. This is positive law, which is reactionary contrasted to God's law that is ultimate and absolute.

If the philosophy of those who have to apply administrative justice is grounded in positive law, changing requirements might dictate severe changes in what is now widely accepted as valid principles, leaving South Africans with a very unsure future, even despite having a constitution that claims the opposite.

This having been said, the ACDP proposes the following amendments to be made to Section 24 as it reads at the moment before incorporation in a new constitution.

We procedurally fair administrative action is concerned, we would like to see specific aspects of natural justice including *audi alteran partem* being mentioned.

The ACDP proposes that the wording of the section dealing with administrative justice expressly makes the right applicable against, parastatals and non-governmental organisations including banks, multinationals and other corporative bodies.

Application of the Right

2.1 Nature of the duty to be imposed on the State

To ensure that true administrative justice is afforded all citizens of this country, subject to the laws of God.

2.2 Application of the right to common law and customary law

To the ACDP, the absolute laws of God, even takes preference over the Constitution, where the latter conflicts with the former. It follows then the application of this right, as with any other, will be to ensure its accordance with these principles.

2.3 Should the right under discussion impose a constitutional duty on actors other than the State?

This right should have both horizontal and vertical application.

2.4 Who should be the bearers of the right?

The right should belong to all natural and juristic persons in their dealings with organs of civil government.

2.5 Should the right under discussion be capable of limitation by the legislature?

Administrative justice is more a mind-set than a set of legal principles. Instances can be foreseen where this right may be limited, but it will be for be a specified period of time when principles of equity will be introduced into society in the form of a truly unique and equity based system of creating equal opportunity.

- ANC

PRELIMINARY ANC SUBMISSION

THEME COMMITTEE 4 - ADMINISTRATIVE JUSTICE

The history of this country is one in which legislative and executive intervention has been used to restrict the powers and functioning of the courts to review unjust administrative action. In the process, the legislature effectively ensured that executive and administrative decision-making proceeded unhindered. The emergencies declared in the 1980's were marked by the limitations placed on the courts to prevent judicial review of unjust administrative decisions.

The ANC believes that it is crucial for a basic guarantee to administrative justice to be included in the constitution in order to prevent the wrongs of the past from being repeated in the future. However, given that it is in the nature of administrative action that thousands of decisions are made on a daily basis, we believe that the formulation in the Interim Constitution should be amended to make this right subject to the necessary practicalities of governance. In effect, such amendment would serve to limit a broad and perhaps impractical formulation of the right as currently drafted and restrict the possible review of legitimate administrative action in the interests of effective government. In addition, we propose that provision be made for the inclusion of a right to request reasons for administrative action taken, rather than the current formulation making the written furnishing of reasons compulsory.

1. Content of the right and its formulation

The Interim Constitution sets out in section 24 that every person shall have the right to:

- "(a) lawful administrative action where any of his or her rights or interests is affected or threatened;
- (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
- © be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and

- (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened."

The ANC proposes the following amendments to section 24 as currently drafted:

1. a limitation making this clause subject to the "necessary practicalities of governance" should be included;
2. section 24(b) should be amended to exclude a reference to "legitimate expectations";
3. section 24© should be amended to entitle any person to request reasons for administrative action which affects his or her rights (with the reference to interests being excluded).

In addition, provision should be made for the these rights to be derogated from:

- I. only in a state of emergency necessarily and properly declared to protect the security of South Africa; and
- ii. only if the Constitution does not specify that the right in question may not be derogated from; and
- iii. only to the extent necessary to restore the security of the nation and the safety of South Africa's people; and
- iv. only to the extent that such derogation is consistent with international legal norms concerning the nature and extent a derogation of human rights justified in exceptional circumstances.

2. Application of the right

- 2.1 The state and its organs have a duty to protect and enforce the right.
- 2.2 The right shall bind the state.
- 2.3 The bearers of this right shall be private persons of where appropriate, groups or social structures.

- DP



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Demokratiese Party
Democratic Party

12 June 1995

CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 4

SUBMISSION BY DEMOCRATIC PARTY

21. **ADMINISTRATIVE JUSTICE**
22. **ACCESS TO COURTS**
23. **DETAINED, ARRESTED AND ACCUSED PERSONS**

ADMINISTRATIVE JUSTICE

1. Content of the Right

Two constitutional principles are applicable to the right to administrative justice, namely:-

Principle VI

There shall be a separation of powers between the legislature, executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness. (Our emphasis)

Principle IX

Provision shall be made for freedom of information, so that there can be open and accountable administration at all levels of government.

Section 24 of the Interim Constitution provides:-

"Every person shall have the right to -

- (a) lawful administrative action where any of his or her rights or interests is affected or threatened;

- (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
- (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
- (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened."

The Democratic Party strongly supports the provision of a right to fair administrative justice in the final Constitution. As is clear from a reading of the constitutional principles, referred to above, it is obligatory for the Constitutional Assembly to enact such a provision if it is to meet its obligations in terms of the aforesaid principles.

The Democratic Party strongly believes that the critical feature of the new Constitution and its greatest impact will be whether or not government officials operate in an open and transparent manner - and whether such a process will advance the concept of democracy. We subscribe to the notion that, in the final analysis, the quality of government is determined by the quality of its administration.

Democratic government is no longer understood to be merely a matter of voting in a general election every five years. The aspiration to democracy has grown into an aspiration to governmental decision-making which ideally should be open, participatory and accountable.

Section 24 of the Interim Constitution promotes government accountability in so far as it confers a right to be given reasons for administrative action which affects the citizen's rights or interests. This right is fortified by a right to question the justification of administrative action in court.

The combined effect of Section 24 is to require officials to justify their decisions, both to the people whom they affect and, under challenge to the courts. Properly applied, these rights promise administration that is unrecognisably more accountable than South Africa has traditionally enjoyed.

Participatory government means an opportunity to influence decisions that affect the citizen. The Bill gives a right to "procedurally fair" administrative action where someone's rights or legitimate expectations are affected or threatened. In most contexts, procedural fairness will be taken to require a person about to be affected by an official decision to be given a hearing, and therefore an opportunity to influence the outcome. Open government depends primarily on the right that the Bill gives of access to official information. But here, unfortunately, an important opportunity has been lost in the Interim Constitution, because the right is restricted

to information required for the "protection or exercise" of a person's right (Section 24(a)).

The Democratic Party strongly believes that the final Constitution should enact a right of access to any information, not qualified by that restriction. The effect of this will be to force the government to procure a Freedom of Information Act. It is clear, of course, that no right of access to official information can be absolute. There have to be exceptions to protect personal privacy, law enforcement, commercial confidentiality, national security, etc. These, however, are well catered for under the general provisions of the limitations clause (Section 33). Section 33 caters for such exceptions because it permits any right in the Bill to be limited by law of general application if the limitation is reasonable, and justifiable in an open and democratic society based on freedom and equality.

An unqualified right to information in the Bill of Rights would force the government to list in a law, all the exceptions that are considered necessary, and then defend them in court, under the limitation clause as justifiable limitations on the right to information. That law would have had to codify what information citizens are entitled to, and what they are not.

We believe that the current narrower right to information as contained in the present formulation of Section 24 misses the opportunity to oblige government to produce such a Freedom of Information Act. It obliges officials to disclose only that which is necessary for the protection or exercise of a person's rights, and the government remains free to fight for the most restrictive interpretation of that category which the courts will accept.

Accordingly the Democratic Party proposes two alternative formulations:

Either:-

Section 24(a) should be amended to read:

"(a) lawful administration action" [where any of his or her rights or interests is affected or threatened]

[] = deletion from the clause.

Section 24(c) should be amended to read:

"(c) be furnished with reasons in writing for administrative action unless the reasons for such action have been made public."

We believe, however, that an alternative formulation of the right to administrative justice could be as follows:-

"24(a) No person shall be affected adversely by decision made in the exercise of public power, which is unlawful, unreasonable or procedurally unfair;

24(b) Every person adversely affected by decision made in the exercise of public power shall be entitled to be given reasons, in writing, for the decision".

The formulation of the above right will entrench every person's right, when adversely affected by governmental action, to decision which is lawful, reasonable and procedurally fair. It also guarantees the right to be given reasons for a governmental decision.

The combined effect will be to require public officials thoughtfully and deliberately to consider their decisions, to take due account of the impact of a decision on those whom it affects, to explain the decision to those whom it affects, and, where fairness so requires, to hear those affected before the decision is taken.

The above formulation will, therefore, foster governmental processes that are both accountable and participatory: Accountable because decisions will have to be justified to those governed by them, and participatory because those governed will have had an opportunity to influence them. In short, the Article will foster democratic decision-making. It will also require the kind of decision-making processes that tend to yield well justified decisions.

Whichever formulation is adopted by the Constitutional Assembly, it is imperative that a right to administrative justice be entrenched in the Bill of Rights. This will make it impossible to legislate such a right away. This will put an end to the legislative practice of the past which tended to exclude the jurisdiction of the Supreme Court to review governmental decision-making, a pernicious practice by which the government has in the past attempted to insulate its decisions from judicial scrutiny, particularly under the security laws.

2. Application of the Right

There shall be a positive duty on the state primarily and on other organs of government at all levels.

3. Application to Common and Customary Law

The right should apply to common law and customary law.

4. Other Actors Bound

Although the state will be the primary respondent of the application of this right, it is conceivable that it could also impact on the requirement for fairness in administrative decisions in respect of any public authority or quasi judicial body and should affect any body which exercises a public power.

5. Bearers of the Right

By the nature of the right to administrative justice natural persons should be the bearers of the rights contained in this provision.

6. Limitations of the Right

The limitations applicable in Section 33(1) should be applicable to the provisions of this Section, save and except that the distinction drawn under the provisions of Section 33(1)(bb) between administrative justice in ordinary situations and administrative justice in relation to free and fair political activity, should be removed and the additional requirement of necessity should be imposed on any limitation applying to the right to administrative justice.

ACCESS TO COURTS

1. Content of the Right

Section 22 of the Interim Constitution provides:-

"Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum."

The rights contained in this Section echo the provisions of Constitutional Principle V which, *inter alia*, states

"The legal system shall ensure the equality of all before the law and an equitable legal process...".

The current formulation of Section 22 is unusual in so far as a clause relating to access to court is usually linked to a specific right (such as those of arrested persons, or those contesting administrative injustice). However, its inclusion as a substantive right, available to resolve justiciable disputes is important given the history of South Africa, particularly the notorious provisions in legislation during the apartheid era which contained a significant number of ouster clauses (e.g. The Public Safety Act 3 of 1953).

- FF



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FREEDOM FRONT

THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

SUBMISSIONS ON ADMINISTRATIVE JUSTICE

The Freedom Front makes the following submissions relating to administrative justice.

1) Content of certain rights relating to administrative acts

The Constitutional Principles do not contain provisions prescribing principles of administrative justice. Such provisions do occur in section 24 of the transitional Constitution. This section reads as follows:

'Every person shall have the right to --

- (a) lawful administrative action where any of his or her rights or interests is affected or threatened;
- (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
- (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
- (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened'.

Section 4 attempts to entrench some of the basic rules of administrative law. The selection of rules included in section 24 is, however, somewhat arbitrary. It can, however, be taken as a basis for the drafting of a section in the new Constitution.

The present section 24(a) is superfluous

Section 24(a) is superfluous in so far as it merely restates the position at common law. However, the Freedom front has no objection to it being inserted in the new Constitution.

The present section 24(c) should be deleted or its application should be severely restricted

The main innovation in South African law introduced by section 24 is subsection (c), dealing with the necessity of furnishing written reasons for administrative action. Thus far in South Africa the predominant judicial view has been that the non-furnishing of reasons is not in itself a ground for invalidating the administrative act concerned. The view adopted by most courts is that the absence of reasons is evidence of non-compliance with some other rule of administrative law, such as the arbitrary exercise of a discretion, mala fides, or acting ultra vires, etc.

The main underlying reason why administrative law in South Africa has not thus far acknowledged unreasonable administrative action as a ground for having the decision concerned declared invalid by a court, is probably that officials or administrative bodies are more competent than courts to assess the reasonableness or otherwise of particular administrative acts. Furthermore, if a court were to have jurisdiction to declare administrative acts void on the basis of unreasonableness, there would be a duplication of functions by the administrative bodies concerned and the courts. The courts would be flooded with applications to set aside administrative acts alleged to be unreasonable.

At present most administrative acts are taken on review to the Supreme Court, not on appeal. Review is concerned with the method and the legality of the procedures adopted by the administrative body concerned, and not, in the first place, with the merits or the substance of an issue or a dispute.

Administrative decisions can, generally, be reviewed by the courts but not taken on appeal before them. The courts have more limited powers on review than on appeal. Whereas an appeal is a (limited) rehearing in respect of the merits or the substance, implying a possible fresh decision on the merits, a successful review generally entails that the matter is remitted to the administrative body concerned to reconsider its initial decision in the correct manner or according to the correct method.

If reasonableness is to be introduced as a separate ground for setting aside administrative acts, reasonableness will become a ground of appeal (instead of merely a ground for review), with the result that an overwhelming number of administrative acts will in fact be 'redone' by the courts. The Freedom Front finds this totally unacceptable.

The Freedom Front also considers the provisions of section 24(c) to be impracticable, for another reason. The furnishing of written reasons for administrative action affecting the rights or interests of persons would lead to such an administrative avalanche that the work of the administration would become impossible.

The present section 24(b) should be rephrased

The Freedom Front is of the opinion that section 24(b) should be rephrased in the new Constitution. The present wording of section 24(b) is unclear in so far as it uses the term 'procedurally fair administrative action'. We find the proposal of the South African Law Commission in its Final Report on Group and Human Rights (October 1994, at page 82) more acceptable, as it uses the phrase 'the principles of natural justice' which is a phrase with a content that is well-known to and applied by the courts.

We do not, however, support the proposal of the South African Law Commission that the principles of natural justice should be applied 'in administrative actions'. The principles of natural justice never applied to all administrative actions. Thus far these principles have been applied by the courts to quasi-judicial administrative acts only. In the case of a so-called 'pure' administrative acts, i.e. acts not infringing any right or legitimate expectation of a person, there is no reason why the two rules of natural justice (the rule that the other party should have an opportunity of stating his case and the rule that the official or administrative tribunal concerned should not be biased) should apply. The existing law in this regard should remain as it is.

The present section 24(d) should be deleted

The Freedom Front does not see the need for a provision such as the present subsection (d). This subsection seeks to introduce the concept of reasonableness as a requirement for all quasi-judicial administrative proceedings, in so far as it requires that the administrative action must be 'justifiable' (stress supplied) in relation to the reasons given for it.

2) Application of the rights

2.1 Nature of the duty imposed on the state

The nature of such a duty cannot be expounded here. It is not a single duty, but a collection of duties comprising the whole of administrative law.

2.2 Application of the right to common law and statute law

As the 'right' is in reality a collection of rights, it would be impossible to relate it in its entirety to the common law. The common law should remain as supplement to the fundamental rules of administrative justice laid down in the Constitution.

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

It does not seem to be the case. The purpose of administrative law is, to a large extent, to curb the state administration and to enforce the rule of law against it.

2.4 Who should bear this right?

All natural persons and fictitious persons lawfully in the country should be bearers of these rights.

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

Limitation of these rights should be subject only to the general limitation clause and the provisions relating to a state of emergency, both to be contained in the new Constitution.

- NP

NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 4

ITEM -- ADMINISTRATIVE JUSTICE

1. Content of the right

S24 is illustrative of the seriousness with which it is intended to provide for administrative accountability and transparency in our constitution. It has extended the scope of judicial review.

Certain important principles have been constitutionalised viz: procedural fairness, the giving of reasons for administrative action; the virtual elimination of ouster clauses.

There can be little doubt that S24 will be the basis for much court action. Accordingly it is desirable that the intent and meaning of the clause is as clear as possible.

The clause was the result of strenuous negotiation and eventual compromise. Subsequently the clause has given rise to considerable comment and academic debate as indicated below. It may therefore be desirable for the Technical Committee to clarify certain points in relation to the questions raised about the clause.

The separate sub-clauses are as follows:

Sec 24(a): Every person has the right to lawful administrative action where any of his or her rights or interest is affected or threatened

It can be assumed that 24(a) has as object *inter alia* to eliminate ouster clauses and vitiate legislative provisions which insulate administrative action

from judicial review. This is commendable and has the effect of overruling the unfortunate decision "Staatspresident v United Democratic Front" 1988 (4) SA 830(A). Seen in this sense 24(a) is an important contribution in engendering a culture of justification and accountability.

The intention appears to be that lawful administrative action must comply not only with the provisions of the empowering statute, but also with the rules of the common law.

Sec 24(b): Every person shall have the right to procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened.

At a minimum this section 24(b) requires that any administrative action taken within its ambit is decided fairly. This would mean that the person affected was first heard. A person affected will not ordinarily be taken to have been heard if the case which he or she has to meet has not been disclosed, and an opportunity given to reply to it.

The duty to act fairly is nothing other than the duty to observe the principles of natural justice which encompass the *audi alteram partem* and the *nemo esse iudex in sua causa potest* rules.

It is assumed that in the case of the mechanical type of administrative action where no discretionary power is exercised e.g. issuing a dog licence, 24(b) demands procedural fairness in the sense that the authority complies strictly with the other procedural requirements for valid administrative action such as, for example, compliance with the statutory provisions of the enabling act.

24(c): Every person shall have the right to be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public.

24(c) places a general duty on officials to give reasons for their decisions. This is something administrative lawyers in South Africa have pleaded for, for decades. No provision in the constitution is more conducive to ensuring that administrative decisions are justified, than 24(c). It illustrates a commitment to open government.

24(c) places emphasis on administrative accountability. The furnishing of reasons facilitates fairness and proper administrative behaviour in that unsound reasons may form the subject of review. The official's decision is now open to censure by both the internal administrative controlling body and the courts. No longer can the official hide behind anonymity.

A question may be posed as to why the furnishing of reasons is restricted to instances where rights or interests are affected and why the person who has a legitimate expectation is excluded. It is suggested that the Technical Committee be approached to clarify this.

In general however, 24(c) introduces an important right which did not exist before and associated benefits are improved decision-making; democratic safeguards against arbitrary action and a greater opportunity for the public to accept and understand administrative decisions.

24(d): Every persons shall have the right to administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.

Again it is not clear why the right to justifiable administrative action is

limited only to persons whose rights are affected. Again we suggest the Technical Committee be asked to clarify this.

This sub clause has given rise to considerable comment and debate on whether "reasonableness" has now been introduced as an accepted ground of review in our administrative law. It appears that the intention of the negotiating committee of the World Trade Centre was to substitute "justifiable on the basis of reasons given" for "reasonable". However, Mureinik declares that 24(d) empowers a court to review administrative decisions within its reach for justifiability - "which is to say for reasonableness". (A Bridge to Where? Introducing the Interim Bill of Rights" SAJHR 31, 40). Corder again declares that those who drew up sec 24(d) resisted the constitutionalization of the standard of "reasonableness" as a ground of review for administrative action and rather introduced the notion of "justifiability" in relation to the reasons given for an administrative act. He declares that "reasonableness" was discarded as it was feared that it could be misused to hold up vitally necessary social reform measures. ("Administrative Justice" in *Rights and Constitutionalism* Van Wyk et al (1994) 399). Basson is of the opinion that despite sec 24(d) using the word "justifiable" instead of the word "reasonable", it means the same thing. That the right to administrative action which is "justifiable" and the right to administrative action which is "reasonable" should be given the same meaning. (*South Africa's Interim Constitution* (1993) section 24). The confusion is further illustrated by the differing viewpoints on this issue by Burns "Administrative Justice" 1994 SA *Publiekreg* 347, 357 and Carpenter "*Administratiewe Geregtigheid - Meer Vrae as Antwoorde*" 1994 THRHR 467, 470. Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 169 prefer to view 24(d) as giving the right to a rational and coherent decision-making process, which will tend to produce a reasonable result. It appears that it would be helpful for the Technical Committee to clarify this point.

2. Application of the right

2.1 Nature of duty on the State

The right places a clear duty on the State:

2.2 Application to common and customary law.

It would apply to both common and customary law.

2.3 Other actors bound by the right.

In South African law, private bodies that exercise powers over individuals are obliged to observe common law requirements that do not differ from those applicable to the state. Many principles of administrative law, such as the rules of administrative justice now included in the constitution, are designed to protect individuals from abuse of power by the state. These principles are applied in almost identical form to private bodies that exercise powers over people (Baxter *Administrative Law* 1984 101). In terms of this argument, the right to administrative justice should apply to private bodies.

2.4 Bearers of the right

Natural and juristic persons would be bearers of the right.

2.5 Limitation of the right

The right to administrative justice may be limited in terms of section 33 of the transitional constitution. Particularly noteworthy is, *firstly*, the requirement of reasonableness contained in section 24(d), which overlaps with the same criterion in section 33(1)(a)(i). *Secondly*, it should be emphasised that the requirement in section 33(1) that rights

may only be limited by "law of general application", does not mean that the executive and its agencies may no longer exercise any discretion to limit a person's rights. The constitution does require, however, that Parliament in its entitlement (a law) must have intended the exercise of a discretion. In other words, the exercise of discretion by administrative bodies is still allowed, but the constitution puts a break on the extent of the discretion allowed. Where exactly the line is drawn will have to be worked out by the courts.

3 WORDING

The NP supports the wording of the clause subject to clarification by the Technical Committee as indicated above.

- PAC



Ref No.

12 June 1995

PRELIMINARY SUBMISSIONS OF THE PAC ON ADMINISTRATIVE JUSTICE

The right of every person to lawful, reasonable and procedurally fair administrative action, is very important. It protects citizens against arbitrary, irrational and unfair administrative action which may adversely affect their rights, interests or legitimate expectations.

Content of the right.

1. The right of every person to lawful, reasonable and procedurally fair administrative action where any of his/her rights or interests is affected or threatened by such actions.
2. The right of every person to be furnished with reasons in writing for administrative action which affects any of his/her rights or interests unless the reasons for such action have been made public.

Other aspects of this right.

1. It applies to both Common Law and Customary Law.
2. This right can be limited and can only be suspended under strict conditions.
3. It binds, in principle, the organs of state and where appropriate, juristic persons and social bodies.
4. It can be claimed, in principle, by natural persons and where appropriate, by juristic persons and other social bodies.

R K Sizani
MP