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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 4

FUNDAMENTAL RIGHTS

15 June 1995

Room OLD ASSEMBLY

DOCUMENTATION & PARTY SUBMISSIONS

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 4

FUNDAMENTAL RIGHTS

Please note that a meeting of the above Group will be held as indicated below:

Date : Thursday, 15 June 1995

Time : **14h00 - 17h00**

Venue : Old Assembly

AGENDA

1. Opening

2. Matters Arising

3. **Administrative Justice; Access to Courts; Detained, Arrested and Accused Persons** : Party Submissions (See Attached document entitled Party Submissions)

4. General
   4.1 Theme Committee meeting 26 June 1995

5. Closure

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 4

FUNDAMENTAL RIGHTS

PARTY SUBMISSIONS

- Administrative Justice
- Access to Courts
- Detained, Arrested and Accused Persons

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- 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.

8th June 1995
[JUSTICE.WPS]

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

ACCESS TO COURT

Content of the Right

The problem on how to make the justice system accessible to the people is surely as old as the institution itself.

In *Exodus 18*, Moses, who alone adjudicated all the disputes in the nation of Israel, and who, understandably, could not cope, was given sage advice by his father-in-law on how to address the question of accessibility.

"[S]elect capable [persons], from all the people, [persons] who fear God, trustworthy [persons] who hate dishonest gain - and appoint them as officials over thousands, hundreds, fifties and tens."

This referred to a judiciary system with a judge over every ten families with a right of appeal to judges over every fifty families and these families having again a right of appeal.

At its core, the system is made accessible by having an adjudicating official virtually on every street block, presiding over everyday squabbles. This is indeed a system worthy of reproduction, keeping in mind that the law that these judges applied was the law of God. This was due to the religiously homogenous nature of the society in question.

Translating this into the modern South African situation, a number of key aspects become evident. Just as every society has its own God - namely the authority in the society, every societal god implies a societal religion. If the authority in a society is Man, himself, then humanism is the religion of that society.

Due to the fact that any court system adjudicates on a system of law, that is shaped by the ultimate recognised authority in that society and consequently by the religion of that society, a court of law is inherently a religious institution in it's very core.

This is precisely the reason why the Lord Jesus Christ, commenting on the religious character of the Roman legal system imposed on the Jews, cautioned them not to allow themselves to be adjudicated by a heathen judge.

The system of adjudication, therefore, is very much a matter of freedom of religion. In keeping with stated aims of allowing for diversity in a religiously heterogeneous society, it would simply make sense to address the question of accessibility to court with due regard to religious differences. Again, we state that religious freedom must not include satanism, spiritism and other "beliefs or consciences" of their ilk.

With the call for recognising the aspect of religious and cultural rights, the ACDP proposes a system of adjudication centred on a particular religious or cultural foundation that would incorporate traditional African courts, Muslim Judicial Council and Christian Tribunals to mention just a few.

To a very large proportion of the South African populace, the right of access to court will be utterly useless if, by using these courts, they have to bow to a foreign religion and submit to what would be to them a renunciation of their own religious belief system.

The ACDP proposes that even sec 22 in Act 200 of 1993 lends itself perfectly to a diversified legal system as contemplated above.

One further aspect that makes the courts inaccessible is the question of sophistication: with law becoming such an intricate field of practice, and even more so with the stated necessity to refer to international law in observance of the constitutional matters.

Aspects that immediately come to mind regarding this, is firstly the question as to who will pay for this legal assistance that the state seems willing to provide and secondly, why not allow individuals to appear on their own behalf in all *fora* ? Surely the law is not meant to exclude but to incorporate.

The ACDP proposes that the legal system, which in any case is based on principles of good common sense, or should be, must be de-sophisticated to accommodate ordinary people. Why must we be made to believe in ideals of equality before the law and yet be discriminated against because of a lack of education or sophistication.

For too long the legal system was a mystifying esoteric science where men and women in robes used an incomprehensible vernacular and yet come up with such incomprehensibilities as did Mr Justice Chaskalson, on reacting to the public outcry on the abolition of the death penalty:

"The question is not what the majority believe a proper sentence should be. It is whether the Constitution allows the sentence."
(quoted in The Argus, 8 June 1995)

If law is so simple in the eyes of the President of the Constitutional Court, surely ordinary citizens have the right to benefit therefrom.

Application of the Right

2.1 **Nature of the duty to be imposed on the State**
To recognise the cultural and religious diversity of South Africans as persons and to provide this right in accordance therewith.

2.2 **Application of the right to common law and customary law**

For the ACDP, the new constitution must reflect the absolute truth of God's law. This will be the ultimate test even for customary and common law, recognising that customary and common already forms the basis to be extended to realise the ultimate goal mentioned in 2.1.

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

This right is essentially a right to be exercised against the State who should at least provide the legislative framework to make exercising it a reality.

2.4 **Who should be the bearers of the right?**

The ACDP believes that with families being at the core of societal corporations, both juristic and natural persons should have this right, this specifically includes the right for Christian companies to use a Christian tribunal and *mutatis mutandis ditto* for Muslim corporations.

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

The ACDP places one main limitation on the application of the right as evidenced above. We do not agree that "belief systems" and consciences that violate biblical principles be allowed the status afforded recognised theistic religions.

8th June 1995

[COURT.WPS]

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

DETAINED, ARRESTED AND ACCUSED PERSONS

Content of the Right

What was said in connection with the right to administrative justice, regarding the changing nature of positive law is of equal force in the aspect of criminal law. The ACDP, recognising that all have sinned and fallen short of the glory of God, believes in all persons being treated with respect as fellow creatures of God.

We however disagree that all people should have all the rights that law-abiding citizens have. We strongly state again that the bearer of every right must have certain responsibilities. When an individual disobeys the norm that society sets in order to protect itself, he or she usually acts wilfully and chooses a particular course of action. Every action has a reaction according to the laws of physics and equally so every human conduct has an attending set of consequences.

It is important to note that a person should ideally only suffer these consequences after a procedurally fair trial. At the stage of conviction, society pronounces that the individual has overstepped the mark.

While basic aspects such as the right not to be tortured to obtain information, the rights to a fair and speedy trial; to be properly informed of all charges; to be prepared for trial and to be legally represented goes without saying, it should be realised that one of the key functions of the civil government is to protect society and to adjudicate transgressions and cause recompense where necessary. The State, having received the sword of justice according to Romans 13, must also be a prohibiting factor to potential criminals.

Criminal elements should fear the wrath of society as evidenced by the state as this is the most effective way to combat crime: by preventing it in any number of fashions, including prevention and education. In this regard the abolition of the death penalty can only be lamented as short-sighted and incomprehensible. Civil government should educate citizens of the unwanted and unfavourable aspects of criminal behaviour including the temporary loss of freedom

We should however never give the impression that the criminal is to occupy a more favourable position, even constitutionally, than the victims of crime.

The ACDP proposes introducing a system, based on the biblical principle of restoration toward victims or their families *by the perpetrator.* Aspects of this is to be seen in the new act on national unity and reconciliation where the Committee on Rehabilitation has the function to investigate the possibility to recompense victims of political violence.

It is interesting that secular-minded persons incorporate a biblical principle in order to achieve unity and reconciliation nation-wide between perpetrators and victims concerning *past* crimes and yet refuse to recognise the wisdom of applying the principle in the present and the future.

It is however important that the perpetrator must repay his victim or affected individuals and not the state. This principle must however not fly in the face of God's law or bring about more resentment and hurt where the individual who has been convicted does not have money. That individual's energies can be utilised for the benefit of the aggrieved, if monetary remuneration is not an option. We see this principle in community service orders, but these partly miss the point, as the aggrieved do not receive a direct benefit.

Moving specifically to the wording of the right in the interim constitution, the following aspects need to be revisited.

§25 (1) Detained persons are given equal rights with sentenced prisoners. The ACDP proposes that society should show its abhorrence of criminal behaviour by greater delimitations on the right of convicted persons.

§25 (1) (a) The right to be informed in a particular language should be made subject to the availability of an interpreter.

§25 (1) (c) It is proposed that the right to a legal practitioner of one's choice should be delimited in accordance with the prompt availability of such an individual.

§25 (1) (d) Spouses must be defined as being in a marriage relationship with another of the opposite sex in a recognised legal and/or religious union. The need for the inclusion of "partner" falls away when the above definition is used.

§25 (2) This section should ideally fall away, following the practice in Japan where the police do not arrest persons unless they are virtually assured of success in convictions.

§25 (3) In keeping with the principle that the state must prove a person guilty while he or she is presumed innocent, wording to the effect of this section is acceptable, except for the provision of § 25 (3) (f) which means that when the death penalty is reintroduced, murderers will not receive this penalty due to the time when they committed their capital offences. The ACDP demands an exclusion of the reversionary principle where the ultimate legal sanction is concerned.

Application of the Right

2.1 Nature of the duty to be imposed on the State

The State must at all times recognise its paramount obligation of safeguarding a law-abiding society by the employment of State authority to deter criminal elements and by authorising the redressing of harm by the perpetrators thereof.

2.2 Application of the right to common law and customary law

Instances of *habeas corpus* and the *interdictum de hominem libero exhibendo* are examples where this right has crystallised in common law. Where common law and customary law adhere to Gods absolute Law, they are to take precedence over any other laws in conflict therewith.

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

The right should ideally only operate vertically, as the State ideally should be the only authority who can legally curb a citizens freedom in the fashion contemplated.

2.4 Who should be the bearers of the right ?

As only people can be arrested and detained physically, this right pertains to natural persons only.

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

Where the right becomes an abuse in the hands of perpetrators, it makes a mockery of the judicial and criminal system. Limitations are thus necessary in order to safeguard society.

- ANC

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OFFICE OF THE SECRETARY GENERAL

PRELIMINARY ANC SUBMISSION

THEME COMMITTEE 4 - ADMINISTRATIVE JUSTICE

The history of this country is one in which legislative and executive intervention has be 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.

PRELIMINARY ANC SUBMISSION

THEME COMMITTEE 4 - ACCESS TO COURTS

No right of access to court to have a dispute heard has existed in South Africa prior to the enactment of the Interim Constitution. Access to court was severely restricted under apartheid and often denied to the majority of citizens in our country. In addition, the legislature often acted to oust the jurisdiction of the courts further, leaving citizens with no or limited recourse to the courts in matters involving patent injustice or a violation of fundamental human rights.

It is for this reason that the ANC believes that a right of access to court must be entrenched in a Bill of Rights. The right to have a dispute heard by a court or similar tribunal fundamentally affects the extent to which a person is able to enforce the provisions of a Bill of Rights in his or her own life. This is not a matter which should be left open to be implied by the courts through the interpretation of provisions such as the right to due process of law.

1. Content of the right and its formulation

The Interim Constitution states in section 22 that:

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

Concerns have been raised as to what constitutes a "justiciable dispute". The matter has been a subject left open, often for varied interpretation, by the courts. The definition of a "justiciable dispute" is, we believe, a technical one and not one which will be easily interpreted by the average South African in reading the Bill of Rights.

The ANC is also of the view that careful consideration needs to be given to the cost implications for the state in constitutionally entrenching a right of this nature. In addition, the extent to which this clause as currently drafted may intersect with the

intended scope of section 24 needs careful consideration.

Given the concerns cited above, we believe that the intended meaning and scope of this provision must be clarified and an attempt made to re-word the clause in simple language.

2. Application of the right

2.1 The state has a duty to protect and enforce the right. This may include a duty to provide financial resources or legal representation to those who are limited in their exercise of this right by a lack of such resources.

2.2 The right shall bind the state and all social structures.

2.3 The bearers of this right shall be private persons of where appropriate, groups or social structures.

PRELIMINARY ANC SUBMISSION

THEME COMMITTEE 4 - RIGHTS OF DETAINED, ARRESTED AND ACCUSED PERSONS

It is during arrest or detention that a Bill of Rights needs perhaps most urgently to protect citizens. History has proven that some of the worst human rights violations have occurred in South Africa and other countries of the world whilst persons are detained or arrested. For this reason, provisions concerning the rights of detained, arrested and accused persons are essential components of a Bill of Rights.

1. Content of the right and its formulation

The Interim Constitution sets out in section 25(1) that every person who is detained, including sentenced prisoners, shall have the right to:

(a) 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;

© 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; and

(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 or medical practitioner of his or her choice; and

(e) challenge the lawfulness of his or detention in person before a court of law and to be released if such detention is unlawful.

In addition the Interim Constitution provides in section 25(2) for a person arrested in connection with any alleged crime to have the right:

may otherwise result. A qualification to this clause may for purely practical purposes require to be included in terms of which the nature and seriousness of the offence is weighed up against the possible consequences and/or prejudice which could result in the event that legal representation was not made available to any person;

2. The extent to which section 23 (freedom to information) impacts on the provisions of section 25 needs to be addressed (particularly the section 25(3) right to further particularity concerning a charge). Section 23 is in our view a provision directed at accountable government and not intended to be applicable to the pre-trial discovery procedure;

3. The practicality of the provision in section 25(2) relating to the release of arrested persons on bail "unless the interests of justice require otherwise" needs to be further considered;

4. The right to recourse to higher courts by way of appeal and review included in section 25(3) needs to comply with provisions relating to jurisdictional and access to all courts set out in the chapter pertaining to the courts and the administration of justice;

5. Provision may need to be made in terms of it is compulsory that all court proceedings be recorded.

2. Application of the right

2.1 The state has a duty to protect and enforce the right.

2.2 The right shall bind the state and all social structures.

2.3 The bearers of this right shall be private persons of where appropriate, groups or social structures.

* to be informed promptly in a language he or she understands of the right to remain silent and warned of the consequences of any statement which he or she might make;
* to be brought before an ordinary court of law and charged or informed of the reason for his or her detention, or released
* not to be compelled to make a confession or admission
* to be released from detention with or without bail, unless the interests of justice require otherwise.

Section 25(3) provides for an accused person to have the right to a fair trial which shall include the right:

* to a public trial before an ordinary court of law within a reasonable time of having been charged;
* to be informed with sufficient particularity as to the charge;
* to be presumed innocent and to remain silent during plea or trial, including the right not to testify during trial;
* to adduce and challenge evidence, and not to be a compellable witness against him or herself;
* to be represented by a legal practitioner of his or her choice, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights;
* not to be convicted of an offence which was not an offence at the time it was committed, and not to receive a punishment more severe than applicable to the crime committed;
* not to be tried twice for the same offence;
* to have recourse to higher courts by way of appeal or review;
* to be tried in a language he or she understands or to have proceedings interpreted to him or her;
* to be sentenced within a reasonable time after conviction.

Given the political manipulation of the past and the draconian legislation passed by Parliament in the apartheid era, the ANC believes that it is crucial to include all rights of the arrested, detained or accused person in the Bill of Rights.

However, the ANC believes that careful consideration needs to be given to the following issues:

1. Section 25(1)(c) is a carefully and, we believe, properly worded clause. However consideration needs to be given to the extent to which the state is burdened by the requirement that legal representation be provided in all cases in which "substantial injustice"

- 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 <u>accountability, responsiveness and openness</u>. (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 sate 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).

Therefore this guarantee of access to court provides a crucial procedural safeguard for the enforcement of all legal rights in the Constitution, not simply those relating to the Bill of Rights. It effectively eliminates "ouster clauses". The inclusion of the concept of "independent and impartial fora" recognises the important role which has been played and will increasingly be played in the future by tribunals particularly in the sphere of administrative justice.

The Democratic Party supports the retention and the wording of Section 22.

2. Application of the Right

There shall be a positive duty on the state to ensure that every person has access to impartial and independent fora for the settlement of legal disputes and that impediments such as legislative ouster clauses are not enacted.

3. Application to Common and Customary Law

Obviously this right would be applicable in the adjudication of both common law and customary law disputes.

4. Other Actors Bound

The primary obligation of this right binds the state and its actors not to prohibit or impede access to the courts. However, it would also have an indirect application on civil society. It should certainly also have application to juristic persons such as voluntary organizations, associations and even corporate enterprises in their disputes with other actors in civil society and the state.

5. Limitations of the Right

The normal limitations in Section 33 will apply.

The concept of justiciability contained in the current wording of the Bill will also act as a limitation since it is likely to limit an over-broad reach of the right to those disputes susceptible of resolution by court of law or tribunal (see further, Du Plessis and Corder, "South Africa's Transitional Bill of Rights" at 163).

DETAINED, ARRESTED AND ACCUSED PERSONS

1. Content of the Right

Section 25 of the Constitution provides:

"(1) Every person who has been 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."

It is correct that a Bill of Rights should contain detailed rights of accused, detained and arrested persons since these require particular safeguarding in view of the wide-ranging powers which the state has displayed in the past to curb individual freedom in these areas.

The Democratic Party is in general agreement with the wording of Section 25, except for the provisions of Section 25(2)(d) relating to bail.

While we believe that arrested persons are entitled to bail in carefully defined circumstances, we are extremely concerned with the extraordinary laxity of the lower courts in granting bail in clearly undesirable circumstances. Whether this is the fault of the general wording of Section 25(2)(d) or the failure of the courts or

prosecuting authorities to apply properly the limitations clause (Section 33), is unclear. Simultaneously with the discussion occurring in this Theme Committee, the Minister of Justice is in the process of introducing legislation which will have the effect, as we understand it, of tightening up the conditions for the granting of bail - which we fully support. We believe that this matter is of sufficient importance and urgency for an opinion to be obtained and for this section to be considered afresh so that a proper balance may be struck between the interests of society and the criminal justice system in the context of our crime-ravaged country on the one hand, and the individual bail applicant on the other.

We also believe an amendment should be considered to the current wording of Section 25(2)(d) which could prevent the granting of bail, as of right, to persons who are detained and arrested facing Schedule 1 offenses in terms of The Criminal Procedure Act. However, in view of the potentially draconian nature and misapplication of this we would prefer to await the outcome of the Minister of Justice's proposed bail revision statute before committing ourselves.

The rights contained in Section 25 are essential rights for any charter of fundamental rights since they are either direct or indirect manifestations of the rights to freedom of the person entrenched in Section 11(1). They are also manifestations of the right to security of the person, and entrench the notion of habeas corpus, a conspicuous feature of our common law, which years of security legislation has substantially eroded in the past.

Many of the rights contained under Section 25 are a progressive extension of the previous system pertaining in South Africa and they are to be heartily welcomed and their retention is strongly urged by the Democratic Party. For example, the right to legal representation (Section 25(1)(c) and the right of communication with and visits to detained persons (Section 25(1)(d) makes extensive provision for such communication visits which is to be welcomed.

Challenges to detention contained in Section 25(1)(e) which will ensure judicial scrutiny of any detention order is absolutely essential if South Africa is to revert to a rule of law jurisdiction under a Rechstaat.

The peremptory requirement for an arrested person to be brought before an "ordinary court of law", Section 25(2)(b) is of considerable significance since it will prevent the state from using so-called special courts to deal with selected offenders, particularly in matters relating to so-called "political subversion". One could comment at length on the other provisions of this section, suffice it to say that they are fundamentally necessary to ensure that when the liberty of the individual is removed it is only done so under carefully confined, codified and reasonable circumstances which are consonant with progressive jurisdictions throughout the world.

2. Application to Common and Customary Law

This right is primarily effective in the realm of criminal law which is essentially relevant to the law of criminal procedure which is effectively based on statute in South Africa. However, in so far as the common law and customary law contains any provisions relating to detained and arrested persons and any element of criminal trials, it should be applicable there as well.

3. Other Actors Bound

The right is primarily enforceable against the state and those exercising authority under it.

4. Bearers of the Right

By the nature of these rights natural persons should be the bearers of the rights contained under Section 25.

5. Limitations of the Right

We believe the rights contained in Section 25 should only be circumscribed or limited in the most tightly defined circumstances and therefore we support the higher entrenchment of the rights as contained in Section 33(1)(aa) in the Interim Constitution.

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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 right(s)

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.

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NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 4

ITEM 18: DETAINED, ARRESTED AND ACCUSED PERSONS

1. **Content of the right**

(a) The Present Section 25

Section 25 of the Constitution 1993 provides for the rights of detained, arrested and accused persons. Section 11(1) guarantees every person's right freedom and security of the person, which includes the right not to be detained without trial. The rights entrenched in section 25 can be seen as manifestations of the right protected in section 11.

The right of detained, arrested and accused persons are often, in many constitutions dealt with together, normally under the heading of the right to a fair trial or rights in courts. It is therefore understandable that the three categories of protected persons in section 25 overlap to some degree. We prefer the more detailed way in which section 25 guarantees the rights of the different categories of persons. The formulations are general, inclusive and simple, but will lead to certainty and will enhance its significance.

Section 25(1) provides certain rights which entitles detained persons to certain standards of treatment and to be detained under conditions consonant with human dignity. It also requires that the detained person be informed promptly of the reasons for his or her detention and allow for communication with and visits to a detained person. The detained persons can consult with his or her legal practitioner and can

challenge the lawfulness of his or her detention.

Section 25(2) provides that an arrested person shall, in addition to the rights which he or she has as a detained person, have the right to remain silent and to be informed of the consequences of making nay statement. Furthermore it guarantees that the arrested person be brought before a court within 48 hours after arrest and not to be compelled to make a confession or admission which could be used in evidence against him or her. Lastly it deals with his or her release from detention and the setting of bail.

In section 25(3) the concept of a fair trial is guaranteed and some conditions for fairness listed. This is not an exhaustive list, but emphasise the importance of these rights.

(b) **Proposal: A qualified Exclusionary rule must be written into the final Constitution**

However, we wish in this submission to focus on one particular aspect, namely the admissibility of unconstitutionally obtained evidence, which may require an amendment to section 25.

The interim Constitution does not address the issue concerning the admissibility of unconstitutionally obtained evidence. Section 25(2)(c) - which deals with the inadmissibility of compelled confessions and admissions - merely confirms the common law. It does not address the wider and fundamental question concerning the admissibility/inadmissibility of evidence obtained in breach of the constitutionally guaranteed rights as set out in Chapter 3 of the interim Constitution. A rule which excludes unconstitutionally obtained evidence is commonly known as "the exclusionary rule". This term is

1.1 The South African Law Commission (hereafter "SALC") made the following recommendation in paragraph 7.373 of its *Interim Report: Project 58: Group and Human Rights* (August, 1991) at 415:

> "Every accused person has the right... not to be convicted or sentenced on the ground of evidence so obtained or presented as to violate any of the rights under this Bill of the accused person or of the witness concerned or of any other person, unless the court in the light of all the circumstances and in the public interest otherwise orders...."

1.2 A similar recommendation was made in paragraph 4.184 of the SALC's final report, dated October 1995.

1.3 According to Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* (1994) paragraph 19.4.8 (at 177-178) two of the members of the Technical Committee on Fundamental Rights (at Kempton Park) were "very much in favour" of adding the following paragraph to section 25(3).

> "Every accused person shall have the right to the exclusion during his or her trial of evidence which was obtained in violation of any right entrenched in this Chapter. Provided that the court must be convinced that the admission of such evidence will bring the administration of justice in disrepute."

1.4 However, the majority of the Technical Committee opposed the inclusion of such a qualified exclusion of such a qualified exclusionary

rule. According to Du Plessis & Corder *op cit* at 178 the reasons were as follows:

> "It ... appeared from bilateral discussions that there were differences of opinion among the negotiating parties themselves. The argument was that even a restricted constitutionalization of the exclusionary rule could have a detrimental effect on the prevention and combating of crime during what could be an unstable period of political

1.4 However, the majority of the Technical Committee opposed the inclusion of such a qualified exclusionary rule. According to Du Plessis & Corder *op cit* at 178 the reasons were as follows:

> "It... appeared from bilateral discussions that there were differences of opinion among the negotiating parties themselves. The argument was that even a restricted constitutionalization of the exclusionary rule could have a detrimental effect on the prevention and combating of crime during what could be an unstable period of political transition. This latter view, which eventually prevailed, was also supported in a submission from an Attorney-General"

1.5 The position in terms of our common law, is far from clear. In *S v Nel* 1987 4 SA 950 (W) evidence of private telephone conversations was admitted despite the fact that this evidence had been obtained through illegal "tapping". But in *S v Hammer & others* 1994 2 SACR 496 (C) evidence of private correspondence was excluded because there had

been an unlawful breach of the accused's privacy by a policeman who had handed to the Attorney-General the accused's letter written by the latter to his mother whilst he was in custody. In this case the court relied on the common law and specifically pointed out that, having reached its decision on the basis of the common law, it was not necessary to make a decision on an alternative submission by counsel for the accused to the effect that admission of the accused's letter would infringe his constitutional right to privacy, which included the right not to be subject to violation of his private communications as provided for by s 13 of the interim Constitution. It is of great significance that the court in *S v Hammer & others supra* excluded evidence of the letter despite the fact that the accused was charged with murder. No reference was made to *S v Nel supra*, and the fact of the matter is that *S v Hammer & others supra* and *S v Nel supra* cannot be reconciled.

1.6 With the common law in such disarray, it is essential that the final Constitution should not be silent on the issue concerning the admissibility/inadmissibility of unconstitutionally obtained evidence. There is a risk that in an attempt to protect constitutionally guaranteed rights, courts might develop a **rigid** exclusionary rule if no guidance is given **in the Constitution** itself. This, indeed, is what happened in the United States. At the same time, it is equally true that in the absence of a constitutionally qualified exclusionary rule, courts might cling to the common law inclusionary approach as set out in *S v Nel supra*. The danger of such an inclusionary approach is that constitutional rights may become meaningless. It has been said (Van der Merwe "Unconstitutionally Obtained Evidence: Towards a Compromise between the Common Law and the Exclusionary Rule" 1992 *Stellenbosch Law Review* 173 184, emphasis in the original):

"But if the police and prosecuting authorities should in their detection and investigation of crime be allowed to ride roughshod over rights guaranteed in a Bill of Rights and *if courts of law were routinely to receive the evidence obtained in this manner,* the following spectacle will ensure. Those rights so carefully identified and so prudently embodied in a Bill of Rights, will to a large extent be stripped of their status as constitutional guarantees. In *Weeks v United States* Day J stated:

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense *[SIC]*, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution".

1.7 The essential purpose of the **proposed general right of an accused to have unconstitutionally obtained evidence excluded**, is to ensure that other constitutional rights are protected - especially the right to personal privacy which in terms of section 13 of the interim Constitution includes the right to not be subject to searches of one's person, home or property, the seizure of private possessions or the violation of private communications. But if the trend as set in *S v Hammer & others* were to continue and if this decision were to be

improperly expanded by other courts, the criminal justice system will suffer and fall into disrepute. The approach should there be:

(a) to accept the need and validity of an exclusionary rule;
(b) to qualify the ambit of such an exclusionary rule; and
(c) to write (a) and (b) into the Constitution (as a sub-section of the present section 25).

1.8 In describing the ambit of the exclusionary rule, it would be best to use the term "public interest"as was done by SALC (see paragraph 1.1 *supra*) or to use the term "disrepute". The latter term was used in *S v Hammer & other supra* 500a-b and is also found in the qualified exclusionary rule contained in section 24(2) of the Canadian *Charter of Rights and Freedoms*, which provides that if a Canadian court is satisfied that evidence was obtained in a manner which infringed or denied any rights or freedoms guaranteed by the Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of such evidence would bring the administration of justice into disrepute. Bryant et al "Public Attitudes Toward the Exclusion of Evidence: Section 24(2) of the Canadian Charter of Rights and Freedoms" (1990) 69 *Canadian Bar Review* 1 at 5 state as follows:

> " The core idea is simple. An effective and stable legal system must enjoy the support of the public. To admit unconstitutionally obtained evidence where that would bring the system into disrepute in the eyes of the public would be to compromise the public's support for the legal system. Conversely, to exclude evidence under circumstances where this would bring the

administration of justice into disrepute would again undermine public support for the legal system. Hence the 'compromise' reflected in section 24(2)".

1.9 Section 24(2) of the *Canadian Charter* strikes a balance between compering interests and identifies the public's viewpoint as an important criterion. It should be noted that section 24(2) seemingly starts with a basic inclusionary approach which is then qualified in the sense that exclusion must take place if it is established that, having regard to all the circumstances, the **admission** of such evidence would bring the administration of justice into disrepute. In at least one South African case (*S v Melani* CC9/93, Eastern Cape, unreported judgment 29 March 1995) the Canadian approach was to a large extent followed by the court which came to the following conclusion (at 23 of the typed record, my emphasis): "Gevolglik het ek tot die slotsom geraak dat die **uitsluiting** van getuienis oor die beweerde aanwysing die **regsadministrasie in diskrediet** sal bring en tot oneer sal strek...." The evidence was **admitted**. It is submitted that this kind of approach should be constitutionalized to avoid a situation where (other) courts might opt for a rigid exclusionary rule along the lines of the one which existed in USA for many years and in respect of which the Supreme Court of the USA had to create several expectations over the past two decades. These expectations became necessary because of increased public and judicial dissatisfaction with the rigid exclusionary rule which seemed to favour the accused at the expense of the public. South Africa can avoid the period of uncertainty by writing a discretionary exclusionary rule into the final Constitution. Such a discretion is also necessary in view of the fact that infringement of a constitutional right can lie anywhere on a scale ranging from the trivial, the technical, the inadvertent to the gross, violent, deliberate and the "cruel".

2 APPLICATION OF THE RIGHT

2(a) Nature of duty on the state

2(a).1 The state's officials (largely those responsible for the prevention, detection, investigation and prosecution of crime) will be required to perform their tasks in such a way that they do not infringe the constitutional rights of others, because their failure so to conduct themselves, will in principle lead to the exclusion of evidence.

2(a).2 This does not impose any improper or onerous task on the state. The exclusionary rule merely confirms, first, that the state and its officials are bound by the Constitution and, secondly, that they should not expect to gain anything should they ignore the constitutional rights of the individual.

2(b) Application: Common law and indigenous law

A constitutionally qualified exclusionary rule will clear up the present uncertainty regarding the position at common law, and should, furthermore, have no detrimental effect on other common law and indigenous law rights.

2(c) Other actors bound by the right

No actors other than the state will be bound by this right

2(d) Bearers of the right

In its prosecution of the accused, the state should also in principle not be allowed to rely on evidence unconstitutionally obtained from

persons other than the accused. SALC's proposal (see paragraph 1.1 *supra) provides for this situation. The state is constitutionally bound to respect the constitutional rights of all bearers thereof - and not merely the accused.*

2(e) Limitation of the right

The right as proposed already has its own built-in limitation: Unconstitutionally obtained evidence is excluded unless the court admits such evidence "in the right of all the circumstances and in the public interest..." (see paragraph 1.1 *supra*)

The right to have unconstitutionally obtained evidence excluded must, however, also fall under the general limitation clause as presently contained evidence excluded must, however, also fall under the general limitation clause as presently contained in section 33. This is necessary in order to ensure that the right under discussion remains protected: The Legislator should not have the power to determine that unconstitutionally obtained evidence shall be **admissible** in all instances. An nor should the Legislator be permitted to determine that unconstitutionally obtained evidence shall be **inadmissible** for all instances.

3 WORDING

The wording adopted by SALC (see paragraph 1.1 *supra*) should be followed. The words "in the public interest" are wide enough for a court to consider the following question as well: Will the **exclusion** of the evidence bring the administration of justice into disrepute? This

is then very similar to the Canadian test where the question is whether the **admission** of the evidence will bring the administration of justice into disrepute.

NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 4

ITEM 22: ACCESS TO COURT

ACCESS TO COURT

1 Content of the right

Section 22 of the Constitution 1993 provides that:

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

This section is most commendable and provides a crucial procedural safeguard for the enforcement of all legal rights and not only those included in the Chapter on Fundamental Rights.

It is a substantive right of access to a court of law and also includes other independent and impartial forums. It recognises the important role that can be played by the various tribunals.

2. Application of the right

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 imposes a positive duty on the State. The State must provide courts and other independent and impartial forums to which citizens will have access. It places a positive duty on the State not to exclude jurisdiction of the courts.

2.2 *Common law and customary law*

The right should without doubt apply to common law and customary law:

2.3 *Actors other than the State*

The right operates vertically against the State. The relationship between individuals in this regard is governed by the common law and other statutes. In as much as an individual relationship can affect this right, the individual will be bound by this right.

2.4 *Bearers of the right*

Every person, including a juristic person, is the bearer of this right.

2.5 *Limitation of the right*

In terms of the Constitution 1993, the stricter limitation test of section 33(1), namely that the limitation must also be necessary, does not apply to this right. Any legislation which may regulate or limit the right in any way must always be subject to the criteria laid down in the general limitations clause.

The Wording

We propose that the wording of the present section 22 be retained.

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:

<u>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</u>

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 ow 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 administratice 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

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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.

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MP

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PRELIMINARY SUBMISSIONS OF THE PAC ON ACCESS TO COURTS

This is an important right which guarantees all persons access to a forum where their disputes can be resolved. Further, it also imposes a positive obligation on the state to make access to such forums a reality.

Content of the Right

The right of every person to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.

Other related aspects.

1. This right can be claimed by both natural persons and juristic persons.

2. It binds the state. As stated above, it does not only accord every person some procedural guarantees but does also impose positive duties on the state.

3. This right can be limited and suspended.

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PRELIMINARY SUBMISSIONS OF THE PAC ON THE RIGHTS OF DETAINED, ARRESTED AND ACCUSED PERSONS

These rights are important especially in the light of our recent past. It is our contention that the distinction between arrested, convicted and detained persons is artificial and all the rights of arrested persons should apply to detained persons unless we still want to introduce some form of "Lawful detention without trial." Of course, the rights of accused persons are different.

Content of the rights.

1. We support S25 (1) and (2) of the Interim Constitution in relation to the rights of detained, convicted and arrested persons. However, we suggest that with regard to detained persons under S25 (1), they should also be entitled to be warned of the consequences of making a statement and should be brought before an ordinary court within 48 hours. This will definately ensure the prohibition of detention without trial. As S25 (1) stands, it does allow "Lawful detention without trial." All detentions must be justified in a court of law within a reasonable time.

2. S25 (3) dealing with the rights of accused persons has our support. However, S25 (1) (c) and S25 (3) (e) which impose a very restricted duty on the state to provide legal assistance to a suspect or an accused person may have to be reviewed. With the abolition of the death penalty, the pro deo system is gone. We need to ensure that litigants, especially indigent persons who face serious offences are not unjustly denied Legal representation.

Other aspects of these rights.

1. They can be claimed by human beings.
2. They bind the state.
3. They can be limited.
4. They can be suspended under very strict conditions.

R K Sizani - MP