

AFRICAN NATIONAL CONGRESS (ANC)

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, 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.

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;
- (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."

As set out above, the ANC believes that this right as formulated above should be amended to include a limitation making it subject to the "necessary practicalities of governance".

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 and all social structures.

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

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 the 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. Accordingly, an attempt must be made to re-word this provision 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.

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 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 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 my alleged crime to have the right:

- * 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, in addition to the rights provided for in the Interim Constitution the ANC is of the view that the right to have proceedings recorded should be a matter constitutionally entrenched.

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.