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CONSTITUTIONAL ASSEMBLY

SECTION 35(1) AND (2)

MEMORANDUM

TO: Members of the Constitutional Committee Sub-committee
FROM: Executive Director
DATE: 18 March 1996
RE: Panel and Tech Comm 4 Memorandum on "*Section 35(1) and (2)*"

We enclose for your consideration a document produced by the Panel of Experts and Technical Committee 4 on "*Section 35(1) and (2)*"

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PANEL OF CONSTITUTIONAL EXPERTS
AND TECHNICAL COMMITTEE 4

MEMORANDUM
SECTION 35(1) AND (2)

15 March 1996

Subject to certain reservations, the following formulation was agreed upon on 5 March 1996:

- “35. (1) The rights in the Bill of Rights may be limited by or pursuant to law of general application only to the extent that the limitation is [demonstrably] justifiable in an open and democratic society based on dignity, freedom and equality and limits the right as little as is reasonably possible.
- (2) Any limitation in terms of subsection (1) must take into account the nature of the right and -
- (a) the importance of the purpose of the limitation;
 - (b) the nature and extent of the limitation; and
 - (c) whether the limitation can achieve its purpose.”

This Memorandum addresses the following: 1. the phrase “by or pursuant to law”; 2. whether the brackets should be removed from “[demonstrably]”; 3. whether the phrase “and limits the right as little as is reasonably possible” should be moved to subsection (2); and 4. whether subsections (1) and (2) should be combined.

1. “by or pursuant to law”

Similar provisions in other bills of rights and international instruments sometimes state that rights may be limited:

“as determined by law” (eg article 29(2) of the Universal Declaration of Human Rights and article 4 of the International Covenant on Social, Economic and Cultural Rights);

“in accordance with law” (eg article 30 of the American Convention on Human Rights and article 12 of the International Covenant on Civil and Political Rights);

“pursuant to a law / *auf grund eines Gesetzes*” or “by or pursuant to a law / *durch Gesetz oder auf grund eines Gesetzes*” (sections 10(2) and 11(2) of the German Constitution).

To achieve consistency throughout the constitutional text we recommend the replacement of the phrase “by or pursuant” by “in terms of law” because the latter covers both “by law” and “under / pursuant to law”.

2. [demonstrably]

The word “demonstrably” appears in section 1 of the Canadian Charter: “... reasonable limits as can be *demonstrably* justified in a free and democratic society”. The Canadian courts have employed the whole phrase (and not individual words in it) to develop the elements of the proportionality test which are contained in section 35(1) and (2) of the South African draft. The word “demonstrably” is not listed as a separate entry in the indexes of

standard text books on Canadian constitutional law, and it has received hardly any attention in Canadian court decisions. The following *dicta* from two well-known Canadian decisions could, however, be important for our purposes.

In *R v Oakes* (1986) 26 DLR (4th) 200 227 it was stated: "The presumption is that the rights and freedoms are guaranteed unless the party invoking s.1 can bring itself within the exceptional criteria which justify their emphasis. This is further substantiated by the use of the word 'demonstrably' which clearly indicates that the onus of justification is on the party seeking to limit. *Hunter v Southam Inc, supra.*" And in *Hunter v Southam Inc* (1984) 9 CRR 355 374 it was stated: "The phrase 'demonstrably justified' puts the onus of justifying a limitation on a right or freedom set out in the Charter on the party seeking to limit."

The Canadian approach in respect of the onus of justifying the limitation of rights has been approved and is followed by the South African Constitutional Court (see, for example, *S v Makwanyane and Another* 1995 (3) SA 391 (CC) 102; *Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC) par 44). Because the Constitutional Court reached this conclusion in terms of section 33(1) of the Interim Constitution which does not contain the word "demonstrably", the word "demonstrably" is not, and need not be determinative of the question relating to onus.

Recommendation: That "demonstrably" not be included in section 35(1).

3. Whether the phrase "and limits the right as little as is reasonably possible" should be moved to subsection (2).

3.1 In all systems the least restrictive measure test ("limiting the rights as little as reasonably possible") is an element of the proportionality principle. (The other elements are contained in section 35(2).)

3.2. As explained in the previous memorandum, the elements of the proportionality principle have been judicially developed in other systems for the purposes of giving content to broadly phrased limitation requirements. In section 35(1), the phrase "[demonstrably] justifiable in an open and democratic society based on freedom, equality and human dignity" constitutes the broadly phrased limitation requirement.

3.3 Although the elements of the proportionality principle are "tools" for applying the general requirement, they must always be applied within the framework of the general requirement - the nature of the right *in a open and democratic society* ..., the importance of the purpose of the limitation *in a open and democratic society* ..., etc (Cf *S v Makwanyane* (1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC) at par 104 per Chaskalson P: "In the balancing process, the relevant considerations will include the nature of the right that is limited, *and its importance to an open and democratic society based on freedom and equality*; the purpose for which the right is limited and the *importance of that purpose to such a society...*" - emphasis added.) This particularly also applies to the least restrictive measure test - it must be determined whether the limitation limits the right as little as is reasonably possible *in an open and democratic society based on ..*"

3.4 Providing for the least restrictive measure test in subsection (1), and not in subsection

(2), creates the impression that it forms part of the general requirement. This will cause the following problems which should be avoided if possible:

- (a) There could be confusion on whether the test should be applied within the framework of "what is justifiable in an open and democratic society ...". As explained in 3.3 above, it is essential that it should be applied in this way.
- (b) "Limiting the rights as little as reasonably possible" as part of the general requirement, cannot practically form part of the framework within which the elements in section 35(2) must be applied; as indicated in 3.1 above, they have been developed as complementary, but distinct elements. Trying to distinguish between one part of a general requirement which forms part of the framework within which the elements in section 35(2) must be applied, and another part which does not, but to which the first part must be applied, is most confusing.

3.5 Moving "limiting the rights as little as is reasonably possible" to section 35(2) will *not* detract from its importance as an essential element of the proportionality test. The proposed formulation provides that the limitation *must* limit the right as little as is reasonably possible.

Recommendation: That the least restrictive measure test in section 35(1) be moved to section 35(2), as follows:

- (2) *Any limitation in terms of subsection (1) must -*
 - (a) *be able to achieve its purpose;*
 - (b) *limit the right as little as is reasonably possible; and*
 - (c) *take into account -*
 - (i) *the nature of the right;*
 - (ii) *the importance of the purpose of the limitation; and*
 - (iii) *the nature and extent of the limitation.*

4. Whether subsections (1) and (2) should be combined.

As indicated in 3.4 above, the provisions of the general limitations should be applied holistically. The removal of subsection 3, as agreed upon, would result in section 3 dealing only with elements of limitation and the division in subsection (1), (2) and (3) could be retained.

5. The proposed new formulation for section 35 is as follows:

Limitation of Rights

35. (1) The rights in the Bill of Rights may be limited in terms of law of general application only to the extent that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom.
- (2) Any limitation in terms of subsection (1) must -
 - (a) be able to achieve its purpose;
 - (b) limit the right as little as is reasonably possible; and
 - (c) take into account -

- (i) the nature of the right;
- (ii) the importance of the purpose of the limitation; and
- (iii) the nature and extent of the limitation.

(3) Except as provided in subsection (1) and (2) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.