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CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE**

**THEME COMMITTEE FOUR
FUNDAMENTAL RIGHTS**

**REPORT ON STATES OF
EMERGENCY**

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THEME COMMITTEE 4
-FUNDAMENTAL RIGHTS

SCHEMATIC REPORT ON
STATES OF EMERGENCY

N O	CONST. PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
1.	II, IV, VI, VII	Nature of right (Application of Constitutional Principle II)	The strict control of the declaration of a state of emergency and the suspension of fundamental rights during such a state of emergency is a universally accepted principle of international human rights law.		

N O	CONST. PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
2.		<p>CONTENT AND SCOPE OF THE SECTION OF THE CONSTITUTION, GOVERNING STATES OF EMERGENCY</p>	<p>There should be a clause in the Constitution setting out in detail the nature and limits of all powers which may be exercised to restrict fundamental rights and freedoms during a state of emergency. Such a clause prevails over all common law rules and prerogative powers of the executive relating to emergency powers.</p> <p>A state of emergency should be proclaimed prospectively under an Act of Parliament.</p> <p>The declaration of a state of emergency and any action taken, including any regulation enacted, in consequence thereof shall be of force for a limited period of time unless extended for a fixed period of time, or consecutive fixed periods, by a resolution of the National Assembly adopted by a majority of at least two-thirds of all its members.</p>	<p>Outstanding¹ Issues</p> <p>The jurisdictional requirements for the declaration of a state of emergency: A state of emergency may only be declared "when the life of the nation is threatened" (article 4, International Covenant on Civil and Political Rights) - PAC.</p> <p>The periods of parliamentary supervision of the declaration of a state of emergency and emergency measures: The declaration of a state of emergency shall be of force for a period of not more than 14 days, unless it is extended for a period of not longer than 60 days or consecutive periods of not longer than 60 days at a time, by resolution of the National Assembly adopted by a two-thirds majority of all its members - PAC.</p>	
1	<p>It should be noted that items marked "Outstanding" do not signify disagreement amongst political parties or contention. Parties felt that these matters could best be dealt with at the level of the Constitutional Committee, where negotiation could take place.</p>				

N O	CONST. PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
2.			<p>Any superior court shall be competent to enquire into the validity of a declaration of a state of emergency, any extension thereof, and any action taken, including any regulation enacted, under such declaration.</p> <p>Derogations from the fundamental rights in the Constitution may occur subject to strictly circumscribed criteria.</p> <p>There should be a "core" category of rights and safeguards from which no derogations are permitted during a state of emergency.</p>	<p>The constitutional provisions relating to the jurisdiction of the superior courts and the Constitutional Court to enquire into the validity of the declaration of a state of emergency and emergency measures should be consistent [compare s.34(3) with s.98(2)(c) read with s.98(3)] - FF.</p>	

N O	CONST. PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
2.			<p>The creation of retrospective crimes or the indemnification of the state or of persons acting under its authority for unlawful actions during a state of emergency shall under no circumstances be permitted.</p> <p>Special safeguards and guarantees should be provided for persons detained under a state of emergency.</p>	<p>The necessity of a "suspensions" clause during a state of emergency [s.34(4)] and its relation with the general limitations clause [s.33] should be investigated by the Technical Committee. The terms, "suspension" and "suspended" in section 34 should be replaced with "limitation" and "limited" wherever necessary - NP. The NP further suggest that provision should only be made for the "special limitation" during emergencies of the rights protected in sections 11(2) and 25 of the interim Constitution in view of the safeguards provided in section 34. The remaining rights could be limited in accordance with a general limitations clause such as s.33. The replacement of section 34(4) should be drafted to clarify that it is to be read subject to the provisions of s.34(5)(c) [the list of non-derogable rights].</p>	

N O	CONST. PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
2.				<p>There should be an explicit duty on the state to ensure that all measures and regulations are enacted publicly and in a manner in which citizens will be aware of the parameters of emergency measures - ANC.</p> <p>The criteria for "suspensions"\ "special limitations"\ "derogations":</p> <p>* Derogations from rights which are not expressly declared to be non-derogable in the Constitution should be permissible -</p> <p>a) only in consequence of a state of emergency "necessarily and properly declared to protect the security of South Africa";</p> <p>b) "to the extent necessary to restore the security of the nation and the safety of South Africa's people";</p> <p>c) only to the extent that such derogation is consistent with applicable international legal norms - ANC.</p>	

N O	CONST. PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
2.				<p>The suspension of rights during a state of emergency may only occur "in consequence of the declaration of a state of emergency and only to the extent, strictly required by the exigencies of the situation" (article 4, International Covenant on Civil and Political Rights) - PAC.</p> <p>The list of rights which may not be suspended during a state of emergency ("non-derogable" rights):</p> <p>The Freedom Front proposed the following additions to the list in section 34(5) of the interim Constitution -</p> <ul style="list-style-type: none"> ● equality before the law and equal protection of the law ● freedom of speech & expression ● freedom of assembly, demonstration and petition ● access to court or another impartial and independent forum ● access to information ● education rights ● language and cultural rights 	

N O	CONST. PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
2.				<p>Consideration should also be given to the inclusion of certain political rights, e.g., the right to vote (section 21).</p> <p>The Freedom Front also proposed that the following rights should not be included in the list of non-derogable rights:</p> <ul style="list-style-type: none"> ● right to life ● right to fair labour practices and the right to form and join trade unions and employers organisations ● limitation of rights <p>There should be a duty on the state to ensure adequate legal redress in respect of any claim arising out of the application of the state of emergency. Consequently the right of access to "a court of law or, where appropriate, another independent and impartial forum" [s.22, interim Constitution] should not be subject to derogation during a state of emergency - ANC.</p>	

N O	CONST. PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
2.				<p>The right to "equality before the law and to equal protection of the law" [s.8(1), interim Constitution] should be included in the list of non-derogable rights - NP.</p> <p>The following should be added to the list in section 34(5) of the Interim Constitution:</p> <ul style="list-style-type: none"> ● freedom from medical or scientific experimentation ● the right not to be subject to retroactive criminal penalties - PAC. <p>Sections 34(6) and (7) of the Interim Constitution should be reformulated and reinforced by the inclusion of the following additional safeguards for detained persons:</p> <ul style="list-style-type: none"> ● protection against incommunicado detention; ● right to humane treatment; ● protection against interrogation abuses; ● right to challenge the lawfulness of one's detention at any stage of that detention - PAC 	

N O	CONST. PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
3.		Application of the right (Nature of Duty)	The State shall be under an obligation to respect all the provisions of the emergency clause, and to provide the necessary remedies and safeguards against an abuse of powers.		
4.		Application of the right (To common and customary law)	The clause governing states of emergency in the Constitution shall prevail over all rules of common law and customary law.		
5.		Bearers of the right	Natural persons are the primary bearers of the right.		

THEME COMMITTEE 4 FUNDAMENTAL RIGHTS

REPORT ON *STATES OF EMERGENCY*

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

PART I

MATERIAL CONSIDERED BY THE THEME COMMITTEE

1. Submissions received from political parties (in alphabetical order):

- ACDP
- ANC
- DP
- FF
- NP
- PAC

2. Submissions received from the public and civil society²:

- 2.1 Individuals (in alphabetical order)
- 2.2 Organisations (in alphabetical order)
- 2.3 Government structures\ institutions (in alphabetical order)

3. Technical Committee reports:

None to date

4. Relevant Constitutional Principles

II, IV, VI, VII

3 A complete listing of all submissions received from the public and civil society is included in the document entitled "Public Submissions". The document is being circulated separately.

PART II

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

1.1 Non-contentious Issues

1.1.1 The strict control of the declaration of a state of emergency and the suspension of fundamental rights during such a state of emergency is a universally accepted principle of international human rights law.

2. CONTENT AND SCOPE OF THE SECTION OF THE CONSTITUTION, GOVERNING STATES OF EMERGENCY

2.1 Non-Contentious Issues

2.1.1 There should be a clause in the Constitution setting out in detail the nature and limits of all powers which may be exercised to restrict fundamental rights and freedoms during a state of emergency. Such a clause prevails over all common law rules and prerogative powers of the executive relating to emergency powers.

2.1.2 A state of emergency should be proclaimed prospectively under an Act of Parliament.

2.1.3 The declaration of a state of emergency and any action taken, including any regulation enacted, in consequence thereof shall be of force for a limited period of time unless extended for a fixed period of time, or consecutive fixed periods, by a resolution of the National Assembly adopted by a majority of at least two-thirds of all its members.

2.1.4 Any superior court shall be competent to enquire into the validity of a declaration of a state of emergency, any extension thereof, and any action taken, including any regulation enacted, under such declaration.

2.1.5 Derogations from the fundamental rights in the Constitution may occur subject to strictly circumscribed criteria.

2.1.6 There should be a "core" category of rights and safeguards from which no derogations are permitted during a state of emergency.

2.1.7 The creation of retrospective crimes or the indemnification of the state or of persons acting under its authority for unlawful actions during a state of emergency shall under no circumstances be permitted.

2.1.8 Special safeguards and guarantees should be provided for persons detained under a state of emergency.

2.2 Outstanding² Issues

2.2.1 The jurisdictional requirements for the declaration of a state of emergency: A state of emergency may only be declared "when the life of the nation is threatened" (article 4, International Covenant on Civil and Political Rights) - PAC.

2.2.2 The periods of parliamentary supervision of the declaration of a state of emergency and emergency measures: The declaration of a state of emergency shall be of force for a period of not more than 14 days, unless it is extended for a period of not longer than 60 days or consecutive periods of not longer than 60 days at a time, by resolution of the National Assembly adopted by a two-thirds majority of all its members - PAC.

2.2.3 The constitutional provisions relating to the jurisdiction of the superior courts and the Constitutional Court to enquire into the validity of the declaration of a state of emergency and emergency measures should be consistent [compare s.34(3) with s.98(2)(c) read with s.98(3)] - FF.

2.2.4 The necessity of a "suspensions" clause during a state of emergency [s.34(4)] and its relation with the general limitations clause [s.33] should be investigated by the Technical Committee. The terms, "suspension" and "suspended" in section 34 should be replaced with "limitation" and "limited" wherever necessary - NP. The NP further suggest that provision should only be made for the "special limitation" during emergencies of the rights protected in sections 11(2) and 25 of the interim Constitution in view of the safeguards provided in section 34. The remaining rights could be limited in

² It should be noted that items marked "Outstanding" do not signify disagreement amongst political parties or contention. Parties felt that these matters could best be dealt with at the level of the Constitutional Committee, where negotiation could take place.

accordance with a general limitations clause such as s.33. The replacement of section 34(4) should be drafted to clarify that it is to be read subject to the provisions of s.34(5)(c) [the list of non-derogable rights].

2.2.5 There should be an explicit duty on the state to ensure that all measures and regulations are enacted publicly and in a manner in which citizens will be aware of the parameters of emergency measures - ANC.

2.2.6 The **criteria** for "suspensions" \ "special limitations" \ "derogations":

2.2.6.1 Derogations from rights which are not expressly declared to be non-derogable in the Constitution should be permissible -

a) only in consequence of a state of emergency "necessarily and properly declared to protect the security of South Africa";

b) "to the extent necessary to restore the security of the nation and the safety of South Africa's people";

c) only to the extent that such derogation is consistent with applicable international legal norms - ANC.

2.2.6.2 The suspension of rights during a state of emergency may only occur "in consequence of the declaration of a state of emergency and only to the extent, strictly required by the exigencies of the situation" (article 4, International Covenant on Civil and Political Rights) - PAC.

2.2.7 The **list of rights which may not be suspended** during a state of emergency ("non-derogable" rights):

2.2.7.1 The Freedom Front proposed the following additions to the list in section 34(5) of the interim Constitution -

- equality before the law and equal protection of the law [s.8(1)]
- freedom of speech and expression [s.15]
- freedom of assembly, demonstration and petition [s.16]

- the right of access to court or another impartial and independent forum [s.22]
- the right of access to information [s.23]
- the right to education [s.32]
- language and cultural rights [s.31]

Consideration should also be given to the inclusion of certain political rights, e.g., the right to vote (section 21).

The Freedom Front also proposed that the following rights should not be included in the list of non-derogable rights:

- the right to life [s. 9]
- the right to fair labour practices and the right to form and join trade unions and employers organisations [s. 27(1) and (2)]
- the limitation of rights [s. 33(1) and (2)]

2.2.7.2 There should be a duty on the state to ensure adequate legal redress in respect of any claim arising out of the application of the state of emergency. Consequently the right of access to "a court of law or, where appropriate, another independent and impartial forum" [s.22, interim Constitution] should not be subject to derogation during a state of emergency - ANC.

2.2.7.3 The right to "equality before the law and to equal protection of the law" [s.8(1), interim Constitution] should be included in the list of non-derogable rights - NP.

2.2.7.4 The following should be added to the list in section 34(5) of the Interim Constitution:

- freedom from medical or scientific experimentation
- the right not to be subject to retroactive criminal penalties

- PAC.

2.2.8 Sections 34(6) and (7) of the Interim Constitution should be reformulated and reinforced by the inclusion of the following additional safeguards for detained persons:

- protection against incommunicado detention;
- the right to humane treatment;
- protection against interrogation abuses;
- the right to challenge the lawfulness of one's detention at any stage of that detention - PAC

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

3.1 Non-contentious Issues

3.1.1 The State shall be under an obligation to respect all the provisions of the emergency clause, and to provide the necessary remedies and safeguards against an abuse of powers.

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

4.1 Non-contentious Issues

4.1.1 The clause governing states of emergency in the Constitution shall prevail over all rules of common law and customary law.

5 BEARERS OF THE RIGHT

5.1 Non-contentious Issues

5.1.1 Natural persons are the primary bearers of the right.

ADDENDUM

PARTY SUBMISSIONS

- ACDP

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

STATE OF EMERGENCY

Section 34 of the Constitution spells out the grounds on which the declaration of a State of Emergency is warranted -

The ACDP believes in principle, that, when necessary, a State of Emergency is justified, provided that we adhere to certain basic conditions that are enumerated in Section A of the International Law Association's Paris Minimum Standards of Human Rights Norms in a State of Emergency.

Section A, entitled **Emergency: Declaration Duration and Control**, establishes the general principles upon which emergency powers should be instituted and further guards against the abuse of these powers.

These criteria are the:

- temporary nature of a State of Emergency
- measures of control
- integrity of the institutional structures

The ACDP supports the spirit of these conditions which are enunciated in the following manner in paragraphs 2, 3, 5 and 6 of Section A:

2. **The constitution of every state shall define the procedure for declaring a state of emergency; whenever the executive authority is competent to declare a state of emergency, such official declaration shall always be subject to confirmation by the legislature, within the shortest possible time.**

3.
 - (a) The declaration of a state of emergency shall never exceed the period strictly required to restore normal conditions.
 - (b) The duration of emergency (save in the case of war or external aggression) shall be for a period of fixed term established by the constitution.
 - (c) Every extension of the initial period of emergency shall be supported by a new declaration made before the expiration of each term for another period to be established by the legislature.
 - (d) Every extension of the period of emergency shall be subject to the prior approval of the legislature.

5. The legislature shall not be dissolved during the period of emergency but shall continue to function; if dissolution of a particular legislature is warranted, it shall be replaced as soon as practicable by a legislature duly elected in accordance with the requirements of the constitution, which shall ensure that it is freely chosen and representative of the entire nation.

6.
 - (a) The termination of a state of emergency shall be automatic upon the expiration of a given term without prejudice to the right of express revocation before such expiry to be exercised by the executive or the legislature, as the case may be.
 - (b) Upon the termination of an emergency there shall be automatic restoration of all rights and freedoms which were suspended or restricted during the emergency and no emergency measures shall be maintained thereafter.

Section 34, subsection 4, of the Interim Constitution states that:

"The right entrenched in the Chapter may be suspended only in consequence of the declaration of a state of emergency, and only to the extent necessary to restore peace or order."

The ACDP is of the opinion that there are rights in the Chapter on Human Rights which during a state of emergency must be constitutionally protected from being suspended.

We believe that as no right is absolute, precisely on the grounds of the limitation clause in section 33 of the Interim Constitution, (insofar as the interpretation of this clause in its application, is as narrowly defined to avoid any misrepresentation of its intended meaning), it is permissible that there should be non-derogable rights and freedoms, which because of their corresponding status of limitation, will not contradict the specifications required by a state of emergency. Yet, in no instance must those limitations be manipulated to contradict the spirit of the criteria as referred to above in the Paris Minimum Standards in a state of emergency.

The ACDP suggests that we construct an identifiable range of non-derogable rights suited to the South African context and clearly enunciate that position within the Constitution.

The ACDP further cautions, that no agreement must be undertaken on an international level that may lead this country into a position of permanent siege and which indirectly can be seen as the hidden hand in the state of emergency.

For example: As Africa is falling more and more under the powerful control of unscrupulous drug-cartels, transparency in our own system is indeed an unquestionable right.

It has become imperative, especially learning from our recent past, that government must function under directives legitimated by popular consent, in order that the citizen is in agreement that whenever certain emergency measures need to be applied, they are done so in a justifiable manner.

Provision must be made that if unreasonable rules are imposed, sufficient avenues to raise objections be made available to the public.

As long as government respects human dignity, operates its function along moral principles and legitimacy, the general law-abiding citizen has nothing to fear in times of emergency.

The ACDP supports Section 34 of the Constitution as stated, with the proviso that paragraph 4 of the said section, includes a clause referring to non-derogable rights.

12th June 1995

[STATE.E]

- ANC

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OFFICE OF THE SECRETARY GENERAL

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Director of the Constitutional Assembly
Constitutional Assembly
P.O. Box 15
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22 June 1995

RE: ANC SUBMISSIONS

Please find attached ANC submissions to Theme Committees.

Please note that these are preliminary submissions and that more substantive submissions will follow.

We hope you find the same in order.

M.C. Ramaphosa
M.C. Ramaphosa
Secretary General

The People Shall Govern!

PRELIMINARY ANC SUBMISSION

THEME COMMITTEE 4 - STATES OF EMERGENCY AND THE SUSPENSION OF RIGHTS

South Africa's history has been tragically marked by the imposition of various states of emergency and the wresting of power away from the legislature and judiciary by the executive, with the executive having been subject only to limited constitutional restrictions. In order to protect constitutionally enshrined fundamental rights and freedoms, the nature and scope of all powers which seek to restrict or limit such rights and freedoms must be set out in detail in the constitution. The ANC therefore firmly believes that the constitution must expressly provide for the manner and circumstances under which a State of Emergency may be declared so as to place clear and strict limits on the exercise of such emergency powers..

1. Content of the right and its formulation

Section 34(1) of the Interim Constitution details that a State of Emergency shall be proclaimed:

- * prospectively;
- * by Act of Parliament;
- * only where the security of the Republic is threatened by war, invasion or general insurrection or disorder or at a time of national disaster; and
- * only if it is necessary to restore peace or order.

Section 34(2) establishes that a state of emergency and any action taken in consequence thereof shall be in force for a period of not exceeding 21 days, with the proviso that the National Assembly may, by a majority of not less than two thirds extend such emergency for periods not exceeding three months. This provision therefore provides for continual oversight concerning the declaration of an emergency by the legislature.

Section 34(3) precludes any attempt to oust the jurisdiction of the courts, which:

"shall be competent to enquire into the validity of a declaration of a state of emergency, any extension thereof, and any action taken, including any regulation enacted, under such declaration."

Section 34(5) provides that certain fundamental rights may not be suspended even under a state of emergency and in particular that no law, action or regulation shall permit:

- * the creation of retrospective crimes;
- * the indemnification of the state or of persons acting under its authority for unlawful actions during a state of emergency.
- * the suspension of this section or the following sections:
 - section 7 (concerning the application of Chapter 3);
 - section 8(2) (right not be discriminated against);
 - section 9 (right to life);
 - section 10 (right to dignity);
 - section 11(2) (right to be free from torture);
 - section 12 (prohibition on servitude or forced labour);
 - section 14 (right to religion, opinion and belief);
 - section 27(1) (labour rights);
 - section 30(1)(d) (rights of the child);
 - section 33(1) (limitation of rights);
 - section 33(2) (limitation of rights).

Section 34(6) provides safeguards for the detention of persons under a state of emergency. Included in these are:

- * an adult family member or friend to be informed of such detention;
- * the publishing of the names of detainees and the measures in terms of which they have been detained in the Government Gazette within 5 days of detention;
- * the review of such detention by a court of law as soon as reasonably possible, but within 10 days of date of detention, with the court to order the release of such detainee if it is satisfied that the detention is not necessary to restore peace and order, with the state being obliged to furnish written reasons to justify the continued detention of such person not later than two days before such review;
- * a detainee may at any stage apply to court to review his/her continued detention;
- * a detainee has the right to appear personally in court, to have legal counsel and make representations against his or her continued detention;
- * a detainee has a right of access at all reasonable times to a legal representative and/or medical practitioner of his/her choice;
- * the state must show good cause for the re-detention of a person ordered to be released from detention by the court.

2. The Syracuse Principles

Given the lack of detail provided in international human rights instruments concerning the application of emergency powers, the Syracuse Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (1984) were drawn up by jurists at Syracuse in an effort to guide the imposition of such powers.

Section 34 of the Interim Constitution has incorporated many of the elements set out in the Syracuse Principles, including provisions relating to:

- * the declaration of a state of emergency;
- * parliamentary oversight;
- * judicial supervision;
- * the non-derogation of certain rights;
- * detention without trial.

However, omitted from section 34 are:

1. an explicit duty upon the state to ensure adequate legal redress in respect of any claim arising out of the application of the state of emergency; and
2. an explicit duty to take any measures or issue any regulations publicly so that citizens may be made aware of the parameters of emergency laws.

3. ANC Proposed Amendments

The ANC is of the view that provision should be made for the fundamental rights and freedoms contained within the Bill of Rights to be derogated from under the following circumstances only:

- I. in a state of emergency necessarily and properly declared to protect the security of South Africa; and
- ii. if the Constitution does not specify that the right in question may not be derogated from; and
- iii. to the extent necessary to restore the security of the nation and the safety of South Africa's people; and

iv. 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.

We are of the view that Section 34 may be amended **to include:**

1. an explicit duty to preserve adequate legal redress in respect of any claim arising out of the application of the state of emergency (of by providing that the right to have a legal dispute heard by a court of law or another independent tribunal, may not be derogated from); and
2. the duty upon the state to take any measures or issue any regulations publicly and in a manner in which citizens will be aware of the parameters of the emergency measures.

4. Application of the clause

- 4.1 The state and its organs have a duty to protect and enforce the provisions of this clause against all citizens.
- 4.2 The bearers of the rights contained within this clause shall be private persons and, where appropriate, groups or social structures.

- DP

25. STATES OF EMERGENCY AND SUSPENSION OF RIGHTS

1. Content of the Right

Section 34 of the Interim Constitution reads as follows -

- "(1) A state of emergency shall be proclaimed prospectively under an Act of Parliament, and shall be declared only where the security of the Republic is threatened by war, invasion, general insurrection or disorder or at a time of national disaster, and if the declaration of a state of emergency is necessary to restore peace or order.
- (2) The declaration of a state of emergency and any action taken, including any regulation enacted, in consequence thereof, shall be of force for a period of not more than 21 days, unless it is extended for a period of not longer than three months, or consecutive periods of not longer than three months at a time, by resolution of the National Assembly adopted by a majority of at least two-thirds of all its members.
- (3) Any superior court shall be competent to enquire into the validity of a declaration of a state of emergency, any extension thereof, and any action taken, including any regulation enacted, under such declaration.
- (4) The rights entrenched in this Chapter may be suspended only in consequence of the declaration of a state of emergency, and only to the extent necessary to restore peace or order.
- (5) Neither any law which provides for the declaration of a state of emergency, nor any action taken, including any regulation enacted, in consequence thereof, shall permit or authorise -
- (a) the creation of retrospective crimes;
 - (b) the identification of the state or of persons acting under its authority for unlawful actions during the state of emergency; or
 - (c) the suspension of this section, and sections 7, 8(2), 9, 10, 11(2), 12, 14, 27(1) and (2), 30(1)(d) and (e) and (2) and 33(1) and (2).
- (6) Where a person is detained under a state of emergency the detention

shall be subject to the following conditions:

- (a) An adult family member or friend of the detainee shall be notified of the detention as soon as is reasonably possible;
 - (b) the names of all detainees and a reference to the measures in terms of which they are being detained shall be published in the *Gazette* within five days of their detention;
 - (c) when rights entrenched in section 11 or 25 have been suspended -
 - (i) the detention of a detainee shall, as soon as it is reasonably possible but not later than 10 days after his or her detention, be reviewed by a court of law, and the court shall order the release of the detainee if it is satisfied that the detention is not necessary to restore peace or order;
 - (ii) a detainee shall at any stage after the expiry of a period of 10 days after a review in terms of subparagraph (i) be entitled to apply to a court of law for a further review of his or her detention, and the court shall order the release of the detainee if it is satisfied that the detention is no longer necessary to restore peace or order;
 - (d) the detainee shall be entitled to appear before the court in person, to be represented by legal counsel, and to make representations against his or her continued detention;
 - (e) the detainee shall be entitled at all reasonable times to have access to a legal representative of his or her choice;
 - (f) the detainee shall be entitled at all times to have access to a medical practitioner of his or her choice; and
 - (g) the state shall for the purpose of a review referred to in paragraph (c)(i) or (ii) submit written reasons to justify the detention or further detention of the detainee to the court, and shall furnish the detainee with such reasons not later than two days before the review.
- (7) If a court of law, having found the grounds for a detainee's detention unjustified, orders his or her release such a person shall not be detained again on the same grounds unless the state shows good cause to a court of law prior to such re-detention."

In principle, the Democratic Party strongly supports the provisions of section 34, since it will prevent the casuistic and arbitrary imposition of a state of emergency which can, if unchecked, utterly extinguish and destroy the content of the Bill of Rights. It is vitally important that emergency powers are subject to detailed checks and balances. In general, the standards required for the declaration, introduction and continuance of a state of emergency are supported. The high threshold provided for in subsection (1) will create jurisdictional facts against which the court will be able to weigh the relative merits of the emergency declaration itself.

Perhaps the most crucial safeguard provided in the entire suspension clause is that contained in subsection (2) which will prevent the imposition of a presidentially ordered state of emergency without appropriate scrutiny by parliament.

Subsection (3) prevents the effective ouster of the courts jurisdiction, without which the remaining safeguards will prove to be illusory.

We note with interest that subsection (5) does provide an illimitable category of rights which may not be derogated from in terms of the constitution. We think this is ample precedent for an illimitable section to be contained, as well, in the limitations clause as referred to above.

Subsection (6) provides extensive rights for detainees held under a state of emergency which are consonant with the other rights approved of in a Bill of Rights which prohibit cruel, unusual and degrading punishment.

Subsection (6), in most measures, is completely in accordance with the Democratic Party's own Bill of Rights provisions on the imposition of state of emergency and detainees rights under it and we therefore strongly support its retention.

- FF



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FREEDOM FRONT

THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

SUBMISSIONS ON STATES OF EMERGENCY AND THE SUSPENSION OF FUNDAMENTAL RIGHTS

1) The ambit and exclusive nature of section 34 of the transitional Constitution

Whereas a limitation clause authorises restrictions on fundamental rights in the normal course of events (i.e. on a permanent basis, unless the clause is repealed or amended), a suspension clause provides for temporary suspension of rights and comes into effect only in very exceptional circumstances.

It would appear that states of emergency are governed exclusively by section 34 of the transitional Constitution. This Constitution does not, unlike its predecessors, provide for the retention of prerogative powers (or conventions).

It seems as if common-law rules, including the rules relating to martial law, are also no longer applicable. The question arises, however, whether relevant rules of the common law will be revived during the suspension particular sections of the chapter on fundamental rights.

For the purposes of this document the present section 34 is taken as the basis of discussion. It will be assumed that the new Constitution will contain a provision substantially similar to (or based on) section 34.

2) General observations in respect of section 34

The following general observations in respect of section 34 can be made at this stage, clearing the ground for consideration of provisions of section 34 relevant for present purposes.

This section does not contain the general international law criterion in this regard, which is a public emergency threatening the life of the nation, and not merely a threat to the security of the Republic.

A state of emergency can only exist if is officially proclaimed in terms of the transitional Constitution (see section 34(1), quoted below).

A state of emergency can only be declared with future effect, and not retrospectively (see section 34(1), quoted below).

The provision of section 34(4) that rights may be suspended only 'to the extent necessary to restore peace or order' is clearly a proportionality test, which would allow the courts having jurisdiction (see section 34(3), quoted below) to adjudicate in the matter.

The general rule is that provisions governing the suspension of rights should be interpreted strictly, and statutory prerequisites should be strictly complied with.

3) Relevant provisions of section 34

Subsections (2), (6) and (7) of section 34 are not considered relevant to the present argument. Section 34(6) contains a number of mandatory provisions relating to the conditions under which a person may be detained under a state of emergency. These conditions appear to be in accordance with the general rules of international law applicable in such circumstances.

Section 34(1) reads:

'A state of emergency shall be proclaimed prospectively under an Act of Parliament, and shall be declared only where the security of the Republic is threatened by war, invasion, general insurrection or disorder or at a time of national disaster, and if the declaration of a state of emergency is necessary to restore peace or order' (stress supplied - see the relevant observation below).

Section 34(3) reads:

'Any superior court shall be competent to enquire into the validity of a declaration of a state of emergency, any extension thereof, and any action taken, including any regulation enacted, under such declaration'.

Section 34(4) provides as follows:

'The rights entrenched in this Chapter may be suspended only in consequence of the declaration of a state of emergency, and only to the extent necessary to restore peace or order'.

Section 3(5) is directly relevant to the argument below. It is not feasible, however, to quote it in extenso.

Sections dealing with inter alia (see also subsection 5(a) and (b) of section 34) the following matters cannot, in terms of section 34(5), be suspended: The application of Chapter 4 (Fundamental Rights) (section 7); the prohibition of unfair discrimination (section 8(2)); the right to life (section 9); the right to respect and protection of a person's dignity (section 10); the prohibition of torture or cruel, inhuman or degrading treatment or punishment (section 11(2)); the right not to be subject to servitude or forced labour (section 12); the right to freedom of conscience, religion, thought, belief and opinion (including academic freedom in institutions of higher learning) (section 14(1)); the right to fair labour practices (section 27(1)); workers' right to join and form trade unions, and employers' right to form and join employers' organisations (section 27(2)); the right of a child not to be subject to neglect or abuse and not to be subject to exploitative labour practices or work which is hazardous or harmful to his or her education, health or well-being (section 30(1)(d) and (e)); the right of a child in detention to be detained under conditions and to be treated in a manner that takes account of his or her age (section 30(2)); and certain provisions dealing with the limitation of rights (section 33(1) and (2)).

4) Comments on relevant provisions of section 34

The Freedom Front submits, in the first place, that the rights entrenched by the provisions of the following sections of the transitional Constitution should also have been protected against suspension by section 34(5): equality before the law and equal protection of the law (section 8(1)); freedom of speech and expression (section 15); freedom of assembly, demonstration and petition (section 16); the right of access to a court of law (section 22); the right of access to information (section 23); the right to education (section 32); language and cultural rights (section 31). Some of these rights are of the essence of democracy, such as equality before the law, freedom of speech, access to a court of law, etc., and should not be curtailed, even during a state of emergency.

It is at least arguable that some other rights should also be protected against suspension, such as certain political rights, in particular the right to vote (section 21).

The Freedom Front submits, secondly, and on the other hand, that certain rights have unjustifiably been protected by the transitional Constitution against suspension. Examples are: the right to life (section 9); the right to fair labour practices and certain rights of workers and employers (section 27(1) and (2)); the limitation of rights (section 33(1) and (2)). If the security of the Republic is threatened, should the right to life of those carrying out the threats necessarily be more important than the security of the country? Similarly, why should certain labour rights necessarily have precedence over the security of the country? Thirdly, what objection can there possibly be against

the suspension of the limitation of rights under section 33(1) and (2)? Does the suspension of the limitation not restore those rights? Surely, it must be only the provisos to section 33(1) that should not be capable of suspension?

5) Possible conflicting provisions in the Constitution

There should be very careful consideration of the question whether section 34(3) of the transitional Constitution (quoted above, and referring to 'any action taken, including any regulation enacted') is not possibly in conflict with the provisions of the Constitution relating to the Constitutional Court (in particular section 98(3), read with section 98(2)(c), referring to 'any enquiry into the constitutionality of any law'). Section 98(2) and (3) confers on the Constitutional Court exclusive jurisdiction 'as the court of final instance' in these matters. Unless an appellate jurisdiction of the Constitutional Court was intended by these provisions, section 98(3) should be redrafted to refer also to section 34(3) of the Constitution.

6) Concluding submissions

In the light of the comments in paragraph 4 above the Freedom Front submits:

- 1) that the provisions of the very important section 34 are seriously defective in various respects;
- 2) that these provisions (and quite possibly others as well) should be reconsidered and redrafted to meet certain objections on matters of principle, such as those mentioned above;
- 3) that various sections of the Constitution, referred to above, be carefully considered for redrafting in the light of possible conflicts between them.

- NP

NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 4

Item 24: States of emergency and suspension of rights

1. Content

Section 34(1) of the interim constitution provides for the declaration of a State of Emergency by an Act of Parliament under certain limited circumstances. The period of the State of Emergency is limited to 21 days unless the National Assembly extend the time by resolution of a two-thirds majority of its members. (Sec 34(2)).

The Supreme Court is given jurisdiction in terms of Section 34(3) to decide on the validity of such a declaration.

Section 34(4) of the interim Constitution states that the rights included in Chapter 3 may only be "suspended" in consequence of a declaration of a state of emergency, and only to the extent necessary to restore peace or order. Subsection (5) prohibits the creation of retrospective crimes, the indemnification of the state and the "suspension" of a number of sections. The following rights may not be "suspended" under a state of emergency: (Section 34(5)(c)):

- the application of chapter 3 (section 7)
- non-discrimination (section 8(2))
- life (section 9)
- human dignity (section 10)
- prohibition of torture or cruel and inhuman punishment (section 11(2))
- prohibition on servitude or forced labour (section 12)
- right to religion (section 14)
- the right to fair labour practices (section 27(1) and (2))
- protection of children's rights (section 30(1)(d) and (e) and (2))

- the general limitations clause (section 33(1) and (2)); and
- the "suspension" clause (section 34).

In consequence of the 'suspension' of sections 11(1) and 25, a special procedure is provided for under subsections 34(6) and 34(7).

2. Application

2.1 Firstly, although section 34 contains the heading "suspension" and this terminology is reflected in this section, it is submitted that such usage is incorrect in that the rights under chapter 3 are never totally suspended (i.e. completely removed), but are limited to a much greater extent than is the case under section 33 and other criteria are applied. Arguing that these rights have been completely wiped out for the duration of the state of emergency, could in extreme cases lead to serious anomalies and authorise abuse of the law. The wording of subsection (4) referring to the 'suspension' of certain rights "only to the extent necessary to restore peace or order" strongly underlines the submission that the rights are only limited to the extent necessary and not suspended altogether. Basson 'South Africa's Interim Constitution: Text and Notes' (1994) at p. 53 echoes this submission by stating that the "suspension" of fundamental rights "... must be distinguished from the ordinary limitations on fundamental rights..." (our emphasis). Section 34 therefore provides for special limitations because of the special circumstances prevailing, namely a state of emergency. It is incorrect to describe the application or effect of this section as a "suspension" of rights. In order not to create the perception that fundamental rights may be abused during a state of emergency, the NP submits that the section should be amended by the deletion of the terms 'suspension' and "suspended" and the substitution therefore of the terms "limitation" and "limited" wherever necessary.

2.2 Secondly a further difficulty arises out of section 34 in that subsection (4) and (5) appear to be in conflict with one another. Subsection (4) provides that "(all) the rights entrenched in this chapter may be suspended (*sic*) only in consequence of the declaration of a state of emergency ..." (our insertion and emphasis), whereas subsection (5)(c) prohibits the "suspension" of certain identified rights. Subsection 4 cannot allow the "suspension" of all rights when subsection 5(c) qualifies the specific rights in respect of which "suspension" is prohibited. It is submitted that the wording should reflect that subsection (4) is to be read subject to the provisions of subsection (5)(c).

2.3 Thirdly, section 34(5)(c) by implication provides that the right of equality before the law and to equal protection of the law (section 8(1)) may be "suspended". The exclusion of this right from the category of rights which may not be "suspended" is insupportable. The exclusion creates the perception that the very foundation of the state, (namely a constitutional state with a respect for the rule of law) can be suspended during a state of emergency. A state of emergency cannot suspend the constitutional state. The rule of law continues to be a basic principle (although the content of certain laws may be changed because of special circumstances). Without section 8(1), section 8(2) is meaningless. Neither is possible without the other. Inequality before the law or unequal protection of the law per se constitutes discrimination (prohibited by section 8(2)). It is therefore our submission that section 8(1) should also be included under section 34(5)(c).

2.4 Fourthly, the exclusion of many rights from section 34(5)(c) may be questioned. Given, from subsection (4), that the rights may only be 'suspended' to the 'extent necessary to restore peace or order', it is submitted that the provisions of section 33 adequately provide for the special circumstances which could exist during a state of emergency. When applying section 33 to determine the extent of the limitation of a particular

right, the circumstances prevailing at the time of such determination are taken into account by the Court. The Court would therefore take into account the circumstances which justify the declaration of a state of emergency and adjudicate the extent of the limitation against the background of the prevailing circumstances. In our submission therefore, only section 11(2) and 25 need to be specially limited in view of the special provisions contained in section 34 in this regard. It is therefore submitted that the question of whether the "suspension" of rights (other than those contained in section 11(2) and 25) ought to be included in this section, should be thoroughly investigated by the Technical Committee and its advice obtained in regard to the necessity for providing for the special limitation of each of the rights reflected in the new text.

2.5 Finally, the criterion provided in subsection (4) ("only to the extent necessary to restore peace or order") differs from the criteria in section 33. The wording of section 34 should reflect whether these criteria are mutually exclusive or whether a two stage approach should be adopted when determining the extent of the limitation. It is submitted that the interaction between the application of these two sections ought to be investigated by the Technical Committee and its advice obtained.

- PAC



21 June 1995

PRELIMINARY SUBMISSION OF THE PAC ON SUSPENSION OF THE RIGHTS IN THE BILL OF RIGHTS

The question of a state of emergency and the possibility of a suspension of fundamental rights, is a very sensitive one. This is more so, given our recent past and the fact that the law enforcement agencies are not as yet transformed into legitimate, representative and human rights conscious institutions.

Content of a suspension or derogation clause.

It should be similar to s34 of the Interim Constitution.

- (1) A state of emergency shall be proclaimed prospectively under an Act of Parliament, and shall be declared only when the Life of the Nation is threatened (Art 4 of ICCPR) by a declaration of a state of National Defence, general insurrection or disorder or at a time of national disaster, and if the Declaration of a state of emergency is necessary to restore peace and order.
- (2) The Declaration of a state of emergency shall be of force for a period not more than 14 days, unless it is extended for a period of not longer than 60 days or consecutive periods of not longer than 60 days at a time, by resolution of the National Assembly adopted by a 2/3 majority of all its members.

- (3) Retain S34 (3)
- (4) The rights entrenched in this chapter may be suspended only in consequence of the declaration of a state of emergency and only to the extent, strictly required by the exigencies of the situation (Art 4 of ICCPR).
5. (i) S34(5) and (b) should be retained
(ii) S34 (5) (c) should read: the suspension of the suspension clause, application clause, non-discrimination, right to life, right to human dignity, freedom from servitude and forced labour, freedom from torture, cruel, inhuman and degrading treatment or punishment, freedom from medical or scientific experimentation, right not to be subjected to retroactive criminal penalties.
6. SS34 (6) and (7) must be retained but they should be reformulated and reinforced by the inclusion of additional safeguards, such as, protection against incommunicado detention, ensure humane treatment, protection against interrogation abuses (see: Van Wyk, et al., Rights and Constitutionalism (1994), and the right to challenge the lawfulness of one's detention at any stage of that detention.

R K Sizani - MP

