

2/21/91/1/19

CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE**

**THEME COMMITTEE FOUR
FUNDAMENTAL RIGHTS**

**REPORT ON LIMITATION OF
RIGHTS**

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THEME COMMITTEE 4
-FUNDAMENTAL RIGHTS

SCHEMATIC REPORT ON
LIMITATION OF RIGHTS

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
1.	II	Nature of the clause	The circumstances in which the rights contained in a Bill of Rights may be limited by a limitation clause (s 33 of the Interim Constitution).		

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
2.		<p>Content of clause</p>	<p>There should be a general clause in the Constitution which governs the circumstances in which rights may be limited.</p> <p>The rights entrenched in the Bill of Rights may only be limited by law of general application (This requirement is expressly endorsed by the NP. The silence of the other parties on this important feature of a limitation clause suggests that they support the retention of this requirement).</p> <p>The present clause should be redrafted to make it clearer and simpler. (The PAC request a clause 'similar' to the present s 33).</p> <p>Apart from the ACDP, all parties agree on the retention of the formula 'justifiable in an open and democratic society based on freedom and equality' as a test for limited rights. (This also appears in the interpretation clause).</p>	<p>The 'law of general application' should include, in addition to common and customary law, "natural law ... Biblical law and Koranic law" - ACDP.</p> <p>The formula -'justifiable in an open and democratic society based on freedom and equality' - as a test for limited rights be extended to include consideration of good morals, public health, the administration of justice, public administration, the rights and responsibilities of fellow citizens and the prevention or combating of disorder and crime - ACDP. (This formula also appears in the interpretation clause).</p> <p>The 'bifurcated' or 'dual standard' approach that requires that some rights may only be limited where this is 'necessary' in addition to the other requirements for limitation is opposed by the ANC and DP.</p> <p>A bifurcated approach cannot have general application but is only appropriate in the limitation of certain rights - DP</p>	

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
				<p>The NP and FF support the bifurcated approach but propose that more rights be protected by the stricter test of necessity.</p> <p>The DP and FF propose that certain rights should be illimitable. They do not agree on the rights to fall into this category.</p> <p>There is disagreement about the requirement that the limitation should 'not negate the essential content of the right in questions'. The ANC proposes that it be deleted; the NP that it be retained but clarified; and the DP that it be retained. The PAC, FF and ACDP raise no objections to it.</p> <p>A limitation clause modelled on that of the Canadian Charter of Rights - ANC.</p> <p>The ACDP proposes that, "in keeping with the federalist ideal ... , special provision be made in the limitations clause for the elevated status of territorial constitutions".</p>	

N O	CONSTITUTIONAL PRINCIPLES	ISSUES	NON - CONTENTIOUS ASPECTS	CONTENTIOUS\ OUTSTANDING ASPECTS	REMARKS
		<p>Content and scope of subsections 33(2) - 33(5)</p>	<p>Sub-Section 33(2), which is a necessary part of the limitation clause, should remain - NP, PAC. (The other parties are silent on this subject)</p> <p>Sub-section 33(5) should be deleted - PAC, NP, DP. (No submission from other parties)</p>	<p>Sub-section 33(3) should be retained - NP, PAC. (The DP claims that it will be superfluous if the horizontal application of the Constitution is accepted).</p> <p>Sub-section 33(4) should be deleted- PAC. The NP believes it is to be dealt within the context of equality.</p>	
3.		<p>Application of the clause</p>	<p>The clause is to apply to the state, private persons and, where appropriate, groups or social structures - ANC. (No submissions on this issue from other parties).</p>		

THEME COMMITTEE 4 FUNDAMENTAL RIGHTS

REPORT ON LIMITATION OF RIGHTS

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 society¹:

- 2.1 Individuals
- 2.2 Organisations
- 2.3 Government structures\ institutions

3. Technical Committee reports:

None to date

4. Relevant Constitutional Principles

II

1 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 CLAUSE

- 1.1 The circumstances in which the rights contained in a Bill of Rights may be limited by a limitation clause (s 33 of the Interim Constitution).

2. CONTENT AND SCOPE OF THE CLAUSE

2.1 Non-Contentious Issues

- 2.1.1 There should be a general clause in the Constitution which governs the circumstances in which rights may be limited.
- 2.1.2 The rights entrenched in the Bill of Rights may only be limited by law of general application (This requirement is expressly endorsed by the NP. The silence of the other parties on this important feature of a limitation clause suggests that they support the retention of this requirement).
- 2.1.3 The present clause should be redrafted to make it clearer and simpler. (The PAC request a clause 'similar' to the present s 33).
- 2.1.4 Apart from the ACDP, all parties agree on the retention of the formula 'justifiable in an open and democratic society based on freedom and equality' as a test for limited rights. (This formula also appears in the interpretation clause).

2.2 Contentious\ Outstanding² Issues

- 2.2.1 The 'law of general application' should include, in addition to common and customary law, "natural law ... Biblical law and Koranic law" - ACDP.
- 2.2.2 The formula -'justifiable in an open and democratic society based on freedom and equality' - as a test for limited rights be extended to include consideration of good morals, public health, the administration of justice, public administration, the

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.

rights and responsibilities of fellow citizens and the prevention or combating of disorder and crime - ACDP. (This formula also appears in the interpretation clause).

- 2.2.3 The 'bifurcated' or 'dual standard' approach that requires that some rights may only be limited where this is 'necessary' in addition to the other requirements for limitation is opposed by the ANC and DP.
- 2.2.4 A bifurcated approach cannot have general application but is only appropriate in the limitation of certain rights - DP
- 2.2.5 The NP and FF support the bifurcated approach but propose that more rights be protected by the stricter test of necessity.
- 2.2.6 The DP and FF propose that certain rights should be illimitable. They do not agree on the rights to fall into this category.
- 2.2.7 There is disagreement about the requirement that the limitation should 'not negate the essential content of the right in questions'. The ANC proposes that it be deleted; the NP that it be retained but clarified; and the DP that it be retained. The PAC, FF and ACDP raise no objections to it.
- 2.2.8 A limitation clause modelled on that of the Canadian Charter of Rights - ANC.
- 2.2.9 The ACDP proposes that, "in keeping with the federalist ideal ... , special provision be made in the limitations clause for the elevated status of territorial constitutions".

3 CONTENT AND SCOPE OF SUBSECTIONS 33(2) - 33(5)

3.1 Non-contentious Issues

- 3.1.1 Sub-Section 33(2), which is a necessary part of the limitation clause, should remain - NP, PAC. (The other parties are silent on this subject)
- 3.1.2 Sub-section 33(5) should be deleted - PAC, NP, DP. (No submission from other parties)

3.2 Contentious Issues

- 3.2.1 Sub-section 33(3) should be retained - NP, PAC. (The DP claims that it will be superfluous if the horizontal application of the Constitution is accepted).

3.2.2 Sub-section 33(4) should be deleted- PAC. The NP believes it is to be dealt within the context of equality.

4. APPLICATION OF THE CLAUSE

4.1 Non-contentious Issues

4.1.1 The clause is to apply to the state, private persons and, where appropriate, groups or social structures - ANC. (No submissions on this issue from other parties).

ADDENDUM

PARTY SUBMISSIONS

- ACDP

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

**LIMITATIONS OF RIGHTS AND THE
CONSTITUTION**

While the need to limit rights at all may be questioned as was done by amongst others, Dr van Zyl Slabbert (quoted in Du Plessis and Corder, 1994 p128), it is nonetheless widely accepted that rights are not absolute. This is poignantly evidenced by the Americanism which states that one person's right to swing his arm ends where the other's nose begins.

The ACDP agrees that provision must be made for a specific limitations clause in the new constitution for the following reasons:

With the introduction of the Bill of Rights into the South African Constitutional heritage, an attempt is being made to prevent repeat occurrences of the hegemony that is illustrative of South African political dispensations for the past several decades. The way this is being done is by allowing for judicial oversight of the legislative process. Again, however, this could mean a new attending dilemma. It has been proved beyond an inkling of a doubt that judicial officers are firstly and foremostly, human beings, with their own moral, ethical and socio-economic mind-sets. As such, they approach their interpretative tasks from their own specific philosophies.

The limitations clause has therefore an important role to play in balancing legislative and judicious capriciousness.

For this very reason a limitations clause must be constructed so as to be able to best describe it as adequate. Adequate, firstly, to control the legislature from effectively negating the values evidenced by the constitutional print and secondly, to prevent a judiciary reviewing from a particular philosophic grounding from playing law-maker. The judiciary is not an elected body, at least not in most major global jurisdictions at the present time and is subsequently not an able body to arrive at true democratic ideals.

This means that the limitations clause needs to have certain key elements to effectively realise the stated goals: It must make provision for the legislature to limit fundamental rights which are otherwise absolute.

In consonance with Biblical teaching the ACDP proclaim human rights to be inalienable and immutable. Granted, as they are, by the Almighty God, in accordance with his principles and plan, they can not be taken away by man except where He himself so provided. These rights are further incapable of being mutated in any way as to meaning or content, except as biblically mandated.

The Godly mandate for civil government as evidenced by Paul in his letter to the congregation of Christians in the capital of the Roman Empire, quite clearly shows that civil government, including the legislature, is a servant of God, and must benefit all people subjected to it.

Responsibilities attend every right - this is clear in virtually every aspect of domestic life, and is a well - recognised principle in our law of contract.

The ACDP views a recognition of this vital truth as central to the limitations clause in the new constitution. The individual has a responsibility against his or her fellow citizens - a recognition of where others' noses start - and should realise that non - fulfilment of those responsibilities will be met with society's reaction to irresponsible behaviour.

The ACDP calls for considerations including good morals, public health, the administration of justice, public administration, the rights and responsibilities of fellow citizens and the prevention or combating of disorder and crime to be specifically listed as aspects which may bring about the rightful limitation of rights. This against the vague wording of "justifiable in an open and democratic society based on freedom and equality". Wording of this unspecified nature, lends itself to interpretation from a specific philosophical vantage point judicially which may be for removed from the national collective will of the grass roots community. Even more so because the framers of the interim constitution thought it prudent to provide for interpretative values that embody accepted international human rights tenets.

The ACDP in cognisance of the stated ideals of recognising the heterogeneous nature of the South African population proposes a clear construction of the limitation by law of general application to incorporate and specifically mention aspects of common law, natural law, African customary law and other legal systems which has to be recognised in order to be inclusive, including Biblical law and Quranic law.

We further recognise that there is a real need to state clearly that limitation may only be by legislation of general application, excluding to a major extent the effect of arbitrary or discretionary legislation such as followed the systems of separate development.

In keeping with the federalist ideal, the ACDP also proposes that special provision be made in the limitations clause for the elevated status of territorial constitutions. It is clearly felt that the limitations clause, secondary and supplementary, to the interpretation clause must recognise the autonomous status of the provinces or regions - including their legislative and constitutional position as being a true and practical outflow of government by the people, through the people and for the people with its attending concentration of power at the level closest to the families that are the essence of the richness and diversity of this country.

12th June 1995 [LIMIT.WPS]

- ANC

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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

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M.C. Ramaphosa
Secretary General

The People Shall Govern!

PRELIMINARY ANC SUBMISSION

THEME COMMITTEE 4 - LIMITATION OF RIGHTS

The ANC believes that rights and freedoms entrenched in a constitution cannot be absolute and that mechanisms providing for the limitation of fundamental rights and freedoms under specified circumstances must therefore be constitutionally entrenched.

1. Content of the right and its formulation

The Interim Constitution establishes in section 33 that:

"(1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation -

"(a) shall be permissible only to the extent that it is -

(I) reasonable; and

(ii) justifiable in an open and democratic society based on freedom and equality; and

(b) shall not negate the essential content of the right in question,

and provided further that any limitation to -

(aa) a right entrenched in section 10, 11, 12, 14(1), 21, 25 or 30(1)(d) or (e) or (2); or

(bb) a right entrenched in section 15, 16, 17, 18, 23, or 24 insofar as such right relates to free and fair political activity,

shall, in addition to being reasonable as required in paragraph (a)(I), also be necessary.

2. A Comparative Approach: The Canadian experience

The Canadian Charter of Rights offers a useful comparative model for the constitutional limitation of rights and freedoms. In such Charter, the basic structure adopted is that of generally stated rights and freedoms included in the constitution with the inclusion of a separate limitation clause on the other. The limitation clause set out in section 1 of the Charter reads as follows:

"The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

In determining whether or not a right or freedom should be limited, the Canadian courts have adopted a two-stage enquiry process. The first stage must determine whether a right or freedom has been infringed, breached or denied. To determine this, the scope of such right or freedom must be determined, whereafter an assessment follows as to whether the law or act complained of interferes with the exercise of such right or freedom. Where such infringement is held to have occurred, it must be determined at the second stage of the inquiry as to whether the restriction of the right or freedom is saved by the limitation provision.

The current formulation purports to supplement this approach with the problematic German formulation (which restricts limitation and which negates the "essential content" test) and the 'dual standard' developed by the U.S courts. These tests have emerged from different texts (which did not otherwise possess limitations clauses) and involved distinct (and confusing) jurisprudential considerations. They introduce little of value to the current limitations clause except for academic controversy and the dubious elevation of certain rights above others.

3. ANC Proposed Formulation

The ANC contends that the Canadian Charter provides a clear and simple approach to the limitation of rights which should be adopted in our Bill of Rights. Unlike the current formulation contained in the Interim Constitution, no hierarchy of as to reasonableness and necessity in the limitation of rights or freedoms exists in the Canadian model.

To this end, we believe that section 33 of the Interim Constitution should be re-drafted to read as follows:

"The rights and freedoms contained in this Constitution are subject to such reasonable limitations as can be demonstrated to be justifiable in an open and democratic society based on freedom and equality."

4. Application of the clause

This clause is to apply to the state, private persons, and where appropriate, groups or social structures.

- DP

20 June 1995

**CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE 4**

DEMOCRATIC PARTY SUBMISSION

24. LIMITATION OF RIGHTS

1. Content of the Right

Section 33 of the Interim Constitution reads as follows:-

"(1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation -

(a) shall be permissible only to the extent that it is -

(i) reasonable; and

(ii) justifiable in an open and democratic society based on freedom and equality; and

(b) shall not negate the essential content of the right in question.

and provided further that any limitation to -

(aa) a right entrenched in section 10, 11, 12, 14(1), 21, 25 or 30(1)(d) or (e) or (2); or

(bb) a right entrenched in section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity,

shall in addition to being reasonable as required in paragraph (a)(i), also be necessary.

(2) Save as provided for in subsection (1) or any other provision of this Constitution, no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter.

- (3) The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter.
- (4) This Chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7(1).
- (5)
 - (a) The provisions of a law in force at the commencement of this Constitution promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain of full force and effect until repealed or amended by the legislature.
 - (b) If a proposed enactment amending or repealing a law referred to in paragraph (a) deals with a matter in respect of which the National Manpower Commission, referred to in section 2A of the Labour Relations Act, 1956 (Act No. 28 of 1956), or any other similar body which may replace the Commission, is competent in terms of a law then in force to consider and make recommendations, such proposed enactment shall not be introduced in Parliament unless the said Commission or such other body has been given an opportunity to consider the proposed enactment and to make recommendations with regard thereto."

1.1 Comment : General

Explicit provision for the limitation of the rights contained in the chapter on fundamental rights is common place in contemporary constitutions. We are advised that limitation clauses occur in international human rights instruments and declaration and covenants as eminent and as widely respected and adhered to as the Universal Declaration of Human Rights (Article 29(2)), The International Covenant on Economic, Social and Cultural Rights (Article 4), and The European Convention on Human Rights (Article 11(2)) as well as in domestic Bills of Rights such as the German Basic Law (Article 19), the Canadian Charter of Rights on Freedoms (Section 1) and the Chapter on Fundamental Human Rights and Freedoms in the Constitution of the Republic of Namibia (Article 22).

We therefore believes that a carefully crafted and appropriate limitation clause is necessary for the Bill of Rights in the final constitution.

1.2 Present wording : S.33(5)(a) & (b)

We believe that the limitation clause (Section 33) in the Interim Bill of Rights needs to be amended and simplified without losing its efficacy.

We believe that clauses 33(5)(a) and (b) should be deleted from the limitation clause as an integral arrangement. Those clauses were inserted in the Interim Bill of Rights to deal with the provisions contained in the Labour Relations Act which were considered by certain parties to require special protection and inoculation from the reach of the Bill of Rights. We are strongly opposed to the idea of a certain sector of society enjoying total immunity from the provisions of the Bill of Rights and from scrutiny under it. We believe it will be singularly inappropriate and anachronistic to repeat this protection in the final constitution.

1.3 S.33(3) - Rendered superfluous

Furthermore, we believe that section 33(3) of the limitation clause, which relates to importing the concept of "mittelbare drittwirking" from German constitutional jurisprudence will not be necessary provided the Constitutional Assembly resolves the fundamental question on the horizontal application of the Bill of Rights. Section 35(3) provides for the indirect application of the Bill of Rights to the common law due to the absence of horizontality in the Interim Bill of Rights. Assuming that this issue is in fact resolved in the chapter on fundamental rights, then the application of the reach of the Bill of Rights into the common law, customary law and legislative spheres will become redundant. There will, in any event, be a range of issues which will generally fall outside the Bill of Rights, (certain aspects of the law of contract, for example).

1.4 A reformulated limitations' clause

We turn now to the substantive provisions of the limitations clause and would indicate we believe there should no longer be the two tier test of limitation which is currently applied: Section 33 provides for a higher standard of justification (or to use the American concept "strict scrutiny") which is made applicable to a range of rights detailed in section 33(1)(aa) and (bb).

We regard this as being unnecessarily complicated and believe that a better and more streamlined system would be to import the concept of illimitability in respect of certain core fundamentals in the Bill of Rights. While "necessity" implies a higher threshold of reasonableness, we believe, however, that certain rights should simply be illimitable. (Although such rights can always be limited by other rights entrenched in the Bill of Rights and in other sections of the constitution). This will create a clear category of core rights which in fact will enjoy a "super-protection" in terms of the Bill of Rights.

Therefore, in place of the current wording of section 33(aa) and (bb) we would propose the following -

"Subject to section [] (suspension during a state of emergency) this (the limitation) section and the following sections of the Bill may not in any manner be restricted:

- The following yet to be numbered sections would then fall within the category of illimitability;
- Equality (in terms of the Democratic Party proposal the equality clause already has an internal limitation since it only outlaws "unjustified differentiation");
- Right to liberty (or due process);
- Right to conscience and religion;
- Citizenship rights;
- The requirement that expropriation of property in the public interest be subject to the proper payment of equitable compensation;
- The right to the essentials of life;
- The right to learning and culture;
- The right to language and culture.

(The wording follows the headings proposed, in previous submissions, by the DP.

We are satisfied that the substantive provisions of the limitations clause, namely, that any limitation shall be dependent on the restriction arising from a law of general application which restriction shall be reasonable; justifiable in an open and democratic society based on freedom and equality and shall not negate the essential content of the right (i.e. section 33(1)(a) and (b) provides a sufficient safeguard against the abuse by the State or the law-giver of the erosion of the fundamental rights protected in the charter.

Proportionality is the essential content of this test of limitation. The SA Law Commission (at 165) summarises the proportionality test as requiring the following of any limitation:

1. The measures chosen should be carefully designed to achieve the objectives;
2. The means should impair the right of freedom as little as possible;

3. There should be proportionality between the effect of the measures adopted and the objective.

In addition, the requirement of justification in "an open and democratic society based on freedom and equality" will require a value based judgment, stemming essentially from comparative legislation and jurisprudence in democratic societies, international covenants and instruments. The hallmarks of an open and democratic society may be summarised as "pluralism, tolerance and broadmindedness". Furthermore, although there is no requirement in a democracy that the views of the majority must simply prevail, these requiring balance against individual interests and liberties. While there is an essential tension between the concept of "freedom" and "equality" we believe that this tension is healthy and necessary to balance the interests of our emerging democracy.

1.5 S.33(b)

A fundamental criticism might be levelled at the requirement contained in section 33(b) relating to the prohibition on negating the "essential content of the right in question". This criticism is based on the fact that this test is somewhat incoherent and ambiguous. It has been suggested that the requirement is in fact drawn from article 19.2 of the German basic law and places a minimum floor for government restrictions of fundamental rights. However, insofar as this will be of assistance to the Constitutional Court in determining whether or not the limitation is required to pass a further test before it can be validated, we see no harm in its retention.

- FF



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FREEDOM FRONT

THEME COMMITTEE 4 (FUNDAMENTAL RIGHTS)

PRELIMINARY SUBMISSIONS ON LIMITATION OF RIGHTS

The Freedom Front makes the following submissions in respect of the general limitation clause, i.e. section 33 of the transitional Constitution, as a basis for a similar provision in the new Constitution.

Only certain basic aspects of the limitation clause are considered here. We reserve the right to comment on other aspects of the clause at a later stage.

1) The crucial importance of the limitation clause

In a certain sense section 33 of the transitional Constitution is the most important provision in the chapter on fundamental rights, in so far as it provides that the rights entrenched in chapter 3 'may be limited by law of general application', subject to certain provisos. Any defect in the drafting of the successor to section 33 in the new Constitution would render many entrenchments nugatory.

Section 33 authorises, by law of general application, limitation of rights entrenched in chapter 33, provided that such limitation

- '(a) shall be permissible only to the extent that it is -
 - (i) reasonable; and
 - (ii) justifiable in any open and democratic society based on freedom and equality; and

- (b) shall not negate the essential content of the right in question,

and provided further that any limitation to [certain specified entrenched rights] shall, in addition to being reasonable as required in paragraph (a)(i), also be necessary' (stress supplied and numbers of sections omitted).

2) The necessity of testing individual rights against the limitation clause

Principle 4 of the so-called 'Siracusa Principles' of 1984, being a guide to the interpretation of the limitation clauses in the International Covenant on Civil and Political Rights, drawn up by a committee of experts in international law, reads: 'All limitations shall be interpreted in the light and context of the particular right concerned'. In the light of this direction the Freedom Front makes the following general submissions.

3) The submissions of the Freedom Front

Submission A: The number of rights that should be capable of limitation only when there is (inter alia) a necessity for such limitation, should be increased

The specified rights referred to above (see the end of paragraph 1) are the following: human dignity (section 10); freedom and security of the person (section 11); the right not to be made subject to servitude or forced labour (section 12); freedom of conscience, religion, thought, belief and opinion (also academic freedom) (section 14(1)); so-called 'political rights' (section 21); rights of detained, arrested and accused persons (section 25); rights of children not to be subject to neglect or abuse (section 30(1)(d)), not to be subject to exploitative labour practices or hazardous or harmful work (section 30(1)(e)); rights of children in detention to be treated in a manner taking account of their age (section 30(2)), and the following rights, in so far as such rights relate to free and fair political activity: freedom of speech and expression (section 15); freedom of assembly, demonstration and petition (section 16); freedom of association (section 17); freedom of movement (section 18); right of access to information (section 23), and a right to administrative justice (section 24).

The Freedom Front submits that the number of rights that can be limited 'by law of general application' only when the limitation is necessary (apart from the three other requirements stipulated by section 33(1)(a) and (b)) should be extended.

There is an unduly large number of sections in the present chapter on fundamental rights that entrench rights that can be limited without the limitation being necessary. This cannot, in our view, be justified. We consider that inter alia the following rights should be capable of being limited only when such limitation is also necessary: the right of access to a court

(section 22); the right to property (section 28); the right to use the language and to participate in the cultural life of one's choice (section 31), and certain rights to education (section 32). (see the next paragraph for the motivation.)

Why should the right to freedom of speech and expression be capable of limitation on the basis of necessity only in so far as it relates to free and fair political activity? In our view inter alia the four rights mentioned in the concluding sentence of the previous paragraph are as fundamental as many of those mentioned above, which can be limited only when all four the above-mentioned requirements (reasonableness, justifiability, non-negation of the essential content of the right concerned, and necessity) have been complied with. The same argument can be raised in respect of certain other rights not relating to free and fair political activity. These include the right to equality (section 8), the right to privacy (section 13), the right to economic activity (section 26), etc.

Submission B: Certain rights should not be subject to possible derogation at all

The Freedom Front is of the opinion that certain rights at present entrenched in section 33 and subject to limitation in terms of that section, are rights in respect of which no derogation should be allowed. For instance, the right to human dignity (section 10) and the right not to be subjected to servitude and forced labour (section 12) are, inter alia, in our opinion, rights which should not be limited under any circumstances. The right to human dignity is probably the most important fundamental human right of all. (The pre-eminence of this right was, together with the right to life, recently stressed by the President of the Constitutional Court.)

4) Conclusion

In the light of the exposition above the Freedom Front submits that section 33 of the transitional Constitution contains major flaws and that the defects are so serious that the ambit and wording of the entire section should be carefully reconsidered.

- NP

NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 4

THE LIMITATION OF RIGHTS

A. INTRODUCTION

It is widely accepted that the rights guaranteed in a bill of rights are not absolute. In any modern society in which so many people must live together in a peaceful and orderly fashion, the state must be able to limit the rights of the individual (or juristic persons where applicable), for the protection of some public interest. In *Park-Ross and another v The Director, Officer for Serious Economic Offences* 1995 2 BCLR 198 (C) 214 Tebbutt J said:

"....it does not mean that the rights of individuals entrenched in the Constitution are absolute or limitless or that limitations to such rights are not accepted...It is self-evident that limitations must exist".

For this purpose, a bill of rights may contain clauses in which provision is made for the limitation of rights by the state and, of course, for the conditions and procedures with which the state must comply when limiting rights. Authorization to limit rights is, in other words, not a blank cheque. Two types of limitation clauses exist. One is the specific limitation clauses that apply to specific rights. The other is a general limitations clause that usually applies to all the rights contained in the bill of rights. The former type of limitation has been addressed in our submissions on the various rights to be included in the future bill of rights. Except to say that both may be employed in the same bill of rights and that the special relationship between a general limitations clause and any specific limitations should be kept in mind (see in this regard *Rautenbach General Provisions of the South African Bill of Rights* (1995) 106-107; *Du Plessis and Corder Understanding South Africa's Transitional Bill of Rights* (1994) 129-130), we restrict ourselves in this submission to the general limitations clause.

B. APPLICATION OF A GENERAL LIMITATIONS CLAUSE

1. General

We agree with the general approach to the application of a general limitations clause advocated by most writers (see for example Cachalia *et al Fundamental Rights in the New Constitution* (1994) 107-110; Basson *South Africa's Interim Constitution; Text and Notes* (1994) 50) and already being applied in several decision (see for example *Qozoleni v Minister of Law and Order and another* 1994 1 BCLR 75; *Matinkinca and another v Council of State, Ciskei and another* 1994 1 BCLR 17; *Khala v Minister of Safety and Security* 1994 2 BCLR 89 (W); *Park-Ross and another v The Director, Office for Serious Economic Offenses* 1995 2 BCLR 198 (C)). It is indeed fairly obvious that the first question to be asked is whether, in fact, there has been a limitation of a right guaranteed in the bill of rights and, secondly, whether or not the limitation satisfies the requirements of the general limitations clause.

2. Onus

It seems to be accepted that the onus to establish whether in fact a particular right has been limited is on the person alleging the limitation, but once that has been established, the burden of proof shifts to the state to demonstrate that the limitation complies with the requirements of the general limitations clause (see for example *Qozoleni v Minister of Law and Order and another* 1994 1 BCLR 75 (E); *Khala v the Minister of Safety and Security* 1994 2 BCLR 89 (W) 98; *Government of the Republic of South Africa v the Sunday Times Newspaper and another* 1995 2 BCLR 182 (T); *Park-Ross and another v the Director, Office for Serious Economic Offenses* 1995 2 BCLR 198 (C).

See, in contrast, the Namibian case of *Kauesa v Minister of Home Affairs and others* 1994 3 BCLR 1 (NmH)). We believe that our courts follow the proper approach.

C. THE PRESENT SECTION 33

In some ways a general limitations clause is the pivotal provision in any bill of rights. In every case where the infringement of a right is alleged, the question will be whether the infringement has been valid in terms of the general limitations clause. The actual wording of a general limitations clause is therefore of crucial importance and it may be useful to direct our further comments to the particulars of our present general limitations clause, section 33.

1. "may be limited by law of general application"

This is a necessary qualification. The idea behind it is that the state may not limit rights arbitrarily, but only in terms of the law - the law, by definition, meaning legal rules applicable to society as a whole and not to a particular individual(s) only. Rights may thus be limited directly by a law of a competent legislative authority, or by an executive or administrative body acting in terms of powers delegated to it by such a law. As pointed out by Rautenbach 87-88, this may include the exercise of a discretion which, in turn however, may not be limitless.

2. "to the extent that it is reasonable" and "justifiable in an open and democratic society based on freedom and quality"

It is generally accepted that these phrases introduce into our bill of rights the notion of proportionality in terms of which, firstly, the limitation must be sufficiently important to justify the limitation of the right and, secondly, a balance must be struck between the limitation imposed and the public interest

that the state wants to protect or further by the limitation. (See in this regard *Cachalia et al* 112-115; *Du Plessis and Corder* 124, *Rautenbach* 92 *et seq.*) According to Canadian decisions such as *R v Oakes* (1986) 26 DLR (4th) 200, the second aspect entails three components, namely (i) the limitation must be designed to achieve the stated objective; (ii) the limitation must impair as little as possible the right in question; and (iii) there must be a proportional relationship between the effects of the limitation and the pursued objective. Our courts, too, have already adopted this approach, *inter alia* with reference to the leading Canadian cases. (See in particular *Park-Ross and another v The Director, Office for Serious Economic Offenses* 1995 BCLR 198; *Nortje and another v Attorney-General of the Cape and another* 1995 2 BCLR 236 (C); *Matinkinca and another v Council of State, Ciskei and another* 1994 1 BCLR 17). In terms of this approach, the Zimbabwean court has, for example, found unreasonable and unjustifiable a regulation that permits a maximum security risk prisoner to write and receive only one letter per month (*Woods and others v Minister of Justice, Legal and Parliamentary Affairs* 1995 1 BCLR 56 (ZS)), whereas a South African court has struck down a provision authorising the director of the office for serious economic offenses to enter and search premises and to seize and remove any property, including documents, without authorization by an impartial arbiter such as a judicial officer (*Park-Ross and another v The Director, Officer for Serious Economic Offenses* 1995 2 BCLR 198 (C)). Evidently, these phrases are of particular importance in the application of the general limitations clause and they should be retained unamended.

3. 'shall also be necessary'

The so-called 'strict scrutiny' test in American law has been adopted by this phrase for the purposes of the limitation of certain rights only. When these rights are limited, the state obviously bears a heavier burden of proof. In American terminology, for example, the state must demonstrate a *compelling*

state interest as opposed to a mere legitimate or even overriding interest. According to Rautenbach 100, "necessary" implies that there is no alternative and that the court should accordingly determine whether the most effective course of action has been adopted and whether the best balance has been struck between the limitation and the object sought by it. (See also Du Plessis and Corder 127-128.) The provision will in all probability be applied in the same way in South Africa.

We agree that this provision does not confer on the rights in question any higher status (*Cachalia et al* 115). It is nevertheless important to consider the rights that should enjoy this additional protection. Although the clause can be drafted only after the specific rights to be entrenched in the bill of rights have been finalised, we believe that at least the right to use the language and participate in the cultural life of one's choice should be added.

The same arguments in favour of the inclusion of the right to freedom of conscience, religion, thought, belief and opinion (section 14(1)), could apply in the case of language and culture. In principle, we are also in favour of the approach followed in the present clause, in terms of which certain enjoy the stricter protection only in so far as they relate to political activity. We do not think that rights such as the right to freedom of expression needs to enjoy the special protection in general. In our view it is indeed only in relation to political activity that such special protection is necessary.

The phrase "in addition to being reasonable as required in paragraph (a)(i)" is open to question. It is not clear whether indeed it was the idea that in these cases the other criteria of justifiability (paragraph (a)(ii)) and negation of the essential content of the right (paragraph (b)) should not apply as well. It seems logical that in these cases a limitation must *in addition to all the other (standard) requirements*, also be necessary. This aspect needs clarification.

4. "shall not negate the essential content of the right"

The obvious purpose of this phrase is that even if a limitation of a right complies with all the other criteria, but negates the so-called essential content of that right, the limitation shall be disallowed. Without entering into the debate of what "essential content" really means and whether it applies to society in general (the relative approach) to a particular individual only (the absolute approach), this is a very strict provision which should have the effect of always making any government body think twice before it imposes a limitation (see the remarks by Rautenbach 105). However, one could argue that, maybe, this is too strict a requirement. It may, in practice, become an overriding criterion which will always have to be considered first, and, in the process, decreases the value of the latter as appropriate and important criteria for limitations. The consequence could even be that the courts may feel compelled to adopt some or other relative approach in order to give effective meaning to those other criteria. In this regard very strong criticism has been voiced against the phrase by *Marais J in Nortje and another v Attorney-General of the Cape and another* 1995(2) BCLR 236 257-258. The argument was that it cannot be justified that even if it can be shown convincingly that a limitation is reasonable, justifiable in an open and democratic society based on freedom and equality and in certain cases, even necessary, the limitation may still not be in order on the ground that it negates the essential content of the right.

At the very least, the phrase is ambiguous and should be clarified, especially with regard to its relationship to the other requirements.

Section 33(2)

This is an obvious but necessary provision. In addition, it reinforces two aspects in particular. Firstly, the phrase "save as provided for in subsection (1) or any other provision of this Constitution" provides that "limitations" of

the rights in the bill of rights contained elsewhere in the Constitution are not subject to the general limitations clause, thereby confirming the supremacy of the whole constitution as provided for in section 4. In actual fact, as constitutional provisions they form part of the definition of the rights in the bill of rights and should not be called "limitations". Secondly, the subsection makes it clear that all law, including the common law and customary law, are subject to the general limitations clause.

Section 33(3)

This subsection is also necessary to make it clear that the bill of rights does not exclude the existence of other rights recognised or conferred by the common law, customary law or legislation. Such rights may, of course, not conflict with those entrenched in the bill of rights.

Section 33(4)

This aspect has been dealt with in our submission on the equality principle (the present section 8).

Section 33(5)(a) and (b)

We are uncertain whether it is still necessary to make an exception in the case of labour and we recommend that the deletion of this provision be considered if the rights in respect of labour relations are sorted out satisfactorily.

- PAC



Ref No.

21 June 1995

PRELIMINARY SUBMISSION OF THE PAC ON LIMITATION OF RIGHTS

The rights protected in a bill of rights are in principle, not absolute. It is important however, that we must ensure that they are not easily infringed and thus eroded.

Content of a Limitation Clause.

A clause similar to S33 of the Interim Constitution should be included in the bill of rights. It should provide that:

1. The rights entrenched in the bill of rights may be limited by a law of general application provided that such limitation -
 - (a) Shall be permissible only to the extent that it is:
 - (i) reasonable and,
 - (ii) justifiable in a free and democratic society based on equality.
 - (b) Shall not negate the essential content of the right in question, and provided further that any limitation to: Human dignity, freedom and security of a person, freedom from servitude or forced labour, freedom of religion, thought, belief and opinion, political rights, rights of detained, arrested and accused persons, childrens rights and freedom of movement.
Shall, in addition to being reasonable, also be necessary.

SS33(2) and (3) may be retained but not SS33(4) and (5).

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