

CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE**

**TUESDAY
5 MARCH 1996
E249
(10h00)**

DOCUMENTATION

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CONSTITUTIONAL ASSEMBLY

MEETING OF THE CONSTITUTIONAL COMMITTEE SUB-COMMITTEE

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

DATE: Tuesday, 5 March 1996

TIME: 10h00 - 18h00

VENUE: E249

DRAFT AGENDA

1. **Opening**
 2. **Bill of Rights**
 3. **AOB**
 4. **Closure**
-

**H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY**

Enquiries: Ms M M Sparg, Tel 245-031

- (4) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.⁵

Human dignity

9. Everyone has inherent dignity and the right to have their dignity respected and protected.

Life

10.

Option 1

Everyone has the right to life.⁶

Option 2

Everyone has the right to life and the death penalty is hereby abolished.

Option 3

Everyone has the right to life, and the right not to be deprived of life except by execution of a court sentence following conviction for a crime for which the death penalty is prescribed by an Act of Parliament.

Freedom and security of the person

11. (1) Everyone has the right to freedom of the person, including the right not to be -
- (a) deprived of liberty arbitrarily or without just cause; or
 - (b) detained without trial.
- (2) Everyone has the right to security of the person, including the right -
- (a) to be free from all forms of violence;
 - (b) to psychological integrity; and
 - (c) to make decisions concerning reproduction free from coercion, discrimination and violence.
- (3) No one may be -
- (a) tortured in any way;
 - (b) treated or punished in a cruel, inhuman or degrading way; or
 - (c) subjected to medical or scientific experiments without that person's consent.

⁵ Agreed. May need to be revisited if "unfair" and "unfairly" fall out.

⁶ Option 2 split to reflect the two options it contains.

DRAFT - 26 FEBRUARY 1996

Status: For discussion by political parties in preparation for report-back to Constitutional Committee. Corrected version.

**CHAPTER 2
BILL OF RIGHTS**

State's duties

7. The state must respect, protect [**promote and fulfil**]¹ the rights in this Bill of Rights.

Equality

8. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To **promote the achievement of equality**, legislative and other measures **that are designed for the protection and advancement of persons** or categories of persons disadvantaged by unfair discrimination may be taken.²
- (3) Neither the state nor any person may [unfairly] discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth³ [**and affiliation or any other grounds**].⁴

¹ Submission from the public propose using the accepted international wording in respect of the State's obligations.

² As agreed. Option 2 deleted. Consideration to be given to proposal tabled by DP.

³ Words in brackets are still in contention. NP will make alternative formulation available. DP proposes obligation on state to legislate to combat private discrimination.

⁴ NP proposal for consideration.

- (b) the incitement of imminent violence; or
- [(c) advocacy of hatred based on race, ethnicity, gender or religion that constitutes incitement to discrimination.]⁸

(3) **Option 1**

The state must regulate any media that it finances or controls to ensure that it is impartial and presents a diversity of opinion.

Option 2

The state must regulate any newspapers and electronic media that it finances or controls to ensure that they are impartial and represent broadly the views of society.⁹

Assembly, demonstration and petition

16. Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, or to present petitions.

Freedom of association

17. Everyone has the right to freedom of association.

Political rights

18. (1) Every citizen is free to make political choices, which includes the right

-
- (a) to form a political party;
- (b) to participate in the activities of, or to recruit members for, a political party; and
- (c) to campaign for a political party or cause.

(2) Every citizen has the right to -

- (a) free, fair and regular elections for any legislative body established in terms of the Constitution; and
- (b) to stand for public office and, if elected, to hold office.

(3) Every adult citizen has the right to vote, in elections for any legislative body established in terms of the Constitution, and to do so in secret.¹⁰

⁸ Section 15(2)(c) still under discussion.

⁹ Agreed to move (3) to Chapter 7. However, this section cannot be moved to Chapter 7 unless a commission or other institution is created. The DP proposed another formulation for this clause.

¹⁰ Agreed on 7 February 1996 that section 18 be reformulated to deal only with political rights and that another section be drafted to deal with the franchise.

Slavery, servitude and forced labour

12. No one may be subjected to slavery, servitude or forced labour.

Privacy

13. Everyone has the right to privacy, including the right not to have -

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; and
- (d) the privacy of their communications **infringed**.

Freedom of religion, belief and opinion

14. (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions provided that -

- (a) those observances follow rules made by an appropriate authority;
- (b) they are conducted on an equitable basis; and
- (c) attendance at them is free and voluntary.

(3) (a) **This section does not prevent legislation recognising -**

- (i) **marriages concluded under any tradition or a system of religious, personal or family law; and**
- (ii) **systems of personal and family law under any tradition or adhered to by persons professing a particular religion.**

(b) **The legislation referred to in paragraph (a) must be consistent with the Bill of Rights.**

Freedom of expression

15. (1) Everyone has the right to freedom of expression, including -

- (a) freedom of the press and other media;
- (b) freedom to receive and impart information and ideas;
- (c) **freedom of artistic creativity; and**
- (d) **academic freedom and freedom of scientific research.**⁷

(2) The right in subsection (1) does not extend to -

- (a) propaganda for war;

⁷ Reformulated to incorporate academic freedom, freedom of scientific research and artistic creativity, as agreed on 7 February 1996.

Environment

23. Everyone has the right -

- (a) to an environment that is not harmful to their health or well-being;
- (b) to have their environment protected through reasonable legislative and other measures designed to -
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure sustainable development and use of natural resources.

Property

24. (1) The state must guarantee property **[and it must foster conditions which enable people to gain access to property on an equitable basis].**

(2) **[The nature, content and limits of property may be determined by law.]** No one may be deprived of property except in accordance with a law of general application **[but no one may be arbitrarily deprived of property].**

(3) Property may be expropriated only in terms of a law of general application -

- (a) for public purposes or in the public interest which includes land reform to address the results of past racial discrimination; and
- (b) subject to the payment of **[just and equitable]** compensation within a time period and in a manner as agreed or decided by a court.

(4) When a court decides the amount of compensation, timing or manner by which payment must be made, the court must determine a fair balance between all relevant interests having regard to all the relevant factors, including -

- (a) the current **[and intended]** use;
- (b) the history of its acquisition;
- (c) its market value;
- (d) **[the ability of the state to pay];**
- (e) the purpose of expropriation;
- (f) the level and extent of state investment and subsidy;
- (g) **[the value of the investment in the property];** and
- (h) **[the need for effective land reform].**

[(5) This section does not invalidate reasonable legislative and other measures that are designed to bring about land reform to redress the results of past racial discrimination.]

Citizenship

19. No citizen may be deprived of citizenship.

Freedom of movement and residence

20. (1) Everyone has the right to freedom of movement and residence anywhere in the Republic.
- (2) Everyone has the right to leave the Republic.
- (3) Every citizen has the right to enter and to remain in the Republic.
- (4) Every citizen has the right to a passport.

Freedom of occupation

21. Every citizen has the right to choose freely their occupation or profession, their place of work and their place of training. [The practice of an occupation may be regulated by law.]¹¹

Labour relations

22. (1) Everyone has the right to fair labour practices.
- (2) Workers have the right -
- (a) to form and join trade unions;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike.
- (3) Employers have the right -
- (a) to form and join employers' organisations;
 - (b) to participate in the activities and programmes of an employers' organisation; and
 - [(c) to lock-out.]
- (4) Every trade union and every employers' organisation has the right -
- (a) to determine its own administration, programmes and activities;
 - (b) to organise;
 - (c) to bargain collectively; and
 - (d) to form and join a federation.¹²

¹¹ Agreed on 7 February 1996 to replace "economic activity" with "freedom of occupation". The words in brackets seem unnecessary.

Section 22 still under discussion.

Children

27. (1) Every child has the right -
- (a) to a name and a nationality from birth;
 - (b) to family care, [parental care], or appropriate alternative care when removed from the family environment;
 - (c) to basic nutrition, shelter, basic health care services, and social services;
 - (d) to be protected from maltreatment, neglect, abuse, or **degradation**;
 - (e) to be protected from exploitative labour practices, and not to be required or permitted to perform work or provide services that are inappropriate for a person of that child's age, or that place at risk the child's well-being, education, physical or mental health, or spiritual, moral, or social development; and
 - (f) not to be detained except as a measure of last resort, in which case, in addition to the rights the child enjoys under sections 11 and 34, the child may be detained only for the shortest period of time and has the right to be -
 - (i) kept separately from other detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age.
- (2) The child's best interest is of paramount importance in every matter concerning the child.
- (3) In this section, "child" means a person under the age of 18 years.

Education

28. Option 1

- (1) Everyone has the right -
- (a) to a basic education, including adult basic education, in a state or state-aided institution;
 - (b) to further education, which the state must take reasonable and progressive legislative and other measures to make generally available and accessible; and
 - (c) to choose instruction in any language where instruction in that language can be reasonably provided at state or state-aided institutions.
- (2) Everyone has the right to establish and maintain, at their own expense, private educational institutions that -
- (a) do not discriminate on the basis of race;
 - (b) are registered with the state; and

Housing and land¹³

25. (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures [**,within its available resources,**] to achieve the progressive realisation of this right.¹⁴
- (3) No one may be evicted from their home or **have their home demolished** arbitrarily and without an order of court made after considering the relevant circumstances.¹⁵
- [(4) Everyone has the right to have equitable access to land. The state must take reasonable legislative and other measures [**,within its available resources,**] to facilitate this access.]¹⁶

Health, food, water, and social security

26. (1) Everyone has the right to have access to -
- (a) health care services, including reproductive health care;
- (b) sufficient food and clean water; and
- (c) social security including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures [**,within its available resources,**] to achieve the progressive realisation of these rights.¹⁷
- (3) No one may be refused emergency medical treatment.

¹³ See memo of TC4 dated 14/2/96, tabled at Subcommittee meeting of 21/2/96.

¹⁴ Refined in accordance with instructions 7 February 1996. The formulation supported by the DP is: "Everyone has the right to reasonable and effective legislation and other measures promoting and advancing access to adequate housing."

¹⁵ The phrase in bold appears to have been lost in the process of reproduction or refinement.

¹⁶ Agreed to insert reference to available resources for consideration. Agreed to consider dealing with land in separate clause.

¹⁷ Changes to 26(1)(a), 26(1)(c) and 26(2) as agreed on 7 February 1996. The phrase supported by the DP is: "Everyone has the right to reasonable and effective legislation and other measures promoting and advancing access to each of the rights".

- (2) Everyone whose rights are adversely affected by administrative action has the right to fair procedure unless the administrative action is of general application.
- (3) Everyone whose rights or interests have been adversely affected by an administrative action has the right to written reasons.

Access to courts

33. Everyone has the right to have any dispute that can be resolved by law decided in a fair, public hearing in a court of law or, where appropriate or necessary, another independent and impartial forum.²¹

Arrested, detained and accused persons

34. (1) Everyone who is arrested for allegedly committing an offence has the right -
- (a) to remain silent;
 - (b) to be informed, promptly and in a language that the arrested person understands -
 - (i) of the right to remain silent; and
 - (ii) of the consequences of not remaining silent;
 - (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
 - (d) to be brought before a court of law as soon as reasonably possible, but not later than 48 hours after the arrest, or where the period of 48 hours expires outside ordinary court hours, on the next court day; and while there, to be released from detention unless that person is charged and the court orders the further detention; and

Option 1

to be released with or without bail, unless the interests of justice require that person to be detained [... if the interests of justice permit that person to be released].

Option 2

to be released from detention subject to reasonable conditions if the interests of justice permit.

- (2) Everyone who is detained, including every sentenced prisoner, has the right-
 - (a) to be informed, promptly and in a language that the detained

²¹ The DP wants to add a due process clause.

- (c) maintain standards that are not inferior to standards at comparable state-aided educational institutions.

Option 2

Subsections (1) and (2) above and the following:-

- (3) Everyone has the right to educational institutions based on a common culture, language, or religion, provided that there must be no discrimination on the ground of race and provided further that the state may not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it has been established on the basis of a common language, culture, or religion.

29. ...¹⁸

Language and culture

30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may violate the rights of anyone else.¹⁹

Access to information

31. (1) Everyone has the right of access to -
- (a) any information held by the state; and
 - (b) any information that is held by another natural or juristic person and that is required for the exercise or protection of any rights.

[(2) This right must be regulated by national legislation.]²⁰

Just administrative action

Option 1

32. (1) Everyone has the right to administrative action that is lawful, reasonable [justifiable], and procedurally fair.
- (2) Everyone has the right to be given written reasons for administrative action, unless the reasons have been published.

Option 2

- (1) No one may be adversely affected by administrative action that is unlawful or unreasonable.

¹⁸ Agreed that Section 29 on academic freedom would be incorporated under Section 15.

¹⁹ TRT has considered the formulation and believes it is appropriate.

²⁰ Section 31 to be reconsidered when horizontality and juristic persons discussed.

- convicted;
 - (l) to be sentenced within a reasonable time after being convicted; and
 - (m) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
 - (n) of appeal to, or review by, a higher court.
- (4) Any evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would bring the administration of justice into disrepute.

Limitation of rights

35. (1) The rights in the Bill of Rights may be limited by or pursuant to law of general application only to the extent that the limitation is [demonstrably] justifiable in an open and democratic society based on dignity, freedom and equality and limits the right as little as is reasonably possible.
- (2) Any limitation in terms of subsection (1) must take into account the nature of the right and -
- (a) the importance of the purpose of the limitation;
 - (b) the nature and extent of the limitation; and
 - (c) whether the limitation can achieve its purpose.
- [(3) Any limitation in terms of subsection (1) must be consistent with the Republic's obligations under international law.]
- (4) The provisions of the Bill of Rights do not prevent the state from adopting any legislative or other measures designed to prevent or prohibit [unfair] discrimination.
- (5) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.²²

States of emergency²³

36. (1) A state of emergency may be declared only in terms of an Act of Parliament and only when -

²² Limitation to be discussed at multi-lateral 23 February 1996. Memo to be distributed.

²³ TRT to draft reformulation.

- or imprisoned person understands, of the reason for being detained;
 - (b) to choose and to consult with a legal practitioner, and to be informed of this right promptly and in a language that the detained person understands;
 - (c) to have a legal practitioner provided by the state if substantial injustice would otherwise result, and to be informed of this right promptly and in a language that the detained person understands;
 - (d) to challenge the lawfulness of the detention in person before a court of law and, if the detention is unlawful, to be released;
 - (e) to conditions of detention that are consistent with human dignity, including at least the provision of adequate accommodation, nutrition, reading material, and medical treatment at state expense; and
 - (f) to communicate with, and be visited by, that person's
 - (i) spouse or partner;
 - (ii) next of kin;
 - (iii) chosen religious counsellor; and
 - (iv) chosen medical practitioner.
- (3) Every accused has a right to a fair trial, which includes the right -
- (a) to be informed of the charge with sufficient details to answer the charge;
 - (b) to have adequate time and facilities to prepare a defence;
 - (c) to a public trial that begins and concludes without unreasonable delay in an ordinary court of law;
 - (d) to be present when being tried;
 - (e) to choose and be represented by a legal practitioner, to have a legal practitioner assigned to the accused person at state expense if substantial injustice would otherwise result [if the interests of justice require it], and to be informed of both of these rights in a language the accused person understands;
 - (f) to be presumed innocent, and to remain silent, and not to testify during the proceedings;
 - (g) to adduce and challenge evidence;
 - (h) not to be compelled to give self-incriminating evidence;
 - (i) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
 - (j) not to be convicted for any act or omission that was not an offence under either national or international law at the time it was committed or omitted;
 - (k) not to be tried for any offence in respect of an act or omission for which that person has previously been either acquitted or

below.²⁵

Section 8	Equality
Section 9	Human dignity
Section 10	Life
Section 11(3)	Freedom from torture and degrading treatment
Section 12	Freedom from slavery and servitude (excluding forced labour)
Section 14	Freedom of religion, belief and opinion
Section 22(1)	Fair labour practices
Section 22(2) and (3)	Right to form and join trade unions or employers' organisations
Section 27(1)(d)	Right of children to not be restricted, neglected or abused
Section 27(1)(e)	Right of children to freedom from exploitative labour practices
Section 27(1)(f)	Rights of children who are detained
Section 33	Access to courts
Section 34(1)(a) and (b)	Right to remain silent, and to be informed of that right
Section 34(1) (c)	Right not to be compelled to confess or make statements
Section 34(2) (d)	Right to challenge detention and be released
Section 34(3) and (4)	Fair trial
Section 35	Rights contained in limitation section
Section 38	Application of the Bill

(5)...

[(6) Any superior court may enquire into the validity of

- (a) a declaration of a state of emergency;
- (b) any extension of a declaration of a state of emergency; or
- (c) any legislation enacted, or other action taken, under a declaration of a state of emergency.]

(7) Whenever anyone is detained in consequence of a declaration of a state of emergency, the following conditions must be observed -

²⁵ The list of non-derogable rights may have to be re-considered. Firstly, there may be too many rights on the list. Fair labour practices (22 (i)), trade unions (22(2) & (3)), limitation clause (35) and application (38) should perhaps come off. Equality (8), religion etc (14) and access to courts (33) are questionable. Restricted in 27(1)(d) (children) should be maltreated.

Or, secondly, the formulation of the rights and references to the section numbers should be re-considered. Or, thirdly, an approach based on principle, rather than a list, should be considered. A memo, is attached.

- (a) the life of the nation is threatened by war, invasion, [general] insurrection, disorder, [national] disaster, or other public emergency;²⁴ and
 - (b) the declaration is necessary to restore peace or order.
- (2) Any declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, may be effective only -
- (a) prospectively from the date of the declaration; and
 - (b) for no more than 21 days from the date of the declaration, unless the National Assembly resolves to extend the declaration. The National Assembly, by a majority of at least two thirds of its members, may resolve to extend a declaration of a state of emergency for a period of up to three months, or for consecutive periods of up to three months each [for no more than 14 days ... up to 60 days, or for consecutive periods of up to 60 days each].
- (3) Any legislation enacted in consequence of a declared state of emergency may derogate from the Bill of Rights only to the extent that -
- (a) (it) is strictly required by the emergency;
 - (b) it is consistent with the Republic's obligations under international law;
 - (c) it conforms to subsection (4); and
 - (d) it is published in the national Government Gazette immediately after being enacted.
- (4) No Act that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise -
- (a) the creation of retrospective crimes or the imposition of retrospective penalties except for an act or omission that, at the time it was committed, was criminal in terms of international law;
 - (b) indemnifying the state, or anyone acting under state authority, for unlawful acts committed during the state of emergency; or
 - (c) any derogation from this section or any of the sections listed

²⁴ The deletion of "general" and "national" is proposed by TRT/Panel to provide for declaration of state of emergency when insurrection or disaster or disaster occurs in only one part of the country.

Application²⁶

38. (1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all other organs of state.
- (2) The Bill of Rights binds all natural and juristic persons if applicable.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law, or legislation, to the extent that they are consistent with the Bill.
- (4)

Option 1

Juristic persons are entitled to the rights in the Bill of Rights to the extent that the nature of the rights and of the juristic persons permit.

Option 2

Juristic persons are only entitled to the rights in the following sections:

(An example of a list:)

Section 13(b),(c) and (d)	Privacy
Section 14(2)	Freedom of religion, belief and opinion
Section 15	Freedom of expression
Section 17	Freedom of association
Section 21	Economic activity
Section 22	Fair labour practices
Section 23(b)	Environment
Section 24	Property
Section 28(2)	Education
Section 29(1)	Academic freedom
Section 31	Access to information
Section 32	Just administration
Section 33	Access to courts
Section 34(3)	Rights of arrested, detained and accused persons

Interpretation of Bill of Rights

39. (1) When interpreting the Bill of Rights, every court -
- (a) must promote the values that underlie an open and democratic society based on freedom, equality and human dignity;
- (b) must consider international law; and
- (c) may consider foreign law.
- (2) When interpreting any legislation, every court must prefer any

²⁶ Multi-lateral 23 February 1996. Memo to be distributed.

- (a) an adult family member or friend of the detainee must be contacted as soon as reasonably possible, and told that the person has been detained;
 - (b) a notice must be published in the national Government Gazette within five days of the person being detained, stating the detainee's name and referring to the emergency measures under which that person has been detained;
 - (c) the detainee must be allowed to choose, and be visited at any reasonable time by, a medical practitioner;
 - (d) the detainee must be allowed to choose, and be visited at any reasonable time by, a legal representative;
 - (e) a court must review the detention as soon as reasonably possible, but no later than 10 days after the date the person was detained, and the court must release the detainee unless the detention is necessary to restore peace and order;
 - (f) if the court does not release a detainee, that detainee may apply to the court for a further review after 10 days, and the court must again review the detention, and must release the detainee unless the detention is still necessary to restore peace and order;
 - (g) the detainee must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at those hearings, and to make representations against continued detention; and
 - (h) the state must present written reasons to the court to justify the detention or continued detention of the detainee, and must give a copy of those reasons to the detainee at least two days before the court reviews the detention.
- (8) If a court releases a detainee, that person may not be detained again on the same grounds unless the state first shows a court good cause for re-detaining that person.

Enforcement of rights

37. Anyone listed in this section has the right to apply to a competent court, alleging that a right declared in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief including a declaration of rights. The persons who may apply for relief are:

- (a) anyone acting in their own interests;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or a class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interests of its members.

reasonable interpretation of the legislation that is consistent with the Bill of Rights over any alternative interpretation of the legislation that is inconsistent with the Bill.

- (3) When interpreting any legislation, and when developing the common law or customary law, every court must promote the spirit, purport, and objects of the Bill of Rights.

PANEL OF CONSTITUTIONAL EXPERTS

MEMORANDUM FOR DISCUSSION PURPOSES AT WORKSHOP/MULTI-LATERAL - 23.2.1996

TO: CHAIRPERSONS AND EXECUTIVE DIRECTOR OF THE CA

DATE: 20 FEBRUARY 1996

RE: PANEL MEMO ON "SPECIAL LIMITATIONS"/"QUALIFIERS" AND GENERAL LIMITATION

1.

INTRODUCTION

In addition to the general limitation clause (section 35) the draft contains a number of what are often referred to as "special limitations", "internal qualifiers", or "internal modifiers".

It is generally accepted that rights are not absolute, and that they can, e.g, sometimes "compete" with one another in certain situations. Therefore they have to be "limited" in some way. (The philosophical question whether rights can only be limited in the interest of other rights, or whether it could also be done in certain interests, or whether such interests always embody rights, is left aside for present purposes). The term "limitation" is not necessarily always correct, but is used here as short hand for the purpose of brevity. (Hogg Canadian Constitutional Law 885 talks about "limitation of rights" and "qualified rights".) Also, limitation in the sense dealt with here does not refer to the derogation or suspension of rights, e.g as may be dealt with in the state of emergency clauses.

2.

SPECIAL LIMITATIONS OR INTERNAL QUALIFIERS IN THE DRAFT

Very broadly speaking, the following could be considered examples of special limitations or internal qualifiers in the draft:

- Section 8:
"unfair" discrimination;
- Section 8(2):
In terms of a substantive rather than a formal approach to equality, affirmative action is not an exception to or limitation of equality, but



CONSTITUTIONAL ASSEMBLY
MEMORANDUM

TO: Constitutional Committee Sub-committee
FROM: Executive Director
DATE: 4 March 1996
**RE: Panel of Experts Memorandum on "Special Limitations"/"Qualifiers"
and General Limitation**

We enclose for your consideration a memorandum from the Independent Panel of Constitutional Experts on "Special Limitations"/"Qualifiers" and General Limitation.

H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY

P. O. Box 15, Cape Town, 8000
Republic Of South Africa

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Tel: (021) 245 031, 403 2252 Fax: (021) 241 160/1/2/3, 461 4487, E-mail: conassem@iaccess.za



You've made your mark



Now have your say

THE NEW CONSTITUTION

3.

THE NATURE OF SPECIAL LIMITATIONS

From the above examples it is clear that those specifications which could broadly speaking be considered to be special limitations or internal qualifiers are not necessarily entirely similar.

For example, Section 15(2) serves to state that certain kinds of (hate) speech do not qualify for constitutional protection as expression, or do not fall within the "scope" of the right to free expression.

The "unfair" in Section 8 (should it remain) serves to distinguish "discrimination" in the negative sense from "differentiation", or "acceptable" discrimination.

The word "reasonable" in some other clauses qualifies the scope and nature of e.g. "measures". In the access to information clause the kind of information to which one is entitled is determined.

What these limitations or qualifiers may all have in common, is that they to some extent define the **scope of the right**.

4.

THE WORKING OF SPECIAL LIMITATIONS OR QUALIFIERS AND THE GENERAL LIMITATION CLAUSE

What is the effect of special limitations, or as Hogg (885) puts it, does the **general limitation clause** have a role to play in justifying infringements of rights that are by their own terms qualified by e.g. reasonableness?

If someone has the right not to be **arbitrarily** detained or evicted, can arbitrary detention or eviction still be reasonable and justified etc in terms of the general limitation clause?

The general answer is **yes**.

A brief explanation of the relationship between specific limitation and the general clause may be helpful:

To some extent the exact implications depend on whether or not a rigid "different stages of enquiry" approach is going to develop in South African jurisprudence, as opposed to an approach in terms of which different tests or stages of enquiry will be applied at the same time in a more holistic manner.

part of equality. (See, however, the explanation of the relationship with the general limitation clause in par 4 below.)

- **Section 10 (option 2):
capital punishment in life;**
- **Section 11(3):
no one may be punished in a cruel, inhuman or degrading way.**
- **Section 14(3):
the validity of certain marriages;**
- **Section 15(2):
hate speech;**
- **Section 16:
"peacefully and unarmed" in assembly, demonstration and petition;**
- **Section 18/18A:
adult citizens can vote;**
- **Section 21:
The practice of an occupation may be regulated by law/legislation;**
- **Section 22:
fair labour practices;**
- **Section 23:
reasonable legislative measures to protect the environment;**
- **Section 25 & 26:
reasonable measures; within the states available resources; no-one may be evicted arbitrarily; appropriate social assistance, if people are unable to support themselves (26(1)(c)); emergency medical treatment (26(3));**
- **Section 27(1)(f):
no detention of children, except as a measure of last resort;**
- **Section 28:
reasonable and progressive (28(1)(b)); the right to private educational institutions that do not discriminate etc (28(2));**
- **Section 30:
no one exercising cultural rights may violate the rights of anyone else;**
- **Section 31:
information held by the state, and information held by others, which is required for the exercise or protection of rights.**

expected that the standards mentioned in the limitation clause will in some way play a role in the enquiry regarding the scope of Section 15.

Because a specific limitation identifies a particular phenomenon and isolates it from the protection of the clause, whereas a general limitation clause provides for the general limitation of all rights, some would argue that a specific limitation limits a right more than a general limitation clause would as far as the particular phenomenon described in the specific limitation is concerned. But, the wording of the specific clause could also be such that its potential to limit the right is less than that of the general clause. If, e.g, the very strict and narrow wording of the American *Brandenburg v Ohio* test is used in the specific limitation of hate speech, requiring intent to cause harm, as well as the likelihood of imminent harm, forms of expression falling outside the scope of that wording might theoretically still be disqualified from protection as free expression, in terms of the general clause, where references to open democratic societies based on freedom and equality and to international law would draw in, e.g, the wider standards applied in Germany, Canada and international law. The significance of such a specific limitation would then be more symbolical than practical.

The explanation in the previous paragraph must be qualified, however. In some instances a very narrow and accurate formulation in the special limitation or qualifier, e.g of hate speech, may tend to "define" hate speech in such a way that it will be difficult to justify legislation which targets more than hate speech in the narrow sense, under the general limitation clause. Or, if it does not define it, it could set the tone for a certain interpretation of hate speech which would be difficult to depart from under the general limitation clause.

5.

CONCLUDING REMARKS

Rights can be limited in different ways, including (a) no limitation clause (leaving it to the courts like in the USA - not "on" for SA), (b) specific limitations and (c) a general limitation clause. Some submissions to the CA have warned against a mixture of (b) and (c), referring to it as "double limitation". The "danger" seems to be exaggerated, as long as care is taken regarding the wording.

The internal qualification or limitation of rights often forms part of the description of a right and seems to be inevitable in a modern relatively detailed bill of rights and is not something that could or should be avoided at all costs. It also occurs in the Canadian Constitution, which has a general limitation clause.

In terms of the "two stages of enquiry approach", which seems to be generally accepted by South African commentators, the first step is that the person who alleges that a right has been infringed must "prove" that he or she had such a right, or that the relevant conduct falls within the scope of the right, and also that the right has been infringed. If this is established, the second question is whether the infringement complies with the general limitation clause. A person complaining of discrimination will thus first have to establish that he or she is a bearer of the right to equality, that discrimination took place on one or more of the relevant grounds and that the discrimination was indeed unfair. Then the onus is on the state (who for argument's sake is alleged to have discriminated) to establish that the unfair discrimination was nevertheless reasonable etc.

With regard to hate speech, an explanation was given in an earlier Panel Memo. If only a general limitation clause is adopted (and assuming that it will be formulated more or less like Section 35), criminal legislation prohibiting hate speech, e.g, will firstly be tested against Section 15 (which won't then have 15(2)). If such legislation is found to violate the right to freedom of expression, at least on the face of it, the next question would be whether the legislation complies with Section 35, and specifically whether it embodies a limitation which is reasonable/justifiable/necessary (depending on the final formulation of S 35), in an open democratic society based on freedom and equality. If the legislation does not meet the standards of Section 35, it is unconstitutional. (It could further be argued that the onus to convince a court is on the party who alleges unconstitutionality, in the first stage, and on the state, in the second.)

If the specific reference to hate speech is included in Section 15, it may define hate speech as described in the section out of the scope of the right (by stating that the protection "does not extend to" hate speech). If the same two stage enquiry is applied and the answer to the first question is that the legislation concerned does not only target hate speech, but also limits other forms of expression, it means that freedom of expression is violated. The state can then, on the second question, try to convince the court that the limitation is nevertheless reasonable etc and thus permitted in terms of Section 35. So, both the specific limitation and the general limitation clause will play a role in the enquiry.

However, if the answer to the first question is that what the legislation deals with is in fact hate speech as described in Section 15, the finding will be that no right has been violated and the enquiry does not move on to the second stage.

Therefore, it is argued that the reasonableness (etc) and open democratic society tests do not enter the enquiry in the case of the last mentioned possibility, but only the specific wording of Section 15(2). This fact would partly be a consequence of any specific limitation and does deserve consideration. However, it also has to be kept in mind that the references to the values that underlie an open democratic society, international law and foreign law in the interpretation clause (S 39(1)) would, to the extent that there is room for different nuances of interpretation, necessitate a look at comparative material from other democratic societies anyway, when the actual limits between free speech and hate speech are to be decided. Furthermore, if the courts do not rigidly follow a two-stage approach, it could be

Furthermore, even in cases where the general limitation clause could in fact "do the job", there may be historical or socio-political reasons to specifically define or qualify a right in a certain way. For example, if South Africans feel that it should be stated clearly that certain forms of hate speech fall outside the scope of the right to free expression, in other words that no one has a right to engage in such speech, the specific mentioning of the exclusion in the free expression clause is justified. This is a political decision to be taken.

The specific wording of special limitations or qualifications naturally has to be approached with care. A right must not be limited or qualified to such an extent that the right becomes meaningless. Furthermore, words which could contradict the general limitation clause, or otherwise be problematic, must be avoided. For example, if discrimination which is unfair (in terms of section 8) is alleged to be reasonable (in terms of the general limitation clause), a court may be forced to weigh fairness against reasonableness, or to find that something which is unfair is nevertheless reasonable. Or if the same wording is used in the qualifier as in the general clause, the question would be whether the word still means the same, or whether the same test should be applied twice. E.g, in Section 26 of the interim Constitution the right to free economic activity is protected, but measures that are justifiable in an open democratic society based on freedom and equality are not precluded. If the result of the first stage of enquiry is that the measures are not justifiable etc, can the same question again be asked under the general limitation clause? So, special limitations or qualifiers must be carefully worded, to avoid confusion.



CONSTITUTIONAL ASSEMBLY
MEMORANDUM

TO: Constitutional Committee Sub-committee
FROM: Executive Director
DATE: 4 March 1996
RE: Technical Committee 4 Memorandum on Section 35 of the Working Draft

We enclose for your consideration a memorandum from Technical Committee 4 on Section 35 of the *Working Draft*.

H EBRAHIM
EXECUTIVE DIRECTOR
CONSTITUTIONAL ASSEMBLY

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You've made your mark



Now have your say

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THE NEW CONSTITUTION

"The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. ... In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation has to be necessary, whether the desired ends could be reasonably achieved through other means less damaging to the right in question."

The criteria identified by Chaskalson P have been reaffirmed and applied in subsequent Constitutional Court decisions. (For example in *S v Williams* 1995 (7) BCLR 861 (CC) par 60; *S v Bhulwana*; *S v Gwadiso* 1995 (12) BCLR 1579 (CC) par 17; *Ferreira v Levin and Others*; *Vryenhoek and Others v Powell and Others* CCT 5/95 (as yet unreported) par 122-127; *Coetzee v Government of the Republic of South Africa* 1995 (10) BCLR 1382 (CC) par 11 and 45.)

(The Constitutional Court described the difference between "reasonable" and "necessary" as a question of degree rather than kind, leaving the legislature a greater discretion in its choice of means in the case of "reasonable", than in the case of "reasonable and necessary." (*S v Makwanyane* (*supra*) par 339 per O'Regan J; *Coetzee v Government of the Republic of South Africa* (*supra*) par 55-56 per Sachs J.)

The criteria in section 35(1)(a) to (c) of the TC4 proposal are used in other systems, regardless of which combination of the terms "reasonable", "necessary" or "justifiable" is used in the formal text, and even when none of them is used. Examples:

(a) By the Indian Supreme Court in a judicially developed "reasonableness test" for the purposes of reviewing limitations of the fundamental freedoms guaranteed in section 19 of the Indian Constitution. (*State of Madras v VG Rao* AIR 1952 SC 196 at 200:

"... [F]rom the point of view of reasonableness, the Court should consider not only factors such as the duration and extent of the restrictions, but also the circumstances in which and the manner in which their imposition has been authorised. ... The nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions of the time should all enter into the judicial verdict."

(b) By the European Court of Human Rights for the purposes of "necessary in a democratic society" in articles 8 to 11 of the European Convention and article 2 of Protocol 4. (Cases and writers quoted by Sach J in *Coetzee v Government of the Republic of South Africa* (*supra*) par 57.)

(c) By the German Constitutional Court in a judicially developed "proportionality test". (Currie *The Constitution of the Federal Republic of Germany* (1994) 20:

"The basic idea behind the proportionality principle is that, even when the legislature is specifically authorized to restrict basic rights, the restriction must be reasonable. The decisions have broken down this general principle into three elements...The limitations must be adapted ("geeignet") to the attainment of a legitimate purpose; it must be necessary ("erforderlich") to that end; and the burden it imposes must not be excessive ("unzumutbar")."

TECHNICAL COMMITTEE 4

MEMORANDUM FOR DISCUSSION PURPOSES

TO: CHAIRPERSONS AND EXECUTIVE DIRECTOR OF CA
DATE: 16 FEBRUARY 1996
RE: SECTION 35 OF THE WORKING DRAFT

In order to facilitate the discussion of section 35 on 23 February 1996, this Memorandum contains a comparative analysis of:

1. *section 35(1) of the Working Draft*
2. the proposal of Technical Committee 4 contained in the *Supplementary Memorandum on the Bill of Rights and Party Submissions (8 November 1995)* pages 33 - 35; and
3. the *Democratic Party formulation tabled on 7 February 1996* page 2.

1. SECTION 35 OF THE WORKING DRAFT

35.(1) The rights in the Bill of Rights may be limited by or pursuant to law of general application only to the extent that the limitation of a right is -

- (a) [reasonable/reasonable and justifiable/ reasonable and necessary/ necessary/justifiable] in an open and democratic society based on freedom and equality;
- (b) compatible with the nature of the right that it limits; and
- (c) consistent with the Republic's obligations under international law].

This draft left a decision on the alternatives defined in 35(1)(a) open for further discussion and negotiation.

2. TC 4 PROPOSAL - NOVEMBER 1995

35(1) The rights in the Bill of Rights may be limited by or pursuant to law of general application only to the extent that the limitation is justifiable in an open and democratic society based on freedom and equality which must be determined taking into account

- (a) the nature and importance of the right that is limited;
- (b) the nature and importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) whether the limitation can achieve its purpose;
- (e) whether the purpose of the limitation can be achieved through less restrictive means.

This proposal entails that the controversies on the alternatives in section 35(1) can be avoided by incorporating the criteria for the application of the concepts "reasonable" and "necessary" in section 33(1) of the Interim Constitution, as described by Chaskalson P in *S v Makwanyane* (1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC) at par 104):

(d) By the Canadian Supreme Court for the purposes of applying "reasonable limits ... as can be demonstrably justified in a free and democratic society" in section 1 of the Canadian Charter. (*Edward Books & Art Ltd v R* [1986] 2 SCR 713:

"Two requirements must be satisfied First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right Secondly, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is, nevertheless, outweighed by the abridgement of rights."

(e) For the purposes of interpreting "necessary" in respect of the limitation of specific rights in the International Covenant on Civil and Political Rights. (Sources quoted by Sachs J in *Coetzee v Government of Republic of South Africa (supra)* par 57.)

3. DEMOCRATIC PARTY FORMULATION - 7 FEBRUARY 1996

- 35(1) The rights in this Bill of Rights may be limited by or pursuant to a law of general application, but only to the extent that the limitation is demonstrably justifiable in an open and democratic society based on freedom and equality and restricts the right as little as possible in such a society.**
- (2) Any limitation in terms of subsection (1) must be -**
- (a) consistent with the Republic's obligations under international law; and**
 - (b) compatible with the nature of the right that it limits.**

Like the TC 4 proposal, this formulation avoids using "reasonable" and "necessary".

It uses the term "demonstrably justifiable", instead of "justifiable".

The last part of 35(1) ("restricts the right as little as is possible in such a society"), overlaps with 35(1)(e) in the TC 4 proposal.

Section 35(2)(b) overlaps with 35(1)(a) in the TC 4 proposal.

The DP proposal does not cover the elements in 35(1)(b), (c) and (d) of the TC 4 proposal

16 February 1996

