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THEME COMMITTEE 4

DEMOCRATIC PARTY SUBMISSION

24. LIMITATION OF RIGHTS

25. STATES OF EMERGENCY AND SUSPENSION OF RIGHTS

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

(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and equitable collective bargaining and the regulation of industrial action shall remain of full force and effect until repealed or amended by the legislature.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 dritwirkung" 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 judgement, 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.

25. STATES OF EMERGENCY AND SUSPENSION OF RIGHTS

1. Content of the Right

Section 34 of the Interim Constitution reads as follows -

- "(1) A state of emergency shall be **proclaimed** prospectively under an Act of Parliament, and shall be declared only where the security of the Republic is threatened by war, invasion, general insurrection or disorder or at a time of national disaster, and if the declaration of a state of emergency is necessary to restore peace or order.
- (2) The declaration of a state of emergency and any action taken, including any regulation enacted, in consequence thereof, shall be of force for a period of not more than 21 days, unless it is extended for a period of not longer than three months, or consecutive periods of not longer than three months at a time, by resolution of the National Assembly adopted by a majority of at least two-thirds of all its members.

- (3) Any superior court shall be competent to enquire into the validity of a declaration of a state of emergency, any extension thereof, and any action taken, including any regulation enacted, under such declaration.
- (4) The rights entrenched in this Chapter may be suspended only in consequence of the declaration of a state of emergency, and only to the extent necessary to restore peace or order.
- (5) Neither any law which provides for the declaration of a state of emergency, nor any action taken, including any regulation enacted, in consequence thereof, shall permit or authorise -
 - (a) the creation of retrospective crimes;
 - (b) the identification of the state or of persons acting under its authority for unlawful actions during the state of emergency; or
 - (c) the suspension of this section, and sections 7, 8(2), 9, 10, 11(2), 12, 14, 27(1) and (2), 30(1)(d) and (e) and (2) and 33(1) and (2).
- (6) Where a person is detained under a state of emergency the detention shall be subject to the following conditions:
 - (a) An adult family member or friend of the detainee shall be notified of the detention as soon as is reasonably possible;
 - (b) the names of all detainees and a reference to the measures in terms of which they are being detained shall be published in the Gazette within five days of their detention;
 - (c) when rights entrenched in section 11 or 25 have been suspended -
 - (i) the detention of a detainee shall, as soon as it is reasonably possible but not later than 10 days after his or her detention, be reviewed by a court of law, and the court shall order the release of the detainee if it is satisfied that the detention is not necessary to restore peace or order;

- (ii) a detainee shall at any stage after the expiry of a period of 10 days after a review in terms of subparagraph (i) be entitled to apply to a court of law for a further review of his or her detention, and the court shall order the release of the detainee if it is satisfied that the detention is no longer necessary to restore peace or order;
 - (d) the detainee shall be entitled to appear before the court in person, to be represented by legal counsel, and to make representations against his or her continued detention;
 - (e) the detainee shall be entitled at all reasonable times to have access to a legal representative of his or her choice;
 - (f) the detainee shall be entitled at all times to have access to a medical practitioner of his or her choice; and
 - (g) the state shall for the purpose of a review referred to in paragraph (c)(i) or (ii) submit written reasons to justify the detention or further detention of the detainee to the court, and shall furnish the detainee with such reasons not later than two days before the review.
- (7) If a court of law, having found the grounds for a detainee's detention unjustified, orders his or her release such a person shall not be detained again on the same grounds unless the state shows good cause to a court of law prior to such re-detention. "

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

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

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

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

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

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

DEMOCRATIC PARTY (DP)