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 Offenses 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 (1 994) 107-1 1 0; Basson South Africa's Interim Constitution; Text and Notes (1 994) 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 individuals 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 Zimbabwian 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 11 5). 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.