

15/06/95

## NATIONAL PARTY PRELIMINARY SUBMISSION

### THEME COMMITTEE 4

#### Item 24: States of emergency and suspension of rights

##### 1. Content

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

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

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

- \* the application of chapter 3 (section 7)
- \* non-discrimination (section 8(2))

- \* life (section 9)
- \* human dignity (section 10)
- \* prohibition of torture or cruel and inhuman punishment (section 11 (2))
- \* prohibition on servitude or forced labour (section 12)
- \* right to religion (section 14)
- \* the right to fair labour practices (section 27(1) and (2))
- \* protection of children's rights (section 30(1)(d) and (e) and (2))
- \* the general limitations clause (section 33(1) and (2)); and
- \* the "suspension" clause (section 34).

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

## **2. Application**

2.1 Firstly, although section 34 contains the heading "suspension" and this terminology is reflected in this section, it is submitted that such usage is incorrect in that the rights under chapter 3 are never totally suspended (i.e. completely removed), but are limited to a much greater extent than is the case under section 33 and other criteria are applied. Arguing that these rights have been completely wiped out for the duration of the state of emergency, could in extreme cases lead to serious anomalies and authorise abuse of the law. The wording of subsection (4) referring to the suspension "of certain rights" only to the extent necessary to restore peace or order" strongly underlines the submission that the rights are only limited to the extent necessary and not suspended altogether. Basson 'South Africa's Interim Constitution: Text and Notes" (1994) at p. 53 echoes this submission by stating that the "suspension" of fundamental rights "... must be distinguished

from the ordinary limitations on fundamental rights..." (our emphasis). Section 34 therefore provides for special limitations because of the special circumstances prevailing, namely a state or emergency. It is incorrect to describe the application or effect of this section as a "suspension" of rights. In order not to create the perception that fundamental rights may be abused during a state of emergency, the NP submits that the section should be amended by the deletion of the terms 'suspension' and "suspended" and the substitution therefore of the terms "limitation" and "limited" wherever necessary.

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

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

2.4 Fourthly, the exclusion of many rights from section 34(5)(c) may be questioned. Given, from subsection (4), that the rights may only be 'suspended' to the 'extent necessary to restore peace or order', it is submitted that the provisions of section 33 adequately provide for the special circumstances which could exist during a state of emergency. When applying section 33 to determine the extent of the limitation of a particular right, the circumstances prevailing at the time of such determination are taken into account by the Court. The Court would therefore take into account the circumstances which justify the declaration of a state of emergency and adjudicate the extent of the limitation against the background of the prevailing circumstances. In our submission therefore, only section 11 (2) and 25 need to be specially limited in view of the special provisions contained in section 34 in this regard. It is therefore submitted that the question of whether the "suspension" of rights (other than those contained in section 11 (2) and 25) ought to be included in this section, should be thoroughly investigated by the Technical Committee and its advice obtained in regard to the necessity for providing for the special limitation of each of the rights reflected in the new text.

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

NATIONAL PARTY (NP)