

NOTE ON SECTION 1 LIMITATION CLAUSE IN CHARTER

In the October 6 draft, the limitation clause in section 1 read as follows:

"subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government."

In the new draft, this clause reads:

"subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The main criticisms of the October 6 draft were that by using the terms generally accepted and parliamentary system of government, this would enable any limit that was found in laws to be a reflection of one that was generally accepted, and that the idea of parliamentary supremacy would be preserved, thus obliging the courts to give effect to any limit imposed by Parliament.

Under the revised draft, the principle of parliamentary system of government has been dropped. Second, limits must now be prescribed by law, which means that any limit must be found in specific law, and cannot be one simply imposed by a government or an official. It is therefore not simply another means of describing a parliamentary system of government. Prescribed by law reflects the wording suggested by Gordon Fairweather and by Walter Tarnopolsky, and is the wording found in the International Covenant, for example, in Articles 18, 19, 22.

Beyond this, the new draft specifies that any limit prescribed by law must meet two tests to be valid: it must be reasonable and it must be justified as one permitted

in a free and democratic society. In addition, ^{the} authority imposing the limit must demonstrate to the court that the limit is justified in the circumstance. Thus, for example, the onus will be on the prosecutor to prove to the court's satisfaction that a limit on freedom of expression is reasonable and justified in the circumstances of the case.

This will be a heavy burden to discharge, and goes beyond the wording suggested by Gordon Fairweather: "such limits prescribed by law as are reasonably justifiable in a free and democratic society".

That is why it is felt unnecessary to specify that no limits can be imposed on certain rights in any cases as the International Covenant provides or as Gordon Fairweather suggested. With the test of demonstrably justified, it will ^{virtually} never be possible, even in wartime, to demonstrate that a limit on equality rights or on certain legal rights (eg. right to a fair trial, protection against cruel and unusual punishment or right to an interpreter), is justified.

Beyond this it should be noted that the non-derogation provision of the International Covenant is inconsistent in the list of rights that cannot be derogated from in wartime.

For example, it forbids derogation from non-discrimination on the basis of race or colour, but allows it with respect to national origin! Again, the Covenant does not forbid derogation of legal rights under Article 14 which includes rights to a fair trial, to counsel, to protection against self-crimination and to a presumption of innocence.

Consequently, those who cite the International Covenant as the ideal document to follow should examine it carefully.

We considered specifying certain categories or rights as non-derogable, but after examining this approach carefully concluded that it would result in very arbitrary distinctions being drawn in choosing between one right and the other.

Thus, we felt the better approach was to create a very strict test in section 1 for imposing limits; one that would make it extremely difficult, if not impossible, to demonstrate to a court that a limit on certain rights was ever justified in even the most extreme circumstances.

NOTE: The proposal by Gordon Fairweather was as follows:

1.(1) The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such limits prescribed by law as are reasonably justifiable in a free and democratic society.

(2) No limitations on the legal rights or the non-discrimination rights set out in this Charter may be made under this provision.

(3) This Charter guarantees the equal right of men and women to the enjoyment of the rights and freedoms set out in it.

1.2 If Parliament should consider that sub-sections (2) and (3) of this formulation do not reflect its intentions, the Canadian Human Rights Commission would recommend that the present wording of Section 1 of the Charter be revised to read:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such limits prescribed by law as are reasonably justifiable in a free and democratic society.

Before the Committee, Professor Tarnopolsky made the following comments on a limitation clause:

So there are really three categories of rights: those which, by international standards, we have submitted ourselves; those which are nonderogable even in times of emergency or war; and those, like the legal rights which may be encroached upon, but only in emergencies if officially proclaimed; and then the fundamental freedoms which are subject to certain rights.

Finally, what are those limitation clauses? In the International Covenant, the reference is to such laws as are subject to such restrictions as are prescribed by law and are necessary for the purposes of a free and democratic (and, in our case, plural and democratic) society.

Now, it seems to me that the importance of that is that the onus has to be upon the one who argues that there are restrictions, and that has to be put in terms of being either necessary or demonstrably justifiable or demonstrably necessary; but the onus has clearly to be upon the one who argues in favour of the restriction and, which is important, it has to be prescribed by law, because that—and this is as far as I will go into the question of the pluses and minuses of the Bill of Rights; because the most important aspect of the Canadian Bill of Rights is not so much in the invalidation of parliamentary legislation as it is in the control of administrative acts, police acts, and with respect to that the limitations that are provided in international instruments require that they be provided specifically by law.