2/4/4/5/17

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 4

~~12 JUNE 1995~~

26 JUNE 1995

CHAIRPERSON: ... gentleman it's been suggested that we commence proceedings. Welcome everyone here, can we take any apologies that we have for today's meeting. Are there any apologies, you don't have any.

UNKNOWN: Ms Nlamini and (inaudible) ...

CHAIRPERSON: Ms Nlamini and Mr Rasmeni have apologised, any further apologies.

UNKNOWN: (inaudible) ...

CHAIRPERSON: Ms Camerer and Ms Pandor will be late.

UNKNOWN: Mr Bakker.

CHAIRPERSON: Mr Bakker, welcome to Mr Sizani. Right we just commence with some minutes here. The Theme Committee of the 12th and the 15th they're in the bundle of documentation on page 2. Any corrections - page 2 - 10, take those then as correct.

Then the Theme Committee on Thursday the 15th, starting on page 11. No corrections or amendments take those as correct. Then the Core Group well only Senator Radue is present and that's not for confirmation but simply for noting.

All right I've had a request from Senator Radue who represents the National Party who has to go for some surgery unfortunately that the - and to facilitate his position we take the National Party's proposals first.

Incidently it's also if you read the documentation not every party has made submissions on all the topics that are meant to be covered today. I think all the parties have muse submissions on limitations and suspensions during the state of emergency, those two topics.

The third topic is the interpretation of rights which not every party has commented upon and it is proposed that those parties which have not submitted - submissions on these - on the third matter that they do so in writing to the Secretariat and these will be circulated at a later stage.

But for those parties who have - that they discuss them today with the tabling of their reports. All right so if we can just reverse the orders slightly. Ms Sizani.

MR SIZANI: Thank you Mr Chairperson one little amendment on - is it possible for those who have not submitted (inaudible) ... by who have carried, who have brought the submissions to present it verbally here.

CHAIRPERSON: Yes, if we start with the National Parties proposals which are not on numbered pages but it is the last proposal in the - second to last in the thicker document, parties submissions. Senator.

MR RADUE: Mr Chairperson thank you very much indeed for allowing me to present these papers early. Can we just say that we will present all three is that the idea from the chair.

CHAIRPERSON: Yes.

MR RADUE: Thank you, well the question of the limitation of rights, the National Parties submission is before the committee and we

regard the limitation of rights as important. In particular there are two types of limitations, the first one being specific limitations where the limitation is imposed in the specific wording of the right itself in each case and then the general limitations clause.

Now we proposed to deal specifically with the general - general limitations clause which is what we have done in our submission. We make a few general remarks on our page 2 in which we indicate that the whole approach which we have adopted is one in which the question is asked whether in fact there has been a limitation of right guaranteed in the Bill of Rights and secondly whether or not the limitation satisfied the requirements of the general limitations clause.

The onus as far as we are concerned appears to be or rest originally on the person who's right has been limited. But once that limitation is alleged, then the burden of proof in our opinion shifts to the State to demonstrate if the limitation complies with the requirements of the general limitations clause.

Now the courts have already had a number of cases in which they've considered the question of the limitations clause. And they generally are following the proper approach in our (inaudible) ...

We turn to the wording of the - of the section itself. We regard the wording as actually of Section 33 as very important indeed and we then proceed to analyze several of the phrases involved on page 3, our first paragraph deals with the phrase may be limited by law of general application.

The point being here that the State may not limit rights arbitrarily but only in terms of the law. And these rights may be limited directly by law of a competent legislative authority or alternatively by an executive or administrative body acting in terms of powers delegated to by such law.

In dealing with the extend that it is reasonable and justifiable in an open and democratic society based on freedom and equality. May we say that we are very much in favour of the retention of these words. We think that

these words in fact generate the notion of proportionality in terms of which firstly the limitation must be sufficiently important to justify the limitation of the right itself.

And secondly a balance must be struck between the limitation imposed and the public interest that the State wants to protect or further by limitation.

Now we've indicated that we refer to some Canadian decisions and in regard to the second aspect that is the balance to be struck between the limitation and the public interest.

There are a number of components, the first is that the limitation must be designed to achieve the stated objective. The limitation must impair as little as possible the right in question and there must be a proportional relationship between the effects of the limitation and the pursued objectors.

Our courts have also adopted this approach following closely the Canadian cases. Once again we emphasise that the

phrases contained in the present clause, there phrases are particular importance in the application of the general limitations clause and we feel that they should be retained.

Chapter - or paragraph 3 the question of the additional criteria of necessity is also of importance. This is the strict scrutiny test in the American law. It's been adopted by the phrase in our Constitution. For the purposes of the limitation of certain rights only.

Now when these rights are limited the State obviously bears a much heavier burden of proof. And in American terminology for example the State must demonstrate a compelling State interest as opposed to a mere legitimate or over riding interest.

According to Professor Rautenbach in his book page 100, necessary implies and this is important that there is no alternative and that the courts 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.

Now we go on a little further to say that we believe that at least the right to use language - to use a language and participate in the cultural life of one's choice, should in fact be added to those specific rights which are entrenched in the Bill of Rights.

Obviously the limitations clause the general limitations clause can only really be finalised not by this committee but by the Constitutional committee, once we have identified all the rights to be enshrined in the Bill of Rights and I think we must bear that in mind.

We, however, still do favour the present approach where there is a diversity in the sense that in terms - the present clause in terms of which certain - certain rights enjoys stricter protection than when it comes to them relating to political activity.

We do not think the rights has such - such as a right to freedom and 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

necessarily.

Now there is one aspect that does require some clarification and that is the phrase in addition to being reasonable as required in paragraph (a)(1) is a little open to question. And this is something I would like the technical experts to have a look at. It is not clear whether indeed it was the idea if you read - if you read that clause carefully, it's not clear whether the idea was indeed that in these cases the other criteria of justifiability and (inaudible) ... of the essential content of the right should not apply as well.

One must just read that clause very carefully in the Constitution. It seems logical that both justifiability and a (inaudible) ... of the essential (inaudible) ... should be included. But at the moment it's a little blurry and I think that we should get clarification on that and eliminate any uncertainty in that regard.

Over the page on page 6 shall not negate the essential content of the right, another phrase appearing in Section 33. Here the question arises as to whether in fact this test may

not be criticised as being tested.

If one studies the judgement of Marais J in Nortje and Another the argument was that it cannot be justified that even if it can be shown convincingly that the 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 that ground that it negates the essential content of the right.

At the very least the phrase is somewhat ambiguous and should be clarified especially with regard to this relationship to the other requirements. We must get absolute clarity in regard to this aspect.

Section 33(2) reinforces two aspects in particular. Firstly the phrase (inaudible) ... as provided for in sub section (1) of any other provision of this Constitution provides that the limitations of the rights in the Bill of Rights contained elsewhere in the Constitution are not subject to the general limitations clause. Thereby confirming that in fact the whole Constitution as a whole has (inaudible) ...

Section 33(3) the Bill of Rights does not exclude the existence of other rights recognised or conferred by the common law, customary law and legislation.

And Section 33(4) has already been dealt with under the equality principle. I think we can all agree on that.

We are uncertain whether it is still necessary to make an exception in respect of the labour rights. If in fact those rights are properly regulated elsewhere in the Bill of Rights, then we don't know if it's necessary again to refer in the general limitations clause to this aspect and in such a case it should possibly be left out in the new Constitution. That deals with the first aspect.

If we come onto the state of emergency and suspension of rights. Here I think we've got quite a bit of work according to our submission for the technical committee.

Section 34 of the Interim Constitution provides for the declaration of the state of emergency and an act of Parliament in certain limited circumstances. And we are

constantly referred in that section to the term suspended.

Section 34(4) of the Interim Constitution states that the rights included in Chapter 3 may only be suspended in consequence of the declaration of state of emergency and only to the extend necessary to restore peace or order. That seems to establish a new criteria.

Now there are a number of rights listed which in fact the suspension may not attach to, those are contained in Section 34(5)(c) and there are a number of important omissions in that regard.

We can deal with the actual application of this particular paragraph in our Interim Constitution. We would like to submit that the usage of the term suspension and suspended is in fact not entirely correct.

We would prefer the term limitation or limited because it is quite clear from the wording of such Section 4 referring to the suspension of rights that only that and I quote only to the extend necessary to this (inaudible) ... and order, to

strongly underline the submission that the rights are only limited to the extend necessary and not suspended all together.

The important thing is that - and if you approach Basson's book on South African Interim Constitution text and notes, you also have - it states very clearly that this is - the suspension of fundamental rights and I quote must be distinguished from the ordinary limitations on fundamental rights.

Section 34 therefor provides for special limitations because of the special circumstances prevailing namely a State of emergency. And it is really incorrect to describe the application or effect of this section as a suspension of rights. They not entirely suspended during the state of emergency. They are only specially limited and this in our opinion is very important and we should look at amending the term suspension and suspended and substituting the term limitation or limited when necessary.

If we just proceed further, on the following page, page 3 of

our submissions, there is another difficulty. Sub sections (4) and (5) seemed to be in conflict with one another. Sub section (4) provides that the rights entrenched in this chapter namely all the rights entrenched in this chapter may be suspended only in consequence of the declaration of the state of emergency.

And then sub section (5)(c) goes on to say or prohibits the suspension of certain identified rights. In our opinion somewhere along the line we must arrange here for sub section (4) to be read subject to the provisions of sub section (5)(c) that's important.

So there is another amendment, possible amendment available there. Now the third problem we have with this sections that in Section 34(5)(c). One of the most basic rights the right to equality has been left out.

Now in our opinion the exclusion of this right from the categories of rights which may not be suspended is insupportable. The exclusion creates the perception that the very foundation of the State, the Constitution states with the

respectful rule of law can be suspended during the state of emergency.

And the state of emergency really cannot suspend the Constitutional (inaudible) ... as a whole. So we are suggesting that Section 34(5)(c) or it's successor should in fact be amended to include the right to equality as well.

The fourth problem we have with Section 34(5) is that given from sub section (4) that the rights may only be suspended to the extend necessary to restore peach or order. It is submitted that the provisions of Sections 33 adequately provide for the special circumstances would - could exist in during the state of emergency.

When applying Section 33 to determine the extend of the limitation of the particular right. The circumstances prevailing the time of such determination, must be taken into account by the court.

The courts would therefor take into account the circumstances which justify this declaration of state of

emergency and would adjudicate the extend of the limitation against the background of the prevailing circumstances.

In our view only Section 25 need to be specially limited in view of the special provisions contained in Section 34 in this regard. So I think it's something that should be thoroughly examined by the technical committee again.

Finally in this regard the criterion provided in sub section (4) that is the one referring to restoration of peace or order, differs from the criteria in Section 33. Now the wording of Section 34 should reflect whether these criteria are mutually exclusive or whether we must adopt a two stage approach when determining the extend of the limitation.

It is submitted that the inter action between the application of these two sections, should be investigated by the technical committee and their advice.

I think that concludes the question of our submission there. Quite clearly there are a number of aspects which I think the Theme Committee should look at, technical aspects.

If I can deal lastly with the interpretation of the Bill of Rights. It is our view that the approached adopted already by our courts is that there should be a broad interpretation of the Bill of Rights rather than a narrow and restrictive interpretation of the rights. And this appears to be the line being followed at the moment by several of the writers and also in a number of important cases which have already come to the (inaudible) ...

And I think we must take note of the warning preliminary warning issues by the Constitutional court where he's found it necessary to say that we must be careful when dealing with our approach to the interpretation of the Bill of Rights.

If one looks at page 2 you will see that there is a quote there at some length by Judge Kentridge in dealing with the judgement of Froneman J in the Eastern Cape some while ago. And the important point is that his view is that we should provide the Constitution also as a legal instrument and interpret it accordingly.

As he says, I would say that the Constitution embodying

fundamental rights should as far as it's language permits, be given a broad construction.

So there is an indication of the attitude. Now we believe that, that is the correct attitude to approach in interpreting.

The question of international and foreign case laws of course very important as members are aware there is a reference already in Section 35 that in dealing with the interpretation of the Bill of Rights, our courts must have regard to international law. (inaudible) ... is very important. But at the same time Justice Tibbalt made a very significant statement in the case of Parkross vs The Director of the Office for Serious Economic Offenses very recent case.

In which the Learned Judge on page 3 of our submission stated and warned that we should have regard - in having regard to comparable foreign case law, this should be done with circumspection because the different context within which Constitutions were drafted, the different social structures and the milieu existing in those countries as

compared with those in this country, and the different historical backgrounds against which the various Constitutions came into being, are very important factors that must be taken into account.

In other words in interpreting our own Bill, we must look very closely at our own background and our own circumstances here and we mustn't take this gospel, everything that comes from overseas that we must take our own circumstances into account.

Section 35(2) I think this section speaks for itself. It just deals with the situation where if a statued is in conflict on the face of it with the Constitution that it should - it should be evident to interpret it as not being in conflict as far as possible.

Then on the question of horizontal application, we once more come to the question of the interpretation of the Bill of Rights as a whole. Our view has always been that primarily the Bill of Rights is first and foremost an instrument regulating the relationship between the individual

and the State. But clearly as we have considered the Bill of Rights in the Theme Committee and looked at each individual right, it is clear that the values and norms laid down by the Bill of Rights must permeate through the entire legal system and effect or influence legal rules governing private relationships as well.

We therefor say that we are also looking to the Bill of Rights and we interpreting it saying that it will also apply horizontally in respect of numerous of the rights which are entrenched therein and then if we look at Professor Rautenbach's view on the last page.

It seems there is room for the application of the Bill of Rights in a case of unequal private law relationships firstly. Secondly in the application of general and undefined private law concepts such as bones mores could face. And thirdly in the application of the equality principle, also important.

We believe that the purpose of Section 35(3) is to provide for this indirect and limited application of the Bill of Rights to private law relationships as well as we support their

attention of that section.

I think that basically deals with the entire submissions.

CHAIRPERSON: Well thank you Senator for the exhaustive analysis. I mean that positively, are there any questions arising to the National Party on their submissions, not.

I noticed that two parties are absent today, the ACDP and the Freedom Front so we will then anyway reverting to the alphabet and leaving out the ACDP we can just simply table their proposals. Could I take the ANC's which is on a separate page called additional parties submissions. There is a submission from the ANC - yes ... (intervention)

UNKNOWN: To the National Party ... (intervention)

CHAIRPERSON: A bit late, but (inaudible) ...

UNKNOWN: Did I understand you correctly that you are suggesting that the interpretation clause should contain explicitly a reference to horizontal application is that a suggestion?

MR RADUE: What we are saying is that Section 35(3) if you read it, implies that there is an indirect limitation in respect of - as far as the Bill of Rights is concerned in interpreting it, that it does apply to private law relationships in certain circumstances.

Namely where there is unequal private law - private law relationship. Where there is in a private firm a management structure as opposed to an unequal structure, power of management and the lower (inaudible) ... certain - in certain of the rights very definitely horizontality will apply.

CHAIRPERSON: Are there any further questions, could we - who will be presenting the ANC's submission, Professor Asmal, thank you.

PROF ASMAL: Well Mr Chairperson I feel like Louis Luyt here and saying this is what we said in 1988 and this is what will happen in 1990, we'll I'll refrain you from doing a Louis Luyt in relation Senator Radue's intervention this morning.

CHAIRPERSON: We might have all hit the roof.

PROF ASMAL: But I - we compliment the National Party for it's very comprehensive submission on all three topics.

Ours is a preliminary contribution to this debate, because quite clearly we'll have to look at this in great detail. And the first note of warning and this arises out of the National Party contribution to is that not all Constitutions have limitations of rights.

And that is why some of the test they have worked out that was under the United States which are test that are worked out to the relevant to the United States (inaudible) ...

The German approach is very different also. And that is why it was a bit careful to put it under our Constitution what are judicial interpretations of their clauses. So our - our first point would be that we got to - as Senator Radue has said, we've got to put into our Constitution on English and limitation rights, those limitation arised from our own experience, recognised (inaudible) ... and this gives vast powers of interpretation to the judges - from whether it's proportionality, negating the effective right. It gives

enormous powers to the judicial, this is in fact the way in which both the Constitution is going to be interpreted, but also controlled to.

And a high degree of sensitivity is required especially when it comes to social legislation. We support the idea that for example there are certain rights because of our background, that have to have preference, the political rights have to have preference.

They don't give way to ideology to fundamental, philosophical assumptions, whereas other rights are closely associated with ideology. So when it comes to the intervention in the courts, then we accept the idea of a hierarchy of rights and in particular in relation to the political rights.

Now whether freedom of expression in general should have - in general should have preference so only in the context of political activity, is something that we need to debate. It's not a matter of our technical committee. It's a matter for us to debate as to the - what we would call the first

amendment principle of some importance.

So the second point we make is that all parties have said there must - the specific reference to limitation rights. But what all parties have not mentioned is that some of the clauses need special limitation rights themselves. And that's accepted because the alternative is not to have specific limitations in each clause, have a general limitation clause like the European convention does, but also their specific restrictions on rights.

So we follow the approach of the interim Constitution that there are specific (inaudible) ... We don't accept the National Party approach that we have to work out which has (inaudible) ... and general limitation clause or the specific (inaudible) ...

That's a matter for judicial interpretation, the matter of balancing between the general interpretation - limitation clause and the specific one.

On page 1 of our submission we turn to the existing Section

33 and then refer to the experience which we think is most relevant to us in the sense that it can be - it can be adopted for South Africa.

We draw attention to the fact that the issue of affecting the essential content test is illusive, we agree with the National Party. This is a very illusive notion and we not sure that it has a relevance to our own Constitution.

I can give an example, when a legislation is passed, abolishing the right to strike for example, for the armed forces which every general (inaudible) ... country has, forbids the right to strike. You go through all the test as been pointed out and then you agree in the end that it negates the essential content of the right. And therefor limitation is unconstitutional.

Clearly that is not the way to handle that and we believe that the essential test as enough and the provision relating to this (inaudible) ... content rule, should not be supported and we draw attention to that.

And it is not a restrictive approach, it's illogical. And we should say by the way, looked at the records that was not in fact discussed at length in Kempton Park, the question of interfering with the essential content.

So the fourth point is as you know we've have great difficulties and debates among ourselves that the reasonable limits prescribed by law must be demonstrably justified in a free and democratic society based on equality and freedom.

Now there has been attention between freedom and equality, we've had many debates on whether freedom and equality should be included in our provisional submission. We retain the phrase. And the view is that it's for the courts to work out in a particular (inaudible) ... which will have pride to take into account of whether it's essential background in South Africa.

So therefor our submission on this point is that Section 33 should be redraft to read as follows. The rights and freedoms contained in this Constitution are subject to such reasonably (inaudible) ... which follows - as can be

demonstrated justifiable in an open and democratic society, based on freedom and equality.

Insofar as the clause applies, it's a matter of judicial interpretation. There - it's for the courts to decide where it applies to groups or social structures. Well that's in relation to the first point.

The second point is in relation to state of emergency, again in our preliminary response, we must emphasise that we will need to visit this very systematically. Because this is the heart of a Constitutional order, the extend to which it can - the Constitution can be restricted - delegated from during a state of seige, a state of threatening the very existence of the State of heart of the State.

Now I should say though that if you look at the Interim Constitution in many ways it is at present the most advanced clause anywhere you can find. And I think that we should - we should accept that, that we have learned from - what is known as a (inaudible) ... principles - principles that have developed because there was so - there was so many

variations and from the Queens University, Belfast, study of comparative states of emergencies.

We have learn from that, and what we really trying to do now is to find (inaudible) ... but in the context that whilst necessary to impose clear and strict limits and exercise emergency powers, we must recognise that in certain situations, the State has to have the capacity to deal with what must be demonstrable direct attacks on the democratic order. And that's the test, it's not ordinary law and order, it is an attempt to overthrow the democratic order which is the context from a state of emergency.

And because as we find out, and Senator Radue accepts that, in our history is littered with examples of political tension given (inaudible) ... to most (inaudible) ... intervention of the State. And I - we should draw out also here, the fact that for the first time in our history, a court of law would be able to test whether the conditions are such as to have a state of emergency.

So that of course it doesn't apply in every country in the

world, but that is by reference the minimum standards of the best practise in the world. And so in that context therefor we make this interim submission that where there's war invasion or general (inaudible) ... of disorder, or a national disaster for limited purposes, we can restore law and order.

Now we will review the National Party submission as to whether we should use the word suspension of right, or whether it should not be limitation or restriction. It may not be as simple as the National Party has said, we'll have to look at this systematically as to whether in fact we negating the right all together during that period or limiting it. It may not be simply and philosophical question, it may have great legal importance.

So we reserve - reserving the position now in good faith as to the National Party proposal. Otherwise where the - we again are leading the world in saying that a fundamental rights may not be suspended even in a state of emergency and we list those rights that can never be effected during a state of emergency.

Whereas in other conventions, all rights may be affected apart from the smallest, and I think that the equality clause is Section 8(2) the right not to be discriminated against. So equality is protected and that in fact you can't pass legislation violating the equality principle because it says it's a right not to be discriminated against, which is the (inaudible) ... sign of equality.

On the third page we draw attention to what is of course the most (inaudible) ... and most difficult area and that is the restriction on freedom. As you know in our movement, we've had long and very strong discussions as to whether there could be detention without trial. And as a result we have this provision which I suppose all of us with considerable pain have to support that the most important restriction during a state of emergency is - is in fact the detention without trial.

We - as this is a preliminary response we want to visit this issue again and look at whether further safeguards can not be proposed. The safeguard we want to refer to is an explicit duty to preserve adequate legal regrets in respect of

any claim arising out of the application of a state of emergency. In other words that disputes may have to be settled by a court of law.

And so that's an additional safeguard that the state of emergency regulations may not subsequently be able to remove the function in the courts in relation to the hearing of any claim.

And then secondly the duty on the State to advertise and ensure public knowledge of the regulations that are made. For the avoidance of (inaudible) ... also as the old public safety act, Section 27(1) says:

Labour rights can't be affected for the avoidance of doubt, as the public safety acts use to say, even during emergency the right to strike, should not - or the right not to work compulsively should not be affected and we would like again to revisit that issue as to whether strikes can be affected during a state of emergency, just for the sake of clarity. So Mr Chairperson that's in relation to the second point.

The third point the interpretation, well we will make a submission on the interpretation clause later, thank you.

CHAIRPERSON: Professor Asmal the - it's now open to questions, perhaps just to kick off the discussion I could just ask you one question for purposes of enlightenment. Under the section on the limitation of rights clause where you quote with a (inaudible) ... from the Canadian charter and then give the formulation from Canada.

When you propose a reformulated model for our own interpretations clause, based on the Canadian model, it just strikes me you say in your proposal:

The rights and freedoms contained in this Constitution are subject such reasonable limitations as can be demonstrated to be justifiable in an open democratic society based on freedom and equality.

Now it's interesting the Canadian one use the word the adverb demonstrably justified which preassembly is a higher form of - of onus to discharge in terms of the limitation.

Do you see any significance in the words demonstrably justified as opposed to how you have formulated it, demonstrated to be justified, and if so, what is the distinction.

PROF ASMAL: Yes I did say that demonstrable is a (inaudible) ... term, frankly. I don't say (inaudible) ... in terms of that in our view as to be demonstrated I think because we under obligation to have clarity and language. I mean this seriously, I don't - (inaudible) ... anything in terms of that, a demonstrable or as it can be demonstrated to be.

The onus is the same, we have not looked at the onus issue by the way, we would reserve our position on the National Party (inaudible) ... we think this is a matter for the courts to work out, the onus of proof, we tend to support the more liberal approach rather than the more restrictive approach of the National Party.

Otherwise the onus here would still be on the State breech - breech necessity demonstrable. And we believe that the onus should be on the State in which case, or the applicant

must shown a breech and then the trigger must be on the State for demonstrably and necessarily.

So not in terms on it, but we can look at this again if you look, as to whether to use the Canadian phrase or the South African phrase.

CHAIRPERSON: Thank you are there any other...

MR SIZANI: (inaudible) ... but it is important that we should ensure that there are not easy (inaudible) ... infringed. Our attitude to the limitation clause basically is not this similar to Section 33 of the Interim Constitution. But we do feel that - that section should be reformulated now in the light of the developments in the final Bill of Rights.

In relation to - to the content of the limitation clause we feel that Section 33(1) could be retained but with a few amendments. For instance we feel that - that the limitations shall be permissible only to the extend that it is reasonable and justifiable and there has been a word left out in justifiable - in our submission - it says is justifiable in a free

open and democratic society based on equality.

We feel that this issue again which was debated at the World Trade Centre should again be revisited here to see whether we still need to retain the tension between freedom and equality at this stage.

So we would like it to read, justifiable and a free open and democratic society based on - upon equality. Because we think that there should be a clear emphasise on social justice that all this freedom basically will be obtainable and enjoyable where social justice prevails and I think we should - there should be an emphasise on that.

Secondly Mr Chairperson we have no objection in the retention of shall not negate to the essential content of the right in question. And the question of certain rights that should also pass the test of necessity.

We were fortunate to have attended the Constitutional court when it - it was debating the question of the right to life. And we found that they didn't simply have any problems

with that type of formulation and actually it was quite an interesting way the way they were going about, this question of necessity and the question to negate the essential content of the right.

But what we say in the light of the developments Mr Chairperson the last point that we mention in our submission that in the light of the developments, we do not think that Sections 33(4) and Sections 33(5) should be retained. Because I think they will be catered for elsewhere.

That's all we would like to say on the limitation.

Then again coming to our preliminary submissions on suspension of the rights in the Bill of Rights. To the PAC Mr Chairperson the question of a suspension of rights and the question of a state of emergency is a very sensitive one.

We are particularly concerned because of - of the history of our country. But we do take into account that this is a changed situation now. And it is probably unfair to always keep on bringing history as a continuation type of

(inaudible) ... and not to draw a (inaudible) ... between a democratic Government and a minority Government which has (inaudible) ... and has adopted (inaudible) ... measures.

So it is in that light that to a certain extend we would give some qualified support to the ability of a democratic Government to declare a state of emergency. But that must be highly qualified and be restudied quite (inaudible) ... and circumstances under which it should be declared must be stated quite clearly in the Constitution.

In that light therefor we - we are happy with the retention of Section 34 with some -with some reformulations and also some amendments to Section 34.

We are happy with Section 34(1) clearly stating that a state of emergency will be proclaimed prospectively and we feel there should be certain changes to Section 34(1). One of that is that it shall be declared only when the life of the nation is threatened which is clearly stated in Article 4 of the international covenant on civil and political rights.

We feel that what is stated in Section 34 - what is stated in Section 34(1) is not quite meeting that, that requirements. Because our concern about the question of where the security of the Republic is threatened by war. And we'd prefer that it says, it shall be declared only when the life of the nation is threatened by declaration of a state of national defence.

Why we use the term national defence is that it is the one that is basically used in a Constitution and there is no way in the Constitution where - in an Interim Constitution probably where war is actually as a term used and this also give the indication that South Africa will not be basically an aggressive nation to carry wars but it will be using basically the question of Article 24 of the charter read with Article 51 of the charter dealing with the question of self defence, when using the instruments of cohesion and war.

And all the others that are in Section 34 would accept. Again there is another issue that we'd like to take and would likewise of the ANC to consider this that in most international - in most other Constitutions basically that

respect Human Rights including the Namibian Constitution. The time for instance for the state of emergency initially is not 21 days, it's 14 days and that is stated in many - even in international instruments, that before a (inaudible) ... state of emergency, if it is declared - at least it must be laid before Parliament for approval within 14 days. And we don't really understand, we've never understood the justification for having it 21 days.

And then we feel that it should be extended for 60 days rather than 90 days as it is such (inaudible) ... there.

And we feel that Section 34(3) in the Interim Constitution should be retained and again in Section 34(3) should be retained that's what we say in our submissions. And Section 34(3) deals with the question of a court basically enquiring in the validity of the declaration of the state of emergency. That can be retained.

And the other change that we want to be considered here is that the right and (inaudible) ... in this chapter may be suspended only in consequence of the declaration of a state

of emergency and we take another portion of Article 4 of the covenant on civil and political rights, which states that only to the extend it is strictly required by the (inaudible) ... of the situation.

That is there because we want some stringent measures before this - before the suspension of certain rights, than when they are suspended it must not only because of a state of emergency. And also there should (inaudible) ... to extend that is required by the existences of the situation. And I am sure there is a lot of in the national juris prudence as to the interpretation of that clause.

We feel Mr Chairperson that Section 34(5) should be retained and of course again we also list some of the rights that, that are listed there as not being open to derogation. The rights we have listed there are - some of them are taken here from Chapter 3 and others we feel that basically even in Chapter 3 are not really necessary to be there.

They might have been put there because of the transition, but we would like that some of the rights that cannot be

suspended to be really looked into especially in areas dealing with political activity and other rights. We think the list is too long, given under international law, not all rights really that are put (inaudible) ... suspended actually included. So we'd like that to be considered.

Again on the question of detention during a state of emergency we welcome some of the projections that are there, but we don't feel that those - those projections there are sufficient and we would like certain considerations to - certain projections and safeguards to be considered for instance in relation to the protection of people who are in detention.

The question that - because the feeling that we really get from this question of detention is that what is - although is a suggestion that detention without trial is not - is outlawed in our Constitution but to a certain extend you do get a feeling that there is a - especially when you get a suspension that there is what - what is actually protected basically is unlawful detention without trial.

There seems to be a certain allowance of some lawful detention without trial. Particularly if you look at the fact that the person can only challenge his or her own detention during a certain (inaudible) ... only after 10 days and even they - the 10 days - that within 10 days probably given for - to the courts is actually very vague it's not really clear when the court can come. Meanings they can come actually at exactly on the 10th day or just on the 9th day.

So we really like it to be clear that if the court probably if he should come in, it must be within 3 days or 5 days. Because we don't also understand why - why it would take 5 days for instance to publish the names of those who have been detained that can be reduced to 3 and then within 5 days the court comes in, 10 days seems to be too long especially knowing what the security forces can do anytime what security force can do with a person in their own hands.

I don't think they need that latitude of 10 days. And we feel also the individual Mr Chairperson if this is against detention without trial even during the state of emergency individuals must given their right to challenge the lawfulness

of their detention at any stage.

We don't really see the rational that they should wait for after - to challenge it after 10 days, we really don't understand why should they wait for 10 days and wait for a court to come in and then later on they are given their own individual right to challenge the lawfulness of their detention only after 10 days.

So we are concerned about that Mr Chairperson in the question of state of emergency. But we don't think that the Government should not have a right to declare a state of emergency.

The last point Mr Chairperson on the interpretation of a Bill of Rights, our submission Mr Chairperson is that the PAC accepts the usefulness of the clause similar to Section 35. We think that this guidelines basically interpretation are very important.

This guidelines on interpretation are very important for instance for our courts, especially that our courts have been

used basically in dealing with legislation and criminal offenses and therefor they are likely to add on the side of a very literal or strict in constructing this approach to interpreting even the Constitution.

So we feel that this clause can guide the courts to what's a broad and more (inaudible) ... approach to Constitutional interpretation which is the type of interpretation that is accepted in (inaudible) ... the Constitution.

So feel that both Sections 35(1), Section 35(2) and (3) should actually be retained but of course with the new formulation of a free open and democratic society based on equality as our only qualification to Section - as our only change to Section 35 of the Constitution but both history elements we feel that they should be retained.

Thank you Mr Chairperson.

CHAIRPERSON: Thank you Mr Sizani, there's quite a lot of additional information you provided which isn't in your submission. Perhaps you can also so it's clarified just elaborate upon it

in writing and send it through to the Secretariat.

Are there any questions to the PAC at this stage? There aren't any - Mr Green, welcome. We are discussing the limitations of the Bill of Rights and the state of emergency suspension and also interpretation.

We don't have a - you have not made a submission on the third topic.

MR GREEN: Ja.

CHAIRPERSON: Would you like to take us through your submissions now.

MR GREEN: Yes thank you Chair.

CHAIRPERSON: Very briefly.

MR GREEN: Yes thank you Chairperson, I just like to apologise for being late, I've been with the - with a group of persons who went on this international delegation to Lusaka and we arrived home very late last night.

With reference to the ACDP's submission on limitations of rights. In the first paragraph we just say that we actually accept the widely accepted school of thought that rights are not absolute. We agree that there should be specific limitations clause in the new Constitution and then we also say this for the following reasons.

With the introduction of the Bill of Rights in the new South African Constitution an attempt is being made to prevent, repeat occurrences of the hegemony that is illustrative of South African political dispensations for the past several decades.

The way this is being done is by allowing for judicial oversight of the legislative process. Again, however, this could mean the new attending dilemma. It has been proved beyond and inkling of a doubt that judicial officers are firstly and foremostly human beings with their own moral ethical and sosio economic mind sets.

As such they approach the interpretive task from their own specific philosophy's. The limitations clause has therefor an

important role to play in balancing legislative and judicious capriciousness.

Now we say in here that for the - for this very reason the limitations clause must be constructed so as to be able to best describe it as adequate. Now adequately first to control the legislature from effective negating the values evidence by the Constitutional print and secondly to prevent a judicial reviewing from a particular philosophical grounding from playing law maker.

The judiciary is not an elected body at least not in most major global jurisdictions. At the present time it is subsequently not an able body to arrive at true democratic ideals.

This means that the limitations clause needs to have certain key elements to effectively realise the stated goals. It must make provision for the legislature to limited fundamental rights which are otherwise absolute.

Now we of course our position is we proclaim that Human

Rights to be inalienable, and immutable. Granted as they are by the Almighty God in accordance with these principles (inaudible) ... and we will therefor say that these rights are further incapable of being hydatid in any way as (inaudible) ... content except as biblically mandated.

Now responsibilities attend every right. This is clear and virtually every aspect of domestic life and as well recognised principle in our law of contracts.

The ACDP's views is recognition of this vital truth as central to the limitations clause in the new Constitution. The individual has a responsibility against his or her fellow citizens - a recognition of where others (inaudible) ... start and should realise that non-fulfilment of those responsibilities will be met with societies reaction to irresponsible behaviour.

The ACDP calls for considerations including good morals, public health and the administration of justice, public administration, the rights and responsibilities of fellow citizens and the prevention of combating of disorder and

crime to be specifically listed as aspects which may bring about the rightful limitation of rights.

This against the vague wording of justifiable in an open and democratic society based on freedom and equality.

Chairperson we feel that this wording in the present Constitution is too vague and therefor we want to be more specific. Wording of this unspecified nature lends itself to interpretation from a specific philosophical advantage point. Judiciary which may be far removed from the national collective will of the grassroots community.

Now even more so before the framers of the Interim Constitution thought to be prudent to provide interpretive values that embody accepted international Human Rights (inaudible) ... The ACDP in recognisance of the stated ideals of recognising the hydrogenous nature of the South African population, proposes a clear construction of the limitation by law of general (inaudible) ... to incorporate and specifically mentioned aspects of common law, natural law, African customary law and other legal system which has

to be recognised in order to be inclusive including biblical law and chorionic law.

We further recognise that there is a real need to state clearly that limitation may only be by legislation of general application, excluding to a major extend the effect or arbitrary or discretionary legislation such as followed the systems of separate development.

In keeping with the federalist ideal the ACDP also proposes that special provision be made in the limitations clause for the elevated status of territorial Constitutions. It is clearly felt that the limitations clause secondary and supplementary to the interpretation clause must recognise the autonomous status of the Provinces or regions including their legislative and Constitutional position as being a true and practical outflow of Government by the people. Through the people and for the people with attending concentration of power at the level closest to the families that are the essence of the regions and diversity of this country.

CHAIRPERSON: Just take the next one as well please, state of emergency.

MR GREEN: Ja, thank you Chair, with reference to Section 34 the ACDP believes in principle that where necessary a state of emergency is justified. Provided that we adhere to certain basic conditions that are innumerate in Section A of the international law associations, (inaudible) ... minimum standards of Human Rights norms in a state of emergency.

And I think we have - we've actually quoted Section A of this document an emergency declaration, duration and control where it establishes the general principles upon which an emergency powers should be instituted and further guards against the abuse of these powers.

And then we've mentioned three criteria there, the ACDP supports the spirit of these conditions which have (inaudible) ... in the following manner. Paragraph 235 and 6 of Section A, the Constitution at every stage shall define the procedure for declaring a state of emergency. Whenever the executive (inaudible) ... is competent declare a state of emergency such official declaration shall always be subject to confirmation by the legislature within the shortest possible time. I think the emphasise there is on the time

duration.

Then (3)(a) the declaration of the state of emergency shall never exceed the period strictly required to restore normal conditions.

(b) The duration of emergencies safety the case of - was or external aggression shall be (inaudible) ... period of fixed term established by the Constitution.

(c) Every extension of the initial period of emergency shall be supported by a new declaration made before the (inaudible) ... of each term of another period to be established by the legislature.

(d) Every extension of the period of emergency shall be subject to the prime approval of the legislature. The legislature shall not be dissolved during the period of emergency but shall continue to function if dissolution of a particular legislature is warranted it shall be replaced as soon as practicable by a legislature duly elected in accordance wit the requirements of the Constitution which

shall ensure that it is freely chosen and representative of the entire nation.

The termination of a state of emergency shall be automatic upon the expiration of a given term with prejudice to the right of expressed revocation before such expiry to be exercised by the executive of the legislature. As the case may be.

Upon determination of an emergency there shall be automatic restoration of all rights and freedoms which were suspended or restricted during the emergency and no emergency measures shall be maintained thereafter.

Now Chair with reference to Section 34(4) of the Interim Constitution which states that the right entrenched in the chapter may be suspended only in consequence of the declaration of a state of emergency and only to the extend necessary to restore peace and order.

The ACDP is of the opinion that there are rights in the chapter on Human Rights which during a state of emergency

must be Constitutionally protected from being suspended.

We believe that as no right is absolute precisely on the grounds of the limitation clause of Section 33 of the Interim Constitution it is - it is permissible that there should be non-dirigible rights and freedoms which because of the corresponding status of limitation, will not contribute the specifications required by a state of emergency.

That in no instance must these limitations be manipulated to contradict the spirit of the criteria as referred to the above (inaudible) ... minimum standards in a state of emergency.

So the ACDP suggest that we construct and identifiable range of non-dirigible rights suited to the South African context and clearly annunciate that position within the Constitution.

The ACDP also further cautions that no agreement must be undertaken on international level that may leave this countries position of permanent seige and which indirectly

can be seen as the hidden name of the state of emergency.

We give an example here as Africa is falling more and more under the powerful control of unscrupulous drug cartels transparency in our own system is indeed an unquestionable right. This becoming (inaudible) ... especially learning from our recent past that Government must function under directives legitimated by a popular consent in order that the citizen is in agreement that whenever certain emergency measures need to be applied they are done so in a justifiable manner.

Provision must be made and if unreasonable rules are imposed, sufficient avenues to raise objections be made available to the public.

In conclusion Chairperson as long as Government respects human dignity operates it's functions along moral principles and legitimacy. The general law abiding citizens has nothing to fear in times of emergency.

The ACDP supports Section 34 of the Constitution as stated

with the proviso that paragraph 4 of the said Constitution includes a clause referring to non-dirigible rights.

I thank you.

CHAIRPERSON: Thank you mr Green, just before taking questions I wonder if I could ask my own just for clarity. You say that we should construct an identifiable range of non-dirigible rights, (inaudible) ... and context and (inaudible) ... that positions in the Constitution.

But isn't that what is in the Interim Constitution already under 35(5)(c) which actually has a list of a range of non-irrevocable rights that cannot be suspended or limited during a state of emergency.

So hasn't what you are actually for in your submission already been achieved in the Interim Constitution and if it has, are you not in favour then of the retention simply of that section?

MR GREEN: I think Chairperson what we are suggesting here is that we

must very clearly articulate and very clearly put into the Constitution which and actually state ... (intervention)

CHAIRPERSON: But it's there.

MR GREEN: You referring to Section 34.

CHAIRPERSON: (5)(c).

MR GREEN: Yes but Chair what we are saying in terms of the paragraphs 235 and 5 of Section A of the emergency declaration, duration and control where we wish to actually bring to the attention of the house, 235 and 6 in terms of additional or the additional measures in order to ensure that those rights are protected.

CHAIRPERSON: I don't understand that. Well I simply want to say that what you calling for is already in the Constitution essentially.

Are there any questions, there is now an opportunity for a tea break for ten minutes until 10:40.

ADJOURN FOR TEA:

ON RESUMPTION:

MR MDLADLANA: Okay, ladies and gentleman I will be charing from this comfortable seat of mine. We'll now hand over to the Democratic Party to give us their presentation.

MR LEON: Thank you Mr Chairman - Democratic Party first of all on the limitation of rights, to deal with the point raised by Professor Asmal which we address it's quite true that there are several important Human Rights instruments which do not contain limitations clause at all and that is why a particular juris prudence has developed around interpretation clauses.

However, as we indicate in our submission there are many international convenance and instruments which do contain specific limitations on rights including the universal declaration, the international convenance on economic social and cultural rights. The European convention on Human Rights and then of course certain domestic instruments such as the German basic law, the Canadian charter and the

Namibian Constitution.

We therefor believe that it is appropriate and quite proper in a Constitutional democracy to have a limitations clause. We then address ourselves to the current wording of the Interim Bill of Rights, Section 35.

We believe it is in need of simplification and at the same time the retention of the thrust of it's provisions.

Let me start with the clauses that we believe should be deleted in the entirety from the limitations clause. 33(5)(a) and (b) we think should be deleted and these relate to labour rights. The special protection or inoculation given to the labour relations acts or it's successor which is currently a subject matter of negotiation, was obviously intended as a interim measure because of the uncertainty about the labour relations (inaudible) ...

On two grounds we think this is no longer applicable there is a new labour relations act coming on stream and if that act or bill is not Constitutional in terms of the Constitution

that we are devising at the moment, then there is a very real problem attached to it, because you can't really have in our view a special section of society which is removed from the scrutiny of the Constitution as of rights.

And therefor we think it's inappropriate and (inaudible) ... to repeat this protection in the final Constitution. And obviously that is consonant with even the provisions of the submissions of the ANC which also proposes that there be no special protection of any category of rights from the reach of the Bill of Rights according to this mornings presentation.

We also think that Section 33(3) which states the encroachment of the rights in terms of this chapter shall not be construe as denying the existence of any other rights to freedom recognised and conferred by common law, customary law or legislation.

That this was a very at the time necessary provision because as you know the Interim Bill of Rights is essentially vertical in operation. And what Section 33(3) does at the moment

is to import a German concept, I think it's called (inaudible) ... from the German Constitutional juris prudence which is just to sort of give the indirect application of the Bill of Rights to other areas which would not be covered by a vertical Bill of Rights.

However assuming that the Constitutional Assembly resolves the question of horizontality, and we believe that it should be resolved as we've mentioned on several occasions in favour of a general horizontal application with obvious acceptance then 33(3) becomes (inaudible) ...

Now those are the specific provisions. We now go on to a general reformulation, the substantive provisions of the limitations clause. Currently as you know there is a two tier test of limitation contained in our Interim Constitution. Section 33 provides for a higher standard of justification or to use the American expression strict scrutiny which is made applicable to those range of rights which are detailed in Sections 33(1)(a)(a) and (b)(b).

We think that while that was appropriate at the time of the

drawing up of the Interim Constitution which after all did cover the periods of the last general election and the political activity which was consequence or president upon it. We think this is unnecessarily complicated and would be better to have a more streamline system in the final Bill of Rights.

In this regard we think there is a strong case to be made for having a core of eliminable rights. That in fact the Constitution should signify that there are a core of rights which are beyond limitation as such. Now there is always going to be limitation even if you have illimitability because the Constitution itself will contain other provisions which will be equally strong as those contained in the Bill of Rights and there will even be rights within the Bill of Rights which will compete with each other and in that regard obviously you can't say that any right is eliminable.

But none the less we think a form or a series of super protective rights would be appropriations in the final Bill of Rights. We notice that also certain other parties have made this suggestion as well including the Freedom Front.

It is difficult at the moment to formulate with precision what those should be because we haven't obviously agreed to the final package. But given those rights that we've mentioned we think that the following broad areas are those which could be considered for non-derogation at all.

Well first of all the equality clause now as the Democratic Party has formulated the equality clause it does contain it's own internal limitation. Then the what we have called in our previous submissions the right to liberty which essentially deals with due process.

Then the right to conscience and religion I might just add incidently that right to liberty would include the prohibition on torture, cruel and degrading punishment right to conscience and religion the right to citizenship and then not the property clause as such but that part of it which requires compensation in the event of an expropriation and then in - what we have called the sosio economic rights clause, our sosio economic rights clause which is the right to the essentials of life which contains a standard of justification against which Government policy has to be measured. The

right to learning and culture and language and culture.

We think that those could be the essential core of an illimitable section. Obviously we can't state that with finality because one has to look at the overall package of the Bill itself and only when you have really agreed to the right can you go through it with a tooth comb which is necessary in such an exercise and say there would be a certain incoherence or illogicality if you said that these rights were non-dirigible for reasons one, two and three.

So you can only state it at this stage as a fairly broad principle. But we think that is one way out of having the over complicated two tier protection which is currently provided.

I would say as well that we have made previously very strong representations on Section 15 which deals with the freedom of expression where we have supported the proposition advanced by among others the conference of editors, that the right to free speech should be subject to strict scrutiny.

Now obviously if strict scrutiny is no longer a feature of the Bill of Rights, that particular argument falls away. We therefor believe that if there's an acceptance here, that there should be non-dirigible provisions in the Bill of Rights that obviously when it comes to looking at freedom of expression itself, you could import the concept of strict scrutiny into that specific right itself.

So it's within that framework because we haven't finalised the rights that we have in mind in this Bill of Rights or reached agreement on them that we would make this proposition.

We are satisfied that the substantive provisions of the limitations clause namely that any limitations shall be dependent on the restriction arising from of law of general application which restriction shall be reasonable, justifiable in an open and democratic society, based on freedom on equality and shall not negate the essential content of the right provide sufficient safeguard against the abuse by the state of the law giver of the erosion, the fundamental rights protected in this charter.

I have to say that on the question of what is meant by negating the essential content of the rights, we do acknowledge that there is a problem because it has been indicated that the essential content of the right in question is somewhat incoherent and ambiguous. It does arise from Article 19(2) of the German basic law which suggest that a minimum (inaudible) ... for Government restrictions of fundamental rights be emplaced.

So we certainly wouldn't argue strongly that, that protection be retained because we not entirely sure that it achieves a great deal. On the other hand on the sort of chicken soup principle that having it in doesn't do any harm there might very well be some purpose in it's retention.

But clearly what has emerged particularly from Canadian juris prudence the case of Oakes, is that the central thrust of the justification in an open and democratic society based on freedom and equality, is in fact the test of proportionality which we outline in towards the end of our submissions.

The argument has been raised by several parties on what is

precisely meant by freedom and equality. Now obviously to answer that we are dealing with a valued judgement stemming essentially from comparative legislation and juris prudence and democratic societies, international convenance and instruments.

I suppose broadly speaking the hallmarks of an open democratic society may be summarised as pluralism, tolerance and broad mindedness.

Furthermore that is no requirement of democracy that the views and the majority must simply prevail these required to be balanced against individual interest and liberties.

There is obviously a tension between the concept of freedom on the one hand and equality on the other. We do not think that the Bill of Rights of the Constitution should seek to resolve that tension but to simply acknowledge it and it will be to the courts and particular the Constitutional court to actually balance the interest of our emerging democracy by using that particular test.

Chairperson I now move on to the second aspect which is state of emergency and the suspension of rights which we detail. Let me just say that we strongly support the provisions of Sections 34 as currently worded because in the absence of a provision or provisions, the detailed provisions, Section 34 we will be back in the somewhat dark ages of (inaudible) ... and arbitrary in positions of states of emergency which if unchecked will utterly extinguish and destroy the content of any Bill of Rights.

We believe it is vitally important that emergency powers are subject to detailed checks and balances. We think that the standards contained in Section 34 as currently worded which required for the declaration, introduction and continuance of a state of emergency are necessary.

The high threshold which is provided in sub section (1) will create jurisdictional facts against which the courts will be able to weigh the relative merits of the emergency declaration itself. It's not just subject to test in the whim or at the whim of the President, but there are objective jurisdictional facts which the court can take into account

when it comes to seeing whether or not the imposition of the emergency is in fact legally sustainable or constitutionally sustainable.

And the most critical safeguards in our view in the entire section are those contained in sub section (2) which do provide for a case of Parliamentary oversight and approval by two thirds majority.

I think there might be some argument which could be levelled. I see the PAC took the point this morning on the time limits involved, however, I think if we make the time limits too short, we can actually evoke, we can invite the law giver to actually simply bypass the Constitution at a particularly (inaudible) ... time.

So I think the time limit should be reasonable but it should not be excessive whether in fact 21 days is excessive, is perhaps open to some debate. But we would think it is actually within a range of reasonableness.

Very important as well in the current wording of the

provision is the prevention of an (inaudible) ... clause with the courts jurisdiction, because if we don't have sub section (3) in then it will be relatively easy to bypass the jurisdiction or the safeguards of court, of judicial scrutiny of the emergency provisions.

Interesting to us in sub section (5) is of course that's here under state of emergency we do have an eliminable category of rights. Absolute non-derogation and we simply draw attention to this apart from it being necessary in a state of emergency that we could usefully also look at this in respect of the Bill of Rights itself as we have tried to do under the limitations clause.

In other words if you can fashion and eliminable category of rights under a state of emergency there is no reason why you cannot fashion a similar category for the Bill of Rights itself and the limitations clause. And certainly it would be even more appropriate in a state of emergency or under a state of emergency.

Detainee's rights under sub section (6) are very important

and we - they really mirror our own submissions in this regard so we can hardly say that we don't agree with them, we certainly do.

I would like to move on, there are certain other submissions we've made which clearly aren't up for discussion today such as directives of state policy, apparently that was dropped as a topic - for the Core Group and I wasn't aware of that so we have a - just for your background reading our views on directive principles and also on class actions which we think in any event are (inaudible) ... because they catered under Section 7.

I now turn to the question of the interpretation clause. We support the formulation contained in Section 35 and I can rest my case perhaps we can just illustrate very briefly the principles which are contained in 35(1) have generally been found to be appropriate in the Bill of Rights like this.

The principle also contained in Section 35(1) with regard to the principles of public international law and comparable case law also seems to be relevant. Some have argued that

this really is a statement to the blindingly self evidence because inevitable that the Constitutional court is going to be significantly influenced in the manner in which other courts have interpret rights similar to those in the Constitution. But so be it, it certainly does no harm.

Section 35(2) embraces the presumption of Constitutionality which directs the courts to interpret laws which are acceptable to Constitutional challenge and is not a directive applicable to the interpretation of the Constitution itself.

That of course has already been dealt with by our courts and particularly by the Constitutional court at the moment. So really anything that we say at this regard, becomes super plus because the courts have already had regard to 35(1) and 35(2).

Section 35(3) indicates that the legislation, the common law and customary law do fall within the ambit of the Constitution and should such lawful (inaudible) ... of the spirit (inaudible) ... to (inaudible) ... the Bill of Rights, it may be struck down as invalid.

We think this is both enlightened unnecessary and could certainly have a very positive impact on certain areas of (inaudible) ... particularly customary law rules which might discriminate against certain categories of persons, such as woman for example and we think that the fact that we have 35(3) in as an additional aid, in the interpretation of the Bill of Rights will actually advance the course which the rest of the Bill of Rights seeks to impose on society which certain practises might contradict.

Mr Chairperson those are our submissions.

CHAIRPERSON: Thank you are there any questions comrade Naledi and comrade Sizani okay.

MS PANDOR: Thank you Chairperson if I could ask Mr Leon to perhaps further elaborate on the DP's view that Section 33(3) should be rended superfluous and I wonder whether in his elaboration he could also clarify whether the sole function of 33(3) is to refer to the horizontal application of the Bill of Rights.

I didn't understand it as such, if he could assist us in that regard.

MR LEON: Well ...

MS PANDOR: The second question if I could ask to through you Chairperson.

CHAIRPERSON: Yes you can.

MS PANDOR: Relates to page 4, the proposal that certain of the rights would fall within the category of eliminability. Could we have some clarification as to the selection of rights and as well as that find out from the DP whether some of the concerns expressed in submissions by parties, for example on the freedom of religion, the concern that is expressed around the practise of Satanism as an expression of religious freedom. What the DP's view would be of this limitibility applying in context where the exercise of the right would in fact be an infringement of you know the rights of others or would the actions that could be considered reprehensible in a society that is open and democratic.

CHAIRPERSON: Tony.

MR LEON:; All right ja dealing with Section 33(3) we -ja insofar as we can see any purpose for it's inclusion in the limitations clause the only purpose that we can see for it, being there are justification at this stage is the concept of (inaudible) ... I mean it's says the entrenchment to the rights in terms of the (inaudible) ... shall not be construe as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or the legislation to the extend that they are not inconsistent with this chapter.

And that I mean first of all the - up until you say not inconsistent with this chapter, you are making a statement of such a self evidentuary point as to almost be - (inaudible) ... of any meaning in a limitations clause. And therefor the only meaning that we could describe to it comes in the qualification where they are not inconsistent with this chapter. And that then becomes the central thrust of the - of the limitations clause in this context.

Now so that is why we think if we resolve this questions, it becomes - it does become superfluous because quite clearly it's - it doesn't need to be stated that the Bill of Rights or the chapter on fundamental rights does not contain the exhaust of elaboration of anything approaching the common law, customary law or legislation. There is customary law, there is common law, there is legislation outside of the Bill of Rights.

But so we can only see that the purpose of it is the qualify in the last section of it, not inconsistent with this chapter which suggest then that you will have a seepage from the Bill of Rights into those areas of law and society.

And I must assume anyway that the ANC is in agreement with our proposal because the ANC too has proposed the scrapping of this particular section from the Bill of Rights in terms of the presentation given this morning.

Dealing with the second section now of course I mean when you get to any eliminable category, you do create problems but I just want to say this, we make it very clear and any

court (inaudible) ... of the problem would be equally clear that when you have a right to conscience and religion, as an eliminable right, you - that is always checked by the existence of other rights and in the Constitution and in the Bill of Rights itself.

So while you (inaudible) ... that you place a premium on the protection of the freedom of religious expression by other persons, that doesn't mean that you can rush around with sort of you know criminal practises under the guides of Satanism for example and get away with them on the basis that freedom of religion enjoys a higher form of protection.

Because clearly freedom of religion as a - as a protected category would also for example be - be checked by the right to dignity which in our proposal would fall under the right to liberty. Or whatever it is so it's not - although you are given it a higher protection, it's not - it's not an unqualified protection.

The Constitution itself the other provisions of the Bill of Rights will also be operational in this regard. So I don't

think that the kind of problem that is drawn - have been drawn attention too is necessarily a real one.

Now obviously I mean when we drawing this up, we will have to go through each right carefully to check that we don't have the kind of law of unintended consequences operating and what we've done here is to simply illustrate those that we think can be put into such a category. It could be argued that there are others and we would have to consider them. But I think it does have a - it does have a - it does send out the necessary signal and I do think religious freedom is one which does enjoy a higher protection, which would not ordinarily be involved in requiring the kind of limitation that certain other rights will.

And to deal with the example that you have chosen Ms Pandor, I've made it quite clear before the question was raised by Mr Mfebe several months ago that the concept of a freedom of religion is not a freedom of criminal or unlawful practises associated with it. And you must separate those out.

I mean I don't doubt that for example Satanism as a form of believe I mean I find it quite repulsive. But that if people have that believe they should be able to express it.

The moment that, that starts involving criminal practises which was the burden of what Mr Mfebe said to me a few months ago, then you in a different category all together. That's no longer religious freedom, that is then the committing of various act which are not going to be tolerated. Because you can't - there is nothing in the Bill of Rights that gives you freedom to commit murder, incensed or animal abuses, even if it - if it might be that religious freedom per se, enjoys a higher form of protection.

MS PANDOR: (inaudible) ...

MR LEON: Well I don't think any right ever is. I mean eliminability is a phrase, but no right is ever utterly without limitations.

CHAIRPERSON: Sizani, (inaudible) ...

MR SURTY: Mr Leon I accept that you've indicated that the category

that you've set out here on page 4 is quite exhaustive. What would you say about the right to human dignity and the right on servitude and forced labour would you rank those two rights, as rights that are in your terminology eliminable because you know the human dignity and servitude and forced labour certainly are important rights which should enjoy a higher status than the other rights.

MR LEON: Yes.

MR SURTY: I do not know whether the exclusion has been deliberate or whether it's just as a result of an oversight on the part of the DP. What are your comments on that?

MR LEON: Yes I am not sure because I don't have our draft Bill of Rights with me that in fact human dignity and forced labour don't fall under what we call the right to liberty under our proposals. We grouped a whole lot of rights together and we said the right to liberty and we dealt with them under that.

And I've just used the shorthand from our own Bill of Rights to put them in here. But certainly I would agree

with you in substance that they should be included in such a category.

CHAIRPERSON: It seems that there is no further questions so I'll hand over to you.

MR LEON: Thanks very much Shepard.

CHAIRPERSON: Well ladies and gentleman we now as I understand it, have come to the end of the formal proceedings. I just have to make several announcements for your edification and enjoyment.

Today is the last meeting of the Theme Committee on terms of it's work programme. No it doesn't mean that we will never meet again. And to acknowledge this major event, we - apart from which we have our four technical advisors, experts together for the first time in many months and we welcome them, they were always here. I didn't - they've left the room, certain of them.

It's proposed that we adjourn in a few minutes and we will

meet again at 3:30 for some form of celebration which John can fill you in on and a photograph or something.

MR SOLOMANDRIS: No photograph, (inaudible) ... .

CHAIRPERSON: Oh! no photograph, okay well apparently next term there will be a photograph. So I think that's all that is left of the proceedings except to draw your attention to a proposal which has come from the Constitutional committee - it's been accepted and that is that there will be a change in the format of the Constitutional negotiations process which I suppose will actually render this format superfluous.

Which is really the result of a desire I think to speed up the pace of actual negotiations themselves rather than us just simply sitting here and reading submissions to each other and answering questions.

Therefor the Constitutional committee has agreed to establish a permanent sub committee of the Constitutional committee to facilitate the affective negotiation of Constitutional issues, arised from Theme Committee reports

and draft formulations.

The composition of the sub committee will be three ANC members, two Nats, one IFP, one Freedom Front, one DP, one PAC, one ACDP. Functions of the sub committee will be to seek broad consensus, remove blockages in elegance - sounds like a plumbing operation.

And negotiate matters would be finalised by the Constitutional committee, sub committee will report to the Constitutional committee. Each political party would also appoint alternate members to the sub committee who will exercise speaking rights in the absence of a full member. Each political party will be able to select members of their party from the relevant Theme Committees to attend sub committee meeting to advise on particular issues before the sub committee.

All right and the Chairperson and vice deputy will come be Mr Ramaphosa and Mr Wessels. Political parties request to nominate their representatives by Wednesday 28th June. First meeting of the sub committee will take place on

Thursday 29th June.

Okay that's just to tell you about the new format. There is no matter for debates here, it's not in our Province to debate it's simply to take note of it.

Well but we not in the Core Committee now, but we - what is the outstanding area of business here. The interpretations clause -well not every party has made a submission on the interpretations clause.

All right well the parties who have not submitted on the interpretation clause which really is the ACDP, the PAC and the ANC must please do so in writing. One is entirely sure whether there will actually be a formal debate here about it, but that's perhaps not entirely relevant in view of the new format.

Yes Senator?

MR SURTY: Just two points of clarification from the Secretariat for you Mr Chairperson. The application clause, clause 7 in the

Interim Constitution is extremely important clause and that it will also deal among other things with the issue of horizontality which could be identified in that clause perhaps.

I do not know whether there is going to be any submissions, there is going to be any invitation for submissions in this particular aspect. But it is brought - ... (intervention)

CHAIRPERSON: Yes, have - the parties has nog actually responded right by right on the question of applicability.

MR SURTY: I am talking about the - you know as if you look at your Section 7 as such, there is extensively no, I don't think any party has made any specific contribution of that particular aspect.

CHAIRPERSON: Well that's true. Well all right perhaps we can suggest that in addition to the interpretations parties comment on those sections of Section 7 which have not yet been covered in our previous submissions.

MR SURTY: And then the other is that there were some outstanding rights that had to be dealt with. In other words the sosio economic rights. I would assume that the parties (inaudible) ... with those rights.

The ANC has not submitted fully it's rights, sosio economic rights.

CHAIRPERSON: All right, I've just been asked to read this out in response to your questions, the Core Group minutes of the 12th of June.

It says decisions regarding the remaining (inaudible) ... paper were as follows. Directive principles be dispensed with. Other fundamental rights, item 26, Theme Committee will be requested to present an opinion based on submissions and the relevant international documents. The Theme Committee will study the opinion in the technical committee and upon agreement will forward their views to the drafters.

Each party reserve the right to make submissions on these matters. It was agreed that attempts to be made to

complete the work programme before the June recess. This will enable the technical committee to work on the draft Bill of Rights during recess. The Theme Committee can them commence work on the draft Bill of Rights immediately after the recess.

So I suppose well the idea is that they will look at this and particularly the question of the other rights which has not been included so far and then at least we'll have a document around which we can have a discussion and that might be the appropriate moment to say well there is certain omissions and there is certain rights which aren't covered and we need to flag these and hear what they are.

MR SURTY: Could I just perhaps raise one issue through you Mr Chairperson again. If you look at Section 7(1) the legislative organ has been excluded in terms of Section 7(1). This obviously has an impact in terms of the interpretation - okay there are two views, there is the view of Du Plessis and (inaudible) ... in terms of a vertical application and (inaudible) ... Professor Rautenbach and (inaudible) ... and others, that it applies horizontally as well.

Now that will impact tremendously on the content or the interpretation of those particular rights. So I do believe that the parties should be invited to make their submission on that particular section as it would certainly (inaudible) ... through the entire interpretation of the Bill of Rights.

I am just expressing a point of view, privately in terms of this, but I am sure you would endorse the importance of that particular clause and also possibly the clause in terms of the - who can seek relieve under the Bill of Rights.

CHAIRPERSON: All right well then - then we have a specific proposal that we have what we invite party comments on Section 7, obviously part of it has been covered. I mean Section 7(3) juristic persons has been dealt with right by right at this stage as far as we've been able to deal with.

So really there are two substantive matters that arise from Section 7 and that is the reach of the Bill of Rights itself which is dealt with in terms of 77(1). I think 7(2) is also going to be superfluous because that covers the Interim section. Section 7(3) we've dealt with and then Section 7(4)

which is the whole concept of class actions and related matters, locus tandi. That those really do require specific comment and I suppose we can comment on that.

And we could perhaps set a deadline for it, what would be - if people could in 14 days sent their submissions and also the outstanding submissions please the - particularly on interpretations or the interpretation clause.

All right the Theme Committee will meet on the 31st of July to discuss this matter further. Okay well we stand adjourned and where is this function being held, here at 3:30.

MR SOLOMANDRIS: Thanks Tony.

CHAIRPERSON: Thank you.

MR SOLOMANDRIS: Which means everyone must come back.

CHAIRPERSON: Well if they do, ja.

which is the whole concept of class actions and related matters, locus tandi. That those really do require specific comment and I suppose we can comment on that.

And we could perhaps set a deadline for it, what would be - if people could in 14 days sent their submissions and also the outstanding submissions please the - particularly on interpretations or the interpretation clause.All right the Theme Committee will meet on the 31st of July to discuss this matter further. Okay well we stand adjourned and where is this function being held, here at 3:30.

MR SOLOMANDRIS: Thanks Tony.

CHAIRPERSON: Thank you.

MR SOLOMANDRIS: Which means everyone must come back.

CHAIRPERSON: Well if they do, ja.

[END]

TRANSCRIBER'S CERTIFICATE

I, the undersigned, hereby certify that in so far as it is audible, the foregoing is a true and correct transcription of the proceedings recorded by means of a mechanical recording, in the matter of:

THE CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 4

12 JUNE 1995

.....

TRANSCRIPTIONIST: L WOOD

.....

EDITOR: H POTGIETER