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**TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS  
DURING THE TRANSITION : SIXTH REPORT :  
NEGOTIATING COUNCIL MEETING : 21 JULY 1993**

Chairperson:

Good morning gentlemen, and welcome and thank you for your presence today. Prof. du Plessis we have the Sixth Report of your Technical Committee before the Council for discussion and perhaps the way we could deal with this subject to your own advice on this matter would be for you to give us the overview of what the Sixth Report contains and perhaps any suggestion on how we should process that. Thank you.

Prof. du Plessis:

Thank you, Chairperson. May I just at the outset ask we've got our Report in front of us with our page numbers - is the Report part of the document of the Council just in order to facilitate the page numbers - your page numbers may not be the same as ours and start on a different page, or is it the same as ours?

Chairperson:

The same.

Prof. du Plessis:

Thank you. Mr Chairperson there is not very much to be said by way of Introduction, as the Council will remember we started off with our first three Reports and the main issue was to identify rights for inclusion during transition and, at the same time to devise criteria for the inclusion of fundamental rights during the transition. In our First Report we suggested certain criteria which were not acceptable to the Council, we refined these criteria in our Third Report, oh, Second Report, and the Council urged us to go back and revisit our criteria, and then in the Third Report we also suggested a set of criteria. Now what happened there we identified certain rights, the criteria were not accepted but the Council's opinion was that we can go on formulating the rights we've identified in our Third Report subject to the approval of some of the rights by the Council. So that's what we did in our Fourth, Fifth and Sixth Reports to start our formulations. In our Fifth Report you would see that we've indicated at the end of certain formulations that some of the rights still have to be agreed to by the Council - the inclusion of these rights.

May I just draw the Council's attention on page 1. of our Report the final paragraph of that page where we say:

"The Committee wishes to reiterate that the Chapter which follows contains only those rights and freedoms (and measures for their interpretation and enforcement) which are regarded as essential for the facilitative of a transition to democracy in South Africa. The protection accorded these rights and freedoms will be of limited duration, until the elected constitution-making body has pronounced finally on the

form and content of a Bill of Rights. These entrenched rights and freedoms do not represent the full range of rights and freedoms which a complete Bill of Rights for South Africa is likely to encompass. The exclusion of certain rights and freedoms from this Chapter is not necessarily to be regarded as an indication of their lesser worth as protected human rights in the future."

Now what we have to say about the rights we suggest for inclusion at this stage and also the rights on the inclusion of which the Council must still decide what is to be said about this is said in our Report. We have listed the rights and started formulating what we would regard as the most appropriate Chapter for including in the Transitional Constitution. As you would see we have not finalised all matters because of certain differences between the parties as appeared from the discussions from the Council, and also as appeared from submissions we've received. But at this stage we would like to receive comments from the Council on our formulations and especially on some of the more controversial rights, comments from the Council in that regards, and also if possible, like the Council to agree on the inclusion of at least certain of the rights which are still uncertain at the moment. I should point out that not all these rights on the inclusion of which have not been agreed yet are equally controversial. Some of them seem to be non-controversial they were just excluded by reason of our criteria used but from submissions we've received and from the discussions in the Council some of these rights seem to be non-controversial and it would help us quite a lot in our work if the Council can decide on the inclusion of at least some of these rights today.

May I just add this, Chairperson, that after today, we would also like to suggest that in view of the discussions here there should be further opportunity for parties here to make submissions to the Committee and we would like to finalise our work within the foreseeable future, if possible, in view of those submissions.

Chairperson:

We trust that we can all share your optimism. Thank you Prof. du Plessis. Can you perhaps guide me in relation to the Chapter that you have before us from page 2. of your Report. Whether we should deal with the preliminary sections, that is the Enforcement Sections.

Prof. du Plessis:

Yes. It may be wise for us to go through them section by section.

Chairperson:

OK. Thank you.

Prof. du Plessis:

I'm going to ask certain of the members of the Committee, Chairperson, to highlight certain of the sections if you would bear with me, I don't want to be the only one engaged i this discussion and I think the appropriate person to guide us on the Enforcement clause would be my colleague, Prof. Hugh Corder.

Prof. Corder:

Mr Chair, would you like just some general background comment on Section 1. to start with.

Chairperson:

What we'll do Professor, is give us a background to Section 1. and then we'll take each clause in its own right, then if there is need for clarification from you you can provide that, if there are amendments the House could suggest that, if there are differences we'll identify them and find a mechanism to resolve those differences.

Prof. Corder:

Thank you. Section 1. entitled "Enforcement" is something of a mixed bag which we would hope in our Final Report to divide up and specify to a greater degree. Essentially what is dealt with there are four matters. Firstly, who is bound by, what bodies are bound by this projected Chapter on fundamental rights and freedoms? You'll see in 1 (1)(a) that the legislative and executive branches of Government at all levels as well as all statutory bodies and functionaries are proposed to be bound, and then 1 (1)(b) other bodies and persons to the extent expressly provided for in this Chapter and a comment from the Committee on that regard.

The second matter is that which I will refer to subclause 3. subsection 3(1)(3) which really really reiterates what we said in the clause, paragraph read out from page 1. by Prof. du Plessis, "entrenchment of the rights and freedoms included in this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised by South African law." In other words, it does not take away any legal status from those rights.

The third aspect which I should draw the Council's attention to is contained on Page 3. in subclause 8 (a) and (b) which in law, is known as "Standing to sue" who has the right to challenge the infringement or threatened infringement of a protected right or freedom, and you will see there that those who allege that their rights or freedoms in section (a) or associations which allege that their members' rights or freedoms are entitled to challenge, but in section (b) this is something which has been added in the present Report that we are contemplating the possibility of what are known as "class actions" or "representative actions" that people could sue on some other group of person's behalf for the protection of one of the entrenched rights and freedoms.

And then, fourthly, there are some really guides to interpretation which are included in this Enforcement section and I draw your attention particularly to proposed clause 9, subclause 9. bottom of page 3 and top of page 4. This is in square brackets and you'll see the comment there: "The Committee is considering the inclusion of this subsection somewhere in the Chapter, and would appreciate comments from the parties." Just by way of background, that is an aid to whatever judicial body is going to be encumbered with the enforcement of these rights. It is an aid to the interpretation of the validity of those rights. I think that in our Final Report we will endeavour to make this first enforcement section more logical and in fact probably divided up into more than one section, but this is I think subject to what anybody else from the Committee wishes to add or that we should say at the moment by the way of background.

Chairperson:

Thank you Professor, are there any additions from other members of the Committee? If not, ladies and gentlemen, what we will do is process this particular section one clause at a time and I now invite comment on Clause 1, subclause (1) (a). Any difficulties with that, Mr Webb.

Mr Webb:

I don't have any difficulties, but and it may have been considered by the Technical Committee, in view of the enforcement factor one wonders whether the heading should not then read: "Fundamental Rights Freedoms and Responsibilities".

Chairperson:

Can we leave that to the Technical Committee to consider?

Mr Webb:

Because by enforcement you suddenly create responsibility.

Chairperson:

It is not a debate that we need to enter now as I understand it. Any other comments on subclause (a)? If that's approved can we move on to subclause, clause (b)?

Mr Maduna.

Mr Maduna:

Mr Chairperson, we do not have a problem as such with (1)(b) except that unfortunately, the rights envisaged in 1(1)(b) have not as yet been identified. Maybe the appropriate route we could take is to allow for an extension of time for the parties to maybe make further submissions in this regard, identifying rights that should be isolated for purposes of section 1(1)(b).

Chairperson:

We hear that - are there any other comments in relation to 1(1)(b)? Mr Alexander.

Mr Alexander:

I will agree with what Mr Maduna has said.

Chairperson:

I see a number of nods as well in the House. Can we then say that at this stage 1(1)(b) remains subject to further submissions, and there is little point in pursuing debate at this stage. Is that agreed? Can we be a little bit more vociferous? Is that agreed? [Yes by many voices] Thank you, at least now I know you are listening. 1(2), oh rather 1(1)(c) then. Any comments on 1(1)(c)? Mr Gibson.

Mr Gibson:

Mr Chairman, yes 1(1)(c). This is a new concept which has been added in here, the principle based on the principle of equality. The Democratic Party regards equality as extraordinarily important, but we also think that liberty is just as important and we would

like to propose that the Committee should consider an amendment so that this whole subject "shall promote the values which underlie a free open and democratic society based on the principles of liberty and equality." Those principles were good enough a couple of hundred years ago and we think it might be apposite to have them in South Africa now.

Chairperson:

Would you like to offer any response at this stage, Professor?

Prof du Plessis:

We will consider that for sure Mr Chairman because all the parties here would feel strongly about this, but we would also have to consider it in view of the fact that we've already referred to a "free and open society", whether that freedom could be inclusive enough to include personal liberty but we'll give that some consideration.

Chairperson:

Mrs Camerer.

Mrs Camerer:

We support that please.

Chairperson:

Which one? Chief Nonkonyana.

Chief Nonkonyana:

Thank you, Chairperson. My difficulty is the interpretation. I thought that that clause which was referred to by the Technical Committee should be the one that provides for the rules of interpretation. That is my first comment under (c). We are saying there that that designated authority should in interpreting take into account certain other things. I would say, Mr Chairperson it would be more clearer - I go along with that - but it would be more clearer if it were specially provided under the clause which deals with the interpretation. That's one point. And secondly, they say "shall promote their values which underlie a free and open democratic society on the principle of equality" so our question would be did the Technical Committee consider the cultural values, the traditional values also and would they be taken into account if interpretation of the rights entrenched in this, and if not why not?

Chairperson:

I would imagine that the concept of values is broad enough to include all values unless the Technical Committee says so otherwise. Am I right Professor?

Prof du Plessis:

Mr Chairperson, it perhaps is important to draw just the attention to just one other aspect of that formulation. The usual formulation occurring in Bills of Rights would refer to "free, open and democratic society". We have had it based on the principle of equality because equality seems to be of such a concern to the participants in this Process, so it is somewhat of an unusual formulation, but we felt that it is warranted given our particular circumstances in this country and given the views of the various parties participating in this Process.

Chairperson:

Chief Nonkonyana's concern is about the concept of values, and whether that caters for other, customary values, etc.

Prof du Plessis:

It will cater for those values, Mr Chairperson.

Chairperson:

Thank you. Mr Gibson.

Mr Gibson:

Mr Chairman, yes, just to revert to the response from the Committee, I am very grateful for the fact that they will take it back and have a look at it, I wanted just to refer to the point that we talk about a democratic society which in essence must refer to equality as well. It encompasses the idea of equality and therefore if you've got the free, and we've got the democratic, I think the inclusion of the principles of liberty and equality together, firstly it sounds good, has a ring to it and its very meaningful to very many people in South Africa.

Chairperson:

Mr Maduna.

Mr Maduna:

Mr Chairperson, when Chief Nonkonyana referred to the question of interpretation I began wondering whether our remarks should not be reserved until we come to (1)(9) because I think the question of interpretation appropriately belongs there.

Chairperson:

Thank you, Mr Maduna. Dr Rajah.

Dr Rajah:

Mr Chairman, just a point of clarification. (1)(c) talks about the enforcement of the provisions and also the interpretation of the provisions. I would just like clarification whether in (8)(a) they said a person whose rights are infringed shall apply to a competent authority for appropriate relief, whether the enforced designated authority in (1)(c) will be the same as the competent authority in (8)(a)?

Prof Corder:

Yes, on the matter of the precise authority you will see that throughout this document it is contained within square brackets, finality has not been reached on that but it is envisaged that it would be the same authority.

Chairperson:

Thank you. There being no further comments on 1(1)(c) we move on to 1(2). Any comments on that? Chief.

Chief Nonkonyana:

Sir, thank you Chairperson, honourable members of the Council. I, we would like a clarity from the Technical Committee here, and they are saying, "save as provided for in this Chapter". There is no rule of common law or customary which shall limit any right to freedom in terms of this. In principle we go along with that, but, we would like to know, because we have read true, Chairperson, but to our amazement we could not find any provision which recognises the rights entrenched in the indigenous laws of this country, and in view of that I would like, Chairperson, the Technical Committee to just give us a brief comment on that, and we might a well indicate, Chairperson, that we indicated when we were dealing with the Technical Committee on Constitutional Issues and were provided with a very useful guide or a principle from the United Nations Declaration on the Rights of Indigenous People which was adopted on 14th August 1992, which, amongst other things provides that there is an urgent need to respect and promote the rights and characteristics of indigenous people especially their rights to their laws, territories, resources which stem from their history, philosophy, culture, spiritual and other traditions, and it went further to provide in paragraph 8, made provision for the right of indigenous peoples to revise and practice their cultural identity and tradition.

Chairperson:

Chief, I don't want to disturb you, but if you look at the second paragraph in the Introductory Section it addresses the concerns that you are raising. I don't want you to go on with reading that because it says here that the Technical Committee will be addressing those concerns. You can frame your question and give them an opportunity to answer. In, under section 1. Background, the second paragraph.

Chief Nonkonyana:

We were saying our concern, Chairperson, is that in this Bill, what they are saying here is, I think with respect is different. This is Declaration on the Right of Person Belonging to National and Ethnical Minorities. Their emphasis there is on "minorities", my emphasis is on "culture". So there is a difference. So I am saying therefore, Chairperson, my question therefore, I was just throwing some light so that they understand why I am asking this question. I would like clarity therefore because there is no, our worry is that there is no clause which say "cultural rights" in here. Did they consider that if not, perhaps, could they consider considering that proposition. That is all we are asking.

Chairperson:

Mr Grove would like to respond to you.

Mr Grove:

Mr Chairperson, thank you. The Committee would very much like to deal with this whole issue of Indigenous Law but we do require input from the different parties and that is exactly what we were asking in our second paragraph. So we will deal with that in the very next Report, very definitely, but it is a very important matter and it should be dealt with and we understand it that way.

Chairperson:

Thank you, thank you Chief. Mr Alexander.

Mr Alexander:

Thank you very much. Mr Chairman, on this matter raised by the Chief, one must understand in the first place why we are talking about these rights and freedoms and the Committee on the Background states very clearly that we are talking about those rights which are essential for or facilitative of a transition to democracy. So we are talking about rights which are essential to the move towards transition to democracy. We are not talking about the final Bill of Rights where you are going to put everything down very neatly. In that respect I think that it will be incumbent then upon the parties here to advise them on the question of customary law which are those aspects which maybe they need to consider in the light of the stated objective of this piece of legislation we are looking at at the moment.

Chairperson:

Thank you, I am sure we will note those comments. Mr Saloojee.

Mr Saloojee:

Mr Chairman, on page 13. Clause 26, where it says "Language and Culture". "Each person shall have the right to use the language and to participate in the cultural life of his or her...."

Chairperson:

We can't hear you, Mr Saloojee.

Mr Saloojee:

On page 13. Clause 26, I'm just wondering whether the Chief's concern is not addressed by that clause there, and with the comment there: "The Council still has to decide on the inclusion of these rights." referring to cultural and language rights.

Chairperson:

We won't enter into that debate now, we'll give the Technical Committee an opportunity to come back with the response and then we can debate whether the concerns of the Chief have been adequately met or not. But thank you for drawing our attention to that paragraph. Are there any further comments on 1(2)? If there are not, can we move on to 1(3)? Chief.

Chief Nonkonyana:

Sir, again, I think the last portio they are referring to South African Law and our understanding of South African Law is the understanding of is the recognition of Roman Dutch Law and we would like them to reformulate so that it is clear to include also the rights and freedoms which are recognised by indigenous law also.

Chairperson:

The Technical Committee will take note of that. Any other comments on 1(3)? We move on to 1(4). Is the recommendation of the Technical Committee accepted that this clause be incorporated? Mr Alexander.



Mr Alexander:

Yes, on 1(3)

Chairperson:

You are taking us back?

Mr Alexander:

Yes. I hope you will forgive me Mr Chairman, sometimes we must throw the ball back in order to get the line to move forward. The, when we talk about the

Chairperson:

That's the Rugby Laws, Mr Alexander.

Mr Alexander:

Yes. the rights and freedoms, we want to be absolutely sure that we are including the question of the so-called "Homelands" Mr Chairman, and as it stands here does it make it very clear?

Chairperson:

Again, we'll ask the Technical Committee to take that concern into account. Thank you Mr Alexander. 1(4). [Could we clarify then that...] Mr Webb?

Mr Webb:

May I just piggy-back on Mr Alexander's comment that some of the Homelands may or Independent States may in fact have their own fundamental rights which would have to be compatible because you cannot transfer the provisions of those Constitutions may in fact set limits on the future and the reincorporation aspect dealing with those fundamental rights which are in existence in the Independent States as they would apply to this set of principles.

Chairperson:

The Technical Committee will take note of that as well. Your comments, ladies and gentlemen on 1(4). Dr Rajah.

Dr Rajah:

Mr Chairman, I want to get the interpretation of the word "may" because it is not compulsory for those who infringed the provisions of this Chapter. It says: "In case of infringement the designated authority may where appropriate ..." Can we suggest that we use the word "shall" instead of "may".

Prof Corder:

May I respond on that. That is really just giving the enforcement authority an extra option should it chose to do so in order to prevent massive disruption let us say, of a Government programme, the Government department concerned would be given an opportunity to put its house in order as used to be said quite often in this country so that massive disruption did not take place. It is merely an extra option available to the enforcement authority.

Chairperson:

Is that OK Dr Rajah? Alright, then we move on, ladies and gentlemen ...

Sorry, Chairperson ....

Chairperson:

Yes, Chief?

Chief Nonkonyana:

Just, Chairperson, if you can highlight this I mean help me here. How long are we going to retain this designated authority? What I am trying to say, Chairperson, are we, can't we decide whether it would be a Constitutional Court or whatever structure that is going to enforce this right. How long are we going to keep this thing?

Chairperson:

Well, I imagine this is a Chapter in the so-called "Transitional Constitution" once the overall context is available those gaps will be filled in. Am I right gentlemen?

Prof Corder:

Mr Chair can I just refer the Chief to page 17 under Enforcement Mechanisms and Procedures. We did call for submissions on the 11th June, as you will see there we have had none so far so that matter definitely will be sorted out as soon as we get some input.

Chairperson:

So, participants, please take note of that invitation to make submissions. We at clause 1(5).

[There seems to be a little bit missing from the tape here]

Adv. Yacoob:

To add to what has been said about Enforcement Mechanisms we can deal with it when we get there, but the position is that we've made certain general propositions in the section under Enforcement Mechanisms and the Committee can go further and flesh these out only on specific authority. But we can deal with that when we get there, Mr Chairman.

Chairperson:

Thank you Adv. Yacoob. Mr Maduna on 1(5).

Mr Maduna:

Mr Chairperson, we would agree with the Technical Committee that 1(5) is unnecessary - it should be deleted.

Chairperson:

Thank you, is there any difference to that point of view? 1(5) will then accordingly be deleted. We then move on to 1(6) "The provisions of this Chapter shall apply to all laws, etc." Comment on that. If there is no comment we will move on to 1(7). Dr Rajah.

Dr Rajah:

Mr Chairman, they've introduced the concept here of juristic persons, but nowhere else does it refer to juristic persons, and I want to know what rights are contained in this Chapter which is specific to juristic persons?

Prof. Corder:

Basically I think, the answer to that would be it would depend upon the circumstances, but basically all would be available to them, could be available to them, you'd have a problem in recognising the human dignity of a company or a close corporation. So that clearly is a personal right, but I think it would depend upon the interpretation by the designated authority. The inclusion of that sub (7) there is merely to put beyond doubt that juristic persons that when we say, you'll see the style is uniform from clause 2 onwards, it says "every person" to put that beyond doubt that its not only natural persons.

Chairperson:

Thank you Professor. Mr Gibson.

Mr Gibson:

Mr Chairman, we felt that clause (7) could be improved by adding just a few words after "rights and freedoms" and insert there "and made subject to the obligations". So it would then read: "All juristic persons shall be entitled to the rights and freedoms and made subject to the obligations contained in this Chapter." We thought that improved it somewhat more particularly so, if clause (1)(b) continues to be retained, because, obviously if this operates horizontally then in many instances juristic persons are going to be involved in having obligations.

Adv. Yacoob:

Mr Chairperson, can I just clarify that that question raises the essential question of the extent to which the Chapter will operate horizontally. That is will apply in instances other than State authority and concerns the question of the response to 1(1)(b) earlier about which we have already taken a decision, so can we just say that can parties when responding to 1(1)(b) also bear in mind this particular question, and that question raises the essence of the extent to which juristic persons are subject to obligations because if there is no horizontal operation of the Bill, then the obligations will be applicable in terms of 1(1)(b) to State authority broadly put. I think that's a question that's raised and it will need to be dealt with in the submissions which are received.

Chairperson:

Thank you. Mr Maduna.

Mr Maduna:

Mr Chairperson, maybe we should state that we have a philosophical problem with the way it is apparently worded. We would like as much as possible, human rights to be confined to human beings and therefore we would recommend a deletion of this or maybe a rewording of it which may necessitate what the member of the Technical Committee ha said, namely, the need to identify some of the rights which may be of interest to corporations, and so on.

But then again, maybe that may be obviated somehow if parties were to make suggestions regarding a reformulation. I am immediately thinking, Mr Chairperson, that we could actually use words along these lines: "All natural persons shall be entitled to the rights and freedoms contained in this Chapter unless expressly stated in this Chapter." In other words, where then you expressly list the rights that the corporations would be entitled to you would have to rather be assisting in the process of resolving of this problem. We have really a problem if what is essentially a human right is regarded as a corporation right.

Chairperson:

But quite clearly this is linked to 1(1)(b) and as the member of the Technical Committee has indicated in making submissions on 1(1)(b) perhaps your formulation could also be submitted to the Technical Committee. Professor Cheadle.

Prof. Cheadle:

I would like to endorse what Mr Maduna has said and just to give some sense with the problems associated with this is to recognise that if you give a juristic person or a corporation an entitlement under this Chapter you might also give them corporations political rights. Now, in the United States there is an endeavour to limit the way in which corporations which manage large resources of money influencing the political process, let us talk about laws that would limit contributions by trade unions on the one hand, which are also large resources and corporations on another, in the political process. A law like that might well be subject to constitutional attack if we give corporations, and that includes corporate bodies and trade unions, these kinds of rights.

The second problem is that we recognise with corporations their interest is only in maximising profit and so in Canada, for instance, corporations have been able to achieve commercial objectives using fundamental human rights. So you strike down Sunday trading laws not because you, as a corporation, have a deep concern about religious freedom on Sundays but because you want to extend shopping facilities or working hours on Sundays. So I think this is a real problem and I'd to suggest, Mr Chairman, and the suggestion you made, which is that this is actually quite intimately linked up with the question of horizontality and the suggestion I would make is this, that we should look at the provisions of this Chapter, identify which rights ought to be, give corporations entitlements, for instance such as the property clause, and then identify those and then submit those for further consideration. In other words, the wording that Mr Maduna suggested is that corporations are only, this Chapter will only give entitlements and rights to corporations where they are expressly stated, and then that gives the parties an opportunity to make submissions to the Technical Committee and for them to consider it. If, otherwise the difficulty in this clause is that you leave it ultimately for the courts to decide and I think, one it is an ambiguity that we can ill-afford during the transition and secondly, it will encourage constitutional litigation and our intention here should be not to do so. Thank you.

Chairperson:

Thank you Professor. Can we then leave this matter as I have suggested which is that there is a link to (1)(b). We need submissions from parties on this particular question and then the Technical Committee can help us to take it forward on the basis of the views expressed

until now. Mr Alexander.

Mr Alexander:

Yes, save to make one addition to what the last speaker said, Mr Chairperson that the aims and objectives of this piece of legislation or approach is to level the political playing field as you move towards the democratic process. So even when you talk about juristic persons and the rights they must enjoy you must be able to relate it to the objective we are trying to achieve.

Chairperson:

I'm sure the Technical Committee will bear that in mind.

Prof du Plessis:

Just one cautionary word, Chairperson, may I? It should be noted that reference is made to juristic persons, not to corporations only. That would of course include corporations, and the problem is that it would be very difficult for a political party or to say to a political party which is also a juristic person, that you have no political rights whatsoever. Or to a church which could also be a juristic person that you have no religious rights whatsoever, so the matter is not only that simple so as to exclude corporations but we'll have to look into that.

Chairperson:

Thank you.

...Mr Chairman I concur with the statement .....

Chairperson:

I thought you believed in the principle of ladies first but please continue. Mr Wessels.

Mr Wessels:

There was a bi-lateral between us and it was reached through consensus that we would do it this way. I concur with the statements made by Prof. du Plessis but I would just like to register that this matter is a matter of importance of great importance and I would just like to highlight that there is a different argument than the arguments we have listened to namely the arguments registered by Prof du Plessis.

Chairperson:

Thank you. Mrs Camerer do you want to ...

Mrs Camerer:

Concur with that I just wanted to register the same point.

Chairperson:

Thank you, it is a very high degree of consensus. Can we then move on ladies and gentlemen to 1(8) and 1(8)(a) in the first instance. Any comments on that?

Mr Gibson:

Mr Chairman, would it be appropriate at this stage to reiterate the Democratic Party's attitude towards the "designated authority". The more we think about the matter, the more we become convinced that the designated authority for adjudicating on the Bill of Rights should in the first instance, be the Supreme Court of South Africa in all its provincial and local divisions, and that only in the final event, should an appeal go up to the Appellate Division which could perhaps then have a separate constitutional division. We don't believe that every constitutional matter large or small, should be adjudicated upon in a constitutional court.

Chairperson:

I'll just seek Prof du Plessis' guidance - is this an appropriate time to discuss this matter or can we discuss it towards the end? Mr Yacoob.

Adv Yacoob:

That's what I want to know as well. If it is decided that this is an appropriate time, then we can talk about it now I would suggest that it is important to discuss it when we get to the section dealing with Enforcement.

Chairperson:

Mr Gibson, if you don't mind, can we hold on with that? We come back to 1(8)(a) - any comments on that? Dr Rajah.

Dr Rajah:

Mr Chairman, its all very well to have a right on paper, my question is to what extent is this right accessible to the individual considering the cost of applying to any competent authority for appropriate relief. My question is whether relief, cost relief, I don't know whether it is, could be regarded as a right, whether the issue of the relief as far as cost, etc. should also be considered, otherwise this would merely remain a right on paper.

Chairperson:

Professor.

Prof du Plessis:

Well, obviously, Mr Chairman, in suggesting mechanisms we shall also have to suggest certain procedures which will make it possible for people to approach the designated authority and that won't be the ordinary rules applying for all other courts in the country, in most jurisdictions there are certain special measures facilitating access to the designated authority, and we'll have to provide with that when we deal with enforcement and the mechanisms.

Chairperson:

Thank you. Any other comments? Mr Mopeli.

Mr Mopeli:

Mr Chairman, perhaps it will be a sort of guidance I would like to get from your or from

the Technical Committee. While our fears are really allayed by this clause here that the infringed and the threatened shall be entitled to apply to a competent or designated authority, I am thinking of the present, Mr Chairman, is it this is perhaps being prepared for future but I am thinking now of the present when the parties are now really very busy and enthusiastically preparing themselves for the election, how to deal with the party or parties that consistently breach the political rights mentioned, though before we come to it in 15(1) of the Report, because I feel, Mr Chairman, if some form of punitive measure is not introduced this may lead to severe discontent on the side of the affected parties. Thank you.

Chairperson:

Quite clearly that would be catered for in the Code of Conduct for Political Parties in an Electoral Code which is being proposed as well, but can we hear comments from the Technical Committee?

Prof. Corder:

Mr Chair, that is exactly how we envisaged it.

Chairperson:

Thank you. Chief Nonkonyana do you want to? Can we then move on from 1(8)(a) to 1(8)(b). Mr Webb.

Mr Webb:

Just a question to the Technical Committee. A person who applies for relief - is there a nexus between that person and the group whom he proports to apply for relief? I take for example, I've no interest in the SPCA but I may just wish to apply for relief on their behalf. Is it precluded or is it not precluded, does there have to be a nexus or can people go and wholesale go and declare rights on behalf of other bodies, other groups? A busy-body principle. This is what I'm worried about.

Chairperson:

Prof Corder.

Prof Corder:

I think the answer to that question, Mr Chair, is contained in those three words and the interpretation thereof by a court of law on behalf of. Busy-bodies would be excluded at the gate of the court, so to speak, under the rules of standing as they exist at present. I don't think that there would be, although this is intended to alter the rules of standing and to widen access, and this comes back to the question that was asked earlier on about the cost of litigation. This is deliberately introduced to try to take care of the difficulties raised by costs of litigation, but a busy-body in our view, would be excluded by a court being able to legitimately to interpret those three words on behalf of to require a nexus between a litigant and the party or body to which, on whose behalf he or she apparently was litigating.

Mr Webb:

For the sake of clarity Mr Chairman, if I may pursue the debate, should we not then put in "authorised by" just to bring it to some clarity.

Chairperson:

We'll ask the Technical Committee to look into that.

Mr Webb:

Thank you, sir.

Chairperson:

Chief Nonkonyana.

Chief Nonkonyana:

Thank you Chairperson. I'm having a bi-lateral next to me so it has disturbed me. But I wanted to ask the same question under (8)(b) though, because (8)(b) as drafted to me gives anybody whether there is a nexus or not to approach the Court for a relief and in the light of their response to Mr Webb's question can they clarify what is the meaning of the clause (8)(b)?

Chairperson:

I think your concern is met by the suggestion made by Mr Webb that the word "authorise" should be considered for inclusion or any appropriate equivalent, and I think we'll leave it to the Technical Committee to address that concern. If that's OK with you Chief?

Chief Nonkonyana:

In (8)(a) Chairperson, that is OK, I have no problem. But (8)(b) is clear, it says "anybody" so if I can say that .....

Chairperson:

But Chief we are saying that it will be, that the Technical Committee will look into (8)(b) to meet that particular concern that you and Mr Webb are .....

Chief Nonkonyana:

Sorry Chairperson, I agree.

Chairperson:

Mr Gibson.

Mr Gibson:

Mr Chairman could I take a contrary view about the wording suggested by Mr Webb about the inclusion of the words "authorised by" - perhaps I could just give one example, there is a large group of disadvantaged children in Johannesburg and they are known variously as the "twilight children" or the "street children". Now, assume for the moment we agree to the inclusion of the clause which says "all children entitled to basic security, food," and so on, and perhaps I, as a general busy-body that cares about street children in two years time decide that the Government has done nothing about their plight and that I wish to apply to court, I don't think I should be prevented from that. The courts tradition, the signal, their disapproval of people who are not involved by imposing costs orders, and I think we'd very soon build up a culture where people would recognise that they applied at their peril, but if



one had a really good case on behalf of a disadvantaged community unable to apply themselves without a nexus to oneself and without being the guardian of those children I don't think one should be prevented from applying. The Democratic Party would like to see open access to enforcing the Bill of Rights.

Chairperson:

The Technical Committee will take note of that. Mr Yacoob.

Adv. Yacoob:

Mr Chairman, thank you, I'm sorry, but it may not serve to refer it back to the Technical Committee because the Technical Committee considered the very argument which the last speaker mentioned and it was on that basis that we came to the conclusion that access ought to be widened and that strict authority ought not to be called for in order to determine whether a person has local standard to appear before a court. Now that is clearly a political decision and the choice is a clear one, either we want to have a situation in which the courts call for a strict authority and therefore we exclude the kind of situation mentioned by the last speaker, or we have on behalf of which is not as strict an interpretation, which does not allow anybody, any busy-body to apply but which allows - which makes the provision for some sort of linkage in the use of the words "on behalf of". Now the political question on which a decision has to be made is whether we should widen slightly and move from "authorised" to "on behalf of" or not, and what I would suggest is that this is another area on which the Technical Committee ought to receive submissions in relation to which way the various parties think about the matter and the motivations either way, so the Technical Committee can then look at where the balance lies, what the concerns really are, do some kind of weighing up and see what kind of recommendations can be made. But, because it is essentially a political decision unless there is more from the Council or the participants in the Council it is impossible for the Technical Committee to make that choice which is essentially not the choice of the Technical Committee.

Chairperson:

Professor Cheadle.

Prof. Cheadle:

Mr Chair, I think we should decide the issue here and now because I think we can resolve the problems that Mr Webb has raised. If you make it authorised it does mean, for instance, that it is very difficult to move on behalf of prisoners, on behalf of people that are in the rural areas very hard to actually get powers of attorneys and the like. The Appellate Division case of Udongo vs the Tribal Authority provides the basis upon which you can bring this kind of class action and it doesn't allow any busy-body just to arrive. You have to demonstrate that the people on behalf of whom you are bringing the application are far away, that it is a fundamental right that is being affected, that it is inconvenient, that it would lead to proliferation of matters in the court, etc. So the wording that I think the Technical Committee has come to is exactly the right wording. It is "on behalf of" - the courts will themselves regulate this both by way of costs orders as I think the Democratic Party has made out, and the courts themselves will develop the rules that will ensure that we don't have any and every busy-body arriving, but to require strict authority would actually make

one be a dead-letter.

Chairperson:

Ladies and gentlemen, I am just wondering, in the light of the last two interventions in particular whether we can in fact resolve this matter here, and I think we can by saying, firstly that this provision does allow for a wider access to this particular provision. Secondly that "on behalf of" is not an open-ended invitation to any, what people call busy-bodies, to actually intervene and, thirdly, the whole question of rules being formulated by the appropriate authority does provide some screening mechanism to exclude people who don't really have an interest in a particular matter. Now, in view of that can I invite both Chief Nonkonyana and Mr Webb to perhaps retreat from their submissions and accept that on that understanding this clause can remain as it is. Mr Webb.

Mr Webb:

I defer to the status of the Chief - I will respond after the protocol has been observed.

Chairperson:

Thank you for your co-operation, can we then move on to 1(9)(a). Mr Maduna.

Mr Maduna:

Mr Chairman when we were looking at 1(1)(c) we did indicate that we would like to say something with regard to 1(9). Mr Chairman, we believe that especially for the purposes of the interim period the build up to the elections and so on, we would have to jealously and zealously guard certain rights the infringement of which would impinge upon our very participation in the elections and reduce the status of the elections. In other words, what I am trying to say is strict scrutiny of laws or executive actions would, in our opinion, have to be restricted to rights that may to laws and actions that may effect free and fair elections or the integrity of the constitution-making process.

Mr Chairperson we think that all other legislation or executive action should be presumed to be constitutionally valid until the contrary is established provided of course, that no law would be constitutionally invalid solely as in fact provided in (9)(b) by reason of the fact that the wording used exceeds the limits specified in this Chapter, and so on. In other words, what we would like to see happen is that the rights with regard to the holding of free and fair elections and the integrity of the constitution-making process should be jealously and zealously guarded, but otherwise the State would have to be free to act and manoeuvre and so on, and so forth, as long as of course it does not broadly speaking, exceed the bounds defined in the Bill and Constitution.

[No name mentioned - different speaker]

Mr Chairperson, broadly speaking it would be acceptable as long as it bears in mind the need to zero in on the particular rights that affect the free and fair elections at the integrity of the constitution-making process.

Chairperson:  
Mrs Camerer.

Mrs Camerer

Thank you Chairperson, I want to say that the South African Government does support the inclusion of this clause but we were wondering about this word "scrutinised" as well and what it really meant, and we were going to perhaps suggest from a drafting point of view that, and maybe Mr Maduna's point would be satisfied if one substituted the word "interpreted" so you have strict interpretation. I'm sure perhaps the Committee could give us their views here, but we were also worried a bit about the word "scrutinised" and what it actually entailed. Perhaps "interpreted" would be better.

Chairperson:

Would the Committee like to respond at this stage? Mr Grove.

Mr Grove:

Mr Chairperson, yes, the proposal is quite acceptable, I think it is a good change to replace the word "scrutinised" by "interpretation" or "interpreted".

Chairperson:

Thank you Mr Grove, Mr Titus.

Mr Titus:

I was going to comment on item (9)(a) but I have been covered now, and also had a problem with the word "scrutinised", but I've got a problem with (9)(b).

Chairperson:

I'm just wondering whether we can come back to that unless its connected.

Mr Titus:

To (9)(b)?

Chairperson:

Yes, I'd just like to clear (9)(a) first, if that's all right. Dr Rajah.

Dr Rajah:

Mr Chairman I just seek your guidance on this matter - (9)(a) refers to limitations of right and we also got a Section 28 which also refers to limitation.

Chairperson:

That's a question we'll come back to after we discuss (9)(b).

Dr Rajah:

OK because there are some sentiments expressed as far as limitation is concerned which covers both limitation and suspension because suspension ...

Chairperson:

I don't want to go into that at this stage if you don't mind.

Dr Rajah:

Should we discuss it, can I a right to raise it also there [Yes] and, just as a point of information could we get clarification on if its interpreted by whom - whether its interpreted by the, again, by a competent designated authority. Could we add that in also for being explicit?

Chairperson:

It might be implicit in the documents.

Mr Grove:

Mr Chairperson it will be interpreted by all the courts including the designated authority.

Chairperson:

Is there any need Mr Grove for an explicit indication of that?

Mr Grove:

In my view, Mr Chairperson, no.

Chairperson:

Fine. Dr Rajah is that acceptable? Mr Gibson.

Mr Gibson:

Mr Chairman, the Democratic Party does not actually understand what the last two lines mean or what the proviso means. Surely any law limiting any right is going to be strictly scrutinised or interpreted or anything but if anybody alleges that there has been an infringement of the Bill of Rights surely they're going to take it to the constitutional court or whichever court or the appropriate authority and they'll adjudicate on it. So to my mind, the proviso is meaningless and should be out.

Chairperson:

Would the Technical Committee like to respond?

Mr Grove:

Mr Chairperson, the purpose of this clause and also paragraph (b) is to strengthen the existing laws because of the impact the Bill of Rights is going to have and the main provision in (a) is to create the presumption in favour of validity for that reason to strengthen the laws otherwise the Bill of Rights could cause havoc on our laws. The proviso is inserted for the reasons Mr Maduna mentioned because of the very importance of the election, the laws relating to free and fair elections should be more stringently scrutinised and interpreted. And I think that is the very purpose of this clause. I can't understand what Mr Gibson's problem is here.

Chairperson:

Do you want to add anything Mr Gibson?

Mr Gibson:

Mr Chairman it is quite clear that you can't have a system of anarchy reigning where everybody says, no no, the Bill of Rights provides one thing and the existing law provides the other. You simply can't have that, so it is necessary to have a statement provision in the Bill of Rights stating that the existing laws are valid unless they pronounced to be invalid. Then that's absolutely clear, but I don't understand how one in practice gives effect to the proviso. I mean, is the constitutional court then sort of going to have an urgent sitting to decide on whether the election procedures are in terms of the Bill of Rights or not. I don't understand why that is necessary, I don't believe that the constitutional court itself or the adjudication authority, the Supreme Court is going to act on its own. Somebody will have to bring the matter before the court. So anybody who says that there's been a breach in the Bill of Rights whether its on a political matter or a matter of freedom, or whatever it is it would be up to that person to say the law infringes the Bill of Rights and there will then be an adjudication upon it, and I don't believe you can have a stricter adjudication in respect of these. Surely you are going to have a strict adjudication of every alleged breach of the Bill of Rights.

Mr Grove:

Mr Chairperson, we've heard the argument and we'll give due attention to that.

Chairperson:

Thank you Mr Grove.

Prof Corder:

Could, Mr Chair, could I just add the concept of strict scrutiny is one which is borrowed from the United States Constitutional Law and we probably erred in using those words which have a particular meaning without explaining them further and I think that we need to spell it out in greater detail.

Chairperson:

Thank you. Mr Mahalangu do you wish to speak?

Mr Mahalangu:

Thank you Mr Chairman, I am just worried about the position of (9)(a). I think it's at the wrong place, we agree with its content but as it is here under Enforcement you read it with 2. it makes a contradiction, but if it is a procedural aspect place I say either under presumptions or evidenciary matters then it makes sense, but as you put it here ....

Chairperson:

That is a question we are going to ask at the end of this particular section. [Thank you] Chief Nonkonyana.

Chief Nonkonyana:

I think what I wanted to raise has been raised, but there's one thing that I would like Chairperson to state, namely that we need to provide for the right clearly so that there is no doubt about that in the interpretation of the clause because we know the rules of interpretation in the court because they are going to apply the literal interpretation all the forms of rules of interpretation. I would like therefore the right as regard the political right should be clearly stated so that there is no doubt whatsoever. That is all I can add Chairperson - otherwise I agree with you.

Chairperson:

Thank you Chief, the Technical Committee will note that. Are there any, Prof. Cheadle you are next, are there any amendments to this clause? You don't wish to speak Mr Alexander?

Mr Alexander:

Yes, Mr Chairman, I think that we cannot find anything wrong with the wording of this clause, technically speaking, but the underlying concern or message that it carries we would have been much more happy if it was stated a bit more positively because basically we are going into elections, we are trying to establish some rights which we don't want people to interfere with unless certain things happen, and as it states here it says actually the opposite thing - it says it in a negative way. It says that even if those rights are there you can interfere with it under these terms, but we are basically saying that if had stated it more the other way around it would have conveyed a more positive message, but it's not wrong, but the message should have been a bit better.

Chairperson:

The Technical Committee will take note of that as well. Mrs Camerer.

Mrs Camerer:

Thank you Chairperson, on (9)(b) which we also support its just in the second last line right at the end of that line where it says "and such a law shall be interpreted accordingly" perhaps it would be clearer if it had said instead "in which event" or "in which case" such a law shall be interpreted accordingly. I would like to suggest that for the Committee and get their comments.

Chairperson:

Would the Technical Committee like to respond? I just want to say that (9)(a) then will be then reformulated in line with the sentiments expressed here. No, no problem. (9)(b) your comments?

Mr Grove:

We'll look at Mrs Camerer's suggestion Mr Chairperson.

Chairperson:

Thank you. Mr Titus.

Mr Titus:

I have a fundamental problem with (9)(b). If you look at (9)(a) it extends certain privileges to the State or to Parliament or to the legislature. Now also (9)(b) does likewise. I just would like to find out from the Technical Committee as to why this additional privilege being now extended to Parliament or to the State is they feel is necessary. In my own view, it really tempers with the authority, the functions, the discretion of the courts, or the designated authority or whatever you call it in that it now dilutes and goes to the extent of saying insofar as that particular aspect is concerned your ruling shall be so and so, why can't we leave this aspect to the better judgement of the courts?

Mr Grove:

Mr Chairman, once again, our laws were written in a period of parliamentary sovereignty and its not been written with the view to a Bill of Rights regime, and we'll have to allow for a period of adjustment to bring our laws into line with a Bill of Rights, and these provisions both of them are recommended for inclusion, just for this purpose - I don't think it will be part of a final Bill of Rights, but it is necessary for the transition.

Chairperson:

Mr Titus any further ...?

Mr Titus:

I won't react I just felt that I should make a point, my point has been made.

Chairperson:

Thank you. Chief Nonkonyana.

Chief Nonkonyana:

I don't think I understood Mr Titus clearly, but anyway, my problem with (9)(b) Chairperson is that the first clause "No law shall be constitutionally invalid solely by reason of the fact that the wording used exceeds the limits specified in this Chapter..." I am having a fear that some tribunal may exceed and as such act will try various and is it the intention of this subsection or paragraph that if the Parliament exceeds the rights, its rights, I cannot challenge that, that's my problem, number one. Even with the proviso Chairperson, I don't understand, they say the law is capable of narrow interpretation and which does not exceed such limits. I really, what I am trying to say therefore, Chairperson, I'm really having a problem with the whole drafting of this paragraph. If there can be some clarification I would appreciate it, but to me as drafted it is not as clear as I would like it to be.

Chairperson:

Lawyers are often confusing - I'm not sure the Technical Committee wants to address us on this briefly. Mr Grove.

Mr Grove:

Mr Chairman, the problem is in regard to our existing laws, they are generally written in very general terms wider than what the Bill of Rights would allow, but maybe we can qualify this provision to apply only to existing laws and not to laws made in future by the new

## Parliament.

Chairperson:

Thank you Mr Grove. Mr Maduna.

Mr Maduna:

Mr Chairperson with regard to both (9)(a) and (9)(b) we have a broader issue just to ask the Technical Committee to add namely that in interpreting whatever laws and executive actions and whatever other actions the interpretation must be done in such a manner that the State's international law obligations are also born in mind. In other words, as much as possible we should strive to go beyond what our courts have tended to do right now, because they are international standards of human rights which we would like to benefit from in the terms of the emergence of a new jurisprudence in our country. Maybe then the Technical Committee would have to find a way to work that in as well, in other words the argument must never be that you should ignore whatever is happening beyond our borders and confine yourselves strictly to what exists in our law as has been the case all along.

Chairperson:

The Technical Committee will take account of that sentiment. Dr Rajah.

Dr Rajah:

Mr Chairman I understand by (9)(b) that if there is a law that exists that limits the existing rights then that law will presume to be constitutionally valid. Is that the intention of this Committee?

Mr Grove:

Mr Chairman, it will only be interpreted in a narrower way so that it falls or interpret it in such a way to bring it within the bounds of the Bill of Rights and as such and in that way it will be valid, yes.

[No mention of person speaking]:

Mr Chairman I think, may I just take the liberty of saying that the second line, by reason of the fact that the wording exceeds the limit, to me it reads a bit clumsy because its not really clear. Will it be possible to amend that by saying that no existing law or that no law shall be constitutionally invalid solely by reason of the fact that such law limits the rights and freedoms in this Chapter.

Chairperson:

The Technical Committee will take account of that formulation. Mr Yacoob. I just don't want us to get into that debate of formulation at this stage unnecessarily.

Adv. Yacoob;

There is one debate though which I fear we may not be able to avoid and that is again the political choice about whether the international law obligations of the State should be taken into account in interpreting this Bill of Rights. Now the problem the Technical Committee had and if there is a clear indication that that's a problem that we can ignore, then we can



go ahead and draft the document accordingly. The problem is that international law obligations would be undertaken by the executive of the State and if you interpret legislation and its conformity with this Bill of Rights in accordance with international law obligations what you're actually doing is interpreting something which has been prepared by the legislature in relation to what has been agreed by the executive. Now that's the political position which is required then it is a very easy matter to put in, of course the advantage is that international law obligations would be accepted by the executive only if they have been properly authorised by the legislature, but that's the difficulty because only those international law obligations then which are specifically agreed to by South Africa, again we need some indication some clear decision as to whether you want the courts to be bound by international law obligations in making interpretations or not and there are different consequences there's no way in which the Technical Committee can make a choice - the choice has to be made here.

Chairperson:

Thank you for drawing that to our attention. Can we address that issue and try to resolve it if we can. Mr Gibson do you want to address this issue.

Mr Gibson:

Mr Chairman, yes. Just on the formulation of (9)(b) perhaps I could draw the Technical Committee's attention again to the formulation which the Democratic Party made in its Bill of Rights in clause 16.1.1. We've tackled it just the other way around and with all due modesty I think its quite elegant. It reads as follows:

"Any law or action in contravention of this Bill shall be to the extent of the contravention invalid."

The Technical Committee might like to look at that again.

Chairperson:

I'm sure they appreciate your offering. Professor Cheadle.

Prof. Cheadle:

Mr Chair, I want to address the issue of international law obligations and it is a matter that ought to be dealt with at the Council and not left to the Committee. I think the important point here is to bear in mind that this is a very different kind of constitutional regime we're entering. Under the Westminster model you had an executive that was answerable to the legislature, and the courts merely interpreted the laws and applied the laws. Under a Bill of Rights system, the courts are given an effectively policy-making powers because they both interpret a constitution, the Bills of Rights in a constitution, they look at the way in which the laws that the legislature have passed conform with their interpretation of this very general wording and [changed tapes here]

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through the Executive will enter into public law, and I'm only now referring to public law obligations, will enter into public law obligations. In the Westminster model then it would be for the legislature to turn those international law obligations into domestic law. Now the problem that you faced with with this kind of system is what happens if the executive signs the international obligations list, the African Social Charter, or Universal Declaration of Human Rights, the legislature then passes legislation to give effect to those international law obligations and then the courts decide no it doesn't comply with the Constitution. So the problem that you're faced with here is not to make the courts bound by international obligations but to as far as they can, so interpret the laws passed by the legislature in a way that is consistent with the international obligations, and where you do have a clear conflict obviously between international law obligations and the provisions in the Constitution, then clearly the Constitution will have to prevail insofar as the courts are concerned and then the legislature will have to amend the Constitution. So its not a matter of pitting an executive against the legislature, policy is made in a modern state with a Bill of Rights by all three arms of government. which is conceptually different from the Westminster model, and accordingly what you want to make quite sure is that where legislature gives effect to international obligations that the courts will then so interpret that legislation to be consistent with this public law obligations to the extent possible. And really that is the substance of the proposal.

Chairperson:  
Yes Dr Rajah.

Dr Rajah:  
Mr Chairman, just to comment on that. We determined I think earlier on that we said if South Africa is a Constitutional State - just guidance on this. It implies that the legislative is not supreme, it is the courts that are supreme, as far as interpretation etc. of the law is concerned in a Constitutional State.

Prof. Cheadle:  
As I understand a Constitutional State the court will be supreme in the interpretation of the Constitution. Of course the legislature with special majorities can always change the legislature and the executive and the legislature obviously can change the court. Where you have constitutional crises like one has had in the United States in the 1930's around social welfare, social legislation. So effectively in interpreting the Bill of Rights the Supreme Court will be supreme. Once you give them that power then they will look at any legislation the legislature passes and then determines whether or not they fit in the terms of the Bill of Rights and in that way what you don't want to do is set up a conflict between your Constitutional Court and your international law obligations, and so the suggestion here is to try and harmonise those three. It doesn't bind the court it's merely an interpretive guide.

Chairperson:  
Mr Gibson, you've spoken. I can strike you name off, you don't want to speak again?

Mr Gibson:  
Mr Chairman, thank you I do. Just very briefly I go a long way with the previous speaker

but I think he emphasises too much the role of the international obligations. The Government musn't enter into international obligations which are contrary to the Constitution of South Africa and to the Bill of Rights, and that's it. If they want to enter into obligation, I can't imagine what they are, but just assume they want to enter into international obligations like that then they must follow the proper course of attempting to amend the Constitution and I don't think we should start bending it here and making it possible for the court to bend it. We want to know, South Africans want to know what's in the Bill of Rights, what's in the Constitution and they want to know the Government's going to abide by that.

Chairperson:  
Mrs Camerer

Mrs Camerer:

I'd like to thank Prof. Cheadle for his very interesting discourse on this subject but it's something that's been raised for the first time here Mr Chairman, and I would like to take up the Technical Committee's suggestion, I think it was Mr Yacoob who said that it's a political matter and the political parties perhaps ought to be afforded the opportunity to make submissions on this particular point to the Technical Committee and perhaps the Committee could come back to us next time on this point. We'd certainly like the opportunity, when we've considered the matter.

Chairperson:

Is the House in a position to accept Mrs Camerer's suggestion which gives all of us an opportunity to understand this very complex subject it seems. Is that agreed? Thank you.

The last matter in relation to (9)(a) and (b) is the question of its location which both Mr Mahlangu and Dr Rajah had raised, from a number of comments that have already been made, it is quite clear that this clause should not be in this position but that it should reside in a later section on the Limitations. Is that agreed? OK. So we've answered the question raised by the Technical Committee in that regard.

Can we then move on to Section 2, clause (1) - any comments on that? If that's agreed, Section 2 clause (2). Please raise your hands, I will see you eventually. Mr Webb, yes.

Mr Webb:

Sir, I wondered whether despite the explanatory notes that are there, whether 2(1) isn't sufficient to cover the whole aspect of Equality by going further to 2(2), to 2(3) and to 2(4) we are limiting in fact those equalising factors.

Chairperson:  
Prof. du Plessis.

Prof du Plessis:

Chairperson, this is a very important clause and it should reflect the concerns of the parties negotiating here and this clause was formulated with reference to the submissions we've

received from parties here. Now it is true that as a general statement 2(1) could suffice in certain circumstances but because of the concern among the parties here for a society based on the principle of equality subclause 2 can only be seen as an amplification of 1. A particular amplification prohibiting discrimination of all sorts and clearly 2 subclause (1) is not sufficiently wide to include subclauses (3) and (4) as well which also raised particular concerns and especially subclause (3) was suggested to us by all the parties. It also appears in the Bill of Rights proposals of all the parties here. I could just mention while I have the microphone, Mr Chairperson, that there is a possible alternative to subclause 2 suggested in the Explanatory Note and that goes back to the whole debate about enumeration of grounds of discrimination or not. The Committee is suggesting two alternatives. I think we initially preferred not to enumerate because that may be limiting instead of extending the provisions of the non-discrimination clause but we did decide to include in our present formulation that these references to race and gender because of the sensitivity to those two issues in particularly our society, but I must just point out that when subclause (2) is debated it must be debated also in view of the alternative suggestion in the Explanatory Note.

Chairperson:

Thank you Professor. A number of people want to speak on this matter, Chief Nonkonyana.

Chief Nonkonyana:

Thank you, Chairperson, one would be inclined to agree with the views of the Technical Committee that really the question of equality especially the gender one is a sensitive one that needs to be catered for and I think we agree with that sentiment. However Chairperson, in the light of our earlier interjection, particularly as regards the cultural rights we are also having actually our own concern that we would like the Technical Committee to look into it in the light of this provision, namely we are worried about the whole equality clause, gender in particular. As you all know, we Traditional Leaders we have about five wives or ten or whatever but they being women they being equal as women, however in terms of our culture, they are not, and as you know that of course that we may be men all men, but we are not in terms of our culture, so we would like to know, the Technical Committee therefore to look into that Chairperson, but however we would like to state here and now that we would like this provision to be provided and catered for for those concerned. However, we need and are advocating for a similar provision also in the same clause to cater for our own concern so that we feel all of us being catered for - we don't want a situation where we can be challenged even by everybody and then the institution will be gone, all our culture would be gone and so, in view of that Chairperson, we would like really to say we would reserve our position in approving anything less from clause 2 downwards until such time the Technical Committee has provided some formulation to cater for our concern. Thank you Chairperson.

Chairperson:

Chief, I'm sure the Technical Committee will find it invaluable to have specific formulations submitted by yourselves to them for their consideration. I don't think the obligations on the Technical Committee on their own account to emerge with those formulations so please if you would oblige them with that. Mr Gibson.

Mr Gibson:

Mr Chairman, the Democratic Party doesn't care for the formulation of 2(2) - we've sort of got half a shopping list here. We think you should either have the whole shopping list of all the forms of discrimination or else have none of them. Now I would like to submit to the Technical Committee that they should consider putting a full stop in after the word "indirectly" so this clause would read: "No person shall be unfairly discriminated against, directly or indirectly." If you wish to, you could carry on and say "on any ground whatsoever", but all of the rest is unnecessary. If it is felt that you should have some in there, there are a few others that we could add which is "race, ethnic origin, colour, gender, sexual orientation, age, disability, religion, creed or conscience."

Chairperson:

There is a second option Mr Gibson on page 5 under Explanatory Note 2. Your preference then is for a crisper version of 2(2) as it appears on page 4.

Mr Gibson:

Exactly Mr Chair.

Chairperson:

Thank you. Dr Rajah.

Dr Rajah:

Mr Chairman I feel uncomfortable with the words "unfairly discriminated" whether we could say "no person shall be discriminated against" because it implies that in some instances discrimination could be, you could fairly discriminate against individuals.

Chairperson:

The Technical Committee will take note on that. You want to speak on that Mr Gibson?

Mr Gibson:

Yes, just on that point. Mr Chairman, for example, it might well be suitable to have separate hostels for men and women at universities, now would one say that that's discriminatory. What about separate lavatories for men and women? That's why if you have the "unfair".

Chairperson:

On this occasion we would ask Dr Rajah to take note of that sentiment. Mr Mentz.

Mr Mentz:

Mr Chairman, my concern is with paragraph (2) as read with (4) and the Explanatory Note. Mr Chairman, my difficulty is the following. I have no difficulty about the onus being shifted - that I'm in agreement with but I'm not sure that what is being said in (4) amounts to the shifting of the onus on the question of only when prima facie evidence is produced, it would seem to me as if a presumption is in fact created here. It says in interpreting in 2(4) "In interpreting this section it shall be presumed that any condition or circumstance, etc." In other words, it goes beyond the production of giving of prima facie evidence, and its creating a presumption and I think this should be looked at and corrected. I think this

will, could be put clearer than it is at present.

Chairperson:

We'll ask the Technical Committee to note your comments, Mr Mentz, but we are still discussing 2(2). Mr Maduna.

Mr Maduna:

Mr Chairperson, I agree with Mr Gibson that there is need for specificity with regard to the categories of discrimination and maybe the suggested reformulation on page 5 would be helpful, but then maybe it might also be useful that parties which would like to add a few more categories should be entitled to by means of submissions, further submissions in this regard, because we would like to believe that the list is not complete on page 5.

Mr Chairperson, we should also comment on the remarks made by Chief Nonkonyana. In this Process we committed ourselves from the very word go to the promotion of a democratic, non-racial and non-sexist order. I want to believe Mr Chairperson that as much as possible we should strive to the achievement of that goal. We cannot as the Negotiating Council be heard to be saying that however we shall be prepared to freeze into the future obvious instances of inequality. We would have to try and address this problem. Mr Chairperson, we have been told on numerous occasions by our women-folk that women constitute the majority in our society and I don't think we need to calculate that, it has been known its been established in many population censuses. I'm imagining what message we'd be sending if we were to say that those who are married in certain circumstances however, are unequal. I think we need to begin to address these problems and here as leaders of our people we've got to be sending the right signal to our people, namely that its important to be seen to be moving into the modern world where all of us must be seen to be equal Mr Chairperson.

Chairperson:

Well, I'm sure Chief Nonkonyana's colleague will convey to him your sentiments. Mr Rajabansi.

Mr Rajabansi:

Mr Chairman, I want to very, very strong,ly support the views expressed by Mr Gibson in respect of 2(2) that either we accept the alternative as proposed by the Technical Committee or do not enumerate any grounds but if the Technical Committee considers this matter and wants to enumerate grounds, we want to suggest two additional grounds. In addition to race and gender we want to suggest "religion and language".

Chairperson:

What is your preference Mr Rajbansi, this will help us to decide. Regarding enumeration.

Mr Rajbansi:

My preference is that we should not enumerate anything.

Chairperson:

Thank you. Chief Gwadiso.

Mr Gwadiso:

Mr Chairman I don't necessarily like to get into a bi-lateral with ANC as far as this point is concerned but on the other hand Mr Chairman, there is no way that because we are here, because we are getting to the modern world we must destroy what we have and what has been of great value to us. Our culture is our roots, and by the comments that have been raised by my colleague also is to protect our people. It is a fact and common knowledge that because of the present circumstances some or most women who are married under customary law are taken as inferior wives in a situation whereby another marriage under Christian rites takes place. So those things must also be taken into consideration. Thank you.

Chairperson:

Well I trust you'll be able to have a bi-lateral soon to resolve that question. We won't instruct you accordingly just yet. I've no further speakers but I'm left with a dilemma. That is that there is a bit of a divided house in terms of the people that have spoken in relation to preferences of either the stricter and more precise or rather more crisp formulation in 2 however amended on page 4 or the alternative on page 5. I actually require your guidance without any long speeches but Mrs Camerer maybe you can help us?

Mrs Camerer:

Mr Chairman we would like to record that we support the wording as set out in clause 2(2) from a legal purist point of view we would agree with Mr Gibson that perhaps the full stop should be after "whatsoever" but in the light of our history in this country where there has been substantial race discrimination and gender discrimination, we have sympathy with the inclusion of these two limited grounds subject to the qualification set out by the Committee. So we would like to support the formulation put forward by the Committee.

Chairperson:

Thank you, Mrs Camerer. Are there any other strong views on this matter? If not - Mr Cheadle.

Prof. Cheadle:

I think the position that we support and that the ANC supports is for a closed list, and the reasoning behind it very simply is that "on any ground whatsoever" really leaves it for the courts to decide what is discriminatory and not discriminatory. In a final Constitution that might well be a formulation you might want to think about because who knows what kind of discrimination is going to crop up in five, ten, twenty, thirty years from now. This is an Interim Bill of Rights, we know what kind of discrimination is taking place, we know what kind of discrimination takes place here and now and it seems to me that a closed list creates finality and I would suggest that the parties submit the kinds of categories of discrimination that exists in the society now and you list it. Otherwise you will get yourself into the situation where corporations or parties who are unhappy for instances, about, lets say the economic policy that prefers the Sasol to the oil import business claiming that they are discriminated against because the Government is subsidising Sasol and not subsidising oil imports and putting tariffs on oil imports. You want to move away from an equality clause being appropriated by the powers that be, particularly the private sector. You want to direct this clause to help the disadvantaged. Let me just make one point here. Of 600



cases brought under the equality provision in Canada of 600 cases in the last three years, only 44 involved the question of sexual discrimination. Of that 37 were brought by men against what they called "discrimination against women". Only 7 were initiated by women, the rest are corporations complaining about regulations, environmental regulations, regulations that prefer the manufacture of steel cans versus aluminium cans and so what this opens up is not any sense here that we don't believe that discrimination should be dealt with we are worried that if you have a clause that is so wide that fits any grounds whatsoever without specifying a list of the kinds of disadvantage or kinds of discrimination we know we will allow (a) courts and (b) any and every plaintive to arrive claiming that some law some legislation treats them unequally, and really its a concern about a proliferated Constitutional litigation in the interim period that concerns us and the second is we want this clause to address those that have been discriminated against, not to give swords to those who wish to entrench or further their already privileged positions.

Chairperson:

In sum, what are you saying? That you would wish the extended version in whatever amended form.

Prof. Cheadle:

I would support the alternative version with any additions that the parties here might wish to add to that list.

Chairperson:

I think we will do two things, ladies and gentlemen. The first is refer the clause 2(2) back to the Technical Committee for reformulation. The second is that you should then give them an indication as to your preference for whether its the extended clause, the alternate version or the stricter version under 2(2) on page 4 and on the basis of that we could perhaps have two alternate formulations before us the next time and we can then make up our minds, but this is clearly a minor, perhaps not too important area of difference at this stage which we are not going to be able to resolve by further debate here in an expeditious way. So can we leave it at that - is the Technical Committee happy with that instruction? [Yes] Thank you.

Can we then move on to 2(3) Mr Maduna.

Mr Maduna:

Mr Chairperson we would like just to make two suggestions with regard to 2(3). The first one is that we should say something about the fact that what we seek to address primarily is the problems emanating from the past discrimination. We know that maybe for some time inequalities and so on may tend to continue in our society, but then again we would particularly like to ensure that whatever measures we were thinking of addressed, particularly the backlog in many areas of our lives, so that in fact we should never fool ourselves and think that once we have got a non-racial, non-sexist and whatever society on paper, as we surely shall in the form of a new Constitution, our problems have been resolved. So we would like maybe the Technical Committee to look into phrasing it into such a manner that it does not allow us to forget past discrimination and its consequences, variegated consequences.

The second suggestion we would like to make, Mr Chairperson, is that the sentence should end with the word "discrimination". In other words we would urge a deletion of the rest thereof from "in order to ...". The reason, Mr Chairperson, is that we don't think it's necessary to restrict the programmes we are thinking of - the measures and the programmes that we're thinking of in the manner specified herein, because we are thinking here about numerous programmes around humanitarian aid, poverty relief, and so on. So it's not just to enable people to enjoy the full and rather to fully and equally enjoy their rights and so on. We would like measures to take into account what I have said in my remarks, and therefore maybe the restriction that is imposed by the latter part of the clause should rather be deleted.

Chairperson:

Thank you. Mrs Gqiba.

Mrs Gqiba:

Thank you Mr Chairman. The point I wish to raise is a practical problem which relates to the implementation of subsection 2(3). What I'd like to enquire is how that is to be implemented because in the implementation of 2(3) one tends to infringe on subsection 2 that is if one reads it as it stands.

Chairperson:

Would the Committee like to respond?

Prof Corder:

I think that, Mr Chair, precisely because subclause (2) prohibits unfair discrimination, subclause (3) is precisely there to authorise discrimination which some people might regard as unfair but which in the light of historical disadvantage, and we deliberately use the words "disadvantaged by discrimination" to indicate past discrimination. In order to forestall any attacks on the Constitutional validity of measures taken to eliminate that kind of past discrimination. That is why it is indeed necessary to have number (3) there.

Chairperson:

Mr Rajbansi

Mr Rajbansi:

Mr Chairman, Mr Maduna has raised most of what I want to say, but I am particularly interested Mr Chairman, is that what type of measures will the layman have access to. Is it going to be an easy access, what is going to be the designated authority, because the Government has taken certain measures already in respect of people who, certain category of persons who were disadvantaged by discrimination, but those measures might be regarded as sufficient by certain persons but those who suffered may not regard it as sufficient. So is it proposed that measures should be certain legislation of the creation of structures where people, for example, affected by whose properties were seized. You don't expect them to go to a designated authority but we must look at types of measures which will make it easy for the layman to have access to.

Chairperson:

Does the Technical Committee wish to respond at this stage, or just note that comment?

Prof du Plessis:

Well, Chairperson, we will take that into account - that will cause once again part of the broader issue that has been raised on several occasions this morning.

Chairperson:

Mr Mentz.

Mr Mentz:

Mr Chairman, I may want to make a suggestion and that is in addition to the existing (3) this is added: "to enable their full and equal enjoyment of all rights and freedoms provided such measures shall not be to the detriment of others."

Chairperson:

Well lets see, we will leave that proposal on the .. is there a seconder for that amendment?

[Voices off: Can Mr Mentz repeat that proposal? I am just having a bi-lateral and I wanted to address you on that please.]

Chairperson:

This is a multi-lateral forum, you know. Mr Mentz would you like to repeat that?

Mr Mentz:

I made the suggestion that another sentence is added at the end of freedoms: "provided such measures shall not be to the detriment of others" or other persons.

Chairperson:

Do you want to now decide Mr Wessels?

Mr Wessels:

Thank you very much. Mr Chairman, I believe that the whole gist, that the whole spirit of this particular Chapter in a Constitution would actually cover that, namely that this Bill of Fundamental Rights, this Chapter would not be intended to be to the detriment of anybody else so maybe there is an oversight from my side not seeing the argument or not grasping the argument but I believe one is covered, but the point I was going to make, I have a problem understanding and supporting Mr Manduna on the repealing, on his request to repeal the certain words flowing from discrimination in order to enable their full and equal enjoyment of all rights and freedoms. Certainly one is not debating the merits of how the i's and the t's should be dotted and crossed at this particular moment and therefore one is still open for persuasion, but to my mind and to my thinking I'm quite comfortable with the position as it stands and I fail to see why it should be scrubbed because fact of the matter is nobody should be promoted beyond full enjoyment and full equality.

Chairperson:

The Technical Committee will take account of both views in that regard. Mr Gibson.

Mr Gibson:

Mr Chairman, the Democratic Party does not have a problem with the wording as it stands. I don't favour Mr Maduna's proposal. Let me make it clear that the Democratic Party is very much in favour of affirmative action programmes. We believe that discrimination in South Africa has led to pervasive inequality in South African life and therefore if you are serious about restoring equality you simply have to embark on programmes of affirmative action, but the D.P. says that these have got to be properly focused. The beneficiaries must indeed be people who have suffered discrimination and the programmes must surely only continue while the real people who should be the beneficiaries are benefitting, and I wonder if the Technical Committee would just look at the question of the focus of these programmes.

Just take for example, just assume a government were to say and to continue saying for the next 40 years, "We will not employ any white persons in the upper echelons of the Civil Service until the racial balance is 70/30." and they went on doing that for 30 years, or 40 years. The Democratic Party simply could not support a programme like that. So we want something more carefully focused and to benefit the people who really have been discriminated against, but in general the wording which appears here as is is acceptable to us.

Chairperson:

Mrs Finmore.

Mrs Finmore:

I just want to support that also by mentioning one thing. We keep referring to this one clause as referring to historical matters, but we might also be looking at future discrimination and I was thinking about people with AIDS have been discriminated against, they could well be looking at that clause to protect themselves but we seem to be discussing it in an historical context but it is also important for future discrimination.

Chairperson:

Thank you. Dr Rajah.

Dr Rajah:

Mr Chairman, the sentiments expressed in the clause is supported. I just want some clarification when they refer to the term "measures" - I presume it is more than just the legalistic measures that includes such things as your programmes like economic policies, housing programmes, etc. that the measures will include other measures others besides the legal issue, and if it is so, may I suggest in terms of reformulation that the disadvantaged does not seek any protection as such, that instead of saying that they're aimed at the adequate protection that we suggest "aimed at the promotion and advancement of persons disadvantaged by discrimination in order to enable the full and equal..." and I suggest that instead of 'enjoyment' "... full and equal benefit of all the rights and freedoms".

Chairperson:

The Technical Committee will look at that. Ms Jacobus - she's also involved in a bilateral, its OK.

Ms Jacobus:

Thank you, Mr Chair, I first want to ask a question to the Technical Committee. If this subclause also deals with the advancement of persons that have been previously

discriminated against, and if not, I would like to move an amendment to insert the word "previous" before "discrimination".

Prof. du Plessis:

Chairperson, perhaps I may just clarify that one. We considered the formulation "past discrimination" you know, referring to the past only, but that reference could be both too narrow and too wide because people could have been discriminated against in the past, but that discrimination may persist, then they are also discriminated against in the present, would only say in the past then a court might tend to just look for past discrimination. That's why we used the term "disadvantaged by discrimination" which would include the present and the past.

On the other hand, past discrimination can be too wide as well, because one can say that people with black hair have been discriminated against 40 years ago, the discrimination is no longer persisting, but because of that discrimination 40 years ago, we're entitled to affirmative action.

Chairperson:

Ms Jacobus, I imagine you would withdraw your proposal? Thank you. Can we then move on, sorry Mrs Camerer you had your hand up do you? [Yes] Yes Chief?

Chief Nonkonyana:

I lifted up my hand because I wanted to speak against the proposal that was made on my left here.

Chairperson:

I think that proposal did not enjoy too much support, but the Technical Committee will look at that. 2(4) your comments please? Can I suggest that we are taking an inordinately long time to process this, understandably in some instances, but I would appeal that statements of support should be desisted from because if you support it I think it is understood if you keep silent. If we wish to address and amendment then perhaps a concrete offering would be useful in a constructive way of going forward and I merely plead for your assistance in enabling us to process this report as soon as we can. Yes Mr Wessels.

Mr Wessels:

Mr Chairman, I agree with what you've said but could I just offer something for consideration? When we finally deal with this matter, I believe one should not at that particular moment say, well, because of the historic moment of this and because we've had this long period of, shall I say, brief debates, we are not really going to apply or afford the opportunity for a full scale debate. One should not underestimate the historic importance of this whole exercise because this country is changing from one dispensation to another. Therefore if we refrain today to make the kind of statements that actually warrants a full debate pertaining to equality, discrimination, whatever, one should not actually at a future moment say, well you've had the opportunity to say so. So I'm giving offering for consideration when we have the final draft before us one should prepare to have a lengthy debate on the matter.

Chairperson:

Well I think the Planning Committee must take note of your warning, Mr Wessels, but all that I am saying is that debate hopefully arises out of dispute, lack of understanding, lack of concurrence, that at stage we do not require debate merely for enunciating party positions on this particular issue, and that's all I'm saying. Your comments, ladies and gentlemen on 2(4). Having no speakers, we move on to clause 3 on page 5, and in the first instance, 3(1). No comment, 3(2) - Mr Maduna.

Mr Maduna:

Mr Chairperson, we would suggest a deletion of 3(2).

Chairperson:

Do I have anybody in the House who wishes to support that idea? Ms Jacobus, all right, let's hear Mr Gibson first and then we'll canvass that.

Mr Gibson:

Mr Chairman on 3(2) the question which arises is can the legislature change its mind and those of us who have served in Parliament know that they amend these Acts every year. Can they one year decide, for example, that they are going to have capital punishment and the next decide that they are not, or is it cast in stone forever once the first Parliament takes a decision? Perhaps the Technical Committee would reply to that.

Chairperson:

Only the future can determine that, not even the Technical Committee, but would you like to respond Professor?

Prof du Plessis:

Yes, it could in principle, change its mind, Chairperson, but as it stands here in 3(2) at least for the period of transition the position will be entrenched and then the constitution-making body will have to pronounce on that and we can't be too much concerned what is going beyond the constitution-making body's decision, but in principle, of course, such a body should be able to change its mind.

Mr Gibson:

3(3) - what does "finally" mean? Until the elected constitutional body has pronounced finally on the abolition or retention of capital punishment?

Prof du Plessis:

Perhaps we could consider that "finally" whether that's not too absolute. But that "finally" would refer to what the constitution-making body would include in a Bill of Rights, Chairperson.

Chairperson:

Can we get comment on Mr Maduna's proposal that subclause (2) be deleted? Mrs Camerer.

Mrs Camerer:

We can't support that Mr Chairman.

Chairperson:  
Mr Mahlangu.

Mr Mahlangu:

Mr Chairman, we support that amendment on grounds that clause 3(2) and 3(3) are contradictory if you look at them. On the other hand to the say the laws must remain in force and just next to that you say no death sentence must be imposed. Now what should the person sentenced to death must wait until the new government comes and then execute, is that what you mean? Because the moment you, if you place a moratorium on that then (3) will stand and (2) fall off. So we suggest that the moratorium is a right thing because it is a controversial issue these things.

Chairperson:

There was another speaker on my right - Mr Mothibe.

Mr Mothibe:

Mr Chairperson. I think subsection (2) should be retained because at the moment we say that every person shall, in clause (1) we say "every person shall have the right to life" but then it is not in this fundamental rights where we should determine whether the law should be retained or not. If a law is relating to capital punishment have to be repealed I think that belongs to the Repeal of Legislation and not in this Fundamental Rights. I believe that we must retain this clause, subclause (2).

Chairperson:

Thank you, Mr Mothibe. Professor Ripinga.

Prof. Ripinga:

Chairperson I would like to support Mr Maduna on the question of deletion of (2) and as well as (3) because I think the central argument here is on the issue of that right of life which is mentioned in clause 3(1) and if you accept that 3(1) obviously you need to look at all legislation at the moment that might contradict that, if not you have to live out that right of life so that the argument here is that if you accept 3(1), obviously 3(2) and 3(3) falls out.

Chairperson:

Thank you, Professor. Ms Jacobus.

Ms Jacobus:

Thank you, Mr Chair, we would like to support the deletion of 3(2) on the basis that this clause 3(2) or subclause 3(2), infringes on the right of women to chose what will happen to their bodies and then, and that abortion debate is still an on-going debate and still taking place at our organisations and parties as we are sitting here, and has not been completed yet, and, on that basis we would like to support the deletion of 3(2).

[tape turned over here and quite a bit missing]

[unknown who is speaking]

..... exist there and the laws and I presume these are the laws that apply in South Africa.

We are talking about the existing law.

Chairperson:

In respect of all these issues that we are discussing that is an over-riding issue that we will have to give attention to I imagine. Prof du Plessis.

Prof du Plessis:

Chairperson, I think its just necessary to say something about the background .....

Chairperson:

Can we have some silence in the House please?

Prof du Plessis:

..to say something about the background of this formulation because it is not a very neat formulation, but this formulation is suggested by the Committee in view of the submissions received from the parties and there are sentiments running along the line saying that the issue of capital punishment should not finally be decided during the transition. The issue of abortion as well. Those two issues should be decided in a final dispensation. Now that is the reason for (2) that the laws determining abortion, the laws determining capital punishment remain intact during the transition, but then following from that (3) which seems to be a contradiction of (2) just says that the laws regulating capital punishment will remain in place, however, no sentence of death shall be executed during this transitional period. So by deleting subclause (2), and I'm not speaking in favour or against that but it would then just introduce the issue of deciding on capital punishment and on abortion already during the transition, and if we are going to delete that then we'll have to decide whether something should be included on abortion in particular in this Right to Life clause, because right to life may exclude abortion on demand - the right to life formulated in general terms. So I just want to draw the Council's attention to the implications of scrapping (2).

Chairperson:

Thank you Professor. Dr Rajah we saw that. Mrs Camerer.

Mrs Camerer:

Chairperson, there is a tremendous variety of opinions around this table and I think it would be very presumptuous of us to think that we, as political parties, could decide issues like abortion, executions, etc. around this table now, surely these sort of issues have not been decided in Constitutional Courts around the world and its surely a matter for a Constitutional Court to decide, but if we are going to debate this and it seems that there are a lot of people who wish to participate, isnt it something that should be reserved for a more intensive debate. I mean it is a cardinal issue to many of us sitting around this table and surely we should get on with the other clauses where perhaps there is less debate and come back to this or reserve it for a particular debate because there are so many implications to this matter, as has been mentioned Mr Chairman, like abortion and executions and so on.

Chairperson:

Thank you for your help, Mrs Camerer. What I'm going to suggest ladies and gentlemen is in accordance with a procedure which I think you adopted yesterday, that we identify this



and a previous clause 2(2) as a point of difference amongst us and refer this ultimately together with others that might arise to the Planning Committee for them to suggest a mechanism which could be a further debate here, which could be other mechanisms as well, in order to help us resolve this matter. So I'm appealing to the other three speakers whose names I have, Mr Alexander, Mrs Jajula and Mr Lockey, whether you could withdraw on the basis of the understanding that I have offered. Mr Alexander.

Mr Alexander:

Not really, Mr Chairman, we are saying that, if you say a person should leave the choice to the constitution-making body and then you ask me to chose between leaving it here or changing it then even if I chose to leave it the current legislation as it is, you still ask me to make a choice, and so we are still saying that maybe we should not entertain this debate at all. Let us delete it altogether and leave it for the constitution-making body for the future to deal with this issue.

Chairperson:

Mr Alexander, what I was saying to you and you didn't seem to hear me is that that is your point of view and there are other points of view here. The issue for me is how do you reconcile these points of view and I was offering a mechanism in that regard, which would hopefully cater for all the views and find some middle ground on that.

All right, ladies and gentlemen, we will come back to this particular clause at the end of our discussion and find a way forward on that. We then go to page 6 clause 4. No debate. 5(1), 5(2).

Mr Gibson:

Just on the question of 5(1) doesn't it contradict paragraph 19? Yes our problem is 19 and not 5.

Chairperson:

Not 5, so we can move on?

Mr Gibson:

Yes but if you improve this here you can't possibly have 19 then. I just put you on notice about that.

Chairperson:

OK thank you. We move on then to Clause 6. Mr Gibson.

Mr Gibson:

A question to the Technical Committee - does this include people who are in prison, can they refuse to perform any work in prison?

Prof du Plessis:

The right refers to them as well Chairperson, but now it has to be read together with the Limitations Clause and its reasonable in a democratic free society to allow for forced labour in prisons, so that will be catered for in that way. May I just while I have the word,

Chairperson, it would be helpful if the Council could now decide on the inclusion of this right. This is one of the rights I referred to this morning which is not really controversial but which in terms of our criteria has not been included, but we can see no reason why the Council cannot agree on its inclusion now.

Chairperson:

Is that agreed. Ladies and gentlemen thank you. Its ten minutes to lunch, please bear with us. Section 7. Dr Rajah.

Dr Rajah:

Just a point of clarification Mr Chairman, the practice now is that when we enter government buildings and, for example, shopping centres, we are searched. How does this right apply in those instances when it is a blanket regulation our right says that I shall not be subject to any searches in any circumstances whatsoever.

Chairperson:

I imagine you have the right not to enter the building. Prof Corder.

Prof Corder:

Could I draw every member of the Negotiating Council's attention to clause 28, the Limitations Clause. We've referred to it now on several occasions but that allows for limitation of any one of these rights depending upon whether it would be acceptable and permissible only to the extent that it is reasonable and justifiable in a free, open and democratic society based on the principles of equality, and if the member wished to challenge being searched at a government building in the Supreme Court it would be up for the Supreme Court or any designated authority to decide.

Chairperson:

Thank you Professor. The others that wish to speak. Chief Nonkonyana.

Chief Nonkonyana:

Chairperson, we have no problem with the right of individual's privacy. However, our problem lies in prohibiting searches to private homes etc etc. Let us not forget Chairperson, and honourable members of this Council, that there are others who are threatening this Process and we know that some of them they do carry arms. We say that those people, if the police or whoever is in charge of the law and order in this country is going to be prohibited to search those properties merely because those people are entitled to a right to privacy. Therefore, Chairperson, we have got a strong reservation that we should actually extend it so far. To me if we can say they must be subject to search but taking into consideration of course, with human dignity and not actually searching in such a manner as not to respect the dignity of an individual. I'll go along with that but for us to say we are prohibiting those people, I'm telling you, those who are threatening this Process are going to go off scott-free by invoking this provision.

Chairperson:

Mr Yacoob.

Adv. Yacoob:

Chairman, thank you, I've been asked to re-emphasize the point made earlier, and that is when we look at each and every one of these rights none of the rights are absolute at all.

So when you look at each one you've got to say, and the kind of problem which the last speaker mentions is again catered for by the Limitations Clause. Surely if a person is committing an offence and there is a law in terms of which his private home can be searched to discover weapons that would be reasonable and permissible, quite clearly, in a free, open and democratic society based on the principle of equality. So that is answered, and I think we must emphasize that, unless when looking at each of these clauses one thinks of 28 at the same time you're going to have the same question in respect of each clause. So when you look at each clause please, if you can look at Section 28 and say "does it cover" you'll probably find in most instances that it does cover, and here quite clearly Section 28 would cover the case of a person who keeps weapons in his own home or plans evil from within it.

Chairperson:

Thank you for your patience in the Technical Committee. Can all of us put in a marker at page 14 so that it might help you for a ready reference to that in respect of each of the clauses we are looking at. Yes Chief.

Chief Nonkonyana:

Just as a follow up, Chairperson, if you will allow me. My problem, Chairperson, even clause 28 as drafted is drafted in general terms and it also limits further limitation, there are those people who are also protected as also reasonable. What is going to be reasonable? It may be reasonable to me, it may not be reasonable to the AWB or any other party but what I am trying to say, in a nutshell is that we are saying in Clause 28 "The rights and freedoms entrenched in this Chapter may be limited by law of general application .."

Chairperson we believe that this Bill will be part of a Constitution and we agree that all laws which will be contrary to the spirit to the fundamental rights will be invalid and what I am trying to say what we have provided there, Chairperson, as a limitation, is not a limitation at all because I'm going to challenge that law which takes away the rights granted to me in terms of the fundamental human rights entrenched in a Constitution. I therefore Mr Chairperson, of the view that really, the Technical Committee should have a real look in clause 7.

Chairperson:

I have a difficulty in that Chief in the sense that we are being told by a group of lawyers and legal professionals and academics that the way in which both Clause 28 is formulated and certain other specific rights are formulated does provide for your concern. Am I right Professor du Plessis?

Prof. du Plessis:

Yes, Chairperson.

Chairperson:

So, at this stage, Chief Nonkonyana, I'll encourage you over lunch to discuss this matter with legal people and if you are still not happy please feel free to raise it again. Mrs Jajula.

Chief Nonkonyana:

I'm having so many bi-laterals today, Chairperson but thank you.

Chairperson:

Then we'll add one more to that.

Mrs Jajula:

Mr Chairperson, we would like to raise the addition of a specific consideration that this clause shall not prevent reasonable steps from being taken to prevent domestic violence and abuse and here we have in mind in particular, the situation of women and children in the private sphere of home. Thank you Mr Chairperson.

Chairperson:

Can we submit that ladies and gentlemen, to the Technical Committee for its attention, is that agreed? Can we then move on to Clause 8, which will be the last clause we will discuss before lunch just to whet your appetites. 8(1) any comments on that, 8(2) any comments on that?

Mr Rajbansi:

Attention, Mr Chairman, I presume by State or State-aided institutions the Technical Committee's referring to schools in particular.

Prof. du Plessis:

Not necessarily Chairperson, it could include prisons, hospitals, any State-aided institutions.

Mr Rajbansi:

But there are institutions that perform certain functions which are similar to the institutions that may be covered by this clause that are not State financed or State assisted for example, schools. You have schools that don't receive any money from the State, they might have a temple or a mosque or a church on the property and could the Technical Committee examine whether attendance or observance at these institutions should be free and voluntary.

Chairperson:

Do you want to respond to that?

Prof du Plessis:

Chairperson, we can consider that but at any rate institutions like that are voluntary, they could make that choice and then in comes again the vertical and horizontal operation of the Bill of Rights which is also the issue we raised this morning.

Chairperson:

Mr Maduna.

Mr Maduna:

Mr Chairperson, my problem really with regard to the whole 8(2) is that it raises an unnecessary controversy like now, maybe if we could opt for a deletion of the entire 8(2) and

reserve the debate around 8(2) for a later stage I don't think its a right we desperately need in the interim. I would be satisfied with 8(1) which guarantees the freedom of conscience, religion, thought, belief and opinion, and just stop there.

Chairperson:

Is there support for Mr Maduna's view. Dr Rajah? He supports that, any other comments? Any opposition to Mr Maduna's view? Mrs Camerer.

Mrs Camerer:

Mr Chairperson we really can't support this and we are surprised at Mr Maduna's position, particularly in view of the proviso that any observances conducted would be on an equitable basis and attendance would be on an equitable basis and attendance would be free and voluntary. So we cannot really understand his objection and we would support the clause as it stands.

Chairperson:

Can we end on the note that over lunch Mrs Camerer and Mr Maduna will have a discussion on this matter, and we will (I'm not calling it a bi-lateral) we will revisit this immediately we reconvene at 2 pm. Thank you very much.

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Chairperson:

... in the chair I've taken the liberty and ask you to give your consent to this, if you deem it fit to invite Mrs Jajula from the Transkei Delegation to act as assistant just for today. I'm trying to get the women's vote. Welcome Mrs Jajula.

We return to page 7, Section 8, and in particular subparagraph (2) - I want to hear the results of the bi-lateral. Who's going to report to us? Mrs Camerer.

Mrs Camerer:

Chairperson, I understand that the result is that we should perhaps hold it over for further submissions to the Technical Committee so that we could perhaps get finality on the matter next time around, which will be next week hopefully.

Chairperson:

You have chosen the easy way out, I see. All right, ladies and gentlemen do you agree that we defer our decision on 8(2) and will come back to that? We then move onto section 9. Your comments. There are not comments on this and we can move on to section 10. Professor Cheadle.

Prof. Cheadle:

In respect of the comment to paragraph 9, one of the parties, I think the ANC, suggested the inclusion of the following provision dealing with diversity of the expression of opinion in the media. The Committee suggested that this is something that should be referred to the Technical Committee on Media, and I think we don't have any difficulty with that, I think however that we should be satisfied that any law that the Media Commission, the Technical

Committee on the Media drafts ought not to be subject then to this Chapter. In other words, we should think both on in terms of the electoral laws and the media laws that we don't want constitutional challenges to those laws under 9 or under the provision dealing with political rights and the like. So some provision ought to be incorporated that the Chapter does not apply to maybe some of these other independent laws that are part of the general package that will go into both the new Constitution and the transitional interim process.

Chairperson:

Does the Committee wish to respond to that?

Prof. du Plessis:

We'll attend to that Chairperson. We picked up that suggestion.

Chairperson:

Is that clause then subject to a possible reformulation?

Prof. du Plessis:

All three clauses, 9, 10 and the one on political rights, clause 15.

Chairperson:

OK then, clause 9 will then be given further attention by the Technical Committee, clause 10 there's a similar position.... sorry, Mr Gibson, my apologies.

Mr Gibson:

Mr Chairman, on clause 9 I thought Professor Cheadle was going to speak with approval on the comment made by one of the political parties because he thought it came from the ANC, but in fact it came from the Democratic Party and we think that the Technical Committee should reconsider and in fact include this. We believe that it is very important in a democratic society in South Africa for the public media which are under the control of the State not to be orientated towards the Government. Just talking in practical terms, the DP expects to be in Government next year as well together with several other parties. There are however, parties which will be outside Government and we never again want to see a situation where the Head of State can interfere with a news broadcast whilst it is going on and the way to do that, we think, is to include the small sentence in the Bill of Rights.

Chairperson:

Thank you. Mrs Camerer.

Mrs Camerer:

Just like to note that we can live with that as well, Mr Chairperson.

Chairperson:

Thank you. Mr Desai.

Mr Desai:

We will go along with the DP on that.

Chairperson:  
All right. Mr Maduna.

Mr Maduna:  
Mr Chairperson we could live quite happily and comfortably with it but there is the question which the Technical Committee is asking, does it belong to the Bill of Rights or does it belong elsewhere. Maybe if we can just resolve that one, by the way I would have no problem with it being included in a Bill of Rights it does not add to or detract from the basic clause we have agreed on.

Chairperson:  
If that is the position let's leave it here and equally inform the Technical Committee on the Media about this and if they wish to incorporate it they can do so as well. Is that agreed, ladies and gentlemen? Thank you. Clause 10. Mrs Camerer.

Mrs Camerer:  
Mr Chairperson could you, would it be possible for the Chairman or a member of the Committee just to elucidate their comment at the top of page 8.

Mr Grove:  
Chairperson, the concern of one of the parties was that during the election period certain people may be denied the right to hold public meetings on certain private premises and that concern should be addressed somewhere in the Bill of Rights. In this instance the Committee was of the opinion that it could more appropriately be dealt with by the Independent Electoral Technical Committee. That's the reason why we dealt with it in this way.

Chairperson:  
Any other views on this matter?

Prof. Corder:  
Perhaps I could just add to that. One of the almost certainties about Bills of Rights is that it takes quite a long time for an issue to be resolved through the courts. One anticipates that it might do so, so that one might find the current situation continues to pertain until after the election has already been and gone, and that it is more appropriate to include this in an Electoral Law which is of a more immediate and expeditious application.

Prof. Cheadle:  
Yes I agree with that. I can now claim that this is definitely an ANC submission and I can also claim that we purloined the DP's submission in relation to diversity of opinion and enclosed it in one of our submissions to the extent that we have had to rely on the DP we are gratefully, we acknowledge it.

Chairperson:  
Are we then saying that the alternative formulation falls away?

Prof. Cheadle:

Subject to the fact that any legislation of the Electoral Law will not itself be subject to constitution attack under this Chapter. So that in the sense what one requires is that the laws in relation to media and in relation to the elections ought to be insulated from this Chapter to discourage litigation.

Chairperson:

Then the submission more appropriately should be made to the Technical Committee on the Independent Electoral Commission.

We then move on to Section 11. 11(1). Mr Wessels.

Mr Wessels:

Mr Chairman, I speak in favour of the clauses as they stand but I take it that it is subject to a further debate on clause 2(2), which I understand we will return to sometime in the future, and that one also reads that closely with the Limitation Clause, 28, 28(2) because I go along wholeheartedly with the Limitation Clause in particular as it is phrased there formulated within mind the present labour dispensation. I wonder, and this is just a question, I'm happy with the formulation as it stands, with 11 (1) and (2). I'm happy with 2(2) as it stands and I'm also happy with 28(2) as it is drafted, however for the sake, or in the service of clarity, if it would not be appropriate maybe just for consideration to clearly stipulate the limitation as it is formulated in 28(2) maybe in such a fashion that it comes to mind immediately when you read clause 11 seeing the importance that one attaches in particular the whole drafting pertaining to a labour dispensation, and so forth.

Chairperson:

Will the Technical Committee take that up.

Prof. du Plessis:

We can easily include a reference to Section 28.

Chairperson:

Mrs Gqiba.

Mrs Gqiba:

Are you at 11(2) sir? [Yes] I would like to see the words "or gender" included at the end of the sentence in 11(2) - "shall permit discrimination on the ground of race or gender".

Chairperson:

Professor.

Prof. du Plessis:

I must just explain the reason for its absence at the moment, Chairperson. The particular concern there was privatised apartheid, and that's why there is only reference there to "race". One could include other grounds as well, but the particular concern was that freedom of association should not be used to uphold practice of private apartheid based on...



Mrs Gqiba:

Mr Chairperson, it is for precisely that reason that we'd like to see it included.

Prof du Plessis:

I didn't hear.

Chairperson:

Mr Lockey

Mr Lockey:

Can I just ask that if gender is included there it can also force the Broedebond to open up its membership to women.

Chairperson:

Its a question you don't have to respond to. Are there any other issues to be raised?  
Mr Yacoob.

Adv. Yacoob:

Can I just say that we can include gender but again that's a decision to be made here bearing in mind the implications and the implications are that if one includes "gender" there one makes it impossible, particularly since its against private action for women's only clubs and all that sort of thing which can get into trouble and that's why we thought that we should leave it at the level of race, but if after careful consideration this Forum comes to the conclusion that we must include "gender" at this stage, and we are quite happy at the level of development of society as it is, to have any legislation which permits any kind of discrimination or distinction as far as the differences between men and women are concerned to be not correct, and we can actually do that but must make sure we bear in mind all the implications of the steps we take. If it operates vertically only it stops only the legislature, if this is one of the clauses which operates horizontally then the inclusion of "gender" would have quite an effect on society and whatever the position might be about that, we want that change in the final analysis, we need to consider whether we want it now, and if the decision clearly is that we want it now, then we can certainly include it.

Chairperson:

Mrs Finnemore.

Mrs Finnemore:

Just a question I have for the Technical Committee, is there any reason why the word "unfair" is left out before "discrimination" in this clause whereas it is included in 2(2). I just wondered if there is some difference.

Prof. du Plessis:

We can attend to that, Chairperson, it seems to be an omission.

Prof. Corder:

Except that one wonders whether any discrimination on the grounds of race can ever be fair.

Mrs Finnemore:

Mr Chairperson if we are going to include "gender" it might make a difference as to if "unfair" is included or not, that's why I'm raising it.

Chairperson:

The Committee will look into that. Dr Rajah.

Dr Rajah:

Mr Chairman, just a comment here. I think we must understand the purpose of that 11(2) which addresses itself to one specific issue and its got a very specific intention and therefore we should not dilute that by bringing in other issues at this stage.

Chairperson:

Mrs Kgositsile.

Mrs Kgositsile:

Mr Chairperson, we would like to support the proposal that in this clause we actually do consider the question of discrimination on grounds of gender or sex. In fact we are having a discussion here whether it should be gender or sex, because besides the question of opening up membership to the Broedebond or any such entity, there are clubs in South Africa that actually do not allow women to join them or to which women are not allowed entry, as Bicas (?) as whatever. I know this because some weeks ago our Secretary General actually had to address people in Durban and his delegation he had a woman who could not go in and therefore that, even now in the transition is very, very relevant. Thank you Mr Chairperson.

Chairperson:

The Committee will take account of all these views and return to us with an appropriate formulation. Yes, Mr Maduna.

Mr Maduna:

Just a small question. What is envisaged in the word, the phrase, "nothing in this section shall permit"? I thought maybe the Technical Committee could look into a formulation that ensures that we are talking about legislation that would prevent discrimination on the grounds that we are agreeing on rather than just saying nothing will permit it, because really there are all sorts of things people who do which would be regulated only when you have laws and maybe then you are saying that once a law has been passed those people cannot say "But what we are doing cannot be prevented or precluded by this law." Rather than saying nothing at all shall permit discrimination - I suppose we would always be discovering discrimination as we do we then decide to pass laws to preclude it and you cant say therefore in absolute terms that nothing shall prevent it or shall permit it in fact, rather say, "nothing shall preclude legislation preventing discrimination on the ground of race" and as it has been agreed now, "sex or gender".

Chairperson:

I'm not sure whether we need to enter into that debate now, but clearly Mr Maduna it goes beyond just legislation but can we leave it to the Technical Committee, they've heard you on this matter and they can take that into account. We move to Section 12. Mr Gibson.

Mr Gibson:

Just a question on this 11(2). Assuming one were to add "gender" as the proposal is would that prevent single sex schools in South Africa, just assume that there are quite a lot of people who still prefer monastic education as its called, for their sons and daughters. Would that then become illegal? If so then we should surely think again about this. Secondly would it prevent, I know there are people of some religions who believe that men and women shouldn't swim in the swimming pools at the same time, you have to separate that. Now one doesn't want to go so far that you start interfering with the liberty of people there. I am not for one moment suggesting gender discrimination but I'm saying that sort of thing if we would make it illegal by adding the word "gender" then we mustn't add the word "gender".

Chairperson:

Thank you Mr Gibson. We'll take that into account. Are there any other comments in relation to 11(2)?

Mr Rajbansi:

Yes, Mr Chairman, very briefly. On the question of "gender" there is discrimination against women in this country in respect of sports, where men can participate amongst each other in a particular sport, but the female cannot. I'm giving example of wrestling - there is a law prohibiting women to wrestle each other.

Chairperson:

On that sporting note can we move to section 12. Any comments on section 12. Having none, we move on to section 13. Mr Beyers.

Mr Beyers:

Mr Chairman I just want to ask it reads that "Every person shall have the right freely to choose his or her place of residence anywhere in South Africa." Does this not mean that every person can reside wherever he wants to reside even on the property of other people?

Chairperson:

Professor.

Prof. du Plessis:

There are two answers to this question, Chairperson.

Chairperson:

Must we refer Mr Beyers to page 14, Section 28?

Prof. du Plessis:

Well the one is Section 28, but there's also an eviction clause which makes particular provision for the eviction of people, (we'll be coming to that) in certain circumstances, but certainly its not reasonable and its not justifiable in an open democratic society based on equality to have people living just anywhere. This clause is more intended to refer to a particular geographical area within the country.

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Chairperson:

Mr Beyers are you happy with that? Thank you. Any other comments on 13?

Prof. du Plessis:

May I just once again, draw the Council's attention to the fact Chairperson that the Council must still agree on this right and there seems to be no controversy as appears from the submissions.

Chairperson:

By accepting this formulation are accepting its inclusion, am I right? Thank you. Can we move on to 14, that's agreed, move on to the next page, 15(1), 15(2), 15(1)(a) yes Mr Maduna.

Mr Maduna:

At 15(1)(b) Mr Chairperson, I don't know whether the words used "accommodate" "recruiting" "canvassing" and so on, if they do, well and good, but if they don't the Technical Committee in my opinion, should be persuaded to look into the inclusion thereof.

Chairperson:

Prof. du Plessis.

Prof. du Plessis:

There are particular references to that, Chairperson, in 1(a), 15(1)(a).

Chairperson:

Are you satisfied with that, Mr Maduna?

Mr Maduna:

No, Mr Chairperson, I'm not. Here I'm talking about say for instance, my right to recruit a member of the AVU, like Mr Beyers, or canvass him for the S A Communist Party.

Chairperson:

Aren't you sitting on the wrong side there?

Mr Maduna:

I'm saying for instance, the right of any party to approach me by way of recruitment and maybe convince me that I should join them and so on.

Chairperson:

But isn't that implicit in (a)?

Mr Maduna:

No, I'm afraid it's not, Mr Chairperson, it would appropriately go together with campaigns and so on and so forth.

Chairperson:

Professor Corder.

Prof. Corder:

Can I just point Mr Maduna to the word "recruit" in (a) "the right to form, to participate in..." which would include canvassing, and to recruit members for a political party then (b) "the right to campaign for a political party or cause" surely that under any interpretation must include canvass for.

Chairperson:

He withdraws - he's now looked at the right one. 15(2) - that's agreed, we move on to 16.  
Prof Cheadle.

Prof. Cheadle:

We would like to move just an amendment to make sure that disputes that are referred to in that provision apply to legal disputes, or disputes of right. In the way it is presently phrased it is that every person shall have the right to have disputes settled by a court of law and I'm certain that any reasonable court of law will recognise that this is only those kinds of disputes that can come before it, namely where there is a cause of action or a legal dispute, a dispute of right, as it is so called. I just think that we should avoid an ambiguity here and just make sure that "every person shall have the right to have legal disputes" I think that might be one phrase or disputes of rights which then include both constitutional and ordinary rights types disputes. The concern I have here is that there are a lot of disputes in society that are interest disputes and particularly in labour there is distinction between interest disputes that is dispute about what our wage should be and rights disputes about what our wage is, and,

Prof. Corder:

Prof. Cheadle, I'm sorry, could I interrupt you. You are not arguing on the Sixth Report, you are arguing on an earlier version of the Sixth Report. The Sixth Report says "every person shall have the right of access to a court of law or where appropriate any other independent and impartial forum".

Prof. Cheadle:

Mr Chairman, I'd appreciate it if the Committee would listen to me. I agree entirely about other independent and impartial forums and I know about a court of law. The question is does this, and this can be interpreted to have disputes of interests before a court of law and let me advise you that the Department of Justice passed a Bill for comment which I had sight of in which they wanted to insist that arbitration disputes, disputes dealing with disputes of interests under the Labour Relations Act, ought to have a final appeal to a court of law. So this is not, its not simply a matter of another independent and impartial forum. I think it is very important here to recognise that in law there are disputes of interests in which you can't go to a court of law for and there are disputes of rights where you can go to a court of law. Under the Labour Relations Act there are disputes of interest and there is a specific forum you must go through. If you leave it like this and the way the Department of Justice has drafted that Bill, I don't know if its been finalised or not, seems to suggest that even though you have gone to an arbitration have had final determination of what is called interests dispute that would leave it open for review or appeal to a court of law. I think it is really, there is no reason why you can't just limit disputes to disputes of right or legal disputes.

Chairperson:

I think Prof. Corder was trying to say that the word "dispute" actually doesn't appear in 16. I'm not sure if you have taken account of that. We then move on ladies and gentlemen, to 17. Mr Gibson.

Mr Gibson:

Mr Chairman, Clause 17 - there are two aspects which arise. One is whether this is going to be applicable to the State and State institutions only or whether of course, it applies to everybody else in society, because that's a matter of enormous significance, so we are back to the horizontality aspect. I can't believe that this would only be applicable to one's relations with the State. So perhaps the Committee would take that into account, and then the Democratic Party would like to have a small amendment inserted. It says: "every person shall have the right of access" and we would like to add the words "with due expedition to all information necessary ..." - you must be able to get it within a reasonable time.

Chairperson:

Is that acceptable to the Committee?

Prof. du Plessis:

Yes, Chairperson. We did consider that but we thought that this would imply within a reasonable time but if we want to do it for the sake of emphasising it, it could be done.

Chairperson:

That's fine. I think the other issue that you raised Mr Gibson will only be resolved once we resolve the issue of horizontality as you mentioned.

Can we then move on to 18(1). Chief Nonkonyana.

Chief Nonkonyana:

In 18(1) in accordance with the principle involved in labour matters I would suggest that the Technical Committee should consider also including "substantially and procedurally fair.." In other the words the word "substantially".

Chairperson:

Any comment on that Technical Committee?

[Change over to another tape - therefore certain amount not taped]

Chairperson:

Chief is there support for that proposal?

Chief Nonkonyana:

No, this is not a point I would really like to ... it was just a point I raised if the people the Technical Committee are happy I have no problem.

Chairperson:

18(2). Mr Gibson.

Mr Gibson:

Mr Chairman, I was slightly distracted, in 18(1) we want to insert the word "reasonable" after the word "lawful", "lawful, reasonable and procedurally fair ...." - something may well be lawful, may be procedurally fair, may be quite unreasonable. We'd like to insert that.

Prof. Corder:

Could I just say our response to that would be exactly the same as to the Chief's point, you are on the doctrine of the separation of powers actually blurring the lines between the judicial government and executive branch of government by introducing the concept of reasonableness there again, if that is, if this body wishes reasonableness to become a ground on which the courts can second-guess an administrative decision, then so be it. It will be a substantial change to existing South African Administrative Law.

Chairperson:

Do we have a seconder for Mr Gibson's proposal? Mr Webb do we have support for Mr Gibson's proposal, are you insistent on that suggestion Mr Gibson?

Mr Gibson:

Mr Chairman, yes we are. We believe that the grounds for review of administrative decisions in South Africa should be much wider than they have been and one of the ways to ensure that is to see that we enshrine reasonableness in the Bill of Rights, otherwise the court might fall back on the Chetty case and others of which people are aware of. So we really would like "reasonableness" incorporated.

Chairperson:

Mrs Camerer.

Mrs Camerer:

Mr Chairperson, I think we must really question whether this is the appropriate forum to effect substantial changes to the law and whereas it is a point that's validly raised with the Technical Committee I would prefer them to reconsider this and come back perhaps with a fuller report.

Chairperson:

The difficulties of the Technical Committee requires political direction from here and I think we need to give an indication of the weight of support that this particular proposal has in order to enable them to decide how they apply their minds to this issue. Prof. du Plessis.

Prof. du Plessis:

Chairperson, the members of the Council should just realise how far-reaching this can be because if the Government would decide to impose a extra VAT for instance, then they can be challenged on the basis that that was not reasonable, that the percentage increase was not reasonable. So it would not only affect individual right it could affect government decisions on a much broader scale. Now, what I'm saying is that the Committee is not committed to the one or the other opinion but the Council should be perfectly aware of what the implications of this change would be.



Chairperson:  
Mr Gibson.

Mr Gibson:  
Mr Chairman, with respect to the Professor the example which he uses is quite incorrect because if the Government decided to change the VAT that would be as part of the Budget and presumably and voted on by the Legislature. We are talking about administrative decisions here.

Chairperson:  
Professor Corder.

Prof. Corder:  
Could I just respond to that in the sense that many, much power although granted in general terms by the Legislature in the modern state is executed through subordinate legislation which is an administrative decision and you have, lets say in the future, an interim government after the elections decide, because of drought to introduce a massive school feeding programme throughout the country and the reasonableness of this decision gets challenged because of budgetary constraints or because of whatever reason. That would be an administrative decision taken by a particular government department in terms of general legislation and that would, in our view, be open to challenge on the grounds of reasonableness. Now if that is so, if that is the will, then it can be included.

Adv. Yacoob:  
Mr Chairman can I just add one more matter. One needs to bear in mind firstly that in relation to all administrative and legislative action the Bill of Rights, the rights contained in the Chapter can't be exceeded except under Section 28. In other words however reasonable administrative action is it is already, however, whatever decision they take, one must bear in mind that such administrative action is already constrained by the Bill of Rights so that nobody can say that unreasonable action, which is against the Bill of Rights, can't be set aside. I think that's the one assurance which we have, that administrative action can be constrained, and is certainly constrained by the Bill of Rights even if that administrative action is reasonable and that follows the minute it becomes unreasonable. We are talking here about decisions affecting not the rights which are contained in the Bill of Rights as such, because for a decision to affect those rights they have to be judged in terms of other principles. We are talking about decisions affecting other rights in which the concept of reasonableness would not apply. So I think in making the determination you must bear in mind that administrative and administrative action is already considerably limited in the interests of fairness and democracy by the Bill of Right itself and whether in the circumstances it is necessary, bearing in mind that additional restrictions are being added already, to add further restrictions in compelling administrative decisions to be reasonable before they can correctly be enforced.

Chairperson:  
Mr Gibson

Mr Gibson:

Mr Chairman, if it would help the Committee, the Democratic Party is perfectly prepared to make additional submissions to the Technical Committee and in an attempt to persuade them.

Chairperson:

Right, it looks like we'll have to go in that direction because we are unable to resolve this issue here and perhaps the Technical Committee can provide both an analysis of the implications and options which the Negotiating Council would have to decide upon at a later stage.

We then move on to 18(2). Mr Gibson.

Mr Gibson:

We would like to see the words "in writing" inserted after the word "furnished" so it would then read: "Every person shall have the right to be furnished in writing with the reasons for an administrative decision ..."

Chairperson:

Is that agreed? Thank you. Page 10, 19(1)(a). Professor Cheadle.

Prof. Cheadle:

Can I just to furnish in writing. Is it the understanding of Mr Gibson that if someone demands those reasons that they will then be furnished in writing. Or are you expecting Government to furnish reasons for every single decision it makes, and it must make over ten thousand decisions a day all over the land, for all of those to be in writing. Lets just be quite clear that if somebody objects to the decision then they can claim it in writing, is that the suggestion you are making?

Mr Gibson:

Absolutely Mr Chairman, it would be nonsensicle otherwise, because if Prof. Cheadle's alternative interpretation were correct everybody would be able to say every time there was a decision "whats the reason for it". So its only if someone feels aggrieved or asks for the ..

Chairperson:

The Committee will take those views into account in reformulating this. 19(1)(a) Chief Nonkonyana.

Chief Nonkonyana:

Chairperson, just in respect of the general clause 19 I would like to state that, subject to what we have already agreed to furnish the Technical Committee with some input because in our system of administration of justice in traditional communities we don't detain people, we don't arrest, nor do we believe in those things. However, we are satisfied with whatever is stated here in terms of the criminal law and procedure, but we would like just to indicate a notice that we would like a provision for customary courts to be considered also.

Chairperson:

Well, we'll do that once you have made your submissions, but can we return to 19(1)(a). Any comments on that? Mr Gibson.

Mr Gibson:

19.(1) the Democratic Party has a particular aversion to the whole idea of detention without trial and everybody who knows the history of South Africa will know why, and we feel a little unhappy with the formulation of this. Prof. Corder was good enough to point out to me earlier that clause 5 makes it quite clear that persons cannot be detained without trial. There is, of course, the awaiting trial prisoner or the person who is awaiting being charged for the 48 hours, that person is a detainee, but the Democratic Party would prefer this to be the whole of clause 19 to be reformulated to make it quite clear that one is not making it possible to have detentions without trial, and that this is more specifically focused on those who are arrestees and awaiting trial prisoners.

Chairperson:

Mr Desai.

Mr Desai:

We would support that proposition.

Chairperson:

Would the Technical Committee like to respond to that? Can we just refer this matter back to you then?

Prof. du Plessis:

We would welcome a submission in this regard.

Chairperson:

Mr Gibson would you try to perhaps make a submission in terms of the reformulation you require. Is there agreement in that? That is 19(1) as a whole is referred for reformulation to the Technical Committee. Mr Maduna.

Mr Maduna:

Just a small comment with regard to 19(1)(b) maybe then by way of associating myself with the remarks of Mr Gibson. Mr Chairperson, maybe because of experience one would like to see the inclusion of things like reading materials, access to media and educational facilities we've had nasty experiences where you've not been allowed to read anything for six months at a stretch - not even to know what's happening in the world and so on. I agree with him, we all would not like to see detention without trial at all and I'm assuming like him that we are talking about detention while awaiting trial or something like that, but the conditions even when you're detained awaiting trial are nothing better than the conditions when you are detained incommunicado, and so on and so forth.

Chairperson:

That will be taken note of. We move on to 19(2)(a). Mrs Finnemore.

Mrs Finnemore:

Mr Chairperson I just have a query which I have discussed with the Technical Committee that I just like to get it on the record is to how these rights concerning arrested and accused persons actually relate to children, because it seems to be they are formulated with adults in mind, and my motivation is this that there are many children now in goals who have been stuck there for various reasons and I just wonder how their rights are protected under this clause. There is a right protecting children's rights but it doesn't specifically mention detention or arrest or whatever, so I'm just putting it on the table and would like the Technical Committee to look at that issue.

Chairperson:

They'll do that. Any other comments? Mr Rajbansi.

Mr Rajbansi:

Shall I just come back to one small point in 19(1)(b) "adequate nutrition" something that has been a problem over the years is adequate nutrition according to one's religious needs.

Chairperson:

That will be taken account of. So 19(2)(a), we've been through 19(2)(b), are there any comments in respect of that? 19(2)(c). 19(2)(b) Mrs Kgositsile.

Mrs Kgositsile:

We would like to propose the consideration of addition of words in (2)(b) "to be brought before an ordinary court of law..." and insert "as soon as reasonably possible but not later than 48 hours after.." and the rest continues.

Chairperson:

Will the Committee take note of that? 19(2)(c) we then move on ... Mrs Jacobus.

Mrs Jacobus:

Thank you Mr Chair, just before we move on I would like to include an additional right under (2), (2)(d) the right to vote.

Chairperson:

Perhaps the Technical Committee could discuss this with the Committee on the Independent Electoral Commission and find a happy way of accommodating this. This matter is under discussion under that as well. Are we in agreement with that?

Mr Gibson:

But it hasn't been resolved is that right Mr Chairman?

Chairperson:

I'm not too clear on that, that's why I am saying there should be some discussion. If somebody else can help me, I would appreciate that. Mrs Camerer.

Mrs Camerer:

I think we should all be afforded the opportunity to make submissions on that score,

Chairperson.

Chairperson:

Yes, you'll be free to do that. Mr Gibson.

Mr Gibson:

Mr Gibson, I just wanted to say that we're opposed generally to persons who've been convicted having the right to vote.

Chairperson:

Well, quite clearly this is a matter under discussion and lets make submissions - it is a new concept that we have introduced here. Lets make submissions to the Technical Committee and we can return to that when they've considered the matter and discussed it with the other Committee. Mr Lockey.

Mr Lockey:

Mr Chairman, if you have the right to vote you automatically have the right to stand for an election and its going to be problematic for a convicted person to stand for an election so I would like the Committee to look into that also.

Chairperson:

Mr Webb.

Mr Webb:

Chairperson, taking away from the particular aspect of the discussion at the moment repeatedly in the last twenty minutes we've heard submissions must be made, written submissions continually, it is a concern to me that this Negotiating Council was constructed for the purpose of debating issues so that the sense of the meeting could be gained by the Technical Committee. Now by instructing everybody to put in written submissions all the time we may be losing part of that sense of the meeting and I wonder whether, and its no reflection on your chairmanship, but whether sometimes debate will not be helpful in helping because diversion views submitted to the Technical Committee in writing is not going to resolve or bring us closer together. Just a practical problem that I put.

Chairperson:

May I correctly point out that the chair is in the House of the Council if there is debate you can't stop it. The only time it will be stopped is if you agree to stop it, so lets bear that in mind as well. Mrs Camerer. We'll take note of what you've said Mr Webb.

Mrs Camerer:

Just in follow up, Chairperson, where its a new issue that's being raised I think we should be afforded the opportunity to consider the implications and then make submissions. That was my point.

Chairperson:

Mr Webb is quite happy with that. 19(3)(a) no problems, 19(3)(b), (c), (d).

Mr Maduna:

Sorry, Chairperson, under (c) - the criminal procedure as is provided for by implication under 22, 28 here provides and indeed does encourage some people to speak. I understand the reasoning behind this one, my problem is in the light of that saving clause is there not going to be any conflict between the two. In other words what I am trying to say in a nutshell Chairperson, is that the system of administration in criminal court is inquisitorial and it does surely encourage the accused specially to speak which in principle we are opposed to it. Thank you.

Chairperson:

The Technical Committee wish to address that.

Prof. du Plessis:

We'll consider the implications of that.

Chairperson:

(2)(d), (e), (f), (g), (h), (i) Mr Maduna.

Mr Maduna:

Mr Chairperson, may we ask the Technical Committee to consider whether they should not add these words "in a language which he or she (and these are the words) sufficiently understands" and then after "understands" "for the purposes of a fair trial" We need not motivate for this Mr Chairperson unless we are asked to.

Chairperson:

Will you take note of that Professor? (j), I am relearning the alphabet, can we then move on ladies and gentlemen to Section 20. Mr Gibson.

Mr Gibson:

Mr Chairman, with great respect this clause as drafted totally undermines property rights in South Africa and would undermine for example, the banks because if this became the Bill of Rights of South Africa nobody would ever have to pay their bond on their property, they couldn't be evicted by the Standard Bank or anybody else because there would not be alternative accommodation available for them, and to us it is unthinkable that this clause should stay as it is now. It would also give people the right to squat wherever they chose and if there was an alternative accommodation they'd have to be allowed to stay there. So with great respect we think that what should happen is that there should be a full stop after the word "law" So that it should read: "No person shall be removed from his or her home, except by order of a court of law."

Chairperson:

Mr Yacoob.

Adv. Yacoob:

Thank you, Chairperson. Again this was brought in because at the present point in time the law is that no person can be evicted from their home except if there is an order of court, except of course that having the clause might prevent legislation to that effect, but the two

concerns which it was necessary to try and meet is the one concern which says that people who are in unlawful occupation of accommodation must go provided that a court of law orders it, and the other concern which was that one needed to bear in mind the fact that there are people who are in very serious difficulty and therefore the fact that they don't have alternative accommodation ought to be a factor to be considered. What we then did here was put both the requirements together on the basis that in the final analysis it will be the court of law concerned which would take into account both factors and determine whether or not to evict somebody. So all that the clause means is that any court of law considering such a position will not be able to regard the availability of alternative accommodation as irrelevant but will obviously take it into account as one factor and only one factor in the process of making the decision in regard to whether or not to evict. What we thought was that by including this we'll be starting some new process in terms of which courts of law will be able to determine the fairness or otherwise of the eviction orders and take into account again, the availability of alternative accommodation simply as one factor. Of course the difficulty is that the decision has to be whether to have it in at all or have it in as qualified but I think that is a decision we will have to make but these were the two concerns which the Technical Committee tried to balance.

Chairperson:  
Mr Rajbansi, did you?

Mr Rajbansi:  
My question has been answered.

Chairperson:  
Mr Maduna.

Mr Maduna:  
Mr Chairperson, to us the clause suffices, it is acceptable as it stands.

Chairperson:  
Mr Gibson do you wish to pursue this any further?

Mr Gibson:  
Mr Chairman, yes I am. You know it is a very easy emotional response to ally oneself with the people who really don't have accommodation, but with respect to Mr Yacoob he says this is a compromise, with great respect, I think it is a very sloppy compromise and it really should be an unacceptable compromise because you know,....

Chairperson:  
Mr Gibson, I must encourage you to desist from words such as "sloppy" if you have a disagreement with the formulation please suggest one.

Mr Gibson:  
All right, I disagree with the type of compromise I withdraw the word "sloppy". What I would like to say is that what we are hoping to do in South Africa is in the fullness of time convert a large number of the have-nots to the haves, and to have a situation where in a

country where we know that for the next 30 years or more, there will be insufficient accommodation for everybody, if every time the court has to take that factor into account surely the court must say there isn't alternative accommodation available for these people. The fact that they haven't paid their rent you say, or they have not paid the bond, the money which they borrowed to buy the property, well that's tough, there isn't alternative accommodation for them and therefore the court must be sympathetic and let them stay there, perhaps forever. I just can't understand that anybody would think that was equitable in a new South Africa.

Prof du Plessis:

With respect Chairperson, I think Mr Gibson is reading this too strictly, because it says after taking into account all relevant factors and then it only singles out two relevant factors, but this availability of appropriate alternative accommodation will have to be weighed against the lawfulness of the occupation, against the fact that the party has not acceded to his or her contractual obligations. It will have to be weighed against the rights of say, a bank who wants people evicted. So all that we are doing is saying that these are two legitimate considerations to be taken into account but all the other considerations which in the case of an eviction order our considerations remain.

Chairperson:

Mrs Camerer.

Mrs Camerer:

Mr Chairperson, I'm a little surprised at Mr Gibson's reservations in view of the fact that I'm sure he should be aware, if he isn't that Judge Goldstone's judgement in the State vs Govender was taken precisely on this basis as far as I recall and that led to the end of the Group Areas Act ultimately. So we support the formulation as set out in this clause.

Chairperson:

Dr Rajah. We'll give you a turn now Mr Gibson.

Dr Rajah:

Mr Chairman there appears to be two sentiments here one is the sympathy of the court in other words some people have sympathy that the courts will have difficulty in exercising this reservation, on the other hand there is a point of view which expresses the sympathy for the people in terms of the right to accommodation and we've got to address this principle on the context of the rights of the individual and therefore, Mr Chairman, this clause here protects the right of the individual in that it gives him the right not to be removed from his home except under certain circumstances.

Chairperson:

Mr Gibson.

Mr Gibson:

Mr Chairman, just to refer briefly to Mrs Camerer's remarks about Judge Goldstone's famous decision which effectively destroyed her Government's Group Areas policy, I thoroughly approved of that and I want to remind you that those people weren't people who



did not pay the rent or refused to pay what they owed, they were being evicted because of the fact that they unlawfully occupied in terms of the Group Areas Act. That was the point there and it was not that isn't on all fours with the type of point which I am trying to make which is if we passed this we will destroy property rights in South Africa, number one, number two not only for private people but for State housing because I think for a long time ahead the State is going to be in the business of providing accommodation for people. The way I read this the State might end up having tenants there forever who don't pay. The third one is that I think you are going to discourage private enterprise from finding the money to build blocks of flats and houses for the people who need them, and fourthly, I think any bank which lends money to people without being absolutely cast-iron sure that they're going to get paid is taking an enormous risk with the funds of the investors.

So, while I hear what the Technical Committee has said and responded thus far, I'm sorry I'm not impressed with it and I think we are making a grave mistake and we're doing enormous damage to the homeless people of South Africa and the poor people of South Africa if we proceed with this.

**Chairperson:**

Can I have before I ask Professor Cheadle to speak on this, ask Professor du Plessis whether he agrees with Mr Gibson's interpretation that property rights will be destroyed and that private enterprise will be discouraged from entering the housing market, I'm sure this wasn't your intention.

**Prof. du Plessis:**

That was not the intention at all Chairperson, and at any rate this clause is still subject to the decision whether it is going to operate horizontally. If it is going to operate horizontally Mr Gibson might have a point, but if its going to operate vertically only then I can't see how it can destroy property rights. Perhaps one should consider this carefully for its operation horizontal or vertical in view of the private law rights which individuals already have with respect to evictions but the main purpose of this clause was to give people not total protection against eviction but just to ensure that when people are evicted that a proper procedure is followed and that certain considerations and all relevant considerations, are taken into account.

**Chairperson:**

**Professor Cheadle:**

**Prof. Cheadle:**

That was part of my reply is that the DP should then seriously consider when it makes its submissions on verticality then it could support it. Secondly, the Committee might ease Mr Gibson's problems if it included "which may include the availability ..." if they decided it should be horizontal affect.

**Chairperson:**

The decision we have to take here is an amendment suggested by Mr Gibson that the words after the word "law" be deleted. Now Mr Gibson would you be happy with Professor Cheadle's suggestion?

after the word "law" be deleted. Now Mr Gibson would you be happy with Professor Cheadle's suggestion?

Mr Gibson:

Mr Chairman what I would be happy to do is "after taking into account all relevant factors" full stop, which then would incorporate what he suggests what Prof du Plessis suggested and so on.

Chairperson:

Let's see where we stand with your first amendment - is there a seconder for the first amendment? Mr Beyers, Mr Mothibe. Now clearly we have a dispute in relation to this clause I'm not sure whether further submissions as such are going to help to the Technical Committee. Can we hold on to this clause and find a mechanism to resolve that.

Page 12, Section 21. Mr Desai.

Mr Desai:

Just a question to the Technical Committee. What is economic activity? I'd like them to tell us what they mean by this.

Chairperson:

The question is "What is economic activity?"

Prof. Corder:

I don't know why I've been given the dubious honour to respond to that, I actually don't know to be honest, Mr Desai. I think that you will see the Council has not as yet not agreed on the inclusion of this right, and submissions on this part in this matter reflect a division of opinion and that's putting it mildly, and I think that it would be best the probably commonly accepted meaning of "economic activity" is that State regulation of the economy should be kept within, should err on the side of being as little as possible. I suppose that would be if one would refer to the freedom to engage in economic activity.

Prof du Plessis:

However, I would just add one observation here. On the face of it, it may create the impression that certain economic system is protected here and the already powerful in the economy are protected, but when you think of free economic activity you also think about the hawker selling his goods on the street corner, for instance. So that would cater for a person in that category as well so the gist of this is not to protect those who already have economic power, but also to empower those who want to engage in economic activity and for that reason that possible qualification has also been added in the explanatory note.

Chairperson:

Mr Wessels.

Mr Wessels:

Mr Chairman, I'm not venturing to debate with Mr Desai what economic activity is but against the background of that question, if you will allow me a little bit of latitude and

overstepping the mark by not strictly responding to clause 21, I believe one ought to read 21 and 22 in tandem with one another and then at least that is why I believe 21 and 22 is of importance to us. If one starts with 22(3) namely "the right to strike to take collective action and the right to lock outs", those two rights are not exclusively in balance with one another they have to be read together with the whole package, so to speak. Part of that package would be clause 21, namely "the right to engage in economic activity, the right to entrepreneurial-ship, the right to accumulate capital, whatever" and in that respect the right to strike is balanced with all these other rights. Now as it stands there, 21 and 22 I believe one could go along with them and one would support their inclusion, but it is a neatly worded package, but furthermore the interpretation of how you should interpret a Bill of Rights whether this has an horizontal or vertical application only is also relevant for the purposes of such a debate. So in a nutshell I would go along with additional submission as it is drafted before us in 21 but I believe one ought to read 21 and 22 in the fullness, completeness of the draft.

Chairperson:

Mr Desai

This is not a question to the Technical Committee. Would a corporation be entitled to rely on this clause if the State wished to nationalise the company as being an infringement of their right to economic activity? -

Prof du Plessis:

I would guess Chairperson that would depend on whether there is a property clause in the Bill of Rights. If there is a property clause, the property clause will be the more appropriate clause to refer to in that particular instance.

Chairperson:

Mrs Gqiba.

Mrs Gqiba:

Mr Chairman, my question relates to 22. and I will wait for you to come to it.

Chairperson:

Let's go back to 21, ladies and gentlemen, although no doubt it needs to be seen as Mr Wessels pointed out in connection with 22. Is 21 acceptable for inclusion? Mr Maduna.

Mr Maduna:

Mr Chairperson, I wonder whether we do need this clause, is it really feared that, at some time in the future, there won't be any freedom of political activity in this country, whatever it means, as Mr Desai asked, or economic activity. Is it envisaged that somewhere down the line somebody somewhere would actually pass all sorts of crazy laws disallowing us from exercising the right to economic activity, whatever its content may be. Frankly speaking I don't think we need it, an appropriate property clause would suffice for this purpose in my opinion.

Chairperson:

Any responses, or comments? Mrs Camerer.

Mrs Camerer:

Mr Chairperson, I don't think we can agree with Mr Maduna on that point. As far as we are concerned its very important that this clause go in, but we are very happy with the addition to the clause, basically to a greater or lesser extent all the elements that are set out in the proviso are already part of our existing law, and I would just like to draw attention to one of them, and that is "economic growth" and I would like to ask the Committee what the motivation was for the inclusion of that aspect and whether, and why they've done it and is it necessary really.

Adv. Yacoob:

Sorry, Mr Chairman, the submission came from one of the parties that "economic growth" should be included as one of the qualifications and the fear as I understood it was that the freedom of economic activity should not carry on to the extent where economic growth was jeopardised and that where economic freedom was limited, where freedom from economic activity was perhaps limited by legislation of one sort or another, that sort of legislation ought to be tested against the question of whether it promoted economic growth. So it is all a balancing exercise trying to work out a package of circumstances in which it could be said it would be fair for legislative or executive action which might in fact impinge on the freedom of economic activity to some extent. The whole debate was that some people wanted the freedom of economic activity in and there were concerns on the other side that unlimited freedom of economic activity might unduly hamper the State in reconstruction activity and this clause is simply an attempt to arrive at some kind of balance and the proviso actually limits a package of circumstances in which it is considered that the State might, if all those circumstances exist together be in a position to enact legislation or take administrative action which might impinge to some extent on the freedom of economic activity provided that they fell within the package in the proviso.

Chairperson:

Do you wish to respond, Mrs Camerer?

Mrs Camerer:

Well, we would support the draft of the Committee as it stands.

Chairperson:

Thank you. Mrs Kgositsile.

Mrs Kgositsile:

Are we on 22 sir? Yes, Mr Chairperson, as Mr Maduna has already said our preferred position is that we delete the clause, however to the extent that we might need it in future for whatever reason we would then like to propose 21(2) with a slight amendment to the formulation that has been given by the Technical Sub-Committee and would like to give a proposed formulation just to expand it and that is "Nothing in this section shall prevent legislation to improve the quality of life, economic growth, human development, social justice, reasonable measures for the regulation of property, basic conditions of employment, fair labour practices or equal opportunity for all provided such legislation is justifiable in a free, open and democratic society based on the principle of equality."

Chairperson:

Can you submit that to the Technical Committee - they will take that into account. Can we then say, ladies and gentlemen, that subject to what Mr Gibson has to say, and Mrs Finnemore, we are approving both the first clause and the second formulation, subject to perhaps a slight reformulation as a result of the suggestion from the ANC. Do both of you want to speak or one of you? Mrs Finnemore first.

Mrs Finnemore:

Mr Chairperson I'd like to ask the Technical Committee if there is any reason why the formulation of 21 is slightly different to the other formulation in that it doesn't say "it shall have the right to the freedom to engage" all our other clauses talk about "the right to do something" Now why I'm querying this is that in industrial relations you talk about the right to strike as being different from the freedom to strike. The freedom to strike is a slightly lesser being. Now are they implying that the freedom to engage in activity is slightly lesser than if it would read if it was the right to the freedom. Because if you look at all the other clauses they formulated it might be the right to freedom of speech, or whatever, I'm just wondering is there a reason for that, and I'd just like an explanation.

Prof. du Plessis:

There's no particular reason Chairperson, we'll consider that.

Chairperson:

Thank you. Mr Gibson.

Mr Gibson:

Mr Chairman, mine is simply a consequential amendment - the Democratic Party marginally prefers the existing formulation, but would be happy with the alternative one just at the end with the insertion of "principles of liberty and equality" to bring it into line with the other amendment that we looked at earlier.

Chairperson:

The Technical Committee will take account of that. We approve the first clause as it is and the additional clause will be reformulated.

We move onto 22.

Chief Nonkonyana:

Just a question really, is a "person" as used here, every person restricted to South African or not.

Chairperson:

Prof du Plessis.

Prof du Plessis:

It is not restricted, Chairperson.

Chairperson:

Mrs Camerer - well it was only a question, we are now on clause 22.

Mrs Camerer:

Mr Chairperson I just wanted to make a point that the reformulation that we've supported the formulation as it stands here, the addition of the point by Mr Maduna the reasonable measures for the regulation of property. We would like the Committee to perhaps consider whether that isn't more properly situated in clause 23, that we bring in references to property up here might not be appropriate.

Chairperson:

You are now referring to the second part of 21.

Mrs Camerer:

Yes, sorry.

Chairman:

OK. Can we now move on to 22. Mrs Gqiba.

Mrs Gqiba:

Thank you, Mr Chairman. On 22(1) my question is to the Technical Committee to enquire whether it would be proper to interpret this section 22(1) as including State employees.

Prof Corder:

We didn't make any intent to make any distinction between any type of employee. So it would include State employees, yes.

[Tape at an end, in turning it over some discussions lost at this point]

Mr Webb:

.... the answer given there may be some need to consider essential services and I'm not quite sure whether it fits in there the provision of essential services, and the right to form unions with the consequent right to strike and things like that. I'm not quite sure whether it fits in there or later. Could I just throw it into the air and hope that they catch it.

Chairperson:

Professor Corder.

Prof Corder:

Mr Webb, it's already been caught in the Limitations Clause. The Limitations clause can limit the right of workers to join and form trade unions as also the right to strike and it would seem that essential services might be acceptable to a court of law as reasonable and as justifiable in a free, open and democratic society.

Chairperson:  
Clause ... Prof du Plessis.

Prof du Plessis:  
Chairperson could we accept that every time a formulation is agreed to the inclusion of the right is agreed to as well.

Chairperson:  
Yes. Section 23(1).

Prof Cheadle:  
Mr Chairman. 22(3) I just think that we want to place on record that we are apposed to the right to lock-out we don't believe in constitutionalising a right to lock-out, but we state that merely for the record because what we do know is that the National Manpower Commission representing both the major employer associations and the major trade unions in this country have come to a broad agreement that for the purposes of this interim period the clause should not be dealt with and it is on that basis that the parties have accepted the formulation as presently stated, but no one should ever misunderstand I think, our position that we believe that the right to lock-out ought never to be constitutionalised but for the purposes of political settlement and a broad package, the trade unions and the employers have agreed to this formulation.

Chairperson:  
Thank you, Professor, we'll make sure that the minutes record your views in that regard. The relevant Minister wants to address you now.

Mr Wessels:  
Mr Chairman, I just want to get clarity. Was the Communist Party present when I made my previous intervention. I think that Prof. Cheadle was not in the House when I made that previous contribution, if he was not I believe that I ought to repeat what I said then for his benefit because it goes beyond a bi-lateral now.

Chairperson:  
We'll try and give you a five minute tea at some stage.

Mr Wessels:  
No, no, I think it is important.

Chairperson:  
Well briefly Mr Wessels

Mr Wessels:  
I'm not playing a game with Professor Cheadle I really, I'm not sure, I don't think he was present could he just nod whether he was present or not?

Chairperson:  
Please go ahead Mr Wessels.

Mr Wessels:

I think what I ought to repeat here Chairperson, is the fact that the right to strike is not a right balanced out by a right to lock-out. These rights ought to be read in conjunction with various other rights amongst others, the right to accumulate capital, the right to participate in economic endeavours, entrepreneurial-ship and so forth, the right of economic activity as well as certain property rights, but read together with the Limitation Clause as stipulated in the Limitation Clause, namely where I believe is a clear understand that this particular right has a bearing and has an operation against the background that there is a Labour Relations Act. In other words it has a vertical application rather than a horizontal application and, against that background we would also agree to this settlement.

Prof Cheadle:

Mr Chair, may I just add one point. He makes a very good point in relation to the National Manpower Commission's submissions which represented all the major employer federations and the major trade union federations there insistence was, that this clause, Clause 22 should operate vertically only, and that the rights that workers have to strikes and that employers have in relation to lock-outs are to be found in the Labour Relations Act, the Public Sector Relations Act, or any other labour relations statute that promotes orderly collective bargaining.

Chairperson:

Having allowed you your bi-lateral in public we can now move on. Section 23(1).  
Chief Nonkonyana.

Chief Nonkonyana:

Chairperson, here we would like to indicate our position that we would like also the Technical Committee to consider the communal ownership and some of I think the majority of us here they are privileged enough to own in a western sense, but in tradition unfortunately I can't own anything, everything that is there belongs to the community to the family and all their rights are actually all there undivided. So I would like the Technical Committee also to consider the whole question of communal ownership when they are considering these property rights. Especially of course, I need not indicate even on land, the land question because as far as we are concerned the land belonged to the people as a whole jointly and communally.

Chairperson:

Thank you Chief. Any other comments on 23(1). Mr Gibson.

Mr Gibson:

Mr Chairman we think 23(1) is unnecessarily restrictive it could be expanded just a little to include "movable and immovable property" Perhaps just a brief illustration if one for example, wants to acquire a share in a company that owns property or share block you are actually acquiring a movable and not an immovable and we thought that by expanding it briefly in line with 9.1 in the D.P.'s Bill of Rights it expands it just sufficiently to encapsulate what we mean.



Chairperson:  
Prof Corder.

Prof. Corder:

Could I just respond both to the Chief's statement and to Mr Gibson. We would and we deliberately changed the language here to take account first of all, rights in property which don't amount to single ownership along Roman Dutch Law lines. So when one talks about the right to acquire and dispose of rights in property this could be a long lease it need not necessarily be ownership as such - it could also include communal ownership and on the other issue again property in our view includes caporal incaporal movable, immovable, so if you start saying movable and immovable then you must start saying caporal, incaporal etc. and in order, and one of the principles on which all of these have been drafted is to simplify the language and make it as general an application as possible and that is why we have confined ourselves just to the word "property" there.

Mr Gibson:  
I'm satisfied.

Chairperson:  
Mrs Camerer, sorry I will come back to you, Mr Desai.

Mr Desai:

Mr Chairman through you could we not ask also of the Technical Committee to devise a clause that would guarantee the right of restitution for people who have been subjected to the taking of their homes away and their properties away under the Group Areas Act and other Acts.

Chairperson:  
That was covered earlier on. Mr Yacoob.

Adv. Yacoob:

To develop such a right of restitution for a Bill of Rights at this stage brings into play too many complications. In the first place the properties may not be in the hands of the State and they may well have been sold and re-sold, and re-sold hundreds of times after it was first taken away and it comes into play the whole question of the extent to which restitution is possible. Secondly if one starts substituting the right of restitution for the right of compensation on some basis then one would probably find, again this is a political question in terms of which one needs to work through the question whether there will be enough money available to ensure that the Government will be able to compensate people for property which had been taken away a long time ago which has passed on to the hands of other people which has really moved along a great deal since the date of expropriation. So again if that political question is very clearly and fairly answered, and if you want to create the situation by a Bill of Rights, in terms of which somebody whose had his property taken away a hundred years ago by the Government, can now get compensation for it at current rate - if thats the political consequence we want and we want it put into a Bill then we can actually do so. Our feeling was that that sort of provision in a Bill of Rights is fraught with a great deal of controversy and therefore it is pre-eminently a matter for any constitution-

making body to make some kind of decision on because it will involve large reconstructional effort.

Chairperson:  
Prof Corder.

Prof. Corder:

Mr Chair, I hate to differ publicly and immediately with my colleague Mr Yacoob, but I'm not sure we have considered this issue fully and squarely and indeed when we arrived here this morning we had already a submission before us pleading for exactly the point that Mr Desai has made this afternoon, the right of restoration of land confiscated consequent on the apartheid policies which would curtail it at 1948 and from 1948 to the present. There is a clause which has been put before us and one of the issues that we wanted to raise at the end of the discussion of the Property Clause was to give notice that we had received one submission on a so-called "Restoration" clause in terms of land and if restoration of the land itself was not possible compensation to be determined along the same lines as clause (2) on the top of page 13 and we would invite and urgently request submissions from the parties on that issue because it is a new issue which has been raised.

Chairperson:

Can we then say that as you receive submissions you can report back to this Council on any progress that you've made in regard to that. Can we restrict all of our comments to the existing two clauses as they are on paper, and if you additional suggestions we can try and accommodate that after we've discussed the two clauses. Any further comments about 23(1)?  
I have Dr Rajah first.

Dr Rajah:

Chairman, I just speak briefly on the experience of Group Areas and it is unlikely that the spectre of Group Areas will return to this country, and in that context I'll suggest to the Technical Committee on the words "acquire" whether it could not read "every person shall have the right to own an occupy" because one can acquire but not have the right to also own. You can make that distinction between ownership and occupation.

Chairperson:

The Committee will consider that. Mrs Camerer.

Mrs Camerer:

Thank you, Chairperson, just on the point that Prof. Corder was making, I mean we don't have that clause in front of us so its very difficult to comment at this stage so I don't know does he perhaps want that distributed to the Council?

Chairperson:

No we are not discussing that now Mrs Camerer, any new....

Mrs Camerer:

No that was just by way of that point, Chairperson, we are basically happy with the clause as it is formulated but perhaps the Committee could consider the right to own property and

property rights in connection with "the right of undisturbed use and enjoyment" which in Roman Dutch Law normally goes together with property rights. If they could perhaps consider whether this can be worked in in some way or other.

Chairperson:

We'll refer that to them. Mr Webb.

Mr Webb:

Mr Chairman I went to sleep at some stage during the day and if you will forgive me for that but on page 3, I think its 1(7) "all juristic persons shall be entitled" those juristic persons I cant remember how the debate finished on that but may I assume that every person in item 23(1) includes all juristic persons, companies, maatskappaye, churches and the like.

Chairperson:

Alright, the question is answered. Mr Rajbansi. Right, Chief Nonkonyana.

Chief Nonkonyana:

Mr Chairperson I just wanted to respond then to the remark from the Technical Committee in saying that the rights entrenched which are fundamental in indigenous law are also catered for here. To say sir, in terms of our Indigenous Law I dont have a right to dispose of my part of royal family at all. I can't sell and I don't want my son to sell, nor anybody else to succeed after me to sell it nor the land of our forefathers was ever for sale. In other words the land in traditional community belonged to the people for generations. It is in trust to the Traditional Leaders and their people. Now we don't want to see a situation where we would agree that this land would be for sale, so what I'm trying to say, Chairperson, is I would like the Technical to help by making some submission to them so that they can clearly understand our predicament in this regard.

Chairperson:

Thank you Chief. Prof. Cheadle, no 23(1). No further comments then....

Mr Webb:

Could I just get clarity, I did get partial clarity. 1(7) which I recollect was that juristic persons were still to be considered by the Technical Committee. Could I just then record my desire that this 23(1) "every person" should include "juristic persons if that decision is not arrived at".

Chairperson:

The Technical Committee will look for a way of accommodating that view. We then move on to 23(2). Mr Rajbansi.

Mr Rajbansi:

Mr Chairman, firstly I want to question whether we should have 23(2). Now not only the State requires expropriation powers but the central government, but all other levels of government also. When it comes to compensation there is adequate protection for the property owner to get fair market value, there's no doubt about that, but what about a protection in respect of the interpretation of the words "public interest". You might have an

official who might have been negligent in his duties of drawing up a road map and expropriation of properties with careful planning can be avoided. The present legislation does not give the property owner the right to appeal against a decision to expropriate his property. Then what happens if the property is not used and if a property owner feels very strong, he is not interested in the money, about the expropriation and the property that has been expropriated is not utilised for the purpose for which it was taken, what about his restoration rights, and I think this question of public interest or .... of interest, we must protect the property owner against the person who is taking the final decision to sign an expropriation order whether their expropriation is really in the public interest.

Chairperson:

Does the Committee wish to respond?

Prof. Corder

I think that it is precisely the shortcomings of the present expropriation law which has induced us, as well as strong submissions from the parties to include this expropriation clause in its present form. The question of restoration of property does not properly fall within this expropriation clause but I did refer a moment ago to the fact that there had been a submission waiting for us here this morning which we hadn't had a chance to consider already and if the issue of restoration rights, land restoration rights if this Council wishes to put them on our agenda then we would naturally consider it and wait for submissions on that matter.

Mr Rajbansi:

What about giving the property owner to dispute whether his property is being expropriated really in public interest. If he feels aggrieved the present legislation does not give him the right to dispute that but dispute compensation.

Prof Corder:

And that is why we have clause (2) here because clause (2) exactly gives the owner the right to dispute in a court of law whether it has been expropriated in a court of law whether it has been expropriated in the public interest or not.

Chairperson:

It seems your point of view and your concerns Mr Rajbansi has been catered for. Mr Gibson.

Mr Gibson:

Mr Chairman may I support Prof. Corder's earlier statement concerning the distinction between expropriation on the one hand and restoration on the other. I think that the two do not belong together and the clause as formulated at the moment is a rather unhappy hybrid. What I would like to see is us focusing our attention on measures for compensation and restoration. I said earlier that the Democratic Party is very strongly in favour of affirmative action in certain spheres and this would be one of them. I want to say, however, that if you confuse that with this expropriation then we are getting into a murky field we we could end up voiding property rights all over the place.

Chairperson:

I think we have agreed that the question of restitution or restoration will be a separate matter if the clause 23(2) requires reformulation in view of that the Committee will look into that.

Mr Gibson:

Thank you I'd like to propose the reformulation that the Committee should consider if I may Mr Chairman?

Chairperson:

Would you like to make that as a submission?

Mr Gibson:

Should I rather do that and not tell you?

Chairperson:

No, we don't have to debate it now because it will be a subject of further debate later. And others need an opportunity to look at that later. We are then, ladies and gentlemen, agreeing that 23(1) and (2) in principle will be included but that the appropriate reformulations will need to take place by the Technical Committee and that in addition the issue of restitution will be looked into as well. Prof. Cheadle.

Prof. Cheadle:

On 23(2) this is a submission that we have made in the past and we would like to if it hasn't been reflected in draft prepared by the Technical Committee we would strongly urge that the availability to the State of resources, the availability of public resources ought to be one of several considerations that have to be taken into account. We say that as just one of a number clearly that does not mean that a shortage of funds should become the reason for effectively denying any compensation at all, its just that it is one of the factors. The second point that we would like to put forward is the inclusion of the words "and the interest of the public and those effected" not simply looking at the interests of those affected but also to balance against that interest of the public. Now our view is that the reference to public interest at the top of the page is probably the jurisdictional point, the bottom inclusion of the public interest and the interests of those affected are ones that would go to the factors to be taken into account in determining what would be fair compensation in the circumstances. But that will also be the subject of submissions.

Chairperson:

Thank you, we now move on to 24. Dr Rajah. Yes? Prof Cheadle you said you would make submission.

Prof. Cheadle:

But what about the restoration point that would go in as 23(3).

Chairperson:

We said that all submissions in that regard will go to the Technical Committee they will report back to us and we will then consider that.

Dr Rajah:

Mr Chairman, this question of environment is an extremely wide one and I'm going to suggest Mr Chairperson, that the Technical Committee look at the deletion of this clause because I think in the normal course of planning and development the issues of environment are built into the system and if we are going to retain this clause it does not really go far enough in saying what further rights does an individual have if or in the event, that his rights to an environment, the safe rights, rights to a safe environment have been effected. Because in the present circumstances we know there are many industries for example, there are pushing out a whole lot of pollution, etc. in terms of - we can already declare them to be unsafe. So what rights then does the individual have in those instances merely besides giving him the rights and saying he can now take it in the normal course of law he has the common law to go to court etc. then this clause then, maybe doesn't serve a purpose and should then be deleted.

Chairperson:

Comments from the Technical Committee.

Prof du Plessis:

Chairperson, we do agree that we haven't catered for the full spectrum of the environmental rights we'll have to go much further than that, however the limited protection here can be seen as a basis on which further protection can be built in future. This clause is formulated negatively in the sense that it would preclude activities or legislation which may constitute that type of threat to the environment which would be unsafe or detrimental to the health or well-being of individuals. Now the argument that these are already provided for in present legislation is not a sound argument in this context because many of the other issues we are dealing here with are also dealt with in other legislation so the idea here was just to lay down certain basic guidelines on which further elaboration would be possible in a future dispensation, but certainly it is for the Council to make the political decision whether they want this included or not during the transition already.

Chairperson:

Dr is this a matter of very serious principle?

Dr Rajah:

Mr Chairman, a right is not just like a decoration on a cake. It must have a purpose, it must have a function it must be capable also of being fulfilled and merely to say that we are having it just to make the whole package look acceptable and that we had a complete look at it really defeats the purpose and really conveys wrong impression to the public that their right really is safe-guarded as far as their right to the environment is concerned.

Chairperson:

Do you have an alternate formulation which could make it more acceptable to you?

Dr Rajah:

Not at this stage.

Chairperson:

Can we then at this stage leave this as it is and if there are additions to it then you are welcome to make submissions in that regards. Ladies and gentlemen, there is a slight dilemma that I have and that is that we originally decided that this meeting would end at 5. The difficulty is that we still need a bit of time to process the rest of this Report, two, we need to accommodate the Technical Committee on Discriminatory Legislation, and three, I'm getting a few persistent demands for a tea-break. Now I'd like your guidance in this regard - can we have a ten minute tea break now and then extend our time of closure to about 5.30? Mrs Gqiba?

Mrs Gqiba:

That will inconvenience us with our flights.

[discussions here on delay of flights, etc. and cross-talking]

Mrs Finnemore:

Mr Chairperson can we just continue, those who want to snap out and get a cup of tea can quickly do so.

[voices - Agreed, etc]

Chairperson:

Lets try and continue and we'll see if we can accommodate the tea-break along the line perhaps you'll herd yourselves on in this regard. 25. Mrs Gqiba.

Mrs Gqiba:

Mr Chairperson I wish to raise some concern here about the apparent exclusion of the right of the child to education which I perceive as important as the other right mentioned here. Is there any reason why it is not included?

Chairperson:

Doesn't clause 27 deal with that? OK we won't pursue your question. Any other comments on 25? Mrs Camerer first.

Mrs Camerer:

Mr Chairperson, we are happy with the formulation as far as it goes but we're of the view that this formulation really does not go far enough. When one considers the right of the child we do not see really how this can be divorced from the right of the parent to care for the child. This right of parents to care for and have access to their children is being taken so far but even fathers of illegitimate children access to their children is at present being considered at present by the Law Commission. Surely the right of a child to security is very dependent upon the care it receives from the family and from the parents. Now I would like to submit that perhaps the whole, the rights of families, the whole family which is really the cornerstone of our society is perhaps not getting enough attention in this Bill of Rights, and when we talk about the right to evict under certain circumstances but we don't talk about the right to marriage and the right to establish a family and the right of parents to care for children. Now surely these are very basic rights and I would like to suggest that the

Technical Committee look again at this section on the rights of the child and look specifically at the rights of the parents to care for children and specifically look at the question of whether to contract a marriage should not be regarded as a basic right but ought to be listed here and the whole question of family rights. I would be grateful if that could be considered Mr Chairperson.

Chairperson:

On the basis of a submission that you will send in tomorrow morning. Mrs Jacobus.

Mrs Jacobus:

Just a question to the Technical Committee, Mr Chair. There's reference made to the "exploitative child labour" - to my mind, child labour itself is exploitative, so I don't know what is meant by that if the Technical Committee could just explain.

Prof. du Plessis:

Chairperson, we considered that, we also initially started by saying "child labour as such is exploitative" but it may be that school children to earn a little bit extra pocket money may do some work of some kind. Now technically speaking that would be child labour but it wouldn't be exploitative child labour, although we are aware of the fact that the concept of child labour has acquired this negative meaning but we didn't want to exclude activities such as those.

Mrs Jacobus:

In the light of the explanation I would then like to propose that "exploitative" then be defined as what is meant by exploitative, because then it's open to interpretation. We could use children for child labour and then say it is not exploitative, while in someone else's eyes it is exploitative. So I think in that sense we should be very clear and define what we mean by "exploitative".

Prof du Plessis:

We could reconsider that, Chairperson, it would perhaps just be sufficient to leave out the "exploitative" and read this clause in conjunction with the Limitations Clause.

Chairperson:

Thank you, any other comments on 25? Mrs Kgositsile.

Mrs Kgositsile:

Mr Chairperson, the difficulty I have with Mrs Camerer's input is the fact that some of what is coming from her, from what she is saying is definitely not very relevant to the transition or not relevant at all in terms of strictly what has to do with the transition and in that case we could just go on and on raising issues that surround the life of a child but we would like to propose that there be an addition of a formulation in favour of the child in addition to what we have under 25 that says "In all proceedings affecting children the best interest of the child shall be of paramount consideration." Thank you Mr Chairperson.

Chairperson:

Any comment from the Technical Committee?



Prof du Plessis:  
We could consider that, Chairperson.

Chairperson:  
Thank you, Mrs Camerer.

Mrs Camerer:  
Chairperson, I really find difficulty in accepting the argument of Mrs Kgositsile really its extraordinary that the rights of the child should go into limbo during the transition and that they should not be fully spelt out in a document that's going to embody the rights of people during this period and I'm sure that all of us agree that the rights of children need the utmost care and attention and I would like to support what she said in connection with the additions she proposes, but perhaps it could be extended to provide the Supreme Court could be regarded as the upper guardian of all children to protect those interests, to ensure that those interests are protected.

Chairperson:  
Prof Corder.

Prof Corder:  
Could I just say something which may be of assistance in the interchange of views that has just taken place, and that is that we proceeded from the point of view when we listed our rights initially and classified them according to the criteria that we were concerned with those rights which would be in, very important during the transition. In this sense children's rights are an exceptional inclusion in this list and we were moved particularly by submission which came from the National Childrens Rights Committee and we were moved also by the fact that children, almost by definition are not able to litigate and stand up for themselves and they being the future life of this country we thought that we should include this provision relating to children's rights, and that is why we didn't include all the other range of rights mentioned by Mrs Camerer.

Chairperson:  
One last round of the bi-lateral and then we'll move on. Mrs Kgositsile first.

Mrs Kgositsile:  
Mr Chairperson, I want to emphasize that the ANC is definitely for the rights of the child to be held as very, very primary at this point in time. However what we are objecting to is bringing in other matters that are really not so relevant to children nor to the transition as such, like marriage. Marriage is about two adults coming together, even family. Family does not necessarily mean children, there are children, I mean children can come out of a family or there might be a family without children so let us not deal with family or marriage or all kind of things, you know, hiding behind the rights of the child. Thank you Mr Chairperson.

Chairperson:  
Mr Yacoob.

Adv Yacoob:

Chairman, thank you, if I can just say this, that the formulation you see before you is precisely the result of the sort of debate which you have heard in an extended forum which found its way through submissions or otherwise in the Technical Committee, and quite obviously because it is a result of the debate which you have just heard the formulation again doesn't satisfy both sides, it doesn't include everything nor does it include everything in connection with children, our starting point having been that it is not a matter urgent for the election. Our problem having been that the law at the moment, does consider the Supreme Court as the upper guardian of children, does make decisions in the best interests of children but regardless of that because of the emotive quality in relation to children certain things should be mentioned so we want to make it quite plain that the formulation you see before you is the limited formulation which takes into account and the problem is that when anybody asks for more and a greater formulation in respect of these rights, others will ask for more, and more, and more and then you get yourself into a fully extended Bill of Rights situation. So I wanted to emphasize that the Technical Committee excruciated over this one, has looked at the debates on both sides and have arrived at a formulation which might actually be acceptable to everybody because it directly or indirectly takes into account some and does not take into account others on the basis that this is the sort of right which ought to be properly elaborated later particularly in view of the fact that there appears to be little danger that any new legislature will start trampling all over these rights immediately. So we want to make it quite plain that, as far as we are concerned, this was a careful effort at formulation and anybody trying to extend the formulation in one direction will get someone else contending for its extension in another.

Chairperson:

Thank you Mr Yacoob. Mrs Camerer, and then I'm going to appeal that we try, if possible, to agree that we're restricted to the question of children at this stage, if we can't get agreement on that then we'll have to declare a difference on this matter. But Mrs Camerer let's hear you on this first.

Mrs Camerer:

Mr Chairperson, I think I just like to draw attention to what seems to be a little bit of imbalance here. I accept the motives of the Committee, but if you're looking at a document that governs the transition, you have a page and a half dealing with the rights of detainees who I accept cannot help themselves and therefore need protection, but the same argument has recently been adduced for the rights of children's protection. I mean the children are not in a position to protect their own rights either, but they're dealt with in two lines and it strikes me Chairperson, that this is unbalanced in the approach of the Committee and perhaps they could reassess the position, looking at the rights of parents specifically to care for children, the points raised by Mrs Kgositsile and then the points raised by myself.

Chairperson:

Mrs Finnemore.

Mrs Finnemore:

Just to add to Mrs Camerer there does appear on just looking at it to be an imbalance, but I just want to raise the query, would there be a difference to this clause whether this thing

is only vertical or whether it is going to apply horizontally this whole Bill of Rights, because then her point about children being related to other parents etc. will be relevant. So I just pose that to the Technical Committee were they formulating this with it being a vertical application of the Bill in mind or are they saying this will be acceptable if it is horizontally applied.

Chairperson:  
Prof Du Plessis

Prof du Plessis:  
We haven't got a particular view on the verticality or horizontality of this one at this stage. We will have to consider it in view of the concerns raised this morning.

Chairperson:  
Can we then send this back to you at this stage. It seems there is some flexibility which we all will be able to work with on this one. Ladies and gentlemen, can we then move on to 26. Any difficulties here? Agreed. We move on to 27. 27(a) Agreed to. 27(b) Agreed to. 27(c).

Dr Rajah:  
Mr Chairman while we may not have any difficulty in inclusion of a language issue as far as education is concerned, there are so many other issues surrounding education that to isolate this one issue, although language is a sensitive issue, doesn't really pay full justice to what the individual's right as far as education is concerned, his choice in education, his right to various choices, etc. are not included. So, if you want to be comprehensive as far as these rights are concerned then other rights of the individual should be also included and I suggest that at this stage there is no need to highlight the issue of language as a right for there are other remaining rights which can be included.

Chairperson:  
Technical Committee.

Prof du Plessis:  
Chairperson, firstly this is the result of a submission we received and I should point out that it does not only refer to language it also refers to common culture, then language or religion, so it goes wider than just language, its not merely the language issue which is being raised in sub-clause (c).

Chairperson:  
I think the reference is to clause (b) is it?

Prof du Plessis:  
Its the reference to clause (b). That was also a very particular submission we received Chairperson on the guaranteeing a medium of instruction.

Chairperson:  
Do we have any further support for Dr Rajah's view? Mr Maduna.

Mr Maduna:

Are we now dealing with (c)? [(b)] Oh, we are still with (b). Maybe, Mr Chairperson, it may be appropriate to call upon parties to make submissions in this regard, because it maybe true as it stands right now it tends to isolate language as though language is the only, in fact then it is linked to (c) questions of culture and so on and so forth. It does present us with a problem and I would reserve my comment with regard to (c) until we deal with (c). I think parties may usefully make submissions in this regard.

Chairperson:

Submissions have been made already and this is a derivation from those submissions, so either we argue that they are additional points to be incorporated under 27 and leave (b) as it is or we agree that 27(b) is deleted, but there doesn't seem to be too popular a view for that either at this stage. Dr Rajah can we move forward on the basis that we retain (b) if you have strong views about the incorporation of other elements then you can make a submission in that regard. We then go to 27(c). Mr Maduna.

Mr Maduna:

Mr Chairperson, the basic problem I have with (c) is that of reference to a common culture which in my opinion would open the way to indirect discrimination. I know we are trying to address the problem of discrimination and indeed we are saying "provided there shall be no racial discrimination" but Mr Chairman, it is known in our experience in this country that this concept of own culture, of own this, own that, has been a real problem. It has actually tended to associate basic rights to those concepts of own culture, own this, own that, maybe then we may find it quite useful to look for slightly different formulation that takes care, yes, maybe of the interest we are thinking of, the interest of culture, but at the same time that does indeed ensure that the right to my own culture, even within the school complex, I mean context, is not at the same time abused or misused.

Chairperson:

Any response to that Mr Grove?

Mr Grove:

Mr Chairman, the Committee understood that this provision was already agreed to during the Codesa era by Working Group No. 2 and that formed part in fact of the documentation that was referred to the Committee when we started with our task.

Chairperson:

Thank you Mr Grove. Mr Maduna I'm sorry, I might have missed something that you said, what was your proposal, I hear your critique. Mr Maduna what is your proposal in relation to 27(c).

Mr Maduna:

Mr Chairperson I don't have a particular proposal in that [But you have a concern?] but I have a concern, I would rather that maybe the Technical Committee re-looks at it bearing in mind the concern that I have just expressed.

Chairperson:  
Mr Beyers.

Mr Beyers:  
Mr Chairman I just want to place on record our support for the retention of 27(c).

Chairperson:  
Thank you, will the Technical Committee take account of what Mr Maduna has said and perhaps return to us.

[Changed over to another tape at this point - therefore part of the discussions not recorded]

Mr Rajbansi:  
.... if there are restrictions imposed by other countries it is out of our control, but for example saying issuing travel documents with the restrictions, and secondly we dealt with children's and adults what about the rights of senior citizens. I believe the Technical Committee should consider a clause where certain rights of senior citizens must be protected for example the State's responsibility to giving them social pensions, disability pensions, health services, etc.

Chairperson:  
The Technical Committee will take note of that, and Mr Rajbansi if you want them to you will please make submissions in that regard.

Mr Rajah:  
One minor point. [Yes] Mr Chairman, this right I presume is read in the context that every child of school going age shall have this right, I'm going to raise a question Mr Chairman, what about the rights of an adult in the context of the high rate of illiteracy in South Africa. What right then has an adult who has been disadvantaged in the system has to improve his quality of life through an access to education facilities. Would the Technical Committee consider incorporating the rights of an adult to some form of improvement as far as education is concerned?

Prof Corder:  
Mr Chair, we considered that already and that is why we said "Every person shall have the right to basic education" If we wished to limit it to children we would have said "Every child shall have the right to basic education".

Chairperson:  
Thank you Professor, is there anybody else who wishes to address 27? Can we then revert to, or move to 28, 28(1). Mr Gibson.

Mr Gibson:  
Mr Chairman, just two relatively small amendments the Democratic Party would like. We think that the Bill of Rights is so important that it should not be too easy to limit the rights which the people are going to have and we would like to insert the word "demonstrably" in

28(1)(a) where it says: "shall be permissible only to the extent demonstrably reasonable and justifiable". We'd like the Technical Committee to consider that it places a little additional onus on the people who seek or those who want to limit the people's rights.

Chairperson:

The Technical Committee can look at that.

Mr Gibson:

The second amendment is again in (1)(a)(ii) where it refers to "the principles of equality" its on "the principles of liberty and equality" It's that same consequential amendment.

Chairperson:

Professor Corder.

Prof Corder:

Could I just respond on the issue "demonstrably" because I think it is only fair to say to Mr Gibson that our previous formulation had "necessary and reasonable" and it was deemed in fact that that test was too strict and it would make it almost impossible for any limitation to be placed and I think our feeling would be that "demonstrably" would fall into the same level of difficulty as "necessary" and we therefore deliberately removed it for that purpose, but we certainly will reconsider it.

Chairperson:

Thank you Professor. Chief Nonyonkana.

Chief Nonyonkana:

Thank you Chairperson, if you will allow me just to ask one question and then come and comment and what is the meaning of that expression "law of general application" what do you mean?

Prof Corder:

In response to that law of general application means that the law is not specified to any particular class or group of people on an equitable or opportunistic basis. In other words it is a law and this is a phrase generally used in law, that law must be of general application in other words it's not to be visited on any particular class or group of people - it's a general application.

Chief Nonyonkana:

Chairperson, I may just note that our reservations be noted in the light of our previous interjections. The law of general application we would like that specific provision should be made for indigenous law also, it is our understanding Chairperson, that the Technical Committee is in mind of legislation and we are of the view that traditional cultural rights should also be entrenched and with that in mind therefore Chairperson we would like to note that we, we would like the Technical Committee to note, our concern in this regard and as indicated previously we may assist the Technical Committee by making a submission in this regard.

Chairperson:

Thank you Chief. Any other speakers? We've now covered 28(1), we move on to 28(2).

Dr Rajah:

Mr Chairman can I just ask for a layman's explanation of 28(1)(b) on the one hand you say that the rights may be limited, but when you limit it it shall not negate, when I regard limitation itself as a negation it says it "shall not negate the essential content of the right or freedom in question". Can I just get an explanation of what actually (b) means in simple terms?

Prof Corder:

I think in ordinary layperson's terms that means that the right cannot be taken away by limitation. In other words on a sliding scale you may limit a right in degree but you can't limit it more than 50%, you can't take away that right by limiting it, by limiting it, by limiting it, to such a degree that it doesn't have any content left.

Chairperson:

28(2) Mrs Finnemore.

Mrs Finnemore:

Mr Chairperson I've got two points I'd like to make here and they really come in the form of queries. The first is that this limitation is not clear to me how it applies to for example, 22(c) with the right to strike because the Labour Relations Act does not per se allow for the right to strike. I mean people can still theoretically be dismissed for going on a long, legal strike. They would then have to go to the Industrial Court allege an unfair labour practise. What I want to know is it is not clear to me how this limitation applies to these rights, would the Industrial Court for example hearing a case in the future say, "Well it won't be an unfair labour practise because it says here there is a right to strike and maybe Mr Cheadle would have some explanation there.

Then the second point also for Mr Cheadle and the Technical Committee is he mentioned something about the NMC agreeing to these things if it was vertically applied. Now does he mean there's a qualification if this is going to be applied horizontally. Can we just have some clarification on this?

Chairperson:

The Technical Committee first and then Prof Cheadle.

Prof Corder:

Thank you Mr Chair. I think the answer to the first question about the right to strike is that our understanding of the inter-action between 28(2) and the right to strike provision, for instance as one of the worker rights is that 28(2) would in effect take precedence in the existing law is in effect frozen in its current form and therefore the inclusion of a provision relating to the right to strike could certainly be argued as persuasive authority in the Industrial Court or any other Court of Law as an indication of the direction which the law is progressing and might lead to a progressive movement towards the right to strike etc. but 28(2) on the suggestion of the NMC would effectively, this would take precedence, 28(2)

would take precedence over that.

Chairperson:  
Professor Cheadle.

Prof. Cheadle:

I think that's exactly right. The effects of 28(2) is to insulate the present law of labour relations from a legislative attack, that's why you only have vertical effect for the labour relations in the Chapter itself and from constitutional attack by virtue of this insulation clause. However, when it's amended and its amended through the process that has been established of the National Manpower Commission or you have the major parties participating in the formulation of laws then any product of that body will then be subject to this Chapter like any other right. The concern really is simply that freedom of association and many of the other rights might suddenly introduce litigation and uncertainty in an area of law where we want as much certainty as possible so you can at least, if nothing else, if you have political difficulties in this country you don't also then have industrial unrest. So the effect of 28(2) is basically to freeze the existing law and to insulate it from any constitutional attack in the interim. May I just add there, Mr Chairman, a concern that I have with the wording "the provisions of a law" it seems to suggest that we would have to demonstrate in each case that this is a provision that promotes fair practises orderly and equitable collective bargaining, it would seem to me much safer and I would suggest to the parties is to probably delete "the provisions of" and just leave it as a law in much the same way as the Committee suggest in relation to capital punishment and abortion.

Chairperson:

Any further comments? Can we then move on to 29. 29(1), 29(2)(a). Mr Desai, yes.

Mr Desai:

Mr Chairman, we who have bitter memories of states of emergencies in this country over the last 42 years, we who have experienced the horrors of detention without trial, we who feel that our rights as free men and women must never again be violated as under apartheid and minority rule, we are convinced that never must we incorporate any legislation in any Bill of Rights which suspends the rights and violates the rights of our people. We therefore reject Section 29 in total.

Chairperson:

Thank you Mr Desai, any further speakers? Mr Gibson.

Mr Gibson:

Mr Chairman, the previous speaker may be surprised to find somebody from the Democratic Party disapproving what he has said or disagreeing with what he's just said, but if there is a genuine national emergency, one doesn't want to put the Government of South Africa into the position where it has to tear up the Constitution and that's precisely what the PAC proposal would lead to. The Democratic Party stands back for nobody in standing up for the rule of law and standing up for the rights of citizens, but there certainly can be in the decades that lie ahead, decades perhaps, this might be in operation for a hundred or two hundred years we simply cannot foresee what national disasters, what national emergencies



could possibly befall us and we think it would be disastrous not to have a provision which then circumscribes what the Government can and cannot do. So in general terms we're in support of the whole of clause 29.

Chairperson:  
Mr Maduna.

Mr Maduna:

Mr Chairperson, I fully accept what Mr Gibson says. We have had all sorts of nasty experiences there is no doubt about it, but then again you can never say that in the future you will never have any national disaster. I would rather that we be certain as to how in terms of the law our rights are going to be dealt with no matter who is in power in the future should there be a national disaster of any kind. Mr Chairperson, having said so, I would like us to look at (d) and maybe propose

Chairperson:

Can we come back to (d) we are 29 (2)(b) at this stage. Is (b) acceptable? We have been swinging between the principle and the detail, let's get back to the detail. 29(2)(b), 29(2)(c).

Mr Desai:

Just one query Mr Chairman, say that you impose a state of emergency for six months and then you renew it, I presume there is no end to the number of times you can renew a state of emergency.

Chairperson:

According to this formulation, no. 29(2)(d) Mr Maduna.

Mr Maduna:

Yes, Mr Chairperson, 29(2)(d) as it stands is not a basic problem but the problem is Mr Chairperson, with regard to the Court, I would like it to be dealt with at a slightly higher level so that for instance it is not just the Supreme Court sitting say in Pietermaritzburg or in Cape Town that decides whether or not there is a state of emergency for instance. In other words whether or not the declaration itself therefore from a factual point of view is valid. I would like us to be able to go to a higher court so that when the state of emergency affects us all across the length and breadth of the country we are not going to be getting different judgements as to whether or not there is a state of emergency. For instance, a court in Natal may rule in one way, and then a court in Qwaqwa somewhere may rule completely differently and say "As far as we're concerned there is no state of emergency and therefore the declaration is invalid" there must be some court that determines this question with some degree of finality and says yes there is, or there is no state of emergency.

Chairperson:

Do you have a specific amendment?

Mr Maduna:

Mr Chairperson, we have been using for short of the right word, all along the "designated authority" I only believe that at the end of the day we are talking about some Constitutional

Tribunal or some Constitutional Court as we have been saying in this House and I think we should be prepared to look in that direction.

Chairperson:

Is the House willing to accept that? Mrs Camerer.

Mrs Camerer:

Mr Chairperson, the whole question of the authority to consider the Constitutional principles and so on hasn't been decided yet it is something that the Committee is still going to address so I think Mr Maduna's jumping a bit ahead of the game at this point and perhaps we should leave the clause as it is. Perhaps they would make submissions to the Committee when the Committee considers that point.

Chairperson:

Mr Yacoob.

Adv. Yacoob:

Mr Chairman, that's not strictly true. The enforcement mechanism in respect of other rights are dealt with a little bit later, but this one deals with a determination simply of the question of whether or not a state of emergency is valid or not valid. The difficulty we have about this is firstly it is not a Constitutional question its an evaluation of an executive decision, but secondly unlike the situation concerning the enforcement of rights or in connection with litigation which specifically intends to deal with the setting aside of legislation. What would happen in terms of the setting aside of the state of emergency is that different people would make applications to set aside the state of emergency on different grounds as imaginative as they can get but these applications for the setting aside of the state of emergency will always be related to applications for relief at a much lower level, if I can put it that way. Then in practise what would happen is there would not be an application to set aside the state of emergency simply so called you'll have somebody detained in terms of the state of emergency or you'll have somebody's rights suspended in terms of a state of emergency where he will not be able to go to church or something, and essentially what he will say is I want to be able to go to school or to church, I want someone released from detention, and he will say in practise "I want to be released from detention on one or more or all of the following grounds", and one of the grounds he'll invariably rely on in each of the applications which he has brought, if one's experience is anything to go by, you'll always contend to make sure he has all the grounds of attack conceivable that the state of emergency has been invalidly declared. The trouble then is that if you want the Constitutional Court to deal with that then the Constitutional Court will have to deal with each application for the release of someone from detention or any such application because it would have to consider also the setting aside of the state of emergency application. Our difficulty with that is that unlike the invalidity of legislation which can very often be dealt with on a fairly limited basis, what happens as far as setting aside of the application as far as the state of emergency is concerned, is that (a) there can be numerous bases upon which such an application can be made, and (b) that the setting aside of the state of emergency will always be related to applications for other relief, and we don't want Constitutional Courts to consider that question and therefore after careful consideration we came to the conclusion that on balance, the Supreme Court would perhaps be the only body to consider it but we could perhaps say

that in certain circumstances a Supreme Court might refer that application to the Constitutional Court, but that we could consider, but having the Constitutional Tribunal to consider every application for the setting aside of the state of emergency will give that Court far too much work during that time.

Chairperson:

Can we then ask the Technical Committee to take note of Mr Maduna's concerns, note your comments as well and we can move forward provided Mr Wessels.

Mr Wessels:

I think that was such a wise argument I'm sure Mr Maduna's going to withdraw his proposal.

Chairperson:

I think there are two issues here Mr Wessels, the first is the consideration of the state or declaration of the state of emergency itself as I understand it, and secondly any matter related to the state of emergency such as the detention of the person, and we might want to deal with those in separate, different ways, if I understand the argument that Mr Maduna might be putting forward. So can we ask the Technical Committee to look at that and we can come back to that.

We are pressed for time, ladies and gentlemen, we will have to give consideration today to the report of the Technical Committee on Discriminatory Legislation. Depending on how hefty our arguments are we'll try to take the matter up to page 16 today and then bring that Committee in. I have consulted Mr Webb who has indicated that he will leave at 5.15 - he's asked me to publicly declare that it is not a walk-out it is merely time to catch his flight home.

29(3) (a), (b) and (c) no comment, 29(4)(a), (b), (c), Mr Gibson.

Mr Gibson:

Mr Chairman the Democratic Party feels that this detention should be reviewed as soon as possible and would ask the Technical Committee to consider reducing the ten day period to seven days.

Chairperson:

We'll refer that to the Technical Committee - (d), (e), (f), (g).

Mr Gibson:

Mr Chairman there's reference here to "detention for longer than ten days the detainee shall be able to apply to court..." and so on, we want to move that there should not, if the court releases the detainee, that the State should not then be entitled to re-detain him. That should be built in here somehow.

Chairperson:

We'll ask the Technical Committee to look into that, but of course the re-detention provision does not apply forever, does it?

Mr Gibson:

You see, we simply envisage a naughty government being ordered by the Court to release the detainee and they do so and then they go and grab him and put him back in again.

Chairperson:

You're going to be in the Government - what about the naughty person?

Mr Gibson:

Yes but this is for a hundred years ahead, and I'm not going to live that long.

Chairperson:

We'll ask the Committee to look into that. Section 30. Professor du Plessis I am just wondering whether you could help us in relation to page 17. Could you very crisply indicate to us what decisions in respect of this need to be made today. If any.

Prof. du Plessis:

We ask Mr Yacoob to do that.

Chairperson:

Mr Yacoob.

Adv. Yacoob:

Thank you Mr Chairman. What we've said in this Section under Enforcement Mechanisms is that there are obviously two categories of situations which could arise. The first category is where the enforcement of riots entails the setting aside of legislation. Where that happens then quite obviously any Constitutional Tribunal and as I understand it a Constitutional Court as a Tribunal is being worked on, will have to look at those sorts of questions. So the jurisdiction as far as that aspect of the matter is concerned would rest with the Constitutional Court where it entails the setting aside of legislation. Where it does not entail the setting aside of legislation it is in fact the view of the Committee at this stage that the ordinary courts of the land should look at the matter subject to two qualifications which I mentioned in the Report, and the third qualification which has not mentioned in the Report but which I believe maybe I should mention.

The first qualification is that we'd need, the broad qualification is rather that we need certain bodies to look at certain enforcement of rights quickly and efficiently and to determine mechanisms for those outside the ordinary courts, because the ordinary courts are going to be too slow, basically, and probably too expensive. And for that reason we have recommended two things, firstly an Ombudsman with extended powers and a commission. We would like authority, agreement in principle in respect of these alternative mechanisms for looking at right enforcements where these do not involve the setting aside of legislation and where these involve mainly administrative acts and so on. So if there was a Commission which had these powers, if there was an Ombudsman which had these powers and if these bodies could be approached directly somewhat informally, and if the Commission etc had certain powers which may be subject to a Court at some stage depending on the circumstances, then it may well be a good idea to have these in order to make procedures more accessible. And what we would like, at this stage, is acceptance in principle in respect

of the existence of such a Commission and in respect of the extended powers of such an Ombudsman on the basis and then these two bodies would be available for easy access in respect of certain matters. One must also take in account a second factor here and that is that the Commission dealing with Discriminatory Legislation which you will hear soon is considering some kind of special Tribunal to very easily and quickly look at disputes which arise out of the attempt by any person to enforce his rights relative to an election. Now this Committee it appears from the Report of that Committee actually agreed that such an institution will be a good idea. We would like to mention that but we'd like authority after acceptance in principle to investigate what we have called these methods of easier access such as the Commission which is mentioned in the Report and the Ombudsman in greater detail and we believe that this is a matter of some importance.

Chairperson:

Thank you Mr Yacoob. Ladies and gentlemen I think the indication that the Technical Committee requires is whether the principle of a Commission and an Ombudsman, and you might want to reconsider that for an Ombudsperson should be accepted, or can be accepted at this stage with a view that the Technical Committee can then elaborate their functions, duties, etc. Mr Wessels.

Mr Wessels:

I go along with that, I would just like to ask a question dealing with the other Commission's work namely the one on Discrimination. Could I do that?

Chairperson:

All right.

Mr Wessels:

Mr Yacoob made a point and he referred to such an institution and I couldn't gather when he made that remark whether he was referring to the Human Rights Commission that you are investigating or the institution that the Technical Committee dealing with Discriminatory Legislation are dealing with.

Adv. Yacoob:

We are referring to our Commission, the Human Rights Commission that we recommend but we simply say that in recommending these in principle one needs also to some extent to take into account the Tribunal and determine whether when deciding what to do with that Committee's recommendations, whether that Committee, if that Committee, for example, is authorised to investigate also the Tribunal then a distinction needs to be made between the two at the level of the Council, so the Council can say to that Committee that it must investigate a Tribunal for (a), (b) and (c) reasons, or to do (a), (b) and (c), which will be related specifically to the elections and that perhaps, this Technical Committee then would investigate the use of a Commission as well as the use of an Ombud for purposes other than that. Otherwise it is perfectly within the powers of this Committee to link the two and perhaps ask for both Committees to work on certain matters together. All we wanted to do was to point out that there is a certain inter-relationship.

Mr Wessels:

Chairman, sir, I agree with that and I would urge that the two Committees work together.

Chairperson:

Is there agreement on that? Mrs Finnemore.

Mrs Finnemore:

Just on a point of clarification. This Ombudsman or Ombudsperson, is it going to be one person, will they be able to cope with this or could that Ombuds have arbitrators underneath that Ombud person.

Prof Corder:

Its normally the case Mr Chair that one person is the Ombud, but he or she has a staff and there must be the political will to vote the funds to staff sufficient officers around the country.

Chairperson:

Ladies and gentlemen, do we approve in principle that this Committee should elaborate the powers, functions, etc of the Ombudsperson and the Commission? Is that agreed, are there any reservations? Fine.

As far as the overlap with the next Committee is concerned, the Technical Committee on Discriminatory Legislation we would encourage this Committee to continue to have discussions with that Committee with a view to ensuring that the overlaps are catered for in anything that you are doing in your Committees at this stage.

In respect of your further recommendations, are there any things we can dispose of very quickly? Professor.

Prof. du Plessis:

Chairman we just want to draw the attention to these concerns we've raised. We don't necessarily expect the Council to pronounce finally on these this afternoon, but these are matters that have to be dealt with at some point in future. They needn't be dealt with today.

Chairperson:

Can we then say that we note your recommendations that participants are free to make submissions to you in respect of this and when you have adequate submissions you can guide us in terms of how we can take decisions in respect of this matter. Mr Gibson.

Mr Gibson:

Mr Chairman is it clear that the Democratic Party has reserved its position about the Constitutional Court. I assume it is not necessary for me to re-make that point relating to the enforcement provisions. Perhaps I should just very briefly say that the Democratic Party viewpoint is that Constitutional issues should be decided in the Supreme Court initially obviously with an appeal to an Appeal Court but we would go along with the creation of a Constitutional Chamber, a separate Constitutional Chamber, at Appellate Division level to adjudicate on an appeal basis.

Chairperson:

We note your comments Mr Gibson. Ladies and gentlemen, on your behalf may I thank this, yes Mr Maduna.

Mr Maduna:

Mr. Chairperson, firstly, I assume that of course there will be a section somewhere some of the words that are used are defined. I am thinking essentially for instance about gender related and gender neutral words that have been used here and where appropriate maybe we would have to define some of these words so that it is clear what we actually mean.

Chairperson:

The Committee will note that. Any other comments before we close this part of the meeting.

Then on your behalf ladies and gentlemen, may I thank the Technical Committee for their patient and diligent presence and work - we've of course loaded them with a lot more work now and we trust that they will be able to prosecute that expeditiously.

Gentlemen, thank you very much.

Adv. Yacoob:

Chairman, one matter before we go, and that is that there is no date set by which we would receive submissions and we would ask the Council to pay some attention to that.

Chairperson:

Yes we will certainly do that. The Planning Committee will give consideration to that on Monday, but for now I think we are saying within the next five days submissions should actually go in particularly on a more complex matters. The less complex matters if possible by this weekend so that the Technical Committee can begin its work. Thank you very much, and thank you for bringing that to my attention.

/mc

**Attendance Register for the Meeting of the Negotiating Council held on  
21 July 1993 at 10h00.**

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Delegate: ~~B. Kgosisile~~ ~~M. Manzi~~ .....  
Advisor: ~~M. Manzi~~ ~~B. Kgosisile~~ .....  
Advisor: *Delegate* P Maduna .....  
*[Handwritten signature]*

**AFRIKANER - VOLKSUNIE**

Delegate: AS Beyers .....  
Delegate: M Mentz .....  
Advisor: JR de Ville .....  
Advisor: *[Handwritten signature]* .....  
*[Handwritten signature]*

**BOPHUTHATSWANA GOVERNMENT**

Delegate: R Cronje .....  
Delegate: R Mangope .....  
Advisor: BE Keikelame .....  
Advisor: SG Mothibe .....  
*[Handwritten signature]*

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Delegate: SN Sigcau .....  
Advisor: GD Gwadiso .....  
Advisor: DM Jongilanga .....  
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Delegate: VT Gqiba *VT Gqiba*  
Advisor: TM Bulube *TM Bulube*  
Advisor: SM Faku

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Delegate: M Finnnemore *M Finnnemore*  
Advisor: PG Soal *PG Soal* (ARRIVING LATER) K  
          DUGLAS FIBSON *DUGLAS FIBSON*  
Advisor: AJ Leon *AJ Leon*

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Delegate: K Ngwenya *K Ngwenya*  
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Delegate: NS Mtsweni *NS Mtsweni*  
Advisor: AP Laka *AP Laka* *LAKA*  
Advisor: Q Vilankulu *Q Vilankulu*

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Delegate: ND Mokoena .....  
Advisor: MS Gininda .....  
Advisor: PMH Maduna .....

*SS Ripinga*  
*N. S. Mokoena*  
*MS Gininda*  
*PMH Maduna*

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Advisor: DRB Madide .....

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Delegate: CC August .....  
Advisor: ~~M. Looat~~ .....  
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*D. Lockey*  
*CC August*  
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*D. Lockey*

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Delegate: S Naidoo ..... *S Naidoo*  
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~~E Makhanda~~

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Advisor: ~~L.R. Brunel~~ ~~A. Tredoux~~ ..... *S. Cameron* *LR Bunn*

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Delegate: N Jajula ..... *N Jajula*  
Advisor: LL Mtshizana ..... *Absent - family bereavement*  
Advisor: .....

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Advisor: NE Ngomane ..... *NE Ngomane*

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Advisor: RJ Dombo .....

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