

CC-SubCom

5/3/96

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CC Subcommittee - 5 March 1996

Tape 4

Chairperson ...freedom of occupation. Can someone address me on this one? ???

??? Not to be confused with the premier of the Eastern Cape. Thank you, Chairperson. Chairperson, we have in the past made the point, which has come through very strongly in all the submissions, that there should be some protection, some rights of being able freely to choose your own business occupation as well, your business. Arising out of discussions we have had with the ANC, we are of the opinion that if the word 'trade' was added to clause 21 as it stands now that, that may fit the bill and we would be prepared seriously to consider that as a possible solution. I would just like to know if any of the other parties would consider the acceptance of the addition of the word 'trade'. In other words, it would read: "Every citizen has the right to choose freely their trade or occupation or profession..."

Chairperson It could also read: "trade, occupation or profession". I say it could also read that, Mrs Pandor.

Ms Pandor Chairperson?

Chairperson I said it could also read, so why are you fighting? "trade, occupation, profession".

(Mrs Pandor off mike)

No, I haven't given the ANC an opportunity to speak yet.

No. I haven't recognised the ANC yet. (laughter) Dene?

Ms Smuts                      Chairperson, let me read you the German one and then ask the question why on earth we should leave out the trade. "All Germans shall have the right freely to choose their trade, occupation or profession, their place of work and their place of trading..." So, why on earth should we leave out the 'trade'? I don't see why we shouldn't have it. And in fact it would be an omission. It would constitute an omission not to have the reference to trade.

Chairperson                      You are supporting adding 'trade'.

Ms Smuts                      Absolutely.

Chairperson                      Good. You honestly don't have to get worked up about this. From Mrs Pandor standing there and saying 'no' and you are saying you are recording your opposition. You don't have to get worked up, you know. You know, Sheila, everyone here is getting worked up about the word 'trade', you know. They are about to declare war and things like that. Willie Hofmeyr now is taking off his jacket... (laughter). Who's got their hand up; is it Mrs Pandor or Willie? Mrs Pandor?

Ms Pandor                      I am sure my Comrade will certainly add wisely to my limited knowledge. I actually wonder at the distinction that's been drawn now between trade and occupation. I wonder what the distinction between these two is and as I understood it, in fact, our acceptance as the various parties of this particular section was that the formulation was well in line with the German formulation and I recall a range of minutes indicating that we all support a formulation along the lines of the German formulation and being quite happy, all of us, with this current formulation and from

questions remaining really as to the bracketed words. So, I am surprised at this new addition and wonder to what degree trade and occupation are distinct and maybe that would help us have some understanding of this new proposal. Furthermore, it may also be useful for us to begin to ask that a close look be taken at the full German formulation in order for us to see whether the translations that we often insert are actually fully equivalent to the intended German meaning.

Chairperson

Mrs Camerer?

Ms Camerer

Chairperson, can I just say in response to Ms Pandor that she would have been less surprised if she had been able to stay to the end of discussions we had yesterday when the whole question of trade as a possible compromise on this issue was discussed because as far as we are concerned, we would like our formulation to be the one that is adopted and that is to add: "to be able to engage in the business of your choice". But in the spirit of trying to reach a compromise, we said that possibly, and we take it back and we are still discussing the possibility, trade would include most aspects of business, but we are not entirely satisfied on that point, but if the ANC are going to be very surprised at this new word, then perhaps we could... What we would really like is for our option to appear in the documentation because we have handed it in on a number of occasions and we have offered it to the other parties, but somehow it never appears. You know, we believe that actually having given up the idea of 'the right of economic activity' which, we understand, is a problem, it has been indicated as such, and we have accepted, we believe that it is very important

to encapsulate the whole question of entrepreneurial endeavour in this clause and not only have the underlying premise that we are talking about employees. So, in a spirit of compromise, we would ask you to look at 'trade', but we would also like our option to appear in the documentation in future.

Chairperson Which is your formulation? It was the 'economic activity'?

Ms Camerer No, Chairperson, we offered you an alternative clause some time ago and in fact we did it again, but it doesn't appear in the minutes for some unknown reason and it has never appeared in the documentation where we keep asking for it to appear. So, perhaps it could appear next time to keep the discussion going.

Chairperson Can we look into that? We suppose, yes. Willie Hofmeyr?

Mr Hofmeyr Chairperson, what I would suggest, rather than reverting back to our old positions, I think we should... When we discussed it with the National Party, as has been indicated, we did say the word 'trade' could be debated as a possible compromise. I think we need to go back and look at that, see what the implications are. I think the National Party wanted to do the same. So, can I suggest that we put that word in, in brackets at the moment? If we cannot reach it over there, then we can revert back to our previous positions, but I think that we have made some progress and let us not make redress now.

Chairperson Thank you. Word is put in, in brackets and the other brackets are removed. Mr Hofmeyr, Willie Hofmeyr, are the

other brackets removed? The other brackets, are they removed? All the words seem unnecessary. Do you remove them or do you drop them?

Mr Hofmeyr We would still like the words that are in brackets.

Chairperson So you are dropping the brackets?

Mr Hofmeyr Brackets removed and I thought we had more or less agreed on that, I stand corrected.

Chairperson Oom ???

??? We just would like to know why it doesn't read: "regulated by national legislation" and just simply "by law". Perhaps the drafters or the experts can just tell us if there is any significance in that. We would prefer 'national legislation'.

Chairperson It should read 'regulated by national legislation' or is it just 'by law'. Mr Chibane, do you want to answer that? Or Professor Murray first.

(off mike)

OK. What's your question?

??? My question is, Chairperson, as to that the footnote seems to suggest that the words are unnecessary?

Chairperson Yes.

??? Now what I wanted to find out, is it the opinion of the experts or is it the opinion of the individual parties that, that part is not necessary? I just wanted to know what the

implications are if they are not there or are there.

Chairperson I thought it was the opinion of the experts. But Mr Hofmeyr seems to be saying he wants to keep the words in brackets.

??? Chairperson, I am asking as to, for example, if you put the words in brackets, I would think that they add something to the sentences, but if you say it is unnecessary, it means they don't actually, they don't remove anything. So I wanted to find out what is the reason.

Chairperson Oh, the reason for... That's right, yes. I understand you now. Professor Murray?

Prof. Murray I think to answer the first question, the reason the word there is 'law' and not 'national legislation' is that there are aspects of the common law that may regulate occupations and professions and that the best example is 'common law relating to restraint of trade agreement'. As to the second point, those words in brackets, it's not a particularly material matter, the words in brackets are, in our opinion, in any event covered by the limitation clause so it's a decision that wouldn't have... Whether or not to include them is a decision that doesn't have any major effect on the rights concerned.

Chairperson OK. Sheila Camerer?

Ms Camerer In view of the fact that the footnote says that the words in brackets appear to be unnecessary, perhaps you can just keep them there in the meantime until we finalise the wording of the clause.

Chairperson That's right. Good. We keep them there. Hofmeyr really has suggested that we drop the brackets; 'trade' is in brackets. Problem solved. Wonderful. Put 2 correct marks there. We now move to 23, environment. Has anybody got anything to say on environment?

Ms Smuts Yes, I am sure this is the appropriate time and place to raise the problems around horizontalisation. We are surprised at this stage of negotiations of reporting surely, Chairperson, to start looking closely at horizontalisation in respect of each ??? and I remind you - I am quickly trying to find it - that the ALS has an interesting point of view on this clause in particular. While I find it, as I recall, I think they suggested that the first part, (a)...

Chairperson Are you a member of the ALS?

Ms Smuts I am nothing, nothing of the sort, as you perfectly well know, Chairperson. The fact some of our advisers also advised on this one doesn't even imply that we always have a position, as you also perfectly well know. (laughter) Here we are. "Clause 23(a) may be read, especially when consulted with (b) as conferring right to ??? private persons if so it facilitates open-ended horizontal environmental law litigation and the case-by-case development by the courts of an environmental protection system. This is undesirable because environmental protection requires planning and structure by governmental authorities who have at their disposal information ..." "...proper environmental protection also requires development of carefully designed process and institutions." They therefore suggest the following formulation: "Everyone has the right to reasonable, effective



and easily enforceable legislation, protecting and advancing an environment that is not harmful to their health or wellbeing preventing pollution and ecological degradation." And some other stuff, promoting conservation and so forth. I mean I think there is something to that, Chairperson, and surely we should discuss it. The (b) part obviously requires government to do something about it. Do we think that there is a problem under (a)?

Chairperson

Do we think there is a problem under (a)? Sally Liebenberg?

Ms Liebenberg

Mr Chairperson, I have great difficulty understanding the purport of that submission because surely you want a situation where the common law rules of ???, for example, dealing with environmental hazards and that are influenced by a clause such as 23.1. So, if you are someone who has sort of moved in next door and sets up a polluting factory that endangers your and your children's health and so forth, and there isn't legislation in place or it comes to court via common law interdict or something to that effect, that the courts will apply the common law rules ??? in the light of 23.1 and certainly, I mean, the European court of human rights have had no difficulty in, in fact applying the privacy clause to situations where there is pollution or a hazard to health by businesses or other private entities. So, it is not just a right for the state to adopt legislation, but also that in horizontal relations that you would want some influence of this clause on common law rule. It seems to me because there is a very fundamental importance of environmental hazards not causing damage to health and safety and wellbeing of a person, that it is a very important suggestion to have in your clause.

Ms Smuts                    The question then really remains because I agree, the ideal situation surely is to use the common law as a vehicle and to have it infused with the right principles. The question then remains. It is really a question for government rather than anybody else. Is it not desirable in the first place to have legislation so that you have a... Yes, Professor Cheadle agrees. But then the question is: Is it necessary to state it?

Chairperson                Mrs Pandor?

Ms Pandor                 Chairperson, I actually think that we to some degree resonate with some of what is said in the document that Ms Smuts quoted and covers the very areas that are raised therein so the legislative measures are in fact provided for through 23(b) to have environment protected through reasonable legislative and other measures designed to... And then we have (a). It seems to me that in fact the matter is addressed appropriately.

Chairperson                Addressed. Resolved. Not quite? OK.

???

Chairperson, the National Party would actually like to present, after a great deal of research and very careful consideration, text for clause 23. It basically envisages the same clause, but with amendments and what we suggest are actually improvements. We have given the ANC sight of this text, but we would like to formally move now that we table it. We in fact envisage in another of the committees of this Constitutional Assembly to suggest the establishment within the Constitution of an environmental commissioner, probably in Chapter 7, and we will motivate

that as well as consequential removals to such a suggestion. So, we would like now just to table the present amendment and ask that the committee be circulated in due course with it.

Chairperson

OK. There is a draft that the NP would like to table. "Everyone has the right (1) to an environment that is not harmful to their health, wellbeing and quality of life, (2) to have their environment protected through reasonable legislature and other measures for the benefit of present and future generations. (that is 2a) (b) preventing pollution and ecological degradation, promoting conservation, securing the ecology, safeguarding the environment, securing the ecological integrity of the environment." That is their proposal. We would like to hand this over. Do you have any response to that?

???

I think at this stage perhaps that we should just allow parties to have a good look at it, and perhaps the technical experts as well, and that we should put it on the agenda for the next subcommittee meeting.

Chairperson

There's a proposal. Would you like to consider this? Mr Chibane first.

Mr Chibane

Chairperson, I am not necessarily addressing the proposal. It's a question of ??? and that's because I look at the ??? made by the DP. That is the objection in terms of the present formulation that it should not apply to horizontal and that is if the answer is positive to what extent do we ??? with the rights as they are and I think ??? should be horizontal or vertical. We have to enter that debate now.

Particularly on this slot ??? in general as we ???.

Ms Smuts

Is he asking whether we are opposed to the horizontal application of the clause? Then the answer is 'no' we are not opposed to horizontal application. The question was whether one ought to think of other ways of making it work horizontally. Each right here, or a specific set of them, needs to be thought through individually for horizontalisation and the point here was whether it is more desirable to do it by way of legislation – which would govern how this right would operate between private parties – or whether you use the common law as a vehicle. So the question is not from our side whether it ought to operate horizontally. We think it ought.

Chairperson

Mrs Pandor?

Ms Pandor

Chairperson, I would like to go along with Senator Radu???’s suggestion. We have received copies of the submission and would like to study it closely. There are one or two, I think, significant changes that it does introduce and we would like to look at those carefully before expressing a view.

Chairperson

OK. I think the proposal is that parties should be given an opportunity to consider this one. The new proposal. Let’s look at it and see how far we go. In the end I really don’t think we are going to have a major problem on this one. I think it is eminently resolvable. As long as parties approach this one as they are approaching all other clauses, with an open mind and view, taking and giving and reaching agreement, there shouldn’t be a problem. I think we are

making tremendous progress. Now we go to 25, housing and land. What is happening with housing and land?

Mr Hofmeyr

Chairperson, on the clause as it stands, I think there is general agreement that subclause 4...

Chairperson

I am told that the memo. on Sections 25 and 26, before you mislead this house... I haven't looked at this one. Can we ask the authors of this memorandum to take us through it? Ms Liebenberg?

Ms Liebenberg

Yes, Chairperson, you will recall it came at the meeting previous to the last one and where the Democratic Party referred to a submission from the ALS with approval and you requested the technical committee and the panel of experts to go away and to look at that and to look at a way of possibly incorporating it into the draft. Now, the memo. really deals with the democratic wording which is the statement "reasonable and effective legislative and other measures which promote and advance access to adequate housing". And this is the other wording that they have proposed and the memo. is really saying that if that wording is acceptable to the committee, it could be incorporated in the way suggested, but what the memo. doesn't accept is the ALS' submission to the effect that there is only an obligation on the state to take reasonable measures to secure access to housing because, as we've argued in the memo., there is also the question of the negative enforcement of housing rights. So, it's not just about the state providing housing, but it's also the protection of people's housing once they actually have housing and for that reason we felt it was appropriate to make the division

between 25.1 and 25.2. But on the actual wording and the statement "to take reasonable legislative and other measure which promote and advance access to adequate housing", I think the feeling there was that it was something that the technical committee felt that it conveyed the same effect as the present wording "and to promote progressive realisation of the right". The disadvantage of it is that it doesn't have the same international and ??? jurisprudence behind it that 'the progressive realisation' does have. So, I think it is really, from our point of view, a point of political decisionmaking among the parties as to which wording they would prefer.

Chairperson Right. Which wording do you prefer? You want to give me an answer? Mrs Camerer?

Ms Camerer Chairperson, I don't think it is possible to give an off-the-cuff answer. I mean, obviously we would like to go and study this, having seen it for the first time and take it back.

Chairperson We have to settle this one. No, no, no. I'm even prepared to give you time to go through this and I assume that you are a fast reader, like I am, and you will be able to read this as quickly as possible.

Ms Camerer Mr Chairperson, I am terribly sorry. I don't know how it didn't come to our attention, but all three of us here haven't really had it in front of us before.

Chairperson Hello, Mr Eglin. I hadn't noticed. Why do you slip in so quietly? It's unlike you. I am not happy with referring this back; with the idea that people will go through this and

consult again and all, I really am not. We have had this for quite a while now, isn't it? Let me hear proposals on all this because what we need to settle is not terribly complicated. Mrs Pandor?

Ms Pandor

Chairperson, you are correct. I think absolutely that it is not complicated as it is in that we are having to make, what we have before us contains a ??? of the demands and requests that the various political parties had made to the panel and it very well addresses all the issues that we had raised concerns about. I think, Chairperson, if parties feel that they really need time, given that this does not substantially alter the views that they have presented and supported up to this moment, we could perhaps ask you to indulge the parties by allowing a break for 15 minutes for them to caucus and then come back with a response and that should finalise this matter, we really feel it is at the stage where we can make a decision.

Chairperson

All right. Can I do this? We are going to have a tea break. So I hope. Do they serve tea in this place?

???

Not at 25 to 3, but they do serve tea at 3,30.

Chairperson

3,30 they will serve us tea. We can leave this in abeyance for now and come back to it.

(Mrs Camerer off mike)

Sheila, no, I'll find you advice, please. We must make some progress. Let's leave 25 and 26 for now.

Mr Hofmeyr

Chair, I think really that 25.1 is the same, 25.3 is the same, 25.2 is the same except that they are really saying we

should consider the DP's formulation or the one that the DP supported from the ALS. You know, the intention in that reformulation is to say the same thing, but in slightly clearer language, so I am not sure what the big issues of principle are that we have to think about. I think what I could suggest... I think we are happy with accepting the DP's formulation, even if they are not, but could we not just say that we have tabled this? If parties do have reservations about the reformulation, which is a general one for socio-economic rights, that we can raise this again in the future. But it seems to us quite uncontroversial and undifficult.

Chairperson That's what I also mean. Let's give them a chance until after 3,30. It's not a long time. Let's give them a chance. OK. That then takes us to 27. There can't be a problem here. The only addition was 'degradation' (d).

Mr Hofmeyr Chairperson, I think that has been agreed to. The only outstanding issue is 27.1(b), the brackets around 'parental care'. I think in our discussions with the NP, we have indicated that we will look sympathetically at the removal of the brackets. We would just like to have a last consideration of the implications.

Chairperson Agreed to, subject to consideration. Progress. Wonderful. Education. Oh, sorry, you want to record progress there too. Oom ??? you want to say anything? Or do you want...

??? The decision here is that we had a bilateral yesterday, as you well know, and we have discussed this at some considerable length and we are considering our position further.



Chairperson Ja, OK. Mr Hofmeyr?

Mr Hofmeyr Chair, just as a point of clarity, I think the National Party has agreed that they would try and formulate this in more narrow terms and come back with a new formulation, if I understood correctly.

Chairperson This is moving out of the deadlock category into the consider category. Let's move then. Going very well. That's education. Language and culture. 30. How do we handle that? Mr Hofmeyr?

Mr Hofmeyr Sorry, Chair, where are we? The National Party would like to have the words after 'choice' in the second line deleted. I think there is a looming deadlock on that if I may put it that way because I think we feel very strongly that they should not be deleted.

Chairperson Don't be alarmist, please. Don't be alarmist. Such shouting that the house is on fire and then you have every newspaper in the country saying the country is on fire when it isn't. The National Party, as I understand it, would like to put this under further consideration.

Ms Smuts Mr Chairperson, I really don't agree with Mr Hofmeyr's gloomy prognostication. I mean, we thought we had made a very positive contribution in the discussions we had, but those words, we didn't say they should only be deleted, but possibly replaced by other wording which would bring the clause more into line with the provisions in clause 14, something along the lines of 'to the extent that this is consistent with the provisions of the Constitution', which

is the way it's treated... and religious and traditional matters are treated in clause 14. So, we would like to table that proposal as an alternative to the wording after 'choice'. I don't know if I should make the wording clearer, but what we would suggest is to the extent that this is consistent with the provisions of the Constitution.

Chairperson Ms Liebenberg?

Ms Liebenberg Chairperson, at the risk of causing another storm, but there was another memo. circulated at that same meeting as well relating to exactly this question of... I think at that last meeting your point was that you should consider a similar wording to 14.2 and then also look at the international precedence and reproduce some of the international agreements. That has also been done in this memo. It was circulated.

Mr Rabie??? And your footnotes 19 there.

Chairperson ??? this question. So the technical refinement team, the people we asked to refine this Constitution, has considered the formulation and they are convinced, overwhelmingly convinced, that this formulation is appropriate. Now, these are experts, these are the people who we asked to give us expert opinion, and we need much stronger basis to argue against them and go against them. Can I ... Sheila, I don't know if you want to open a lengthy debate on this one. If you don't... I don't know what I want to say, but I want to say something that will help us move on.

Ms Camerer Chair, can I just say that it was ??? team of the experts

addressed this specific points ??? just bringing the wording into line with the other clauses. I mean, I can see the point the point they've made, I have no problem with that, but if we are using... Perhaps we should consider using this phrase in the other clause. I mean, the idea is that we don't violate the rights of others in terms of equality and so, but traditional customs and the practice thereof wouldn't violate the equality rights, for instance, and so on. So, I don't know why we have to use different wording from the wording we've employed elsewhere. That's all.

???

Chairperson, I could try to react quickly. First reaction to this idea of putting in 'consistent with the Constitution' to the 'consistent with the Constitution', may only be exercised 'consistent with the Constitution'. It's different in Section 14. There we talk about recognition of traditional marriages and recognition of systems and then it says: "such recognition may not be inconsistent with the Constitution". What we deal here with is simply a guarantee with regard to a right and it actually stands to reason that all rights – all rights, not only this one – can only be exercised consistent with the Constitution. So, it's a little bit troublesome to add that phrase here because it really applies to all rights, that reservation.

Chairperson

OK. ???, do you want to add?

???

No. Chairperson, I don't have anything.

Chairperson

Can we leave this for now? Let's leave this for now and we can come back to it under the category of 'Agreed'. If we still have this uneasy feeling about matters, we can always

come back to them. Let's leave it under the category 'Agreed' and we move on. Thank you. That then takes us to 32. What's wrong with 31. Oh, yes. I see. Yes, 31. I apologise.

Ms Smuts

We should thrash out the question, Chairperson, of horizontal applications under (b) and we should decide whether this is something that we can constitutionalise. Having looked at the question ourselves, we came to the conclusion that in fact you can't, that the way we looked at the experience in places like Australia and Sweden where they have long established traditions of rights to information and the Swedish ??? a constitutional right and the Australians, of course not, since they are not rights based. But both of those countries have experience in the field, had both explored - by way of commission I think - the possibility of creating a right of access to information on the horizontal plane against juristic questions and other, and it sounded impossible. They had all come to the conclusion that you couldn't start legislating, let alone constitutionalising. Frankly, the private sector is simply not comfortable to public ??? in the same way as the public sector. Secondly, all sorts of endless problems arise. The basic problem is that there is a kind of a wavy line. There are certain kinds of juristic questions, especially parastatal ???ing privatised or restructured where one would like to see a right of access to information operate. But even there, it might be different for arguably an airline or another kind of utility, and so the basic situation from our point of view is that the question is so beset by questions that we doubt that you can constitutionalise it. When it comes to legislation, clearly the better way to deal with it is any

government will set up regulatory bodies. If you are talking about companies for example that might be producing environmentally potentially hazardous substances, whatever. One would like to see some sort of right of information operate both for the press and for citizens, but the best way surely to handle it is that the government should in the first place have regulatory bodies keeping an eye on these factories and so forth and that both the press and the public ought then to be able to get at that information through the regulatory body, which is a public institution. That seems the prudent way at this stage until such a time as people have worked out satisfactory legal definitions of what you do with this extremely wavy line and we would be interested to hear what the views of other parties and of the experts are.

Chairperson

Thank you very much, Dene. Willie?

Mr Hofmeyr

Chairperson, we have discussed the matter as well in bilaterals with the National Party. I think the proposal that we have come up with may go some way to meet the concerns expressed by the DP, if I understand them correctly. Essentially our proposal is that at the beginning of the clause we should delete the words: "everyone has the right of" and we should start the clause by saying: "the state must take legislative measures to provide reasonable access to..." and then to continue with "...any information held by the state or any information held by another natural juristic person..." and I think, as we indicated in the multilateral last time, our understanding was that the second line of (b) is in fact qualified, it applies to both (a) and (b) so this needs to be separated out from the (b). Then

sub. 2 as it stands would be deleted. Essentially the proposal is that there should be an obligation to pass this open democracy type act. There would be a test that it must provide for reasonable access.

Ms Smuts

Chairperson, but surely you don't want that qualified. That you can only give information if it protects your rights. You ought to have a flat right to access to information held by the state. What you do then in your legislation is to craft your exceptions as they do in any country, ranging from the United States to wherever, and they are always on the same grounds: foreign policy, national security, the privacy, if you are dealing for example with commercial type information. Your exemptions are always drafted under an Act, but my understanding is not that you would qualify for information only applicable to people's rights. The press, for example, ought to be able quite simply to put in a request for information; your information officer and a given government department would then be obliged, within x days - 5 or 10 days - to supply the information and not only where it affects private...

???

Chairperson...

Chairperson

Could you hold your fire for a second. We'll give Sheila an opportunity and maybe you can respond to both comments.

Mrs Camerer

Chairperson, this was put forward by the ANC in discussions with us. We've looked at it and I must say we can't understand why they want to take the actual right away - the right of access to information. Our view is that this is a very watered down right. We believe that the basic

rights should be there and we tend to go along with the DP's view that any limitation on the right of access to information held by the state could be dealt with satisfactorily in legislation although we are still looking at that aspect. I know it is presently phrased like that in the present Constitution which we did agree with, but we believe that it could well be dealt with in legislation. But we cannot... I would like to ask the ANC why they believe that we shouldn't have the basic right of access to information for the individual or juristic person to information held by the state written into the Constitution? We have that right now in our present Constitution and we have ??? a disappearing and watered down right situation. Why are we trying to do this? It would appear to us that we need, you know, that it is much stronger to have the basic right there rather than just a right to some legislation. I mean we would like a response from the ANC on that.

Mr Hofmeyr

I didn't think that we were coming here to trade cheap political shots, but I am quite happy to do that. I think the National Party is proposing exactly the same in relation, and the DP were actually the ones who said that it should be a so-called disappearing right in regard to private institutions or juristic persons. They said they wanted a regulatory framework, not the right in the Constitution. I think it is the same process the National Party is advocating with regard to private discrimination. But I think our motivation is – and we believe that it is a well founded on – that it is not a right that is found in constitutions throughout the world, that it is usually a right that is found only in relation to a regulatory framework set up by a piece of legislation. And that is why we want to give in the Constitution a right to the public that

there will be freedom of information. The state has to pass  
that legislation...

(end of tape 4)



CC Subcommittee - 5 March 1966  
Tape 5

**NOTES**

Oom Ray/André/Omré???

Who is first speaker?

0758:  
in the way that ??? limits information ??? rights.

0918:  
if my ??? party's attendance

1026:  
??? you didn't have to come to check

1498:  
receive ??? information and that part of information is a right that ??? international  
???

1551:  
looks at ??? universally ??? separate rights

1608:  
with regard to ??? rights

1781:  
both ??? be made

1791:  
security ??? in terms of the

2093:  
Who is speaker?

2279:  
Who is speaker?

2300:  
??? give it to me

2332:  
what is the ???

2474:  
second line as (b)??? - is it (b)

2559:  
this high??? part in brackets ??? I mean that's not???

2582:  
required to exercise ???

2680:  
all last night/such time???

2724:  
is it André??? or Omre???

2978:  
Is it Reverend Mishre???

3076:  
that information there?

3093:  
Who is speaker?

3539:  
profusely ??? fair

3653:  
because we think it's slow follows???

3667:  
column sounds nice???

3868:  
extracurial??? proceedings

3875:  
has had to find a residual ??? Section 25.

4014:  
due process goes ??? as an

4129:  
administrative justice to land ??? too

4223:  
can we allow admissions???

4238:  
Who is speaker? Oom Ray/Omré/André???

4249:

Leon Ray???

4270:  
memorandum ??? by the Democratic

4327:  
relation to ex ???curial proceedings

4608:  
right to ??? practice constitutionally

4633:  
in the Minister of Justice/administering justice???

4634:  
Is it administrative justice??? (this is repeated in this section). Or is it perhaps the Minister of Justice or in administering justice??? (definitely ends in a ??strative justice).

4702:  
raised in ??? opinion

4934:  
Swanepoel from Oseo???

5164:  
substantial injustice test or text???

5503:  
Omré/André/Oom Ray???

5783:  
socio-economic ???

5833:  
Mr Baum??? amongst us.

6499:  
I ???. It seems to me

6550:  
Is the speaker Ms Sally Liebenberg???

6556:  
is really to ??? provisions

6596:  
acknowledged ??? Theme Committee

6763:

Who is speaker? - Is it Professor Cheadle?

6864:

The ??? and all the accord

???

...and that is why we want to give in the Constitution a right to the public that there will be freedom of information. The state has to pass that legislation and the Constitution should contain a test to ensure that it provides it on a reasonable basis, but the difficulty we have – and it is a practical difficulty – is that in the granting of that right in the absence of the regulatory framework, that led to a lot of practical difficulties that we have discussed ad infinitum in this committee. I don't think we need to reinstate... The points that Dene made in respect of juristic persons is one indication of the practical difficulties that there are. But I am sorry, I just thought that when we discussed it in the bilateral that there has been a broad agreement that we should be looking at a regulatory framework. It is a point that we have been raising with the National Party repeatedly and if there is not that agreement then I think we need to go back to the drawing board. I think our understanding has been that the National Party was inclined to look at this approach, perhaps not the exact wording, but that we had broad agreement that we should go for this kind of approach. On the issue of the qualification, in the second line of (b), that is a qualification that is in the present Bill of Rights in the Constitution,.

Ms Smuts

It is in the Interim and it has been the subject of considerable debate and I will have to go through my papers, but I think that I have elicited from the Deputy President, Mbeki, an agreement in this house when the Parliament started. There is agreement from your party from

on high that we will drop this qualification because it is something that many sectors have felt very strongly about. The right to information cannot at source be qualified.

Mr Hofmeyr

I don't think that we have any such mandate, but I don't think that it is necessarily an issue that will stand in the way if we have an agreement on the broad way to approach this issue and I think that is really... I thought that we had made some progress on agreeing on the framework in which we are going to tackle this. If we have not made that progress then I think we need to go back to the drawing board.

Ms Smuts

Chairperson, I think there is agreement on the framework. It is simply unnecessary from our point of view, you don't have to say: "there shall be legislation" you can just state the rights. But we are perfectly happy to go along with the formulation of giving the regulatory legislative framework. So could we not consider that there is basic agreement, but that we are looking still at some of the details? Clearly the National Party isn't happy with some aspects. I certainly cannot accept anything that's qualified in the way that ??? limits information ??? rights. It's an old battle. That's an old debate. So there is agreement on the broad approach to it and that's the input and fine. Then perhaps we can fight out the details in the multilateral.

Mr Hofmeyr

I just think it would be useful to hear from the National Party because they did raise some reservations about the framework.

Chairperson

Oh, Mr Leon, welcome! I didn't see you were here. But

Parliament is on. Was it boring?

Mr Leon Well, I can ask you the same question because you are also a Member of Parliament! But I am due back in Parliament shortly.

Chairperson Oh, you will go back?

Mr Leon Yes. If my ??? party's attendance is a matter of concern to you, I am most touched about it. It's very civic minded of you, Chair, to be concerned about our parliamentary participation and presence, but we are represented in parliament at the moment plus my presence here as well.

Chairperson Nonetheless, well, it's good to have you here particularly when we are discussing the Bill of Rights. ??? You didn't have to come to check with her. (laughter) OK. Dene is saying, Willie and Sheila, Dene is saying there is broad agreement on this point. We need to flog this on. Shouldn't we just look at how we can fit in the details or... I am very attracted to what she is saying.

Mrs Camerer I am too. The fact is, Chairperson, that we did undertake to take it back and we have as a result of that consultation process reservations which I bring to your attention about this approach as far as legislation goes. So, I mean, it is only fair to say that we did exactly what was asked of us and required of us, but we have a conclusion at this stage. We are not entirely satisfied with this approach, particularly when it comes to access to information held by the state, which is required for the exercise of protection of rights. That right is in the present Constitution and I believe that

amendments along these lines would look like watering down. I mean I acknowledge that in terms of (b) it might well be necessary to look at a legislative framework, that's been our approach throughout. But, as far as the right as it is now in the Constitution, access to information by the state, we don't really understand that it is necessary to go this route which is a watering down, definitely, of the right as it stands now in the Constitution. But we are happy to discuss it further. You know, we only heard it was approached yesterday, we got a sort of view from our advisers on it. Perhaps if we get the wording, we could take it back again.

Chairperson

Mr Surty first and then I'll come to you, Mr Hofmeyr.

Mr Surty

Chairperson, I've got a small contribution. There will be freedom to receive and pass information is contained elsewhere in this Constitution. Then it's just between the question 15.1 (b) then we'll discuss how the media feels to receive ??? information and that part of information is a right that ??? international ???. The right of information as it appears or the way it is set out in the Interim Constitution has no national basis as such. What I am simply saying is that if one looks at ??? universally ??? separate rights then it should be set out as it is set out in this paragraph 15.1(e). However, all the parties seem to agree that there are difficulties with regard to ??? rights particularly as it applies to the private sector and we know, from the functional level, that this applies equally to the state, at the ministers Cabinet meeting, civil security and so forth. So, there are limitations that one has to take into account even in a transparent democracy and for that reason then with regard



to the difficulties of qualifications both on the level of the private domain and the public domain as far as the state is concerned, we felt that, that approach would be in order to promote legislation which will deal with this matter in fact. I mean, there is already legislation that is going to be introduced shortly which will cover this particular aspect so, in a nutshell, what I am saying firstly, is that this right does not appear in any other international constitution. Secondly, it is addressed to a great extent under freedom of expression. Thirdly, there is agreement that there are constraints with regard to the application of rights, both ??? be made and also in terms of the state with regard to security ??? in terms of the governmental aspect where there should be a degree of confidentiality. Therefore the proper thought would be: we have legislation.

Chairperson            Sounds good. Mr Hofmeyr?

Mr Hofmeyr            Chairperson, I think I am covered largely. I think... You know, we are a bit disappointed because we did meet with the National Party yesterday, discussed all this. One of the points that they've made here, they made there, but perhaps it would be useful for them to reflect further.

Chairperson            Sheila and André???, Dene is saying: Put this one under the Agreed category. All you need to set is the detail, which even now our experts here would help us with. And I am very persuaded by that. I am very attracted.

(Off mike comments.)

Do you agree, André??

???                        We would like to see the text, the proposed text. We don't

know what the finer details are that you are referring to, Chair. We would like to see a text in front of us. I don't think we can be asked to agree to something that is not formulated fully and that we've had a nice good look at. Our basic position is that we honestly believe that everyone should have the right to access of information from the state. That's our primary concern and then your inter-person relationships will be regulated by legislation, there's no problem about that. But if we can just see the text maybe we can get around this difficulty.

Chairperson

Mr Hofmeyr?

Mr Hofmeyr

Chair, we will give the text again to the National Party, but I thought we gave it to them yesterday.

Chairperson

Do you have the text in front of you, please?

???

I've got text which is somewhat different and I wrote it down yesterday, different from the one he has quoted this afternoon.

Chairperson

André, ??? give it to me and I trusted it to you. Trust me. Mr Hofmeyr, what is the ???

Mr Hofmeyr

Chairperson, the proposal is, as I said earlier, to delete the words 'everyone has the right of' and to put in...

Chairperson

Hold on, hold on! Let me get hold of it first. 'Everyone has the right of'...

Mr Hofmeyr

...and to substitute 'the state must take legislative

measures to provide reasonable'... Then it goes on to 'access'. I did not delete 'access'. And then, 'in regard'... I think at the moment our proposal is that in regard to the second line as (b) that, that should be (b)??? indented, unindented and that 2 should be deleted. If we can discuss that. I think also, as I said that our, I mean, we have not drafted this necessarily, this consistent language elsewhere in the Constitution and we would be happy if the technical drafters look at that.

**Ms Smuts** Can we put this ??? in brackets ??? . I mean that's not ??? problem, qualifying one. Could we put that bit in brackets, "required to exercise ??? protection of the rights".

**Mr Hofmeyr** If there's a dispute about that, we are quite happy for it to be put in brackets.

**Chairperson** Mrs Pandor?

**Ms Pandor** Chairperson, I wonder, for the sake of progress whether at this stage, March 1996, heading very closely towards May 9, we should actually be putting phrases in brackets, given that we have had these phrases before us all last night???

(off mike comments)

**Chairperson** We've just had a draft. What André??? has said, shall be erased from the record, please, please. Otherwise everyone would like to respond to what she has said. Erase that from the record. We have just had a formulation read by Mr Hofmeyr, how did that grab you?

Mrs Camerer

Mr Chairperson, that is the formulation that I wrote down. It hasn't differed at all from what was given to me yesterday, but as I tried to explain, I mean, I said 'yes' we hear what you are saying, it sounds fine to us, but we will take it back and we've taken it back and discussed it and our principals, I'm afraid, I don't know how to put this without hurting Willie's feelings, don't like it particularly and the thing is that when I say this to them, they say I am making cheap political shots. The fact is I can't pretend they do here, so I am really trying to take the debate forward and putting, you know... After consultation, this is the position. But we are prepared to look at it again in relation to particularly (b), that formulation. But we wouldn't like the wording as it stands to disappear and only have the ANC's wording in the next document because we cannot commit to that wording at this point in time because we have had advice that it represents a substantially watered down right. Now, we are prepared to go and discuss it further.

Chairperson

You are prepared to discuss it further? OK. That helps me. Reverend Mishre???, I hadn't noticed that you are here. Welcome, welcome, Reverend! Are you able to shed any light on this. We desperately need light here now.

Rev. ???

I want to endorse the right as it stands in the Interim Constitution. Secondly, I want to ask the ANC a question and the question is why were they happy with the right when the National Party was the government, but now that they are the government, they do not want... Everyone has to have the right to that information there???

???

I am not aware that there were any rights when the National Party was in government. (laughter)

Chairperson

It's a very good one, hey?! Such a good one, you must admit. I think what Sheila has said, to go back and consider again helps a great deal. I have been working on a number of categories here. I have agreed deadlock, technical refinement team, consider. I was about to have another one: ridiculous. So, I am not going to add ridiculous because I would have put this one under ridiculous. So, none of you are being ridiculous, so we put it under 'agreed, but to consider'. The 'agreed' column, but 'to consider'.

Ms Camerer

Could we have the ANC's version as an alternative version at this point, Chairperson?

Mr Hofmeyr

Supported by the majority party. (off mike)

Chairperson

We will come back to this one. Agreement is not out of reach. I think you are all just sparring. Administrative action, 32.

Mr Hofmeyr

Chairperson, I think this is something that we will have to discuss further, but we have indicated in the past that we may look at a compromise on administrative actions that largely incorporates option 1, but perhaps in a similar context to what we are talking about in regard to accessing information. We do have a proposal that I will table and ensure that it is distributed to the other parties, but maybe I should just mention it. It says that "the state must provide by way of relevant legislation access to just administrative action", sub 1. And sub 2, "the legislation referred to in

subsection 1 must (a) provide for the review of administrative action by a court of law or an independent or impartial tribunal, (b) would essentially be the same as under option 1, the first clause. It would say "impose a duty on the state and organs of state to take lawful, reasonable and profusely ??? fair administrative action, (c) be justifiable in an open and democratic society based on freedom of equality, and (d) promote an efficient administration." I don't think that there is much purpose in discussing this. We have unfortunately only just been able to get this ready, but I think that it may provide a basis for meeting these concerns that have been raised on different sides on this issue.

Ms Smuts (off mike)

Chairperson It sounds nice?

Mr Hofmeyr It isn't because we think it's slow??? follows, but I think we could consider that.

Chairperson It sounds nice. Column??? sounds nice. Wonderful.

Mrs Camerer We would like an opportunity to study the wording because this time the wording I've written down here from our discussions yesterday doesn't correspond with what's been said. So this is new?

Chairperson Ja. It sounds nice, all the same. OK. We've been dodging this one for a bit too long. Could I propose that it be typed now and circulated whilst we are sitting here? You did bring your computer? Access to courts. Any problem with access

to courts? The DP want to add 'due process'.

Ms Smuts We would like to remind you that we have tabled a proposal, very short.

Chairperson I seem to recall that.

Ms Smuts You will remember it. Also "shall enjoy the right to due process of law" and I am sure you recall the short and elegant motivation as well. This matter has already occasioned difficulty in the Constitutional Court where in relation to extracurial??? proceedings the court has had to find a residual ??? Section 25. And then the second phrase: "the concept of due process is not confined to criminal proceedings or matters ancillary to such a process". There's a bit of a gap in the Interim Constitution and the way to plug it would be a clause like this. So, can we see what reaction there is from the other parties?

(off mike comments)

Ms Smuts ...give them the whole motivation. Ja, well, your basic due process rights for non-criminal matters are not spelt out. The wording of Section 25 defines the many procedural rights set out in that section, the three classes of person: detained, arrested and accused. The commitment to due process goes ??? as an entitlement of those classes of persons. This matter has already occasioned difficulty in the Constitutional Court where they have defined residual content. In the second place, the content of due process is not confined to criminal proceedings or matters ancillary to such a process. One of the peculiarities of the Constitution

is that it appears to afford no right of due process in civil proceedings. That is an omission that requires curing. Thirdly, the due process clause is an important residual position. It commits our society to proper process. It has often correctly been pointed out, fundamental rights are largely the rights of process. The residual aspects of a due process clause give useful support to a cluster of other rights of the Constitution without redundancy. Such rights include rights in the sphere of labour relations and administrative justice to land ??? too. Can we take the opportunity of asking the experts for their views as well as the other parties ?

Chairperson I would like to. It's very much unlike you, Dene. You've never had to read a motivation. You've always been so articulate in putting it forward in your own words.

Ms Smuts It's not my field, Chairperson. You know, I support...

Chairperson Also from the ALS! OK.

Ms Smuts ...Democratic Party. Democratic Party in chamber.

Chairperson In chamber! (laughter) Ja, but everything is allowed. André/Omré??? can we allow admissions??? to come in first?

??? Thank you, Chair, for not calling me an 'Oom'...

Chairperson No, there's only one Oom in here, that's Oom Leon Ray??? No one else is qualified to be called 'Oom'.



???

I think that the way Ms Smuts put it... We have received a memorandum ??? by the Democratic Party in chambers, that's more or less the same content! What she said. Now, to react to this, the first matter in this memo. is that the... (loud whistle) Sorry, Chair. ...the matter already – it was not me – occasioned difficulty in the Constitutional Court with relation to ex ??? proceedings, the court has to find procedural content to Section 25. I don't know who read that case, but that's not a quite correct version of what happened in that case. They didn't find a residual content in 25. 25 was applied without a residual content. In the second place was mentioned that the present Constitution doesn't deal with due process in civil proceedings. That is true about the Interim Constitution, but in the new formulation that's been agreed upon, there is a right to a public and fair trial in civil proceedings. Now the word 'fair' I think would cover proper procedure. It is not in the Interim Constitution, in the access to justice provision. 'Fair' is now there for the first time and that, in other constitutions, has covered all the guarantees with regard to civil procedure. Then, the third point was with regard to the need for a general residual clause. It's an open question whether that is really necessary. In the Ferreira case, two of the judges said there is a need for such a general residual clause, but the other nine/one??? said, "No, our Bill of Rights is extensive enough that we don't really need that." So, that is an open question whether one really needs such a general residual clause.

Chairperson

Professor Cheadle?

Prof. Cheadle

Can I just add to that? The two examples that he gives is

labour relations and the Minister of Justice/administrative justice???. I think if you look at the labour relations clause, you will see the right to fair labour practices that have been extensively interpreted by the industrial court, the labour appeal court and the appellate division, who speak of 'procedural fairness' in labour relations disputes. So, again, the right to ??? practice constitutionally will ensure any procedural due process that's necessary in labour relations and in the administrative justice.??? Again if one goes back to that clause, the procedural fairness is an issue that's incorporated in the clause, certainly in the proposal made by the ANC today that is also part of that proposal. In other words, if there is any residual issue in administrative justice, it has got to be looked at in the administrative justice clause and when that's finalised, I think you will see that there is no need for a residual due process clause, particularly in relation to the two specific issues raised in ??? opinion.

Chairperson            You know, that's why we have experts. That's why we have experts.

(off mike comments)

You know they... I have never had them this articulate. We will put this in the Agreed category.

(off mike comments and laughter)

Good, Agreed category. Arrested and detained and accused persons. We must do this one and finalise it. We really must. Mr Hofmeyr?

Mr Hofmeyr            Chairperson, I am now... On a number of issues. I think the first one is in relation to 34.1, what should be (e), where there are two options. I think the feeling from both the ANC and the NP is that we could opt for option number 2. In

relation to 34.2(c), there was some of the submissions – I think particularly from Jan Swanepoel from Oseo??? – that there is a difference between the way we deal with legal practitioners in 2 and in 3 when it comes to detained person and the right to fair trial, particularly the wording in (c). I think that we – and I think the National Party supports us in this view – would like the wording there to make it clear and perhaps we should be using the word 'assigned' as it was used in 3(e), but to make it clear that it is not the right of a person that the state will pay for the legal practitioner of their choice, but that the state can assign a lawyer to defend them through the Legal Aid Board or through the public defender system or whatever. We are just not necessarily saying that 'assigned' should replace 'provided', but we would like that issue to be made very clear in 2(c). Similarly in 3(e), in fact you will see that the subject matter, what is dealt with in 3(e), is dealt with separately in 2(b) and 2(c) to make it clear that there are two issues that are being dealt with. The one is the right to choose one's legal practitioner and the other one is the right to be provided with a legal defence. And we would think that it would be better to go into 3(e) for the same approach of breaking up that clause as 2(b) and 2(c) are broken up. I think there is agreement also between us and the National Party that the words in brackets could be deleted and that we use this substantial injustice test??? both there and in subsection 2. In relation to Section 3(l), Nico Steytler in his memorandum argues convincingly, we believe, that what is covered in 3(l) is already covered in 3(c); in other words, that the trial should be concluded without delay, that sentencing should be part of the conclusion of the trial and that if it is not, it would in fact have drastic consequences because it may

imply that post-sentencing procedures, such as appeal, would also be excluded from the ambit of 3(c). So, I think the suggestion that Steytler made, and which we will support, is that (l) could be deleted safely. And then, I think the National Party is also with us on that one. On subsection 4, again in relation to the memorandum from Steytler, the concern that he raises is that the use of the words 'must be excluded' there in effect sets up a test that may become as rigid as the poisoned fruit test from America, which I think our intention has been to avoid and while we do not have an exact wording, I think our suggestion would be that we would rather have a case there that refers to the fairness of the trial, that one would be saying evidence should be excluded if the admission of the evidence would adversely affect – or words like that – the fairness of the trial. So that one does not build up a set of rigid exclusionary rules, but makes it clear that this is to be judged in the context of each and every case. And there I think we are really in the hands of the experts to come up with a formulation that captures that. Thank you, Chairperson.

Chairperson Right, how do we respond to all these?

(off mike comments - sounds like Ms Smuts.)

OK. All right. Omré/André/Oom Ray???

??? Chairperson, we are basically in agreement with the National Party. We would like to confirm that.

Chairperson You are in agreement with the National Party! (laughter)

??? With the ANC. When I look at them sometimes...

Chairperson            You think that's the National Party?

???                        ...the National Party starts to shine through!  
(off mike comments – laughter)

???                        Chairperson, yes, we would like to have a look at sub. 4's reformulation by the experts when that is available, but in general we think the changes are logical and we agree with them.

Chairperson            OK. So, it's agreed to, subject to... What did you say, Dene? Partially agrees! Tentatively agrees! There is sufficient agreement. I think we have to give the DP the opportunity of reverting back to this one. But it falls enough, substantially within the agreed category and we will come back to it. All right. Then we come back to it, that's the reason why we will come back to it. Then, the tea. They are ready. OK. Maybe what we should do is to take a quick break, a quick break and then when we come back we look at the socio-economic ???, limitation of rights, state of emergency, enforcement, application, interpretation, and we are done! As we take a tea break, I would like to welcome Mr B??? amongst us. Always good to see you, sir. Not giving any attention to me! I mean, seriously, you are in my court, Mr Wessels is in my court now; we are not in your court! It's good to see you. It is always good to see you. Welcome! from the Land Claims Court and many, many other structures. Thank you for gracing this session of the subcommittee with your presence. Would you like to join us in a cup of tea? Thank you.

(off mike comments by Ms Smuts?)

Can we take a tea break and then we come back to socio-economic rights.

(tea break)

OK. 24. No, sorry, I keep saying 24. 25. I'm sorry. 24 is not the issue, it really isn't. 25. Mrs Pandor.

Ms Pandor

Thank you, Chairperson, and thank you for allowing us to go back to that. I think, Chairperson, what we would like to have noticed is an alteration to what may have been minuted earlier, that the ANC would be supportive in terms of other proposals from the technical committee of 25.1(ii) as it appears in the memorandum and the suggestion coming from our side was that we would accept the words in brackets, the 'or' that refers to measures that promote and advance... Our preference, Chairperson, is for the words that appear before the brackets because consistently we had been attracted by the motion of making reference to the available state resources and we believe that 25.2 before the brackets and words addresses the concern that we had in terms of the wording. So, that is the preferred wording that the ANC would want to be adopted and not the wording after the brackets, or within the brackets.

Chairperson

Not after, within the brackets. In other words, you want to leave out 'within its available resources'.

Ms Pandor

No, no.

Chairperson

Which one are we looking at?

Ms Pandor

The statement from our side earlier that we would agree...

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Chairperson Oh, I see! So, we are looking at this one?

Ms Pandor Yes.

Chairperson Oh, sorry, sorry. I apologise to Mrs Pandor. I apologise.

Ms Pandor Thank you. We would want to say we support the wording that is in line with much of the international instruments and treaties. That is the one that we would support once we have come to arrive at finality. I just wish to clear the record on this one.

Chairperson The state must take reasonable legislative and other measures within the state available resources to achieve the progressive realisation of this right. OK. Right. Sheila?

Ms Camerer Chairperson, it looks reasonable, but I would like to take it back finally and give you a final OK.

Chairperson Good, that's reasonable, want to take it back. Same with you?

(off mike comments by Ms Smuts?)  
Wonderful. This is wonderful.

Ms Camerer Sorry, Chair, I forgot to mention a thing. That's in connection with subclause 3. That we have continually said that we felt that we weren't entirely happy with the way that, that clause was phrased. The fact that the words 'or have their home demolished' makes, you know, allows it to make more sense, but we are still not entirely happy that we haven't referred in this clause to a lawfully occupied home and we would like to just... We would like those



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words in brackets, Chair. We have mentioned this on a number of occasions, but it doesn't seem to get through to the draft.

Ms Pandor

I ????. It seems to me that if one would make an application for the exercise of this right, they would be doing it in the context of their home which one would assume it is; the implication here would be that in fact your home is lawfully yours, I don't see what the addition of 'lawfully' would achieve.

Ms Liebenberg???

Chairperson, yes, I mean, the effect of this clause is really to ??? provisions in legislation like we saw with the prevention of illegal squatting act, which would ask the court's jurisdiction in eviction cases, which would say like a landowner can go in without a court action, without a court application, and demolish and evict people from their homes and I think that's sort of been acknowledged ??? Theme Committee discussions. It's a very important aspect that you want to test. You want a court to determine the eviction, the lawfulness of the eviction, and you don't just want to restrict it to... Because that's exactly what the court's application is going to do, is determine the lawfulness of the owner's occupation as against the interests of the people who are occupying the land. So, I mean I see this as being a very vital procedural right, including lawfulness.

Ms Camerer

Chairperson, you know the point that we made right at the beginning is that we believe that 'arbitrarily', you know, if the fullstop came after 'arbitrarily' we wouldn't have a problem with that then. But where we are talking... You

see, what worries me about the way this is constructed, is that it looks as though... You know, if you get an order of court. I mean, maybe my legal drafting isn't as good as the panel's - and no doubt it is not - but you could actually then arbitrarily go and evict and demolish. I don't know, it just seems... Perhaps we should go one way or the other. Or just... Our preferred route would be to stick with the word 'arbitrarily' which we favour in other clauses as well, but not in... I mean, certain other clauses as well, Chair.

Prof. Cheadle??? There are two issues that are being raised here. I think what you really want to deal with here is primarily that you are not evicted from your home or have your home demolished without an order of court. That's the nature of the... The core nature, I think it is called. You must... And that resolves the question of lawfulness, which concerns you because a court of law, of course, will only permit an eviction or a demolition of a home if it's lawful and that will then go directly to the question of whether or not the occupation is lawful.

Chairperson Yes.

Ms Camerer Perhaps you could just look at the way it is drafted then...

Chairperson Yes, but doesn't that answer this, quite honestly? Doesn't it? The way that Professor Cheadle has explained it? The ??? and all the accord. I mean the court in the end would be able to determine all these things. Mrs Pandor?

Ms Pandor I think, just briefly, in conversation with Professor Cheadle here, he does agree that one would perhaps look at whether

one could re-order the wording so that it is clear because I think what Mrs Camerer is implying is that the meaning that could be taken to derive from the formulation is that if you have an order of court, you can arbitrarily demolish so therefore perhaps we need to look at tightening the formulation to make it quite clear what is intended. I am very sorry to intervene on behalf of Mrs Camerer, but I think that makes it clearer.

**Mrs Camerer** I have been making this point for some time, Chairperson. You know, we have been concentrating on subclauses 1 and 2 so we haven't really looked at the wording in detail, but perhaps now that we are, we could ask the panel to take it back and we'll reconsider the wording.

**Chairperson** They take it back and we reconsider? What does that mean?

**Mrs Camerer** We'll have a look at it once it's here, once they have reworded it. I want to say that we discussed the whole question of possibly... I have a note that there was a possibility that there would be a fullstop after 'court' as well. You know, the rest of the clause wouldn't be included. I see it is still included.

**Chairperson** Yes, Professor Cheadle?

**Prof. Cheadle** Can I suggest, I mean without having discussed it fully with the committee and with the panel, I mean, the question is that I just can't conceive the courts ordering an arbitrary demolition which means that you shouldn't have the word 'arbitrary' there at all and it might well be resolved by

saying that you may not be evicted or demolished without an order of court. The court, of course, is bound by this Constitution and accordingly, as I say, you could only get a lawful order.

Chairperson            How is that?

Prof. Cheadle            I mean, the wording as it presently stands, just remove the word 'arbitrarily'.

Chairperson            So you remove the word 'arbitrarily'. Agreed to? Agreed to.  
Thank you. Now...

(off mike discussion about 'arbitrarily')

Are you on the small draft? I was on the...

(end of tape 5)

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Tape 6

Chairperson ...Are you with me, Willie? On the small draft. I was on the other one. I was one ??? now I have been found! That 25.3 on the small draft. 1, 2, 3, 4, 5, sixth paragraph. OK. I'm with you. Right. So, that's cleared; automatically falls into the Agreed category. We are doing very well. Very well indeed. 26. Mrs Pandor?

Ms Pandor (far from mike) So, the same would apply now. ??? as with my earlier comments, with reference to 25.2, that we prefer the first ??? ??? to 6.2 and not the word that was in the brackets.

Chairperson Yes, I think that was agreed. Agreed to. That then moves Help out of the way. Agreed category. That then takes us to children. No, no, children we've done? Sorry?

(off mike comment)

Just before, yes, thank you. Mr Hofmeyr.

Mr Hofmeyr Chair, just in relation to 26.1 we don't have a major question there, but a minor question. Just around the question of whether we take decisions on food and clean water. We just would like to place a question mark around the 'clean' for the moment. We have had some advice that it would be sufficient to say water, but we want to think about it. We just want to get intent notice about that.

(off mike talk - laughter)

Chairperson Don't you want us to remove 'clean' and when you have considered your point, you'll come back and say 'that's

clean' or whatever.

Mr Hofmeyr If that's OK with everybody.

Chairperson That's more clean. Everybody is in a clean, pleasant mood here, please. We can keep the clause by removing 'clean'. OK. 'Clean' go then we'll come back to it.

Ms??? Does it go or does it have brackets around it?

Chairperson No, it goes and when they want it back they'll come back to it. Good. That takes us to... What is it Mr ??? 35. Limitations. Now, do we still have a major problem here or have we substantially resolved our differences? Please, let's get it up front.

Mr Hofmeyr??? Chair, I think we have substantially resolved our differences. On 1 and 2 I believe that we are waiting for a new draft from the experts, but I think the parties are broadly agreed. I think... Can I just say that in relation to the international law, the compatibility with international law, we do not believe that, that is appropriately placed here. We have raised it with the National Party. I think they are in agreement with us that, that should be moved or is sufficiently dealt with when it comes to the question of interpretation under Section 39.1. Then the issue of the non-discrimination or allowance for affirmative action, I think there is an agreement that, that would be dealt with in the context of the discussion around Section 8, the equality clause, and we will either agree to have it or not agree to have it there. But I think those two, there is probably agreement that they could be removed.

Chairperson           What you are essentially saying is that it's the experts who are holding us back? Professor Cheadle, isn't this really terrible! The experts are holding us back. The politicians and the nation want to move forward, surge forward, and you are holding the entire Constitution back!

Prof. Cheadle???      Chairperson, I take great exception to that. We go to great lengths to ????. We distribute them weeks before beforehand, and the politicians don't read them and then say that they get them on that day. I would like now... It's a two-pronged attack - not only some people across the way, but also to this side. (noise and laughter). I would like to just draw your attention to Section 35, page 13, the document that was circulated on Tuesday. Sorry, it was in fact last week.

Chairperson           Hold on, hold on. Let me get the document first.

Prof. Cheadle???      And the formulation of 35.1 and 2 gives in fact the key reformulation that arose out of the meeting last Monday.

Chairperson           Wag 'n bietjie, wag 'n bietjie!<sup>1</sup> Where is this document?

Prof. Cheadle???      It's headed 'Constitutional Assembly, Constitutional Committee, Subcommittee, Tuesday 5 March, PG 49??? 7h00'. Documentation, page 13.

Chairperson           Is it this one? Page 13.

Prof. Cheadle???      It's also a document, I might add, which is referred to by

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<sup>1</sup>       Wait a moment, wait a moment!



your learned brother there on your left who sought to find some mechanism to try and resolve this. He's referred to this document as a 'non-document' and we prepared this document on his instructions. We came to Cape Town, we met, we worked through the document with members of the refinement??? team and distributed it and...

Chairperson By document... Hold on, hold on! By document you mean Clause 35?

Prof. Cheadle??? Clause 35, Sections 1 and 2.

Chairperson May I say to you, Professor, this is not a document, it is a clause. Where is the document that you are referring to?

Prof. Cheadle??? The clause is in the document.

Chairperson Thank you, sir. So, you are not referring to a document, you are referring to a clause.

Prof. Cheadle??? Well, I can only refer to a clause if there is a document. (laughter). All I am trying to say to you is that we did our work. We met last Wednesday. The National Party and the Democratic Party graced us with their presence, but the African National Congress did not. We did work through this particular clause with the political parties and we are not holding up the nation despite the scurrilous suggestion by Mr Hofmeyr.

Chairperson OK. Mr Hofmeyr, now that you've seen the light. Right. What problems do we have? Dene?

Ms Smuts I think we understand that sub. 4 now formally moves out of this clause. Right? What is now sub. 4?

Chairperson 3 and 4 move out.

Ms Smuts So you move 4, I'll move 3.

Chairperson They're still having a caucus.

??? What is the actual proposal?

Chairperson Ja. Mr Hofmeyr?

Mr Hofmeyr Chair, I thought that the National Party and the Democratic Party wanted to put a revised form of this clause in the equality clause. That was, I think, in footnote 3, or whatever, is what is originally??? there. So, if there is an agreement that we should have that revised form in 8. That is where it will be. If there is not an agreement, then it will not be anywhere because the agreement then will not be necessary. If it is necessary, I think it will probably be in 8.

Chairperson Now, once you have finished all this, will you let us know what you are agreeing to? Mrs Pandor?

Ms Pandor Chairperson, we would want to ask that we first ??? to what the implication of its removal would be and to what degree it then deduces??? the current status as an obligation. If it's moved, does it have any negative impact on 4? We really want some response to that. But I am not saying we shouldn't accept what our colleagues have suggested at this time, but we would review it along the

lines of having a clear understanding of the import.

Chairperson OK. Once you have all finished, you will let me know what all this is about. Professor van der Westhuizen?

Pr.v.d.Westhuizen I think, Chair, that this morning it was agreed that we would try one or more reformulations of 8.3 and I think all we need to do is to take this into account there to see whether it can be accommodated there and in the process we will then also point out what the effect will be and if it cannot be moved there then one can again consider it whether it belongs here. I think it can be incorporated into that opinion.

Chairperson OK. So, that will be looked at when we reformulate 8.3. ????. Senator Surty?

Sen. Surty Chairperson, I wonder if ...

Chairperson Mr Hofmeyr, ???

Sen. Surty ... I'd like to enquire as to the need for 35.5, sub. 5. Why should it be there in that particular clause, why (inaudible???) 35.5 that should be built into clause 8.

(interjection) No, no, 5.

Sen. Surty ...because, I mean, sub. 5 seems to be tautologous or redundant. It doesn't necessarily spell out what are trying ??? legal terms. We can set it out the right ??? ???

Chairperson Professor Rautenbach?

Prof. Rautenbach Just trying to explain the reason for 5. If the rest of the Constitution is equally entrenched like the Bill of Rights, the same majority being required, it is necessary to have this to say that if a right is limited in the rest of the Constitution, that will be regarded as a limitation, or any other provision of the Constitution. The emphasis is on that. If it is not equally entrenched, this could fall away so it depends on whether there will be equal entrenchment for the whole Constitution or whether the Bill of Rights will be more heavily entrenched. At the moment I think the position is that it will be equally entrenched, the whole Constitution, and then a clause like this would be necessary to make it clear that there couldn't be unconstitutional constitutional provisions in the rest of the Constitution.

Chairperson Thank you. Does that satisfy you?

Sen. Surty??? It satisfies me, but I am not convinced, Chairperson, I still feel...

Chairperson OK. Still not convinced. OK. Oom Ray???

Mr ??? Could I just enquire of the members who met, perhaps Professor Cheadle could help us here. Was there not a suggestion that we would combine 1 and 2 in the formulation at one stage?

Prof. Cheadle??? Yes, there was. I think that one can combine it. We think it looks probably easier to probably set it up in two sections, but what you could do, there was a concern, might be to make this 1(a), which is now 1, and what is now 2, 1(b). So, in other words, we're dealing then in a sense with one

single set of issues under subsection 1. And certainly we would look at that. I want to just raise two issues, Mr Chairperson, if you will, that there are two issues around which we have undertaken to come back to the subcommittee on. The one is 'publicly??? demonstrably' there in brackets. And the phrase just here on 2, the force of that particular phrase: "the rights in the Bill of Rights must be limited by the law of general application" and just what the implications are of the phrase 'pursuant to law'. ??? on 2. So, those are the issues that we wanted to... and we will come back to on the next meeting and then we will consider maybe the restructuring of the clause, either as 1(a) or 1(b). Personally, I think it just reads better to assist the, you know, the limitations and then a ??? to refer back to limitation. But we can try and look and see if you want one single clause, we can try and look at a formulation for that. I just want to raise, in relation to subsection 4, that it appears that just what the force of this clause is and you will follow what Professor van der Westhuizen said that we will consider this. I think it is just important to flag and bear in mind that this isn't a matter only and peculiarly linked to the equality clauses, it's linked to the Bill of Rights as a whole. I mean, the intention of the World Trade Pact(???) was to deal with the problems associated with anti-discrimination law and it seeks to prevent discrimination inside the clubs. And then one is always ??? arguments??? and other kinds of ???. The intention behind this clause was it created a zone of legislative empowerment to be able to prohibit clubs that exclude women and exclude black people or exclude Jews. And, really what 4 does is to create a wider ambit for legislative intervention here so that the privacy clause, the property clause and many of the other

clauses in this Constitution can't be used as a basis to constitutionally attack this kind of legislation. And that is the intention for 4, why it is not just simply an interim measure, it's a permanent measure and it should be considered in that light. It wasn't just an interim compromise in the World Trade Centre. It has a very specific function and I think people should... I would like to suggest we will deal with this in more detail in the memorandum, but I would really like the parties just to think what the implications of this clause are. It does not create an obligation upon the state to pass this legislation. It's merely to create a wider zone of legislative intervention in order to root out discrimination, particularly as we know how deep the roots go.

Chairperson

Thank you.

Ms Smuts

The effect is nevertheless a double limitation or an immunisation and you can do those same things under 8. But can I just check it, Chairperson, how many... The agreement recorded a minute ago that has moved to 8, stands. Does it? In spite of what Professor Cheadle ???

Mr Hofmeyr???

I think Professor van der Westhuizen's formulation is that they will see to what extent this can be taken into account in the drafting of Section 8. You know, I think let us rest it there. If it can't be dealt with there, then we may have to come back, but I think provisionally the agreement is that we try and deal with it under 8.3.

Chairperson

OK? Good. They will be drafting, it will be brought back to us. Professor Rautenbach?

Prof. Rautenbach I just recall the matter, Chairperson, it is not on the contents whatsoever on the contents of 35.1 and 2. Professor Cheadle said that we would consider the possible merger of sub. 1 and 2 or whether it should be (a) or (b). I just want to ask permission to also reconsider the last part of 35.1 and limit the right/to write??? as little as possible. To consider whether that could be moved to the end as a 2(d) perhaps, and to report back to you on that. Just as a consideration. One could perhaps argue that, that last part is really in nature something which must fall under 2, not be elevated to the general principle in 1, 'justifiable in an open democratic society based on...'

Chairperson You can't have that solution. You must resolve it amongst yourselves.

Prof. Rautenbach Thank you, Chair.

Chairperson You discuss it, you resolve it, you bring it back to us. We will then take you on. Isn't that what you have just said?

Ms Smuts Chairperson, from my side that is not the appropriate way. I would not be interested in that particular...

Chairperson Actually you wanted to say exactly what I am saying.

Prof. Rautenbach That's is what I wanted to find out. If nobody is interested, we won't ???

Ms Smuts No interest, no interest, thank you very much.

Chairperson OK. Flying a kite, it's shot down. OK. Do you want to ???.

Mr Hofmeyr            Chair, I think we are always persuaded by our technical experts. If they were to come to us and say that this may be better placed there, I am sure we would listen to them very carefully, unlike the DP. (laughter)

Chairperson            Let's leave it there then. There seems to be broad, general, tentative agreement around this. When it comes back after redrafting, and it falls under the Agreed category. State of emergency. Any issue? Mr Hofmeyr?

Mr Hofmeyr            Chairperson, a couple of issues. One is that we have raised previously the fact that sections 36.1 and 2 could be dealt with more appropriately under the powers of the President, but that has nothing to do with the limitations of rights per se and everything to do with the checks and balances between the President and Parliament. I think the National Party is in broad agreement that those two sections should be relocated under the powers of the President. Other issues. We are proposing that a clause should be drafted that deals with a state of war, or whatever it is called these days in the Constitution, a state of national defence or whatever, and it really should be to the effect that in a state of war the Republic should be obliged to abide by the appropriate international conventions. We do not have the precise wording, but I am sure our technical advisers could deal with that. I think our view is that 36 as it stands at the moment is clearly inappropriate to war and that leads to very real danger that if we say nothing about war that the courts may not apply 36 to a state of war because of its inappropriateness. Again I think the National Party is supporting us in that, but both of us would like to see the draft. In relation to Section 4(a), there was a request, I think



at the previous meeting, that the National Party was worried that the retrospectivity talked about in 4(a) may be retrospective to before the Declaration of a State of Emergency and we would like to have a view from the experts on that and if it is indeed the case that this may be retrospective to before this Declaration of a State of Emergency, we think that, that would then need to be qualified in 4(a). In relation to 4(c), there is a note I think in the documentation that the rights listed in 4(c) are presently under review by the committee or the panel – we are not quite sure which – but I think we are really awaiting some sort of revision of that list. We have not looked at this in any detail at this stage.

???

Chairperson, I assure you, we do not want to hold up the nation. These things, these aspects have all been noted and they have been thoroughly studied by the panel and by the experts and we have indeed dealt with the identified issues like the rather wide list, we have dealt with what happens to those institutions of state during a very grave emergency or a war. If you look at sub. 2, for example, the extension of the state of emergency involves the National Assembly. We are aware of those issues, but we have, I think, one or two problems and the other members will have to assist here. At present there seems to be... There is no definite decision, I think – or maybe if there is one, it must be given to us... If there is one single status in emergency provision, and the idea is that the provisions contained in there must deal with all manifestations of an emergency, then the implication is that it must be structured in such a manner that it will cover a local disaster to a war. There are examples of countries where they do it differently. Up until

now, I think, we have worked on the assumption of one single emergency clause. It belongs in the Bill of Rights and it must be so comprehensive that it deals with all the possibilities. But when it does come to what happens to the institutions of state under very grave conditions, as our debate stands at the moment we have formulated alternative institutions, emergency bodies, that will take over the functions of, say for example, the national Parliament. But we will put before you a very comprehensive document dealing with these implications, but on this one point I think we could be given assistance if we are now told that maybe we should not work on the assumption there is only one single state of emergency clause.

Chairperson

Mr Hofmeyr?

Mr Hofmeyr

Mr Chairperson, I think that this was an issue that was canvassed at some length in the Justice Committee in Parliament last year when we had to deal with the practical state of emergency legislation and I think the unanimous view of the parties at that stage – and we even adopted the resolution to that effect – was that it was desirable that the Constitution should not deal in the same way with the two things. Certainly there are a number of provisions in here such as that detainees must be able to have lawyers of their choice and so on. That was certainly just not appropriate in a state of war, flying Chinese or Japanese lawyers to South Africa or whatever. So, I think that we may be able to talk about other options. I think essentially the view that emerged at that time from our discussions was that this clause was really appropriate for states of emergencies, but

not in states of war and that we need something separate to deal with those kinds of very grave situations that may arise in a state of war.

Chairperson

Mr ???

Mr Hofmeyr???

Sorry, Chair, just to add that the conduct of government in a state of war is really extensively governed or set out in a number of international instruments and I think that was therefore our suggestion that they could be adequately dealt with at that level by referring to those international instruments.

Ms Smuts

Chair, the problem is just that we haven't defined the protocols under this new ???vention. Chairperson, may I just briefly from our side... I think it to be welcome that the experts are working on this issue and we will look at that with interest, but may I just say, we think that the list of non-derogable??? rights is over-long and could profitably be shortened. But let me just register some concern at the idea of moving the first two subsections out altogether to another part of the Constitution because the whole essence and criteria of this emergency clause is the concept of life of the nation being threatened, which isn't as all-inclusive as it sounds. That is the criteria and everything else gets measured in a proportional way, the exigencies of the situation get measured in that criterion and so it seems to me wrong to move that particular section elsewhere in the Constitution. After all, one is to guard against executive power, which operates extra-constitutionally. Having said that, just as our broad approach, we will look with enormous interest at what, according to Professor Erasmus,

the experts are producing. We think that this provision is over-luxurious??? in many ways and can... Yes, in respect of the list of the non-derogable rights, and we think that, that can be looked at. But we stay/state??? clear when we are doing that not to dilute what are the essential principles of the approach. However, we await with interest the report.

Chairperson OK. Professor Erasmus?

Prof. Erasmus Chairperson, I think one can also make the point that in the international human rights instruments there are also example of how this whole notion of derogation and non-derogation, how they are dealt with within the confines of what I would like to call the single approach to a state of emergency across the spectrum. So, would it be in order if we put before you a memorandum explaining all these various nuances and the possibilities of accommodating the various situations as they arise and link them to the international scene? And they will definitely address the issue of the wisdom of non-derogables.

Chairperson Ja, I think so. We would welcome that. Professor Cheadle? Senator Radu???

Sen. Radu??? Thank you, Chair. I would just like to know from the panel is there any reason why sub. 6 is still in brackets? Is there any question or sword of Damocles hanging over that section, or should it be there or should it not be there?

Chairperson Why it is still in brackets? Professor Murray, you are saying it shouldn't be?

Prof. Murray (too far from mike to hear)

Chairperson Professor Cheadle?

Prof. Cheadle I just want to say that the list of non-derogable rights contained on page 15, Section 36, were in fact what the parties themselves instructed us in the process. So, you may now call it luxurious???. The question is, really, it is up to you to tell us which sections ought not to be there. Clearly, if you look at international instruments (mike gone strange) constitutions, and show you that some of these rights are not regarded as non-derogable. But ultimately this is the product of Theme Committee 4. That list is the list that you thought ought to be there. If you want to cut down, I think you should apply your mind to tell us which you don't think should be under derogable, you know.

Chairperson I only see three. Only three.

Ms Smuts??? Four ??? four and the other question is whether we ??? just the four or ??? ??? (away from mike).

Chairperson OK. Good. The technical requirement team will deal with this one, so it falls under TRT. Good. We will come back to this one and the memoranda and redraft it. And ???

??? ??? TRT. It will view these words differently so that's ??? involve ourselves ??? or not.

Chairperson I think it might exclude you. Because I had, I mean, it was Professor Erasmus who offered this memorandum. I don't know. You work together, will you sort it out amongst

yourselves?

???

No, it's just... We just want to know exactly what work is to be done. There is a fair amount of work that has been handed out here today, all to be ready by Monday, so we have to give a sensible opportunity for both sides, of course, to read these memorandums which ???

Chairperson

Well, in that case. There are quite a few things that have been referred to the Technical Refinement Team, in which case you will need to sit amongst yourselves and sort out exactly how you are going to do all this. OK? 37, enforcement. Is there anything on enforcement? That's agreed to. Wonderful. Application? Mr Hofmeyr, where are we? Why don't you reformulate it right?

Ms Smuts

Mr Hofmeyr didn't attend our last extremely interesting meeting.

Mr Hofmeyr???

Chairperson, I think broadly we are happy with 1. On the question of 2, we are still thinking about 'applicable' and 'appropriate' and issues like that. We are not sure what the best would be there. I don't think we have a problem with 3. In relation to 4, under option 1, I think...

Chairperson

Just hold on, hold on. Multilateral 23rd said memo. to be distributed. Was this memo. distributed? Before you give in too much, shouldn't you receive this memo. first?

Mr Hofmeyr

Chair, I just wanted to mention one last...

Chairperson

...used to be. On the application. Is it here today? No. Has

it been repeated today? Christina is shaking her head.  
Johan?

Mr Johan ???

I don't think there was a new memo. The one that is here today is an old one. That is an old final memo. on horizontality. That was dealt with previously. What came out of the multilateral of the 23rd... You will remember, there was a difference of opinion regarding the words 'applicable' and 'appropriate', but that was at that stage mainly amongst members of the Technical Committee and panel members. So, what we then offered the meeting – because there seemed to be considerable political agreement on it – is that we would meet and sort it out and so on. So, we had a meeting like on the other issues being next Monday and thereafter we explained what we did to the parties who attended on the Wednesday evening last week. All that it amounts to is that for the moment we do not think that the word 'appropriate' is substantially better than 'applicable', but we are still looking at other possible formulations to capture the right meaning of the word 'applicable' as agreed to by most parties here. So, I don't think it is a major issue. It is just that we are looking into it on an ongoing basis to make sure that we do have the right wording in the end. But there wouldn't have been a new memo. This is what we reported back on, on Wednesday evening and now.

Chairperson

OK. Mrs Pandor?

Ms Pandor

(mike very noisy) Mr Chairperson, I just happened to spot the memorandum on the table just before tea and I tried to read through it. I note, with some concern, that in fact

what the memorandum does is raise new questions and answers and I just confirmed it. Right at the end under 'recommend' it poses a number of question – I don't know whether the parties are ??? the ones that seek out the answers or whether we do receive guidance. For example, the mention of whether ??? results from 38.1 and ??? questions. That is why I say that there are many questions and answers. Then it raises the ??? ??? mentions specifically equality and provides perhaps the ultimate ??? that some of the parties might not regard as classifying them in terms of Section 7???. So, in a way, I think we would need some more detail to guide us and to recommend ???

???

That would be... The memorandum was prepared, this particular one, as a discussion document for the multilateral that took place on the 23rd. It was prepared before the 23rd and I think all those issues were discussed during the 23rd. The idea of that page was just to raise it as informal points for discussion, but I think all the concerns were dealt with during the discussions on the 23rd and subsequently as well and all that remains, I think, of all those questions for the moment, is the question about 'applicable' and 'appropriate'. I don't think there are any other concerns remaining as far as the panel is concerned.

Ms Smuts

Is there any merit, Chairperson, in trying to reach finality on option 1 vs option 2 in respect of juristic persons. Do we...  
Oh, excellent, so we are all going for option 1?

(off mike comments)



Chairperson           What are you saying, option 1?

Mr Hofmeyr           Chairperson, I think in relation, we are broadly in favour of option 1, but we would like to propose a slightly different wording at the end which would be to delete 'submit' and to use the word there where the nature of the rights and of the juristic persons 'so acquire'. We feel that a slightly stricter sense is appropriate here. It is not simply a mechanical enquiry about whether the right can be applied and then it is applied. We feel that the courts need to be looking at the nature of the right, the nature of the juristic person, and so on, and then see if the nature of the right almost demands application in that particular case. But as a newspaper, for instance, the freedom of expression would be almost a corollary??? or automatically follow that it should be applied to a newspaper and not just to individuals. So, that is our proposal, that... As far as I understand, the National Party is broadly in agreement with that. I don't know if they wanted to have a technical look at it, but that is as far as our discussions have gone.

Ms Smuts???       While we think about it, why don't we delete option 2 at this stage...

Chairperson       OK.

Ms Smuts       ...it means we orchestrate our thinking and we think about that word...

Chairperson       Delete option 2. Agreed to?

Ms Smuts       ...we are still speaking about a verb. And, Chairperson, can

I ask one question to Willie? I mean if you are going to be that strict about the entitlement to the right are you going to be equally strict when it comes to bearing the burden of the right in the clause the subsection is about. Juristic persons are now both the bearers and ??? their entitlement and they carry the burden to the degree that we make application horizontal. The question is what...

Mr Hofmeyr            We will think about that, ja.

Mrs Camerer            Chairperson, we are in full agreement. We just want to re-examine the words '??? requires', and possibly come up with an alternative.

Chairperson            OK.

Mrs Camerer            Can I just ask, Chairperson, I am a little unclear as to what extent this memorandum is on horizontality because it seems to be this memorandum favours the words 'if appropriate' and not 'if applicable'. Are they going to have another look at the whole thing or what? I mean, this is what is says here.

Chairperson            Johan?

Mr Johan???            Chair, this memorandum, this old ??? should not even have been distributed today. It is a dated document that was prepared before the 23rd February for the multilateral which took place on the 23rd February and everything in the memo. was then discussed and subsequently dealt with last Monday, last Wednesday again, and again today. So the questions are dated questions. We then mentioned the word

'appropriate'. We had discussions about 'appropriate' and the debate has moved beyond that. So, I really don't think that memorandum which was simply a discussion – or are we not talking about the same one now? The panel memo. on horizontality, that was simply a discussion document at the time and in the meantime it has been overrun by numerous debates and other discussions.

Ms Camerer??? That's fine, thanks.

Chairperson Is that fine?

Ms Camerer Yes, I just wanted...

Chairperson Good, good. So we've deleted option 2. We are now going to look at option 1 and reformulation. I see broad agreement here. Thank you. 39. Oh! Mr Chibane first.

Mr Chibane Chairperson, sorry for taking you back, but I just wanted clarity on sub. 1.

Chairperson Sub. 1 of what?

Mr Chibane Of 38.

Chairperson OK.

Mr Chibane In the Interim Constitution we said to only ??? it and the executive ??? and in terms of this one its only by the legislative and the executive and the judicial. They weren't part of ??? of government and liaise with that ??? on other things. I wanted to find out if there is any material

distinction between ??? ??? and what he says ??? in terms of ??? ???.

Chairperson OK. If not, why?

??? If not, why not?

Chairperson Right. Professor Rautenbach?

Prof. Rautenbach Chairperson, I think there's no material distinction. This will automatically apply to all levels of government where it isn't necessary to insert that again. There is, of course, the insertion of the judiciary which is not in the Interim Constitution, but in November we distributed a memorandum which at that time there was more or less agreement on, that the judiciary should in this case. Now I believe so. If you want to repeat the argument.

Chairperson No difference. Covered? Covered. 39. No problem.

Ms Camerer Chair, can we just raise a thing about dignity and human dignity. Here we are referring to human beings. In the new limitations throughout they are talking about dignity, in the dignity [they are] talking about inherent dignity. I just find ??? clean it up or is it necessary to do so?

Chairperson Is this really necessary? Human dignity, inherent dignity, dignity and dignity. Let's use one dignity.

Mr Hofmeyr Chairperson, I'm not sure, but elsewhere when we are talking about the right to dignity, we say then every person has an inherent dignity, but here when we are in another

clause completely, we are talking about human dignity. I don't have a problem with this, it's still my dignity, but I think we are talking about human dignity.

Chairperson OK. I'm not worried about it. This you will resolve very easily. Dene?

Ms Smuts Can I propose one other point under 39.2?

Chairperson Let's resolve this one first. Johan?

Mr Johan??? If I was ??? perhaps the cleaning up at least between 35, the limitation clause, and 39 is perhaps easy. I think we must just make it consistent, use 'dignity' first without any adjective before it, just plain 'dignity' and then 'freedom under equality'. That's what we did under the last, the latest formulation of the limitations clause and if we do the same here the two would be consistent.

Chairperson OK. Dr Cheadle?

Prof. Cheadle I think there is a difference though when one talks about dignity, there are sorts of values of dignity in the limitations clause and the interpretation clause. But where you refer to a right, you say everyone has definitely... You are referring that now to... (more than one person talking at once). The right to ??? I think this is also worth recognising as heading in Section ??? human dignity. And I think we should consider whether or not, if we are talking about human dignity then that's really what we are talking about. So, I think we must be consistent there. I think the subcommittee should tell us whether they want human dignity or just

dignity, but there should be consistency ??? clause as such,  
the actual writing.

Chairperson

Human dignity? Human dignity.

(end of tape 6)

**CC Subcommittee- 5 March 1995  
Tape 7**

**NOTES**

0394:  
obviously today's ??? might be down???

0417:  
sense that ??? is

0704  
illegal ??? (sounds like timing)

0919:  
we can ??? all

0966:  
happy at this ???

1122:  
executive director to dance/down??? with

1146:  
Who is speaker?

1182:  
subcommittee or ??? there is a meeting on competency ???

1274:  
Who is speaker?

Chairperson Human dignity? Human dignity. Dene?

Ms Smuts May I just say one last thing – hopefully not problematic – on 39, Chair. We've now taken what is quite a big step. We now bind the judiciary. That means that we horizontalise, that means there can't be any room for the law standing outside of the values enshrined in this Bill of Rights. That means that, strictly speaking, we don't need the seepage clause anymore, at the very end here. But I see no harm in keeping it. I just think we should explicitly address it. Is there any reason why we can't keep the seepage alongside the binding of the judiciary in 38? There's no reason to throw it out. Strictly speaking, it isn't logical there though.

Chairperson Professor Rautenbach?

Prof. Rautenbach To a certain extent Ms Smuts is right: strictly speaking it is not necessary. But it can do no harm to keep it here and I think it should be kept. It could confuse the courts tremendously if all of a sudden it's not there. (laughter)

Chairperson The courts will be confused! Professor Cheadle?

Prof. Cheadle I would go a little further, Professor Rautenbach. First of all, it is an interpretation clause: you are talking interpreting legislation and obviously today's ??? might be ????. But when you develop the common law – and there are common law developments – then in a sense that ??? is actually down by it. It's not down to develop in a particular



way so my sense is here that the seepage clause is not just maybe unnecessary. I think there is a good reason maybe just to keep it. Not a very powerful argument, but there is no argument that I can think of that would suggest that the courts would be confused by leaving it there.

Ms Smuts                    There's one thing you can't do, is getting confused. Nobody knows... (away from mike)

Chairperson                OK. So we separate the human dignity clause, so that's abridged. That seems to conclude everything. I can tell you with a measure of certainty that we have done very, very well here. The issues that remain appear that long, are just three now. Where your differences at the moment are illegal ??? At the moment. And I am confident that in the next nine weeks you will be able to resolve even those three. Areas of agreement are quite numerous. Areas where the Technical Respondent Team needs to come back are about six or so. And where the parties are to consider their positions, just about six also. So, we've done very well to have narrowed areas of deadlock to three, or major differences to three, is actually great, great. We will meet again next week, is it? Monday. And to try and see how best we can ??? all the areas of some tentative agreements, deadlocks, to full agreement. I am quite happy at this ???, how we've progressed. I think we've progressed a great deal. Some people will just think that we have actually retrogressed, we've moved backwards, and those are usually the profits of doom. And it is proved once again that we have done much more than what they have predicted. We have done extremely well. This clearly shows that we are going to conclude the Constitution by full consensus. I

am confident. You don't think so? For an executive director to ??? with. Do you want to say some more about tomorrow's meeting?

???

Chairperson, tomorrow's meeting – so that nobody's confused – is in the old Assembly Chamber starting at 7 and for those who have got a subcommittee or ??? there is a meeting on competency ???. National Council of Provinces documentation is presently available; if anybody wishes to take the document along, you are welcome.

???

Thank you very much, ladies and gentlemen. Thank you.

CC Subcommittee- 5 March 1996  
Tape 6

NOTES

0094:

I was one ???

0247:

??? with my earlier comments

0281:

(far from mike) prefer the first ??? ??? to 6.2

0733:

Who is lady speaker - is it Mrs Camerer?

789:

Mr Who?? (sounds like Bruyn or de Bruyn)

0877:

Is Mr Hofmeyr the speaker?

1213:

Who is speaker? Can one assume it's Professor Cheadle?

1232:

great lengths ??? (more than one person speaking - noisy)

1410:

Is it PG49???

1533:

the refining/refinement??? team

2014:

Who is speaker???

2066:

is what is originally??? there

2177:

that we first??? us to (they first tell us???)

2200:

what degree it then ???ces

2393:

reformulate 8.3. ???

2446:  
Mr Hofmeyr, ???

2492:  
particular clause ??? (mike fading)

2523:  
it doesn't necessarily spell out what are we trying ??? legal terms. We can set it out the right ??? ??? (lot of noise on mike)

2757:  
Is speaker Senator Surty???

2790:  
Is it Oom Ray/Omré???

2942:  
publicly/probably/positively??? demonstrably

2996:  
that put's you on 2???

2060:  
then a vet??? to refer back to

3157:  
World Trade Pact ???

3188:  
is always ??? arguments??? and other kinds of ???

3441:  
Professor Cheadle ??? (voice fading in noise)

3452:  
Who is speaker? Sounds like Mr Hofmeyr.

3587:  
and limit to write/to right???

3743:  
is interested we won't ???

3768:  
do you want to ???

4307:  
Who is speaker?

4777:  
Who is speaker? Sounds like Mr Hofmeyr.

4833:  
under this new ???vention.

4863:  
non-derogable??? rights???

5012:  
we stay/state clear???

5149:  
Is it Radu???

5346:  
call it luxurious???

5426:  
Speaker sounds like Ms Smuts???

5426:  
Four ??? four and the other question is whether we use/lose???

just the four or ???  
???

5486:  
And ???

5498:  
Who is speaker? (away from mike) It will view these words differently so that's ???  
involve ourselves ??? or not.

5552:  
Who is speaker?

5576:  
these memorandums which ???

5696:  
Who is speaker? Is it Mr Hofmeyr.

5823:  
Who is speaker? Johan who???

6039:  
parties are ???

6066:  
whether ??? results from 38.1 and ??? questions.

6085:  
(mike sound very poor) then it raises the ??? ??? mentions specifically equality and provides perhaps the ultimate ??? that some of the parties might not regard as classifying them in terms of Section 7??? So, in a way, I think we would need some more detail to guide us and to recommend ???

6133:  
Who is speaker?

6367:  
be almost a corollary???

6411:  
Who is speaker? Sounds like Ms Smuts.

6466:  
bearers and ??? their entitlement

6499:  
the word '??? requires'

6544:  
Who is speaker? Johan ???

6546:  
this old respect??? should not even have been

6628:  
Who is lady speaker? Mrs Camerer?

6684:  
only ??? it and the executive ??? and in terms of this one its only by the legislative and the executive and the judicial. They weren't part of ??? of government and liaise with that ??? on other things. I wanted to find out if there is any material distinction between ??? ??? and what he says ??? in terms of ??? ???.

6754:  
Who is speaker?

6860:  
I just find ??? clean it up.

6905:

Who is speaker? Is it Mr Hofmeyr?

6982:

Who is speaker? Johan ???

6982:

If I was ??? perhaps the cleaning up

7068:

the right to ??? I think this is also worth recognising as heading in Section ???  
human

7102:

there should be consistency ???