

2/2/11/1011

CONSTITUTIONAL ASSEMBLY

**CONSTITUTIONAL COMMITTEE
SUB-COMMITTEE**

**TRANSCRIPTION OF THE ADDRESS BY EDITORS
ON THE ISSUE OF FREEDOM OF EXPRESSION**

**MONDAY
21 AUGUST 1995
E249
15H30**

**TRANSCRIPTION OF THE ADDRESS BY EDITORS ON THE ISSUE OF FREEDOM
OF EXPRESSION TO CONSTITUTIONAL COMMITTEE SUB-COMMITTEE HELD
ON MONDAY 21 AUGUST 1995 IN ROOM E249**

Chairperson: Cyril Ramaphosa (Chairperson of the Constitutional Assembly)

CA members present:

**D C du Toit
Colin Eglin
Pravin Gordon
Ken Andrew
Patricia de Lille
P G Marais
Leon Wessels
CP Mulder
Colin Chabane
Dene Smuts
Jack Rabie
Naledi Pandor
Essop Pahad
Sheila Camerer**

Black Editors Forum

**Thami Mazwai
Khaba Mkhize
Mathatha Tsedu**

Conference of Editors

**Ken Owen
John Patton
Anton Harber
Raymond Louw
Evan Dommissier**

(Tape 2)

Chairperson :

Thank you ladies and gentlemen we now come to the second part of our meeting. We had earlier agreed that we would today be having a hearing where we give the editors an opportunity of addressing us on the issue of freedom of expression. We welcome therefore representatives from the Black Editors Forum as well as the Conference of Editors. You will recall that they had requested an opportunity to address a structure of the Constitutional Assembly. It was not possible at an early stage to afford them this opportunity through the Theme Committee that is dealing with this matter. The matter was presented once again to us and we found it to be a fairly reasonable request to have them come here to make a presentation to us as the Sub-Committee of the Constitutional Committee. Ladies and gentlemen, editors we are the sub-committee of the Constitutional Committee. We are what we call a processing committee. Some people say we are the committee that resolves deadlocks and we call it in all sorts of - through all sorts of names. Others say we are their bird's eye view committee and all that. We are whatever you may want to call us but we report to the Constitutional Committee. We will be receiving a presentation from yourselves and thereafter we will no doubt report whatever you have to present to us to two structures. One will be the Constitutional Committee itself and the other one will be to the Theme Committee that has been dealing with the issue that is of concern to you. The Theme Committee itself has reached a point where its about to conclude its work. They are in the process of drafting the chapter which deals with the Bill of Rights. They have promised that they will have that draft in a matter of weeks. That draft will then be presented to the Constitutional Committee for further discussion. So you do come to us at the opportune moment where we have not yet reached finality on any of the issues that you may want to address us on. And we are therefore rather pleased that we have found the time and you have also devoted some time to come and address us. We've allocated an hour and a half to hear your presentation. The Black Editors Forum representatives informed us that they would like to present their case first whereafter they have to catch planes to the Eastern Cape and so forth, particularly in Mr Mazwai's case. And after hearing them we will then open an opportunity for the Conference of Editors to address us. I therefore allow Mr Mazwai and whoever else from the Black Editors Forum to address this sub-Committee. We are electronically linked to a very sophisticated sound system Mr Mazwai if you press a button there, right in front of you, you'll be audible.

Mazwai:

I have problems in catching up with technology. I'll introduce Khaba Mkhize who works for the Natal Witness as an Assistant Editor and Mathatha Tsedu, he's political editor of the Sowetan ... and I'm editor of Enterprise and Chairperson of the Black Editors Forum. Now, the Black Editors Forum is an organisation representing editors and senior black journalists in the print and electronic media. We believe that the media should fulfil its role without any hindrance from the state or any other institution of society, be they religious, commercial or otherwise. However, we also maintain that as we are emerging from the legacy of white domination in which blacks were reduced to inferior citizens and more so in the media, the constitution must provide for the eradication of the imbalances of the past to ensure that the media does not continue to be in the hands of the white minority and yesterday's ruling class. It must now reflect the diversity of our nation at all levels. Firstly and on a broad level, the constitution must limit the control of our media by foreigners. This is already the case in broadcasting, but it must be widened to include all media. We suggest a ceiling of a 20% stake in local media should be set. Such limitations are common cause in many other countries in view of the fact that the media is a national strategic asset with which the country's inhabitants talk to each other. That it should be controlled by foreigners is unthinkable. Furthermore, we propose that section 23 of the constitution should be amended to remove the qualifications that limit accessing information to individuals, using such information for their own personal use. The removal of this limitation will ensure that the media plays its role as a representative of the general public and acting in its capacity as a custodian of the civil liberties of the general public. We also submit that Section 33 must be amended to ensure that the most stringent test is required where government is to inhibit political activity. Returning to our comments on media diversity, we propose that the constitution should provide for antitrust or anti-monopoly restrictions that would facilitate the entry of other players from the black communities into the media so as to ensure diversity. Secondly we believe that a constitution should enable government to fund or finance media operations owned/controlled by entrepreneurs from the black, coloured and Indian communities. At present IBA has issued several licences to black radio stations without adequate funding. And it is a known factor that our financial sector is not sympathetic to emerging entrepreneurs. The licences those operators have are useless. In conclusion and with all respect, we maintain that any constitution must facilitate democracy. And our comments are based on this contention.

Chairperson: Thank you very much Mr Mazwai. Is there anyone who would like to add in your delegation?

Mazwai: Not really, if there were questions...

Chairperson: I should have said earlier that no doubt after making a presentation members of the sub-committee may well want to ask some questions. I already have a thousand questions and I'm sure some members will have up to 2000. Mr Eglin I see that you're fidgeting with you pen there. I'm sure you want to ask a few questions.

Eglin: Chairperson just a number of important issues have been raised. And it may be helpful to the process if the promoters of these issues could perhaps provide us with a draft text of how those particular issues could be taken up at a constitution. We find there's quite a difference between a concept and the draft of a text. So if there was a draft of a text which would give effect to these, it would be very useful I think to the constitutional process.

Chairperson: There's a proposal from Mr Eglin. I think its really a comment, proposal, a comment whatever you may want to call it. You can take it up. You don't need to respond to it specifically. Mr Pahad, is your hand up. Professor du Toit. Mr Chabane

Chabane: Chairperson with regard to the proposal of probably the editors to provide with a draft text, I think it might be slightly problematic if people are going to present to us and then say to them go and draft. I think they will have the responsibility of the submission that they made with values which the editors believe need to be incorporated into the constitution. And therefore I think it is our task to make sure that we - if we agree with those values we are able to incorporate them in the policy including the commission of the drafting by the people who are actually responsible for drafting. So I do not support that idea of asking them to go and make a draft text. (End of Tape 2)

(Beginning of Tape 3)

Chairperson : Okay, there's another different view that we shouldn't be expecting those who make presentations to us to also propose text formulation. I think Mr Chabane wouldn't you agree that where it is possible, where they have fairly clear views on how it would look like in the constitution, they should make a proposal. It does not need to be legalistically drafted just putting forward the concept and how it can be accommodated

in the constitution. But in the main I think your point is an important one because editors are not constitution makers in the end. And I'm sure they will also agree to that. They are good at writing editorials and editing their newspapers. But if its possible I think we could allow it. Dr Mulder.

Mulder: Mr Chairperson could I ask the editors, the proposal that the percentage of shareholding, the limitation on that on foreigners, if the intention that that should be accommodated in the constitution itself or perhaps in subsequent legislation.

Mazwai: Our position is that the constitution should put a broad position that says that a foreigner should not be able to take up a stake in any media that would give him controlling holding. The details as to whether it should be 20% or 30% can be incorporated in any other legislation. But we feel that the limitation on grabbing that control should actually be embodied in the constitution.

Chairperson: Right, Mr Gordhan.

Gordhan: Chair, I just want to understand the relationship between freedom of expression on the one hand and foreign ownership of media and secondly what one might call monopoly ownership of the media by South Africans. What's the relationship between the two. Is monopoly not consistent with the so-called free enterprise economy and is that position inconsistent with freedom of expression

Mazwai: I think that when we look at these issues we as black editors will always - our point of departure is that one has got to take into account the environment that you find in South Africa. The history of South Africa. We are an emerging democracy with far different problems than the problems that we'll find in other parts of the world. So whilst I mean we could perhaps have some theoretic understandings on the link between freedom of expression, monopolies and such related issues. But it is important to place things in context. And on that basis I think that what we are doing here, we are presentable, we're preparing our country to enjoy democracy to its fullest. And at the present moment regardless of the fact that all restrictions have been - all racial legislation has been eliminated, but the fact of the matter is that the problems that were entrenched yesterday are still in power today. And we cannot afford to have a situation in which we have - we have them hide behind dictionary definitions. Because at the end of the day what the people fought for will not have been delivered. And that's the position from which we come from.

Tsedu:

Just to add on to that comrade chair, the relationship between monopoly and freedom of expression is also cardinal for us in that given our situation here, you have basically a monopoly that is controlled by what used to be known as the Argus and Times Media Ltd, Naspers and Perskor. Between them they own all the voices and the argument that is generally made is that there is diversity of voices. But we maintain that that is not diversity of voices. Its one voice multiplied many times. And what we are arguing for here is diversity that would introduce other voices and not just one big noise from one port. And also the question of monopoly of freedom we've got to be honest with each other. A monopoly inhibits freedom of the press. We have a typical situation here in South Africa where you've got monopolies and there's very little press freedom. Even though it has been said that the Sowetan has been sold to a black owner. The truth about it is that there has been vertical integration in the media. All these big companies controlled the distribution outlets and they even control the manufacturing arms. That is the printing presses. So that the Sowetan has got to go cap in hands to the printers and say can you please print us. And these are the people who sold the Sowetan to them. Also the Sowetan doesn't have facilities to distribute. It must still go cap in hands to the same media monopolies. "Can you please allow us to sell our paper to the public". That is the truth of affairs in this country.

Chairperson:

I saw some hands. Mrs de Lille. I'll come to you, Mrs Smuts.

de Lille:

Chairperson I just want to find out where the request that we remove the qualification of Section 23 of the current interim constitution. If they can give - if the black editors can give us an example that how now this limitation is limiting them to do their work or to do investigations. And if we remove the limitations of section 23 how will that help them. But I would like to have a practical example just to understand it clearly.

Mazwai:

Okay Section 23 as it is presently phrased, says that "any individual can have access to information held by the state if that individual needs the information to enhance his or her rights". Now when I'm operating as a journalist and I require information I do not necessarily want that information to enhance my right as an individual I want that information to enhance the rights of the general public. And the limitation as it stands now inhibits my functioning.

Chairperson:

Thank you. Mrs Smuts.

Smuts:

Chairperson if I may know whether their position on Section 33

limitation is similar or the same as the position of the Conference of Editors. In other words is it their submission that Section 15 will substitute Section 33. Is that the basis of their position or not.

Chairperson: Do you know an organisation called the Conference of Editors Mr Mazwai?

Mazwai: Yes we are aware of the Conference of Editors. I will speak for us and I hope in this - our new emerging democracy that is allowed. We do not envisage any need to amend Section 15. We think it is sufficient as it stands. But in so far as the Conference of Editors position is concerned on Section 33, my understanding which is subject to correction when they come here just now, is that they would also be going for the same position that we .. If in other words is going together without necessarily any one following another one.

Tsedu: I think its also wiser to phrase such questions ask, is the Conference of Editors similar to ours. That will then balance the equation.

Chairperson: I saw another hand, Mr Chabane.

Chabane: Chairperson, there's a question regarding funding of entrepreneurs in the media what I wanted to understand is that, is it meant to serve as some sunset clause for the black entrepreneurs. And if for example its phrased in the constitution to do that kind of thing which may probably within the framework of affirmative action in terms of .. is it seen to be something to be continuous as something which needs to be done for a specific period until probably some certain conditions have been met

Mkhize: We are living in a situation where people are ignorant, the vast majority of people are ignorant and as such we need to open the prisons of ignorance. And if you say you've opened up a democracy, you want people to have information in order to make informed decisions, you've got to open the gates of the prison. You don't just say you're free now. But still we can't get out of this .. of ignorance. So the government would agree with you Mr Chabane when you say that it could take the form of affirmative action. But then there will be a time period. But at the moment during the transition, people need to be assisted. Like for instance the radio stations, there are many licences that have been dished out. But you need to money to run those radio stations. And communities need to be informed. You find that in rural areas for instance where

newspapers cannot reach - electronic media reach those places. And you find a situation whereby libraries are not accessible to the majority of the people. And without the government helping you informing the people, this country will not again desire democracy. So by assisting the communities, you are actually assisting democracy. In countries like Sweden, governments there actually see to it that every person in the community must be informed. And there's no other way to do that except by assisting the up and coming publishers and source of information.

Chairperson: Mr Rabie

Rabie: The forum stated that in some form of criticism that its no use having this ... into a black company and that it must go cap in hand and say please print my paper for me. And please distribute my newspaper for me. My question is why don't they establish their own printing companies and why don't they establish their own distributing agencies.

Tsedu: At the risk of losing my job as I'm employed by the publication in question, I think the reality indeed is that one doesn't know whether the question is serious or is not serious. But if it is a serious question one has to go back into the little history of yesterday that the people who have now bought the controlling shares of the Sowetan have in a way achieved maybe the maximum possible under present circumstances. They should aspire to even own one day the printing. But because of the legacy that we're talking about here where black people were denied opportunities to own such things. It is presently not possible.

Chairperson: Thank you. Mr Andrew.

Andrew: Thank you chairperson, as I understood earlier in your opening presentation you expressed various concerns about foreign ownership of media in South Africa and the impact that that control could have. Would you have similar reservations about foreign subsidies of media of various sorts - that it could end up having adverse influences in a similar way?

Mazwai: I'm not sure how we link the whole question of subsidies and control. ... what has happened, if we deliver critical issues, we deal with practicals, is that a specific company has now - owns 51% of the Argus company and its an overseas company. And there is a distinct possibility although this has been strenuously denied by Anglo-American that owing media might also of all into the hands of - might also fall into the hands of some ..

publishing group. Maybe we would know by the end of that, that the English language press says the majority is supposed to serve the majority in this country and it should be under foreign hands. And once the media is under foreign hands, it means that ultimately it is going to dance to the tune of foreigners. Because they have got their own agenda, they don't take the media because of the love of mankind. They have got their specific objectives that the .. of their printers to look at and their own objectives and entrepreneurs and where they come from. Now I don't understand where the whole question of subsidies and - I don't understand where the whole question of subsidies is coming. Because buying shares is definitely different from the whole gamut from actually subsidising somebody. Subsidies might not necessarily have any extremes. ... is able to say I am not able - this is unacceptable to me.

Chairperson: You want to follow up Mr Andrew?

Andrew: Yes clearly there is a distinction and that is why I was asking the question. And it is the question of conditionality. One is looking, and there's been mention of looking for resources to encourage media of various sorts and whether this country to develop. And I just wanted to get your opinion on whether if that support and particularly money support comes via foreign sources, whether that could end up being conditional and having the same negative - potentially the same negative effects that foreign ownership might have. So that is really - we want to get your response in that context. I accept there is a difference obviously between subsidies. But if the subsidies are high enough, and a form of media becomes dependent on the subsidy for its financial survival, it perhaps isn't as free to choose whether it wants the subsidy or not. So it was in response to that context.

Mazwai: Okay the short answer is that if we look back into the recent past, you'll find that there were a number of publications in this country that emerged and came to be known as the alternative media which depended on foreign funding in order to survive. That foreign funding has now dried up as a result of the death of apartheid. And it becomes paradoxical that those publications that fought so hard against apartheid should themselves become the victim of the tests. But be that as it may, what then happens is, you find a void developing where those publications used to be and we are saying that instead of us going back cap in hand to foreigners asking them to fund necessary voices within our communities, the government of this country should take over that responsibility.

Chairperson: Okay. Mrs Camerer.

Camerer: Thanks Chairperson, I would just see clarifications of a proposal that the editors made about providing an anti-trust provision in the constitution. Is it proposed that this should be by way of a clause - well shall I say a mechanism specific to the media or are they perhaps suggesting a general provision or are they suggesting an organ of state, that we constitutionalise an anti-trust body. We'd just like clarification of that point.

Mazwai: I think that it is a - one has got to look at this from two- we have got the general belief that comes from the black community on just anti-trust legislation and anti-monopoly legislation. And the idea behind that is always that to give emerging businesses a place in the sun. So we don't have any problem with that. Now we also want a similar type of legislation. But this time it's where it's now going to be for the media to protect South Africa from organisations that are - from what is now happening today where you find that one organisation will actually even own the distribution outlets. And because it owns the distribution outlets, therefore it is in a position in which it can, it makes it , impossible there are barriers of entry - the entry becomes very expensive for new comers. So we think that even in the media industry for instance when you talk of anti-trust legislation, we are thinking in terms of that no media - the media industry must be divided into perhaps the printing houses, the printing industry, the newspaper industry, the publishers themselves and then from there on you have the people who distribute the publications. You .. have certain demarcations so that no group must have an unfair advantage over others or over people who were just getting into their industry. And we have got no objection if at all this is for a specific period, say 10 years, so as to make sure we've got vibrant babies who are going to grow up. Then after some time I believe that our country will take a decision based on the circumstances that prevail at that time. That will say do we still have a need for legislation that is for anti-monopoly legislation. Because at the end of the day, the emergence of big companies is not necessarily bad. It has got its own - it has got advantages. So we should .. those advantages to the country. But right now what we've got to take into account, that we are an emerging democracy and we need to bring in people who are outside. And this is not only a political decision that we're taking. It would also be an economic decision because at the end of the day the tax base is very small. We need more taxpayers. And those taxpayers are going to come from the black community and not from the

ordinary over taxed white community.

Chairperson: Mrs de Lille

de Lille: Chairperson just to follow up - I wonder if they can quote some examples to us in which countries outside of South Africa where they are using the limitation of foreign media ownership. I will definitely support that in that we have to put a limit somewhere to the ownership of the media. But you also mention in your presentation its already like that in some other countries. Can we hear those countries, who they are.

Mazwai: Well, looking at how the French government is limiting - has got what type of measures it is applying. And we are looking at the measures that the American government are applying to limit the concentration of overseas players in their media. And there is also similar processes in Australia and our - we've got somebody who is doing a study into this and we hope that we will be able perhaps to present it at a later stage

Chairperson: Thank you. Dr Pahad.

Pahad: If I understood Black Editors Forum correctly, my understanding is that they're not necessarily asking that the anti-trust then should be embedded in the constitution. But if I understood them correctly, I thought what they were then saying was that the constitution should not preclude any legislation which may be found necessary to promote...

Chairperson: Dr Pahad will you speak into the mike.

Pahad: I said that I wanted to check with the Black Editors Forum whether my understanding of their input is correct. My understanding is that they're not insisting that some anti-monopoly or anti-trust clause be enshrined in the constitution. But what they were doing was putting a point of view about the necessity by having a diversity of opinion and that really what may be important to ensure is that the constitution does not preclude parliament from passing legislation which would then encourage diversity, both of ownership and control in the media. I'm wondering whether that understanding of mine is correct.

Mazwai: It is.

Chairperson: Mrs Pandor.

Pandor: Chairperson, I'm having a slight difficulty in understanding the

focus of the input that we've heard thus far. Because it has centred primarily on media. Whereas I think what we've been attempting to look at, is the rights that persons should enjoy. And I'm not seeing a link being built in terms of this discussion between the rights that citizens would have in comparison to rights of the media which is what the editors appear to be addressing. Could you try and establish that link. I hope you understand my question

Tsedu: Yea, we do

Chairperson: They're asking for rights for editors. And editors are also individuals

Mazwai: We - what we are saying effectively, is that unless the concerns we are raising are addressed, the rights of citizens to information, the right to express themselves amount to nothing. Comrade Thami here as the editor of Enterprise can take - can decide that tomorrow he wants to take two pages of Enterprise to put his point of view across. But if somebody else who is staying at x wants to bring forth an opposing view, that person's chances of presenting that as forcefully as Thami has done would be limited because he would - that person would probably only have Thami's medium to express it through. So that even if the constitution can guarantee rights in theory, if the mechanisms through which those rights can be exercised are not in place, those rights are useless. That is the sum total of what we are saying.

Chairperson: Ladies and gentlemen, I would like to maybe have stop here because I have a feeling that some of the questions that we will want to raise and questions that we're raising could well be questions that we can raise to the Conference of Editors, what would have been preferable, would have been to get the presentation from both first and there after to get into questions. I only realise that now. But I think we're also operating under time constraints because Mr Mazwai has to catch a plane. But in ending this I think we would like to thank the Black Editors Forum for coming forward to make this presentation. We would like to ask that if you have your presentation in writing either now or in amplified form, it should be presented to a Constitutional Assembly administration so that we can take the views expounded therein into account when we deal with the report. There are obviously a number of other questions which many people would have wanted to raise but we are mindful of the fact that you have to be rushing off and would like to hear the Conference of Editors as well. And thank you very much once again for coming through and

we will touch on other matters as we hear the Conference of Editors. Thank you very much

Mazwai: Thank you.

Chairperson: You're welcome. And we will ask and I don't know who it will be - yes please the representatives of the Conference of Editors.

CONFERENCE OF EDITORS ADDRESS

Chairperson: Do you have it in writing, wonderful oh thank you very much. Thank you ladies and gentlemen, we now welcome the delegation from Conference of Editors. I don't know who presents your case. But please proceed.

Patten: Mr chairman can you hear me?

Chairperson: Yes we can hear you.

Patten: I'm John Patten, editor of the Mercury and Deputy chairman of the Conference of Editors. I have with me Mr Ken Owen from the Sunday Times, and Evan Dommissser from the Burger, Anton Harber from the Mail and Guardian and Raymond Louw, ex-editor of Rand Daily Mail. Unfortunately our Chairman Mr Khulu Sibiyha has been unable to attend. He would have presented the case but he has been unable to come today. So we send our apologies on his behalf. I think before getting into our presentation, it might just be worth making a passing reference to the Black Editors Forum, a suggestion on preventing control from foreign sources of the media in South Africa. Its something we don't have in our plan. I believe that the press just as South Africa itself is in the process of transition, and that possibly foreign money can greatly facilitate that transition. Just as it started the alternative press or helped the alternative press in the days of apartheid, it may also assist in the creation of a diversity of the press in which black interests can be served as well as those of other races. The Conference of Editors represents editors from various media, the mainstream newspapers of South Africa, covering the whole of South Africa, English, Afrikaans, morning, afternoon, Sundays and we certainly represent a big readership between us. We don't always, we don't often agree with each other but

on this particular issue, we do agree with each other...

Chairperson: That's progress.

Patten: We believe that it's essential to the future of the press that what we are trying to get achieved is putting to the new constitution when it is finally framed. We don't only speak for the printed media, in fact newspapermen, and certainly the Conference of Editors don't believe that we represent only the interest of the press. In fact the press at its best should represent the people. We ask for no more rights than an ordinary citizen and no fewer rights. So that is where we come from in our presentation. And I think that we have already provided a written submission based on an excellent opinion of the Advocate Gilbert Marcus which you have read. I've presented a summary of our case to you this afternoon. And the main points - I would like just to say before going into the main points that you will be aware that we were somewhat sensitive about the fact that we submitted a written submission and we did not appear to have an opportunity to talk to it. I thank you very much for granting us that opportunity today. And obviously we will be very ready to answer any questions that you might have on it. I will give an overview of our case and then individual editors will pick up aspects of it afterwards and then we'll be open to questions. The points that we wish to raise are threefold One is the scope of the freedom of expression. And I would draw your attention particularly in that submission on page 4, we proposed that Section 33 be amended by elevating freedom of expression to the highest plane of values.

Chairperson: Excuse me, maybe - could I halt you. May I say that it was part of the submissions that we received and its not in this document here, the document that is being referred to. So please don't look for it. It is in another document or package which was already distributed, particularly to theme committee members. So not everybody has it, and maybe you could, in presenting, articulate a more fully - the area that you want to speak of.

Patten: Well in dealing with the scope of freedom of expression, its universally recognised that free expression is central to democracy. Freedom of expression is accordingly recognised as a cornerstone of democracy. Its generally recognised that all rights are subject to limitation, including the right of freedom of expression. That is so all around the world. We don't expect it to be different in South Africa. The notion that constitutionally protected rights are not absolute is entirely consistent with the

approach adopted in other countries. The extent of limitation on freedom of expression and the way in which this limitation is determined, varies according to particular legal system of each country. And it depends to some extent upon the value placed on freedom of expression in each country. In this area in the United States the Supreme Court has gone further than any other court in jealously guarding freedom of expression and protecting it from limitation. Section 33 of the South African constitution provides the framework within which rights may be limited. It creates two tiers of justification for the limitation of rights. Those rights which may be limited if the limitation is reasonable, justifiable in an open and democratic society based on freedom and equality and does not negate the essential contents of the right in question. And those rights which may be limited only if in addition to the above the limitation is necessary, the word "necessary" I think we would lay emphasis on. Our constitution accordingly accords different weight to the entrenched rights. Some regard it as more valuable to a democracy than others. Freedom of expression in our constitution is placed neither at the highest nor the lowest end of the scale of values. It falls between the two. On the one hand in so far as freedom of expression relates to free and fair political activity, any limitation on such a right must in addition to it being reasonable and justifiable in an open and democratic society, also be necessary. So the highest values attached to that. But on the other hand, in so far as freedom of expression does not relate to free and fair political activity, the limitation need only be reasonable and justifiable, not necessary. The constitution accordingly affords free and fair political activity a higher value than other rights in the constitution. Given the centrality of free expression in a democratic society and the role of the press, this is a serious short coming in the constitution. Whether it was done unwittingly or deliberately, I'm not sure. But we believe it's an oversight. It needs to be corrected. In council's (?) view, this is one area which justifies amending the legislation if freedom of expression is to enjoy its rightful place in the new democracy. And we accordingly propose that Section 33 - we don't want to tamper with Section 15 but Section 33 that deals with the limitation, we believe that should be amended by elevating freedom of expression to the highest plane of value recognised by the constitution. We have set out where we suggest the recommended changes should take place. Then on the reach of the constitution, the second crucial issue in relation to the nature and ambit of constitutionally protected rights is the question of whether or not the common law falls under the sway of the constitution. The issue of the application of the constitution to the common law is of vital importance to the

press. The entire body of law of defamation for instance, is regulated by common law. And it is this area in particular which poses hazards for the press. The effect of a series of decisions handed down in the Appellate Division over the last decade, culminating in the decision of Neethling vs Vrye Weekblad has been to seriously curtail the ability of the press to raise concerns about the conduct of public official in matters of the most vital public interest. We believe that a proper interpretation of the constitution, it does apply to the common law. We would like to make the common subject to the constitution. To put the matter beyond doubt, we propose the following amendments:

Chairperson: This constitution shall be the supreme laws of the republic

Chairperson: Hold on, there's something wrong.

Patten: I'll go back to that - we believe that on a proper interpretation of the constitution, it does apply to the common law. this view has been endorsed by two recent cases, namely Mandela vs Falati in the PWV region and the full bench decision in the Eastern Cape namely Kozomeleni and the Minister of Law and Order and another. To put the matter beyond doubt, we propose the following amendments:

- *This constitution shall be the supreme law of the Republic and any law we wish added including the common law or act inconsistent with this provision, shall, unless otherwise provided, expressly or by a necessary implication in this constitution, be of no force and effect in the extent of the inconsistency.*
- *This chapter shall apply to all law and again including the common law enforce and all the administrative decisions taken and acts performed during the period of operation of this constitution.*

Then on the question of access to information, Section 23 of the Constitution gives every person the right of access to all information held by the state or any of its organs at any level of government but only in so far as such information is required for the exercise or protection of any of his or her rights. The Council unable to find any equivalent clause in the constitutions of other major democracies. There is certainly no provision in the constitutions of United States and Germany. The absence of a general right of information in the constitution of other democratic countries is remedied by statutes which entitles citizens under specified circumstances to obtain access to information. This legislation tends to be complicated by

reason of the necessary procedures for applying for information and the nature and extent of the exemptions to the general right.

On its own Section 23 is extremely limited in scope and constitutes a wholly inadequate substitute for detailed freedom of information legislation. The most striking feature of Section 23 is that it does not enunciate a general right of access to information held by the state. On the contrary the right embodied in this section is contingent upon such information being required for the exercise for protection of rights. Section 23 of the constitution is capable of both a broad and a limited interpretation. A limited interpretation would confine the right of access to information to circumstances involved in the legal protection of rights. In other words, information required for the purpose of legal proceedings. A broader interpretation would extend the right of access to information beyond the legal process. Thus in so far as the constitution affords a special protection to the press, it is strongly arguable that for the press to fulfil its constitutional function, it will be entitled to have access to information required for that purpose. Section 23 places an onus on the person seeking access to the information to establish a right to such information. We believe the onus should be on the state to establish a right to withhold the information. We accordingly propose that Section 23 read as follows:

"Every person shall have the right of access to all information held by the state or any of its organs at any level of government".

Deleting the rest of the sentence in the interim constitution saying: in so far as such information is required for the exercise or protection of any of his or her rights. For the press to carry out its constitutional function, we believe it needs to be able to access information that the state has at its various levels as a right. If it can't get that information, it can't fully carry out the role that the press as a force of state should play in a democracy. Those are the three main issues we wish to raise. And I would then ask for the right of other members of our delegation to address specific issues under that. Would that be in order?

Owen:

Mr chairman thank you very much for this opportunity. I was startled to hear my colleagues say that we would assume that we were in agreement. I was even more startled when he actually put my case for me very ably. I - I'll be very brief. I'll direct myself to the limitation's clause, Section 33 and after Mr Patten's remarks, all I'm trying to do is add some emphasis. On

two points. The first is - I would like to say that we accept the need to limit the right of expression. There occasions in every democracy and in our's where that is necessary and we accept that. We don't however think it should be made easier than in the case of any other right. And what has happened here is the constitution makers, the interim constitution makers, have singled our political speech as deserving of the highest level of protection. But they are denying that protection to artistic speech, to research, to philosophy, to arts, to a whole range of other subjects which fall outside political speech. And I suggest that this distinction is bizarre and that the constitution is in that respect defective. I will make my point and ask why is it important that the legislature should not be permitted quite easily to make limitations on free speech. I would say we accept it provided it is necessary. And all you have to do is show that the limitation on speech is necessary and that is the end of the matter. When you come to the words reasonable, we think that reasonable can be reasonable in different ways and we get some very funny reasonable judgements from very reasonable courts. And so we would rather in fact entrench the requirement of necessity in the constitution and force both the parliament and the courts to think very, very seriously before they impose a limitation on speech. I spell you the rhetoric about the importance of speech I'll assume you know that. But I do want to quote to you briefly from a case in Zimbabwe in March this year. Its in x in which the Zimbabwean Supreme Court defined the purposes of free speech in a way which I think is pertinent. It said that not only is such a right fundamental to democracy, that's what we're always saying. But it says that "freedom of expression has a special purpose in helping the individual to obtain self fulfilment" and that is where you've made it vulnerable. The second is free speech is important in assisting in the discovery of truth. You have protected politics and you haven't protected truth. And the third is, in strengthening the capacity of the individual to participate in decision making and we're in agreement there because that is the right to be informed and the right to participate in government. We have no problem with the constitution on that point. And then one which is not often mentioned, freedom of expression is a mechanism by which a reasonable balance between stability and change can be established. In other words, it's a means of debating and exploring issues and finding out the truth and deciding how much change we'll need and by limiting freedom of expression you are denying yourself that adjustment mechanism. So I'll finish up by saying if you can find a necessary limitation on freedom of speech, we will accept that. But we are unhappy with limitations which you just simply think is a good idea or

you like it or you have whim or a prejudice or a very strong conviction, we say that is (End of Tape 3)

Beginning of Tape 4)

Louw:

Mr Chairperson, and ladies and gentlemen of the committee, thank you very much for the opportunity. The question of the limitation on access to information has already been dealt with by Mr Patten but I think it's important for me to emphasise that we have gone through an experience in this country where in fact access to information held by the state or by other bodies has been denied the population to dramatic and traumatic affect on the affairs of this country. And the manner in which this clause...is has been worded in fact empowers the state to continue doing so because it makes the limitation in so far as such information is required for the exercise or protection of any of his or her rights; which means that information which may be of general interest to the public which may be of general interest to the individual other to his or her can be denied. We have seen the in America what has happened to the Freedom of Information Act there, where administrative measures have been employed by the state to prevent access to information, I suggest the wording of this clause in the constitution will have much same affect. May I just then briefly go on to some general considerations. Mr Chairperson - and that is that, this constitution is an extremely important event. I don't think I have to emphasise that it is an extremely important event for all South African's, (and we have). South Africa now has the opportunity of breaking new ground and setting new democratic values. Far from helping the state, that is the nation as distinct from the ruling party, to order it's affairs, such powers prolong the country's trauma and I'm talking about the powers to place limitation on, free speech on free expression at times when the nation is going through a period of national trauma like an emergency. We saw what happened here in this country when a government tried and to prevent people from knowing what was going, on by introducing a state of emergency with the limitation on freedom of expression. In fact I believe that those limitation that was placed on freedom of expression by the previous government prolonged the long period that this country endured under apartheid. If there had been freedom of expression and I mean real freedom of expression without the limitation of clause 33 that period I'm sure would have been very much reduced. One has only got to look at the example of America and its intervention in Vietnam to realise what freedom of expression did as far as the American population was concerned. It in fact as a result of the pictures and the stories coming out of Vietnam helped that country to terminate that intrusion. No one

has yet tested the verity that if there is unhidden freedom of expression in times of national emergency the problems that give rise to that condition of emergency can be more readily resolved. Information and publicity helps a nation to solve it's problem speedily, this indeed is the cornerstone of the democratic culture that is sought for South Africa by this government of National Unity. From the President down the government believes that negotiation is the means of solving problems. Indeed, our own recent history in the constitutional talks illustrates that but one cannot negotiate or resolve problems and issues whether there a national emergency or not without information as distinct from propaganda or disinformation and, the limitations in the constitution under "section 33" prevent that dissemination of that kind of information. I support Mr Owen very strongly in the suggestion that that clause should be amended to talk about necessity rather than reasonable. Thank you.

Chairperson: Thank you.

Harber: Anton Harber on the reach of the constitution. Thank you very much for the opportunity. I will briefly just address one point but I do want to say that it significant, that there is consensus there is quite clear consensus in the Conference of Editors which represents a wide range of views. among editors in the country on the issues being raised today. I want to talk specifically about the **Common Law and the Constitution**. I think it's clear that we a have particular interest in this because, my newspaper has particularly felt the brunt of **Defamation Law** which is being used as a powerful weapon for the suppression of information, and as a weapon to make it difficult to report on public officials, government activities, and matters of that sort. We have outstanding cases such as Neethling versus Vrye Weekblad and Weekly Mail, in which we are struggling to argue that the Constitution should reach to these cases. It is the view of the counsel we have sought that the constitution would apply to **Common Law** and deal with these issues and I'm pleased to see that this appears to be listed as a non-contentious issue in the submissions on this, but what we really seek is to make it absolutely clear to put this problem away, out of the reach of courts that have in past taken a different view and we have proposed amendments to Section 4(1) and 7(2) that would explicitly bring **Common Law** within the reach. Thank you.

Louw: We will just ask Evan Dommisser to bring to your attention the views of a leading constitutional lawyer from the Unites States. Thank you.

Dommissier: Geagte Voorsitter! Ons het gedink dat sal baie nuttig wees om 'n ...you want English?

Chairperson: Ja.. there may be a problem cause I think we did not arrange for prior translation, we have a system where you can address us in any language provided if it's not English you make prior arrangement for translation, I don't have a sense that it has been arranged. No? It has not been arranged if it possible...

Dommissier: It's alright.

Chairperson: Thank you very much.

Dommissier: We thought it might be useful to get an international perspective on the interim constitution and we asked Prof. Floyd Abrahams who is the leading media lawyer in the United States. He is Professor of Law and Journalism at the Graduate School of Journalism at the Columbia University in New York and he is in fact, has argued more cases before the Supreme Court in the United States than any other lawyer in the history of the States. He wrote an article which appeared last Saturday in *Die Burger*, and with your permission I would like to quote a few paragraphs from it. He said Beginning to show how the words chosen by the constitutional draftsman were crucial in the recent ruling of the constitutional court about capital punishment. And he goes on, "***.. Words matter, words embodied in the constitution written for as yet unborn generations of future South Africans matter intensely***". He points out that other fundamental rights receive far more protection in the Interim Constitution. The right to human dignity for example, may be overcome not by law which is merely reasonable but only by one which is necessary. The same is true of the right to freedom of belief and opinion; so too with academic freedom. And he goes on, "***...What is the reason for providing watered down constitutional protection for free speech? Why protect freedom of opinion more than freedom of the press? Why give the author of a play or a ballet less protection than a Prof? The Interim Constitution does not offer an explanation. Whatever the reason, any decision to afford less protection to freedom of speech and of the press than to other freedoms will without doubt be sieged upon by enemies of freedom in the future to justify repression. That these enemies will surface can hardly be doubted. That is not because South Africans are particularly susceptible to such misbehaviour. It is because South Africans are human, it is part of the human condition to view those who differ with us, particularly in the press, as not only wrong but dangerous. It is tempting, terribly tempting for those in official power to seek***

to punish the speech of their critics, and they always claim to have some reasonable basis for doing so. To defend national security, to assure national unity, to protect public order. If one change must be made from the Interim Constitution to the permanent one, it should be to afford free speech the same level of protection as other freedoms receive". Thank you.

Patten: Mr Chairman, that more or less raps up our case. Just one other point that I could draw to your attention that is our counsel, Gilbert Marcus, suggested that it might be desirable to make it clear that the guarantee of freedom of expression and the press has horizontal effect as well as vertical affect on state bodies. That is to say that it applies to disputes between private litigants as well. Thank you. We are open to questions.

Chairperson: Thank you very much. There it is. We've heard well articulated points of view which no doubt we would like to respond to, to raise questions around. What I didn't hear the editor saying I quite strongly is the other side of the story because I've been told and they are great advocates of this that whenever you write a story you mustn't give one side only, you must also give the other side. I didn't hear what the other side is, maybe that is what you want to hear from us so let's give them the other side of the story. Prof Du Toit?

du Toit: Thank you Mr Chairman - Two questions. Number one, I didn't hear a word about freedom of expression in regard to pornography, I would like to hear their views on this matter; and number two, and I'm thinking of the previous submission we had here which is not addressed by them directly. It's a bit broader sense, on freedom of expression that means that as you've heard in the previous round that if you have'nt got the money the big money to drive your newspaper you actually don't have freedom of expression. As someone once said it seems to me that sometimes big capital and overseas capital is needed for dominating the discourse by way of newspapers. If someone called you the coloniser of the life world of people, how are we going to get beside the right (theoretical in the constitution) of freedom of expression going to get factual freedom of expression but not just some people has freedom of expression or that some people has access to information, but that we can democratise this whole basic right in South Africa. I would like to hear them on those two matters.

Chairperson: Just as you respond to that, one of the issues, I think it touches on the question Prof Du Toit raises, of pornography. Mr Owen and I once discussed the impact of Internet on this issue, of freedom of expression. Maybe if they want to touch

on that. I'm not raising it because I'm keen on Internet or that the Constitutional Assembly is connected to Internet I can assure you we don't spend most of our time looking at the other type of interesting things you can find on Internet. But how does it really impact on freedom of expression? Mr Owen?

Owen:

Mr Chairman, on pornography and the constitution let me say that the suggestion we make leaves the way open for controls of pornography which you can show to be necessary. That means you need to apply your mind to it quite seriously and come up with an argument which is more than your prejudice. Now it seems to me that that is a better basis from which to start than one in which you can come up with limitations that are dubious or ill-founded or unscientific or simply based on [Inaudible] so I think Prof Du Toit's requirement and mine are both met by our formulation. The second point addresses the diversity of opinion and I will say here that it seems to me it's remarkable that people try to increase the range of opinion by forbidding some people to say something. So I don't see that any limitation on speech is going to assist you in diversifying opinion. I will say this, that, and I know that at the end of my interest in the whole subject the recent period has been quite breathtakingly revolutionary because of the new technology coming into operation. And I think if, when people talk about keeping foreigners out, what are you going to do? Shoot down their satellites? You actually have no way of keeping foreigners out. And perhaps there is a more sensible way to approach the consequences of the intervention than to mess up your own constitution. And the latest of the technological innovations is the Internet. Nobody has control of it anywhere. It's the exchange of information down telephone lines through computers and children operate it. Especially the new generation of children, who are computer literate, actually manage to get into the Internet, move and pull out whatever information they like from an almost limitless (so we talking here about 20 billion messages), an almost limitless a array of information. And I think we must really get to debate beyond the silly prejudices of yester year, the idea that you can actually pass a little law and you going to stop somebody from doing something. We are in a different world, and we had better think much more clearly about what we are going to do about the Internet and try and learn from other countries which are also struggling with it and who don't think it is necessary to junk their constitution or to go and wreck their constitution in order to deal with technological problems. So I would urge you try to get the constitution right, and then let us deal with the consequences which we don't like which is what parliament should be doing, that is what the law makers are

here for. The internet I have no suggestion to make how you can control it. I think its impossible but maybe we can control the consequences if we're clever enough and maybe we need to go into international conventions and do it through the United Nations. That is not solved by putting some Town Council clause into your constitution. Thank you very much.

Patten: Could I just deal with the question of the "if you have'nt got the money you have'nt got freedom of expression" which is the other issue you raised. I think it's a very real issue. Black opinion has been unrepresented in South Africa; efforts are being made to correct that, but to establish a newspaper cost a great deal of money; to own a press, one press alone might cost forty million rand it's really quite big money. What is happening within the press at the moment is an adaptation of available resources with unbundling taking place, with opportunities developing in which blacks will gain quite higher positions quite fast than they previously held. It is a transitory stage, it does take time if there is a quicker way of doing it without destroying the press the danger of legislative intervention to speed it up is that you make the whole industry unviable that is a problem.

Chairperson: Thank you. Mrs De Lille?

de Lille: Chairperson...

Chairperson: The editor-speak. Mr Owen said we must junk the constitution so that we have serious-speak there, - the editor-speak.

de Lille: Chairperson my question is on Section 23. I hear the concern raised by the editors that every person shall have the right to access to all information held by the state or government. I want to hear their view, that is the vertical application of this right I want to hear your view on the horizontal application of this right where we can also have access to information to private person's to private companies, social clubs. Why only the emphasis on state information? Should it not apply horizontally? What is your view on that?

Louw: Surely the state's information comes from the money that the taxpayer gives to the state and the taxpayer in entitled to that information.

de Lille: Chairperson can I follow up?

Chairperson: Yes, please follow up!

De Lille: I can make the same argument for a worker in a company, a worker who's also contributing to the wellbeing and profits of that company also must be entitled to see the books of the company. It works the same way. So why can't the worker use the same section 23 to the advantage of the worker?

Owen: Mr Chairman - I'm afraid Mrs De Lille is going to be unhappy with my answer but we think that they are very difficult questions about the limits of the rights of privacy to be regarded here and I would concede that I don't think, unlike our courts, I don't think a corporate person or juristic person should have the same right to protection to their privacy or dignity as individuals. It's a whole field which is fraught with difficulty and I really don't know the answers but I cannot believe that the problem is solved by adding the limitation to the amount of information from public sources which is available to the citizens. So it may be that we have later to come with horizontal application and figure out what we can and should take from private clubs and from the Members of Parliament's sports club whatever else, but our immediate problem is not solved by leaving the clause as it is. Our immediate problem is to get at the information held by the state and which has been used I would argue more at least than our information held by private bodies to oppress individuals and I think we really should solve part of the problem that we can solve now and leave the other part until we're wise enough to do it.

Chairperson: Thank You. Ms Smuts?

Smuts: Thank you chair may I think I Mr. Dommisser's input was useful because it put us on the right track in as much as it makes us look at the clause itself on the freedom of expression, and the reason I say that is that there is a view that we ought to lose the two tier structure altogether, one that divides rights into quite reasonable and those requiring the super test of the necessity and there is a view that we ought to go for a Canadian formulation or roughly a Canadian formulation I think the ANC position is pretty much the Canadian formulation which I think is capable, if you look at the Canadian jurisprudence, is capable of some quite restrictive interpretations. It is not always just pressing the substantive stuff and that is an issue, the socially desirable comes into play, and Canada a wonderful but a gentle land. Ours is more robust, or history is more robust. I certainly hold that the view we need quite robust safeguards on free speech on which subject by the way I think there is'nt another side of the story. Free speech is very important. Now if, I'd like to ask the Conference of Editors. So lets assume for argument sake we

end up with is the Canadian clause and you lose the two tier structure which is tackled on board from somewhere else, then surely what you can do is to safeguard some rights. Either you can make some rights illimitable, but there's a problem with free speech and expression isn't there? Even if you put it with thought and opinion where really it belongs, you've got a problem. So we can't make illimitable, so what do we do? So we have to look at the clause. And therefore I think what would be really useful is if we could get a detailed view from the Conference on how that ought to be handled, because surely Mr Hobb who spoke to us on defamation and I think the common law is not a problem. The "s" dropped off the word "laws" half way through the reports even at Kempton Park. But how do you deal with the matter of personal reputation, you do have to grapple with it obviously, so you will have to deal with it explicitly as an exception. Youth and morals, clearly you'll have to deal with that, there is no democracy that doesn't look after it's young people in respect of obscenity. And what else, then one has got to draft and craft incredibly carefully. Perhaps if there is an immediate response that would be useful, but perhaps what would be even more useful is a considerate written response in due course.

CFE: I think on this question one should say that if you do away with the difference between reasonable and necessary are you doing away with the hierarchy of values, are you then placing all the values at the highest level?

Smuts: Unless you use some other device and impose illimitability on some rights or use some other device.

Louw We are not suggesting that there should be no limitation. As we said there's no constitution in the world, in the democratic world that goes close without some limitation. We saying only that we believe that expression must rank with the highest in any hierarchy if there is a hierarchy. And which is necessary, yes, that is why the word necessary becomes so important and then I think if legislation has to be introduced to meet certain situations then you're right we have to think very carefully, indeed, about these things because they do affect people's rights; then if they are measured against that yard-stick at least we will get something that doesn't affect other rights too badly.

Louw: But then if I may add to that response. You were asking for another mechanism, another mechanism doesn't detract from the constitutional right for freedom of expression but you can have regulation as there is regulation in Europe of pornography

and there is regulation in other parts of the world of pornography and other items. So you don't have to have to detract from the right of the constitution. Regulation is something different and that's a very important consideration.

Owen:

Mr Chairman can I please just make a point that I would be bothered by the question of illimitability because I suspect that rigid formulations actually are a danger to the constitution and in regard to freedom of speech we've seen that in The American Constitution where they say that Congress shall make no law, then Congress goes around and makes laws and the courts actually intervene from time to time. The language is actually nonsense because you can't live up to it, and I am impressed and pleased with the double formulation which we have in our constitution because I think it does introduce flexibility and it puts no insurmountable barriers in front of the legislature. It just means that for seriously protected rights the legislature has to be very serious and precise and has to formulate it's legislation to pass the Constitutional Court and I think that it's all to the good. The only quarrel we have with it is that somehow we taken the artists out and chucked them out of the category that is properly protected. We're trying to put the non-political speech back into that highly protected category but it doesn't make it utterly rigid. It doesn't mean that it's illimitable, you can actually pass legislation to deal with pornography, with hate speech, with other things as long as you can prove it's necessary. All we're saying is you must'nt put unnecessary restrictions into it.

Chairperson:

Thank you. I have a few, a number of speakers now. Could I ask the members of the Committee to be quite precise in the questions they want to ask rather than make long inputs. First. Mrs Pandor?

Pandor:

Thank you, Chairperson. You know I won't have a difficulty with that request. In the Interim Constitution the formulation currently, particularly the second clause on the freedom of expression, refers to diversity of media that's owned by the state. The Black Editors Forum was making reference to all media, even privately owned. I wonder what the opinion of Conference of Editors is as far as diversity of opinion and perhaps even ownership is concerned. The input asks for quite significant rights for the media in terms of elevating the freedom of expression to a higher status, I think were the words that were used in order to bring in the notion of necessity within the Limitation Clause. I would like to know how the rights of individuals would be protected in the view of

the editors. And Mr Owen made reference to legislators dealing with things that aren't right once we've written the constitution that we want. What if the press doesn't like what the legislators do do in response.

Owen:

Can I take your second question first. If we don't like your constitution which we shall oppose it and try to have it changed. The first question, and it puzzles me because I have not once referred to the rights of the media, I've only referred to the right of free expression and specifically to people outside the media. I mentioned philosophers and artists and pornographers, but that it seems to me that I was talking about individual right to free expression, not about the media.

Harber:

Could I just address the issue of diversity. I believe it would be the consensus Conference of Editors that true freedom of expression, practice does depend on a maximum diversity of opinion and ownership, and the maximum access of a diversity of people to the media. I don't believe however that that is something sold in constitution. There may be various legislative ways to encourage diversity to prevent monopoly that have been tried and worked to some degree or another around the world. But I don't see that being dealt with in the constitution.

Louw:

I wonder if I can add to that response on the diversity of the media - You're referring to the item number 2 under clause 15. We think that is very badly worded. There's a difference between media being financed by the state and under the control by the state. And for instance if one goes into the broadcast media a very strenuous effort is being made by this government to divorce control of the public media, public broadcasting media from the state by installing an independent broadcasting authority to control all broadcasts, even though the state may in fact may be partly financing the public broadcaster. So we think that that word, that phraseology could be changed, it shouldn't be under the control of the state. Financed by the state is something very different but we think that if the state is very interested, as we think it should be, in diversity of media one of the ways in which it could bring this about would be to contract to media producers if I can use to your publishers, could I out it as crudely as that, to produce the diversity of media which deals with state subjects instead of having the South African Communication Services dealing with the matter which is an arm of the state. There is no reason why the very diversity that the Conference, the Black Editors Forum is asking for cannot be contracted to in this way to produce the kind of not only diversity, but also independent views of what the state is doing as publications

financed by the state. Thank you.

Chairperson: Thank you. Mr Green?

Green: Thank you, Chairperson. There was a concern raised by the panel with reference to section 23, Access to Information. Now I think you also made reference to the defamation law, the common law and you actually suggested that that is the limitation on your right. What do you suggest what would be the alternative in protecting the rights of individual as far as character is concerned. Is this not a proper balance when you look at the defamation law, common law and your right to freedom of expression and freedom of information. What other instruments would we have to protect the individual?

Harber: Of course there's the right to privacy and I think what we're saying is that defamation law, defamation law needs to be brought in line with our existing constitution. Defamation at this moment in this country is out of line with the existing constitution in that the courts have not weighed the individual's right to protection from defamation against freedom of expression and the argument that the public good, public service could be argued in favour within the bounds of the freedom of expression clause as a defence against defamation and what we're arguing is that the defamation law be forced to come in under the umbrella very clearly and unequivocally of the freedom of expression clause.

Chairperson: Thank you

Owen: Mr Chairman if I may just add to that. The constitution now contains protection for dignity and it seems to me that our life will be, the shape of our lives will be determined by what the courts decide on the balance of dignity and freedom of expression and we think if that balance is subjected to the test of necessity then we would be happy with it and we think it will offer all the mechanisms either the court or the legislature need to protect the dignity of the people.

Chairperson: Mr Eglin?

Eglin: I'll pass.

Chairperson: You'll pass. Mr Chabane?

Chabane: Thank you Chairperson. With regard to the input on Section 23, is the proposal that the onus to prove cause, it seems that the onus lies on the individual in terms of accessing state-held

information. Is the proposal that the onus should be removed from the individual to the side of the state completely without the onus on the other parties or the individual for the right to access that information. The second point relates to the grounds for seeking that type of information, that it seems at the present moment in terms of the current formulation in section 23 is limited. Is the idea that it should be broadened or that limitation on the grounds for seeking that information should be dropped completely so that the...I just wanted to know those two aspects.

Patten:

May I answer that by going back to what I said previously, that Section 23 places onus on a person seeking access to information to establish a right to such information and we believe the onus should be on the state to establish a right to withhold information. It would have to demonstrate why it should'nt give the information. That's what we're asking for. It's not only question of an individual requiring the information for the exercise for protection of his/her own rights but we believe that access to state information should be more widely available and in the case of the press we believe it's essential for it to play it's role in society so that if we going to have a constitution which only says that you can get the information from the state if you need it for exercise or protection or your own personal rights. That's a very limiting way of dealing with that particular issue and the issue is much wider.

Chairperson:

Thank you. Dr. Pahad?

Pahad:

I accept that the issues is much wider with the regard to Section 23. What I'm not sure is what you actually asking for, once having gotten rid of that. I mean, for example I think it's a fact that many journalist worked for the South African Secret Service in this country for quite some time, maybe some of them still do. Would it then be within my rights to say that they must now give me the name of every agent they had who was a journalist or an editor. Now I'm posing this in a stark manner cause I'm not sure what you really asking for when you say you want to amend Section 23 in the sense of saying. I'm not clear what you are saying that could anybody then ask for any information from any state organ about any other institution or any other individual. Let me finish, don't be in a hurry, that's the first part of it. So we must be very clear because when we discussed this in Kempton Park I should say we were well aware of what you are raising now. Not that we were unaware neither so I in a sense we're not speaking to some people who didn't discuss the matter in the way you're posing it now, and at that time we might be wrong, we may have been wrong so

I'm not saying we were right, we may have been wrong. That the feeling still was that we needed to keep it narrow and not so wide you could be opening flood gates. I'm just posing that question to you that that possibility does exist and to my mind you haven't sufficiently dealt with the second issue that's been worrying me. Can I say that we can come back to this question that you may want to say that overall the principle of necessity should apply to all of these freedom of expressions, that it doesn't apply only to one sector of society which is fine, we can come back to it. What I'm still not clear in my own mind is whether and to what extent are we saying that, taking what Mr Owen says (and I'm sorry he is retiring next year although a pity), is why don't you tighten the Defamation Law against the press so that you don't have the right to think that you can go and publish whatever you want about any individual because individuals must have rights against you too, it just can't be a one way ticket that you have a right to say what you want to about individuals and at the moment we have very little rights. Let me give you an example: Anton's newspaper, the Weekly Mail and other newspapers, whenever they're talking about something, they always say "a source", "a high level source", "a highly placed source in the ANC" and my own experience is that everytime I ask them "Which 'highly placed source'?" Sorry we can't tell you, you see. And the problem you face with them is that the newspaper hides behind the "highly placed source" to make all kinds of accusations which may not be true. Now what protection does the individual have against the press (I'm not saying that you do this deliberately) but against you doing this because we should balance these rights. The press must have these rights. I've absolutely no doubt about it and I've absolutely no doubt about the fact that you need a free and independent press but I think individuals also need some rights against, to some extent, you're not going to like this word perhaps, the tyranny of some of the editors of the press in this country so I want the balance and I want you to approach this question please ?

Harber:

I don't think, I don't think anyone will argue but there does'nt need to be a balance and protection against the tyranny of editors. I don't think anyone would argue that newspapers should not be able to hide in an uninhibited way in an absolutely open way behind unnamed sources. The courts will have to balance the newspaper , the individuals right's to freedom of expression against the individuals right to privacy and dignity other related rights. Those are matters the courts will have to weigh up against each other. What we're asking in the amendment in relation to Common Law is that in that consideration, the right to freedom of expression be taken into

account because the American courts, for example, have accepted that the argument of public good in publishing information holds water, that public officials can under certain circumstances have different levels of protection from ordinary individuals and that those cases must be taken up and weighed in the balance, but I don't think any of us are arguing that we must be free to abuse people or main sources in Deputy President's office. On your first question, your first question related to access to information. I think we making it clear there that we do also see a possibility for limitation, but we're saying that the onus must shift. At the moment and I've had this direct experience under the Interim Constitution: a request for information in terms of that section is met with a legal debate about to what extent I'm exercising my rights in pursuit of that to the point where I can't get any information because I first have to seek legal advice to prove that I'm exercising a right. From this clause there may come legislation which governs how it is executed and what the limitations are but I think we're saying that the spirit of the Interim Constitution and the spirit of the thirty four principles that determine the final constitution place a very high premium on openness and transparency and that's something of enormous value in the constitution, in the principles and I think in keeping with that idea it's appropriate that clause 23 should express the right of a citizen, the right of an individual to information and then **(end of Tape 4)** the courts or the necessary legislative process should determine the extent to which that right may or may not be limited.

(Beginning of Tape 5)

Harber: That idea it's appropriate that clause 23 should express the right of a citizen the right of an individual and to the information and then the courts or the necessary legislative process should determine the extent to which that right may or may not be limited.

Chairperson: Mr Owen?

Owen: Can I please go on record and say that I really don't mind if you publish the names of the spies for the National Party or the KGB or anybody else. You can publish all the editors who are on that pay roll I have no objection. But if I come more seriously to the question of defamation I would like, it's a vexed subject and a big one I would like to say that our Common Law has been greatly influenced by the historical development of our law, and there are difficulties with it. I will cite for example the Sage Judgement. We are now under the

interdict which prevent us from publishing the information about Sage which may well be of interest to you as a shareholder if you are one, and we have run into a whole range of limitations both by interdict and by threat of defamation action and we think we should really take a fresh look at it in the light of the philosophy of the constitution which we're adopting. I would personally not go as far as the Sullivan Case in the United State which actually allows you to publish 5 untruths, even knowingly, and I don't think that's an defensible position and I don't think the United States is sticking with it, but the Australians have now lately begun to develop a whole new view of defamation law and in order to do it they have imported into their constitution a clause which has never been written down. They say "It carries an implication of free speech" and the implication of free speech has now been used to justify the public action of certain kinds of material which, in the face of it could be defamatory, specially material which relates to public life and public interest, and these balances can be struck by our society because we have a clause in the constitution which say's flatly you have right to the protection of your dignity and you can go back to the court and appeal to that clause and then it's up to the court to weigh that clause against Section 33 and to find that's it's necessary to limit a speech in order to protect your dignity and we would live with that. We think there is no problem which you can raise which is not satisfied by the necessity clause, it just puts a higher test on the one you've got now.

Chairperson: Do you want to add?

Louw: Might I just say that to say that journalists are agents of the secret service, is set is said outside Parliament might be defamatory.

Chairperson: Are you saying that all journalists might sue Dr Pahad? - really ! Dr Pahad maybe you are being challenged to say it outside.

Pahad: With your permission I was saying -

Chairperson: No, no it's alright, Dr.Pahad I was not inviting you, no, no please don't lessen the blow on yourself.

Louw: If that is so these secret agents are actually working for the government, for him.

Chairperson: The very last word, this is giving you a second bite to the cherry, Prof, Du Toit which I'm inclined to say which we

shouldn't do because the members of the Committee are grumbling. we have until five-thirty, one sentence.

du Toit: If the press or media is the fourth estate if they are the representatives of public opinion wouldn't it be advisable that the press should be more democratic in its constitution.

Patten: I don't think the press has a constitution as such, but representative of public opinion, yes, I think there's a bit of a problem there. I think it's a problem we trying to address. It's quite difficult because if you look at the make of our society and then you compare it with newspaper reading society you will see quite a considerable difference, and that is a complication of the issue and if everybody could read and everybody read newspaper and then have the kind of make up of our newspapers we do have it would be very much out of step. It's not so quite out of step if you look at those people who do read and do read papers, although there's still ground to be made up. We are well aware of that.

Louw: Mr Chairman! There is one point about that and that is that the press represented by the conference of editors does not necessarily represent the whole of the republic of South Africa but if one take all the published in this country including community newspapers, community radio which is coming into effect, smaller monthly newspapers etc in addition to the daily newspaper that are represented here daily and Sunday newspapers represented here you will find that coming very much closer to the representation of the public as a whole.

Chairperson: Yes! Well I don't know, but I think we have come to the end of our time, the time we allocated for this presentation, and I think you all join me in thanking the Conference of Editors and earlier the Black Editors Forum for making time available to come and make this presentation. The views that have been expressed and the answers to questions are, will have been recorded, they'll be transcribed, and these will be forward to the Constitutional Committee, they will be properly processed and also to the Theme Committee for final drafting. We'd like to thank you for giving up your valuable time in coming and I would like to thank members of the Committee for agreeing that editors should come and address us. I think they have enlightened us a great deal on the very key issues that many of us may not have been sensitive to and for that we thank you and as we end, we do not regard you as tyrants. Please never think that we see you as tyrants. If we had, we would not have allowed you to come here. So thank you very much for coming.

Patten:

Again, our thanks Mr Chairman.(End of Tape 5)

