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THEME COMMITTEE 6.3

08 FEBRUARY 1995

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SIDE A

95/02/08

Chairperson: For debate early this er, er later last month, who now would be winding up his work with Lawyers for Human Rights, and getting on to do some private consultancy work, and perhaps what he'll be doing today is partly some of that area he is now getting into.

Mr Karim: I just want to pay tax for a month, and hopefully that will(laugh)

Chairperson: Er Mr Karim you are welcome! [thankyou] er to address us, [thankyou] and let us have as much information [ya] from your knowledge of the Human Rights Commission.....[sure]

Mr Karim: Ok, well thank you very much for inviting me, and giving me the opportunity to speak to you, er do you mind if I stand I, I

Er of suggestions about role function powers, and that on the little bit about structure, er but I'll come back to those later on, now I realise this is not ideal particularly for people that are sitting on the flats, er maybe you can't see it so well, er but it's not terribly profound it's actually fairly basic, but as I say I thought it would be a good idea, just to give it a general picture. What, what I really got here er em, the Constitution, right at the top, with the Constitutional Court, and then we got the Senate, National Assembly, which of course constitutes parliament, we've got the President, the Executive, and the Administration, and of course all of that together, er excluding the ... the ... cons.... all of that together constitutes the government, the Executive and the Administration.

Then on this side, I've put the Constitutional Court, and the Supreme Court, which in terms of the present Constitution, all together make out the Judicial Authority. Then we have three structures, and I believe that this group is infact involved in looking at all three of those structures, the Public Protector, the Human Rights Commission and the Gender Commission. Now as you know, or I hope, we here to talk about the Human Rights Commission, I ... would hate it if I was wrong on that, er, em What I want to just do, is relate the Human Rights Commission fairly briefly by way of introduction, to the role of the Constitutional Court, to the role of the Public Protector and very briefly, and not because is not important, but because is dealt with very, very briefly in the Constitution - the Gender Commission. Em, what I'm going to say now and also the proposals that I'm going to make at the end. Er very largely dependent in fact on how the New Constitution looks in its entirety, one needs to emphasize the fact that one can't look at these structures in isolation, and then at end put them together and expect something to work. Er it won't happen, I think that's one of the problems with the constitution at the moment. The various groups and committees looked at structures, and when they put them together they don't actually gel, all that much is often overlapped and the other areas where there's large, where the're large gaps, but I need to emphasize, what I'm gonna say now might not seem better than what I think it is. The Constitutional Court as you know, in terms of chapter three, which is the fundamental rights chapter, really protects the individual, by the way these are the people down here.

the chapter three of the constitution, the Constitutional Court deals, will protect I think primarily the relationship between these individuals and the State. Now there's a certain amount of debate around, that some academics are saying one can read it in a way that in fact the constitution as it presently structured in that chapter three will also deal with human rights violation between the people and that they refer to as the horizontal application. Whereas the relationship between the State and the individual, is of course the vertical relationship. I would ask you for the purposes of our discussion today, to accept that primarily, now I would say significantly most of the time, that human rights mechanism the Constitutional Court is now, and I believe will in the future the New Constitution probably deal primarily with relationships between the State and the people. So, all those provisions which prohibit discrimination, must promote equality, ... all this fundamental civil political rights, about the right to assemble, freedom of expression etc. etc. all relate to the rights which the State may not take away from the people. The Public Protector, em as it is structured at the moment, basically has em, three functions one it investigates, you probably heard all this before, but lets just also recap there, one it investigates, em, em government maladministration, abuse of power, improper conduct, undue delays, dishonesty, corruption etc. etc. So, it investigates the actions of the government.

Ok, that's what the Public Protector's job is, and in practise it will be probably more often

than not, looking at the administration, of government. It also presently has been given the power to resolve issues, so that for example if a person living in the Karoo goes along to the Public Protector and says, the person that's running the pensions department is being obstructive and I've been waiting for four months for my pension. The Public Protector's job really is to investigate, find out yes there's a problem, go in there and resolve the dispute. Either through mediation, negotiation or advice, so it's really to facilitate that problem. But the problem which the Public Protector, is really facilitating, again is aimed at the relationship between the people and between the State, and these are normal human rights issues, this is really as I said to do with maladministration, dishonesty, corruption and so on, and so fourth. Fundamentally, the Public Protector will protect the public against this monster here, which er run things too ... inevitably er, have to some lesser or greater extent. What this Public Protector can also do is refer, once it's investigated these things, if it finds that a crime has been committed refer it to the courts for investigation. Right, so the Public Protector dealing with that relationship. We now come along, and we find that there's a Human Rights Commission. And what is the Human Rights Commission been given the tasks to do, presently in terms of the constitution at the moment? And one can really summarise it into two broad categories, the one is to promote human rights generally. em promoting respect for the protection of human rights, developing an awareness of human rights, making recommendations to government, at all levels on measures to promote

the protection of human rights, to undertake studies etc. etc. So, generally speaking, it's given us promotional role. Which is very important. The Human Rights Commission needs to have a promotional role, that is one aspect of the work which the Human Rights Commission does. This promotional role which the Human Rights Commission has is aimed at all the various arms of government. It's aimed at the ... the courts, it's aimed at parliament, it's aimed at the President, the Executive, the Cabinet, the Administration and it's also aimed at the people. So it needs to teach the government about human rights, respect for human rights, promotes human rights awareness, and also needs to do ... to do that for the people. That's the one function that the Human Rights Commission is got at the moment. The other function which it's given, is to protect the individual against the violations of rights, now ... and to do that its power in the constitution is to investigate human rights violations, and assist victims financially and otherwise in redress. If you look at the constitution you'll find that broadly speaking, that is the function which the Human Rights Commission is got, at the moment, besides promotion, ...promotion. So, what that means if an individual or a group come along to the Human Rights Commission and say 'My rights have been ... my fundamental human rights have been violated. The job of the Commission is to provide money, in order to assist that victim, to go to the Constitutional Court to litigate.

So, there's an immediate connection at the moment between the Human Rights Commission and

the ..., I would say ... the Constitutional Court presently. But if this commission were to remain the same in the new constitution, would be the Constitutional Court under Supreme Court. So, this commission would facilitate access to a court which is going to make determinations about human rights violations. But the question you have to ask yourself is, what human rights violations does this court have jurisdiction to consider, and generally speaking, predominantly the human rights violations that this court is going to be considering now, and I venture to suggest that in the future, will be the violations of rights by the State against the individual. So, all this commission is doing now, is really facilitating. Give the people access to that court in order to protect their rights. It's acting in other words as a ... as alegal aid board, in a sense. Now, I would suggest that it is totally inadequate. And that's not what a Human Rights Commission is supposed to be. And ... the problem with this total picture, and why I needed to illustrate it, you will notice that there's nothing presently in place in terms of the current constitution, that deals with human rights violations that are committed horizontally, ... nothing. Those violations which are committed by one person against the other, by an employer against an employee, by a group of people against another group of people, by an individual against the group, by a group against the individual, by an entrepreneur, restaurant owner, whatever the case maybe, there's nothing, I would argue.

That really, comes to terms with those violations, which happen on a daily basis between

people. If you were to have an opportunity to read about Human Rights Commissions, in other parts of the world .. certainly, and the ones that I've looked at ... er, I've had a look and in fact I was in Canada a few years ago and had a close look at the er, interior Human Rights Commission which is er, a very interesting structure, but generally, and of course that's a provincial Human Rights Commission, but generally the Canadian Human Rights Commission ... I've read a bit about the Australian, New Zealand, The Philippines, I've met the Commissioner of the Philippines Human Rights Commission, er a little bit about Bermuda and then there's been a large debate about the Human Rights Commission in India, which is er, I believe is still continuing at the moment. If you were to read that literature, and a lot of it is in fact also contained in a publication from a commonwealth investigation, you'll find in fact that Human Rights Commission deal predominantly with what they refer to as non discrmithey deal predominantly with the ... with the implementation of what they refer to as non discrimination legislation. What that means, ... already means what it says, discrimina ...er, in the legislation which is passed by parliament, that prohibits discrimination on whatever basis. Whether it's there to protect the women, whether it's there to protect em.. children, whether it's there to protect the disabled, whether it's there to protect any disadvantaged group, and there's plenty of legislation er, in countries that actually just promulgating in order to protect disadvantaged groups.

There are...there's legislation for example,

against racial discrimination, in many countries, specific legislation. Because the constitution er, doesn't necessarily prohibit racial discrimination horizontally. Any legislation that deals with discrimination is implemented and to some extent administered and policed by Human Rights commission. And that is the most significant task which Human Rights Commissions undertake in most countries, where they actually function successfully. Now, ... what I want to do is share with you, and that you'll see behind you ...em ... on that chart there in the blue writing, and I would like to speak to that. Er, bearing in mind what I've said, and I will add as I go through it, em ... and possibly before I start and discuss each one of those, let me empha... emphasize that if there is a human rights mechanism, which is able to be structured in a way that it can provide access to human rights mechanisms to sort of access to the implementation of rights about which people have the expectation, it's a Human Rights Commission. Far more than the Constitutional Court, em I believe. So when you think in terms of creating a Human Rights Commissions structures, I think ones focus should be creating structures, which really are there in order to be closely accessible to as many people as possible. Having said that, I would like to just go through roles and functions, first of all ... this one of course is totally unrelated to the point I'm making ... An important function which human rights commissions exercise in may parts of the world is participation in drafting legislation.

Now, if you move across to the chart on your

left, you'll see that on the extreme left hand side there's a little square there which is Human Rights Commission law form programme. Ok, maybe I should come to that one right at the end. I think it will be confusing to go from one to the other. So let's start from the board behind you. That's participation in drafting legislation. What one needs in a country is a group of people with diverse knowledge and skills around human rights issues. Socio-economic rights civic political rights, international human rights law, totally up to date with what's happening, at .. on the United Nations level, with regard to new instruments that are being introduced, people that 've got a holistic knowledge of human rights internationally and within the country. Bearing in mind that in our constitution we have now and will in the future rectify and in fact introduce international public law into our legal system. We're going to have to insure that all our legislations complies with those international standards. And I would argue, and it's ... I think I'm arguing this because it is a situation that many human rights commission fit. The Human Rights Commission is ideally placed to have that as one of it's functions, to have a structure programme which falls under the human rights commission, that has the necessary expects, that has the infra structure, to be able to study, to research, to know what is happening and in doing so, literally audit legislation which is on our statued books at the moment and new legislation. Go through that legislation with the fine tooth comb. And I'm not only talking about human rights legislation, I'm talking about all legislation.

Because the most sort of em,...small little insignificant piece of legislation, that comes from somewhere that looks as if is totally remote, and disassociated in all ways with human rights issues you'll find that within that legislation there's a little clause somewhere, that could well been violation with a very fundamental principle of human rights. So, one I think critical function ...function of such a commission is to do that. How one is going to structure that particular programme, how many people, how many expects in various areas, you gonna have to have academics whether you going to have them on a permanent basis, or whether you going to find expects in various fields, at the universities and use their services on an ad hoc sort of secondment basis. Those are questions that you gonna have to consider in due course, when one knows what the budget is how much can be afforded etc. etc. But somehow you need that pool of expects. em.. The contribution I think at all times to the drafting of legislation once they have studied it would I think be very significant em.. and I think an important task. The next one that I've got, just below that is to receive complains re: human rights violations and do investigations. Now that is the function which we have already. OK, the moment in terms of the new human rights commission, the interim one which is not yet functioning er is the question of investigating em.. violations, and then as I've said to you, referring those violations to the judiciary. So yes, an important function of a human rights commission, and this certainly replicated in many parts of the world, is to receive complaints about human rights violations and then to investigate those

complains. But what human rights violations, and this of critical importance. I would argue that the human rights commission should not be concerning itself, with the human rights violations em.. between the State and the individual. We have a constitutional court. The powers of the constitutional court with regard to those violations are going to be extended, I have no doubt I see even the president of the constitutional court er.. Oscar Charlckeson yesterday made a representation that infact the Appellate division and Supreme court, generally should also have those powers. This relationship between the state and the individual is going to be dealt with, predominantly and I believe, by the constitutional court and the judiciary generally. The... one can say well to what is this court going is going to be accessible to the people. That of course is a problem, but there... one hopes that some lateral thinking will create ideas about the role of organisations, like Lawyers for Human Rights, Legal Resources Centres, and one also hope that we can persuade the Ministry of Justice to put some money into a trust which then can be used so that ... so that the people on the ground have access to practising attorneys to that court. But, I think that certainly it's the way it's done in most countries. The ... when we talk about em, ... about receiving complaints and investigating human rights violations, generally speaking human rights commissions concentrate on those areas which hurt most, and that is the area of discrimination, in all it's different forms. Em, ... and ... although I can say to you, that in theory most of the human rights commissions don't just limit it to non discrimination.

They include human rights violations broadly, between the people horizontally. But in practise it's normally discrimination, which falls er, on the lap of a human rights commission. So, we talk about receiving complaints, re: the human rights violations and then doing investigations. Ok, now presently it investigates, says there's a problem, and it refers you off to the constitutional court, with a few rand in your pocket and it says 'cheers'. That's not the way it must work, I mean that is in fact I think counter productive. We need a human rights commission that is involved, a human rights commission that is hands on, a human rights commission that in fact has got some powers, to actually get involved, and to implement action, and to work. And, what I would propose ... and this is certainly the way in which it's done in Canada, and I believe very successfully. The Human Rights is empowered to try to attempt to resolve the disputes. And you'll see that a third little item is to resolve disputes via mediation, negotiation, and conciliation. So what happens is, there's an issue, let's say for an example in the work place. And a person feels that he or she has been discriminated on whatever basis, you go along to the Human Rights commission, you lay a complaint, there's an investigation. And maybe the best way to illustrate how this works in practice, I'll tell you about a little case that I read about in Canada. A woman applied for a job at a particular company. She had an excellent CV, all the qualifications that were required. She put in an application, and er... about er... three weeks later, a month later, without..., she got an acknowledgement without having being short-

listed or called for an interview, she got the letter saying, sorry you didn't succeed with the application, we have appointed so and so. She felt fairly upset about this because she really felt she had the qualifications, so she made some enquiries about the person who have been qualified. And of course it was a white male Canadian. And she also made enquiries about his er.. qualifications and came to a conclusion that he was'nt nearly as well qualified, either academically or practically for the job. She then made further qualifications (investigations) and found that this particular company, didn't employ one women in any position of management or of doing substantive work. So she went along to the human rights commission and she laid a complaint, she was discriminated against. Big investigation at the end of the day, the human rights commission infact came to the conclusion well... Before I get to that let me tell you how they function in practice. They function with the combination of mediation and arbitration. So what they do is the first stage is to try and resolve the dispute. Bring the two parties together and they try and mediate and get the company to say ha we sorry, you know we did discriminate. em... we willing to try and resolve it, we'll pay you compensation whatever the case may be. But the understanding right from the outset, if the matter is not settled it will go to arbitration for a determination. In the process of doing the mediation obviously the mediator is going to say to the one party, now this is mediator who work full time for this particular structure. Is gonna say look, my sense is that you've got a bad case.

Really I have seen many of these cases and if you go to arbitration, determination I guarantee you, you going to loose. That sort of advise is given in the process of trying to resolve the dispute and that also sometimes persuades the weaker or the offending party to settle. But the party doesn't settle and in this instance the employer refused to settle, went to arbitration for determination.

What the... tribunal did is quite interesting. First of all it found out that there had been blatant discrimination. It then made a financial award, ordered the employer to compensate the applicant for the discrimination. But then it made an award which surprises a lot of people, but is sort of award that these structures have made and do make. It made an order that this particular company have the period of three years. Or is obliged to send some of the top management on some sense surprising affirmative action courses, that they could actually bring themselves up to date regarding gender issues, and also made an order that I have repeated for so many years that you employ at least two women into places of management. Now I mean, this sort of for a country we come from and the way we think it sounds like real sort of interference, with er... the way in which one can do one's business. But I think it's quite an interesting exercise to see the sort of issues that are taken to the one in Canada. Now one the ... I think one of the advantages of that is that the entire process is educative, is educative for every body involved. People are forced to grapple with the issues, there's discrimination.

We've all learnt through our recent experience, that we sort of thrown together. You all thrown together here in this committee, coming from different backgrounds etc. etc. Different political persuasions, and you work together and exact greater understanding. And that's precisely one of the functions that the commission can play. People that are really at logger heads with one another, different forms of discrimination are forced to actually sit and grapple with the issues. Reach solutions if they don't --- as determination. So we talk here er... about resolving the disputes throughout by mediation, negotiation and conciliation. By the way is all very informal so that is user friendly and easily accessible to people that are laying the complaints. Then the question is what happens if it's not settled and I argue that infact the commission should then have a tribunal connected to it which is then enabled to make determinations. Er, ... and if it makes the determinations, how far you want to go, whether is gonna have the power to do the sort of things that the Canadian commission has done ... is really for you to decide. But certainly I believe the commission should have powers which are aimed at resolving those disputes to the satisfaction of people who are on the receiving end of discrimination of whatever form. So, we talk about then the power to actually make determinations. That of course implies that it has to have certain quasi - judicial powers, for example to subpoena witnesses, to seize documents etc. etc. It needs that information available. I argued strongly that ... that in some of the commissions the Australian Commission ... I think it's the Australian one.

If it can't reach a solution, it refers to the courts for determination. And that become problematic, the courts are distant, the courts are inaccessible, the courts are busy with their own stuff. Then of course it becomes a fairly formal procedure, er ... money is required the -- ---problems relating to that. By the way, I do have a paper which I'm going to distribute to you later, er ... where I deal with some of these arguments in more detail. Er, ... clearly the advantage of having the tribunal, the human rights commission tribunal making the award, I've already said. It's inexpensive, it's easily accessible. But the other one, I think it's important, and that is one can create a tribunal ...er which is representative easily and quickly. Em ... one which takes into consideration, the general make up in the country, and of course race make up. And I think that's important for a structure of that nature for it to be representative, and it's gonna take a long long time for our courts to er... to be representative in that context. So, there are a number of reasons why, given where we are in South Africa er, ... it could be ... it could be a long way to go. Em, underneath making determinations, I've got another I've got a little star there saying: Implement and enforce civil rights and non discrimination legislation. Em, ... and that's precisely what one is talking about, er ... if there is specific discrimination, and I would argue just on that point by the way. That one should'nt have a gender commission separate. I, I would argue that, there must be legislation certainly there can be legislation that is specifically aimed at protecting women against discrimination.

No problem, but that legislation which protects women, must be energetically, and enthusiastically implemented by the human rights commission. I would argue that. Er, ... because that body there is going to be ... and should be the central most powerful structure in a country where it comes to in fact protecting people's rights on the ground. And if you take the gender issues out of that, my feeling is that the gender issues will be sidelined. Em, ... but I'll come back to the question of the gender commission again in a moment when I talk about public inquiry. So, er, .. we talk about the ... the role of implementing and enforcing civil rights and non discrimination legislation. I don't know whether you're aware that probably in the order at the moment there are people, that are in the process of drafting a civil rights Act. Em, ... because it is accepted that the constitution and chapter three is going to be dealing predominantly with that vertical relationship. One needs other legislation to deal the horizontal relationship, and civil rights legislation in fact deals with the horizontal legislation. And I would argue the human rights commission is ideally placed to implement civil rights legislation. Em, ... I also, I want to make a point: I don't think it's a good idea to criminalise ... to necessarily, I mean in certain circumstances yes, but generally speaking to criminalize discrimination. Because it is a confrontational approach to a socio - political problem that's been inherited in a country, and which needs to be dealt with constructively and sensitively. If you take a person that has discriminated against another, and you send him to jail or you give a big fine.

It's not really going to solve the problem, it will probably worsen the problem. If you try to deal with that discrimination in a constructive way, through a human rights commission which is educative in the process I think one would go a lot further in defeating and stamping out that ill ... and evil of discrimination. The next er, ... function that I've got below Public Inquiry, and public inquiry is a function of an Australian human rights commission. The reason why they have given that as a function of their commission, is because they acknowledge that there's difficulty in implementing socio-economic rights. We all know that, that is a problem, we also know that unless something is done, something constructive, something quickly is done to deal with socio - economic issues this country is in for a very very hard time. So, what they've done in Australia for that reason their problem is not nearly as enormous as ours, they've given the human rights commission a function of holding public inquiries, which predominantly looks at socio - economic issues. And recently they had a public inquiry around street children. So, particular issues to the social ----- be identified and then the human rights commission would be given a job of in fact holding a public inquiry to look at it as a phenomena, as a problem and causes and how it can be dealt with. And come up with recommendations, as to how it can be dealt with. I mean linking to the legislature, to see how legislation can in fact be drafted, and what practical steps can be taken to address that particular issue. I would suggest, that if one is going to hold a public inquiry, and is going to em,.... give gender issues particular focus,

it could be public inquiry around specific gender issues, as part of the function, special function of that er, ... of those public inquiries. And then lastly I've got human rights education awareness and promotions. Er, and that is a function which we have in the interim er, ... constitution. That is obviously very very important it's critical that one creates a human rights awareness, a human rights culture ----- in a country all levels of government, police, defense force em ... general administration, justice, em, ... amongst the people. And if one doesn't do that well the constitution, and all the wonderful writings we got will quite shrank to be meaningless that's a very very important task. Now to try and give some structure to that, what I've done on that chart over there, em ... I've said rightwith, and by the way I'm talking now about the national human rights commission. How the provincial ones are going to work, and how are they going to fit in, and how one is convert to take this model, how one is going to sort of decentralize it. These are all issues that obviously need to be looked at. And I would suggest that, it would'nt be a human rights lawyer who would tell you how that should be done. There you need management consultancy, and ... I mean in my organisation we spent like seven years running it as a group of lawyers, and only now we realise we need people in place to come and tell us how we structure the whole thing. And ...I believe that, once one has a general sort of concepts, the way to go is to get special consultancy to look at how can it be implemented nationally and provincially. But anyway, this is now a National Structure.

First of all I made a point that a human rights commission should independent statutory body created by parliament, which is subject to the rule, yes obviously it must be subject to the law, but not accountable to government. You can't have a human rights commission which is accountable for it's behaviour to government. It has to be the Act needs to make quite plain, what it's role is what it's functions are etc. etc. Then it must be left to go and do it's own thing. The only way it could be tapped over the knuckles is if it breaks the law. It must be subject to the law, but it has to be totally independent. You can't have a human rights commission, where the government can move in and say: `listen in fact we don't think you should investigate this particular issue, because it's bit sensitive, politically ... bla ... bla ... bla. That's out of the question, most of it ---- [inaudible] There had been a few human rights commissions that have gone that route, like the one in Philippines for example, sort of government connections is far too strong, and they got very discredited for this. Er, ... so it needs to be totally independent, and in no time ----[inaudible] to government in that sense. Obviously there I mean, if there is some senior official or one of the commissioners breaks the law or is dishonest as the case may be that doesn't he should be sacked, but must follow the due course the law. Er, ... it's ... I would also then suggest that when you looking at structure, you telling me to appoint the right sort of people as commissioners. You need people who have knowledge of human rights issues, who have an understanding of human rights issues, who have ideas ... who know about international

field, international commissions. Er, .. you need people who have credibility, people who are respected, people that could give this human rights people who are independent, politically independent, people who would could give this commission a sort of image, that is critical for it to be accepted broadly by the country. Em, ... I think that it would be expensive and fool hardy to have ten or fifteen permanent commissioners, I really don't think that is necessary. I think you need your chair person, and your vice chair person should be permanent, and the other commissioners should be there because of who they are, what they are, what they can bring to the commission generally. Almost like trustees, but they don't bring with them the ability to raise money, they bring with them the knowledge, the experience that they've got. It's largely a policy making structure, they decide on issues that are going to be dealt with priorities etc. etc. Will come back to that a little later, in a moment. The other reason why, I would argue that the majority of the commission, commissioners should not be permanent. Inevitably even although the structure is not accountable to government, because it's funded by government it is a sort of a quasi state structure. If you have commissioners who are permanently in the employ of the human rights commission, they would possibly, eventually develop the mind circles of civil servants that are loyal to the government, and then would not want to rock the boat etc. etc. Whereas if they continue to do, whatever they do in the private sphere, whatever it might be as lawyers, as activists, whatever.

Their mind set remains independent, and bring that with them to the commission, when the commission meets. Individual commissioners can also be called upon to chair public inquiries. If it's gonna be a public inquiry, you come along to the commission you say: `look we want to have a special inquiry into er, ... er, ... particular issue, issue of homelessness and we know that you've got expertise in that area it's gonna sit for six weeks, could you please make yourself available and chair that particular commission. So, commissioners can be used for that purpose. Em, ... but clearly there needs to be an administration, a director, staff to run this whole operation in that sort of head office level. While I've been down, I've suggested that one creates four separate sort of structures that fall under the jurisdiction of the commission. Em, on the extreme left I've put the law reform programme, that law reform programme is a whole question of participation, participation in drafting legislation. And as I said to you, -----[inaudible] Em, I've said that it's aimed at government, clearly it's aimed at government, it's aimed at parliament in changing the law em, for the benefit of the people and I emphasize people in all of those, because as I said I think it is the structure that can play the most significant role in assisting the people. So, that would be a structure er, I think it should be separate in a sense that it has an identity. Er, it has specific goals, specific objectives and off it goes. Strategic committee etc. etc. planing, obviously in consultation, meetings with the commissioners and how that work and how often they meet and how policy is implemented is

something which will have to be decided later. There you have a structure with that particular objective and function in mind. Then next to that there's a human rights commission promotion and education programme, and that is this whole question of promoting and nurturing developing a democratic and human rights culture in a country equals ----- One should be able to walk into a hospital sit wait in the reception area and reading a little brochure which tells you about your fundamental rights to health care and what it entails and how you can exercise it etc. etc. One needs to get this information out. Em, ... it's interesting that if one speaks to most people on the ground, how most people feel that er they have'nt got, in fact got any more rights than they had before. That's the feeling, because they have'nt actually been given information about those rights, that needs to happen, one needs to give information. People need to know about their rights. They know they got the rights, eve though they have'nt actually enjoyed them, I think it assist to some extent. Em, ... there's a good practical example that I saw in the newspaper the other day. If I remember it I'll come back to it, but it's a very good example of what it means to people when they realise that they've got rights which they didn't know about. Er, then the question of public inquiries. That is actually just ready for the people, identifying issues, holding inquiries which are aimed predominantly at socio - economic problems that we have in the country. They are sort of marginalized groups that need to be their phenomena needs to be researched, and suggestions, proposals need to be made must be referred to various government departments which

then can eventually filter through and come on the other side as legislation and as PLANS which are to be implemented. And obviously that sort of structure could er, work very closely with the RDP programme. But I think that there's a place for a structure like that. And then finally the tribunal and dispute resolution er, forum which I've spoken very strongly about. I think that that is absolutely critical. There need to be as many of those all over the country, in as many communities as possible. I know that means money, I know one has sort of a community centre with em structures which assist in facilitating the resolution of disputes with tribunals etc. etc. But somehow I think that one is going to have to try and bring that sort of justice which impacts on peoples daily lives, right down as quickly as possible. Because if we don't do that er, ... I think we people will begin to come to a conclusion that we are talking about paper rights not real rights. Again that is er, a completely separate structure. So broadly speaking, as I would like to see the human rights commission. Probably I've been speaking for too long already. But er, those are just some ideas, and obviously er, ... all these ideas are fluid at the moment, so much depends in what happens in other committees and how things develop here and there and everywhere. I would suggest is as things progress, or I would in fact ask, as things progress and as you get ideas from other people em, I'm sure you get some very very good ideas from other people, it might be quite wise to at some stage bring together people that have spoken to you and brainstorm with all of you that in mean time gained so much knowledge. Try and swoop ideas and see whether one can't

sort of develop out of that a structure which can really work and take the advantage of lots of good ideas put together and see what comes out of it. Thank you very much.

THEME COMMITTEE 6.3

SIDE B 95/02/08

Chairperson Now, we've been talking about this human rights commission, and we are very grateful for your views in this matter. Now can we have question clarification, and comments and some discussions over.

M/V aud. Thank you er, chairperson I want to believe that these are indeed very very important structures. But I'm concern as to the effectiveness of these structures. Taking into account that they are actually meant to normalise the situation that er, you know has for a long time been bedevil by the political situation in our country. Er, if you look at these structures one doubts as to first of all, the accessibility of these structures by the people that they are actually made to assist. And that er, ... you know ... taking again into account. Er, ... some of the things that are happening even now, one doubts if these structures are going to be effective enough to help the people that intends you know to help. Though some of you I believe you read a newspaper whether it's yesterday or day before. Where a certain lady had lost her livestock, and on finding out where the livestock were and trying to retrieve them, from the people who were in possession of those livestock. If you read about that story, it was so difficult for her, after the police had actually asked her to do certain things to identify those livestock she did all that, but then it was not easy for the police to do same to the people who illegally possessed her livestock. And ... then I come to a conclusion that She didn't have .. you know some other

totally is an abnormal situation, er ... when it comes to our societies. Now I don't think that these are really a strong structures, to help to normalise the situation that for a long time has been bedeviled. Where people do not have any property, where people do not have a land at all, and then we rush into ... you see a bill of rights, which is immediately going to protect the property of those who already own properties against those who don't own any thing. I don't know how much justified we are, because as is now the aim and the intention is to protect those who already have against the acquisition of property by those who do not have. How are we going to normalise that, wouldn't it be better perhaps to have other measures, of at least helping those who don't have anything to acquire something? And then there after we can talk about you know, introducing even the so called public protector. Somebody one day told us that it has been there and it has been working, but I just doubted how many benefitted, and how many even knew about that public protector. Isn't there anything that could be done to help you know fairly normalise this abnormal situation in our country.

Mr Karim

I just stand with your question, ----- --- er but my mandate was to talk about the human rights commission. Er, I have'nt come prepared to talk about other possible structures. Em, so I really can't answer your question, and I don't think it is not a right place for me to come now to think to try and suggest other structures rather than a human rights commission. Em, ... but yes, and I think for the reasons that er, you've stated, if it's going to be a human rights

commission, I'm trying to say to you, if you gonna have a structure like that, you need to design it in a way, that is actually is accessible to those people that you spoken about. And if it is not, if it doesn't serve that purpose it is going to be a total waste of money. If it's there only to assist the privileged and the rich, then I would say don't have it, if you gonna have it I would say it must be accessible.

Chairperson -----[inaudible] ----- including the first three, and then come down -----

Mr Karim Iaea sure....

2nd M/V aud. Thanks chairperson, mine is just a question: Can an individual take his or her complain direct to the constitutional court or he or she is expected to first go through the HRC. Again I'm trying to get the connection between the HRC, the Public Protector and the Constitutional Court, because I see there are some overlapping when one looks at their activities? When are they co - ordinating because it looks as if the activities are co - ordinating ... are overlapping, switching to that charter this side? Em, the HRC we are told should be totally independent, and it must not be accountable to the government, unless if I didn't hear it correctly. Who is going to monitor their activities, not in case where one official or one commissioner has done something wrong, but just to make sure they are doing, what their structure is being created to? Because I think in a normal situation, any structure would be accountable to parliament, then even private or civil section

the executives remain the wise dogs of parliament? That's my question thanks.

3rd M/V aud. Er, I just want to know er to what extent is er, any Southern African, or African influence in the kind of experience that you bring, I've listened you know you quoted the Australian and Canadian and many other examples to what extent is a benefit in looking more closely at African and Southern African experience?

F/V aud. [inaudible] ----- Personally I've been covered by Chief Mokoena, but I thought that Brian raised an issue about the gender commission in relation to the human rights, and I was wondering, I saw in the agenda are we discussing the gender commission after or can we raise issues right now?

Chairperson I think you can raised right now, because if you raise it in relation ----- [inaudible, off mic.]

F/V aud. Yes I'm very much concerned, because I think he has done the same thing which is criticising of looking at one structure in isolation. Er, ... because I think the conceptualisation of the gender commission, is conceptualised within er, mechanism to insure gender equality for women is just one structure which is being suggested and to be a constitutional structure, there are various structures which are being suggested. And er, ... when it was conceived, that's why it is so brief even in the constitution, er, ... at the negotiations was that er the women of this country who for quite some time have been working on various mechanisms, should be the ones

to be given the chance to say exactly what it should do and we did take into consideration the role of the human rights commission. And I believe, and I think is the belief of most women who have been tackling the issue of gender in this country, that racial discrimination and gender discrimination has been so much ingrained in our society and time and again when we talk of discrimination we actually focus on racial discrimination because it has been so much er, ...er,er it permeated the lives of all the people of this country. But gender discrimination we usually over look. And if you look at how, even the ministries themselves function they are supposed incorporate gender, but how many, the budget of this country how gender sensitive is it, how do you resolve those problems. There is no way in which you can start resolving it in a very er, ... er, er superficial way and think that when you establish a human rights commission, automatically be it also look at gender, and it will focus on gender the same way as it will focus on race and other forms of discrimination, it doesn't happen in this country. And I think is the experience of most especially in Africa, where the issue of gender is linked with culture, religion etc. I think it's an area which will need some specialised structures to deal with but it must find link the other existing structures. I agree. But to just rope it in and say it will be integrated integration has never worked in most countries. During the decade of few men that have been there, the debate whether we talk of integration or we talk on a special focus on issues affecting women.

2nd F/V aud. Ok Brian before you answer can I just raise in regards to how the commission is structured, why wouldn't well ... you do argue that er, ... as far as you are concerned commissioners must not be full time, you said permanent ... you used the word permanent [iaea] but I think you were talking about full time [iaea] Iaea, And I'm wondering to what extent then you are going to be able to get the commissioners to bring their experience and their expertise to bear on the work of the commission if non of them are full time. [I said the chairperson and the vice chair must be permanent] Ok, ... ok, ok, now let me come to the second part of my ... of what I'm trying to clarify, if you don't leave areas like for instance you do indicate that human rights commissions are usually about implementing non discriminatory ... non discrimination legislation. Like for instance one knows in the case of Australia have the sex discrimination commission, implementing sex discrimination act, right and same for the race discrimination. Now if we don't move those specific areas being attended to by people who open up offices that run and really focus on those areas especially in this country that has had this huge problem, in those particular two areas, how are you then really going to attend to those problems?

3rd F/V aud. Thank you, I was very happy, when you said the gender commission should not be a separate commission, because er, last week I also posed a question, was it really necessary to have a separate commission, if we have a human rights commission, and I'm for the opinion that here, we have a.... lets say four desks when we should

actually have five desks, and one of those desks must be actually or could deal specifically for gender issues. Er, ... it would save money etc. and apart from that one could take it to the people down, if one have a one stop. A human rights one stop service centre at local level. Then people will know where to go to. They'll go to the one stop centre. -----[inaudible]

Remote F/V
from aud.

It's also just a follow up of what ----- has said. But you er, maybe equally ----- of this Canada or another country, we could have a human rights which deals with er, gender question. But we are in South Africa, and if you look at the history of our country, is a history of the oppression of women or the disadvantages of women, even if we use a strong word of oppression. What just the women are today ----- as I'm talking. I just can't see how will that can be dealt with, by a commission which is in itself in South Africa going to be inundated with what really proves from history of our country. So er, to put that gender question under this for me, it will be just saying ok, women wait until every body else had their rights, and then we will begin to look at you. Because actually in practise that's what is going to happen [laugh] The women will have to wait until every right, every human right has been attended to, and then they will say women ... or by the way we have women where are their rights. That's what is going to happen that is the practise. No because that's what the commissions want to do, but because of the amount of work of human rights violations -----[inaudible] Er,

secondly, er, so, I feel very strong that er, we need an agenda from you, particularly because of the amount of work of the programme that we'd like to put on the women's position. Or the women in this country. The other one is the question of er, which you said is the same thing ----- we must no er, er ... criminalise discrimination. I don't know some of the discrimination we've seen ----- I'm not talking about Whites and Blacks, I'm talking about crimi..... you know some of them are crimes. So how do you not criminalise a crime ... how do you make it not a crime when already it's a crime. I see a point that er, we must be open minded, we must look at things clearly. But some of the er, human rights violations are crimes. So I can't see how we can er, make it anything but crime. So I am a little confused, maybe you can say exactly what you mean there. Thank you from me.

Mr Karim

Right ladies I think I will start -----
 [inaudible] --- whether the gender commission should be part the human rights commission or not, My view is that it's not for me to decide, I reserve some issues that must be predominantly decided by the women, and if women feel, that generally there should be a separate commission, and they can get support for that, which I mean obviously is critical, then that's fine. I don't feel so strongly about it, and I'm not trying to play it down at all, I was just expressing an opinion, I think the best place would be to be within the human rights commission. But let me just motivate a little bit further and say the following to you. Em, in the last four years,

women have spent and I'm talking now about real women and human rights activists in North America, and in Europe ... have spent enormous amount of energy trying to elevate ... and I'm sure you know this ... trying to sort of elevate the gender issues, gender discrimination or gender rights to human rights. Because what happened historically, when we took up the issues as women's issues, and eventually they became the women's issues like a sub component, of human rights. And in a way were neglected because of that. And the women then said 'this is not good enough' women rights are human rights. And there were many papers delivered all over the place, arguing that particular point. Now I'm not for one moment suggesting that the human rights commission, will automatically deal with gender issues. When I said that gender issues should be dealt with by the human rights commission, I'm not even suggesting that should assume that it will then by the matter of course then deal with gender issues. Because you right, it wont. But what I'm arguing is that if you have a human rights commission, and there's a law form programme to that human rights commission, within that department you have a sub section, which looks and can be staffed predominantly by women, by people who are going to be within the gender commission, that looks at legislation just from the gender perspective. But within that section, they are given a specific mandate, and they fine tooth comb every single piece of legislation, that comes out of parliament looking at it purely from the gender perspective. Then if there is legislation, a specific legislation I would propose that one talks about the systemic

discrimination against women, I would propose that one needs legislation to deal with that. That legislation must be implemented by a human rights commission. And there should be that's getting to your point should that be now one of the commissioners who has a speci... special task of implementing that legislation. But clearly one of the functions within that commission would be the implementation of legislation, which is aimed at outlawing, prohibiting, smashing systemic and other form of discrimination against women. Er, public inquiries they could also be a special ... a special focus. So, I'm saying that in that whole infrastructure, one could do every thing, one can have special desks that are set up to deal with that. Why I would argue that it should be part of it, is because so often other issues which on the face of it don't appear necessarily to be gender issues, in fact are gender issues. But only comes out later. And other issues which give the appearance of being gender discrimination, have all sorts of other implications maybe relevant to racial discrimination in it's totality. I think all these issues are so inter wound, that I would think that's where it should be. And I think that if it's done properly, it could be more effective. But I'm not here to argue that it should be one, or the other. I'm just explaining why I think it should be part of the human rights commission. But if the predominant feeling is that it should be a separate commission, well that is er, ... that I think is really for the women to decide.

Chairperson Brian before you pass on from that one, I think we could preserve some time just to come back to this. Because for instance I don't think we are necessarily... people are necessarily arguing that a human rights commission should not have a component that attends to gender issues. But I don't think that should then mean there should not be a commission that looks at other issues, with regards to the rights of the women.

Mr Karim That's fine. The point is, if that is the feeling then maybe there should be then a special er, ... mandate to a special group to, ... to, ... to deal with some of the issues that are recorded in the constitution, which by the way I think it is totally inadequate, the way in which the gender commission is structured at the moment in the constitution. Iaea, but why should that not be part of the mandate of this national human rights commission that deals with human rights issues. And gender the issues are human rights issues, they are not just ok. But be it as it may ... I feel strongly ... but I Really I ... I don't mind for example it should not be that way Let's get back to er, let's get back to other questions.

Co ordination, one mustn't spend too much time I think worrying about the structures, as it is at the moment because all this is going to change. But your question: does a person who wants to go to the constitutional court have to go through the human rights commission? No. Not all. A person who wants to the constitutional court, can go to an attorney, can go to lawyers for human rights can go to legal resources centre, can go anywhere and say my fundamental rights have been

violated in this way and on that I'm going straight to court. So you don't need to have accesses, you don't need to go through this commission. How the commission in the interim constitution is structured at the moment, it envisages that it will be there when somebody comes along and says look 'something has happened and I don't think it is quite right, then ... I think that maybe my rights have been violated, the human rights commission will investigate and say 'yes, your rights have been violated' The person says 'what can I do about it,' we think it's an important matter we'll assist you financially, then they will then refer that to the constitutional court, for some assistance and maybe somehow through the department of justice to get legal representation. But purely a referral agency. With no power to deal with the issue on it's own, that is what I feel is totally inadequate. If it has the powers to receive complaints, to resolve disputes to make determinations, somebody comes along with the issue that should go there, they'll refer the person there in any event. So, that sort of plan -----those suggestions -----take away from what we got here at the moment. The er, ... the public protector er, ... doesn't really Have answered your question sufficiently or not?

F/V respond.

Accountability

Mr Karim

No, no, no I have'nt got to accountability yet, that's another question. [voice from aud. inaudible] No, no, no, I just talking purely about the first part of the question was co ordination between the human rights commission the constitutional court and the public

M/V aud.

Mr Karim

protector. Er, that is your first question hey?
Iaea, my first was ...

The co ordination of those three [inter action
with audience inaudible] Iaea, ok well at
the moment er, ... they must really co ordinate
I don't think but they need to be really co
ordinate, I think is a good idea that this
particular committee is looking at all three.
Because what you gonna have to do, is you gonna
have to make sure that they are co ordinate, you
gonna have to make sure that there's as little
overlap as possible. This public protector's job
is predominantly aimed ... at,...at the
administration of government, as I've indicated.
These are'nt human rights issues. These are
issues relating to maladministration, abuse of
power, improper conduct, delays, ... wait for six
months or ten months to get your pension, that
you should have got, dishonesty, corruption. And
if laws have been breached in the process of
investigating, you refer to court. They are not
human rights issues. So, I actually think that
the way the public protector is structured at the
moment, is quite good. I mean I have far less
problems with the structure and the functional
powers that are given to the public protector in
the interim constitution, than I have with the
human rights commission. So, that is very very
separate and very distinct, constitutional court
also very distinct and separate. This is the
structure of the human rights commission that we
need to now, create so that it fills the gaps.
And that's why, I've followed this approach to
try and identify the gap is nobody is
dealing with that relationship, that horizontal
relationship. And that is something which in any

event the human rights commission should do. But in the process of hearing all your evidence, you gonna have to, in fact make sure that you come up[with three structures, or however many structures you need that are properly coordinated. The other question was er,...which was asked was er,... the question of accountability to parliament. On that what I want to say, ... you said who monitors their activities. First of all the question is who appoints the commissioners? And at the moment, as the constitution stands the President appoints the commissioners after it been through the parliamentary process, and there's certain amount of support etc. etc. So the President and parliament appoints people, give them a mandate and say there's an Act of parliament, that's what you must do. I'm saying that ... that just as judges are not accountable, judges aren't accountable to parliament. Now if you take the risk of appointing judges to administer the law, and to ... and to be part of the judicial authority, and you put your trust in the judges to do their job as they are expected to do. I'm saying you gotta have the same faith in the commissioners that parliament chooses, and ultimately the President. And however if there's corruption, dishonesty etc. etc. The public protector must deal hold those people accountable, because I've said the commissioners and the commission is subject to the law. They break the law, then clearly they must be held accountable, they may not be accountable to parliament, they're accountable to the law of the land, the constitution.

Em, ... the moment you make them accountable to

parliament, in what way, where do you draw the line. How do youI mean if you make them accountable to parliament, that means at the end of the year, will have a meeting with parliament and say, iaea actually you know we not happy with the fact that you are investigating, this issue and that issue, it's not really priority we think you should rather investigate these matters. I mean is that the sort of interference, that one would want? Or you say you have faith and trust in these people you chose as commissioners, they must do their job properly. They must use their discretion, they're the expects, you not the expects, you're the politicians. You're expects at being politicians, but you're not expects at being human rights commissioners, and you not human rights activists etc. etc. So, I would argue very strongly against any parliamentary interference. They must monitor their own activities, and em ... to the extent that they break the law, then they must be held accountable ...

3rd F/V aud. By who....? You see the point is, what is the exercise that intervenes at the point at which there's a problem, because you see usually somebody has to pick up a complaint and take it forward to somebody, then who should do that?

Mr Karim Let's assume that one of the commissioners has really behaved in a despicable fashion, em is er, abusing power, improper conduct, undue they not dealing with the matters and so on and so forth. Somebody is gonna complain about it. I mean somebody is going to go along and say iaea, we not happy with what you doing.

{audience noisy}

What I'm saying is, to the extent they're public servants, they must be held accountable in the same way, and the other mechanisms which are in place whether it's the public protector, or the courts of the land. If you break the law, you get prosecuted, and that applies to every body, that must apply to the commissioners and staff of the commissions. If as commissioners they're not doing their job, then they must be subject to investigation. But not by parliament, by the other structures, by the courts, by the public protector. And that's not parliament. I mean, what happens when a judge misbehaves? Parliament doesn't intervene, and it's not envisaged that parliament is going to intervene. But the judge commits fraud, the judge is charged. If a judge sits on a judgement for three years, and never passes em, ... em ... and never gives judgement, he hears the case but never gives judgement. He can be removed from office. And by the way, the President em, ... can move certain commissioners from office, in the present act, if they don't do their job. And I don't have a problem with that. But that's not being accountable, for what they do the substance of their work. It's merely saying you're not do your job properly, you not fulfilling your functions. An therefore you have security of tenure, but if you don't do your job, then you can be fired. Of course you can be fired, but you not accountable to parliament, for what you do, how you do it, and what cases you investigate.

4th F/V aud. I wonder if Mr Karim could give us some examples, from particularly African countries, where this

has been an issue in Zimbabwe, and I think in Kenya possibly. Em, ... where there's been disputes, serious disputes between the courts and the legislature, and the executive and now the parliament is actually threatened. You know the judges, and yet at some cases they've succumbed in other cases they stood up, against parliament and the executive. And I think it's a very important principle that ... that independence.

2nd M/V aud. Iaea, we are saying this, because there was a so called public service commission in the past regime, we were told that er, .. that structure was independent, you couldn't do any thing, people would forward applications to be employed, they just picked and selected their relatives and families, and the minister or whoever couldn't touch them because they are independent, so we are afraid now even this er, ... commission, what if they just drag their feet?

Mr Karim I don't think that we should even begin to compare what we hope to do, in terms of the new structures, the new constitution, the new forms of accountability openness with what happened in the old order. I mean it's like comparing apples and pears. Mind you apples and pears are quite similar. But it's not I think a valid ar ... argument, because we dealing with completely different animals, completely different structures, completely different way of governing a country, one would hope. If we look at the constitution, if we look at the structures in place. Em, ... there are all sorts of checks and balances that are in place. And we know, I know, I mean every body know, that those structures in

the past that claimed to be independent, were not independent. I mean it's the fact that it was just the way things were. Er, ... we mustn't allow our things to be like that again. We need to be vigilant, and that's why it's good that one has a strong civil society. I mean will see the civil society will stand up, and take issue with government, on all sorts of things. Not only the truth commission. Em, .. but er be that as it may. Em, ... but I feel very strongly about the independence. But that doesn't mean the commissioner can't be fired. The commissioner can be fired. But not because a commissioner made a statement about a particular human rights issue or chose to research an area, rather because the commissioner wasn't doing his work or her work whatever the case might be. Em, some ... you asked a question about the er, ... human rights commissions in Africa. Unfortunately there are not functioning national human rights commissions, not even in the newly born er, ... democracy for example Namibia doesn't have one. Er, ... there is an African human rights commission, which is a regional human rights commission. There are by the way regional human rights commissions all over the world. The African human rights commission works fairly effectively, accept that it doesn't have any teeth, in a sense that there's no African human rights court. The problem with the African human rights commission is it can draw a nation 's attention to alleged human rights violations, but it can't take any action. But they are em, ... there is a fairly strong movement in fact at the moment to try and have established an African human rights court. But there is not any

functioning national human rights commission, in Africa that I'm aware of. And I think ours will be the first if we have one we have one in the interim constitution, hoping it will start working pretty soon. So there is no example that we can take from Africa. Em, ... the closest as I say it's the Philippines and India, and the Indian one has not yet come off the ground. As far as I know the've not sort of I've got some material that goes back to 1993 early 1994. Em, either than that, it seems possibly to be regarded as bit of a luxury, in er maybe some of the developing countries. Er, ... I dealt with the I tried to deal with the gender commission issues. Em, ... the question about er, crime, task violations of crime which many of these can be. But the question of discrimination, say for example you apply for a job, and you are turned down, because you're a woman. Er, ... one can deal with that through er, ... the administration of criminal law. One could say, ok you gotta prosecute that person, find them guilty of committing an offense, and then punish them for that. I'm just saying I don't think that's the best way to deal with discrimination. Which is often ... I mean I know it can be very very overt, in this country and elsewhere. But often it's also covert, often it's unintentional, often it's just there because of the way people think, because of the legacy of the past etc. etc. And I'm saying the more constructive way of dealing with discrimination is through a commission whose task is to resolve those issues in a constructive er, ... educative fashion. If you maybe think of an example of er, ... of how one could effectively deal with em,

... discrimination through criminal justice system. I'm not talking about if you go to a person and he say you know ... I hate Blacks, and you then you've committed a crime. Em, ... it's not just a question of having an attitude about people of another colour, it's what goes with it that is a crime. Then obviously you need to be prosecuted, and you need to be charged, you need to be treated very severely. But if just an attitude, do you criminalise attitudes or you try and change attitudes. That's really the debate. But I understand your question.

Chairperson I think you really worked quite hard Mr Karim, but I think you will take another round of questions.

3rd M/V aud. Iaea, I think I must talk now ...{every body laughs} Look as we are going on I become scared you know. We now talking human rights commission. You have somebody here, with tracks and tracks of land, and you have somebody here who stay in a plastic shack. Then you come with human rights commission, while the imbalances, the radical imbalances are there. What relevancy is the human rights is going to have before the imbalances are being addressed, this is my worry. We seem not to be talking of any commission somewhere, who`s only in charge of addressing the imbalances, so that human rights commission should then be relevant. In a particular situation where the playing fields have been levelled. This is my extreme worry, you know this means, the legislators should be so sensitive. But before the imbalances are being

addressed, you should be careful how you legislate, because you may ... you may lock other people outside. This is my worry, my mind is grappling with that. Maybe the other question, is where you said, the human rights commission, could be able to send people to court, giving them money to go to court. How do they where do they get their money, to be in a position to help people with money to go to court. Now again in what you were saying as far as gender commission, is concerned you said they could go on their own, if they had money. You know but you create an impression that the human rights commission, will have money to give people moneys to go to court, but with the gender commission, wants to go on it's own they can go on their own if they get money, it seems as if I don't know whether did I understand you correctly, I would like you to clarify that. { I didn't say that }

Chairperson

Can I just er, ... indicate to Brian, we also ... we are also looking at the land restitution commission, and therefore last week we did have an information seminar on that. And that whole question of the reality of that land hunger as some ... one of the things that needs to be addressed. You know. But also the whole question of the socio - economic rights, which was dealt with by Judge Olivier. Er, ... what are the rights that the human rights commission is looking at the implementation of in our land? Is it those which are in the bill of rights, and if the bill of rights is not going to contain certain rights as yet, those are the most relevant for the majority of the people, what

then does it mean?

5th F/V aud. Maybe these are two related questions, maybe they are not. Er, ... you did say something about the civil rights Act, being at this moment, in drafting, could you please give us some more information on that. But then there's something else I would ask ... er, would like to ask. Em, ...if my rights as a citizen are violated against, in say, civil servants not doing their job, teachers not educating the children, my children not getting the education and me as a parent and my children as children er, then our rights have been violated against. Can I go to the human rights commission and say that the teachers are on strike, where do I go with that type of complain, or the nurses are on strike and my child dies, where do I go to?

6th F/V aud. I have a follow up question, and it's not really a question it's exactly what comrade was saying. Say er, ... for instance there are some human rights, which er, when taken by themselves can become discriminatory. Because as Jenny had just her children their human rights are violated because her children are not getting the education they should get. And I'm the teacher, my rights are being violated because I'm not being paid, so I go on strike. You see it's exactly what you are saying that er, ... when we look at some of these things that's why we are saying you cannot remove the gender er, er, ... commission {laugh} You are going to end up er, ... with I've been locked up there, when other people are getting their human rights,

because women want their rights, your human rights as man are violated, because your wife is been asked to go and work. You see, we will get that type of things. So I think that we need to really look at this question of human rights, very very clearly. Because I would say that her you know human rights are not being violated. She should be as a citizen as a cats caf she should be supporting the human rights of the teachers and see to it that they are paid. And the are on strike. This it's er, ... really one of those situations that when we look at this question we moved to answer. Thank you.

Mr Karim

Your is er, ... similar to the one that the ... the comrade asked. Em, ... and very relaxed with priorities. Er, ... I'm not here to defend a decision to establish a human rights commission, but to say that a human rights commission should be put in place before other critical issues relating to land redistribution and very fundamental issues are dealt with. I'm not arguing that at all. I'm just here because you asked me to come to tell you about the human rights commission. {Big Laugh} If you asked me to come here to tell you why there shouldn't be a human rights commission, and what other things that rather be put into place, I would have prepared myself and I would have come to tell you what other things that one rather, either than the human rights commission. I'm just doing what you asked me to do. So, it's not possible for me to really deal with that other than to agree, that there are so many very fundamental issues that have to be grappled and dealt with that are so important that the future of the country

depend on them. That's up to you the politicians, you gonna have to do a list of priorities and decide what is more important, what would you do first, what would you second. I got no power to decide what should be done where. That's up to you to decide. All I need to decide {laugh} and deliver the goods. You're in power not no...no... {laugh} don't forget that. It reminds me of ----- at a conference a little while ago, when we were talking about the truth commission, he was saying the regime do this, the regime do that
{laugh}

END

THEME COMMITTEE 6.3

TAPE 2

95/02/08

Mr Karim: Is not possible for me to really deal with that, other than to agree that there are so many very fundamental issues that have to be reacted with and dealt with, that are so important that the future of the country depend on it. That's up to you, the politicians, you gonna have to do a list of priorities and decide what is more important, what should you do first and what should you do second. I've got no power to decide what should be done when, that's up to you to decide (laugh - inaudible) and deliver the goods. er.. You are in power not me ... (laugh - inaudible) don't forget that. er.. It reminds me of a conference a while ago when we were talking about the peace commission, and you were saying the regime do this the regime do that, Johnny you actually the regime now (laugh). Anyway, so I, agree with you that there are so many things that need to be done, but I think, and I would really argue that if there is a human right mechanism, that has the potential to do some work for the people on the ground, it's the human rights commission. Most of them are constitutional court, em.. Public Protector has a very important job to play around those issues that Black Sash used to deal with, pensions, em.. all those very difficult sort of bureaucratic delays that happens from time to time in little remote spots all over the country, which of course just by laziness or by disregard for people and their rights, that sort of form corruption can be dealt with very effectively by the Public Protector.

Human rights commission really has the potential, to get to the people and it's a matter of deciding how we going to actually reach out and

Lawyers for human rights in Colburg in the Karoo runs a mobile law clinic, we literally drive around the Karoo with our mobile law clinic going from one community one little town to the other. Covering a massive massive area. There's no I don't think there's any reason why one can't create a roving facility for trying to resolve disputes through mediation facilitation etc. So it's a, we'll have to use our imaginations and come up with ideas which are suitable to South Africa. And let me say from the onset, human rights commissions are not tailor-made, I mean we don't have the ideal blueprint human rights commission, it has to suit the means of the country. And that's what your challenge is, to create human rights commission, which can in fact at least begin to address some of the problems which er most people have. And although it won't be a panacea resolve of all the problems. I think it will be better than nothing, I really do. Because if we just gonna sit back and talk about you know, what other things that need to be done, whereas we can get something running in the meantime we should do so.

Before I forget just touchig on the question of er.. you know, the money for the human rights commission and not for the gender commission, I spoke about support for the gender commission not financial support. If the women want to set a gender commission I think they should get it.

But I suppose in real terms they going have to get the support of the rest of the people in power who decide on whether or not there's a gender commission, I'm not talking about financial support but just talking about the moral support for the issue.

er.. I think we probably running out of time, that question of teaching, that really is public protectors. I mean they are in part of conduct, and to the delays in the education of your children. I mean that problem you would take to the public protector. And if you really feel strong about it, in the sense of services I mean the striking nurses and the striking teachers those strikes are all unlawful. You can have referred to court and have them prosecuted if you want to. I mean that's your rights as a citizen to that. Certainly there are ...

FVAUD1: But the human rights commission is not the right person...

Mr Karim No I don't the human rights commission is the right person... And then the civil right act will briefly, er.. the government em.. gave a mandate to a, not the government I think the ANC who gave a mandate, I think even before elections to a group of lawyers which included people from those human rights to do work around civil rights legislation. And it was done simply because it was accepted by the ANC that the constitution and chapter 3 of the constitution deals with the logical application and not with those model application. Lot of work has been done and there are drafts floating around. And those drafts civil rights intended dealing with ... as I said it(inaudible)

Chairperson: Thanks can you just take the last two questions.

FVAUD1: Thank you er.. Madam Chair, er.. I got the impression as you were discussing around that er.. some of the programme that arise when we are faced with these issues, arise from the fact that

sitting again ... of the whole thing er.. the divisions, unequal, er.. religions economic religions, otherwise which when we address human rights questions as if people are equal, it just make nonsense of the whole thing. So I'm just wondering whether perhaps we missing peace here, is it not because the United Nations fundamental human rights were indigenous people. This country has decided to ignore those which came out last year in July. I've never had anyone addressing us ever referring to those. To the indigenous peoples human rights which come in situations where people are moving from colonial system to the system of democracy as we have just moved out.

(inaudible female voice audience/chairperson?)

MVAUD1:

Thank you chairperson, maybe my question is out of the way. My question is er.. we are right now in this exercise whereby as our guest was addressing us, to try and get some advise as to what we can take in to the new constitution. Now when I look in the structure which we drew up there, I realise we have public protector, human rights commission, gender commission. To my mind, ladies will forgive me, I regard the gender commission as a short term thing. Because if it should go on it will become discriminatory in reverse, it will discriminate against men in the long term. When I take public protector, well it may be addressed by the human rights commission even the gender commission, the gender issues may be addressed by the human rights commission as an umbrella body. Because, I'm saying this because I know our interim constitution right now, is not a constitution in the international sense of the word.

It is more than a jumbled provision which was made out because of this negotiations. A constitution which er.. deserve this name to be

called a constitution should be concise, precise and up to the point without giving this extra things describing every each and every thing. If we should come with this public protector aside, gender commission another side, then we are going to have a very bulky difficult constitution, so I think I was wondering whether it would be advisable for us now as the legislators and advisors and .. (laugh) that we consider putting this human rights commission as an umbrella body, rather than to separate this thing and it will be costly. We take the human rights commission, members there must be paid, every commission members must be paid, everything, so it's going to be very, very costly. Thank you.

Mr Karim

em.. I'm glad you asked the questions because it reminds me, by the way my view is that the constitution that the human rights commission, and the public protector, any other similar structure should not be born out of the constitution. I don't think that they should, I think the constitution might refer to them. But I think that they should call be created by separate legislation. er.. I think that the constitution should not be too worthy and too weighty .. and too complicated, I agree with that. But legislation in fact should establish the public protector not the constitution and legislation to create the human rights commission, em.. and any other commission that is to be created. I don't think that they should be part of the constitution. That's my opinion. em.. I'm not going to comment on er.. your speech about gender issues and.. (laugh) (inaudible) OK

em.. The other question .. oh ya yes. The trick is relating to the rhymes of the indigenous people which came from the United Nations. As I understand it, er.. is really aimed at countries

where there are indigenous populations who have been largely wiped out where you have small pockets of indigenous people. Like for instance in Canada and United States, er.. where the populations are --- compared to what they used to be. And when those people are now saying as indigenous people we want self determination. And the whole basis for that, those --- at the moment we should be debating that is coming out of the United Nations, is to try and give some recognition and is a very, very controversial issue as to tell determination for indigenous people and what it means. At this very point in time there are indigenous people in Canada for example, particularly in the north eskimo communities that are saying they want to be independent they want to be independent homelands, similar to the ultimate around self determination that has been raised at the moment by some of the right hand groups. So my understanding is that those people are not ready to one's relations to the indigenous communities in any way appropriate, applicable to the South African situation.

FVAUD2:

All that I'm saying is that em.. why don't we have access to this and look at it ourselves than saying is type of thing that we are describing. Because some of us who have seen it, see it as very complicated. Part of it is that what you are describing, part of it is the entitlement of people to really er.. call and demand proper treatment if horrible treatment has been -- to them in the past. (inaudible)

All that I'm calling for is that it should be introduced to us, it should not be kept away from us.

Mr Karim

Now if we had a human rights commission --- form

programme, will be experts and access to all the material which come in from United States and all the other parts of the world, and you would be able to sort of pop down to the library or sort of computer and get access to that. I've got it in my office, got those -- in the offices of the most of the ----- offices in our resource centres in Pretoria. And they certainly must be available er.. somewhere in Cape Town. er.. but they need to be readily available. We have that structure to the human rights commission, when are we will be able to get if on core. We probably have a summary of it and relationship with other similar --. But I agree with you that, that should be available and you should be able to look at that and see to what extent that may impact some of the decisions which you are going to take when it comes to priorities.

Chairperson: I think we should really thank Mr --- for the energy this afternoon (laugh), you really had enough energy to cope with the group. It's a very taxing --- er.. I think that we would take up your offer earlier on when you said that you would it will be available later on after having more hearings and interactions with various people on the issues that we are discussing. To come back together and take another look, because you will also go home and (inaudible), and I would certainly want to interact with you on the gender (inaudible - laugh). So I really want to thank you em.. I wonder if you would like to leave...

Mr Karim I will leave this if you really want me to leave it. (inaudible). I will also leave this OK, I've got one copy, but I want to also apologise, I really sort of put it together at some paste, I've written on it, but at least is a document which says a little bit more detailed what I

dealt with not here, but when I was talking about the proposed --- functions. And I in fact some other little issues are included as well. For example we talk about class action er.. before the er.. before some of the human rights structure particularly the tribe --- er.. to make it more accessible in this document. So excuse any mistakes that you may find in this document in the --- but at least you can use as a reminder. Anyway thank you very much for the opportunity to speak to about these actions, I really feel that the human rights is the important structure and play a role. What we'll have to do is find a way in which we make it applicable to the unique problems of South Africa. And listening to the questions and some of the concerns people raised, my feeling is that you all very aligned to those issues, and you should be able to create a human rights commission at this room (inaudible)

Chairperson: Can we just have a stretch for few minutes and come back. (inaudible)

FVAUD3: We can clarify those proposals, and I think Cathy and I can work on that to actually make a final submission out of the or summary out of these submissions. We may be at a certain stage start holding seminars at various or through the various rooms or organisations that are available here, or maybe er.. I'm just looking at technickons or universities to convince special seminars on page 61.

And I see there's also a schedules of hearings on page 60 mentioned (inaudible) on women. I do not think that might er.. (inaudible) schedule of hearings might work out now, because they actually assumes now that women will have a --- I think we should first start with the seminars and present some options to them and then also to

have the seminar into the hearing er.. to get feedback from the women. I think that worked very well er.. through the various different hearings group that has been dealing with for the past two three years. And I think it's another, er.. it's time now we have to go back to those women organisations who have been holding these seminars and major conventions. To say OK this is the current thinking about the gender commission and human right commission and the public protector --- and we can give this whole picture. And then present them with some options and get some feedback. Thank you, sorry er.. I would really conclude that we need some seminars and we need to get some feedback from the various womens organisations over the country.

Chairperson: I think you are raising a very important (inaudible) er.. in terms of -- we already having er.. the two expects with us, to get employed with us. But secondly I think let's go back to the issues we raised yesterday. Our own acknowledgement that we need to locate even a discussion of this commission within the international experience (inaudible). Secondly that we need to locate within a broader context of national machinery, so that we not just, I mean the --- constitution has the commission and I think the --- (inaudible), so we are really not looking at it in terms of needing to find commission now, we are looking at it in terms of structure a mechanism a specialised structure and I think we will acknowledge you know the need, to locate it within the broad content of national machinery. And I think that would be the second area before we even come to the other structures that interlink the with a possible commission continuing in the new constitution. So I would say those seminars in terms of taking the issues to the women around the country would have to

empower the women in terms of understanding, you know, by explaining these things as much as we giving the information and accessing them, so that they are empowered to even understand what roles these things play. Because otherwise these things just simply don't make sense and uMfundisi was saying earlier on to have a commission dealing with human rights and yet you not have learned to do something for your stomach, you know, for your survival. So you really need to take the debate to people in a way that would make sense and in a way that will enable them to come back to you about how best to address a problem. Because I think all these things are being created or are being --in the both the interim constitution or whatever the way we are going to put them in the constitution to change peoples lives, to create a descent society. That's the idea, so it should not just be us being so focused with structure because it's there by name, you know instead of us looking at the broader thing and saying how best can we get on so that we are on the same weight length about these things and we can come to the same conclusion.

FVAUD4:

(inaudible) taking a word out of my mouth because I was going to say we need really to focus also on our other duty here, the transformation aspects.

That we are looking at these structures not only as structure on isolation, we are looking at ways that the society can be transformed in which it can be transformed. And we went further we said transformation is non ----- and looking at how it proceeds the ways of monitoring the transformation and evaluation. And in fact even that task somewhere along in the governmental structure, I don't know, I'm not sure wherether

it's within the government or outside the government. Some structure which keeps doing that right through as change takes place er.. in order to keep re-visiting what ever we might come up from the constitution. But another aspects relating to the gender issue, I was wondering whether the experts could not help us, in finding out what usually as far as I know during the first decade of women just before they went to conference to re-evaluate the previous decade, and think of the following decade, the United Nations produced a very important critique of the activities of the women in the world those were concerned with their programme of the women activities. er.. That critique, if we can get hold of that document perhaps through the NDP I think, I don't whether I think it's possible. By now it should be out because we having the meeting is next year. It could help us a lot because we will then be able to critically assess what we are thinking of doing ourselves in the contents of the larger international situation. Thank you.

Chairperson: Can I suggest that perhaps we start looking just to take on and make practical to what Ronnel was raising. Look at the area of seminars, workshops, but start looking at where and how, you know in terms of provinces, er..

Because you can't say people must come to Cape Town, you know, if you are serious about involving people you can't say people must come to Cape Town. So we have to begin to get out and take these things out to the provinces and even to whatever sub-divisions, I don't know how they are divided I know in the ANC we have got regions in the provinces. To begin to do that sort of thing. So that you begin to take this information and take this debate there. So er..

perhaps we can just loosely the leave arrangements between the administration and the discussion of the actual logistics of how best to evolve a programme around this particular debate on the national machinery for women. And then perhaps we can look at the proposal at another week if Cathy, Ronnel, and people --- can start looking at what is possible, what is workable in terms of provinces. Because I know that also there was interaction with provinces for them to start looking at how they can make venues and facilitate, you know, workshops of that sort which are happening within the processes and within the context of constitution making.

FVAUD5: How is this related to the set programme of a participation and public participation?

Chairperson: You see the thing about public participation precisely that there has not been a set programme, you see, there were these ideas which are contained with document, that you know, one of the ways is to look at the target groups and say those target groups can only be addressed during a particular month, but those were all just ideas that the administration had because it was trying to be very organised in packaging things.

But that does not necessarily suit the programmes of thin committees and sub-thin groups in terms of you know, the fact that we already have Ronnel and Cathy here, are we going to wait for March before we get on or are we going to, if it is possible start you know, arranging for seminars and engaging them so that we get on with the work. You know, and I think these are all the issues and this is why Mr Ebrahim was saying that well they are flexible, you know they were just putting ideas forward. So even in considering

our own programme we will you know obviously look at this. And continue have continuous consultations with the administration as to what is possible, because at the end of the day they have to make sure that the finances, the logistics are workable. Mary..

FVAUD6: I'm beginning to feel that the public protector is got lost. I think he is suppose to be or she is suppose to be first in our list, and it seem like it's getting swallowed up by agenda.

Chairperson: No that is not true, because we have said, the public protector I think is too big to be swallowed up (public laugh). What we have said Mary is that next week as soon as we have reports er.. we see what is coming out of the public protector right, we can start planning a definite programme around public protector. Right, but who are the groups that we want to call to give more evidence, because we can't just have the --- being the only person to address us. We must have other people. And maybe we can call lawyers for human rights and other people, we are going to come up with all those ideas. Hearings, er.. do we need seminars or are issues much more straight forward with public protector.

Is something that even before the deadline for block 3 comes, I don't know which we can perhaps prepare a report and say to the institutional commission committee, this you can get on with and they can even refer it for drafting. But it does not stop us because we already have our experts here. Already, because there is already enough for us to begin to concretise certain ideas for a programme around the gender thing. And it might be a much more complex programme. Precisely because it is a new concept in our country. So, you know, while it may be simpler to

deal with the public protector and we are dealing with it, it might need more time. And I think we did acknowledge that in fact for the gender thing and for the land we need more time. And I think we should not stop ourselves from saying already OK, this is the possible programme, and we keep feeling the gaps as we go.

FVAUD7:

I just also think that we need to bear in mind those well parliamentarians are going to be going back on the 17th. So that when we developing our programme I know that we've got the sense now that we can have gender that we can have public participation and public protector in terms of the public participation programme they may not mutually exclusive of each other. But I do think we need to work in quite a programmatic way, given the fact that you people are goanna have such heavy programmes from the 17th of February. And it is the CA goanna be meeting once a week I think. And we goanna have the weekends full public participation events. So maybe we jumping ahead far too quickly, far too fast. And I don't think that we must worry, cause I think this committee is dong a hell of a lot of work. em.. But maybe let's develop our programme. We can look at the gender, we need to look at what we are saying around the gender programme even if it's only going to start in a month's time. But maybe we need to try and be more pull ourselves back a bit, and look more problematically. But that we can only look at next week.

Chairperson:

Then we have item, you know the preparation for tommorow's meeting. I think tommorow er.. or we have not yet announced that tommorow we are going to be addressed by Mrs Homsgard from the Danish embassy who was the head of a structure which was in the prime minister's office, to the former head of that structure but which was part of a

national machinery in Denmark. em.. It was called the equality status something, the equality status council. And I talked to her briefly on the phone today, and she said that it was the central part of national machinery in Denmark. em.. So she is going to address us, I did indicate to her we would rather broaden out so that we locate you know our own thinking and our own contextualisation of the structures we are talking about. The experiences of how the national machinery worked else where. So she's coming to address us at 14h30 tommorow. So that is the programme and perhaps we should just leave it at that, because we do also start overworking ourselves. Can we just have that and then any other business if there is anything pressing then we can look at it when we finished that as we usually do. ---

FVAUD7: er.. I need to be reminded, who was responsible for working on the public protector?

Chairperson: Jenny, er.. (inaudible) OK, Mary, Jenny and yourself is here as volunteers for the gender and quality, right. The public protector it was only Jenny, I think we will find somebody. (inaudible). And then the human rights commission was Sheila (inaudible) there was this --- looking like there was somebody else. And then the commission on restriction of land rights, er.. (inaudible) and Mr Mokoena. Has any body signed the register?

MVAUD2: Except me, (inaudible)

Chairperson: What was the question, and what is the question? No not according to our programme. Any other business then we move to item 6 as that is closure and we will be meeting tommorow at 14h30. (audience voices inaudible).