

NEGOTIATING COUNCIL MINUTES / MINUTE 2107 28 JULY 1993

5.1.3 It was agreed to go through the report section by section. Furthermore, background information was given on each section, where necessary, by the Technical Committee. Questions of clarity were also put to the Technical Committee. During the course of the discussion the following was noted:

5.1.3.1 Section 2, the title "Fundamental Rights and Freedoms" refers: It was suggested that the Technical Committee should consider the addition of the word "responsibilities" to the end of the title of Section 2.

5.1.3.2 "Enforcement" Item I refers:

- * Item (1) (b) refers: After the stating of various points of view, it was agreed that this item remain as is, subject to further submissions.
- * Item (1) (c) refers: It was suggested that the following be inserted after the word "principle" "s of liberty and".
- * Item (2) refers: That the Technical Committee would deal with the issue of Indigenous Law in its next report. The Technical Committee requested submissions from participants on this issue. The Technical Committee would also take into account the views expressed in the meeting.
- * Item (3) refers:
 - It was suggested that the Technical Committee reformulate this item to include the rights and freedoms as recognised by indigenous law.
 - The Technical Committee was requested to take into account the concerns expressed on this issue with regard to the inclusion of the so-called "Homelands". Furthermore to take into account other views expressed in the meeting on this issue.
- * Item (4) refers:
 - It was suggested that the word "may" be replaced by "shall".
 - The Technical Committee requested participants to make submissions on 'Enforcement Mechanisms and Procedures'
- * It was agreed that Item (5) be deleted.
- * Item (7) refers:

- It was suggested that the words "and made subject to the obligations" be inserted after the word "freedoms".
- It was suggested that the item be reformulated to read "All natural persons shall be entitled to the rights and freedoms contained in this chapter unless expressly stated in this chapter."
- After discussion and the putting forward of various points of view, it was agreed that there was a link between this item and item (1) (b) and that all participants, if they so wished, should make submissions to the Technical Committee on this issue. Submissions were also requested from participants with regard to the question of the extent to which this chapter would horizontally operate.
- Participants were requested to make submission on entitlements and rights applicable to corporations.

* Item (8) (b) refers:

- The Technical Committee was requested to consider the addition of the words "authorised by" or an appropriate equivalent into this item for purposes of clarity.
- Other participants did not support this view.
- After discussion it was agreed that the provision did allow for a wider access to this particular provision; that the wording "on-behalf of" did not constitute an open ended invitation for interventions; that the whole question of the formulation of rules by the appropriate authority did provide for some screening mechanism to exclude people who did not really have an interest in a particular matter and therefore the item remains as is.

* Item (9) (a) refers:

- It was agreed that the word "scrutinised" be replaced by either "interpretation" or "interpreted".
- It was suggested that the proviso in this item was meaningless and should be deleted.
- The concept of strict scrutiny would be spelt out in greater detail by the Technical Committee.
- It was suggested that the right as regards to the political rights should be clearly stated.
- It was suggested that the item be positively reformulated. It was agreed that this item be reformulated. The Technical Committee was requested to take note of the views expressed in the meeting.

* Item (9) (b) refers:

- It was suggested that the word "and" be replaced by "in which event" or "in which case".
- It was suggested that the formulation of this item was clumsy and the following amendment was put forward "No law shall be constitutionally invalid solely by reason of the fact that such law limits the rights and freedoms in this Chapter".
- It was suggested that this item should be formulated as follows "Any law or action in contravention of this Bill shall be to the extent of the contravention invalid".
- After discussion it was agreed that participants make further submissions to the Technical Committee on this item.
- It was agreed that Item (9) (a) and (b) should reside in the latter section on the Limitations.

5.1.3.3 "Equality" Item 2 refers:

- * It was suggested the Item 2 (1) was sufficient to cover the whole aspect of equality.
- * The Cape Traditional Leaders reserved its position in approving clause 2 until such time as the Technical Committee had provided some formulation to cater for the concerns of the Traditional Leaders. It was agreed that the Traditional Leaders would submit specific formulations to the Technical Committee.
- * It was suggested that with regard to Item 2 (2), a full stop should be inserted after the word "whatsoever" and the rest of the sentence deleted.
- * It was suggested that the word "unfairly" should be deleted from Item 2 (2).
- * After extensive debate it was agreed to refer Item 2 (2) back to the Technical Committee for reformulation. Participants were requested to make submissions to the Technical Committee indicating preference for either the extended clause, the alternate version or the stricter version under 2 (2). On the basis of the submissions and taking into account the discussion in the meeting, the Technical Committee could possibly put two alternate formulations before the Negotiating Council for consideration.
- * It was suggested that a full stop be inserted after the word "discrimination" in Item 2 (3).
- * It was suggested that with regard to Item 2 (3) the Technical Committee should consider phrasing this item in such a manner that it did not allow the forgetting of past discrimination and the consequences thereof. It was

further suggested that the concept of future discrimination should also be considered by the Technical Committee.

- * The question of the implementation of Item 2 (3) was raised.
- * It was suggested that the following words be added to the end of Item 2 (3) "provided such measures shall not be to the detriment of others".
- * It was suggested that in Item 2 (3) the word "enjoyment" be deleted and replaced with "benefit".

5.1.3.4 "Life" Item 3 refers:

- * It was suggested that Item 3 (2) be deleted. Other participants did not agree with this view.
- * Extensive debate proceeded around this item after which it was agreed to refer this item and any other points of difference that arose from the debate to the Planning Committee to suggest a mechanism to attempt to resolve the issues concerned.

5.1.3.4 No comments were noted on Item 4 "Human Dignity" or Item 5 "Freedom and Security of the Person".

5.1.3.5 "Servitude and Forced Labour" Item 6 refers:

- * It was agreed to the inclusion of this right.

5.1.3.6 "Privacy" Item 7 refers:

- * The Technical Committee was requested to consider and to ensure that this item did not prevent reasonable steps from being taken to prevent domestic violence and abuse, particularly against women and children in the private sphere of the home.

5.1.3.7 "Religion and Belief" Item 8 refers:

- * It was suggested that Item 8 (2) be deleted. Other participants did not support this view. It was agreed to defer further discussion on this item until after lunch.

The meeting adjourned for lunch at 13h00.

The meeting reconvened at 14h20.

- * As a result of informal discussion on this item, held over lunch, it was agreed to defer taking a decision on this issue to a future meeting of the Negotiating Council. Participants were requested to make submissions to the Technical Committee on this issue.

5.1.3.8 "Freedom of Expression" Item 9 refers:

- * It was suggested that a provision dealing with diversity of the expression of opinion in the media should be included.
- * The Technical Committee stated that items 9, 10 and 15 were all subject to possible reformulations.
- * It was agreed that the Technical Committee dealing with the media should be informed about this item for incorporation in its Draft Bill should they so wish.

5.1.3.9 "Assembly, Demonstration and Petition" Item 10 refers:

- * It was agreed that this item should be referred to the Technical Committee on the IEC.

5.1.3.10 "Freedom of Association" Item 11 refers:

- * It was suggested that the limitation applicable to this item (see Item 28 (2)) should be clearly stipulated.
- * It was suggested that the words "or gender" should be added to the end of the sentence of Item 11 (2).
- * It was agreed that the word "unfair" should be inserted between the words "permit" and "discrimination" in Item 11 (2).
- * It was agreed that the Technical Committee reformulate Item 11 (2) taking into account the views expressed in the meeting.

5.1.3.11 No comments were noted on Item 12 "Freedom of Movement".

5.1.3.12 "Residence" Item 13 refers:

- * it was agreed to the inclusion of this right.

5.1.3.13 No comments were noted on Item 14 "Citizen's Rights", Item 15 "Political Rights" and Item 16 "Access to Court".

5.1.3.14 "Access to Information" Item 17 refers:

- * The question of horizontality with regard to this item was raised.
- * It was suggested that the following words be inserted between the words "access" and "to" : "with due expedition".

5.1.3.15 "Administrative Decisions" Item 18 refers:

- * It was suggested that the word "substantially" be inserted between the words "lawful" and "and" in Item 18 (1).
- * It was suggested that the word "reasonable" be inserted after the word "lawful" in Item 18 (1). The DP stated that they would make submissions on this issue to the Technical Committee for consideration.
- * As the Negotiating Council was unable to resolve this issue at this point it was suggested that the Technical Committee provide both an analysis of the implications and the options on which the Negotiating Council would have to decide upon with regard to this item.
- * It was suggested that the words "in writing" be inserted after the word "furnished" in Item 18 (2). The Technical Committee was requested to take the views expressed in the meeting into account when considering a reformulation of this item.

5.1.3.16 "Detained, Arrested and Accused Persons" Item 19 refers:

- * It was suggested that provision for customary courts should be made in Item 19 (1).
- * It was agreed that the whole of Item 19 be reformulated to clearly state that it is not possible to have detention without trial, specifically focused on those who are arrestees and awaiting trial prisoners. Submissions were requested from participants in this regard.
- * It was suggested that reference to items like reading materials, access to media and educational facilities should occur under conditions listed in Item 19 (1) (b).
- * It was suggested that the Technical Committee consider how the rights concerning arrested and accused persons relate to children.
- * The Technical Committee was requested to consider the problem of adequate nutrition according to one's religious needs.

- * It was suggested that the words "as soon as reasonably possible but not later than 48 hours after" be inserted after the word "law" in Item 19 (2) (b).
- * It was suggested that an additional right be included under item 19 (2), the right to vote. It was agreed that the Technical Committee consider this and discuss this with the Technical Committee on the IEC. It was suggested that submissions be made on this issue to the Technical Committee.
- * The Technical Committee was requested to consider the implications of Item 19 (3) (c) with regard to the criminal procedure as provided for by implication under Item 22 and 28.
- * It was suggested that the word "sufficiently" be inserted after the word "she".

5.1.3.17 "Eviction" Item 20 refers:

- * It was suggested that a full stop should be inserted after the word "law" and the rest of the sentence be deleted. Other participants did not support this point of view.
- * After discussion on this issue and as no agreement could be reached, it was agreed to defer discussion/decision on this item and find a mechanism to resolve the dispute.

5.1.3.18 "Economic Activity" Item 21 refers:

5.1.3.19 "Labour Relations" Item 22 refers:

5.1.3.20 "Property" Item 23 refers:

5.1.3.21 "Environment" Item 24 refers:

5.1.3.22 "Children" Item 25 refers:

5.1.3.23 "Language and Culture" Item 26 refers:

5.1.3.24 "Education" Item 27 refers:

5.1.3.25 "Limitation" Item 28 refers:

5.1.3.26 "Suspension" Item 29 refers:

5.1.3.27 "Duration" Item 30 refers:

5.1.3.28 Section 3 "Enforcement Mechanisms and Procedures" refers:

5.1.3.29 Section 4 "Further Recommendations" refers:

5.1.4 The Technical Committee was thanked for its work so far completed.

5.2 Technical Committee on The Repeal or Amendment of Legislation Impeding Free Political Activity and Discriminatory Legislation:

5.2.1 The Technical Committee was welcomed. Present were ?,?,? Apologies were noted from ??????. The Technical Committee presented an overview of its report and drew the attention of the meeting to matters that needed its consideration. Questions of clarity were put to the Technical Committee.

5.2.2 Discussion and debate followed on the report after which it was agreed to refer the following issues to the Planning Committee for consideration.

- I. To look into what mechanisms need to be employed or what suggestions can be made in respect of the date of implementation of the Bill of Rights and secondly, the issue of verticality and horizontality pending the report from that particular Technical Committee.
2. To consider the issue of the need for democratic/democracy and rule of law government from day one after the elections - concern and the concern of the IEC is what happens with the period before the elections - getting from point A to point B (the elections).
3. To look into the issue of the uniformity of application.
4. The Fundamental Rights Committee has suggested a set of enforcement mechanisms, the IEC is also considering enforcement mechanisms. Furthermore enforcement mechanisms are necessary for the enforcement of the Bill of Rights - the Planning Committee should apply its mind to this issue and bring various recommendations on how the overlaps could be avoided.

TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION : SEVENTH REPORT : NEGOTIATING COUNCIL MEETING : 30 JULY 1993

Mr L Landers in the Chair.

Chairperson:

A warm word of welcome to the Technical Committee on Fundamental Rights During the Transition. Ladies and gentlemen, you will no doubt recall that the last time we discussed this

Technical Committee's Report we gave them certain decisions on certain issues and clauses and then there were others that were outstanding or referred back to the Technical Committee, or the Ad Hoc Committee of the Council. Now I'm going to ask the Technical Committee whether they would like to first address the Council in terms of this Seventh Progress Report and then we will look at discussing those outstanding issues in the Report.

Prof du Plessis:

Thank you Chairperson. Very briefly the Seventh Report took into consideration the discussions on the Council at the previous meeting when the Sixth Report was discussed. It also takes into account submissions received by the parties since then and also certain proposals which were made by the Ad Hoc Committee appointed by the Planning Committee. I think the best way to proceed would be to go article by article and we can indicate where changes have occurred and where certain re-arrangements were affected. It would be easier than merely high-lighting the changes that were made.

[seems to be a part missing here as the tape is silent and then goes onto another discussion]

Chairperson:

Chief Nonkonyana, I take it you have a problem with that proposal. We can't hear you sir.

Chief Nonkonyana:

Sorry, Chairperson, I have no problem with that proposal but before we even discuss I want to raise a matter which is of fundamental importance to us concerning the Report. I just wanted to come immediately after he has spoken.

Chairperson we are very pleased to hear from the Technical Committee that in drafting the Seventh Report they had regard to the debate that took place when we were discussing the Sixth Report and of course the submissions that were submitted. I would like to remind this House Chairperson, that when the Sixth Report was discussed, we the Traditional Leaders raised the point of Fundamental Rights entrenched in terms of our tradition and culture and that was noted in the minutes which was approved subsequently by this Council and I must say, Chairperson, notwithstanding the remarks from the Technical Committee no regard whatsoever having read through this Report, did they have any regard to what was stated even in this Council, not for the first time, though, and also they did not consider at all our comments which from a document I have before me which is dated the

Chairperson:

Chief Nonkonyana, can I just interrupt you. I think you are referring to a matter that is contained under Section 30 on page 12 of the Seventh Progress Report. That being the case I am not intending in any way curtailing or pre-empting what you are trying to say but would it be appropriate for you to raise it when we get to that particular stage of the Seventh Progress Report.

Chief Nonkonyana:

Sir, with due respect I think you are referring me to 30(1) to 30(2). Now.....

Mr Cronje:

On a point of order wouldn't it be more appropriate fully accepting the seriousness with which it is regarded to afford the Chairperson to go through the Report and then those things addressed or not addressed would be more properly discussed then because what we are having is a discussion on the fundamental issues then in the Report there may be others who may have serious problems with it. Would it not be better if we allowed them to present the Report and then discuss what is in it, or is not in it, and what should have been in it.... to table their Report.

Chairperson:

[seems to be a bit missing here in the tape] because that's my problem Chief.

Chief Nonkonyana:

No Chairperson, I accept that - why I deem it proper that I should actually address the Council at this stage is because from the Technical Committee they are saying in this Report they have taken consideration of our submissions, and with due respect nothing, they did not even consider anything which is contained in our comment. So if therefore the Technical Committee was giving us a report saying we had regard to the comments from the Traditional Leaders we don't see - they must tell us, "We don't agree with that", I would be happy, what I'm not happy about, Chairperson, is the fact that I raised this matter which is of fundamental concern to the Traditional communities of this part of the world and it is so central to us Chairperson that we need to be assured by the Technical Committee that they have considered the matter. So in view of that I wanted Chairperson to give me five minutes to address the Council as to why we are feeling strongly that this issue must be considered by this Council, because seemingly the Technical Committee has snubbed us as far as we are concerned, has not considered at all our views in this regard. So the only thing that we can appeal to is this Council to hear us.

Chairperson:

All right, I'm going to follow the procedure that we agreed upon. Prof du Plessis perhaps in your introductory remarks you could make some response to Chief Nonkonyana or you could raise it at the appropriate stage in your Seventh Progress Report.

Prof du Plessis:

Thank you, Chairperson. May I just state right at the outset as a fact that we did receive the submission referred to, it was taken into account, but the appropriate place as you correctly pointed out to deal with the issue would be when we deal with clause 30 and there we could explain how it was taken into account and how clause 30 addresses the concerns of the people who made the submission.

You will see Chairperson that clause 1 has been changed, we took certain provisions out of clause 1 and we formulated, actually we didn't formulate a new clause but we moved them to the end of the Chapter to clause 30, the reason for that being that provisions previously contained in clause 1 mainly dealt with the application or enforcement of the Chapter whereas there were also certain provisions included which dealt with the interpretation and we thought for systematic reasons it would be better to separate the two issues to begin with the application and then at the end of the Chapter to include a clause on the interpretation of the Chapter. So basically the clause 1 you have

before you at the moment says less than the clause that was in the previous Report, clause 1 of the previous Report. Now in that particular clause there are two significant changes - the first one 1(1)(a) where it says "bind the legislative, executive" and then the words were inserted "and where appropriate the judicial branches of government" Now that ties in with the proposal we make in 1(1)(b) "bind where just and equitable other bodies or persons". Now you would recall, Chairperson that this has to do with the horizontal application of the Chapter. In the previous Report we proposed, but it was very tentatively, that the Chapter should operate vertically only. We have received submissions from parties to the effect that that is not good enough and there were discussions to that effect from the Council as well, and after deliberation we decided to propose a limited horizontal application of the Chapter and the reason for doing so is set out in the comment to 1(1)(b). The other option we had was to identify certain rights in the Chapter for horizontal application and thereby leaving the others for vertical application too, but that is very difficult at this stage for us, for anybody to predict that certain rights, there will be no need for certain rights to operate horizontally and we therefore took a cautious middle road leaving it open like in most other jurisdictions for the courts to develop the whole notion and develop jurisprudence of horizontal application. I think there is nothing else in this particular clause which changed fundamentally.

Chairperson:

Tony Leon, DP, followed by Chief Nonkonyana and Mr Sisane and then Mr Penwell Maduna.

Mr Leon:

Thank you Mr Chairman. May I preface my remarks here and if the Prof du Plessis is an exponent or knowledgeable expert on statutory interpretation will he please accept that this applies to all future comments as well which I'm going to make. I'm going to address a specific criticism of this clause but I do not wish the Technical Committee to take it as a reference to themselves personally, but to the problems which are attendant on a document of this kind, and I think Prof du Plessis has highlighted one of them and I would like to address it. The Democratic Party among others, was very insistent that a Bill of Rights generally should apply horizontally in other words, as between citizen and citizen, and corporation and citizen, and not just between the citizen and the State which would be the vertical application because otherwise you have a very anorexic document. However, sir, with due respect the way that this has been formulated now I think bristles with problems and implications of an unforeseen kind which I would just like to give one example of. What this Technical Committee I don't think have done and perhaps the instructions were not clear in this regard and they need to be reformulated, was to consider that once you making this Bill horizontal as well as vertical it is going to actually impact on other clauses which have been drafted when the Bill was not intended to be horizontal and simply to be vertical and can I give you one example of that, Sir. If you turn to clause 17 using, bearing in mind that it is now going to apply horizontally and vertically - it says here "Every person shall have the right of access to all information necessary for the protection or exercise of his or her rights. "Now we are in general terms giving that now horizontal application. If the Bill was first to be drawn up that it was going to be applied vertically and where applicable, horizontally, you would obviously have limited that in specific terms, for example you will have said "Every citizen shall have the right to obtain from the State from any organs of State information concerning one, two and three." But here its completely open-ended

and what are the qualifications on that, Sir. Well the qualifications are that it must be just and equitable. I don't know what that means, Sir, as a qualification, is it vacuous, does it have a precise meaning in law, will it act as a limitation because the fundamental limitations, Sir, on this whole Bill of Rights, which is not very great, is that all the rights here may be limited provided that the limitation is consonant with the free, democratic society founded or governed by the principle of equality. Now let me take this example one step further, once you've got those are the only limitations what is to prevent a shareholder from saying that he wants the confidential minutes of the directors meetings in order to properly exercise his rights as a citizen who is entitled to equal protection of the laws and I believe, Sir, that once you bring in horizontality, which in the abstract is a very good thing and something that my party is insistent upon, then you've got to recast your whole Bill of Rights in that light, you've got to look at every clause in this Bill of Rights and say what will the impact of this be, or you've got to have a limitation which is going to be far more precise than the one which is offered here.

Chairperson:

The Technical Committee can, is free to respond immediately after a speaker has made a submission or you can wait until you've heard the others. Its entirely in your hands, Professor.

Prof du Plessis:

You see, Mr Chairman, perhaps it would be best to respond to that immediately and I'll do as briefly as possible - the problem with that particular right Mr Leon referred to is that once we say that right operates vertically only, it operates vertically only and there may be instances where there is a need for this right to operate horizontally. For instance there are many mighty organisations in our society which are not states which go around collecting information about people and very often far reaching information for instance credit agencies, and as we have formulated 1(1)(b) at the moment a person can bring an action to court to have access to that sort of information and it will be left to the court to decide whether in view of all the provisions of the Bill of Rights and in view of the nature of the right protected and in view of the needs of the particular situation, it would be just and equitable to have access to that information whereby the Bill would then operate horizontally. So the point I made right at the beginning - it should be left to the courts to develop the jurisprudence with respect to the horizontal application of the Bill of Rights. There is the other way Mr Leon is suggesting we can identify certain rights and say that these operate horizontally or can formulate them in such a way that they operate horizontally and others vertically only. The problem is that it is a very mechanical way of dealing with the issue. We thought, specially given the history of this Chapter that it is to operate during the transition that we don't want to cast things in a final mould forever and ever - there should be the opportunity for the body for the competent authority, the designated authority interpreting this Bill to develop a jurisprudence in this regard. That is what has happened in most other jurisdictions where the whole notion of horizontal application develop. There are very few Bills of Rights which provide expressly for an unqualified horizontal application and the jurisprudence in that regard is being developed by the bodies interpreting and applying the provisions of the Bill of Rights.

Mr Leon:

Mr Chairman, if I could respond briefly, I don't want to get bogged down to debate on this but I think Professor du Plessis has now raised another issue which to my party goes to the heart of the

Bill of Rights as it is now drawn, and that is Professor du Plessis' explanation be perfectly acceptable were it not for the fact that the Bill of Rights as it is now formulated has taken its own view, Sir, of what the nature of the democratic South Africa is going to be. It says it is going to be a free, open and democratic society based on the principle of equality. So you are actually limiting with respect, the judicial interpretation of any of these clauses because they are going to have to be in accord with that particular prescription and that appears in no less than three or four absolutely fundamental and crucial places in this Bill. Now that, Sir, is an ideological perspective, it might or it might not be the correct one, I don't know, I wouldn't prescribe what the form of democracy should be in the future South Africa, but you have decided, Sir, that its going to be based on equality to the exclusion, or as the super-imposed virtue of society where the liberty and others are not more important is not going to be determined by the courts, its going to be determined by this document, because this document is going to bind the courts in their interpretation, and that, Sir is the problem, with great respect, not just of this clause but of many other clauses in this Bill.

Prof. du Plessis:

Chairperson, Mr Leon is raising another issue now - it's a formula on which this Council has agreed - free, open, democratic society based on the principle of equality. His party did suggest the inclusion of the term "liberty" together with "equality" but we deal with this and we state in a comment to clause 30, subclause (1), comment there we state our reason why we haven't included that in the formula, but for the rest, that formula has been agreed on by the Council and its the first time this kind of objection is being raised to it.

Mr Leon:

Sorry, with respect, I disagree Sir, because not only did the Democratic Party make written submissions in that regard, my colleague, Mr Gibson, actually made those verbally and I understand, I wasn't here, and repeatedly in very strenuous terms, and the effect of Mr Gibson's qualification which I understand was also accepted by this Council last week. The effect of Mr Gibson's qualification that "equality and liberty" is identified by you because you say in your response "the concept could moreover create tension between the concepts of liberty and equality" and that is precisely, Sir, what we wished so that the courts could then evaluate for themselves which of these concepts was to prevail in a specific circumstance. But Sir, with respect, the way the Bill is now formulated it has been decided that equality is going to trump all other principles and rights in this Bill.

Mrs Jajula:

Mr Chairperson on a point of order.

Chairperson:

Mrs Jajula.

Mrs Jajula:

Chairperson, on a point of order I don't think this Council is here to listen to a dialogue between the DP and the Technical Committee - please proceed.

Chairperson:

Mrs Jajula, it is a fundamental issue, just as the debate that took place earlier in the Council on the question of Constitutions for SPRs was a fundamental issue, this too is a fundamental issue - no I understand what you are saying and perhaps Mr Leon should direct his remarks and comments through the Chair but it is not, I can't curtail the debate it is an important one and I'm not going to curtail.

Mrs Jajula:

Chairperson it is not the debate to be curtailed but should conduct it in the right position.

Chairperson:

All right, accepted. Any further comments, Mr Leon, Professor du Plessis?

Prof du Plessis:

Mr Chairperson, may I just say we didn't ignore that we regarded it as a suggestion coming from the Council, it was once again raised in the DP's proposal. Our problem goes further than merely the creation of tension between liberty and equality but the particular way in which it would be created if we add the word "liberty" there. The formula we use is a free open and democratic society, now that freedom and openness and democracy already presupposes liberty - it includes liberty, but it does not necessarily include the notion of equality. Therefore the particular reference to equality. If we have these notions referring to liberty and we add liberty, then Mr Leon will know there is a rule of interpretation saying every word must be afforded its own meaning. Now then the question is going to arise - does that liberty refer to there, does that mean something different from free open and democratic, and that is going to create all kinds of interpretation problems. Its either retaining this formula "Free open and democratic society based on the principle of equality" or "in a society based on the principles of liberty and equality". You can't have them both. The reason why we preferred "free, open and democratic society" is because it is a formula used in other Bills of Rights as well, there is a whole body of jurisprudence on that and if we use this formula in our own Chapter here, then reference can be made to that jurisprudence as well.

Chairperson:

Mr Leon, I'm going to allow you this last opportunity, and when I say this I am not curtailing debate - there are other speakers on my list, and I'd also like to afford them opportunity which doesn't preclude you from coming back into it.

Mr Leon:

Mr Chairperson, I'm not attempting to monopolise the debate, I do regard this Bill as in a sense being even more fundamental than the Constitution because its actually going to govern every single regulation in the future society we are trying to start fashioning here but may I through you Mr Chairman, actually respond to that. You see in our view "free open and democratic" is the correct way in interpreting any Bill of Rights in fact its in the Democratic Party's Bill of Rights proposal which we in turn borrowed from the Canadian Constitution, but its not just that there are three or four qualifying adjectives here because the wording is "free open and democratic based on the principle of equality" and Sir, I have taken some legal advice last night and I'm convinced by two advocates at least and its perhaps a matter of discussion, that this in fact its then equality which governs free open and democratic and I think it is equally true to say, although Professor du

Plessis, Mr Chairman doesn't accept this, that if you don't need to put in the word "liberty" you don't need to put in the word "equal" because "free open and democratic" is capable of both interpretations.

Chairperson:
Chief Nonkonyana.

Chief Nonkonyana:

Thank you Chairperson, honourable members of this Council. We are having a problem with accepting the application clause (1) in the light of the fact that the Technical Committee is ignoring and has in fact ignored our plea that a provision should be made for cultural rights that are entrenched in the traditional communities. Chairperson, we need to state that as far as we are concerned we know that these fundamental human rights are the rights that should be entrenched during the transition, that is the main objective of theirs. They are saying in 1(1)(a) that at all levels of government these fundamental human rights would be applicable. Chairperson, with respect, the whole set of these fundamental human rights is based on the western culture and nothing was taken into consideration about the culture of the people in this part of the world, and we find it extremely difficult to impose a western culture over and above our own culture in this part of the world. We are of the view therefore Chairperson, that as far as we are concerned, the whole set of fundamental human rights we cannot agree that they should be applicable at all levels because it has not taken into consideration the cultural rights of the people. Chairperson, I can just cite one thing which I quoted and I submitted to the Technical Committee, that at this stage we are having a problem in traditional communities, for instance I have provided them with a cutting from a newspaper in the Cape Province where there is a clash presently between the community and church groupings on the question of the application of the cultural rights of the people and 200 people who were arrested and some people died. We are quoting this Chairperson to state one thing, that it is fundamental, the question of custom to the people, the question of a culture to the people of this country is so fundamental it cannot be ignored. There is an urban bias here, Chairperson, in that everything that is pro-western type of culture, then it is the thing that

[end of the tape and the start of a new one - some part of this debate therefore missing]

Proof du Pleases:

..... these rights shall not be denied it is subject though to the provision of clause 30, subclass (2), which says "save as provided for in this Chapter no rule of the common law custom or legislation shall limit any right entrenched in this Chapter". That means if there's a conflict between any rule of common law custom or legislation then the provisions of the Bill of Rights will take precedence in those instances only, so if the Chief's concern is that certain people should, on account of their culture not be subject to the provisions of the Bill of Rights, then we will have to attend to it and the Council will have to attend to it, but we must refer you to the Constitutional principles which were adopted by the Negotiating Forum and I think its Constitutional Principle 2(12) in particular provides for customary law to be subject to the provisions of the Bill of Rights. I can read the formulation here if you want me to Mr Chairman, if that would facilitate a discussion.

Chairperson:

Thank you Professor. Do you want to respond to that?

Chief Nonkonyana:

Yes, Chairperson, am I out of order?

Chairperson:

Mrs Manzini, a point of order.

Mrs Manzini:

Perhaps I'm lost but I wanted to be guided by the Chairperson as to how we are going to discuss this document because I see us jumping from one point to the other. For instance I thought if we go clause by clause with this all the issues will be handled. We are discussing horizontal and vertical application of the Bill and then we went to culture and to tradition and I think I find it very much confusing as to exactly how we are discussing this document.

Chief Nonkonyana:

Thank you Chairperson I find it surprising that the delegate from the ANC finds it more confusing when the Traditional Leaders are actually raising that matter under 1(1)(a) when why that point was not raised when Leon when he was discussing this question. He even touched on Equality on 2. There was, it was not suggested that he was out of order. [voices - cant hear what they say] Yes exactly. So I too have a lawyer he's on my side. So what you are saying Chairperson here is that I would like to respond therefore, Chairperson to the honourable members of the Technical Committee. Clause 30(2) is clear and it says that "no rule or custom shall limit any right entrenched in this Chapter" and in the same vein 2(3) says we can, we recognise custom. It says "the entrenchment of the rights included in this Chapter shall not be construed as denying the existence of any rights or freedoms recognised and conferred by custom" Chairperson, these clauses in my respectful submission are contradictory. They are most destructive as I am concerned, it is very clear, again it reminds me Chairperson when I remarked in this Council, that we are given a positive as Traditional Leaders and immediately thereafter a negative, which comes to zero and to me, Chairperson, I think it insults our understanding. What we are saying Chairperson is that there are, when I say that people must not, cultural people must not be - Chairperson I'm having a problem.

Chairperson:

I'm having a problem with the conversations, the caucuses, and lobbying that's taking place, in particular on my right hand side.

Chief Nonkonyana:

Thank you Chairperson, for your protection. Our problem is that, it lies in the fact that we are saying that in these rights which are entrenched no rights which are entrenched in our Constitution are provided for here. Only the rights recognised in terms of the Western Roman Dutch Law legal system. We are saying even if we agreed in this Council that the Roman Dutch Law as well as the Indigenous Law would be equal, then the fundamental human rights entrenched in terms of both systems of law, should be provided for - that's all. We are objecting therefore, Chairperson, to say that only one set of fundamental human rights should be applicable to all, even ourselves. We are not suggesting for a moment that no fundamental human rights should not be applicable in our

culture, no, what we understand, we want to understand by saying that, we had agreed, Mr Chairperson, there must be universally accepted human rights. It means in our understanding that the rights of the people in Ulundi, the rights of the people in the Eastern Cape, the rights of the people in the Chris Hani Squatter Camp, should in other words, if that right is universal in that sense then it must be protected, but if that right exists only in Eland and not existing in the squatter camps then it is not universal, and as such, my respectful submission should not be protected. So what I am trying to say therefore, Chairperson, those rights that are here are those rights that are applicable I know, in towns, in townships they are accepted, but they are not accepted in our traditional communities at all. I'm having a problem therefore - are they universal? I'm saying no, they're not universal. So to cater for my concern therefore, I say I suggest to the Council that cater for those rights that I would love to be catered for amongst the fundamental human rights, if you regard the fundamental human rights in that regard. Thank you Chairperson.

Mr Wessels:

Mr Chairman, can I address you on a point of order please? I believe what we've been listening to is very important and I don't want to stifle the debate in any manner, but I would suggest the following route. I am of the opinion that we have only one hour at our disposal for this debate today, we've been discussing this matter now for approximately 45 minutes. I believe it would be the correct way if we ask the Technical Committee just to high-light and tell us with one sweep what they had done since we have the previous debate because I see at the end of this Report it is suggested that this Report be referred to very important people for their comment. I'm referring to the Chief Judges, the Judges President etc. Associations of Law, and then we start at the time at our disposal with a complete picture of what they have achieved because we are also aware of the fact that a special committee had been formed representing various points of view as it was reflected during the previous debate and I think we're losing touch on the one hand of the work the Technical Committee had done, on the other hand of the work that particular sub-committee had done and the way the debates continue now, we may have to wait another couple of days before we can submit this Report to the important persons I have indicated, and then we could schedule and have a proper debate on the very important issues that have been mentioned here.

Chairperson:

I take the point you have made Mr Wessels but it would seem that given what we've heard from Mr Leon and the DP and given what we've just heard from Chief Nonkonyana, that this Seventh Progress Report tabled by this Technical Committee has raised the temperatures somewhat. Now we have also allocated to ourselves just two hours and I think certain individuals in the Council are afraid that the points they want to raise in this Report we may not get to within that two hours. Now we've already agreed my assistant Chair and the Administration that should we not complete discussion of this Report today, it would probably number one on Substantive Issues for Monday's Agenda. That depends of course on whether the Technical Committee will be available on Monday but I'm going to make a special appeal to delegates to please let us go through the Report in the proper manner as we normally go through all reports. It is quite true as was pointed out to me by Ms Manzini that we haven't properly discussed Item 1 of the Report and we have already jumped to item 30 on more than two or three occasions. Fine, we've had to but it also does not make for proper discussion structure of the Report. I'm not in any way apportioning blame to the Technical Committee in this regard, perhaps it is necessary to do so because the one impacts on the other.

Mr Wessels:

Mr Chairman could I just, what has happened with great respect, we've had a preface or a preamble to Mr Leon's submissions to follow and we've listened to a concern of Chief Nonkonyana which is a fundamental one and as we sit here we have the Technical Committee's Report before us, but we've had nothing from the Technical Committee except responses to these very important matters raised. All I'm asking is that the Technical Committee maybe just run through tell us what they have achieved or not achieved and let's return to Clause 1.

Chairperson:

Fine. Mr Gordhan, I was going to rule that that is the way we're going to follow it.

Mr Gordhan:

Chairperson, then further that if a new, and the last occasion we identified four areas of differences and we referred that to the Ad Hoc Committee who were able to help us to resolve those differences as a result of which the Technical Committee was able to attend to reformulating those sections. If there are acute differences once again lets identify them, lets refer them to an appropriate structure without taking up too much time here because debate here is not necessarily going to solve their problem, and perhaps that guideline might help you Mr Chairperson.

Chairperson:

Thank you very much it does help me because what we are having here is really a debate between delegates and members of the Technical Committee, which is not healthy because that is not what the Technical Committee are here for. Mr Leon. Is it on the point of order?

Mr Leon:

Yes, I'm very sympathetic to what Mr Wessels and Mr Gordhan have said and I've no problem but I must point out a fundamental problem we have. The Democratic Party and no doubt many other parties, have made detailed submissions to each one of the Reports of the Technical Committee. Now I would, and I don't want to jump clauses, but every time we've made many of the submissions we've made have not been met, and I'm not saying they have to be and we ultimately come back to some point. Now where is that point going to be resolved, Sir? Is it going to be resolved here or is it going to go back to the Technical Committee and do we just repeat our objections, our problems, our qualifications, our amendments and the Technical Committee comes back and says we can't deal with it because we don't agree that administrative decisions should be governed by the concept of reasonableness to give you one example, which we regard as crucial to the administration of the entire new state of South Africa, does it not get resolved because I don't know, Sir, how many times we, in the DP now, and no doubt other parties who've made detailed submissions, actually have to respond to the same points because they cannot be resolved by the Technical Committee as such in terms of the mandate that the Technical Committee exercises.

Chairperson:

Mr Beyers

Mr Beyers:

Could I, Chairman, say that if Mr Leon was here two days ago he would have heard the same being said in the Technical Committee on Constitutional Matters, so officially I say to the Democratic Party welcome to the club.

Mr Gordhan:

Of course creating clubs doesn't quite help Mr Chairperson if I might intervene. I think the proposal that I've put forward actually takes care of Mr Leon's concerns, that it is not the Technical Committee that will look at the political issues that arise out of the differences its the Ad Hoc Committee structured in an appropriate way that will look into them. So I think, lets identify those differences if there are any and lets have the debate there in the committee and have solutions.

Chairperson:

I want to follow Mr Gordhan's proposal and I'm going to. This debate is going nowhere very fast, its going absolutely nowhere very fast. Chief Nonkonyana and I'm going to appeal to members to please look for us to make progress - I understand that its important for you to make your point and to have it recorded but having done that its not the end of the road we need to move forward. Let me hear you Chief.

Chief Nonkonyana:

I quite agree with you Chairperson, that we should move forward and I've no doubt that you know and you recognise that those who feel that the matter is of fundamental importance to them at least they should be given some latitude. However, I wanted to say, Chairperson, the proposal from Mr Gordhan is an acceptable one to us, however, in view of the fact that that sub-committee was involved when the Seventh Technical Committee Report was - before the Seventh Technical Committee Report was prepared by the Technical Committee, I would suggest that the Planning Committee should look into the question of seconding to that subcommittee experts in indigenous law in this country. So it is only that I would like to raise as a suggestion.

Mr Rowan:

Chairman should we not proceed according to the proposal and allow the Chairman to go through the Report and identify those issues?

Chairperson:

And I think the suggestion of Chief Nonkonyana can be looked at and if necessary be accommodated. Professor du Plessis, once more.

Prof. du Plessis:

Do you want me to proceed to clause 2, Chairperson?

Chairperson:

Yes please.

Prof du Plessis:

Clause 2 is a result of consultations of the Committee together with the Ad Hoc Committee. Clause 2, subclause (1) remains unchanged. Clause 2, subclause (2) has changed - it was proposed

as an alternative in our previous Report. The question there was whether to say that discrimination shall not be allowed on any ground whatsoever, in other words, a general statement or the question of enumerating grounds on which discrimination should be excluded. We've opted for the latter but not totally, not only we, that's a proposal from the Ad Hoc Committee as well. We tried to formulate the clause generally but nevertheless enumerated grounds of discrimination and may I add, coming from the DP's proposal which is the most comprehensive one, we might consider adding sex, apart from gender, because there is an argument that sex and gender are not necessarily the same thing in literature, but we have to consider that in feminist literature for that matter. We have to consider that in view of the way in which accord would interpret sex and gender if you have them together, so we haven't decided on that finally. Then you will also see Chairperson subclause (3) has remained unchanged. Subclause (4) has been changed as a result of the discussions on the Council, the argument there was that the clause we proposed in our previous draft created a presumption whereas we only contemplated the shift of the evidential burden, and it has been formulated in such a way now that it only imposes an evidential burden in cases where discriminatory action is alleged.

Shall I proceed with Clause 3, Chairperson?

Chairperson:

I want the Technical Committee to take us through the Report, alright? Please we will come back to the clauses individually.

Prof du Plessis:

Clause 3 Chairperson, it just says now "Every person shall have the right to life" without any qualification, that is the result of the recommendations of the Ad Hoc Committee the Technical Committee agrees with that.

Clause 4 has remained unchanged. Clause 5 has remained unchanged. Clause 6 has remained unchanged, and, may I add, Chairperson, as we understood it they were approved of at the previous meeting of the Council although it is not expressly reflected in the minutes but I think the way in which we proceeded judging by that we can assume that they have been approved. 7 has remained unchanged, 8 has remained unchanged, so has 9 - there is the submission to be considered is the submission from the Democratic Party that another clause be inserted - we decided not to do it, but if the Council so wishes, if it can be argued on the Council that that clause on State-controlled media should be inserted, it can be done, but there are reasons why we're not suggesting its inclusion. 10 has remained unchanged, 11 has remained unchanged, so has 12, and 13 and 14, and 15. 16 we added the word, the qualification "justiciable" to disputes, it says "Every person shall have the right to have justiciable disputes settled by a court of law, etc." it was as a result of a recommendation coming from one of the parties on the Council. Clause 17 has remained unchanged, clause 18 has also remained unchanged. Chairperson, there was a discussion on the Council on that, there was no agreement on the Council, we received a submission from the Democratic Party which we once again considered, what you have there is our recommendation. Of course, it is free for the Council to decide otherwise and we are prepared to address the Council on the implication of the proposed change.

Clause 19, Chairperson has remained unchanged, except for 19(2)(b) where it says "now to be brought before an ordinary court of law as soon as it is reasonably possible". That is a new concept which has been introduced. I think that was as a result of a submission we received "but not later than 48 hours" so the idea is that it does not simply state that somebody should be brought before court within 48 hours but also introduces a notion of "as soon as possible but not later than 48 hours". We regard that to be an improvement. For the rest 19 has remained unchanged.

20 we have changed - it said "no person shall be removed from his or her home except by order of a court of law, after taking into account all relevant factors which may include" we introduced the notion of "may include" - previously it only said "including the availability of appropriate alternative accommodation etc." - so it is put more tentatively now. I must say that this is a controversial clause - the Ad Hoc Committee is recommending its scrapping in total. That the Council will have to discuss.

21 has not changed. 22 has not changed. 23 there is the addition of 23, subclause (3) a matter which was also raised during discussions on the Council on the Previous meeting, it is a clause providing for or authorising measures aimed at the restoration of rights inland. It was also part of the submission of the DP which we took into consideration when we come to that particular clause. We can discuss our formulation which is a more general formulation than one suggested by the DP.

24 has not changed, Chairperson, 25 has not changed, 26 has remained the same, so has 27. 28 there is a slight change there - it used to say "The rights entrenched in this Chapter may be limited" we had the formula "by the law of general application" Now apparently that term created some confusion and we decided to be more explicit about that, the formulation you have now is the rather inelegant one "by a law applying generally and not solely to an individual case" That is the formula used in the German Constitution, the German Bill of Rights. For the rest

Chairperson:

You've also left out the words "and freedoms".

Prof du Plessis:

Yes, I'll come to that right at the end, Chairperson, thank you for reminding me of that. Then the Suspension Clause, there were amendments to the same effect we had with the clause on the rights of Arrested Persons. Clause 20 subclause (4) paragraph (c) where it says "the detention of a detainee shall as soon as it is reasonably possible" so that notion of having the detention reviewed as soon as reasonably possible has been introduced as well.

Chairperson:

Clause 29 subclause (4)

Prof du Plessis:

Oh, 29 subclause (4) paragraph (c). Then Chairperson as I explained there is the Interpretation Clause, and then I must draw attention to there is one addition to Clause 29 and that is subclause (5) introducing the notion that a person cannot be detained on the same ground after the court has ordered his or her release. I already explained the origin of the interpretation clause - all the

matters dealt with in this clause have been included in our previous Report but we have slightly reformulated some of the sections for example, clause 30 subclause (5) was included in our previous proposal but the way in which it is formulated there is that is a new formulation, and then we have also in subclause (4) introduced a notion that some of the rights cannot be suspended, in other words there are rights which cannot be suspended at all.

Clause 31 has not changed at all. May I just then, Chairperson, explain why we, in our previous drafts we consistently referred to "rights and freedoms". After consideration we came to the conclusion that we might just as well refer to "rights" only because most of our formulations refer to rights only and in one or two instances where we did refer to "freedoms" we could reformulate it in such a way that we can construe a right freely to do something and therefore the formulations have changed to the effect that we refer to "rights" only and no longer refer to "rights and freedoms" except in a few exceptional cases in which we can draw the attention when we come back to the discussion.

Chairperson

Does that conclude your presentation, Professor?

Prof du Plessis

That concludes it, Chairperson.

Chairperson:

Thank you. Mr Gordhan

Mr Gordhan

Mr Chairperson, in view of that presentation which helps us to understand which were the non-contentious and which ones were actually amended may I suggest that the non-contentious and which ones were actually amended may I suggest that the non-contentious clauses, that is those that haven't undergone any amendment, be adopted by the Council at this stage and that our intention is focused on those that have been amended with the proviso that we amend them one at a time in the eventuality that although they had been non-contentious on a previous occasion some party might have had an after-thought on that.

Chairperson:

Mr Gordhan has made a proposal that Council now adopt those non-contentious clauses, as indicated by Professor du Plessis' submission. Do I hear support for that. There is support - Mr Leon are you opposing that? [But I've got to raise my hand first] Mr Leon's hand was up before yours [No, it was long up you've been ignoring me - you saw his first] Mr Leon.

Mr Leon:

Mr Chairman, Sir, I appreciate Mr Gordhan's idea of trying to move this along - the problem is that certain of the clauses which are identified as being un-controversial was simply done on the basis that there has been no amendment to them between their slighting and the Sixth Report and their presentation in the Seventh Report. In fact, Sir, there are certain clauses here or aspects of them,

which for example, my party, has had serious reservations about *ab initio*, and the fact that they haven't changed between the Sixth and Seventh Report doesn't mean they aren't controversial.

Mr Sisane:

I'll second that. I'll seconding Mr Leon, that a clause by clause approach is preferable.

Mr Gordhan:

Mr Chairman, for the record, I actually suggested a clause by clause approach in the adopting them so that if there are any new problems we can take them on. Again I think we need to listen to each other a bit more carefully it seems.

Chairperson:

All right let us look at Clause 1. Mr Sisane followed by Mr Maduna.

Mr Sisane:

Thank you Mr Chairperson. I would like first to make a short preface to my contribution to this that our approach to this document in its entirety, that this document to us is not a Bill of Rights and we agree that it should not be one. We take it only as a document that emphasize on those rights that merely limits the abuse of power by the State so it is to a certain extent a rights document. So we to a certain extent agree with the approach on the whole that has been followed by the Committee especially during the Transition and our emphasis therefore would be to try and really make that throughout that the power of the State and the ability of the State to abuse its power is actually limited. Coming now to Clause 1, Application. Though in reality in this area especially of horizontal application of this, there is the problem of course that we are concerned about that one of private apartheid and discrimination between individuals and we would like to see that eradicated as soon as possible but we know that it cannot probably be done overnight and some credulism might be necessary but we are worried about the formulation as done by the Committee here because if you're going here such criteria like "where appropriate just and equitable" that is too vague and it might lead to a lot of problems in judicial proceedings and we are further worried by the fact that these terms will now be left to the courts and I mean the South African courts I don't think they'll change also overnight, so we need to be very worried about them, even their composition and their record actually in dealing with the matters that affect our people does not need any introduction to this Forum, but we are worried about the fact that those tests will be applied by the courts especially that they will still largely be composed in the same way. So we felt that the draft proposal as made in the Sixth draft was much more preferable to us, so we feel that this one as suggested now is basically worrying to us and would prefer that the courts must be given a clear mandate and a clear message from this that certain things like private apartheid will not be allowed in a new South Africa. Thank you.

Chairperson:

Mr Penwell Maduna.

Mr Maduna:

Mr Chairperson, Mr Sisane has unfortunately for me, stolen words from my mouth, but nonetheless I should say a few words about this. Mr Chairperson, we are as we said, even earlier on, unhappy

about the use of the phrases such as "where appropriate" and "where just and equitable" for reasons stated by Mr Sisane here. More than that Mr Chairperson, assuming that we were to leave as is suggested in the comment by the TEC rather by the TC - the Technical Committee, some of these matters to the courts, our fear Mr Chairperson, is that in any event a new human rights jurisprudence is going to take quite a bit of time to germinate and eventually mature in this country.

EXTRACT FROM THE DISCUSSIONS OF THE NEGOTIATING COUNCIL ON THE SEVENTH REPORT: 3 AUGUST 1993

ECONOMIC ACTIVITY

21.

Chairperson:

Mr Schutte and then the last speaker will be Mr Gordhan on this issue. Mr Schutte.

Mr Schutte:

Mr Chairman I would submit that Mrs Finnemore was very compelling, and I would suggest that in order to take the DP along that we add the word "liberty" to that last line.

Chairperson:

Mr Gordhan.

Mr Gordhan:

Mr Chairperson, I think what we have here and these are a few reservations I want to make. Indeed, as Dr Rajah points out a clash of value systems and whilst the DP is fully entitled to put forward the views consistent with its value system, so are other participants and I think the essence of negotiations is to begin to find some common ground rather than the insistence on the inclusion of concepts such as "liberty" which quite clearly reflect one value system. And I think what the Technical Committee has attempted to do is to find formulations which embrace all the participants here. And in that context I think there is an unfortunate tendency developing, Mr Chairperson, of using scare or smear tactics in respect of certain of the clauses. Words such as "communist" "socialist" etc etc. are being used in a very unfortunate and I believe irresponsible way not only with a view to producing constructive debate here but with a view to discrediting other views around this table, and that's not the way we're going to win debates and find common ground, I believe around the negotiating table. Now, with that in mind, Mr Chairperson, what I find also quite interesting is that if 21 (1) was left on its own then its fine and its acceptable, but once 21(2) is introduced and with a view to empowering those who have been historically disempowered in our country then the libertarians have difficulty with that, because indeed then Mr Maduna's contention that we want a laissez-faire economy becomes a justifiable one in this context. My appeal would be that we leave both 21(1) and 21(2) intact - the one does cater for the widest possible scope of economic activity, and the other assures the majority in this country who have been disowned and disempowered and disadvantaged that they are also being catered for and if we can't address that constituency in our formulations then we are not addressing the major problem in our country.

Mr Chairman, I support those who say that 21(1) and (2) should remain.

Chairperson:

Thank you ladies and gentlemen. Mr Maduna has actually moved that the whole section should stand as it is and Council has said "Yes it can stand". I am looking therefore, for the second time the whole section - is the Council in agreement that it should stand?

Voices saying "Yes"

Chairperson:

OK but we note the objection from the DP.

(Voice of Mr Webb) and me, and mine in regard to 21(2) thank you.

Chairperson:

Thank you Mr Webb, your objection noted. Thank you ladies and gentlemen.

Section 22, Labour Relations, Section 22(1).

**TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS
DURING THE TRANSITION : SEVENTH REPORT :
EXTRACT FROM NEGOTIATING COUNCIL MEETING
3 AUGUST 1993**

Chairperson:

Section 23. Property. Section 23(1) Mr Rajbansi.

Mr Rajbansi:

I just need a clarification about the word "property" - shall I take it that the interpretation would be that if a man has more than one property he also has the rights. The reason why I am stating this Mr Chairman, is that there are suggestions in the air that if you have more than one property you might be penalised. Now there is concern amongst the people, some of course gain an advantage because of the apartheid policy, but there are those who follow a certain cultural patterns and have more than one properties, so we just wanted clarity that does this mean that if a person has more than one property he still has that right.

Chairperson:

Professor du Plessis.

Prof. du Plessis:

The suggestion Mr Rajbansi's referring to is certainly not coming from the Technical Committee. What Section 23(1) protects is property as an institution. Property of a very special kind, not only

property as such but rights in property to cater for various dispensations of property which we have in our country. But certainly if the expropriation or the alienation of more than one property would become an issue, then you have to look at 23(2) in order to see whether 23(2) authorises the expropriation of property simply because a person has got more than one property and that can certainly not be read into 23(2).

Mr Rajbansi:

For clarity Mr Chairman, I am not dealing with expropriation or disposal, I'm dealing with any other forms of penalty. For example there has been a suggestion that if you have more than one property severe taxation would be imposed, at local level or at national level.

Prof. du Plessis:

This clause does not deal with that situation, Chairperson, this clause protects property.

Chairperson:

Thank you Professor. Mr Webb and Mr Schutte.

Mr Webb:

Mr Chairman can I give you a particular problem which is peculiar to Ciskei first, and leave that in the laps of the Technical Committee. As you are aware, we have what was jocularly called "some sort of fundamental Bill of Rights in Ciskei" - jocular nature which has not seem to have been overcome yet, but it nevertheless presents a constitutional problem. The difficulty is having that Bill of Rights we cannot be party to anything, and even if you should wish to have us reincorporated, which you may not wish, reincorporation at some stage, we could not reincorporate with our Bill of Rights being in conflict with anything that is in the proposed Bill of Rights. That is one of the difficulties and the Technical Committee I'm sure has addressed that, but what we have in our Bill of Rights is the right to property, to own individually or in association with others, and the right to bequeath to heirs or legatees. That is just one part of it. There are other items which affect 23(2), and 23(3), but the fact of the matter is that unless we have something better than we have got, we cannot, we are unable to agree to it and certainly it will preclude incorporation of Ciskei into South Africa. That is a choice which you may wish to exercise.

Chairperson:

Thank you Mr Webb. Now, Mr Schutte.

Mr Schutte:

Chairman I assume that the words "rights in property" is so framed to refer also to indigenous rights to property. My difficulty as far as that is concerned, is that as far as my knowledge is, as far as indigenous law is concerned it may be wrong, is that there is no as of right to dispose of indigenous right to property, and so this would definitely cause a problem as far as indigenous rights to property is concerned. I believe that there should be such a right, but that should be restricted to registered indigenous property rights. In other words, once it is registered there should then be and as a right, right to dispose, but as it stands I believe that it is contrary to indigenous law.

Chairperson:

Would the Technical Committee like to respond? Professor Corder.

Prof. Corder:

Thank you, Mr Chair. I think in answer to both Mr Webb and Mr Schutte, we have specifically phrased this in the way it is to acquire, hold and dispose of rights in property to be as all encompassing as possible, to contemplate the.....

[tape ended here so some of this is missed out]

..... but people will only be able to dispose of such rights that they have. So therefore if there are already legal restrictions, restrictions in law on the right the extent of the right in property, as I believe to be the case in indigenous law, nobody can alienate more than he or she holds, and therefore there is a natural in-built restriction because you cannot dispose of rights which you don't have. In addition, were it to be deemed to be politically desirable a future government could limit this right of property in some way under the limitations clause and then any such limitation, through legislation, would be testable and reviewable by the courts, by any constitutional court.

Chairperson:

Thank you Professor.

Mr Webb:

Point of clarity, sir?

Chairperson:

Yes, Mr Webb.

Mr Webb:

Has Professor Corder dealt with the corporate ownership and does that cover that question? Is that your explanation regarding "in association with others or corporate?"

[Several voices at once so cannot hear reply]

Chairperson:

Thank you. Dr Rajah, and then Mr Titus.

Dr Rajah:

Just a query here Mr Chairman, having listened to the response of the Technical Committee. He dwelt more, I think, on the rights, property as it exists at present, communal rights etc. My concern is what about the rights of individuals in the future, where is that spelt out or is it implied that properties can be acquired, for example in freehold tenure, do we need to spell out to some extent the tenure system in such a right whether it is going to be acquired in freehold and I presume that, when we talk about acquiring the land we are talking also about the ownership of land or all rights that vest, that normally go with the legal rights that are possessed in terms of the property.

My concern is what about the future rights. Where does it spell out the rights of the individual as far as his, the system of tenure that he might enjoy in the ownership of the land?

Prof. du Plessis:

Chairperson, we must just look carefully at this. It is not referring to property rights in the sense that the private law would. It doesn't say, here's a person holding property and we're protecting his or her property. It is protecting the institution of property, and when we protect the institution of property in this way and we foresee the possibility to acquire rights in property then of course it covers the future as well. So this is encompassing, we shouldn't look, this is public law property so to speak, or public law protection of the institution of property, it's not property in the private law sense where you have to have the rights, and then the rights are protected by this clause.

Chairperson:

Thank you Professor. Mr Titus.

Mr Titus:

Thank you sir. I just want to add to what Professor Corder had to say, I accept his explanation in reaction to what Mr Schutte had to say, but I think there is still room for improvement for purpose of putting the issue that he was addressing beyond doubt in so far as the formulation of clause 23(1) is concerned. I think in particular what gives rise to doubt and to the question posed by Mr Schutte is the use of the word "and" in that formulation. I know when dealing with various situations or different situations or varying situations it's always difficult to come up with an appropriate formulation, but I would like to ask the Technical Committee to explore the explanation given by Professor Corder and see whether they can't put this issue beyond doubt by reformulating clause 23(1). Thanks.

Chairperson:

Thank you Mr Titus, I think they note that, OK. 23(2) Mr Webb and Mr Leon.

Mr Webb:

Am I first?

Chairperson:

Carry on Mr Webb.

Mr Webb:

The first time ever Mr Chairman. Mr Chairman in contrast to what I have said previously we now deal with the question of expropriation and one of the essential elements of expropriation is the prompt payment of a fair market compensation. They may determine a fair market value determined by court, but there's nothing to indicate prompt payment of that. I wonder whether the Technical Committee will not consider it being as fundamental as the determination of the value.

Chairperson:

Could you look into that Mr du Plessis? Mr Leon then Mr Rajbansi.

Mr Leon:

Thank you, Mr Chairman. I think this would also be on the question of the expropriation of property and the compensation of anything payable for it is an appropriate moment as well to respond to the remarks made previously by Mr Gordhan about the fact that certain parties or individuals were introducing unfortunate smear words into the debate here which could colour the whole question of the bill of rights, but unfortunately, Sir, the view of my Party, not just in 21, but in terms of 23(2) and various subsequent clauses, is that precisely the fears that we have about what this Bill of Rights will become are in fact reinforced as we go along in this document, particularly in 23(2), and I think it will be a very interesting exercise, Sir, dealing with 23(2) in particular, but the other clause in general, to see what response is received to the suggestion that the Technical Committee, at the end of this document, that the Chief Justice, Judge President and Association of Law Societies, The General Council of the Bar, Nadel and others be consulted about this Bill of Rights, because I think far from our fears being hysterical or unreasoned that in fact they will find considerable support from those various groups of lawyers. Sir, on the question of expropriation of property, the Democratic Party is firmly of the view that no one should have his or her property expropriated on an arbitrary basis. We have furthermore submitted right from the beginning to the Technical Committee and as recently in submissions which we made on the 26th July of this year, that many of the victims of apartheid are entitled to special consideration and in certain instances, to compensation or even restoration of property where their rights have been infringed. However, Sir, we are firmly of the view that these two ideas have to be separated and not collapsed into one concept, because by doing that, Sir, you will simply take away rights from both groups without affording any equitable compensation to those who should have rights or those who currently possess them, and Sir, we are very worried that far from being a property expropriation subject to compensation clause, this clause actually achieves the reverse of that. For example, it gives the right but then hedges it in with all kinds of qualifications which we think are fundamental to protect the rights of property on the one hand and then the subsequent clause, which we can discuss separately, although I would submit they go together under (3) in actually giving rights to those who've been dispossessed. Sir, if you are going to give a right to property and to the repayment of it by way of compensation, that's fine but if you go on to say that the courts must consider all relevant factors including the use to which the property is being put, you are effectively penalising investors with that section, or potentially creating that penalty. The history of its acquisition, Sir, is an interesting concept because a question is that property rights currently held in South Africa, many of them, were acquired as a result of racially discriminatory or punitive legislation. Now if, Sir, you wish that to be a factor which is going to detract from the payment of proper compensation, then you are seriously interfering with the rights of property owners who currently possess property even if they currently have bonds and so on, and five generations ago, or owners ago, that house, or that property, arose from a Group Areas or Land Act dispossession. Now you might as well say so, I mean it is no good giving this right and then taking it away, you might as well say to the property owners of this country and to the future property owners of this country, and to those who are currently being empowered that their rights are going to be undermined in this way. And then, Sir, the question of market value and the value of the owner's investment - well what do those mean cumulatively viewed, and I think that the Technical Committee would agree with me that this in fact is another clause which has been made in Kempton Park. Now that might in fact be a very good thing, Sir, but it would be very interesting to see what in fact this clause is going to mean when it is adjudicated upon and what the people who are going

to have to adjudicate it upon actually think about it. So this Negotiating Council can pass this with a real exclamation of approval and then two weeks later we can land up with a situation when the parties that we are consulting say that this clause is either meaningless, it's unenforceable or it extinguishes the very rights which it claims to protect. Now it's very difficult to discuss this clause, Sir, without looking at the next clause, but in view of the way that we are dealing with this on a subclause by subclause basis, I will deal with that aspect when we get there, save as to say, Sir, that the Democratic Party strongly feels that those people who have been dispossessed of their property as a result of the Group Areas Act or the Land Act, those people in the same category who haven't received adequate compensation should be compensated, and if the proper place to deal with that is in the next clause, but you are not going to effectively compensate them or compensate them at all by simply invading the rights of people who currently own title.

Chairperson:

Mr Rajbansi, and then Mr Sizane.

Mr Rajbansi:

Mr Chairman, when we dealt with this clause the last time I was very, very much concerned about "in the public interest". Now Mr Leon used the phrase "arbitrary basis" - now as far as compensation is concerned the various criteria that's listed only deals with how compensation is going to be determined but even present legislation Mr Chairman, does not protect the rights of a property owner if the expropriation legislation is going to be used to seize his property where he believes and others may believe that property is not being taken, expropriated, in public interest, so my very strong point is that a property owner does not have the right to challenge a decision which is made in public interest where he could prove to the court that such a decision is not made in public interest. Now let me substantiate with one or two examples. A town planner might decide to draw a road map favouring one person and placing another person at a disadvantage, now in Durban for example, when a certain freeway map was drawn when they came across a white-owned property they built a freeway over the property. When they saw the property belonged to a non-white, they put a pencil through - "it must be expropriated". So they said all these things were done in public interest. We know that the Group Areas Act is gone but as far as local authority projects and State projects are concerned, an individual behind the four walls in a drawing room could decide to favour somebody and place somebody at a disadvantage. That property owner must have the right to challenge the decision whether it is truly being made in public interest, or in the words of Mr Leon, whether it is being done on a arbitrary basis.

Chairperson:

Thank you Mr Rajbansi. Mr Sizane and then Dr Rajah.

Mr Sizane:

Thank you Mr Chairperson. We just wanted to give our understanding of the two clauses already discussed. Our own initial position was that we preferred that the property clause should not actually be in here because of a number of reasons and we would have wanted it to be done by the, dealt with by the C.A. - the Constituent Assembly, but since it is here we are willing to go along as long as it is a balanced clause. We cannot accept a clause only that allows the status quo to continue, where 15 % of the population owns about 75 % to 80 % of the resources and we say that

we are guaranteeing that property clause, we cannot allow that when 75% of our people do not own almost anything. So if we are going to have a property clause we really have to have also to introduce clauses that are going to balance that allowing people with land claims, allowing the principle of distributive justice to also apply there. So our understanding of (1) that (1) cannot stand alone it has to have (2) and also (3) at least it will be a balanced clause. So we feel (2) as it stands does to a certain extent go a long way, we are not also satisfied with (2) let me say that, but it does go a long way to satisfy some of our concerns in the sense that at least the property of people is not only going to be taken at face value, so that's why its important that the history of acquisition to come in there. Also we know that we're worried about the courts dealing with those questions of history of acquisition because basically onus of proof is likely to be on the claimant whom might not even have the funds to bring all that historical evidence and all those aspects. So we are still worried and want to see what would happen in terms for instance of the mechanism to deal with restitution and the legal aid that might come in and the claimants who are actually doing these things, because the land owners are some of the richest people in this land and are able to get all the resources to defend their own right to property, however that property was acquired. So though we are not fully satisfied with all these things but we feel in the spirit of compromise a balanced clause like this would be probably supportable with a little bit of changes which we will suggest later on. Thank you.

Chairperson:

Thank you Mr Sizane. Dr Rajah, then Chief Nonkonyana, and Mr Schutte.

Dr Rajah:

Mr Chairman there are two issues involved in this clause. One is whole question of acquisition and this is a question which Mr Rajbansi raises on what basis, first of all, is a property acquired, who determines what is in the public interest although there are probably plans and structure plans, etc. by which any authority is guided in expropriating property? Perhaps one should also give consideration and I think at certain levels that light of opinion in fact is granted to individuals. This is not an arbitrary or a unilateral expropriation of property at the regional level and at the local level, the regulations and ordinances does provide that the individual has a right of appeal. Secondly we are arguing as if we are introducing a new concept as far as expropriation and compensation is concerned. This all exists in the present context and there are expropriation acts which governs and guides the whole expropriation of property, it also guides the terms under which compensation is paid and this an open ended issue in terms of the actual values that are paid to individuals because each case is in fact governed by the merits of the case and there are many, besides its market value, there are many other issues that are taken into consideration in terms of the expropriation act and there are several case clause that adequately governs the payment of compensation and the individual has a right and access to court to question if we fail to agree on a price on a compensation, he has access to the courts and is governed by the, adequately governed, by the expropriation act for fair compensation but the question here lies is the acquisition in itself a correct one?

Chairperson:

Would the Technical Committee like to come in at this stage or can we call some more speakers?

Prof. du Plessis:

May I just clear one thing, Chairperson, and that is the point raised by Mr Rajbansi. Of course the whole object of this clause is to give people the right to challenge any decision on the expropriation of property including the decision that expropriation would be in the public interest, so such a decision could be challenged at all times.

Chairperson:

Thank you Professor. Chief Nonkonyana, Mr Schutte and then Mrs Finnemore.

Chief Nonkonyana:

Thank you Chairperson, honourable members of this Council, I would like to express our position in so far as the whole question of land acquisition and disposal, in particular the question of compensation, sir. We must reiterate what we said before in this Council, namely that the land of our forefathers was never for sale, nor is it intended to be for sale. It is an issue the acquired, we are agreed that the people must acquire their rights and so that this land can be available for generations to come. We are worried sir about the whole emphasis on the compensation which if I have heard the speakers very well, the emphasis is on the question of prompt payment, which means they look more to cash rather than kind.

Our view sir, is that as the land was never for sale, those of us that were dispossessed and the land was taken away from us, the land must be restored to us, never to those people, or compensation, if compensation in this section can be interpreted to mean that if a land was taken away from you then some land should be restored to you by way of a compensation. In other words, we should not emphasize the question of cash payment in this regard because many communities specially from our areas we were adversely affected by this and also on the question of the historical acquisition we are in complete agreement with the PAC in this regard, namely that yes, we are pleased that the courts are given at least that power to consider history, but nevertheless we are worried about the whole concept of prescription. We are worried because the courts may say very well our claim must have been prescribed we would like therefore sir, if the Technical Committee could help us in this regard, whether the concept of prescription in this country is not going to accept the rights of acquisition. So all in all, Chairperson, therefore, I would like to state therefore that we would love that the whole question of compensation we should not emphasize cash payment but we should also look into a reparation of that damage. Provided of course that we are not robbing Peter to pay Paul in that regard.

Chairperson:

Thank you Chief. Mr Schutte and then Mrs Finnemore.

Mr Schutte:

Mr Chairman I feel that we are still on 23(2) and I would just like to say that there can be no question that allowance should be made for the expropriation of property in the public interest but Mr Chairman the compensation must be just and equitable and can only refer to market value, the present market value, when the expropriation is applied. I fail to see what relevance the use of the property is, I fail to see what relevance the value of the owner's investment is at one or the other stage, I believe that if one looks at a just way of expropriation then one must refer to equitable

compensation. I would therefore argue very strongly that this clause should be changed, that the words after "the expropriation of property by the State shall be permissible in the public interest subject to the proper payment of equitable compensation which in the event of a dispute shall be determined by an ordinary court of law." I would suggest Mr Chairman, that if we use the word "equitable" compensation that would refer to all relevant and just considerations in the circumstances.

Chairperson:

Thank you Mr Schutte. Technical Committee do you want to have an election on that or are you noting that? Will you consider that?

Prof. du Plessis:

Chairperson, no we can't consider that change by ourselves, the clause as we have it here is already the product of a political compromise and we will have to make a political choice if we are going to simply proceed on the line that we propose that very broad formulation.

Chairperson:

OK, we'll hear other speakers on that. I have Mrs Finnemore, Mr Maduna, Mr Cheadle and then Mr Leon will be the last one on this issue and then we can break for tea.

Mrs Finnemore:

Mr Chairperson, obviously this is a very difficult clause in its formulation, but I just want everybody to be quite clear what we are agreeing to here. We are talking about public interest, and wherever you have public interest it over rides individual interest, there is no doubt about it. Now if we can just have a look at a case in Detroit where the General Motors Corporation decided it wanted to build a plant in that town and it persuaded everybody that in the public interest it was going to expropriate some properties there. The people living on those properties, according to the Fifth Amendment of the Constitution were paid just compensation. What was that just compensation? According to them half of the value of that property. Now let's just be absolutely realistic and looking at this clause that is quite possible that could occur here, so I come to Mr Schutte's proposal here - what is the compensation to be because what people perceive as just is sometimes not equitable. So it is the court's decision to make that, and I really think that we must look very carefully at this clause, because let us understand that we are over riding individual property interests here, property rights. As long as we know that it could be our property that's going to be expropriated and then maybe we'll look at this a bit differently and a bit more cautiously, I think it deserves our attention and we should look at the proposals very carefully that have been put forward.

Chairperson:

Thank you Mrs Finnemore. Mr Maduna.

Mr Maduna:

Mr Chairperson,

[In order to save time and get the above to you, I stopped here as you only wanted what Mr Schutte had said. The Chairperson recommended after Mr Maduna had spoken, that Mr Maduna and Mr Schutte have a bilateral during tea, and report back after teabreak. and then Mr Cheadle and Mr Leon speak after tea.]

Chairperson:

OK, ladies and gentlemen, Council will start formally with this meeting. Mr Maduna, we've only one Council not two Councils, [its a bilateral] Is it bilateral OK. Who will report first, Is it Mr Schutte or is it you on your bilaterals? Mr Schutte.

Mr Schutte:

Mr Chairman, we've had a very successful bilateral and we would like to suggest that this clause be referred to the Ad Hoc Committee also to allow other parties to make inputs to the Ad Hoc Committee on this aspect. Mr Chairman, I would also like to argue that the Council should perhaps consider also referring subclause (3) to the Ad Hoc Committee at this stage because this is definitely going to take a long drawn out debate in this Council which may also be productive, but I think if we look at the time it may be at this stage advisable to refer to the Ad Hoc Committee.

Chairperson:

Thank you Mr Schutte. I'm happy that you've had very fruitful bilaterals. Mr Maduna are you in support of that?

Mr Maduna:

Yes Mr Chairperson.

Chairperson:

Mr Rajbansi are you talking on the same issue?

Mr Rajbansi:

[Again I am only making a brief precise - Mr Rajbansi proposes that subclause (3) also be for the Ad Hoc Committee's attention and he was requested to make the relevant submissions. Chairperson recommended submissions be sent by Mr Leon.]