

**TRANSCRIPTION: MEETING OF THE NEGOTIATING COUNCIL:
23 JUNE 1993**

Chairman

On behalf of the Negotiating Council we welcome the Technical Committee on Constitutional Issues. I don't think it is necessary for members to be re-introduced to the council.

5.2.1 of our agenda reads general constitutional principles including self determination, now in terms of the reports emanating from the technical committee, they have tabled a report that deals with confederalism, the council needs also to revisit the debate on self determination. A way of procedure I propose that we ask the technical committee to both table and present there report, and may do so by way of addressing the council, when they've done so will then deal with, the whole question of confederalism and self determination on the one matter.

Mr Cronje:

According to item 5.1.1 we will be dealing with general constitution principles, including self determination, I think confederalism was a separate document, which comes much later after we have discussed the fourth and fifth report.

Next Speaker:

Alright, well I'm open to the meeting, if the meeting feels that we must deal with confederalism separately, as a separate agenda item.

Mr Cronjè:

But that was not the point, sorry. The point is that under item 5.1.1. we are dealing with general constitution principles which are grievous the third report from them on that issue together with self determination. Confederalism is a different issue which is subject of a different report.

Next Speaker:

Very well, does the meeting agree? I'm in your hands.

Next speaker:

Which report will you be discussing this morning?

Next Speaker:

Volume

Next Speaker:

Mr Chairman could I be of assistance?

Next Speaker:

Volume 2 of the documents before you. It reads Technical Committee reports, constitutional committee reports Volume 2 23 June 1993. Which contains in the index three reports.

Advocate Jacobs:

Could I be of assistance Mr Chairman? We have had the debate on self determination on Friday and the light of that debate I suppose, I presume the Technical Committee has filed a special report containing some questions, as far as self determination and in connection with Confederation as such, have been tabled and I would suggest that this report, the special report in the general debate of self determination could now be discussed. I am in your hands but I think that could be some sort of way of dealing with this.

Mr Cronje:

Chairman if we look at the report that you are referring to, it is the revisiting of the General Constitution principles which have been discussed before. Contained in it is also what the committee terms the sixth report. I've yet not dealt with the fourth and the fifth that is on the agenda 5.1.2. We received these at 11 am this morning. I will submit to you that the most fundamental issues to be sorted out by this council as contained therein. There are a number of issues which are highly questionable in the view of some of the people, I will submit to you that we cannot discuss what is termed the sixth report today, Before we have dealt with the fourth and fifth.

Mr Raja:

Well, Mr Cronje according to the agenda, item 5.2.1. deals with general constitutional principles including self determination. 5.2.2. refers to reports on instructions given to the Technical Committee on Thursday 17 June, then 5.2.3. and 5.2.4. refers to fourth report and then the fifth report.

Mr Cronje:

I will submit to you that the table that we noted, but discuss it later.

Mr Raja:

You referring to the report before us now.

Mr Cronje:

Because it was only received very late this morning. There are very fundamental issues in which proper preparation should be made.

Mr Vali Moosa:

Chairperson I was told to understand what Mr Jacobs suggestion was. Was his suggestion that we should deal with the special report on confederalism prior to dealing with the report on general constitutional principles?

Mr Jacobs:

I did not say that.

Next Speaker:

No he didn't.

Dr Rajah

Chairman I just want clarification. Are we presenting now the Volume 2 for discussion or are we saying that we haven't discussed? I need that before a discuss it.

Next Speaker:

Mr Cronje is saying that because we only received Volume 2 this morning or yesterday, alright fine we won't argue about that. That in the light thereof discussion of this report should therefore be postponed until later. Dr De Villiers and then Mr Rajbansi.

Dr De Villiers:

Mr Chairman I take note of what Mr Cronje says about some of the reports before us, the the mere reports, but the second supplementary report contains the constitutional principles that we've dealt with on two occasions in this council and its really we can deal with that, alright sorry I didn't ah, then I'm No problem with general constitution principles, I'm dealing with what is deemed the sixth report.

Chairman:

Ok so you are referring specifically to the sixth report. I don't think the council would have any difficulty with that or am I wrong. Mr Zam Titus.

Mr Zam Titus:

Just for the sake of progress chair, what Mr Cronje refers to is going to be considered under item 5.1.2. can we deal with the point that is raising when we come to that particular item of the agenda please, just for the sake of progress.

Chairman:

Professor Ripinga do you agree?

Professor Ripinga:

Yes I do agree, but with regard to 5.1.1. I thought the last time when this constitutional principles were discussed we're looking at 2.9 and that was at that point when I could get Jacobs started discussing and was stopped to deal with procedural matters and today was supposed to have enough time to ask questions and to debate and also to listen to the report that has been prepared by the technical committee. On this presentation of a conservative party. So that the 5.1.1. refers specifically to 2.9 and making up with the presentation of the conservative party.

Chairman:

Alright, fine I think that's pretty clear, I've got Mr Cronje's point is relevant, he is referring specifically to the technical committee's sixth report. But let us then continue, will the technical committee address the council, Dr Venter.

Dr Venter:

Mr Chairman as you can see some of our members are not able to attend today, we apologise for that. If I understand your ruling correctly Mr Chairman we should start by presenting our second supplementary report on the constitutional principles, and where necessary you will indicate to us which are of the other two reports we must present. I would like to ask Mr Michelle Olivier to present our second supplementary report on constitutional principles.

Chairman:

Please go ahead.

Mr Olivier:

Thank you chair person, ladies and gentleman. During the debate of the negotiating council a number of issues were raised with regard to our third report and our first supplementary report on constitutional principles. We now respond to those issues. Indicating what decisions are necessary to enable us to prepare a final schedule of constitutional principles in a consolidated form. I will only refer to those principles where there was comment and point out what is necessary for finalisation of principles. We treat the general constitutional principles and the principles dealing the allocation of power to different levels of government together, showing where appropriate the numbering in third report where this differs from our present report. May I first refer you to paragraph 2.1. I hope you can all hear me ok. With regard to this principle the question was raised whether the words non racial and non

sexist should be inserted before the words sovereign state in line 2. We share the concerns of those who propose the amendment and seriously reconsidered the matter as instructed. We are of the opinion that from a legal point of view, the question of sexism and racism is covered by paragraphs, 2.2, 2.10 and 2.11. There is therefore no constitutional need to include these words. We can take the matter no further, the negotiating council must decide. The next paragraph I will tackle is um paragraph 2.8. dealing with the diversity of language and culture and how it should be acknowledged. The question was raised whether it is sufficiently clear that culture and the protection and encouragement for the promotion thereof should be subject to the provisions of the fundamental rights contained in the constitution. We express the view, that paragraphs 2.2 and 2.10 met this concern and we are still of that view. If specific reference to fundamental rights is required in this paragraph, the following words can be added after the present paragraph as it stands, provided that this is done subject to the provisions of the fundamental rights contained in the constitution. We next move to paragraph 2.9 which deals with the principle of self determination. As you all know the debate still has to be finalised in this regard and the decision must still be taken. Point 2.12 deals with indigenous law and provisional leadership that will be the following paragraph to dispute. We have received submissions in this regard and we have regard for these submissions received as well as the debate in the council. This destination between constitutional principles and constitutional provisions needs to be kept in mind when dealing with this matter. A final decision needs to be taken on the matter of the principle in regard to the inclusion the words in brackets, as it was in paragraph 5.6 of our first report which reads and to legislation dealing specifically therewith, we would appreciate a decision in this regard to take us forward. 2.17 This principle deals with the legislative and executive powers and functions of each level of government. It has been reformulated in response to a suggestion that the last sentence of paragraph 5.2 of our previous report should be reincorporated as a principle. The principle has been reformulated in response to that inclusion. The next one 2.18 This principle states that the powers and functions of National and SPR governments should be defined in the constitution and it deals with amendments of the constitution in this regard. A proposal was made to insert the underlined words after SPR's which reads alternatively if there is such a chamber a specified majority of a chamber of parliament composed of regional representatives. No objection was raised to this. We move on to 2.19. An amendment dealing with local government powers was proposed during the debate, no objection was raised during the debate to this proposed amendment. The wording we have adopted is our edited version of the proposal. 2.20 It appears clearly that the word Shell has been substituted for May in the second line in accordance with the debate. Ladies and gentleman paragraphs 2.21,22 and 23 will be dealt with subsequently. We have reformulated paragraphs 3.3,3.6,3.7 and 3.8 of our third report. I am now on page 7 of our second supplementary report. We have reformulated these paragraphs of our previous report

after a number of issues concerning the fiscal powers and functions of the different levels of government and the method of allocating fiscal and financial resources so as to ensure that this is done on an equitable basis were raised in debate. We had regard to this debate as well as to written submissions made to us. In particular we have noted the concern that the SPR and local governments should have access to funds needed to enable them to carry out their responsibilities and provide necessary services. We have also noted that local government is in the special position because of the different categories that will exist and that this will have to be accommodated in the constitution, thus our reformulated principles. Paragraph 2.24.1. In this paragraph the words an accountable have been added as proposed hearing the debate. It is also underlined in the principle for your easy reference. 2.24.2. The word geographical has been substituted for territorial as was proposed during the debate. 2.24.3. This principle remains as it was formulated in our third report. I can comment as follows:

It has been contended that over riding powers of the National government should be confined to conflicts arising in the field of concurrent powers and that paragraphs 3.9.1.4 of our third and fourth went further than is necessary for this purpose. In this context attention has been drawn to the reference in our report, to the report of the independent experts published by the consultative business movement on which we have placed reliance and it is said that this report wrongly relies on the German constitution, which in effect deals only with over riding powers in the context of concurrent powers. It is correct that the German constitution deals with the over riding the context of concurrent powers. The passage that is referred to in the comment we received is from page 36 of the CBM report which deals with co-ordination of the existing powers, which Prima Farkie is concerned with concurrent powers. This is confirmed by the following passage from page 38 of the report. So far the power of the centre to override the regions has been discussed, solely in relation to concurrency. It has also wider applications. The centre would necessarily have to possess the power to take action to uphold the fundamental norms specified in the National constitution, this will be the regions. When judicial mechanisms were either in appropriate or inadequate. We agree and are of the opinion that there is a need to make it clear that where National priorities such as those specified in paragraph 2.24.3 conflict with SPR competencies the National priorities will prevail. Paragraph 2.24.3 specifies the high objective criteria necessary and particular priorities to which it refers are of crucial national importance. Paragraph 2.25.2 on page 10 of the report. This reads Where uniformity across the nation is required for a particular function then power over that function should be allocated predominantly if not wholly to a national government. We have substituted the words required for the words regarded as important with regard to. 2.25.3. This principle deals with minimum standards with regard to the delivery of public services. The words regarded as it was found in our third report have been deleted in the first line. We move on to 2.25.4. This principle was amended as follows after debate in the council: The determination of national economic policies that part

was inserted and the power to promote inter SPR commerce and protect the common market in respect of the mobility of goods services, capital and labour should be allocated to the National Government. 2.28 on page 11 This principle should be pointed out, it addresses the possibility of conflict in legislation in the field of concurrent powers. A number of issues were raised in regard to this paragraph. It was suggested that a way be found of resolving conflicts without providing that legislation of National Government should take precedence. This will happen only when there is both conflicting legislation and overlap of legislative competence which cannot be resolved by the court through a construction of the provisions of the constitution. In such circumstances the need for legislative certainty requires the court to prefer one legislative enactment over another. The National Government will only have a competence if the legislation is relevant to a national interest and it is for that reason that we formulated the clause so as to get preference to national legislation. Finally 2.29 as amended. A comprehensive allocation of powers in the constitution as contemplated by this principle makes the question of residuality of less importance. In practice residuality will amount to no more than establishing the allocation of ancillary powers through those powers and functions attributed to National and SPR Governments. Mr Chair person, ladies and gentleman I conclude with points 2.29.

Next Speaker:

Thank you very much. Mr De Jager.

Mr De Jager:

Mr Chairman we've got great difficulty, I don't know whether we are sitting in the fire line between the Government and the PAC, but we can't carry on here its terribly hot.

Chairman:

Alright the matter is being attended to Mr De Jager and I certainly have sympathy for the heat that you are experiencing.

Mrs Gasas

Mr Chairman mine is on the first constitutional principle.

Dr De Villiers:

Mr Chairman, just a point of order, could I just ask you, the way in which you are going to deal with the principles now. Is it a general discussion or are you going to take them one by one and then ask for approval.

Chairman:

Yes. There has been extensive debate on these principles, with certain amendments being put to the technical committee. Now I'm not sure whether the council wishes to revisit the debate or to have a general debate on them collectively Dr Venter.

Dr Venter:

Mr Chairman can I suggest that you take the principles one by one and approve or refer them back to us, because as we understand it until now this council has not approved any one of those.

Chairman:

I tend to agree with your thinking Dr Venter, so we'll follow that line then and deal with them one by one and I will look to you for approval or referral back to the Technical Committee of each of the principles before us. Mrs Gasa.

Mrs Gasa:

Thank you Mr Chairman, I wish to thank the Technical Committee for the explanation that was afforded us in terms of the constitutional principle 2.1. Now I would like further Mr Chairman ask that the council debate this and let the women participate and after this the idea I see now, I understand what the presenter said in terms of it not being constitutionally correct, but now my great problem is are we listening to what the lawyers presently want to say or are we interpreting what our women constituency would like to see. We can agree if we are given full explanation as you have done, but now looking at the limitation of a constitutional debate still further explains that if we let loose such clauses we are running the risk of going back to the old South Africa and we are looking forward to it in food down. I do understand the item that you have put forward but I am asking that this point be handled by council and finalised today because if there is no problem in putting it in, then IFP wants to know why then is it not put in, because when we look at the clauses as stated we still feel that and even our constituency keep on asking and hammering on this issue. So we would like to discuss it freely so that we may get to finality today chairman.

Chairman:

Fine Mr Moseneke do you want to come in on this point before I ask the Technical Committee to respond?

Mr Metsepo:

Yes. I would like to support the delegate from the IFP, not because the two leaders of our parties are meeting today. But because I think that the two issues, actually its not only non-sexism but also non-racism which we have to address and I would like to hear from the

Technical Committee the rational behind leaving this and referring to the council because I think amongst them they might have debated those amendments put forward but still found that they have to be referred to council. Because in my view I think this was actually the principle which was also adopted during Codesa period of characterisation of the state as non-racist and non-sexist and if there is a reason now to drop it, would like to know what is the rational behind it.

Chairman:

Thank you. Mrs Jajula Transkei followed by the Indian Congress.

Mrs Jajula Transkei:

Thank you Mr chair person. I quite agree with the Technical Committee when they say this matter has been continuously reflected upon on the following 2.2,2.10 and 2.11 but I wish to request the council to take the matter more seriously and objectively. Look at it in this manner that we are now in the process of change we are here negotiating change from the previous South Africa to the new one and when reflecting on the 2.1 principle we actually reflect the type of a country that wish to go into. The type of state we should go into and therefore the problem in that this very state it was the racism and sexist problem. I therefore request the council to respond not the Technical Committee this don't be job but it is for the council to look at this principle, reflect the state that wish to go into and we as the people of South Africa would like to have the state being a non-sexist non-racial state, I thank you.

Chairman:

Chairman

Thank you Mrs Jajula, Mr Pillay NIC.

Mr Pillay:

Mr Chairman with great respect for the speakers that preceded me, I noticed that in that particular statement 2.1 there is no mention of non-racial or non-ethnic and so on. I believe the statement as it stands is so fundamental to the changing history of South Africa that I believe it should stand as it is because I agree with the committee there that they adequately catered for in 2.10 and 2.11.

Chairman:

Thank you, Mr Mahlangu.

Mr Mahlangu:

Thank you Mr Chairman I stand merely to make an enquiry from the Technical Committee.

I can understand and I agree with there interpretation that care has been taken to include this in 2.2 but then for the purposes of anthraces and the purposes of making an impact in the first opening principles there any wrong or perhaps any damage if repetition is heard even if its to then you have it in 2.1 any damage which is according to the meaning of the first principle. Thank you.

Chairman:

I don't want to enter into a debate with you on this but I think the Technical Committee has made it clear that and it says so there that the negotiating council must decide. My next speaker is Miss D Smuts.

Next Speaker:

Mr Chairman the reason why I am asking this is I just want to know the meaning of the residual if we include this because there is not address there, though they say they still feel it must not included, but they have not indicated whether the meeting would be impaired if we have non-sexist and non-racial

Chairman:

Its not a point of order, but the point is taken. Miss D Smuts.

Miss D Smuts:

Chair person on our part we like the formulation that the Technical Sub Committee as given us. We feel that the matter of gender equality is given real content and substance in section 2.2 and 2.11 if you will look at them with me. The constitution shall be the supreme law of the land shall be binding on all organs of government, shall prohibit racial gender and all other forms of discrimination and promote racial and gender equality and national unity. And the Technical Committee goes further and satisfies the constant demand, the constant and correct demand from the female constituency for full meaningful equality by giving us section 2.11 the legal system shall ensure the equality of all before the law and an equatable legal process, the principle of equality before the law includes laws, programs or activities that have as there object amelioration of the conditions of the disadvantaged including those disadvantaged on the grounds of race, colour or gender. By doing so they do get to the heart of the matter. I hope you would be that they have dealt with this well. And perhaps the problem the delegate from Inkhata first raised could be best addressed by using in draft of the final constitution done by this body, the words men and women many people have expressed the view that would satisfy the needs of the female constituency to use at all times the words men and women.

Chairman:

Thank you, Advocate Jacobs.

Advocate Jacobs:

Mr Chairman I don't want the indorsement of the debate to consider the general question concerning status of general principles, so I could comment later or I could comment now.

Chairman:

Well we're dealing with 2.1 specifically, so as a general then I would prefer it if you came in later on the matter. Does that suit you?

Advocate Jacobs:

I am in your hands.

Chairman:

Later please. Lets deal with this particular one. We've started now and I don't want to introduce this new element. Thank you. Mrs Gouws.

Mrs Gouws:

Thank you Mr Chairman. I think it will be i order if we ask this council and the Technical Committee at this stage of the negotiations and the adoption probably of all these principles. To in this specific case bend their legal backs a bit, to meet the very fundamental fears of most of the women of South Africa. We have been to the ????? on our 15 on Monday and the women on the outside stood up and was represented by their chair of the Womens' National Coalition and I can assure all the men in this council who has any aspirations, to stand for the elections coming that they must consider 53 of us,53% of the voters are women and the coalition ladies asked us specifically the women in this delegation must please plead at the legal committee's indulgence to please add non-sexist and non-racial. I know its covered by ????? articles but I think we must consider bending our legal backs a bit to meet the demands of these women.

Chairman:

Thank you Mrs Gouws. Xhosasana Stella Sigcau

Xhosasana Stella Sigcau:

Thank you Mr Chairman, I also want to add my voice. To those of you,The women who say non-sexist and non-racial should be added,we know for a fact that we come from a society and a history which was riddled with separatism, riddled with racism and riddled with

sexism, so if there constitutional principles which are there to correct grievance of the past. In this principle at which stands, only one aspect has been corrected, that is the accent of separate states, in that we have a single sovereign state but the other soar points of racism and sexism have not been corrected, that is why we feel that we'll be stronger and have a better principle if non-racial and non-sexist is added as part of that principle. Mind you we really feel strongly about this one.

Chairman:

Thank you Xhosasana, Dr Raja it defers to you.

Dr Raja:

Mr Chairman on a point of information does the Womens National Coalition discriminate against men or could we join the party?

Chairman:

I think that can form part of the debate around this matter. Miss Jacobs please continue.

Miss Jacobs:

Thank Mr Chair. I would like to align myself with speakers who are advocating that we should include the word non-sexist and non-racial, um as I see 2.1 it is a principle that will underline all the other principles that are still to come. So to say that non-sexism or non-racialism is catered for in all the other principles we might as well leave out the word democratic and say it is also catered for in 2 point whatever is still to come and for that reason I would say because in 2.1 we are looking at the type of South Africa we are working towards

and on that basis we should include non-racial and non-sexist. Thank you Mr Chairman.

Chairman:

Dr Raja.

Dr Raja:

Mr Chairman I'm wondering as a compromise that if we look at 2.2 with a 2.2 cannot read as 2.1 so that in the opening gambit the principle the issue of racism and gender question can be firmly resolved and then all other principles obviously subject to the first statement.

Chairman:

I'm going to allow Professor Wiechers to respond to that

Dr Raja:

Rather than constantly reinforcing the fear, all I want to ask is not carry our fears of the past into the future. If it is clearly stated in the first paragraph then I'm going to say then that the issue of racism must in all other subsequent paragraphs will be subject to 2.1.

Chairman:

Professor Wiechers.

Professor Wiechers:

Thank you Mr Chairman all other members. I don't want to interfere in this debate which I consider and we consider personally very important, but let me just explain why these principles were formulated. It was exactly for the reason, the fear that if you look at 2.11 and it says the principle of equality before the law improves laws, programs and activities that have the object of amelioration of the conditions of the disadvantaged including those disadvantaged on the grounds of race, colour and gender. Now the equality clause includes the amelioration of the position of women and people of colour. Now if we take it that these are legal principles it could complicate matters if there is a law ameliorating the condition of women or people of colour and then in the court it is said but there is a clash because in your other principle you say it is non-sexist and non-racial and now you categorising people according to gender and race. So that is invalid, now I'm assured and I think the committee thinks that if we have non-sexist, non-racial ranked together with 2.11 that problem or that complication cannot arise. But that was the reason that we don't want to say non-sexist, non-racial in order to jeopardise programs that do exactly that to ameliorate the position of women on gender grounds an race. So we are and I think Mr Chairman members that read together this problem would not arise, but that is why the committee felt that don't complicate the non-exist non-racial in order to jeopardise exactly the things you want. Thank you.

Chairman:

Thank you Professor. Mrs Graybas Ciskei

Mrs Graybas:

Thank you Mr Chairman. First of all I would like to align myself with the previous speakers who are making an input. 2.1 but before I can comment further I have already had the explanation by Professor Wiechers about the exclusion of this point. What I was going to say was in response to what the ladies said before that the only reason they excluded this was to avoid repetition and I was going to say to the council that parallel is taking the matter to and fro from the technical comment I think it is about time the council itself made a decision in

view of all the input of all the members, thanks.

Chairman:

Thank you, Mr Vali Moosa.

Mr Vali Moosa:

Chair person nobody has mentioned the letter which we have received from the Womens National Coalition. It is I think this meeting should note this letter we received from them which represents over 60 national organizations and ten regional womens coalitions and they specifically urge this council to insert the words non-racial and non-sexist. It is a matter which I think this council should want to take into account. Furthermore there is hardly any other issue on which the IFP the ???? ???? the ANC the Communist party and a whole range of organizations are at one mind on. And I would want to suggest that, I would like to move in fact that we insert the word non-sexist and non-racial if the , from what Professor Wiechers has said there is concern about the impact it would have on 2.11 it would be simple technical matter to clarify that we could at the beginning of the second sentence in 2.11 simply say not withstanding the provision of any other principle etc. etc. and I think Professor Wiechers seems to agree with me, we could sort that out with you know, just a few technical manipulations. So I move Mr Chairman that we adopt.

Chairman:

I accept your proposal, except that I do have other speakers on my list and I'd like afford them the opportunity before proceeding with your proposal. Mrs Debbie Govender.

Mrs Debbie Govender:

Thank you Mr Chairman. Mr Chairman I support the views expressed by Miss D Smuts in regard to 2.1 but on the other hand I see no harm in the insertion of the word non-sexist and non-racist if that is the general wish of the ladies present here.

Chairman:

Mr Joe Slovo.

Mr Joe Slovo:

Mr Chair person subject to the proposal by Mr Vali Moosa to which Mr ??? seems to be nodding his head as a way of overcoming any possible conflict between 2.1 and 2.11. I would just like to appeal to this assembly to really cease the debate, nobody is suggesting apart from the part about 2.11 that this would damage the constitutional principles it is an issue in which we should all not just ladies, but men as well , we should all be passionately

involved in this issue and not laugh about Mr Chair person, whether its about the ladies coalition or anything else, there is too much of a tendency when the womens question comes up for titters to go through the court and my appeal Mr chair person really the report of the technical sub committee has indicated beyond a shadow of a doubt that the only reason they have not included it is because it is covered elsewhere so what is the harm of putting it into 2.1 and let us end this debate Mr Chairperson.

Chairman:

Thank you Mr Slovo, I am going to allow two more speakers, we have Chief Nonkonyana followed by, Mr Cronje you withdraw.

Chief Nonkonyana:

Mr Chair I think I waive my right, but actually what I wanted to state Mr Chairman that as far as I understand the question which you were debating, it is a matter that can be appropriately accommodated in what we term a preamble to a constitution. So I wanted to just achieve means of that the technical committee can just comment whether the preamble to a constitution cannot cater for these, now that there is a sufficient consensus well we might as well not debate, but many thanks.

Chairman:

Thank you Chief, Professor Harriet Ngobane indicated she'd like to make the final point, and then I think we'll allow the Technical Committee to make any further comments it wishes to, and then ladies and gentleman I think we must decide. Professor Ngubane.

Professor Ngubane:

Thank you Mr Chairman, I want to add my voice to the predominal feeling of many people here. That seeing that South Africa has had tremendous discrimination based on race and sex we are concerned that the first principle as important as this should leave out that emphasis, we would wish to see the emphasis on these discriminations again and again, we admit that we are not legally minded, we don't really know how to phrase it, but there cannot be too of it because the more and more we get of it the more we get reminded of it. So what I'm saying is probably they could as professional people find a way of if they feel there could be clashes 2.1 and 2.11 find a way of removing of blending what is said in 2.11 already in 2.1 and another point which I want to be specific on, because it may differ from everybody's perspective here is that I'm not sure whether I really go along with the term non-sexist and non-racist. If there could be positive terminology which would not again continue to express our self and define ourselves in negative terms. I don't have an answer to that, but if they could find a way of including those disadvantaged on the grounds of race, colour and gender

that is much more positive than disgracing ourselves again in negative terms. But apart from that Mr Chairman, there is another point which is different from the gender issue, which I would like to raise in connection with 2.1 if you will allow me Mr Chairman?

Chairman:
Certainly.

Professor Ngubane:

The constitution of South Africa shall provide for the establishment of the single sovereign states. I don't know how to improve this to indicate that at the end of the day we don't know whether we'll have a single sovereign state which is a federal type or a state which has confederation or a state which is just single sovereign with no federation or confederation so I'm concerned about not describing the possibilities of that eventually Mr Chairman.

Chairman:

Thank you Professor, Professor Ngubane has now introduced a new element contained in this principle. I would like us to deal with the part of the debate that we have already conducted and come to a decision in that regard as requested by the Technical Committee. Mrs Mangope.

Mrs Mangope:

Mr Chairman I guess its time to support Mr Vali Moosa's proposal and I would like to second what he has proposed, taking into consideration whatever positive wording that ought to come.

Chairman:

Very well, Mr Vali Moosa proposed that the words non-sexist and non-racial be included in the principle on the understanding that principle 2.11 be suitably amended to accommodate that so that they include the words or some such words that reads notwithstanding the provisions contained in any other principle. I think the Technical Committee will be happy with that, can I have an indication Dr Venter?

Dr Venter:

Yes Mr Chairman, I understand you are referring it back to us in view of this debate we will come back with another formulation.

Chairman:

I get the impression that they don't want a reformulation they want a decision today.

Dr Venter:

Yes Mr Chairman, I do not understand the debate or even the desolation to say that the council is now changing the specific formulation because there maybe in view of the contents of 2.11 certain implications and we understand that you want us to insert the words non-sexist and non-racial in 2.1 but also take cognisance of the implications of 2.11 and then revisit a formulation of 2.11.

Chairman:

I think we must allow the Technical Committee to accept our decision as regards 2.1 and the insertions of the words non-sexist and non-racial and then ask them to revisit 2.11. Does the council agree to that?

Council:

Yes.

Chairman:

Fine. Now

Next speaker:

Mr Chairman we can come to 2.11 we are not there as yet. I take it that we are deciding, that as far as 2.1 is concerned we have included the words non-sexist, non-racial I would speak on 2.11 when we come to that.

Chairman:

Agreed, but Professor Ngubane has also introduced a new element into the debate on 2.1 which I would like the council to address, and that is what I am now asking you to do. However its been pointed out to me that this is an appropriate time to break for tea. Would the council agree to that?

Council:

Agreed.

Chairman:

For ten minutes, thank you very much.

Chairman:

You wish to make additional comments, please do.

Professor Ngubane:

Thank you Mr Chairman. On 2.1 I'm suggesting an amendment which reads the constitution of South Africa shall provide for the establishment of single sovereign state, I will come back to that later, but with a democratic system of government committed to achieving equality between men and women and people of all races and to a common South African citizenship.

Chairman:

Professor Ngubane you have created a bit of a problem for me now, in that we are revisiting something we had already agreed upon, and I have asked the council to address the new element which you yourself had introduced and you are now taking us back.

Professor Ngubane:

Oh I thought I introduced elements.

Chairman:

No, no we had agreed on the first element.

Professor Ngubane:

Oh I see.

Next Speaker:

To present: With the order I did have the impression that Professor Ngubane indicated an intention to place an amendment.

Chairman:

No, no I don't recall any such intention. Mrs Gouws

Mrs Gouws:

Mr Chairman I think we all agree that we would like softer words if you can call it that way for non-sexist or more positive words and I think she is trying to help with those positive wording now.

Chairman:

I am in the hands of the council, if the council is prepared to accept Professor Ngubane's proposed amendments

Next Speaker:

I think we should now I'm asking the chair, we should allow Professor when to lead the amendment because that amendment is going to further assist the Technical Committee because they have explained to us why the first state and we had also our discussion and so could we please listen to the amendment.

Chairman:

Alright

Next Speaker:

And then if we don't agree then we could then to see what it is we can

Chairman:

Agree. Professor Ngubane please proceed.

Professor Ngubane:

Yes. On the gender issue 2.1 the constitution of South Africa shall provide for the establishment of a single sovereign state with a democratic system of government committed to achieving equality between men and women and people of all races and also committed to a common South African citizenship.

Next Speaker:

I second that.

Chairman:

Seconded by Miss Dean Smuts. Now is there anyone in the council not in favour of the amendment? Let me hear of see please. Do I take it then that there is general consensus? Thank you very much ladies and gentlemen. Professor Ngubane.

Professor Ngubane:

Thank you Mr Chairman, on the second point that I raised regarding 2.1, I suggested that the constitution of South Africa shall provide for the establishment of a single sovereign state or stroke federalism but I've been advised by the people who have legal minds that it is understood that federal states are also united and sovereign, you may call United States of America, you may call them General Federal Republic, since we don;t have a name so long as I have a undertaking that by this single sovereign state we are not accepting that defiantly we all accept an idea which means one unitary state. Because we have not yet agreed on the form of state.

Chairman:
Ah Dr Venter.

Dr Venter:
Mr Chairman I would like to confirm from a technical point of view that a single sovereign state as I previously explained in council can include a federation, the United States of America, Germany, Switzerland and so on are all sovereign states.

Chairman:
Thank you Dr Venter. Professor Ngubane does that meet with you?

Professor Ngubane:
As long as what Dr Venter has just stated to us is understood and minuted I accept that.

Chairman:
Thank you, ah Mr De Jager.

Mr De Jager:
Mr Chairman if that supervision do we need the word single?

Chairman:
The council says yes we do.

Next Speaker:
Why?

Chairman:
Mr Webb you ask why.

Mr Webb:
Why?

Chairman:
Alright, Dr Venter can you help us once more? If possible. If Dr Venter is unable to help the council, then I think the council must debate this issue and come to a decision.

Dr Venter:
Ah, Mr Chairman the, the word single indicates that there is one state. Ah, you will

remember that some of the original formulations have different words there such as demoted and damnatory and so on. Ah single is shall we say a more new clue indication of the nature of the state in a technical constitutional sense and it, as I explained previously indicates that this new state will not be a confederation but it can be anything else as long as it is a single state.

Chairman:

Thank you Dr Venter, ladies and gentleman let me hear you now. Mr De Jager.

Mr De Jager:

Chairman, I would submit that a sovereign state is a single state, but it need not be described as a single state, we're using the singular. A sovereign state with either a ??? system of the common South African citizenship. The using of the word single, may indicate sir that the intention is to exclude further states in the sense of federal states, and I think it would do no harm, in fact I think it would clarify things if the word single could be excluded, we using the single, the singular and I don't see the need for use of the word single.

Chairman:

Mr De Jager I had thought that Dr Venter's explanation had sufficed, however let me hear the council. Mr Webb.

Mr Webb:

My colleague is trying to hide my features my profile from you see.

Chairman:

She doesn't want you to speak obviously.

Mr Webb:

I would hate to debate that in public. I'm inclined to support Mr De Jagers rule and perhaps we should have the benefit of the expertise of the Technical Committee in this regard, it is highly an interpreted matter.

Chairman:

Dr Venter.

Dr Venter:

Mr Chairman it is true that it would not make any difference if single is left out.

Chairman:

Does the council, Mr Vali Moosa you are itching to come in or not.

Mr Vali Moosa:

Since you're twisting my arm. Mr Chair person I think that to be absolutely clear we would favour leaving the formulation as it is, reading a single sovereign state, the explanation has been made, but it does not exclude particular forms of state and we don't think it is necessary to engage in a long debate on this matter.

Chairman:

Ok. Is there further debate on this matter, Mr De Jager.

Mr De Jager:

Mr Chairman, we're creating a document, a legal document and that it would be included in the Act and there should be even a interpretation to every word standing there, that's the legal position, if its correct why use the word single, because then the court must give an explanation to the word single and if its correct that what's understood is a sovereign state that could consist of several federal states, I would claim that the word single would only be confusing and not creating clarity.

Chairman:

Ladies and gentlemen I'm not sharing anymore ideas on this particular matter, so either we refer this principle back to the Technical Committee or we take a decision. The lady from the PAC.

Lady from the PAC:

Mr Chairman the PAC would like it to be recorded that we would prefer the principle to be left as it stands.

Chairman:

As amended by Professor Ngubane. Fine. Is containing the word single, containing the word single if there the advisors will allow me, Mr De Jager.

Mr De Jager:

If I could ask your indulgence, let us leave it to the Technical Committee, I'll settle for what they say, I think I've produced the legal argument if they could think about it and I'll rest with their decision.

Chairman:

Mr De Jager I get the impression the Technical Committee have decided on the word single, um but the council feels we should decide on this matter. Does the council feel we should go ahead on decide on this matter? Dr Venter.

Dr Venter:

Mr Chairman the inclusion or exclusion of the word single should not make a difference either way, it is correct to say that a sovereign state would indicate exactly the same as a single sovereign state, therefore it is a political decision to be taken and not a technical decision.

Chairman:

Fine. I think Mr De Jager that clarifies the point, it is a political decision, Mrs Mangope.

Mrs Mangope:

In that case Mr Chairman I would like to support Mr De Jager and suggest to this council to omit the word single.

Chairman:

Professor Ngubane.

Professor Ngubane:

Thank you Mr Chairman, since it was my proposal in the first place, I think I have the privilege, I think since the Technical Committee has pronounced on this matter it makes no difference whether single is added or not, I would rather choose to leave out single.

Chairman:

Fine, then it's for this, I would like to hear a few more views on this matter, Mr Slovo very briefly.

Mr Slovo:

We support single.

Chairman:

Mr Ken Andrews.

Mr Ken Andrews:

Mr Chairman I accept that there's no difference whether you have it in or not but the same

applied in respect of non-sexist and non-racial, um and given our history of fragmentation in the same way as discrimination on grounds of gender or race I think if its going to give comfort to people that we're not going to have the type of fragmentation we've had in the past we should give those people comfort and leave the single in.

Chairman:

Ah, Mr Pillay

Mr Pillay:

Mr Chair we would support the formulation as is with the word single.

Chairman:

Thank you. Mrs Gasa.

Mrs Gasa:

Mr Chairman, IFP would like to drop single.

Chairman:

Professor Ripinga.

Professor Ripinga:

We would support the retaining of single.

Chairman:

Mr Moority followed by Mr Joe Mashlangu.

Mr Moority:

We'll favour the retention of the word single sovereign state.

Chairman:

Mr Mahlangu.

Mr Mahlangu:

Supported as it stands Mr Chairman.

Chairman:

Before I allow the Woman delegate from Gazankulu, can we come to a decision on this matter?

Next Speaker:

Correction Mr Chairman the Woman delegate from Ximoko and

Chairman:

My apologies. You have the floor madam.

Woman Delegate from Ximoko:

Mr Chairman Ximoko would like to support that you drop the word single, thank you.

Chairman:

Dr Raja.

Dr Raja:

Mr Chairman if the word single is added for clarity I don't see any harm in retaining that word.

Chairman:

Mr Mopeli.

Mr Mopeli:

Mr Chairman I think to leave the fears of these people we seem to shy away from the word single, I mean the Technical Committee has said it makes no difference. Why do we actually want to harbour on the word single, I would, from the Judicial dealings I would say we delete the word single.

Next Speaker:

Mr Chairman, if the word a or a single is causing problems will statement on substitution say of establishing one sovereign state, will that, will that help?

Chairman:

I think we need not, I don't know that we should run away from the matter, we've tried um Mr Umchizana.

Mr Umchizana:

Mr Chairman Transkei, so far as Transkei is concerned the word single must be retained.

Chairman:

Ladies and gentlemen can we round up this matter, clearly we gonna go round the table

getting this kind of comment from each delegation and we have to take a decision, Mrs Gouws.

Mrs Gouws:

Just at the tail ends Mr Chairman, Why have adjectives which can confuse in a legal document. In most legal jargon you tend to steer away from as much proverbs and adjectives and adverbs as possible not to confuse the matter, this is a legal document, why have so many adjectives?

Chairman:

I prefer not to uh make that particular comment, Advocate Jacobs.

Advocate Jacobs:

Mr Chairman, I'm glad to say it seems as if only the conservative party has a clear and unambiguous view, we are not in favour of a single state a unitary state and therefore we take no decision besides saying we oppose the concept of reunitary or a single state.

Chairman:

Mrs Gouws, its just been pointed out to me that appropriate comment about adjectives you ot so long ago advocating the inclusion of the adjectives non-sexist non-racial I am not in any way trying to influence the debate when I say that, you must allow me that though. Ladies and gentlemen, come let us take a decision, let us take a decision, either we include the words single or leave it out.

Next Speaker:

Mr Chair person quite clearly we are not going to be able to take a decision in the normal way, without simply making an appeal for people to say there is a view tending towards saying the intention of single if we can tolerate that it will enable us to actually move on and perhaps make an appeal from here that lets leave now otherwise we will actually have a split house and the debate will go on without any end. So we require a bit of flexibility on all sides to,just as we had a little earlier on, so perhaps that appeal Mr Chair person is what we need to hear.

Chairman:

Mrs Mangope are you responding to Mr

Mrs Mangope:

Yes to Mr Gordans comments yes. In the spirit of tolerating each other I think it can go to

the other way as well. Why not drop the word single.

Chairman:

Well it seems to me that we are going to have to resort to the rather unpleasant task of establishing whether we have sufficient consensus or not. Sorry Mr De Jager

Mr De Jager:

Could I ask you before making the decision, lets consult with our colleagues, I don't think its so important that we take an immediate decision, there will be however, a adjournment for delight, but lets come back to, but lets still teach further and see whether we can solve it.

Chairman:

Alright, I'm going to allow that, we will revisit this particular constitutional principle before we have concluded the discussions on the rest of them. But only in respect of the use of the word single or the retention of the word single or the deletion of the word single. Right, uh ladies and gentlemen we then move on and I wish to point out to you, that 2.2,2.3,2.4,2.5,2.6 and 2.7 Chief Nonkonyana.

Chief Nonkonyana:

Thank you chair person, I didn't intend to interrupt you, but immediately after if you can give me

Chairman:

Ok, All six of those have already been adopted, so there is no need for us to go back to them at all, right Chief Nonkonyana,sorry

Chief Nonkonyana:

Thank you, we have trained the indulgence of this council,

Chairman:

We are we now?

Chief Nonkonyana:

Chapter six,I'm just on the point of you have just addressed. We would like to revisit 2.2 because it is having an impact on 2.8 as well as 2.12, just for understanding for clarity we don't want to revisit as such reformulation but clarity.

Chairman:

Chief, we have a difficulty, this particular principle has been adopted, now if I reopen the debate on this particular one then in fairness I must do it for all the others and its already been pointed out to me that we are moving along at snails pace.

Chief Nonkonyana:

Sorry chairperson we are not calling for a debate on the issue we would like to be given clarity on 2.2 in view of what is written under 2.8 and 2.1.2.

Chairman:

Alright, I'll tell you how we do deal with it. I've already pointed out that the council has adopted 2.2 to 2.7 which leaves us with 2.8, if you will allow me Mr Webb. In discussing or considering 2.8 I will then call upon the Technical Committee to clarify the point raised by Chief Nonkonyana.

Chief Nonkonyana:

If you will allow me to raise the point, there will not be negation clarify anything because I've not yet raised anything.

Chairman:

Chief Nonkonyana I need to point out something to you very clearly, I'm not going to allow debate on 2.2 under any circumstances.

Chief Nonkonyana:

Chair person I cannot impose the view of these delegations, not at tall on a ruling but I think

Chairman:

Alright, please put your question to the Technical Committee.

Chief Nonkonyana:

Thank you chair person. Our question members of the Technical Committee is clarity on 2.2 as read with 2.8 namely the diversity of culture and our emphasis there is gender equality and all other forms of discrimination. There is a principle which is entrenched in our system, namely for instance there are areas where women naturally are sent to ????? precisely because they are women and there are other areas where men merely because they are men then they must ascend to the throne, we would like to know therefore whether there is any concept between these two, if there is we would like clarity there.

Chairman:

Mr Webb do you want to on the same point?

Mr Webb:

Mr Chairman I'm hoping to be useful in the progress of the meeting. In terms of paragraph six of the explanatory memorandum. There will be a time at a later stage when all of the principles and everything has been established when the final form of state, when the final analysis has been done to come through to all these items to make sure cross the t's and dot the i's, I'm wondering whether we are not being a little too fastidious in this point in time, um given the fact that we need to make progress, alternatively if this is our last bite of the cherry so to speak, then indeed I believe that we need to debate it at full length and no one should be stopped. But in view of the fact that there is a promise given by everybody to each other, but we will see it again really do we need to go through this process?

Chairman:

I've allowed Chief Nonkonyana to pose his question to the Technical Committee and in fairness I must now afford the Technical Committee the opportunity to respond.

Technical Committee:

Thank you Mr Chairman, members, yes it is a very important point if I may say so. 2.2 is a very general but strong fundamental non-discriminatory principle, now it does not come into immediate play as far as 2.8 is concerned because 2.8 deals with language and culture and there protect it and be promoted, so on a basis of non-discrimination and equality. Where it does come into play through you Mr Chairman & Chief is under 2.12 because I take it that you've been referring to traditional legal systems. Now the article in proposed in 2.12 says Indigenous laws shall be recognised and applied by the courts subject to the provision fundamental rights contained in the constitution and that would make indigenous law of course under the fundamental rights and principles that I should think Mr Chairman that what Chief Nonkonyana has raised should be debated under 2.12. it is a very important principle, but it has no direct relationship as I see with 2.8 which is a positive and no prohibitive progression only saying that on a non-discriminatory basis, culture and languages will be provided.

Chairman:

Chief Nonkonyana.

Chief Nonkonyana:

Chair person I think I'm abiding by your ruling, but the point I wanted to make was that we

need to have a proviso on a point 2.2 to say that provided nothing contained there shall affect the rights, cultural rights as envisaged under 2.8, that's all I wanted, but anyway I'll be pleased chair person should not cloud the issues now, if I could be given an opportunity later on to debate this point.

Chairman:

Well I have a difficulty because 2.2 has been accepted.

Next Speaker:

Mr Chairman I have only a formal question, no debate I just wanted to ask whether 2.2 and 2.24.2 are not the very same thing and which would mean if I am correct 24.2 would be a repetition of 2.2.

Chairman:

Er, you refer to 2.24.2?

Next Speaker:

National Government shall not exercise its powers exclusive or current so as to encroach upon the geographical, functional or institutional integrity of the SPR'S. 2.24.4 I'm so sorry.

Chairman:

2.24.4

Next Speaker:

Its right at the end of page 9

Chairman:

Alright, well Dr Venter.

Dr Venter:

Mr Chairman 2.24 it deals with criteria for the allocation of powers and its not intended as principles in mention of the principles proceeding 24.

Chairman:

Ok thank you, I think the explanation provided by Professor Vickers could possibly be adhered to and I'd like us to now deal with 2.8. Miss Dean Smuts followed by Professor Ngubane.

Next Speaker:
Er Chair person

Chairman:

Miss Dean Smuts Followed by Professor Ngubane, point of order, I'm sorry I didn't hear that.

Next Speaker:

I just want Mr Chairman to I heard the chairman saying that certain points here have been adopted. What I'm saying is to remind this house, this council that in the minutes of 17th June page 4 5.2.7 It was agreed that we would not take a decision on any constitutional principle until we received a report spelling out an alternative motive as we requested. But Mr Chairman I don't want to disturb the flow of discussion but I want to register that even though we participate in the modalities and in the constitutional development in principle, but we are not here to give in our consensus, I'm just reminding you Mr Chairman that when you talk of adoption of certain principles, you should be reminded of that.

Chairman:

Professor Ngubane I think I also need to remind you, that the meeting you refer to in your point of order was the meeting that considered regional principles.

Professor Ngubane:

Mr Chairman can I remind you that it concerned the form of state and the constitutional principles.

Chairman:

Dr Chief Zierhof.

Dr Chief Zierhof:

Chairman just on a procedure the 3rd of June, on the 3rd of June we addressed the general constitutional principles these I think 12, the meeting then decided to accept them with the proviso that we will in the end obviously according to Mr Webb's point come back to the package, that stands. But on the meeting of the 3rd of June accepted certain principles referred some back and those we are now discussing, then afterwards on the 17th of June we had the meeting where we decided, we discussed the principles pertaining to the allocation of powers to regional governments or SPR'S and in that context we said we will not take any

decisions of acceptance even preliminary, so there is a status, a difference of status between the general constitutional principles which constitute number 2.1 to 2.14 of this report and the others. Some of those from 2.1 to 2.14 have been accepted on the meeting of 3rd June. The others from 2.15 onwards have not been accepted and will have to be accepted today. Again against the background of what Mr Webb said.

Chairman:

Professor Ngubane, I have those minutes of the 3rd June before me here and clearly states that the council accepted them in.

Professor Ngubane:

I'm prepared to accept that Mr Chairman.

Chairman:

Thank you. Miss Dean Smuts.

Miss Dean Smuts:

Chair person the Technical Committee specifically invites the council to decide whether reference to fundamental rights is required under section 2.8 which reads the diversity of language and culture shall be acknowledged and protected and conditions for their promotion shall be encouraged. We would like to advance the view that these cultural and language rights should expressly be made subordinate to the fundamental rights in the same way that indigenous law is made subordinate within the parameters of section 2.12 itself and for the same reason, which is that cultural provisions I would think are very likely to compete with fundamental rights, the right of equality for example in the context of religious, marital regimes. And one does not after all bequeath to the court a set of competing clauses or sections. Now we certainly do as a party treasure the variety of languages and cultures and one would like to see public monies being voted for eg. for the development of dictionaries and so forth, but one does want to avoid the abuse of a section like 2.8 its latter part and conditions for their promotion shall be encouraged and wants to avoid abuse of that as either a potential racialtor or a sexualtor, its the same argument that applies in the case of the potential abuse of the freedom of association. Now if under 2.8 the condition for the promotion could conceivably or arguably encourage the proliferation of cultural clubs, like the Kruger pond or the Rand Club which control public goods in the form of career opportunities. So we are arguing that we would like specific reference to fundamental rights not only that but the cultural rights should be made sub-ordinate to those.

Chairman:

Chief Nonkonyana followed by Mr De Jager.

Chief Nonkonyana:

Thank you chair, we are of the view that clause 2.8 as is clearly met our concern, namely in that it acknowledges our different culture, it also acknowledges our different languages and not only acknowledges that but also protect an promote, therefore we are of the view that if the proviso, which is suggested at the bottom there, is allowed then it would mean that for instance, the question of different culture, that I alluded to earlier on, namely because in our system which I must say Mr Chairman is entrenched, our system which I must say Mr Chairman is treasured by the people, they are of the view that system should be promoted. If we are going to then to make it subject for fundamental rights we would need before we could agree see those set of fundamental rights first, should we agree, as is suggested we are afraid we might be giving a blank cheque and we have done so on 2.1.2 to 2 to our prentice already and we are of the view therefore, that we would settle with clause 2.8 as is, however, if there would be any need that we should actually make a proper subject of fundamental human rights later on, then we will have no problem later on to do that chair person. Thank you.

Chairman:

Thank you Chief, Mr De Jager. Mr De Jager.

Mr De Jager:

Mr Chairman only on the point of clarity isn't every law and even the constitution subject to fundamental rights?

Chairman:

I'm in the chair, so I am going to ask Dr Venter to respond.

Dr Venter:

Mr Chairman indeed not only every law but every rule of law whether written or not that would include the religious laws of all natures as well as the common law.

Chairman:

So implicit in what you're saying then, is that not withstanding anything that may be contained anywhere else it still must stand the test, ok, Miss Manzini.

Mr De Jager:

In that case to follow up why should we include that clause then?

Chairman:

I'm looking for debate Mr De Jager. Miss Manzini.

Miss Manzini:

Yes. I would like to support Dean Smuts from the Democratic Party on the issue of promoting our divergent culture, provided this is subject to fundamental rights contained in the constitution. It is our view that the question of culture and tradition in our country, actually doesn't only affect the African people I think all of us have got different cultures and tradition and we have different interpretations of this culture and thus what the delegate from the traditional leaders is saying about our people is actually very questionable. If fundamental rights are to be extended to him I don't see why they cannot be extended to his co-delegate. I think this is very important because I think by our people, people tend to speak for people who are not able to speak for themselves and thus it is very important that the constitution actually protect those people who cannot speak for themselves and thus it is our view that we have to have the provision which is being suggested by the Technical Committee in order to protect those people.

Chairman:

Thank you, ah Mr ????, before you come Mr ????, my apologies to you, Professor Vickers you asked to come in, to make an input now, please do so.

Professor Vickers:

Mr Chairman, with your permission may I just clarify something, its quite true we've defined the nature of the state as non-sexist, non-racist but in a positive way, so that was a freudian slip, I hope not you see I'm worried about it, but its no big phrase in positive way, for that reason on devout principles we had to state the non-discrimination principle, but in our principles and our Technical Committee we have not dealt with the actual fundamental rights, freedoms and liberties, because as you all know there is another Technical Committee who will report on that. What the council is in our view to be introduced at this stage is to accept the principle and then come back with Technical Committee on human rights and liberties present the proposals and then test this against the bill of rights they're proposing, so with all respect I think it is a bit premature to talk about all these rights and liberties at this stage and all this council with all respect can do this stage is to accept the principle and then reinvestigate and see how this principle is applied and is going to be applied in the view of the proposals of the Technical Committee on human rights.

Chairman:

Which justifies the point made earlier by Mr Webb, ah Mr Lockey.

Mr Lockey:

Yes, I've got a question to the Technical Committee Mr Chairman and my question relates to the word shall, it compels the constitution making body to acknowledge and protect various cultures and languages and it binds the constitution making body in that regard. My question is unless you put in the qualification that provided it is conducive to the fundamental rights, one can interpret this, is that this will supersede the fundamental rights. There is a conflict between this principle and the principle dealing with fundamental rights as it reads at the moment.

Chairman:

Ah Dr Venter:

Dr Venter:

Mr Chairman I think it is important to point out, as we've done a few times that it is unavoidable that these principles will have to be read together. The one would qualify the other. One of these principles cannot override any one of the others, therefore we've pointed out in our commentary here, that 2.8 is directly influenced on this point by 2.2 and especially 2.10.

Mr Lockey:

Chairman, but my point is that they, even if read together there is a conflict between this principle and the principle between fundamental rights and unless we change the word shall or you qualify this as Miss Smuts indicated, there is a conflict between the protection of cultures. If you have a culture that discriminates on the basis of gender for instance, in terms of this principle at this point in time, it compels the constitution making body to incorporate and protect that in the constitution. Now it's obvious that, that will be in conflict with the charter or fundamental rights.

Chairman:

Ok, yes Mrs Jajula?

Mrs Jajula:

Thank you Mr Chairman, I think, I wish to draw the attention of this council that this principle was fully discussed last week and the underlined clause that provided that this is done subject to the provision it was from this very council that it needs to be read under after encouraged so that this principle does not override the fundamental human rights and that was discussed and it was clearly, and I would suggest that Mr Chair person we need not be delving on this and proceed to the next principle, thank you.

Chairman:

I tend to agree without any way affecting the rights of others who have indicated they wish to speak. I tend to agree, this is not the first time we have debated this particular principle and that being the case, I would appeal to the council to allow us to come to a decision on this particular principle, now I have Mr Rajbansi, Mr Andrews, Mr Vali Moosa and once more Chief Nonkonyana and Miss Smuts, so if you wish to continue with the debate, please indicate to me. But really I would like us to come to the end of this debate on this principle. Mr Rajbansi?

Mr Rajbansi:

I waive my rights.

Chairman:

Mr Andrews?

Mr Andrews:

Thank you Mr Chairman I would like to concur with points made by my colleague and others and I think the very important point made by Professor Vickers. Now, first of all I think that if we are going to keep 2.8 in this context we need the proviso that it subjects the fundamental rights, I wonder given the fact that we also have found it necessary to put the proviso in at least one other place, whether it would not be neater and save any possible difficulty, if for example after 2.10 we had a principle which simply said that all the constitutional principles herein are subject to the provisions of the fundamental rights contained in the constitution. So one makes one simple statement on its own, that subordinates all the clauses to the fundamental rights contained in the constitution and then there is never any confusion that maybe because you didn't mention it somewhere else and you did mention it here that it has some kind of significance so I would suggest that is a possible solution. secondly in respect of for eg indigenous law and other matters, surely we should take the point that the rights, the fundamental right themselves which are being looked at by another committee will in due course be decided upon by the negotiating forum. At that stage if there is a need to make any of those rights subject to something, for eg if were to want to make them subordinate to indigenous law that would be the time to debate it and not in this context where we are in a sense anticipating what those fundamental rights are going to be. So on the one hand I suggest that we have a separate self standing paragraph saying that all the principles are subject to the provisions of fundamental rights contained in the constitution. And secondly the debate as to whether any aspects of our society or law should be exempted in some way or another from the full impact of the fundamental rights when we get round to discussing them, but that is the time to look at whether they should

be made conditional in any way. Thank you.

Chairman:

Thank you. Will the Technical Committee, are you prepared to respond now to Mr Andrews suggestion? You've just taken note of it. Mr Vali Moosa.

Mr Vali Moosa:

Mr Chairman the first point is in response to, to Mr Vickers where he say that we should first wait to see what the Technical Committee of fundamental rights is drafting, prior to considering this matter, because we will then know what the fundamental rights are. I don't think that his intervention is really material to the present discussion, and the reason why I'm saying that is because these principles are meant to bind whatever constitution making body we have. And it is for that reason that in the drafting of the entire constitution by the constitution making body, including the terms of the charter of fundamental rights, these principles would have to be taken into account. When we received the report from the Technical Committee on fundamental rights, there was a specific discussion that had taken place, if I would just jog the memories of the council and Technical Committee to at one stage to what are the criteria that will be used to draft a chapter fundamental rights at this stage. And I think if one looks at all those reports, it will become very clear that we need to decide on this matter at this stage. That is my first point, my second point is in response to the Camp traditional leaders delegation and to point out, to point out that in our own history, in the name of culture, the name of culture Chief Nonkonyana and I have been discriminated against in the name of culture and it is for that reason that we do not want that kind of culture ever to be practised ever again in the name of religion Apartheid was justified, we need to remind ourselves of those things, and when we talk of fundamental rights they are fundamental because they apply to everybody, everywhere, equally and that is of vital importance. And therefore we would not be able to support a clause which says that we must protect and promote language and culture without saying that this should be done in line with the Bill of rights or Charter of fundamental rights. It may well be that many of us, I am no exception have cultural practises which do discriminate against people, which do discriminate against women and that the point which ????? has made is that the constitution is meant to protect the voiceless, it is meant to protect those not only the traditional leaders but also the subjects, not only the politicians but also the followers, and I think that is of vital importance. So we would urge the Cape delegation to reconsider their position on this one, it cannot be, it cannot be that there are arguing that somebody somewhere in this country, should not enjoy all of the rights which will be set out in the constitution.

Chairman:

Thank you. I have Dr Raja on my list and then I am going to allow Chief Nonkonyana followed by, alright I have Dr Raja followed by Mr ????? with Chief Nonkonyana and Miss Smuts rounding off the debate.

Mr Raja:

Mine is just a very short input Mr Chairman. I just want to express concern about the parenthesis that we always include provided this is subject to this and subject to the other provision etc. because you are viewing a clause out of context, the constitution must be read as a whole, and if you look at 2.2 it says the constitution shall be the supreme law of the land and shall be binding on all organs of the state etc. and if the fundamental principles are part of the constitution if so facto all other principles will be subject to the fundamental rights without having to spell it out in each and every clause.

Chairman:

I rather you didn't. Mr Imchizana.

Mr Imchizana:

Thank you Mr Chairman, Firstly let me say, let me say that we must understand our concern about the question of culture. I do not think that we are so naive as to say that cultural practises must not be subject to fundamental rights, but we must know what these fundamental rights are. I think we must appreciate, and some of us don't appreciate that is a matter of fact ripped of our culture, we remain as nothing as some of these people, let me say the blacks. We have that culture, I therefore take the advice of the Technical Committee that we shall have to see what those fundamental rights are. At this stage I'm certain that this two aid is going to be subject to fundamental rights we do not know what fundamental rights will eventually be written into the constitution. We might find that in the end and the entire culture, the entire culture, culture that is known to be the culture of the black people is wiped off. We are very particular about that, so that we must know exactly, this is the position and I would ask that some of the delegates here must also learn to be sensitive about our own feelings, those people who believe that they have a culture, those that believe, in fact there are so many here who believe that what you call black culture is an entirety opposed to fundamental rights and are determined to see to it that nothing remains of black culture. This is what we are now suspecting. And you know this issue has even the effect of dividing delegations. It has the effect and we must be very sensitive about that to, take that into consideration, thank you Mr Chairman.

Chairman:

Chief Nonkonyana followed by Miss Dean Smuts.

Chief Nonkonyana:

Thank you chair person. We are talking and we are advocating for a culture, a culture which was adversely affected by colonial rule and all other successive governments and we are talking about fundamental human rights, the question would be and the people would like to know, fundamental human rights in terms of youth criteria worse than our own culture, that is the problem we are facing, so we are saying therefore, chair person that the clause 2.8 as is, it gives a right, but the proviso is taking away then we are having a plus and a minus which is equal to zero which according to my mathematics, if my teachers taught me right then it means therefore that we don't have 2.8, we have nothing. Bear in mind we have said that equality, gender let me tell you, I am not talking about me because I know at home my subjects respect me, whatever you say about me I have no problem about that, but a home, a homestead there they do have a system and they recognise a cornhead of that family, nobody can perform any tradition there, except that man. If that man is not there that custom cannot be performed. We are saying that let's bear in mind those, not the regional leaders themselves, no, but those people at this point in time I can say Mr Chairman that those voices have not been adequately heard. That's why we were so happy then if we were going to promote them, because they have been deprived from this for 15 centuries, so this I mouth the view chair person that this is so fundamental to us and if I would like to know, the here delegates must tell us clearly as they've told the women, that we will support you. So tell us clearly, don't use us, tell us you traditionally as a delegation we'll support you, tell us now and if you do not say no and we'll see what you do, so that is it chair person.

Chairman:

I accept that was not a threat but a challenge, Miss Dean Smuts.

Miss Dean Smuts:

Chair person I wish to respond to Professor Vickers who said that we could not anticipate rights when dealing with these clauses, I wish to respond to him by pointing out that in section 2.12 the Technical Committee has done precisely that thing when dealing with traditional leadership and indigenous law, it has precisely anticipated a clash and dealt with it. So I was arguing for no more than they themselves have done in 21.12 in the case of 2.8. May I now just respond to Mr Imchizana and the Chief by perhaps observing that, I am under the impression perhaps Chief this situation is not so difficult, I am under the impression that in the Ciskei where a Bill of Rights was instituted it has been shown to be possible to reform and modernise aspects of customary union relating for example to property rights permit without harming the many very wonderful aspects of that particular cultural

tradition.

Chairman:

Thank you. I'm going to now allow Miss Manzini to make an input and then finally Mr Webb I'd like Mr Webb to close the debate, Miss Manzini.

Miss Manzini:

Yes, I think we are debating this issue for the second time, third time because I think in the past week it was made very clearly as to what we mean by promoting and encouraging culture subject to fundamental rights. No one in this council suggested that culture or religion will be banned. We said culture, religion will be promoted and encouraged subject to fundamental rights. This was to make sure that will culture and religion continue to be practised and a member of our society feels that culture and religion doesn't suit him or her has recourse to go to court and challenge that and not subject individuals or a group who don't want to be subjected to that culture and religion. This means that the various customs and traditions will continue to be practised in the various homesteads, provide members of those homesteads agree to those practises, and I think this is what we have been trying to put through because I think what has been happening is that there is a blanket application which is stating, which has fossilised our culture and tradition despite the various changes which are taking place or which have taken place. And I think these other issues we are debating here that in creating a new South Africa we shouldn't go over and over those things again and find members of our community who are subjected to that against their will.

Chairman:

Thank you, Mr Webb.

Mr Webb:

Chairman I would like to make just one very strong point I hope. This is a negotiating council, we should not try and attempt to stall or stop discussion but what I do believe is that we have been able to share a number of ideas, we have the wisdom of seven academics, it is their function to attend this meeting to hear what is being said, to develop those ideas and those concepts and to try and synthesise them and report back to us. Now there is a very strong emotion with which I can identify, I was born and bred in the type of area we are talking about and I believe that this emotion cannot just be swept under the table, I believe that it is now encumbered upon us to refer having heard the discussion to hand it back to the Technical Committee and ask them to come back with some sort of synthesis which maybe acceptable to all of us.

Dr Venter:

Mr Chairman what we are trying to say in our reports and our responses in many of these instances, is that we take these things as far as we can in a constitutional, legal, technical manner, then one reaches a point where decisions have to be taken on considerations different from constitutional and technical considerations, such as emotional and political matters, and this to our mind was one of those.

Chairman:

Yes, Mr Webb I have great appreciation for the points you've raised and I'm inclined to agree with you, but then as Dr Venter has pointed out what we have before us is fundamental problem and I'm not sure that referring it back to the Technical Committee having listened to the debate today is going to afford the Technical Committee of coming forward with something that will resolve our problem.

Dr Venter:

Mr Chairman effectively we are taking away existing rights, I think that is very important, we must consider that.

Chairman:

Alright, look, I am in the hand of the council, if the council feels that we should leave this matter in abeyance and revisited to at a later stage and that what Mr Webb is saying has merit then by all means let us do so. How say you? You want me to repeat what I have just said?

I've just said that if the council believes that in the light of the emotions expressed in this debate that we should leave this matter in abeyance and afford the delegates in the council an opportunity to consider it further through bi-laterals and multi-laterals because I don't believe the Technical Committee can resolve the problem for us, I think Dr Venter has pointed that out very clearly to us. Then please say to me that we must leave it in abeyance and we can go on to consider other matters. Mr Vali Moosa.

Mr Vali Moosa:

Mr Chair person, I would suggest that we leave it in abeyance we'll come back to it later today, to give all of us an opportunity to exchange further ideas and formulae.

Chairman:

I believe the council agrees. Thank you very much. We then move onto 2.9.

Next Speaker:

Mr Chairman

Chairman:

Advocate Jacobs?

Advocate Jacobs:

As far as 2.9 is concerned I would ask you to stand over as well.

Chairman:

Fine.

Advocate Jacobs:

I mean till we get to an opportune moment.

Chairman:

I accept that, certainly. We have already adopted 2.10.

Next Speaker:

Mr Chairman you haven't put that to the house, whether it should stand over.

Chairman:

Alright I think there was an understanding when we discussed the ratification of the agenda that there would be a clear time allocated to revisiting that debate, but if want a formal proposal in that regard, by all means.

Next Speaker:

I just like clarity as to when and how we'll deal with it.

Chairman:

When we have finished with the rest of the principles, does that?

Next Speaker:

That would have minded, my suggestion as well Mr Chairman.

Chairman:

Thank you. We have already adopted 2.10 so we don't have to go back to it. Now, 2.11 was referred to in a debate on another principle a little earlier, does the Technical Committee feel that this needs to be revisited now, or will it, can we leave it in their hands? We leave it in

their hands. Thank you very much. Which brings us to 2.12, the chief from the Transvaal traditionally this, Chief Netsibupfe.

Chief Netsibupfe:

Thank you chair person. You remember that this honourable council referred this clause back to the Technical Committee to reformulate it with some suggestions, brought about by the Cape which was seconded by the Transvaal here and the Orange Free State. But now, it is back and we realise that from what we had suggested to us, it has gone from bad to worse. We had suggested some amendments to be brought into this and they went as follows: We had suggested that they institute a role and status of traditional leaders shall be acknowledged and recognised in the constitution and indigenous law shall be applied to the extent that it is compatible with the provisions of fundamental rights contained in the constitution, but what we see now is great discretion of what we suggested to come in here, we understand that this is not, association is not a mere political association, it is a clear constitutional principle and it is not a mere constitutional provision, but a clear cut constitutional principle as we have suggested, thank you.

Chairman:

Before I allow you Chief Nonkonyana, Dr Venter would your committee like to comment?

Dr Venter:

Thank you Mr Chairman just very briefly we had close regard to the submission that was referred to, and on those grounds we changed inter-alia, changed the sequence of the words in order to make it very clear what the implications of the recognition of the status of the traditional leaders will be, it now reads, as you can see, the status according to indigenous law and that indicates the legal status which is determined by the rules of indigenous law, which in our view would cover all the considerations that were mentioned just now and give a submission to us. This is in legal wording exactly what was asked of us to protect in this principle.

Chairman:

Alright, before you come back I must allow Chief Nonkonyana.

Chief Nonkonyana:

Chair person, first of all I rise to support the proposal, rather the proposed amendment which is has been proposed by the Transvaal Delegation of Traditional Leaders. You will recall sir and this honourable council, that when this matter was debated last time, and I hope we are not going to waste a lot of time again today. We clearly stated in no uncertain terms our

position, but to our surprise what we have said has not been taken into consideration at all and as the mover has already pointed out this situation has gone from bad to worse. When we said that we are concerned about the word status, it was suggested that perhaps we need to go back into our library because it was the view that the word status recognise the institution and the role. I have consulted a dictionary, this is the definition of the word status: It says social or professional position, condition or standing to which varying degrees of responsibility, privilege and esteem are touched, that's the first one and in no way that one accommodate us in the Institution of Traditional Leaders at all and our rule. It's just a position, professional position. Two, the relative position or standing of that person or thing. Three, The high position or standing prestige he has acquired new status, since he has appeared in that job, the other one, legal standing or condition of that person, a state of affairs and this dictionary has been wise enough to even have a look at the origin of this word from Latin, it says ????? - you stand. Chair person I don't think we were understood and third I don't want to attempt, I would understand them, probably they did not taste the this institution how vulnerable to us it is. Without going further Chair person I would crave the indulgence, I would plead with this council with this council that the proposed amendment should be adopted, thank you.

Chairman

I have Mr de Jager followed by Mr Mopedi.

Mr de Jager:

Mr Chairman, I'm not going to speak on the first part, the status, I think that necessary respect should be created and awarded to the status of the leaders. But I want to know from the Technical Committee whether the formulation of this clause here puts indigenous law on the very same footing as the Roman Dutch Common Law or the common law of South Africa whether it's on absolute equal status in the formulation here created.

Chairman:

Dr Venter do you wish to respond?

Dr Venter:

Mr Chairman can I respond also the question of status?

Chairman:

Certainly.

Dr Venter:

The dictionary meaning that the chief has quoted, is comprehensive definition of status in the social sense and in many other senses. But the relevance for the present purposes is the part on the legal standing of a person. This being a legal document and status having a very clearly defined meaning in South African Law, would limit the meaning of the word status here to the legal meaning and our intention was to accommodate the need which we certainly did recognize from our point of view, to give protection to all those elements that are mentioned in the proposed amendment, in this way, in the most effective legal way. This word status qualified by the words according to indigenous law should make it very clear to a court of law what is meant including the role and position and the cultural attributes of the institution of traditional leadership. Regarding the second question of the status of indigenous law, the effect of this form of formulation would be, that indigenous law is basically placed in a similar position as that of the common law.

Chairman:

Ah, Chief Mopedi?

Chief Mopedi:

Mr Chairman, thank you. I would like to associate myself with the sentiments expressed by my colleagues here. In fact, Mr Chairman, we are happy that the status has been recognized, but we feel that the Technical Committee should have gone further, regarding the role, the rights of the traditional leaders in the new constitutional law, and these I think, we strongly have still to be acknowledged and to be defined. I am not a legal man, I mean in my humble opinion I feel that this has to be acknowledged and be defined somehow. That is all please.

Chairman:

Mrs Klabá?

Mrs Klabá:

Thank you, Mr Chairman, before I can proceed with my question I just need you to tell us the amendment that was done by the Chief over there.

Chairman:

Mrs Klabá, what I was going to actually propose is that the traditional leaders need to perhaps sit down or formulate the appropriate amendment of principle and submit it and sit down with the Technical Committee and discuss it. I'm looking for a way out of this particular predicament, but I'm being guided and advised here that that's not appropriate at this stage.

Next Speaker:

Could I just ask a question, Mr Chairman, is that detriment to our evidence?

Next Speaker:

Mr Chairperson, could I assist you? I think quite clearly once again, this is an issue on which there are firstly, strong feelings but secondly, also a lot of technicalities involved which are not easy to discuss in a forum like this without perhaps, interlocutor. Now, your first suggestion that was a very constructive one because unless we have an alternative draft it very hard to understand what the differences are notwithstanding various views which have been expressed on the matter. So what I think we could do is ask Chief Nokonyana and others who share his view, to in the next few minutes, however long that might be, to draft an alternative formulation firstly, and secondly perhaps the Members of the Planning Committee could be asked to facilitate any advice they might require in order to streamline their drafting process without really entering the area that Mr Jacobs I think is warning us about, which is verbal evidence. So can I put that forward as a procerro matter Mr Chairperson.

Next Speaker:

Mr Chairman, could I congratulate your advice Chairman. He immediately picked up the point.

Chairman:

Thank you, Vice Chairman.

Next Speaker:

Mr Chairman are we still ...

Chairman:

Mrs Klabu we haven't quite finished with you.

Mrs Klabu:

Okay. What I wanted to find out was whether the amendment related to the first sentence because my question relates to the second sentence of Paragraph 2.12.

Chairman:

I'm listening to you. Are you referring to the first part of the principle?

Mrs Klabu:

No, the input I wanted to make is on the second paragraph.

Chairman:

The second Paragraph?

Mrs Klabá:

Second sentence, I'm sorry of 2.12

Chairman:

Second sentence yes, let me hear you.

Mrs Klabá:

I just wanted to make sure the amendment is not related to the second sentence.

Chairman:

Well, I would have thought the amendment or the proposed submission from the traditional leaders would cover the entire principle. Because, I mean if we deal with it piecemeal then we're going to keep coming back to it and keep referring.

Mrs Klabá:

That is quite precisely my point because if you look at the second sentence before we can reach any conclusive principle on this second sentence you have to go back to 2.8 and we have reserved the right to come back to 2.8 and I think it materially affects 2.12.

Chairman:

Well, obviously that is the way in which we are heading now, where we are going to allow the traditional leaders to make their submission to the Technical Committee, but I don't want to curtail the debate because there are still four more speakers on my list. Miss Makada, followed by Professor Ngubane and then Mr Shilowa and Xhosasan Stella Sigcau. No not before the others.

Next Speaker:

Is there such a point. We have the proposal all we need to do is just have it typed and I think it will help the members if the typed copy could be circulated, then make an intelligent discussion.

Chairman:

Fine, but Xhosasan we are coming back to other principles and as they are going to do with

those then let us also revisit this, OK? Miss Makada? Moleti, Moleti? My apologies.

Miss Moleti:

The PAC rises to support the proposed amendment by the Transvaal Traditional Leaders. Let it be noted Mr Chairman.

Chairman:

It's noted, thank you. Professor Ngubane?

Professor Ngubane:

Thank you, Mr Chairman.

Chairman:

Can I please have order, can I please have order in the Council Chamber. We have several sub-meetings taking place simultaneously. Professor Ngubane?

Professor Ngubane:

I would like to support the standpoint of the Traditional Leaders, but Mr Chairman, I hate to say I told you so. We had suggested earlier on that we should have a sub-committee to deal with this. These are very, very complex issues. If we remember, if we look back in our history and we remember that these people we are talking about, the indigenous peoples have never really had time to look into their laws, to look into their culture, to restructure it in spite of all the various sufferings that they went through which destroyed their cultural formations. It's not something that you can handle within two minutes standing up during teatime. It's a very, very complex issue. Mr Chairman, I still appeal to you to consider giving it a special treatment and I leave it to the Technical Committee to decide whether the original proposal which some of us had on having a sub-committee, only Traditional Leaders laws and indigenous people should not be considered.

Chairman:

Mr Sam Shilowa?

Mr Shilowa:

Thank you very much. It's a pity that you, you've already made a proposal. A proposal which says that we are going to look into some form of formulation. I say it's a pity because I think what we should differentiate, I think I've heard a number of words here being used, we must respect emotions. I don't know what that means, I don't know what that means because I can actually make an emotional speech saying to you now, that are you saying, are

you saying, not you, I mean the Council, that in terms of indigenous law which would accept that it will remain as it was ever since those centuries. That we should accept that those who are actually saying according to our indigenous law we have to cut every boy or every mans left ear immediately he is born. That we are going to say we accept that, is that what we are saying here? I thought what wanted to say without getting into a debate is first, that no one here has said we don't recognize and in the future we are not going to have the Traditional Leaders playing a role, and respect, in their institutions. No one has said that. But what I thought was being said is that that recognition will have to be done in a legal manner and it has to subject itself to legislation. We are going to have parliament in the New South Africa, and that parliament will have to pass legislation that allows for the evolvement of us working towards one common law at some point, whether it's customary, African or Afrikaner or whatever you call it. So what I'm really appealing for is that if we are going to reformulate whatever we reformulate, I think the spirit is it must be clear that from our side we are actually saying that the whatever formulated, whether it is a role, whether you call it whatever, it has to be subject to the provision of fundamental rights, and secondly it has to subject itself in terms of legislation, not only around this one but everything we're dealing with. So what I'm really appealing for is that we should not use words such as 'let's respect emotions'. But I think we all have emotions, I mean there are areas where we actually use that emotion and I'm very capable of making an emotional speech if I want to.

Chairman:

I have experience of that Mr Shilowa, so I can confirm it. Ladies and Gentlemen, I'm in your hands but rather than I make the proposal ..

Next Speaker:

Chairperson, if you don't want to make it, can I propose that we hold this matter over and allow us as in the instance of 2.1, sometime an opportunity for exchanges and I'm sure that once we come back after an adjournment for supper we'll be able to resolve this matter.

Chairman:

Agreed?

Council:

Agreed.

Chairman:

Dr Eloff, can you give us some indication of what time the supper break will be?

Dr Eloff:

Chair, I just enquired, they haven't returned the message. I would say in five minutes.

Chairman:

Ok they we'll continue. Principles 2.12, 2.14

Next Speaker:

Mr Chairman?

Chairman:

Advocate Jacobs?

Mr Jacobs:

Before we continue, in the same paragraph but different thing, I read the second sentence in the note, the distinction between constitutional principles and constitutional provisions needs to be kept in mind when dealing with the matter. Now I have a question on this, 1) When principles are made part of positive law in a constitution, do they become constitutional provisions and if not what does that sentence mean?

Chairman:

I'm allowing the question on the understanding that we are not re-opening the debate.

Advocate Jacobs:

No, no I'm not talking about indigenous law now.

Dr Venter:

Mr Chairman, the reference that we made there to the distinction between constitutional principles and constitutional provisions is intended to indicate that we're dealing here, not with the drafting of a constitution as such in any other way than drafting principles to be included or to be binding on the constitution making process. The question that Mr Jacobs has asked has bearing on something different, the intention there is merely to distinguish the need of providing framework, framework in principle within which a constitution can be drafted and the decision not to draft constitutional principles and providing for structures and so on in this specific set of principles.

Next Speaker:

Just a follow-up question, Mr Chairman, now my question still stands when these principles,

these constitutional principles are now couched in legal terms in a constitution, do they then become constitution provisions? Do I understand the sentence correctly if I understand it that way?

Next Speaker:

Mr Chairman, the question deals with something different, should these principles be included in a chapter or an addendum or schedule to a constitution they would be capable of being defined or described as provisions of that constitution, but the issue here is that we're not dealing here with the making of a constitution by framing these principles as such.

Chairman:

Ok, thank you. Ladies and Gentlemen, Principles 2.13, 2.14, 2.15 and 2.16 have already been dealt with in a previous debate. Which brings us to principle 2.17.

Next Speaker:

Sorry, Chairperson, sorry. On 2.16, the last one, however, I think matters arising

Next Speaker

Can I just come in before we go on to regions?

Chairman:

No we are not going on to regions.

Next Speaker:

Am I out of order, Mr Chairman?

Chairman:

Chief, you have the floor. Please continue.

Chief:

I was saying on 2.16, Chairperson, yes but we raised this matter and we were promised clarity on the role of Traditional Leaders, when this matter was discussed. I think it's Page 5 of the Minutes dated 17th June. Let me repeat what was said there, Chairperson. We said we need some clarity because it says that at each level of government there shall be democratic representation, we understood thereby three tiers of government local, regional, national. We were interested of course, at local level because we do have traditional authorities there. I remember saying that and there, Chairperson, of a traditional authority is a Traditional Leader who is born and not democratically elected. We wanted some clarity

about that, whether we are talking about a structure which may be different from the structure which will accommodate us or something else, thank you, Chairperson.

Chairman:

Chief Nokonyana you refer to the Minutes of the 17th, I am look at them on Page 5.

Chief Nokonyana:

Yes, 5.3 sorry 5.3.4.3, Chairperson, sorry I'm referring to that one.

Chairman:

So which principle are you referring to in the report before us, 2.16?

Chief Nokonyana:

2.16 yes, and anyway it will affect also 2.17 but ..

Chairman:

I ask the question because in the report ..

Chief Nokonyana:

That was noted.

Chairman:

Well I'm still a bit in the dark, I'm not sure whether you are referring to Principle 2.17 or 2.16.

Chief Nokonyana:

Chairperson, I don't know. I was raising this under 2.16 you see, that at each level of government there shall be democratic representation. I admit, Chairperson, that day the proceedings were too fast for us and we raised it when we were dealing with I think, 2.17, so it is having an impact on 2.16.

Chairman:

I will call on the Technical Committee to respond.

Technical Committee:

Mr Chairman, this can be a very complicated matter, the reference in 2.16 to each level of government may or may not refer to traditional structures and councils. The ordinary meaning of 2.16 in a reading of it would refer to first, second and third tier government.

Another factor which may complicate this matter is the question, and I think that is really the intention of the question, whether a system of government which does not necessarily conform to the principles of western democracy would be capable of surviving a constitution of this nature. Now when we discussed this we came to the conclusion that it need not necessarily be the case, that it would be inconsistent with this principle, or this set of principles, should traditional institution continue to exist. It would, however, affect the situation where you have a community living under a system of traditional leadership which may want to decide to terminate for their own purposes that kind of structure. I think these principles would then require the government to allow such a community to express itself in a democratic manner, whether it would like to retain this specific chieftainship or this system under which they are living at that stage. But it need not necessarily, it would certainly not require traditional leaders to be elected because that has been covered by the other principle which requires the acknowledgement of the institutions of indigenous law and traditional leadership.

Next Speaker:

Mr Chairman, can I just add to that? There are many democracies in the world with leaders who are not elected. Nobody would say that Britain hasn't got a democracy or Holland for that matter. This is not the difficulty. It's what the community and the country and the levels of government, whether they institute democratic government. Now democratic government has got a wide range of preconditions and that is the principle, its not encroaching on status as my colleague has said, of some leaders and so on.

Chairman:

Thank you, I, Mrs Gasa do you wish to still comment?

Mrs Gasa:

Not on this point, Sir, but I have got a practical problem which I glad to be assistance with.

Chairman:

Alright, I have a particular point of order that I need to place before the Council. 2.15 begins with the principles relating to SPR's. I want to put it to the Council, do you wish to proceed with these principles as well and deal with them in the manner that we have dealt with these before us already? Mrs Gasa followed by Professor Ngubane.

Mrs Gasa:

Mr Chairman, precisely this is where now I think I am on a sticky patch and I wouldn't like to commit the IFP. I'm pleading with Council that IFP reserves some rights to revisit these

principles and as I said, it's a practical problem. I was at home with some of the constitutional principles, but i wouldn't like to commit my party now when we get into constitutional and government and whatever. Some of these clauses we really need a very informed decision and I submit that I'm alone, without my full delegation. I know its not the fault of the House, but I'm pleading with this House, that IFP from now on will not have, will just be listening and picking up, but will not stand committed until such time IFP can have the right people to discuss on these clauses. If I sit here now and allow these clauses to go on I may have problems of re-entry later on.

Chairman:

Your comments have been noted Mrs Gasa. Professor Ngubane?

Professor Ngubane:

Thank you, Mr Chairman. In fact reminding of the House of the Minutes of June 17, where it was agreed that we would not take any decision on any constitutional principle until we received a report spelling out an alternative motive as it was requested, as we requested. I am only SPR, I think Mr Chairman the best thing for proper order and procedure it would be better to contribute under 5.12 where we are dealing with reports of June 17, but in the meanwhile as the IFP indicated, our consensus is withheld and indeed the Council itself is agreeing with that according to the Minutes.

Chairman:

I hear what you're saying Professor, but I must also point out to you that in terms of those particular minutes, the agreement on the decisions referred to that particular meeting. In other words the meeting didn't say there would be no agreement for the next meeting and so on. I think you were clear on that point.

Professor Ngubane:

Mr Chairman, I think what we actually agreed upon was that until we have an alternative motive, that is all we are asking for and on the Agenda on 5.12 we should be discussing that.

Next Speaker:

Mr Chairman?

Chairman:

Mr de Jager?

Mr de Jager:

Could I make a suggestion? Couldn't the Planning Committee, ?? see whether we've got other work to do, where no decision taking will be involved. Discussions so that we could discuss it, proceed with the meeting, but Inkatha requested they not there for the delegation, no fault of the forum or Council, but it's a request. Let's see whether we could meet them without delaying anything. If we could proceed with something else. Let's see whether we could do it.

Chairman:

Mr Rajbansi?

Mr Rajbansi:

Mr Chairman, on the Agenda we have a discussion under Fourth Report of this particular Technical Committee. The Fourth Report cannot be dealt with without dealing with the general constitutional principles relating to regional government. And the Fourth Report in my opinion is very, very important and of course, equally important is the events which has taken place today which did not allow the presence of certain important members of delegations and I want to support what Mrs Gasa has stated in respect of the IFP's problems.

Chairman:

Mr Shilowa?

Mr Shilowa:

I thought we had agreed earlier on in terms of what is being quoted. We didn't say we're not going to discuss constitutional principles, I thought what we had agreed in terms of on the day when we were discussing this, we actually used Paragraph 6 of some other meeting I can't remember, which was ready, to say we will allow the debate to flow, make comments, to allow the Technical Committee to be able to present to us a package around this issue. We will discuss the type of issue that is being raised in terms of the form of state, self-determination as well, and that once we have finished the various suggestions and so forth, we will then come back and say this is the package that we have and each delegation, IFP, and the Kwa Zulu Government included, will then say, ah we agree now to the whole package because this, in terms of regions or federalism, has now been dealt with in the manner in which we agreed. Equally, the South African Communist Party may say we're committed to a unitary state and because we're veering more towards federalism we actually think that we, there is no consensus. So what I'm saying is that I think in terms of that agreement we should actually proceed and discuss and take it from there. I think you can be able to quote the paragraph I am talking about, or Mr Webb has actually got it in front of him, I think.

Chairman:

I am not going to allow Mr Webb, but Mr Gordhan.

Mr Gordhan:

Mr Chairperson, if we take all the views into account perhaps a way forward is to go through the Principles from 2.15 onwards on the understanding that we can't take a final decision at this stage, but the Technical Committee has done important work in terms of incorporating suggestions that had been made at the previous meeting. We can at least give some feedback on those suggestions and we can note progress in that regard and then we can go on to a verbal presentation of the Fourth Report, Fifth Report and the Sixth Report and we can decide at each stage what we are in a position to discuss or not discuss. So I think we have a way ahead of us, Mr Chairperson, and perhaps it's a proposal that the Council could consider.

Next Speaker:

Mr Chairman, I would like to correct perception. It's not the IFP views to stop proceedings, Ok? And experience has taught me in this House that if you don't say it as you see it, and ask someone to be sure that you have heard it you're looking for trouble and I'm running away from trouble, that is why I am saying I am glad to reserve the right so that when the IFP wants to make a stand because as we get into these critical issues I shall be taken, I will understand what Comrade ? is saying, but I don't, I have reservations, I cannot just take it for granted that, OK later on Inkatha will say Ah ha, at that time we shall be called ? and I'm trying to stop there, thank you.

Chairman:

I think we are going to follow the proposal put by Mr Gordhan. We'll discuss the principles without taking any firm decisions in fairness to the Technical Committee whom we've asked to appear before the Council. Mr Valli Moosa?

Mr Moosa:

Mr Chairperson, I don't know if you are ruling on that, but I wanted to say that we have had a general discussion on a non-committal basis on these principles already. It was on that basis that a Technical Committee has given this report. I don't know whether it would be wise for us to have another discussion on a non-committal basis at this stage because we would simply be having general discussion and if the Council is not at this point in time in a position to discuss it, let's not discuss it. I would then go along with what Mrs Gasa says. We have said earlier that when we are through with these principles we'll come back to the issue of self-determination we could deal with that and then we could deal with the other

reports in the meantime.

Mr Gordhan:

Let me clarify for Mr Moosa, Mr Chairperson, that we are not talking about a discussion as much as noting the amendments that have been incorporated, rather than revisiting each principle and if there is a comment in relation to an amendment that has been incorporated, perhaps that comment can be allowed but no really a general discussion.

Chairman:

I think that's clear to everybody. Some people do not look too clear. Alright, we'll proceed and I'm going to refer to those principles where amendments have actually been made, rather than those where there are no amendments. Yes, Mr de Jager? I'm sure all of us are hungry.

Next Speaker:

Can I speak before we deal with this other aspect. That's what I was asking you earlier before Chief Nokonyana spoke on clause whatever.

Chairman:

2.16

Next Speaker:

Yes. What I wanted to say is that notwithstanding the fact that we are going to come back to 2.9, I mean clause 2.9, and the various aspects, that we want to make it very clear that we actually intend and to put up a proposal that we have an additional clause. That clause as Principle 2/1/5 and that clause is made on the basis of the fact that a number of issues that we decided both employers on the one hand, and the workers outside are actually raising concern as to whether in the manner in which we formulate the war and your friends is it not going to begin to interfere with the various agreements that they have and the institutions that they have. And that to allay the fears of those constituencies be they employers or whatever. Can we make an additional clause which will read as follows: Notwithstanding the provision of any other clause the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognized and protected. I've got the wording here, we can actually pass it over to you later.

Next Speaker:

Point of order, Mr Chairman. Point of order.

Chairman:

Let me hear your point of order.

Next Speaker:

Mr Chairman, I would suggest that the correct way of dealing with this, is to refer this to the Technical Committee and the Technical Committee must then come up with submission or an opinion on this.

Next Speaker:

That I've got not problem with. What I wanted to say, I didn't want people to then say why was it not raised earlier. If it is the proposal of this Council that we give this formulation to the Technical Committee we are happy to do so.

Chairman:

Yes, I think you should.

Next Speaker:

And we pass it to them now.

Dr Venter:

Mr Chairman, may I suggest that this matter is a matter which should not be referred to us, but more appropriately to the Committee, the Technical Committee on Fundamental Rights, in the interim.

Chairman:

Mr Shilowa?

Mr Shilowa:

I will not agree to that because I think the manner in which we're going to discuss Clause 9 and others in terms of the constitutional principle, I think what we're saying as a South African Communist Party it must be clear that having formulated these constitutional principles we are not in any way, whether you deal with the question of freedom of association or in terms of how 2.9 has been formulated or maybe changed, it does not in any way mean therefore that we want to interfere with those issues pertaining to that. So it will also go in terms of human rights, but what we're saying is that notwithstanding anything contained in terms of these provisions of the constitutional principles, the rights of those employers and employees to continue to bargain collectively shall be respected. And this arises, if you look at the present formulation of 2.9 that formulation is perfectly correct, unless you take away 2.9 as it presently stands or whenever it's changed, will have a difficulty as a South African Communist Party to go along with your suggestion.

Chairman:

Alright, Dr Venter I hear your comments on this and I'm not going to enter into the debate as to whether this is a fundamental right on a constitutional principle. However, Mr Shilowa, given the fact that we were going to revisit 2.9 I would've preferred that you had raised it at that time. Be that as it may, the procedure stands. You make your submission to the Technical Committee, thank you. Ladies and Gentlemen, we are still on 2.16 - there is no amendment there. 2.17 has been addressed, concern raised by Chief Nokonyana has been addressed by the Technical Committee. Chief.

Chief:

Sorry, Chairperson. It has been addressed and the way I understand it the Committee is saying that well it may be, but the point it is not provided for at this point in time and I think our point, we want a provision and we would like therefore to suggest this formulation I may circulate later. Anyway, under 2.16 that at each level of government there shall be democratic representation with appropriate provision for traditional leadership at each level where applicable. So that is our proposal which we want, to look into it, we don't want to

debate, to look into that whether it would be feasible or not probably then they even say where there must be two system parallel to each other, the western and the traditional system on the other hand we don't know whether that will not be hit against by discrimination I don't know but anyway it is up to the Technical Committee to look into that also.

Chairman:

?? I've already said there won't be debate. Now Chief Nokonyana is going to make that as a submission to the Technical Committee, are you introducing a debate? That is my difficulty.

Speaker:

No, Chairperson, I'm supporting the proposed amendment.

Chairman:

Thank you. We have Principle 2.17. Mr Rajbansi followed by Mr Cronje.

Mr Rajbansi:

Mr Chairman, I want to raise certain queries in respect of this addition. In what is, it definitely is linked with the final decision in respect of determining the size of each regional government authority. Now the question I want to pose to the Technical Committee is in respect of the emphases on financial viability and legitimate reasonable autonomy in relation to the allocation of powers. Now assuming you have a situation where a region, because it is geographically situated may not be financially viable to carry out a certain responsibility and if it is the decision to have uniform powers throughout all regions, now does that mean that the allocation of shall I say, uniform powers, will be affected by the size which has a bearing, may have a bearing on the financial viability, that one clarity. the second one is, let us have a clear understanding of what is regional autonomy, legitimate regional autonomy and whether it is envisaged that there may be the possibility of different powers being allocated, some areas having more autonomy in respect of the allocation of powers and some areas having less autonomy, I mean we have the situation in South Africa at present as far as local government is concerned, these are the charities I require.

Next Speaker:

Mr Chairman, Ill reply to the first question and Mr ?? to the second one. I simply want to point our that 2.17 concerns the vertical distribution of powers not the horizontal. It concerns the allocation in a constitution of powers to the national SPR and local levels of government and therefore does not affect directly the relative positions of SPR's regarding those powers.

Mr ??

Perhaps I can take it a little further. If Mr Rajbansi would look at Paragraph 2.22 there is a constitutional principle that would have to be read with this, which says that each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that SPR' and local government are able to provide basic services and execute the functions allocated to them in the constitution. So that ties up with the whole question of financial viability. As far as the question of different powers to different regions that really again comes into the whole question of asymmetry which is an entirely different debate, there is no reason why this principle shouldn't apply to a system in which each region has precisely the same powers because once those have been decided upon as the regional powers, then the financial resources to implement the function which are part of those powers or necessary concomitant of those powers are constitutionally provided for. I see Mr Rajbansi raising his hand, I seem to have said enough, thank you.

Chairman:

Thank you for that. Mr Cronje.

Mr Cronje:

Chairman, if I could have clarity on the second sentence of Paragraph 2.17. The various ways and various basis on which you allocate powers, that it says the allocation of powers between the different levels shall be made on the basis which is conducive to financial viability, if that could just perhaps be clarified. And to effect of public administration that speaks for itself and which promotes national unity legitimate regional autonomy, what is that, what is legitimate regional autonomy? Just those two aspects.

Next Speaker:

Mr Chairman, can I just add one more question so I can incorporate mine with the question?

Chairman:

Alright.

Next Speaker:

On the word conducive because I just want clarification with, when you use the word conducive in this context when you are saying it shall be subject to financial viability or whether it shall promote financial viability.

Next Speaker:

Thank you, Mr Chairman, Members, yes I think conducive to economic viability is exactly to express the two ideas, that it must be economically viable and it must also promote economic viability in the sense that you don't want to pump funds into regions simply to keep them going and not to generate economic viability in your region, so it must be conducive to financial viability in the regions which means that they must be productive and that you don't waste money there.

Next Speaker:

Mr Cronje, on legitimate regional autonomy. Well that is comprehensive concept meaning that the regional autonomy, the powers, the functions and ? and so that the regions are protected and so guarded and recognised for constitution but what is vastly more that the regions have historic, geographic, demographic legitimacy and that is exactly if you would look at your own instructions to the Commission on Demarcations busy working those are elements that would constitute regional legitimacy, that regions are not simply carved out of a map without sound historical and sound basis.

Chairman:

Mr Cronje?

Mr Cronje:

Chairman, clearly one cannot have an unviable region you keep on pumping money into it to keep it a unviable thing, viable, so I have no problem with that. My difficulty is, what it says is that the allocation of powers, now this is norm or criterion determining the allocation of powers say between the national government and the regional government, will be determined, will be made on the basis which is conducive to financial viability. And perhaps it will be easier for us who are slow thinkers, if Professor Wiechers could perhaps explain it by using an example.

Chairman:

Alright

Next Speaker:

Of course we're talking about criteria not a situation.

Chairman:

OK

Next Speaker:

Mr Chairman, this also be read in conjunction with the principle on the allocation of powers, certainly, nuclear physics, very expensive powers of research, are not going to be allocated to regional and regional governments it will simply become a waste of national resources.

Chairman:

I take it Mr Cronje is satisfied, thank you. If there's not further comment on Principle 2.17 then we will continue. I wish to point out to the Council that under Principle 2.18 there was a proposal made to insert certain words, that has been done and that proposal received no objection. So I cannot see the need for us to have any discussion on that particular principle. 2.19 similarly came about as a result of the debate, and again no objection was raised during the debate to the proposed amendment, so I again say there shouldn't be any need for comment or discussion on this particular one. Mr de Jager?

Mr de Jager:

On a point of clarity 2.18 alternative, the word alternative is the alternative dominant, because if there is such a chamber the chamber will decide and the previous procedure would not be followed.

Next Speaker:

Mr Chairman, its equal, the constitution making body will have a choice in terms of this principle, to do either.

Chairman:

Thank you

Next Speaker:

And the regions wouldn't have a choice, the constitution making body will decide which one they'll choose.

Next Speaker:

Mr Chairman, it doesn't really concern that aspect, this envisages the possibility of dealing with this whole matter either by means of the establishment of the second chamber with regional representatives in them or by referring, drafting the constitution in such a manner that there's no such chamber and it's dealt with in the other alternative.

Next Speaker:

If there's such a chamber, the chamber would decide then it would not be referred to the other, its dominant, the alternative is dominant as set out here.

Next Speaker:

Commander Ill debate that outside with the..

Chairman:

Thank you, thank you very much Mr de Jager. Ladies and Gentlemen 2.19 as I pointed out, there was no objection during the reading of this amendment and so there shouldn't be any need to revisit it. 2.20 is an amendment in accordance with the debate. Mr Landers?

Mr Landers:

May I just make a point, or ask a question which may help. Its to do with the delegated basis and all I'm trying to ensure that the working is not such or that the wording does not make it clear, that a power can only be delegated if the authority that receiving it as well as the authority giving it, we should just prepare to receive it and so whether putting, instead of an agency of delegation basis if one had a neutrally agreed agency or delegation basis it would clarify that point, but that's just in a sense a combination of a question and a suggestion, because as it is my concern is that for example the national government could decide to delegate something to a regional government whether they wanted it or not.

Next Speaker:

Mr Chairman, as I understand it, its in the nature of delegation, that, you need like marriage mutual consent and therefore its in law unlikely that that situation will arise.

Chairman:

Mr Andrew, does that ..

Mr Andrew:

If that the position in law I', slightly surprised, but I'm not debating the point if that is a clearly legal situation that you can only be delegated with the agreement of the person who is receiving the delegation.

Chairman:

Professor Wiechers?

Professor Wiechers:

Mr Chairman, I never, I promise you differ with my colleague on my right hand side, but an agency would be the agreed as you see. Delegation could be that the national government, its got to be done by statute then require regional governments to do thins, but

then of course its qualified by the financial provisions and you'll see that, that they cannot expect a regional government to undertake things on the basis of delegation if they don't apply for that and make it possible because its in the financial structure. Now I can't think for one moment that any responsible national government will delegate functions to regional government not paying for those execution of functions and doing it without the consent of such a regional government. It would just be bad government.

Chairman:

I wish I were taking part in this debate, be that as it may

Next Speaker:

If I might just say, we have good experience of that, I mean take Library Services that are provincial responsibilities that are delegated to certain local authorities and over the years the subsidy has been cut back and back and back until it then, and everybody's looking to the local authority to provide the service, now I know there is not current constitutional provision, all I', saying is it's just something one wanted to try and cover.

Chairman:

Mr Andrew, may I just point out to you that it's been pointed out to me your comments should be done through the Chair, no harm done. Has the Technical Committee concluded this particular issue. Thank you.

Next Speaker:

Mr Chairman, a question

Chairman:

Advocate Jacobs?

Mr Jacobs:

Mr Chairman, I would like to know what this other levels of government what this means because in the very first sentence, reference is being made to national and SPR levels of government so the other levels of government must be something else than the national and SPR level of government. Is that perhaps local governmental levels or something else.

Chairman:

Professor Wiechers?

Professor Wiechers:

Chairman, it means all other government levels, it could very well be that say regional government delegates its powers to national on a national level and say can't you help us in the meantime on this basis, so it very well be a local government ask for regional assistance, so it is not really as well as the power to perform functions for other levels of government. It is a principle that very well applied in all modern governments it is the principle of co-operation through agency or delegation. As your delegation is never permanent, the delegator can always take it back. So it is really the principle of modern government to make it possible to have assistance, co-operation on level of government.

Chairman:

Thank you. Can we move on? Principle 2.21 has been re-formulated and the Technical Committee refers us to their comments under Principle 2.23. Dr Venter?

Dr Venter:

Mr Chairman, may I suggest that you take 2.21, 22 and 23 together because they are inter-related and the comment below 2.23 relates to all of them.

Chairman:

By all means, that would be practical. Are there any comments on the three principles before you? Dr Raju?

Dr Raja:

Mr Chairman, I just want clarification on one term and used, word used on Principle 2.22 and I read that: each level of government shall have a constitutional right to an equitable share or revenue. I want clarification on exactly what is understood and meant by the term equitable, because as far as my knowledge goes, it would be subject again to correction, I make a distinction between equitable and equity, that when you say each government shall have a constitutional right to an equitable share of revenue, my reading of that is that each share shall have an equal share of revenue. Whereas what is implied here, is that the revenue shall be distributed on a fair and just and impartial basis. So, let's like the Committee to be clear of exactly the distinction between the equitable and equity and how we can interpret it in any other form in terms of the sharing powers.

Chairman

Mr Cronjè do you wan to come in on this specific point or on another point?

Mr Cronjè

Perhaps just add to it, it is basically the same point. Clearly it appears that there will be a

national collection of money/ funds and there will be fiscal powers at each level of Government, so I assume that in addition to the national appropriation of funds, say the SDR will have the ability also to have its own sources of revenue.

Dr Venter

Regarding equitable, the distinction should not really be drawn between the words equitable and equity because they are rather closely related, more closely related than equitable and equal. This in deed means that there will have to be a fair distribution of revenue and not an equal, an absolutely equal division, because that will not make any sense.

Chairman

Does that accommodate Mr Cronjè's question?

Mr Andrew

Thank you, 2.2.3, two points; one is in the second line after allocations, for greater clarity I would suggest we should put there from revenue collected nationally. It makes it clearer in general and specifically the recommend could be read to be recommend to the SPR governments as opposing to recommending the allocations. So I would suggest that one inserts there "from revenue collected nationally". The second point is by way of a question. Is one correct in reading the word recommend, in the second line, shall recommend, in conjunction with in 2.22, shall have a constitutional right, so in a sense the recommendation is the implementation of a right and one doesn't need to have a word like determine, now because of what one has in 2.22, those are the two points that I would like to raise.

Mr Chaskalson

Yes, I think it is not quite what Mr Andrews has in mind there. If you go back to 22 there is in fact a constitutional right to an equitable share. If you go to 2.23 you will get an idea of what the constitution would regard as equitable. It will set out a set of criteria. The fiscal commission has got to go into that, its got to make recommendations but ultimately it isn't a decision by the fiscal commission, it is a recommendation by the fiscal commission taken into account these criteria. If the Government chooses to depart from that recommendation, it would still have to answer the fact that its obliged to act equitably. So in other words it leaves a margin for the government not to be bound by it, but not to go off on its own. Because at any stage if it departs from the recommendation it would have quite a difficult case to justify as to how its departure could still be on a basis which is regarded as equitable. So it is an attempt really to bring together all the ????? of thinking which we had at the last debate, where a number of speakers said that governments must govern and these sort of decisions have to be taken on a government level. On the other hand you do have now a

constitutional right which wasn't there before.

Chairman

Do we have any further questions on these three? If not, I would like to announce adjournment for supper and we will come back at 19:45. Thank you very much. Members of the Planning Committee please be informed that you are required to meet at 19:30.

Chairman

I would like to call the meeting to order please. In keeping with the previous agreement that said that when Planning Committees were held, a brief report or statement would be conveyed to the Council by the current chairperson of the Planning Committee. I would like Mr Gordhan to do the necessary.

Mr Gordhan

Ladies and Gentlemen, Mr Chairperson, you will remember that we reported at our last meeting in accordance with a proposal made by a participant that when a Planning Committee meeting takes place and a report has to be presented to this Council an adjournment should be allowed in order to allow for consultations. Now we are going to turn that a little bit around, with your permission, here is a request from various members of the Planning Committee that we allow an adjournment of about 15 minutes to share with each other certain views about proceedings in relation to the Council and the Negotiating process, we will return in 15 minutes time, we ensure you that provisions have been made for all participants to be briefed properly on this issue informally and once we return we will take a formal position on a proposal from the Planning Committee. So we seek your indulgence in agreeing to an adjournment of 15 minutes, in order to allow for informal discussions.

Chairman

Is the Council then agreed. We adjourn for 15 minutes. Thank you very much.

Chairman

As you have now, no doubt, all been informed there is a proposal emanating from the Planning Committee that we want to place before the Council before we continue with our agenda. I am going to ask the present chairperson of the Planning Committee to place the proposal before the Council.

Mr Gordhan

Thank you Mr Chairperson. I have the unenviable task of putting this proposal to you ladies and gentleman.. It is in the form of a statement which will be distributed to you shortly and

it reads as follows: "The Planning Committee has carefully reviewed the progress in the Negotiating Process. The Planning Committee recognises that some progress has been made in processing the reports of the Technical Committees. However it is a view of the Planning Committee that significant time has been lost in the process of discussions which did not enable the optimum usage of time available. It is firmly believed however that South Africans are eagerly awaiting news of concrete and constructive progress in the Negotiating Process. With a view to ensuring an optimum and constructive conclusion to this phase of the Negotiating Process, it is recommended that the Negotiation Forum be postponed until Friday, 2 July 1993. We believe that if all participants commit themselves to this process and to endeavour to make constructive and sufficient progress, a Forum meeting on Friday the second of July will be able to produce tangible results which would enhance the Negotiating Process and reassure South Africans of the viability of this process. Accordingly the Planning Committee proposes that the Negotiating Council meets on Friday 25, and the schedule of Negotiating Council meetings for next week will be proposed at tomorrow's Council meeting. In accordance with this it is proposed that tomorrow the Planning Committee meets between 9 am and 10 am, that the Negotiating Council, in view of the fact that we are only finishing at ten tonight, meets at 10 am until 6:30 pm and that on Friday the Negotiating Council commends with its business at 8:30 am until 6:00 pm.

Chairman

Ladies and gentlemen I must assume that all delegations have been briefed and informed of this here. That being the case all that is left for us to do, is to accept the Planning Committee's proposal.

Ms de Lille

Thank you Mr Chairman, we accept the postponement as proposed by the Planning Committee but we just want to state a few points Mr Chairman. At once we think that the Council must start planning properly now and we also think that the Council must be more alive to the reality outside this process. We as the PAC do not want to be involved in a protected negotiating process. We must also look at setting some date as to how many days or months we are going to spent here. We must set a date in which formal agreements can be reached an forward to the Negotiating Forum. One, we must set a date for an election for a Constituent Assembly. Two, we must agree on a date for the installation of a TEC and Three, we must also set a date for the implementation of the cessation of Hostilities. We must specify what we want achieve in what time, because we are just afraid that next week we might have to look at the same decision again.

Chairman

I don't want us to enter into a debate, because if we do, the agenda that we have before us will have to be set aside. Can we then refer back to the agenda. When we adjourned for supper, we had dispensed with principle 2.23 which brings us now to the criteria under 2.24 and in terms of the Technical Committee's report there was a proposed amendment which has been complied with and you will agree with me there shouldn't be, I don't think there should be discussion on that and 2.24.2 is a substitution of the word geographical for territorial which was also proposed during the debate and accordingly on that particular item there shouldn't be debate as well. Which brings us to 2.24.3

Mr Ken Andrew

Thank you Mr Chairman, we consider this to be quite a critical clause and we are still not entirely happy with the way it has been formulated and there are two small additions that we would like to recommend to it. First of all, in the first line, we would like to have the word essential inserted before national so that the opening line would read: "Where it is necessary for the maintenance of essential national standards", now the reason for this is that national standards outside of the powers and functions allocated to national government should only be set where this is absolutely necessary, absolutely essential, national government is not necessary more competent than SPR governments in determining standards and the SPR's will be quite entitled to enter voluntary agreements with each other and or national government wherever they consider it desirable. Furthermore, an excessive use of national standards would inhibit the creativeness and the ????? from the flexibility of the whole SPR system. So that is our motivation behind that amendment. The second amendment we wish to move, is in the fourth line, before the word prejudicial, to insert the word unreasonably. So that would be that "Where it is necessary for the prevention of action taken by one SPR which is unreasonably prejudicial to the interest of another SPR or the country as whole then the national government can intervene". Now our reason for this one is that it is an advantage of having SPR's with considerable autonomy that diversity is permitted. It is inevitable, therefore that on occasions particular policies or procedures of some SPR's will be to their advantage and to the prejudice of others. This should only be prevented when the behaviour of one or more SPR's is unreasonable. Say for example if an SPR has something relating to building regulations, which is attractive to people who want to bring industry or property development to that area, they should be entitled to do so. Now because they are running a more efficient, effectively run economy or state or SPR it may well be that people or business or something else or labour choose to move there which could then be to the prejudice of other SPR's and in a sense one wants within a system to provide for innovation which in effect also results into a certain competitive element and its only where that kind of potential prejudice is unreasonable that we believe the national government should then be intervening to prevent it happening. So those are the two amendments we

would like, both small ones as you can see, to move to that paragraph, but we feel they are important in the spirit of having a proper and effective devolution of power. I have been asked to repeat the actual amendments, would you like me to do so?

Chairman

Please, without motivation.

Mr Andrew

In the first line, before the word national, to insert the word essential and in the fourth line before the word prejudicial to insert the word unreasonably.

Chairman

Does the Technical Committee wish to respond. No.

Mr Cronjè

Chairman if the respective powers, functions and duties of the respective levels of government has been clearly defined in the constitution, their areas of responsibility, would it really be necessary to take what I would call a dramatic step for a national government to take legislative action to deal with the situation and if so, could I have examples of where this is provided for elsewhere in the world.

Chairman

I think now the Technical Committee is expected to respond.

Prof Wiechers

Thank you Mr Chairman, members off course in the 99% of affairs it wouldn't be necessary. Simply, exactly for that reason, but what if in this essential national standards and the criteria, there is nothing that the national government cant do. The you create a situation that legally, it is not a political situation, its a legal deadlock and then you ask for what, an amendment of the constitution which is perhaps not constitutional, so it is not to say this would be the general rule. If you look at the next page, I think the answer is exactly in the last paragraph of the note there, we agree in our opinion that there is a need to make clear that the national priorities such as specified here, the national priorities should prevail. It specifies the highly objective criteria necessary and to the particular priorities. So it is a legal consolable mechanism for the national government not ??? to have been powerwise but in a legal constitutional way. It is very often so that many people say if we have a peaceful state and we hope everything is going to go well, why do we have any provision in the constitution for emergency powers and states of emergency, but we know that could

happen and the it is far better to have it regulated in your constitution, with judicial control, when it happens, and that is the idea here.

Mr Cronjè

How do we provide for a government abusing that power?

Prof Wiechers

Then certainly this is the whole thing, its objective and then the SPR or interest groups will certainly have the right to go to the courts, because its infringement of their SPR autonomy and rights.

Chairman

Any comment or question, if not can we move on. The Technical Committee would like to consider the amendments so do you wish to decide on the amendments now? It brings us to principle 2.24.4 on which I believe there shouldn't be any discussion or debate. 2.25.1 is, Mr de Jager.

Mr de Jager

Could I ask a question for information, generally. If there is any dispute between the regional governments and national governments or regional governments to the regional governments. Would there be any provision in the constitution that you could have that tested or clarified in the courts?. Would the court have the right to solve disputes between these governments?

Prof Wiechers

Mr Chairman it is foreseen in 2.2, if you look to 2.2, the constitution shall be the supreme law of the land, shall be binding on all organs of government and the goes on. The point is by being the supreme law of the land and there is an encroachment and if you look at 2.4, the judiciary shall be competent, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the constitution.

Adv Jacobs

Mr Chairman previously you have indicated that I could ask a question on the general status. Mr chairman my question is the following, I would like the Technical Committee to reply to the following: What to their mind is the status, the legal status, of the constitutional principles, one, are they going to form a part of the constitution or on the other hand, are they only judicial guidelines within which framework the constitution must be drafted or thirdly, are they prerequisites for amendment procedures of the constitution. I am asking

this, Mr Chairman, Because if one compares and this is one of the submissions which form part of the submissions of the delegations, if one compares this with the constitution of the Republic of South Africa, a draft document, one reads on page 39 in schedule four, the following, referring to constitutional principles, it states: "This constitution (this is now the draft constitution of the government) shall be amended or substituted only within the framework of the following constitutional principles", and there are enumerated a number of constitutional principles, most properly all of the constitutional principles that we are now discussing. Therefore my question, what is the general legal position, are they guidelines or are they only prerequisites for amendment procedures or are they to be included in the constitution as within constitutional provisions?

Dr Venter

Mr Chairman these constitutional principles have been developed in this process as a guideline for the drafting of a future constitution. The manner in which they will be made binding is still open for decision because this pertains to the constitution making process. It doesn't really matter for the present purposes whether a one phased or a two phased process is going to be followed. The principles will have to be made binding on the framing of a constitution and in that sense they can for example form part of a transitional constitution or constitutional framework, in terms of which the constitution making process is further determined or they can be framed in a different form, but these are not intended to be constitutional provisions as such in any other sense than a framework of principle for the guidance of the drafting of a constitution. Therefore they can be part of a transitional constitutional instrument but they are not intended eventually to be written into the constitution as such. They will determine what is going to be written in a constitution.

Chairman

Thank you Dr Venter

Prof Wiechers

Could I possibly add to what Dr venter has said. I think it does as Dr venter has pointed out dependent upon the constitution making process, but the models which have talked about a two staged process require the constitutional principles to be entrenched in the transitional constitution as standards according to which the final constitution has to be drawn and to be justiciable in the sense that a constitutional panel or a constitutional court or some independent body will have to satisfy itself and be satisfied that the final constitution complies in every respect with those principles. So there would be a legal document in that sense, but they do not constitute the constitution, the detailed provisions of the constitution and the detailed clauses have to be worked out but if they don't conform with the principles

they will be rejected. That will be on a two staged principle and they would get legal form in the constitution for the transitional period. If a different process is adopted, then it would depend upon the precise nature of that process as to what legal impact these particular principles would have. Assuming a one staged process, assuming agreement that the constitution were to be drawn here at the MPNP, then this would be part of the process and the parties will be bound by their agreement that the final constitution would conform with this and then their agreement they would have to say how that would be determined. So it would become part of a pact as it were if that were to be the process and any other of the possible models in between would each time have to define how the constitutional principles would be made applicable, who will determine whether they have been complied with and whether the final instrument meets that standard.

Mr Jacobs

A follow up question Mr Chairman. According to the submission of the government, now I know the Technical Committee could most probably not answer this, but this is such a fundamental thing, that through you Mr Chairman, I would like them at one stage or another that the government could just answer also this question, because one must take into consideration the very fact that the government is a very important component of this honourable Council. Now, in the government submission it is clearly but clearly stated that these constitutional provisions or these constitutional principles are not substantive principles but are only used as so called procedural mechanisms, as so called prerequisites according to which a amendment or a substitution of a new constitution, after the Transitional phase must be taken into consideration, before you could have a valid substitution or a valid amendment. My question therefore is in relation to the document of the government of the draft constitution, should one, when one looks into the future of the Negotiating Process, only see these principles as prerequisites for a procedural amendment or not?

Chairman

The Technical Committee does not have to respond and I am not in a position to force the Government's arm, SA Government's arm to respond. It may do so if it wishes to.

Mr Jacobs

Sometimes the government has a very strong arm, Mr Chairman, If we could persuade them to answer the ?????? future.

Mr L Wessels

The National Party is present, but not the South African Government.

Chairman
Thank you.

Mr de Jager
There is a woman sitting there, is she not representing the government?

Chairman
Mr de Jager.

Mr de Jager
Thank you Mr Chairman. Mr Chairman if we, we have all agreed that this should be constitutional principles, if so, why cant it be included in the constitution as such? I cant see why because what are we doing - we are discussing constitutional principles that we want to be in the constitution and we are acting accordingly.

Prof Wiechers
Mr Chairman, may I just an example. With the Namibian independence there were also constitutional principles decided upon by all the internal parties, the Namibian political parties, the way you are doing it now and these principles were being, you know, Southwest Africa at that stage of a international nature endorsed by the Security Council and the United Nations and the drafting of the Namibian constitution, Arthur Chaskalson remember this, each and every article in that constitution was tested against these principles and it became known, these principles to be the holy cow. So everybody in that Constituent Assembly would put up his hand, from what political persuasion he would say, this is not in conformity with the holy cow. If you decide and it is for you to decide Mr Chairman, honourable members in this Council, once you have agreed on these principles, what are you going to do with them. If you decide on the second phase process then include this in your constitution as constitutional principles and bind the constitution making process to give effect to these principles, the was Adv Chaskalson explained, with judicial review and judicial recalls if they not adhered to. This would be the nature and the working of these constitutional principles. They all deal with a single, non sexist, non racial South African State and I cant think for one moment in the constitution making process that any constitution making body would revert back and create something that is sexist, racial or non democratic. So this is what you are doing Mr Chairman.

Mr Slovo
Mr Chairperson the paragraph that triggered off this question is paragraph 2.25.1, isn't that so , where there is a necessity for South Africa to speak with one voice or to act as a single

entity. Let us take that paragraph, it is not a paragraph that would make sense in an actual constitution. It is a paragraph that could bind the constitution makers, which is what we are trying to do, to adopt a set of principles which would bind the constitution makers. This does not actually define the powers of the national government. It just indicates to the constitution makers, some restriction on the way they can handle this particular provision and that applies to many of the other constitutional principles. Read in themselves they cannot be the constitution. They are principles which will bind the constitution makers to the point of justiciability if they depart from the agreements reached in these constitutional principles.

Adv Jacobs

Mr Chairman could I then take it on account of what Prof Wiechers has said that they do not as a Technical Committee ???? in a submission of the government and that these are only procedural aspects for the amendment or the substitution of the constitution.

Prof Wiechers

Mr Chairman, members with all respect, we share the views of the agreements in this Council and that is our task. With all respect to any submission, we present you reports and finally if there is a decision in this Council, we as a Technical Committee share those views.

Chairman

Adv Jacobs the opportunity to debate these matters is still ahead of us. Can we then move on to principle 2.25.1, agreed. 2.25.2, Mr Cronjè.

Mr Cronjè

Chairman if I could just ask for the subtle difference between 2.25.2 and 2.25.3. I understand 2.25.3. I don't completely understand the implication of 2.25.2.

Dr Venter

Can I just briefly remind you Mr Chairman that these are the criteria for the allocation of powers to the different levels of government and where 2.25.2 says that where uniformity across the nation is required and so on, it indicates that such a function should be allocated primarily to the national level.

Mr Cronjè

Chairman my difficulty is understanding the subtle difference between uniformity and minimum standards.

Mr Chaskalson

2.25.2, uniformity would be things like weights and measures, posts and telegraphs and so on whereas minimum standards is something different.

Chairman

Thank you Mr Cronjè.

Mr Ken Andrews

Yes 2.25.2, I would like to move that, in the second line, before the word power one put legislative, one inserts the word legislative. So that paragraph then read "Where uniformity across the nation is required for a particular function, then, legislative power over that function should be allocated predominantly if not wholly to the national government. Mr Chairman the reason is that national legislation can on occasions be required to ensure uniformity and that could be desirable, but the implementation may or may not then be left to another level of government. So I think the key on the uniformity is the legislative power and thereafter may be the national government does the implementation and the executive functions or maybe one or other level of government does it.

Chairman

Do I understand Mr Andrew that the amendment does not apply to 2.25.3, only to 2.25.2. Note is taken of the proposed amendments.

Mr Rajbansi

Mr Chairman there may be an occasion where uniformity across the nation is required, but I will substitute the word implementation to deliver of service. Let's take an example, you might need a determination of a national standard for the sake of uniformity, say for health, but your actual delivery of service, that particular power may not be vested at the level of the central government. So there can be a division, like if you look at your functions for the region, you have got health services but the determination of national norms or national standard might be a national function, but in respect of the same health, the ultimate implementation and delivery, might not be a national function.

Prof Wiechers

Mr Chairman could I draw the honourable member's attention. It is quite true, 2.25.3 deals with minimum standards for delivery of public services. If you then look at 2.26, the next page, it says "and the delivery of services and aspects of health" and so on, so the actual delivery would be on SPR and the standards nationally set.

Chairman

Can we move on? Do you wish to make another point?

Mr Andrew

I am not sure which one we are on, because I think Mr Rajbansi talked to the next paragraph.

Chairman

No, he didn't. He was talking to 2.25.3.

Mr Andrew

You haven't put it. I would like to speak to that one if that is what you are dealing with. I would like to suggest that in terms of wording we standardise it in line with 2.25.2 in two respects. First of all as indicated in your change to 2.25.2, the word required is a more objective criterion, as you mentioned in the previous paragraph, than "regarded as important". So I would suggest that in the first line of 2.25.3 one deletes the word important and substitutes the word "required" and in the third line of 2.25.3 where one says "the power to set those standards should be allocated", and then I think one should do the same as one has done in the previous one and have predominantly, if not, wholly to the national government. So it provides for the potential of some flexibility there as well. So I would suggest those two changes which would bring it essentially in line with the previous paragraph. Thank you.

Chairman

Agreed? Thank you. 2.25.4, are we agreed? 2.26?

Mr Moosa

There is a point of order, Chairperson, you are saying agreed.

Chairman

No, no not agreed as in, we all agree to the principle.

Mr Moosa

Just to clarify the point. When you introduced this item on the agenda your co-chairperson explained that what we are doing is listening to comments from whoever wants to make comments. Not debating those comments and where we are silent on any particular intervention, does not mean that we agree with that intervention. We are still on that.

Chairman

We are still on that and when I say agreed I am saying that we agree that we move forward.
2.26.

Mr Andrew

Yes, Mr Chairman this is another one that we feel is very important. We would like in the second line to delete all the words in the rest of the paragraph, after the word "as" and substitute "defined in the constitution so the paragraph would then read: "SPR governments shall have such powers either exclusively or concurrently with the national government as defined in the constitution". It is our view that this would be consistent with the approach to the other principles that we have in this document. There is no point in identifying, as has been done, a very view examples in the principles and then leaving a large number of other items that for example we would believe should be under the power of the SPR governments not mentioned and if one were going to keep it in this form, our believe is that the list of examples would have to be extended considerably, even though they are only examples and we think by mentioning a few, it carries certain implications and the actual, what is going to be under the control of the SPR government and there are a number of guidelines and principles set in previous paragraphs, should in fact be what is defined in the constitution and it serves no useful purpose to put in a short list in this paragraph and that is why we believe one should cut it short and say as defined in the constitution and then the constitution will define those powers in terms of the principles that are enunciated in the previous paragraphs. Thank you

Chairman

The Technical Committee takes note. Does it wish to respond?

Prof Wiechers

Mr Chairman I think my colleagues and I take the point, but why it is necessary to ??? and to give examples, we thought, is to show what would be necessary and as being indicated by Mr Rajbansi's remark, it would be necessary to show the distinction between standards and delivery services, but of course it is not exhaustive but it is a principle. The only worry we had, if you say, shall have powers exclusively or concurrently as in the constitution, it says nothing more than that. I think it is in the concept of, inter alia, then certainly, in the real allocation, giving flesh and blood to this principle, all the others will come. It is by way of an example, but I think it is a necessary example in the ??? discussion we had. It doesn't affect anything, it doesn't say that these are the only ones. It is a way of practical example.

Mr Andrew

I would just like to respond briefly. If one is going to adopt that approach, because I think

the wording for example and aspects of health, welfare and education is in my view, read in the context almost a kind of through-away line as if bits and pieces of education could be in a regional government and if one is going to do that, then I would suggest that in that line you would need to say something like major aspects of health, housing, police, welfare, education and culture. To actually suggest that there are going to be something significant done, as it is here it is almost as there is going to be a few bits and pieces that these people will be busy themselves with. The absence of, in the previous, for the purposes of regional planning and development, one would be wanting to have something more like in respect of local government regional planning and development, again to actually suggest that these things are going to be slightly meaty, even though one is only mentioning examples and not exhaustively. I think at is, it looks so flimsy it makes the powers of SPR governments look almost incidental to the whole process of governing. Thank you.

Next Speaker

Mr Chairman I would like to insert the word administration after regional, in the third line. So that it will read that: "That for the purposes of regional administration, planning and development". That will broaden the scope for powers to be allocated to SPR governments, significantly. As it reads right now it is quite narrow. It limited those powers to planning, development, the delivery of health, welfare and education services. There may be other services that will also be allocated to the government and for the purposes of regional administration that can then be done, if you broaden the definition of those powers.

Mr Moosa

Chairperson I would not have any difficulty with the amendments being suggested by Mr Andrews just stating that for the information of the Technical Committee which would say that SPR governments shall have such powers either exclusively or concurrently with the national government as set out in the constitution. I think there is a point there. The other alternative would be for us to attempt to be more exhaustive in this principle. So I think that amendment is something that the Technical Committee should perhaps consider.

Chairman

Any further discussion? There being none we will move on. Principle 2.27.

Next Speaker

Where mutual co-ordination is essential or desirable or where it is required to guarantee equality of opportunity. Take ??? for consistency and in fact in all instances, one, it is important

to guarantee equality of opportunity in terms of fundamental rights and various other provisions. So it is only where it is required to do so, should it have to be a concurrent power, because you, even where there are not concurrent powers it is going to have to have equality of opportunity.

Dr Ngubane

Thank you Mr Chairman. Concurrent powers, I just want to clarify whether it refers to legislative powers. then I would want to ask if the concurrent power of legislation in the SPR, will it depend on to what extent the central government legislates, in other words will the legislative function or power in the SPR, depend on the extent to which the central government legislates. In other words if the government legislates in the concurrent power level then it takes away the right of the SPR to legislate.

Dr Venter

Mr Chairman, the intention would be and the meaning of this would be that the constitution will determine exactly in what area the concurrency will exist. Therefore it would not be a matter of, for example, the national government being able to overrule except if it is in power to do so in the constitution. Allocation of powers, legislative or whatever, concurrently would mean that the constitution will specify in which areas that concurrency will exist and that would also be justiciable.

Dr Ngubane

Mr Chairman I think the problem is putting my question properly. These concurrent power at the central SPR level, now who legislates on that particular issue. You say it shall be defined in the constitution then it means in fact that there is no guarantee that there will be real concurrency, whereas if we were clear that if the central government legislates, then it means the SPR cant legislate, it would probably just implement. I think it would give us more clarity.

Prof Wiechers

Mr Chairman if I may answer. If you look you can actually read 27 and 28 together. Concurrent powers mean concurrent, it runs at the same time. There is no possibility that the national government can take away or legislate it away the concurrent powers of the region. They both have these powers. If there is a clash, the national government, and that is in 28, would then have the strongest, but only in the case of a real clash, then if it is in the national interest the court will then give preference to the national legislation. But at no point in time can the national government or legislature take away the concurrent powers of the SPR's. Because it is in the constitution, it runs concurrently

Chairman

Any further comment.

Adv Jacobs

Yes, just a question Mr Chairman. The last line, paragraph 2.28.

Chairman

We are still on 2.27.

Adv Jacobs

Prof Wiechers referred to 2.28.

Chairman

We will then move on to 2.28 and I must allow Adv Jacobs followed by Dr Mdlalose.

Adv Jacobs

Mr Chairman the last line of 2.28, "???? shall be given to the legislative powers of the national government". That could of course be a purely political decision. There could also come into play, constitutional mechanisms or principles or attitudes, but my question is, one could also have said if one would have liked to say this: "precedence shall be given to the legislative powers of the SPR governments". Not so? That could have been said.

Dr venter

It could have been said. It is so Mr Chairman, but you must also take note of the italicise sentence there which points at the fact that this kind of problem will only arise in cases of a conflict, but it is in a certain sense a political choice whether you want to put it in the hands of the national government or the SPR governments.

Adv Jacobs

Sorry Mr Chairman. So I take it that this specific political choice, as Dr venter has indicated, could then at a later stage be negotiated upon fundamentally.

Dr Mdlalose

Mr Chairman, obviously 2.27 and 2.28 are working hand in hand together. Now if we come to a practical situation like education which would probably be having concurrent powers between the SPR's and the central government and we are talking of a schooling up to a certain level and maybe the central government have a tertiary education or something like that and if there is a clash between the two, it is clear that a preference would be given to

the national government, which is the central government. What if in fact we had residual powers with the SPR's and that the SPR's would in fact be wanting to have something to do with tertiary education. A particular SPR at one point or another wants to retain that power and there is a dispute. What would be the final result? Would this still be relevant, this last one of 2.28, "Legislative powers or the national government being given overriding power". Can I just commend on that because I think the clash comes up from the point of view of who really has residual powers.

Chairman

Prof Wiechers or any of the members of the Technical Committee, although residual powers is dealt with in the following item. But please go ahead.

Prof Wiechers

Thank you Mr Chairman. Dr Mdlalose the question is, say for instance, they have concurrent powers on education, education on both levels. Now it wouldn't simply say national government or national parliament has powers on education, SPR on education. It would say the national legislature would have legislative powers on overall nationwide or national standards, qualifications, degrees. The SPR's powers regarding education will be spelt out so that a court could say no, in this case its an SPR educational power, not a national power. There would be no problem for the court then to overrule the national law when there is a conflict. Because only where there is a conflict that cannot be resolved by the court in the national interest, then one law must prevail and it is only in that case that it is foreseen that the national law will then prevail. But it doesn't mean to say that both struggle against each other doing exactly the same thing. It will be demarcated concurrently, education, education with definite demarcation. Now the residual powers, in modern constitutions, if the powers are allocated in a definite way and the way the principles here, then residual powers means nothing more than those extra powers flowing from these allocated powers and as we suggested, I don't want to jump the discussion Mr Chairman, but in the last section courts will say this residual powers it is not expressly mentioned, is an axillary power either on the SPR level or on the top level. So it is not into our mind a very important question where residual powers reside, because all the other powers will be allocated at the various levels and not only be allocated, but constitutionally protected.

Chairman

I beg your pardon Mr de Jager, before its Mr Cronjè. My apology.

Mr Cronjè

Chairman, at the bottom of this is a political decision, because it either goes to the central government or it goes to the SPR government. Now, in italics it is being explained, that if there is both conflicting legislation and overlap of legislative confidence which cannot be resolved by the courts, then they further go on to explain its really a simple matter, because the national government will only have the competence if the legislation is relevant to a national interest, then I wonder why, if that is so, a court cant determine that, because if it is in the national interest clear, the court can determine it, surely it can. But, secondly, if the constitution as has been previously suggested, even ad ?????, repeats and clearly sets out the respective powers, functions and duties on the one hand and has a mechanism, a constitutional mechanism, to resolve this conflict. Why should we then, if what appears to me to be a fairly simple matter, do we have to say that this matter will then become, fall under national legislation. Because, if your criteria is that if it is a national issue it will be national government, then why do we have to do it after a court cant decide, it seems a little bit more complex than that.

Prof Wiechers

Mr Chairman, yes it is absolutely true what Rowen says. In most instances SPR and national governments wouldn't draw up legislation in concurrent affairs, just on their own and I can foresee there be conferences, they will clear out and say we are not going to ???? on your toes and this and that. We all know there could be disputes. Two laws have been made on top level or regional level and then there is a conflict and it is for the court to resolve that and we don't preclude this. If you look at the next page it says, "Requires the court to prefer one legislative enactment to the other". So it is still the court, if it is the national interest to say okay a national law will prevail and there is a definite reason to this, Mr chairman, members, say for instance region SPR has made a law and there is a clash, it hasn't been cleared out, they didn't foresee this possible conflict with a national law. Now, if the SPR's law take prevalence it could very well happen that other SPR's would be put into a very difficult position, whether they are also be able to carry on with these laws, because some of their constituencies can then also challenge it and then you have across the board an uncertainty about the existing national law. So in that case to have legal certainty, it is suggested that in the national interest it would then be the national law, would be the stronger provision. It is really not the idea on overall to give to the national legislature a ????? powers or to make laws because its domain, its power base will still be circumscribed in the constitution. It is a conflict resolution provision. It is not an empowering provision.

Next Speaker

If I could at something. It really arises because you have to know what the law is. Once

there are two laws people have to know how to guide their affairs and if the matter were to go to court, a court couldn't stop and say well I don't know what the law is, nobody knows what the law is we have got to go through some conflict or resolution mechanism where the region will meet the national government and decide whose laws will prevail. In that concrete situation you can't have that. So you have to have a means whereby if there is both overlap in the sense of a matter of construction the court can't say the power resides exclusively one way or another and also a conflict in the sense that the two provisions can't be reconciled and then in that situation the court has to make up its mind one way or another and this is the determining factor, it is for that type of category.

Mr de Jager

Mr Chairman as it is phrased here it seems as if though there is a dispute, the national legislative powers is predominantly. So that is the decision. I would like to have clarity, I would suggest that we have in the event of a dispute which cannot be resolved by the court in terms of these constitutional principles, then, to make it clear this only in that event and not in the event of a dispute.

Mr Cronjè

Chairman if may follow, that is my difficulty. The explanations I understand, but reading that without your explanations here, does not quite cover what you are explaining and it seems to me that an amendment in line of what Adv de Jager has said, clarifies the position without any doubt. Here it seems straight forward and your explanation given in writing and by word makes it clear, but not having that and simply reading this in five years time, it may not be ????? So if the Committee would consider that addendum or amendment, I think that would clarify the situation.

Dr Venter

Mr Chairman the problem with that would be by the time this kind of dispute arises and comes before a court, these principles will not exist any more in the sense of being part of a constitution. This will be the result of the application of this principle. The problem really isn't that complicated because one should read the whole italicised sentence. It is only if it cannot be resolved by the court through the construction of the provisions of the constitution, in other words, the constitutional provisions are not on this specific point that clear and this can easily happen because a constitution can't be volumes thick to cover every eventuality. Then only and only then the court is in terms of the constitution required to decide that the national legislation prevails.

Mr de Jager

Mr Chairman, this is a remark that's alarming. To say that by the time this comes before the court, the court can't decide because it's all gone then. I can't understand that because then why would we refer to the court.

Mr Chaskalson

I don't think Mr de Jager needs to worry. The constitution will have to provide a provision consistent with this principle and the constitution will then say that and we record the principle in accordance with the way you have requested, it would then say somewhere in the constitution that in the event of there being a dispute concerning any particular legislation which cannot be construed by the court as a matter of construction, this will follow. That is why I am saying that shouldn't present a difficulty.

Adv Jacobs

Mr Chairman it is even more confusing now. According to what I have followed, after Mr Cronjè asked that Mr de Jager's amendment be put forward I clearly read Prof Wiechers, if he doesn't mind me saying this that he nodded his head and saying yes. Now, after Dr Venter has spoken and Mr de Jager replied, Mr Chaskalson says that it is not necessary anymore.

Next Speaker

I have been misunderstood completely. I think Mr Cronjè agrees.

Adv Jacobs

Please then explain it.

Mr Andrew

Mr Chairman just in this context on 2.28, I don't know if it may help if after "shall" in the third line, one put "where this is in the national interest the president shall where this is in the national interest be given to the next ????? of the national government". I just suggest that as a possible way that may assist out of this.

MR Cronjè

Chairman I believe the Technical Committee has heard what we said and we leave it to them to adjust and to accommodate it.

Chairman

Are you saying that Mr Andrew's amendment shouldn't be accommodated, surely not.

Mr Cronjè

It could also be considered.

Adv Jacobs

I just have a last question. My question is, do we have now more or less, more or less, of course there are differences, I don't dispute that, but do we more or less now have the same position as was the position within the ??? of article of 84.1 of the old South African constitution of 1961. Is that more or less the position concerning the precedence of national interests in contradistinction to the old provincial interests.

Prof Wiechers

Mr Chairman I think this is so important it needs to be addressed over and over again. It's not because under these principles, in terms of these principles, the SPR powers are entrenched under 84 and that happened, they were taking away all the time and erode. It cannot happen in terms of these principles.

Adv Jacobs

That is not the point I am taking up but I would discuss it with Prof Wiechers.

Chairman

Thank you very much Adv Jacobs. We move on to principle 2.29, residual powers. Comments and question if any?

Mr Andrew

I want to make a comment after 2.29 in relation to the principles ??? 2.29.

Chairman

Let us deal with 2.29 first please. Mr de Jager.

Mr de Jager

Mr Chairman seeing that it is of so little importance let us give it to the SPR's.

Chairman

It seems that there is no comment or questions. Mr Andrew, Prof Wiechers.

Prof Wiechers

I must just correct, with all respect, Mr de Jager, say if there are national powers the residual side to those national powers must be on national side. These "versweë

bevoegdheide", these ancillary, would then flow from the national, just the same as the SPR. You can't just say give them to the SPR's.

Mr de Jager

With respect, Prof Wiechers is correct.

Chairman

That brings us to the end of the discussions of this section of the report. I had promised Mr Andrew the opportunity before you Mr Meyer and then I will recognise you.

Mr Andrew

Thank you Mr Chairman, two points. First of all the actual numbering, 2.24 has an introductory paragraph or sentence which says "The following criteria shall be applied in the allocation of powers to the national government and the SPR governments". I would suggest that intro should in fact also be applying to paragraph 2.25 and the various 2.25 paragraphs and 2.26 and maybe even 2.27 as well. I think that there is something in the setting out in the numbering that needs to be looked at because as it is, the national government allocation of powers sort of hangs in the air and doesn't follow on from that introduction. The second point, I simply wish to advise that we will submit a written suggestion for an additional paragraph which would read: "Subject to the other provisions of paragraph 2.24 wherever it is practical to do so powers, functions and the delivery of services should be allocated to the level of government closest to the people concerned". We will be submitting that in writing to the Technical Committee.

Chairman

Fine, thank you for that. Mr Meyer.

Mr Meyer

Mr Chairman we would like to propose two additional constitutional principles to be considered by the Technical Committee. The one deals with the impartiality of the civil service in a broad sense and the other one with the impartiality of the security forces. We would just like to read it out and with your permission hand it to the Technical Committee for them to consider and make a recommendation to the Council next time, both in terms of the contents and also where it should fit into the set of constitutional principles. If I may Mr Chairman, I would just like to read them out. The first one; "The independence and impartiality of a Commission for Administration, a Reserve Bank and Auditor General and an Ombudsman shall be provided for and safeguarded by the constitution in the interests of the maintenance of effective public finance and administration and a high standard of

professional ethics in the civil service". the second one, "That every security force and every member of such security force, that is the police, military and intelligence, shall be required to perform their duties and functions and exercise their powers in the national interest and shall be prohibited to further or prejudice party political interests". These have been considered Mr Chairman, I believe it might be worthwhile for the Technical Committee to consider them and make a recommendation.

Chairman

Thank you, Mr de Jager.

Mr de Jager

I would like to ???? amendment for consideration by the Committee on 2.29, the selfdetermination clause, could I hand it to them and they could consider it and report back on it.

Chairman

Thank you very much Mr de Jager. Are there any more amendments, submissions.

Mr wessels

Mr Chairman could I just check this with you. I am not so sure I have had a discussion with Mr Sam Shilowa who proposed an amendment just before we adjourned. That amendment has been taken for consideration?

Chairman

Yes.

Mr Wessels

If that is the case I have nothing to add.

Chairman

Ladies and gentlemen I think that concludes our discussion of this part of the report.

Mr Moosa

Just to remind you that you had ruled that we would deal with 2.9 and I am not saying that we should do it right now, but that is an outstanding matter.

Chairman

Yes, I was coming to that Mr Moosa. It brings us also to the end of our days' meeting and

deliberations. I would like to propose to the Council that today's agenda, that is the outstanding matters of today's agenda be carried over to tomorrow. I failed to see that anyone would object to that. I would like the Council to approve of that proposal please.

Meeting

Agreed.

Chairman

I would also wished to remind the Council that tomorrow the Planning Committee starts its meeting at 09:00 hours until 10:00 am and that the Council begins meeting at 10 am and we will go on until 7 pm tomorrow evening. Ladies and gentlemen thank you very much we will see you tomorrow.