

**FIRST REPORT OF THE TECHNICAL COMMITTEE ON THE
REPEAL OR AMENDMENT OF LEGISLATION IMPEDING FREE
POLITICAL ACTIVITY AND DISCRIMINATORY LEGISLATION,
13TH MAY 1993**

This technical committee has been mandated with the task of investigating legislation and administrative acts impeding free political activity and discriminatory legislation. It is clear from the Codesa Consolidated Document that the emphasis is on discrimination in the area of free political activity and free and fair elections. The committee has been asked to prepare a report which would include a schedule dealing with laws to be repealed and laws to be amended. The committee has considered its mandate and, in order to compile a report and table a submission, has decided first to obtain clarity on the most effective method to approach the assignment.

1. The committee has identified the following two ways of proceeding to accomplish its task

1.1 To study all the laws and subordinate legislation pertaining to all forms of political activity normally associated with democratic elections. In doing so, not only South African legislation, but also laws and regulations of the TBVC states and the self-governing territories will have to be identified, analyzed, interpreted and put into an integrated report.

After identifying such laws, regulations etc a second comprehensive study would be required to propose amendments to or the repeal of all sections and provisions identified to be inimical to the conduct of free and fair elections. Only then can the actual amendment or repeal process be undertaken in the various legislative bodies.

1.2 To prepare a "higher code" by which to judge the validity of laws, administrative actions and the acts of private individuals that impede free political activity, as well as discriminatory legislation. Such a code would establish the necessary judicial, administrative and political structures to pronounce on the validity of objectionable laws and to provide effective remedies for violations of such a higher. This code will enjoy supreme legal sums.

2. Advantages and disadvantages of each option

2.1 Advantages of option 1.1

2.1.1 A comprehensive list of all discriminatory and repressive laws in South Africa, the self-governing territories and the TBVC states would constitute a useful compilation of statutory enactments for scholars and historians to study. (Such a study would also involve an examination of the laws of local authorities, statutory bodies and functionaries.)

2.2 Disadvantages of option 1.1

2.2.1 Such a study would take enormous time and is completely beyond the resources of the technical committee. It has been suggested that technical sub-committees might be established to investigate such legislation in the TBVC states. This would however be insufficient as all self governing territories have their own electoral laws and several have their own security legislation. To identify all the relevant laws could certainly not be done properly and accurately in less than six months. This conclusion is borne out by the experience of other groups that have considered compiling a list of such legislation.

Whether these laws are in fact discriminatory or impede free political activity will then have to be considered in the negotiating process. If it is agreed there that these laws are indeed objectionable, it will then be necessary for each legislative body to repeal or amend the legislation in question. To this committee it seems that, in view of the present political climate, there is not sufficient time available for this process.

2.2.2 There is a real possibility that such a list of legislation would not be perfectly accurate and complete. Legislation could be overlooked for a number of reasons, such as:

- a) lack of time for research
- b) suppression of information by regional sub-committees acting negligently or in bad faith.

An inaccurate compilation could have serious consequences, because it would in effect give the stamp of approval to any discriminatory or repressive legislation not included.

2.2.3 The compilation of such a list will obstruct the negotiating process and the search for consensus because some of the parties present in the negotiating process will feel constrained to defend their laws.

2.2.4 The identification of objectionable legislation will result in demands from the negotiating process to the legislative body in question to repeal or amend the law in question. This is likely to lead to tremendous delay and could strain the negotiating process.

2.2.5 Repealing or amending of legislation will have to be implemented by eleven different legislative bodies, numerous local authorities and other lawmaking persons and bodies. The likelihood of obtaining uniformity on non-discrimination and free political activity from eleven different legislative bodies is small. If no uniformity in legislation is obtained, this will inevitably result in discrimination because one cannot justify a doctrine of "separate but equal" in different regions of South Africa in matters relating to free elections and equality,

2.2.6 A further problem is the absence of any single structure for the enforcement of laws and regulations pertaining to free political activity and equality. This would inevitably lead to unequal and unfair application of laws.

2.3 Advantages and disadvantages of option 1.2

With respect to the second option, which entails the adoption of one single "higher code", the following observations could be made. The higher code contemplated by the committee is not an interim Bill of Rights although it will certainly include many of the fundamental rights contained in a Bill of Rights. What we propose is a uniform code prescribing principles for free political activity, free and fair elections and non-discrimination in this process. It will also contain provision for effective and expeditious judicial, administrative and political remedies.

The advantages of such as code are the following:

2.3.1 Consensus. To us it seems there is general agreement on the part of all political parties that the election should be free and fair and preceded by a period of free political activity, without discrimination on the grounds of race, sex, religion, ethnic origin or political opinion etc.

2.3.2 The likely delays pointed out above could be avoided.

2.3.3 Such a higher code could be used to measure and to set aside any law, administrative act or private activity in violation of the code.

2.3.4 The parties taking part in the negotiating process should all be given an opportunity to endorse such a higher code. This will give it a uniform legitimacy. The adoption of such a higher code by all the parties in the negotiating process will send out a positive signal to all the people of South Africa that consensus has been achieved on certain principles and that real progress has been made.

2.3.5 An independent judicial or administrative body charged with enforcing such a code is more likely to be acceptable to parties than the procedure outlined in option 1. 1.

2.3.6 The same standards will apply in all parts and sectors of the country and would lead to uniformity, predictability and certainty.

2.3.7 The higher code will only cancel out the objectionable provisions in a statute whilst the rest will remain intact.

2.3.8 An additional advantage of this approach is that unwritten common law powers vested in the executive (e.g. prerogative powers) will also be subject to testing.

3. Reasons for adopting option 1.2

The ultimate aim of the electoral process must be to provide results which will be accepted by all participants as free and fair. All political parties participating in the preceding campaigns and the election itself must be prepared to live with the outcome of the process. The "Angolan Spectre" must be avoided at all costs. It

should not be possible for any participant to cast doubt on the fairness of the whole electoral process and jeopardise the establishment of a democracy. In order to achieve this objective all practices that could subsequently be cited as having impeded free political activity must be addressed and remedied timeously in terms of the higher code.

4. Mechanism for implementing the code

4.1 The implementation of the higher code approach will require a structure providing for judicial, administrative and political control.

4.2 Other technical committees also address matters relating to this particular aspect. This could perhaps be an area for cooperation between more than one technical committee. We would however like to suggest a number of general principles and powers to be contained in such a higher code.

5. General principles and powers to be contained in a "higher code".

5.1 If the objective of free and fair elections is to be achieved, the bodies responsible for deciding disputes in the period immediately preceding the election itself will have to enjoy legitimacy.

5.2 In order to be able to decide particular disputes the typical characteristics of free political activity in a democratic society will have to be incorporated into the code. This will include principles such as:

freedom of expression

freedom of the press

freedom of association

freedom of movement

freedom of assembly

free access to information

All public and private activities which impair these freedoms, such as intimidation, denial of access etc should therefore be prohibited.

5.3 Effective and expeditious remedies are required and this structure should therefore be adequately empowered. In particular all affected and interested parties should enjoy standing before the structures established.

5.4 The type of behaviour that interferes with free political activity could result not only from actions by government bodies and officials but also originates in the behaviour of private individuals and groups.

5.5 The full participation of women in the political and electoral process is open to suppression at the instance of governmental bodies and/or private individuals and groups. The structures envisaged in terms of the proposal would have authority to address and remedy discriminatory and repressive acts of this kind.

6. Conclusion

6.1 The committee has noted that the Goldstone Commission has proposed a draft bill on ensuring freedom of assembly which has a bearing on free political activity. This Bill should be studied by political parties and should be analyzed for purposes of a final proposal on free political activity.

6.2 All parties in the negotiating process have been invited to submit reports to the technical committee. We attach the only submissions received.