

7/9/1993

**BACKGROUND DOCUMENT ON REPEAL OF
DISCRIMINATORY LEGISLATION IMPEDING FREE AND
FAIR ELECTIONS**

VOLUME 3

**MPNP TECHNICAL COMMITTEE REPORTS, RESOLUTIONS &
EXTRACTS FROM NEGOTIATING COUNCIL MINUTES**

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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 The committee has been asked to prepare a report which would include a schedule dealing with laws to be repealed and laws to be amended.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 status.
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 enactment's 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 a 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. **Mechanisms 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 principals 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.

CONFIDENTIAL: THIS REPORT IS EMBARGOED UNTIL 12H00 ON TUESDAY 1 JUNE 1993

FINAL REPORT TO THE NEGOTIATING COUNCIL OF TECHNICAL COMMITTEE NO. 79 THE COMMITTEE DEALING WITH THE REPEAL OR AMENDMENT OF DISCRIMINATORY LEGISLATION OR LEGISLATION IMPEDING FREE POLITICAL ACTIVITY

The Negotiating Council, at its meeting on Tuesday 18 May, mandated the above Technical Committee to identify, within two weeks, those laws which are discriminatory and inhibit free political activity and which should, accordingly, be repealed. In addition the Technical Committee, was mandated to draft a "higher code" along the lines suggested in its First Report, together with suggestions for the appropriate implementation mechanisms.

In this Report the following issues will be considered.

- 1. Discriminatory laws which constitute the foundations of political apartheid.
- 2. Discriminatory laws which flow from the above laws.
- 3. Laws which are inherently discriminatory.
- 4. Laws which may impede free and fair elections.

5. A proposed "higher code" designed to ensure free and fair elections. This section will deal with the code, mechanisms for its enforcement, remedies and sanctions for violation of the code.

Before embarking upon this study it is necessary first to provide a framework indicating what the Committee understands by discriminatory laws and laws that may impede free and fair election;. The term "South Africa" is also one that requires clarification.

(a) Discriminatory Laws

Racial discrimination is defined by the International Convention on the Elimination of All Forms of Race Discrimination of 1965 as:

"any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life (article 1)."

The Convention on the Elimination of All Forms of Discrimination against Women of 1979 contains a similar definition. It defines discrimination against women, as:

"any distinction, exclusion, or restriction made on the basis of sex which has tie effect of or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field (article 1)"

In this Report discrimination will therefore be viewed as the unequal allocation of rights and freedoms on the basis of race, ethnic origin, colour, gender, age, disability, religion, creed, conscience, political opinion, or sexual orientation. For historical reasons the emphasis will be on discrimination on grounds of race and gender.

Both the above International Conventions recognize the need for affirmative action and do not regard such action as discriminatory.

The Committee also takes the view that the provision of separate facilities or opportunities in accordance with the "separate but equal" doctrine, constitutes discrimination. The Committee agrees with the decision of the US Supreme Court in *Brown v Board of Education* 347 US 4 (1954) that separate facilities etc are inherently unequal.

(b) Laws that may impede free and fair elections

Laws that may impede free and fair elections include any law that may deny or interfere with the right to vote

- * deny the equality of treatment of voters in the whole election process from the time of qualification as a voter to the casting of the ballot
- * prevent the free exercise of freedom of speech, expression or access to information
- * deny political parties equal access to voters, to venues for meetings, to the media, to funding resources etc
- * interfere with the freedoms of association and assembly (including the right to demonstrate)
- * interfere with or deny freedom of the press or media
- * prevent an election from being conducted in accordance with uniform rules for the whole country
- * deny the right to stand for election
- * deny the right to vote freely without fear of victimization
- * deny the right of political parties to canvass voters.

(c) South Africa

It is not the function of this committee to pronounce on the statehood of the TBVC states. The fact that the TBVC states are all represented in the Negotiating Council does, however, indicate that this body seeks to find a solution for South Africa within its boundaries of 1910. For this reason South Africa is understood to mean the territory of South Africa within its boundaries of 1910.

1. DISCRIMINATORY LAWS CONSTITUTING THE FOUNDATIONS

Act/Ordinance No:

Short Title:

Reason for repeal or amendment:

Act/Ordinance No: 21 of 1977

Short Title: Self-governing Territories Constitution Act

Reason for repeal or amendment: Provides for the establishment of legislative assemblies and executive councils in the selfgoverning territories. The self governing territories were created by way of proclamations, which provide for ethnic-based citizenship. See attached list (Annexure A), for relevant proclamations.

Act/Ordinance No: 102 of 1982

Short Title: Black Local Authorities Act

Reason for repeal or amendment: Provides for the establishment of local committees, village councils and town coun for black persons. Qualification of voters racially based.

Act/Ordinance No: 45 of 1979

Short Title: Electoral Act

Reason for repeal or amendment: Blacks excluded from electoral process.

Act/Ordinance No: 117 of 1979

Short Title: Local Government Bodies Franchise Act

Reason for repeal or amendment: Voting rights limited to persons registered as voters in respect of a House of Parliament

Act/Ordinance No: 8 of 1962

Short Title: Local Government

Reason for repeal or amendment: Ordinance (Orange Free State)

Racial disqualifications regarding the right to vote or to become a council.

Act/Ordinance No: 20 of 1974

Short Title: Municipal Ordinance (Cape)

Reason for repeal or amendment: Racial disqualifications in respect of voters, representatives of voters and councillors.

Act/Ordinance No: 18 of 1976

Short Title: Divisional Councils Ordinance (Cape)

Reason for repeal or amendment: Racial disqualifications in respect of voters, representatives and councillors.

Act/Ordinance No: 25 of 1974

Short Title: Local Authorities Ordinance (Natal)

Reason for repeal or amendment: Racially Based

Act/Ordinance No: 18 of 1976

Short Title: Durban Extended Powers Consolidated Ordinance (Natal)

Reason for repeal or amendment: Racially based (group areas mentioned).

Act/Ordinance No: 17 of 1939

Short Title: Local Government Ordinance (Transvaal)

Reason for repeal or amendment: Racially based.

Act/Ordinance No: 16 of 1970

Short Title: Municipal Election Ordinance (Transvaal)

Reason for repeal or amendment: Racially based

Act/Ordinance No: 4 of 1984

Short Title: Coloured and Indian management Committees Ordinance (Transvaal)

Reason for repeal or amendment: Racially based.

Act/Ordinance No: 22 of 1962

Short Title: Local Government (Extension of Powers) Ordinance (Transvaal)

Reason for repeal or amendment: Racially based.

Act/Ordinance No: 46 of 1959

Short Title: Representation between the Republic of South Africa and Self-Governing Territories Act

Reason for repeal or amendment: Although repealed in part, it still forms the legislative cornerstone of the selfgoverning territories.

Act/Ordinance No: 86 of 1988

Short Title: Promotion of Constitutional Development Act

Reason for repeal or amendment: Although not implemented it is a constitutional law premised on apartheid.

Act/Ordinance No: 73 of 1986

Short Title: Restoration of South African Citizenship Act

Reason for repeal or amendment: Fails to restore citizenship to all South Africans deprived of South Africa citizenship due to creation of TBVC states.

Act/Ordinance No: 80 of 1986

Short Title: Joint Executive Authority for Kwazulu and Natal Act

Reason for repeal or amendment: Partnership between self-governing territory and Natal.

2. DISCRIMINATORY LAWS WHICH FLOW FROM THE LAWS CONSTITUTING THE FOUNDATIONS OF APARTHEID

ACT NUMBER : 39 of 1976

SHORT TITLE : National Education Policy Act

ACT NUMBER : 70 of 1988

SHORT TITLE : Education Affairs Act (House of Assembly)

ACT NUMBER : 47 of 1963

SHORT TITLE : Coloured Persons Education Act

ACT NUMBER : 3 of 1987

SHORT TITLE : Development Act (House of Representatives)

ACT NUMBER : 61 of 1965

SHORT TITLE : Indians Education Act

ACT NUMBER : 12 of 1968

SHORT TITLE : Indians Advanced Technical Education Act

ACT NUMBER : 4 of 1987

SHORT TITLE : Housing Development Act (House of Delegates)

ACT NUMBER : 27 of 1951

SHORT TITLE : Black Building Workers Act

ACT NUMBER : 90 of 1979
SHORT TITLE : Education and Training Act

ACT NUMBER : 27 of 1981
SHORT TITLE : Technikons (Education and Training) Act

ACT NUMBER : 91 of 1984
SHORT TITLE : University Staff (Education and Training) Act

ACT NUMBER : 104 of 1987
SHORT TITLE : Community Welfare Act (House of Representatives)

ACT NUMBER : 81 of 1976
SHORT TITLE : Aged Persons Act (particularly section 23)

ACT NUMBER : 44 of 1957
SHORT TITLE : Defence Act (compulsory military service for whites only)

There are furthermore still laws of provincial and local authorities that discriminate on grounds of race in the field of health, pensions etc.

It has been suggested that this Committee should consider reparations for harm caused by discriminatory laws (submission of Mr A Rajbansi). This seems to go beyond our mandate.

3. LAWS WHICH DISCRIMINATE ON GROUNDS OF SEX AND RELIGION

Sex

ACT NUMBER : 44 OF 1949
SHORT TITLE : Citizenship Act

ACT NUMBER : 73 of 1986
SHORT TITLE : Restoration of South African Citizenship Act (Section 5)

ACT NUMBER : 72 of 1986
SHORT TITLE : Identification Act (Sections 43 and 44)

ACT NUMBER : 96 of 1991
SHORT TITLE : Aliens Control Act (Section 28)

See Government Gazette No 14591 of 19 February 1993 which lists a number of discriminatory statutes (Annexure B).

A number of customary law systems discriminate against women. This Committee does not believe that discriminatory laws of such a kind fall within its jurisdiction since they do not interfere with free and fair elections.

The minority status of women under customary law encourages a climate of thought that such women are subject not only to the guardianship but also to the political direction of their husbands.

Many of the obstacles that prevent the political participation of women are not found in existing laws, but in practices and attitudes of husbands, employers, civic leaders and politicians.

Particularly important here is the access of women to canvassing, political information, voter education and voting. Domestic workers and farm workers are particularly vulnerable. Women, who bear the double burden of work and housework, are also prevented from attending meetings etc.

Religion

Laws governing Sunday observance discriminate against non-Christians.

4. LAWS WHICH MAY IMPEDE FREE AND FAIR ELECTIONS

4.1 Every city and town in South Africa has by-laws regulating the holding of public meetings, demonstrations, processions, etc. Obviously it is beyond the resources of this Committee to identify all these laws and to consider the extent to which they may impede free and fair elections. Their validity must be measured against the standards contained in the attached Higher Code. After the adoption of such a code they should automatically become null and void to the extent that they violate this code. See for example:

* Standard street and Miscellaneous By-Laws of Transvaal Administration Notice 36 B of 14 March 1973

* By-Laws relating to Streets and Street Collections GN R2606 of 2 December 1983 (99 8990), in respect of black Local Authorities.

4.2 Some self-governing territories have enacted laws dealing with public safety, public peace, order, or good government which impose serious restrictions on freedom of political activity and freedom of speech in the territory. They are permitted to enact such legislation in terms of section 21A of Schedule I of the Self-Governing Territories Constitution Act 21 of 1971. Such legislation must be strictly scrutinized to ensure that it complies with the standards contained in the attached Code. After the adoption of the Higher Code legislation which violates the Code should automatically be null and void.

The following are examples of legislation from the self-governing territories which should be repealed:

Lebowa

Public Service Amendment Act of 1984 amending section 25A of Act of 1972 which denies the political freedoms of civil servants.

KwaNdebele

The KwaNdebele Public Safety Act 5 of 1987.

KwaZulu

KwaZulu Black Administration Amendment Act 26 of 1988 dealing with the movement of black persons at the instance of the executive.

4.3 The laws of the TBVC states governing public safety and the conduct of elections require special scrutiny.

ACT ORDINANCE NUMBER : 30 of 1977

SHORT TITLE : Public Security Act (Transkei)

REASON FOR REPEAL OR AMENDMENT : Based on the following Acts of the RSA that have since been repealed:

- (a) Suppression of Communism Act, 1950
- (b) Unlawful Organizations Act, 1960
- (c) Section 22 of the General Law Amendment Act, 1962 (Sabotage)
- (d) Terrorism Act, 1967
- (e) Certain provisions of the

Riotous Assemblies Act, 1956 The Act consequently provides for a prohibition on organizations and publications, restriction of persons; prohibition on gatherings; detention without trial; and further provides for wide discretionary emergency powers.

ACT ORDINANCE NUMBER : 32 of 1979

SHORT TITLE : Internal Security Act (Bophuthatswana) As amended by Acts 39 of 1985, 5 of 1986, 13 of 1986, 2 of 1988.

REASON FOR REPEAL OR AMENDMENT : Provides for a prohibition on organizations, publications and gatherings; the restriction of persons; detention without trial and wide discretionary powers.

ACT ORDINANCE NUMBER : 13 of 1982

SHORT TITLE : National Security Act (Ciskei) As amended by Acts 35 of 1983, 33 of 1985, 4 of 1991 and Security Amendment Decree 1992

REASON FOR REPEAL OR AMENDMENT : Resembles the Internal Security Act, 1982 of the RSA and provides for a prohibition on organizations,

publications and gatherings; detention without trial and wide discretionary emergency powers.

ACT ORDINANCE NUMBER : 13 of 1985

SHORT TITLE : Maintenance of law and Order Act (Venda)

REASON FOR REPEAL OR AMENDMENT : A replica of the Internal Security Act, 1982 of the RSA before its amendment in 1991.

ACT ORDINANCE NUMBER : 40 of 1985

SHORT TITLE : Bophuthatswana Security Clearance Act

ACT ORDINANCE NUMBER : 1 of 1988

SHORT TITLE : Republic of Bophutatswana constitution Amendment Act

4.4 **South Africa**

Obviously South Africa will require security laws during the election period. Such laws should not, however, place arbitrary powers in the executive authority. The South African Internal Security Act 74 of 1982 as amended by the Internal Security Amendment Act 138 of 1991 is a much better model than the laws of the TBVC states. Nevertheless it has certain shortcomings.

The following laws should be repealed or substantially amended:

ACT NUMBER : 3 of 1953

SHORT TITLE : Public Safety Act

REASON FOR REPEAL OR AMENDMENT : Grants unfettered powers to State President and Minister of Law and order to declare.' a state of emergency or an unrest area respectively and to promulgate emergency regulations or regulations iii an unrest area. Jurisdiction of the courts ousted to a great extent.

ACT NUMBER : 74 of 1982

SHORT TITLE : Internal Security Act

REASON FOR REPEAL OR AMENDMENT : Empowers Minister of Lay, and Order to declare certain organizations unlawful and further provides for detention without trial; a prohibition on gatherings and offences regarding organized resistance against laws of the RSA.

ACT NUMBER : 67 of 1976

SHORT TITLE : Parliamentary Internal Security Commission Act

REASON FOR REPEAL OR AMENDMENT : Establishes a Parliamentary Internal Security Commission.

ACT NUMBER : 52 of 1973

SHORT TITLE : Gatherings and Demonstrations in the Vicinity of Parliament Act

REASON FOR REPEAL OR AMENDMENT : Prohibits demonstrations in the vicinity of Parliament.

ACT NUMBER : 71 of 1982

SHORT TITLE : Demonstrations in or near Court Buildings Prohibition Act

REASON FOR REPEAL OR AMENDMENT : Prohibits demonstrations in or in the vicinity of court buildings.

ACT NUMBER : 103 of 1992

SHORT TITLE : Gatherings or Demonstrations in or near the Union Buildings Act

REASON FOR REPEAL OR AMENDMENT : Prohibits demonstrations at the Union Buildings.

ACT NUMBER : 31 of 1974

SHORT TITLE : Affected Organizations Act

Empowers the State President to declare certain organizations to be affected organizations whereupon such organizations are prohibited from receiving funds from abroad.

ACT NUMBER : 42 of 1974

SHORT TITLE : Publications Act

REASON FOR REPEAL OR AMENDMENT : Section 47(2) permits the banning of publications deemed to be prejudicial to the safety of the state, the general welfare, peace and social order.

ACT NUMBER : 26 of 1989

SHORT TITLE : Disclosure of Foreign Funding Act

REASON FOR REPEAL OR AMENDMENT : Regulates the disclosure of the receipt of money form outside the RSA by or for certain organizations or persons.

ACT NUMBER : 51 of 1968

SHORT TITLE : Prohibition of Foreign Financing of Political Parties Act

REASON FOR REPEAL OR AMENDMENT : Prohibits the receipt by political parties of financial assistance from abroad.

5. THE "HIGHER CODE"

5.1 Why this Code?

This committee has been instructed to prepare and submit two documents:

5.1.1 A list containing some of the most important discriminatory laws (see I - IV)

5.1.2 A Code which can serve as a "higher law" to be used for judging all Acts that may impede free and fair elections. This Code is not another Electoral Act. It has to be far more and quite different - a supreme law to be applied by properly equipped structures in order to

ensure that any Act impeding free and fair elections can be judged and an adequate and swift remedy be made available. The need for a separate Electoral Act will remain, albeit a new or updated one.

The following exposition will explain the purpose, content and operation of the(proposed Code. In certain areas these proposals could overlap with the work of other Technical Committees - like the one on an Independent Electoral Commission. Such areas will become clearer when reports from the various Committees are available. Joint tasks may then be undertaken if necessary.

At this stage it is however clear that this proposal for an Election Code has a focus of its own:

5.1.2.1 To provide for principles, mechanisms and remedies to ensure that action in terms of existing legislation (original and subordinate) and by existing; authorities (of various governments and tiers) are judged uniformly. Its purpose is not so much to provide for the technical means of conducting; and monitoring the first democratic election and the campaigning preceding it but rather to deal with the myriad of existing laws that could impinge upon free and fair elections. It is not possible in the time available to identify all such laws and to have them repealed or amended by the various legislators.

5.2 Purpose

The ultimate objective is to achieve free and fair elections in South Africa as a whole when the first democratic elections are held.

South Africans have to avoid at all costs a situation where such an election will not qualify as free and fair. If the result of the election is not accepted, peace and democracy will suffer irreparable damage. We have to avoid the "Angolan Spectre".

The objective of free and fair elections in a democratic society also becomes the basic criteria for determining whether any particular action is to be declared invalid or its perpetration prevented. The detailed criteria of the Code that follow are all related to this basic objective. It is the ultimate criterion and guiding principle for subsequent rulings.

5.3 Method

This code will be implemented in terms of the following framework:

5.3.1 **A set of Criteria.** It will consist of all those principles associated with the type of behaviour which is to be expected in a democratic society and which qualify as participation in the process of free and fair elections.

These criteria will provide the yardstick for the proposed Tribunal to apply in its decisions. These criteria seek to achieve free and fair elections in a democratic society.

The criteria are formulated in a positive manner. They indicate what South Africa should be free to do when participating in democratic elections. They are not formulated by providing descriptions of prohibited behaviour (like in a Penal Code)

It is believed that in this manner the Tribunal will be able to judge more effectively whether activities claimed to be impeding free and fair elections should be disqualified. These principles provide the yardstick against which to measure such behaviour. This approach is akin to the implementation of a typical bill of rights. They will also be "supreme" in nature. In order to be valid behaviour, the standards contained in such principles are to be complied with.

Such principles function as typical judicial standards. Concepts such as "in free and democratic society" (of the European Convention for the Protection of Human Rights and Fundamental Freedoms), proportionality and fairness are inherent in these principles. They refer to certain well known human rights and freedoms contained in international instruments and the constitutions of democratic societies. When they have to be applied by the Tribunal, recourse could be had to the jurisprudence of courts and other bodies well-versed in the enforcement of such concepts giving judgement the Tribunal will often have to balance the claims of an individual or a political party. A typical limitation clause approach will therefore be adopted - as is usual when a bill of rights is enforced through a court of law.

5.3.2 **Mechanisms.** The above mentioned principles will have to be effective in securing the rights and freedoms associated with free and fair elections in a democratic society. They must therefore be enforced (and remedies provided for when necessary) by properly equipped bodies. A special Tribunal will be proposed, (performing the judicial function) as well as other organs more of a political nature. They should all be adequately empowered.

5.3.3 **Remedies.** Violations of the Code will have to be declared invalid and other appropriate relief should be provided for. In certain cases it may be sufficient to provide for administrative procedures aimed at correcting wrong practices, or to achieve the desired result through legislation.

5.4 **Criteria**

In expanding on 5.3.1 the following criteria (principles) for participation in free and fair election will apply:

5.4.1 **Uniformity of application.** The same principles should apply in the whole of the country.

5.4.2 **The freedom to form political parties, to belong to them and to stand as candidates.** This is part of what is also included under freedom of association. This is a central concept and will have to be expanded in order to include:

5.4.2.1 Freedom from intimidation. (This will have implications also for private behaviour. This Code will in certain circumstances be enforceable against individuals or private organizations too.)

5.4.2.2 The right to qualify and timeously "register" as voter.

5.4.2.3 The right to a secret ballot and to cast a vote freely and without fear of victimization. (This aspect is usually dealt with in an Electoral Act.)

5.4.2.4 Right to canvassing. (Of both parties and their members.)

5.4.2.5 Equal opportunity to receive funding.

5.4.3 Freedom of assembly. Here the access to suitable venues must be included. In this country such venues are sometimes privately owned. It may require rulings on insurance against damage or paying for the use of facilities, which will have to be done without causing discrimination. Who gives permission for the use of such facilities?

5.4.4 **Freedom of expression and thought.**

5.4.4.1 To include freedom of petition and peaceful demonstration.

5.4.4.2 Access to information.

5.4.4.3 Freedom of the press

5.4.4.4 Special protection of journalists.

5.4.4.5 Access to the media (State and private?).

5.4.5 **Equality.** No political party or person should be discriminated against in the enjoyment of any of the above-mentioned freedoms. Women are in a special position and particular care should be taken to prevent gender discrimination.

5.4.6 **Limitation.** Such rights and freedoms are not absolute in nature. Their exercise may be limited in order to protect the rights of others, the public order and safety. Only those limitations necessary in a democratic society should be permitted. Limitations should not negate the essence of these freedoms and rights and they should be to an ascertainable extent be prescribed by law. In this regard the various "security laws" of South Africa require careful scrutiny. A power to limit is not a power to take away, it is in itself also a limited power which has to comply with certain standards in order to be valid. These freedoms have to be balanced against the grounds permitting limitation. This is to be done by a judicial process (Tribunal) while applying such standards as proportionality and reasonableness.

5.4.7 **Derogation.** In times of emergency threatening the life of the nation. Who should proclaim an emergency? Should certain rights be non-derogable? See further 5.5.4 hereunder.

5.5 Mechanisms

5.5.1 In deciding on the nature and powers of the mechanisms necessary for implementing and enforcing these freedoms, the following are to be considered:

- * Uniformity
- * Expeditiousness
- * Effectiveness
- * Fairness
- * Clarity
- * Accessibility

5.5.2 It is proposed that judicial and representative, structures are established.

5.5.3 **Judicial.** Should include an Ombud and a Tribunal with the typical functions usually associated with each. Both central and regional offices will be required. Appeal to be provided for?

5.5.4 **Representative control.** To be undertaken by something like the Elector Commission (area of another Technical Committee) which will form part of Transitional Executive Council (TEC). Will involve tasks such as passing, amending and repealing laws together with existing legislative structures in a manner to be worked out. The declaration of an emergency, derogation of rights and freedoms and the limitations upon their exercise to be done here.

The adoption of this Code itself will have to entail broader involvement and cleared through the negotiating structures.

5.5.3 The appointment of those people to serve on these bodies deserves careful attention. (See further infra.) It might be necessary to construct the judicial machinery on the same basis as that of the industrial court, with an appeal body included.

5.6 Remedies

5.6.1 Access

5.6.1.1 It should be possible for political parties, NGO's and individuals to bring their cases before the Tribunal. Locus standi requirements should be flexible enough in order to permit the achievement of the original objective of free and fair elections.

Access to the Ombud should be even easier. Informal administrative procedures should suffice.

5.6.1.2 The procedure for bringing applications or laying complaints should be informal. Complaints by lay people should be the general rule. Where necessary assistance in bringing cases should be provided. The office of the Ombud should be involved in this. This might call for a specialised department.

5.6.1.3 Costs should not hinder the bringing of applications.

5.6.2 **Sanctions**

All sanctions and remedies necessary in order to ensure effective participation in free and fair elections should be available. These may differ - depending on the nature (1 the body (electoral commission, tribunal, ombud) involved.

5.6.2.1 **Nullity of legislation**

Should the Electoral Commission be empowered to perform a political control function with respect to existing legislation? The need for the legislation could involve other legislative structures as well.

The Tribunal will perform a judicial control function when it too should be able to declare legislation on certain provisions of laws to be in conflict with the criteria laid down by the code. Actions taken in terms of such provisions will therefore be invalid.

These powers flow from the supreme nature of the Code. The concept of the sovereignty of Parliament will obviously not apply with respect to the Tribunal. A testing right should be part and parcel of the powers of the Tribunal.

The Tribunal will be an independent institution, staffed by experts. It will therefore enjoy the esteem necessary for creating acceptance of ruling and legitimacy.

Nullity will prevent repetition.

5.6.2.2 **Specific performance**

To be ordered by the Tribunal. The ombud should also be able to achieve specific relief through negotiations, mediation, and, if necessary, by seeking judicial involvement by the Tribunal.

5.6.2.3 **Interdicts** - if the usual legal requirements are met.

5.6.2.4 **Nullity** of executive acts.

5.6.2.5 Contempt - necessary when rulings are not respected. It may require fines by the Tribunal.

5.6.2.6 **Damages.**

5.6.3 Execution

It will probably be necessary to include in the Code a set of principles on procedure and execution. One possible means of enforcement could be through the Registrar of the Supreme Court - as is done with respect to the Industrial Court. Another possibility is simply to give the Tribunal the required powers and status. If this is not acceptable, the ordinary courts could become involved in the execution and enforcement of procedures. Involving the ordinary courts might cause a delay and increase costs. This may frustrate the objective of cheap and expeditious remedies.

5.7 Implementation

This proposal has some far reaching and new consequences. Because it will play such an important role during the transition to a new dispensation it should be debated and adopted through the negotiating structures.

The early implementation of this proposal will provide an opportunity to conduct election campaigns and the election itself in terms of clear and precise guidelines. This is of particular importance in South Africa because we have no experience of such an election. The majority of the population have never voted. The present violence requires effective and adequate structures.

It will be necessary to implement this proposal as a matter of urgency. Electioneering will probably start once an election date is announced.

The implementation of and actual practice of this Code will also provide a useful learning experience. This code will for all practical purposes function as a typical bill of rights - albeit that it would only focus on those rights and freedoms associated with free and fair elections in a democratic society. When the (interim) constitution becomes operative and its bill of rights has to be implemented, some valuable expertise will then be available. The public will then be accustomed to the idea and the practice.

5.8 Staffing

Who will serve on the various bodies proposed? The bulk of the members should not come from the present judges. They have no experience of a supreme constitution and the different approach involved in giving effect to human rights and freedoms. The existing courts also do not enjoy the required legitimacy - although some of the judges (and practising lawyers) will be quite suitable and effective in these positions. Legal academics might also be a useful pool from where to make amendments, as well as those lawyers actually involved in human rights work and organisations. This method of appointment should be legitimate. This requires involvement of the negotiating structures.

The majority of the appointees should be South Africans.

The election Tribunals shall have all the powers provided for in this code and those necessary in order to give effect to the purposes and objectives of this code.

5.9 **Further steps to be taken**

As indicated in the introductory section of section 5 it will be necessary to create mechanisms for the enforcement of this Code. Suggestions have been made in paragraphs 5.5 to 5.8 as to how this may be achieved. This committee has not drafted a complete "technical" code on this subject as this matter seems to us to fall in the jurisdiction of the Committees on the Independent Electoral Commission and the Transitional Executive Council (TEC).

We have, however, included an example of how such a Code could be formulated. This deals with the principles and main machinery only. Other aspects such as the remedies, sanctions, enforcement, execution, implementation and staffing will still have to be dealt with. Our explanatory document on the content of the code (5. 1 - 5. 8) is complete insofar as it describes all the aspects to be dealt with in the final Code. Should our assistance in the preparation of final document be required, we are prepared to comply.

We also attach a number of submissions received from parties to the negotiating process.

5.10 **Draft Code**

5.10.1 **Title: Election Code**

The Election Code is to provide for the principles to govern the democratic process of free and fair elections (for a Constituent Assembly/Legislature to be held in 1994,' and to provide for the implementation and enforcement of such a Code.

5.10.2 **Implementation of Election Principles**

The rights and freedoms enshrined in this Code shall be respected and upheld by the Executive, Legislature, Judiciary and all organs of the Government and its agencies, including the structures established in terms of the Multiparty Negotiations and where applicable to them, by all natural and legal persons and associations of persons and shall be enforceable by the Election Tribunal and Election Ombud in the manner hereinafter prescribed.

5.10.3 **Election Principles**

The elections for a Constituent Assembly/Legislature are to be democratic, free and fair.

5.10.3.1 These elections are to take place in terms of the same uniform principles and criteria to be applied in the whole of South Africa as it existed in 1910.

5.10.3.2 Participation in Elections:

- 5.10.3.2.1 Every South African national, 18 years of age, shall be entitled to be registered timeously as a voter and to participate in the elections for a Constituent Assembly/Legislature.
- 5.10.3.2.2 Every South African, ? years of age (the Committee feels that this decision should be left to the Negotiating Council), shall be entitled to stand as a candidate in these elections.
- 5.10.3.2.3 All South Africans shall have the right to participate in all peaceful political activity, free from any form of intimidation, associated with democratic, free and fair elections.
- 5.10.3.2.4 All South Africans shall have the right to cast their vote in secret and free from victimization and undue influence.
- 5.10.3.2.5 The right to vote and to stand as a candidate may be qualified by law on grounds of infirmity or on such grounds as are necessary in a democratic society.

5.10.4 Political parties

- 5.10.4.1 All South Africans have the right to form and join political parties.
- 5.10.4.2 All political parties are to be registered, subject to such requirements prescribed by law as are necessary in a democratic society.
- 5.10.4.3 Political parties and their members shall be entitled to canvass for solicit the support of voters peacefully, subject to such qualification prescribed by law as are necessary in a democratic society.

5.10.5 **Assembly**

All South Africans have the right to assemble peacefully and without arms and o have access to venues suitable for political meetings as are necessary for democratic elections.

5.10.6 **Expression**

- 5.10.6.1 All South Africans have the right to freedom of speech and expression 1 which shall include freedom of the press and of other media. For purpose of conducting democratic, free and fair elections, this right shall include the freedom to submit petitions and of peaceful demonstration.
- 5.10.6.2 Freedom of expression also requires access to such information and to the media as is required for participating in democratic, free and fair elections.
- 5.10.6.3 Freedom of the press requires the protection of the gathering information by journalists as required for the purpose of conducting democratic, free and fair elections.

5.10.7 **Movement**

All South Africans shall have the right to move freely throughout the whole of South Africa in so far as it is necessary for the purpose of conducting and participating in free and fair elections.

5.10.8 **Equality**

5.10.8.1 No person or political party should be discriminated against on the grounds of race, gender, colour, ethnic origin, religion, creed, political belief or economic or social status.

5.10.8.2 These rights and freedoms should apply equally in all regions societies of South Africa.

5.10.8.3 Special care is to be taken in order to ensure the full participation women in the elections.

5.10.9 **Restrictions**

5.10.9.1 The rights and freedoms referred to in this Code shall be subject to such reasonable qualifications and restrictions prescribed by law as are necessary for the purpose of conducting and participating in democratic, free and fair elections and are required in the interest of public order, national security, the rights of others or in relation to contempt of court and of the Election Tribunal, defamation or incitement to an offence.

5.10.9.2 Restrictions permitted under this Code shall not be used for any purpose, other than that for which they have expressly or by necessary implication been authorized.

5.10.9.3 Any law providing for regulating or restricting the rights and freedom granted by this Code shall:

- (a) be of a general nature
- (b) not negate the essential content of such a right or freedom
- (c) specify to an ascertainable extent the scope of such restriction or qualification
- (d) identify the provision in the Code on which such restriction qualification is based.

5.10.10 **Derogation**

5.10.10.1 If, during the period up to the establishment of the Interim Government of National Unity, there is a threat to the life of the South African nation justifying the declaration of a state of emergency, the State President, 1) the advice of the T E C, may by proclamation in the Government Gazette declare a state of national emergency for the duration of such emergency.

- 5.10.10.2 Such a proclamation may enact the measures necessary for the protection of the life of the nation or public safety.
- 5.10.10.3 Such measures may suspend, for the duration of the declared emergency, the operation of the provisions of this code provided that no derogation of provision 8 will be permissible.
- 5.10.10.4 Such a declaration may apply to the whole of the country or only to a part thereof.
- 5.10.11 **Supervision by the Transitional Executive Council (TEC)** (see ANC Submission, p. 22)
- 5.10.11.1 During the duration of the state of emergency the State President should report to the Transitional Executive Council (TEC) at intervals not long, than one month on the effects of the emergency measures and on the net for their continued existence.
- 5.10.11.2 The TEC shall promptly consider these reports and may revoke declaration of an emergency or restrict the area of its operation.
- 5.10.11.3 During the duration of the state of emergency the TEC may not abolished.
- 5.10.11.4 The Election Tribunal may decide on the existence of condition 1 threatening the life of the nation and its continued existence.*
* If any of the other Technical Committees propose structures to be established for the period until the adoption of a new constitution or interim constitution providing for measures and structures controlling states of emergency, this part of the code should be harmonized with such other provisions, provided they are comprehensive and effective in securing the holding of democratic, free and fair elections.
- 5.10.12 **Election Tribunal**
- 5.10.12.1 There shall be an Election Tribunal and ten Regional Election Tribunal which will be independent and which will be subject to this Code only
- 5.10.12.2 The Election Tribunal shall act as forum of final decision with respect the final implementation of this code and shall enforce the principle contained therein.
- 5.10.12.3 The Regional Election Tribunals will act as forums of first instance with respect to the implementation of this code and shall enforce the principles contained therein.
- 5.10.13 **Election Ombud**
- 5.10.13.1 There shall be an Election Ombud and ten regional offices of the Election Ombud which shall be independent en which shall be subject to this code only.

5.10.13.2 The election Ombud shall exercise all the functions conferred upon it this code.

ANNEXURE A

The following proclamations create Self-Governing territories. They provide for ethnic-based citizenship.

- (a) Lebowa: Procs R224 and R225, GG 3666 of 29 September 1972 (Reg Gaz 1762).
- (b) Gizankulu: Procs R14 and R15, GG 3772 of January 1973 (Reg Gaz 1735).
- (c) Qwaqwa: Proc R203, GG 4461 of 25 October 1974 (Reg Gaz 2060).
- (d) KwaZulu: Proc RI 1, GG 5387 of 28 January 1977 (Reg Gaz 2417) read with Pro R70 GG 3436 of the 30 March 1972 (Reg Gaz 1594).
- (e) KwaNdebele: Proc R205, GG 6661 of 14 September 1979; Proc R60 GG 7499 of 2) March 198 1; Proc RI 14, GG 9303 (RegGaz 372 1).
- (f) KaNgwane: Proc R2104 of 16 September 1977 and Proc 12 of 18 July 1986.

ANNEXURE B - GOVERNMENT GAZETTE, 19 FEBRUARY 1993

[Editor's Note: Not scanned in]

ANNEXURE C

The following parties have made submissions to the Committee and these submissions are herewith included in the report:

- * Transkei Government
- * National Peoples Party
- * United Peoples Front
- * African National Congress
- * Inkhata Freedom Party
- * Inyandza National Movement

(C) AMENDMENT OR REPEAL OF LEGISLATION IMPEDING FREE POLITICAL ACTIVITY AS WELL AS DISCRIMINATORY LEGISLATION

1. We undertake to offer the Technical Subcommittee our fullest support and co-operation.
2. You will be notified of the name of the officer from our Department of Justice who will work with you, in due course. Please notify us of the day and date on which the Technical Subcommittee will confer with him/her on this matter. Refer all enquiries to Z. Titus who can be contacted through Dr. Eloff's office. In the meantime copies of the appropriate legislation as well as a list thereof will be made. We have an updated Index covering subordinate and primary legislation introduced in Transkei after 1963. There are also a number of pre-1976 South Africa laws applicable in Transkei. Reference will also be made thereto. We are also compiling a list of the laws falling within the purview of the laws under consideration hut which have otherwise been repealed or amended. We would

welcome a comprehensive list of the laws the subcommittee has already identified in respect of the other States and homelands.

3. A practising attorney will work with the officer from the Department of Justice on this matter. We feel that someone from outside of Government will provide the team with the fair balance required in tackling a matter of this nature.
4. Finally, a circular letter will be sent to all organisations in Transkei requesting them to contribute to this exercise. This is being done in order to ensure that there will be no queries with regard to our handling of this matter.

Dr. T. Eloff
Administration
Multi-Party Negotiation Process
World Trade Centre

Technical Committee on the repeal or amendment of legislation impeding free political activity and discriminatory legislation.

The NPFs comments on the First Report of the Committee.

In addition to the repeal or the amendment of such legislation a process should commence in order to restore the rights of those who have suffered as a result of such legislation.

The Acts that repealed the Group Areas Act and The Population Registration Act should be examined.

In respect of those who have lost their properties because of Racially-Based Legislation the Government should arrange for the affected persons to either get their properties back or be provided with suitable alternative premises not at market value.

The Technical Committee also dealt with the Freedom of the Press and the question of Free access to information.

In this respect the Committee also referred (paragraph 5.4) to the actions of Government bodies and also private individuals or groups.

The Code should also deal with the rights of journalists reporting on any movement without hindrance from his/her superiors and also such rights must not be interfered with by any individual or organisation that may want to coerce journalist how to think and what to write.

A. RAJBANSI

UPF'S SUBMISSION TO THE TECHNICAL COMMITTEE ON THE AMENDMENT OR REPEAL OF DISCRIMINATORY LEGISLATION

1. LOCAL GOVERNMENT BODIES FRANCHISE ACT 117 OR 1984

There is no shred of doubt that this Act is cast in the same racial mould as the Constitution Act itself is. It is actually crystallization at local level of that which is envisaged by the constitution. For as long as this law remains on the statute book, it would not be possible for other races to participate in the local elections in such areas except those that are specifically mentioned in the Act. On the other hand the Black, Local Authorities Act is designed to deal exclusively with Blacks within their own areas. This sound very much like the American pipe-dream of 'separate but equal' philosophy.

In the kind of situation created by this Act, it would not be possible to speak of a climate where free political activity can take place. This Act puts shackles on people on racial lines. It has to go before one could create an ideal climate for free political activity. The same point still holds good in respect of the Black Local Authorities Act.

2. ELECTORAL ACT 45 OF 1979

This Act extends the rights to vote to persons who are either White, Coloured or Indian in term of section 52 of the Constitution Act (Act 110 of 1983). Free political activity presupposes that a person should have the right to vote for an candidate of his choice. With this Act firmly in place, the Black people would not have such a right. How does one then exercise his democratic right to elect the government of his own choice if the very fundamental right to vote for such a right. How does one then exercise his democratic right to elect the government of his own choice if the very fundamental right to vote for such government is denied him by legislation.

3. REFERENDUMS ACT 108 OF 1983

There is presently much talk about a referendum being held with a view to testing the views of the people of South Africa before a transition into the new South Africa. In terms of this Act only the views of Whites, Coloureds and Indians may be tested and known. Blacks cannot lawfully participate in this kind of a referendum because for purposes of this Act they do not qualify as 'voters'.

4. SOCIAL PENSIONS

The tenets of justice would dictate that there be one act dealing with the aspect of social pensions without referring to a particular class of persons or a specified population group. However our Act empowers the Minister to use a proclamation relating to a particular population. This would obviously tempt the Minister to issue proclamations designed to treat people unequally. This is the position as regards the benefits to which people belonging to different race are entitled (illegible)... and the yardstick is the colour of their skin.

These acts should be repealed.

5. PREVENTION OF ILLEGAL SQUATTING ACT 52 OF 1951

It is a notorious fact that the policy of the Government in the past has been that Blacks were sojourners in the urban areas and therefore the policy was that they would remain there for as long as they were working. As a result there was no clear and permanent arrangement for the provision of housing for blacks. Hence the problems of squatting are mostly confined to Black communities.

If the policy has now changed and it is accepted that Blacks are cities to stay, then this Act will fall into desuetude and there is no reason for its continued existence. Besides the harsh manner in which the 'squatters' were treated cannot be countenanced by any society claiming to be civilized.

6. EDUCATIONAL POLICY

A plethora of laws are in place to regulate education issues of the numerous departments of education. The problem with these laws is that they were purposely made to disadvantage other races educationally.

It has now become urgent and imperative that these discriminatory laws be removed so that all the people in this country should have the right to the same educational opportunities. There should be only one system of education. This will ensure that the same quality and the standard of education will be maintained.

7. BLACK ADMINISTRATION ACT 38 OF 1927

This Act was an ideal instrument in the hands of the Government to control the Black people in this country and their traditional institutions such as bogosi. Since the new policy is that all people should be equal in the eyes of the law, then there is no reason why there should still be acts controlling only lives of certain races. Such laws have no place in the new South Africa because they would go against the of equality.

8. SELF-GOVERNING TERRITORIES CONSTITUTION ACT (ACT 21 OF 1971)

This is undoubtedly the foundation upon which separate development is built. It is the instrument by which the Government would extend the 'vote' to the voteless and voiceless Blacks. They were to be developed into independent nations. There was no hope for most of these enclaves because they could never be economically viable -they had to be sustained financially by the Central Government in order to survive.

Reality has now dawned and it has been realised that this system cannot be sustained forever because it was prohibitively expensive to maintain.

Reality would dictate that as this law was founded on apartheid, it should go when apartheid goes.

At this stage the self-governing territories have original powers to legislate on certain scheduled matters. In those instances where the Legislative Assemblies have such powers, not even RSA parliament legislation can apply in these self-governing territories. Therefore, this piece of legislation should go so that there could be uniformity and certainty in our law.

9. **CONSTITUTION ACT 110 OF 1983**

This is the basis of the tricameral parliament which despite all opposition from Black communities, was bulldozed into existence in 1983. There were hundreds of casualties as a result of the introduction of this Act. Even to this day the effect hereof are still felt. One can hardly speak of a climate conducive to free political activity for as long as this Act remains on the statute book.

10. **CONCLUSION**

In a nutshell we are on all fours with the view expressed that all the acts referred to are discriminating on the basis of race. Some of these laws are so cruel that they dehumanised people and made them lose their self-esteem and self-respect. One need only think of the notorious migratory labour system that was designed to tear families asunder. The clear manifestations of the psychological effect that this system has had on our people is still with us.

There is no room for discriminatory laws in a new South Africa.

UNITED PEOPLE'S FRONT SUBMISSION TO THE TECHNICAL COMMITTEE ON THE AMENDMENT OR REPEAL OF DISCRIMINATORY LEGISLATION

ADDENDUM

The UPF is of the opinion that in view of the possibility that other administrations might be reluctant to disclose all discriminatory legislation operative within their jurisdictions, it would be wise if the technical committee were to invite members of the public to make representations on the legislation that in their respective opinions, inhibit free political activity within their respective areas.

This will, in the UPF's view, act to counter the possibility referred to above.

Submission by the African National Congress

To the Technical Committee on the Repeal of Discriminatory Legislation

19 May, 1993

These representations are done in line with the call by the Multiparty Negotiating Process for various political parties to make submissions to be considered by the various technical committees in order to prepare for their discussion and negotiation by the Negotiation council. Our

submissions are based on the ANC Women's League submissions to Codesa and those decisions of the Gender Advisory Committee.

A. **CONSTITUTIONAL MATTERS**

1. Constitutional Principles

- 1.1 South Africa will be a united, sovereign state in which all will enjoy a common South African citizenship.
- 1.2 South Africa will be a democratic, non-racial and non-sexist country.
- 1.3 The constitution shall be the supreme law.
- 1.4 There shall be a justiciable Bill/Charter of Fundamental Rights, which will spell out fundamental and socioeconomic rights of all citizens and how state policies will ensure their implementation.
- 1.5 There shall be separation of powers between the legislature, the executive and the judiciary with appropriate checks and balances.
- 1.6 There will be a legal system that guarantees the equality of all before the law.
- 1.7 There will be representative and accountable government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters role and, in general, proportional representation.
- 1.8 The diversity of languages, cultures and religions will be acknowledged subject to principles of equality, democracy, non-sexism and non-racialism.
- 1.9 All will enjoy universally accepted human right, freedoms and civil liberties including freedom of religion, speech and assembly which will be guaranteed by an entrenchment of a justiciable bill of fundamental rights subject to the principle of equality, democracy, non-sexism and non racialism.
- 1.10 The government shall be structured at national, regional and local level.
At each level there shall be democratic representation.
- 1.11 The Bill of Rights shall guarantee just property rights (Provided that legislation shall in the public interest, authorise expropriation against payment of reasonable compensation which shall, in the event of a dispute, be determined by a court of law).
- 1.12 The constitution shall define a suitable role for traditional leaders consistent with the objectives of a united, non-racial, non-sexist and democratic South Africa.

Other issues to be looked at:

- * Notion of the family
- * regressing historical racial and gender imbalances
- * charter for women's rights, to form part of the Bill of Fundamental Rights, which among other things will deal with abortion, privacy, the family, women and child protection, diverse cultural practices, etc.
- * the right of the disabled people

2. **Constituent Assembly/Constitution making Body**

- 2.1 This must be a democratically elected body.

- 2.2 When drawing up electoral procedures, methods should be sought to encourage full participation of women. This should apply to both encouraging women to exercise their political rights to campaign and stand for elections and to vote. These provisions would include, among others, education programmes, elimination of sexual harassment, drawing up of electoral lists and giving women exposure in the media.
- 2.3 All parties should include a proportion of women in their electoral lists. It is essential that women are evenly distributed within the lists, to ensure their inclusion in the elected body.
- 2.4 Among the subcommittees to be formed there should be a gender sub-committee to monitor and raise gender issues in the drafting of the constitution and bill of rights.

B. TRANSITIONAL EXECUTIVE COUNCIL AND ITS SUB-COUNCILS AND COMMISSIONS

1. Women should be included in the TEC and its sub-councils in addition there should be a gender commission, This will be in pursuant of the principles of a non-racial, democratic and non-sexist South Africa. We recognise that the noble ideal of a non-sexist state will not be realised if the TEC stage of the transition does not have women represented in all structures as an appropriate structure to level the playing fields with regard to gender. The establishment of a gender commission will enhance women's participation in ail the transitional structures.

1.1 Status of the gender commission

* it should be an independent commission of a specialised nature, enjoying the same status as the other TEC Commission.

1.2 Composition of the commission

* It should be composed of 7(seven) to 11 (eleven) gender specialists

1.3 Functions/Powers of the Gender Commission

* It should ensure gender sensitisation of the TEC and its Sub-council

* It should scrutinise all recommendations from the sub-councils and come up with gender perspective of these.

* It shall also make an input into legislation pertaining to the reform and repeal of law and administrative procedures that impinge on the rights of women,

1.3 Relations with other transitional structures

a. Independent Electoral Commission: One of the tasks of the IEC would be to set out rules that would enable maximum participation in the first non-racial election We believe that such rules should ensure that women participate effectively elections. Special procedures

will have to be drawn so as to realise this goal. The commission will be in the best position of defining enabling legislation for women's maximum participation.

The following are examples of these functions. There is the need to be sensitive to women's situations such as the double burden of women which is employment and family management. Accordingly, electoral procedures should conform to the times when women are most available. Another is that of general illiteracy amongst women. Voter education should be tailored to suit women too. There are current indications that women under tribal authorities, in the farms and those in domestic service are denied the right to organise meetings or to attend meetings. The probability is that intimidation would increase during elections. There is therefore the need for educational material to be produced informing the populace and women on rights to vote. There is also need to repeal by-laws which restrict access to farm workers. Educational material directed to chiefs and employees should be produced.

- b. Media: currently there is a move towards setting up a media board. The drafting of guidelines for fair usage of the electronic media during the transitional period dominates the media discourse. The gender commission will make appropriate recommendations in this regard. The media personnel as relating to the board should include women. The commission will also define in terms of the gender perspective what fair coverage implies. These factors should apply to the print media as well.

REPEAL OF GENDER DISCRIMINATORY LEGISLATION

In its report to CODESA 2 the Gender Advisory Committee called for the "repeal of all legislation in South Africa and the TBVC states which discriminates on the basis of race, creed, or gender which circumscribe and impede free political, economic and social activity." It suggested that "this be attended to by a generic law asserting certain basic civil and political rights, combined with an omnibus law repealing all legislation in accordance with a schedule of Acts to be provided."

ANC Submission : "Technical Committee on The Repeal of Discriminatory Legislation 19 May

The identification of such legislation is obviously a very involved task which might take a long time. It also has a danger of leaving some laws and thus not being able to repeal them. It will seem a practical way of dealing with this will be to enact an omnibus which will automatically outlaw all discriminatory legislation which will impede political activity and to set up an enforcement mechanism which will be accessible to citizens without going through long court procedures.

C. LAW REFORM FOR THE FREE AND FAIR PARTICIPATION OF WOMEN CITIZENSHIP:

- 1. The South African Citizenship Act of 1949 contains many clauses which are discriminatory to women. It also includes clauses which may prove a problem to returning exiles and their families. This memorandum will only focus on gender implications of the act. Some of the discriminatory consequences of the clauses relate to the law of domicile and the fact that the

wife has always followed the domicile of her husband. These will doubtless be removed once 1992 Domicile Act is proclaimed.

The following commentary on the act must be read with the act.

- 1.1 Section one deals with definitions. This requires amendment in the following manner:
 - 1.1.1 the definition of "father" should be rendered redundant; a
 - 1.1.2 the definition of "responsible parent" must apply equally
- 1.2 Citizenship by Birth: persons born in SA before 1949 (section 2) Section appears to protect the position of married women in this section.
- 1.3 Citizenship by Birth: Persons born outside of SA who qualify for citizenship by birth (section 4(1)(b)) This section only confers the status of citizenship by birth on children of SA fathers working outside SA. This must be amended to include the children of SA mothers working outside SA.
- 1.4 Citizenship by descent - Persons born outside SA before 1949 This generally only allows for citizenship through the male line and must be amended.
- 1.5 Citizenship by descent - persons born outside SA after 1949 (section 6) Section 6 (1)(a) has different requirements according to whether the mother or father is a SA citizen. This distinction should be removed.
- 1.6 Citizenship by Naturalisation (section 10)
 - 1.6.1 Section 10(2) makes allowances for the wives to qualify permanent residence outside of the country in certain circumstances, but not for husbands. In other words the spouse of a man receives benefits that are denied the spouse of a woman.
 - 1.6.2 Section 10(4) requires application by a "responsible parent or "guardian". These are overwhelmingly fathers and not mothers. Thus women will generally not be able to apply behalf of their children.
 - 1.6.3 Section 10(4) bis only applies to the male line.
 - 1.6.4 Section 10(6) provides special dispensations for wives and widows of SA citizens, but not for husbands and widowers
- 1.7 Permanent-residence and ordinary residence

These are important requirements for the acquisition of citizenship by naturalisation. One has to be lawfully admitted for the purpose permanent residence, and to be ordinarily resident and physically reside for certain periods before qualifying for citizenship by naturalisation. This means that any discrimination in that acquisition of permanent and

ordinary residence has to be considered. These are discussed in respect of the Aliens Act no 1 of 12U below.

- 1.8 Problems of Proof Insofar as many people do not have papers of any kind proof of birth, marriage and residence will be difficult.
2. The Aliens Act no 1 of 1937
 - 2.1 Section 4 sets out the requirements for permanent residence. The following provision discriminates against women:
 - 2.1.1 Section 4(3)(e) allows the wife, children and dependants of a qualified man to qualify for permanent residence; but does not extend the same benefits to the husband, children and dependants of a qualified woman.
 - 2.2 Section 1 2 sets out the exceptions to the section 2 requirement of permanent residence permits. Insofar as section 12 (1)(a) bases an exception on the acquisition of a lawful domicile prior to 1937, this may discriminate against married women who follow the domicile of their husband.
3. The Restoration of South African Citizenship Act no 73 of 1986 provides for the restoration of SA citizenship to TBVC citizens. Insofar as this depends on actual application and residence qualifications, many people may be discriminate against. Careful attention should be paid to the position of all TBVC residents

4. **SECURITY OF EMPLOYMENT FOR PUBLIC SERVANTS**

A. TEACHERS:

- 1 Women teachers are subjected to gender discrimination in the law and in the practices of the teaching profession. Legal discrimination against women (organised on a racial basis) means that they receive few or no maternity rights and different pension, medical aid and housing subsidy benefits. The forms of indirect discrimination include unequal pay, unequal division of labour, gender teacher training, sexual harassment and the allocation of "feminine" tasks with schools such as "pouring the tea".
2. Teachers are presently excluded from the Labour Relations Act and from the current initiative to draw up a Public Service Labour Relations Act. Teachers accordingly have no rights of freedom of association, collective bargaining and dispute resolution. Teachers in state schools have no recourse to the courts (civil or labour) in respect of "unfair labour practices".
3. In relation to job security, the rights of a woman to retain her permanent status as a teacher after marriage is not always guaranteed. If an unmarried woman falls pregnant, this is

regarded as "misconduct" and she is dismissed. Teacher generally are also restricted in their political participation:

- 3.1 The Indians Education Act and Coloured Persons Education Act describe the following as "misconduct" which can lead to a disciplinary hearing: I a teacher "makes use of his position in the department to promote or to prejudice the interests of any political party, o presides or speaks at any public or political meeting, or draws up or publishes o causes to be published, any writing or delivers a public speech to promote or t prejudice the interests of any political party" (S16(ga) in both acts).
- 3.2 The Education Affairs Act (House of Assembly) sets out the position on civil and political rights of teachers in section 96 of the act. It allows a teacher to be a member of and in the management of a political party but states that he or she may not act politically in a manner which "may embarrass the department", act as a chairperson of a public meeting, publish in his or her name a document to further or prejudice a political party or use his or her position as a teacher to promote a political party.
- 3.3 Regulation 15 of the 1981 regulations in terms of the Education and Training Act provide that a teacher cannot use his or her position to promote the interests of a political party organisation; publish a paper or express him or herself in the press or in a public meeting on political matters. A teacher also not circulate documents relating to elections work in respect of an election in a school, on school premises or at school function.

B. **POLICE:**

The Police Act does not appear to contain any discrimination in respect of job security. If there is such discrimination, it is likely to be found in the regulation made in terms of the act. I was unable to track these down due to time restraint

There are restrictions on the political involvement of the police but they a appropriate to the role of the police.

C. **PUBLIC SERVICE:**

There is no overt discrimination in the Public Service Act in respect of politic freedom and job security. It may well be present in the regulations and practice of the public service.

The restrictions on political involvement appear to be appropriate to the role an position of public servants.

D. **NURSES:**

The situation of male and female nurses has also to be looked at. The Nurses Ac restrict them from political participation and are not covered by the Labour Relations Act.

- E. **DOMESTIC AND FARMWORKERS:** There is need to focus on these two groups whose political participation is restricted by, by-laws and other measures.

CITIZENSHIP:

5. **TBVC citizenship: do women have lesser rights of citizenship) than men?**

In each case citizenship of the particular "independent state" is governed by the constitution" act and a citizenship act.

- 5.1 **Bophuthatswana:** The Bophuthatswana Constitution act provides for citizenship as follows (sec. 80):

2.1.1 All Batswana defined by an act of parliament

2.1.2 All persons Legally domiciled for at least 5 years (this was automatic until 1978 when application had to be made). This is a problem in so far as women follow the domicile of their husband

2.1.3 Anyone else who applies and is accepted as a citizen

The Bop Citizenship Act is discriminatory. Persons born outside of Bop can only qualify for citizenship, through the male line. This affects citizenship by birth and descent...The provisions regulating the acquisition of citizenship by registration or naturalisation grant greater rights and privileges to men and the dependants of men.

5.2 **Ciskei:** The Ciskei Constitution act states that citizenship shall be obtain by birth, descent and naturalisation on such conditions as may determined by an act of parliament. The Ciskei Citizenship Act grants citizenship to persons born outside of the Ciskei only through the male line. The provisions regulating the acquisition of citizenship by registration or naturalisation grant greater rights a privileges to men and their dependants of men.

5.3 **Venda:** The Venda Constitution Act regulates citizenship and appears t allow citizenship to following either parent. The only discriminatory rule appears to apply to citizenship by registration/naturalisation which is dependent on 5 years domicile.

5.4 **Transkei:** I have been unable to track down the Transkei Constitution an Citizenship Act. It is probable that gender discrimination occurs in a similar manner to the other independent states.

INKATHA FREEDOM PARTY

MULTIPARTY NEGOTIATION PROCESS

TECHNICAL SUBCOMMITTEE #6 ON THE AMENDMENT OR REPEAL OF LEGISLATION IMPEDING FREE POLITICAL ACTIVITY AND DISCRIMINATORY LEGISLATION

FIRST POSITION PAPER OF THE INKATHA FREEDOM PARTY

WORLD TRADE CENTRE : 18 MAY 1993

All legislation impeding free political activity and discriminatory legislation should be amended or repealed immediately. This exercise needs to be preceded by the determination of applicable reference concepts. In fact this exercise amounts to a comparison between existing legislation and given concepts of political freedom and lack of discrimination. The preliminary threshold issue of what is discrimination and what is political freedom needs to be resolved. The IFP proposes that the Technical Sub-Committee reviews the existing legislation against the parameters of the Bill of Rights set forth in the Constitution of the State of KwaZulu/Natal and recommends the repeal of all the legislation which would not allow the free exercise of any of the rights set forth in such a constitution.

Special attention should be given to those rights and considerations which are immediately related to the political presence of segments of society in the political process leading to elections and therefore special attention should be given to the right-of the victims of apartheid, women, the disabled and other groups which require special protection.

The IFP fear that any possible listing of legislation which carries with itself the potential for discrimination any impairment of free political activity would not be either exhaustive nor comprehensive. Therefore, rather than listing specific segments of legislation which ought to be repelled, the IFP finds it more appropriate to suggest the modus operandi of this technical sub-committee so as to ensure that this technical sub-committee will be able to identify any relevant piece of legislation to be amended or repelled.

Once this technical sub-committee has agreed on the reference parameter to be used to determine-what needs to be amended or repelled -- which we suggest to the Constitution of the State of KwaZulu/Natal-- it would be advisable that this technical sub-committee opens its door to receive the grievances of s and cultural formations throughout South Africa.

In fact, the type of work that the committee is going undertake is substantially no different to a process constitutional adjudication. In this respect it might be u that the sub-committee forward a request letter to the judicial authorities of South Africa, requesting them to indicate legislation would appear to be discriminatory or otherwise in compliance with the preagreed parameter with relation to of controversy before them. The sub-committee should also itself to the direct access of social and cultural formation itself to the direct access of social and cultural formation the country.

This exercise would be valuable to set the initial parameters a future constitutional jurisprudence of a new South Africa. this respect it would be advisable that this committee motive all its

recommendations on the basis of explicit constitutional principles rooted in acceptable and recognised principle modern constitutionalism and human right protection.