

REPORT : SPECIAL MEETING OF THE TECHNICAL COMMITTEES ON THE REPEAL OF DISCRIMINATORY LEGISLATION, FUNDAMENTAL RIGHTS, THE I.E.C., THE T.E.C. AND CONSTITUTIONAL PRINCIPLES.

10 August 1993

1. AGENDA

This special meeting had to consider a document prepared by the convenors of the Technical Committee on the Repeal of Discriminatory Legislation and Free and Fair Elections. It dealt with proposals on how to ensure free and fair participation in the election process.

(Copy of this document attached. Note the background as explained in the "Assignment" paragraph).

2. CHAIR

Mr. S.S. van der Merwe

3. RECOMMENDATIONS

After general discussion, questions and clarification, the following recommendations, based on the proposals made in the document under discussion (paragraph 4), were adopted.

- 3.1 It was recommended that the status quo was not acceptable. (Free and fair elections will not be possible if nothing is done and the legislative and executive conditions remain as they are at present.)
- 3.2 It was recommended not to pursue the possibility of a comprehensive, justiciable bill of rights being adopted in the immediate future.
- 3.3 It was recommended that an Independent Election Commission with political powers only, will not suffice. (Although such a Commission is necessary and should form part of the general election structures, additional mechanisms and remedies are to be provided for in order to achieve free and fair elections.)
- 3.4 It was recommended that the repeal of discriminatory legislation should be continued with. Some kind of body should have the task to identify discriminatory legislation. Another "functionary" or entity should then issue proclamations repealing or amending such laws. It was also necessary that in the meantime the legislative bodies of the [Editor's note: two illegible words] in the NC would take the initiative in repealing offensive legislation. (This possibility did not appear in the document under discussion. It was added by the chair as a result of discussion from the floor. The relevance of such a

process for free and fair elections was queried by some; especially since it will deal with all discriminatory laws. The principle was eventually accepted. No machinery was identified and no specific tasks formulated.)

- 3.5 It was recommended that a higher law be adopted in order to protect election rights only. It will have to be enforced by a special judicial mechanism which is to form part of the structures of the IEC. The proposal contained in option 5 of the discussion document, i.e. the appointment of serving judges in a special election court/chamber to be appointed by two assessors, was generally supported. This higher law will be drafted by the Technical Committee on the IEC and the Technical Committee on Fundamental Rights. It will be included in the legislation for an IEC and will be referred to the Negotiating Council. This legislation (covering all aspects of the IEC) should be implemented as soon as possible.

JOHN DUGARD

1. IEC receive report from FHR on electoral rights ("Higher Code").
2. IEC - adjudication wing. IEC to consider tribunals, etc. (currently busy with this).
3. Recommendation that political parties repeal legislation identified.
4. Ongoing commission - no consensus.

THESE MINUTES ARE CONFIDENTIAL AND RESTRICTED TO MEMBERS OF THE TECHNICAL COMMITTEES ON THE INDEPENDENT ELECTORAL COMMISSION, FUNDAMENTAL RIGHTS DURING THE TRANSITION, CONSTITUTIONAL AFFAIRS, THE TRANSITIONAL EXECUTIVE COUNCIL, THE REPEAL OF DISCRIMINATORY LEGISLATION, MEMBERS OF THE SUB-COMMITTEE, THE PLANNING COMMITTEE AND THE NEGOTIATING COMMITTEE.

MINUTES OF THE MEETING OF THE TECHNICAL COMMITTEES ON THE IEC, FUNDAMENTAL RIGHTS DURING THE TRANSITION, THE TEC, THE REPEAL OF DISCRIMINATORY LEGISLATION AND CONSTITUTIONAL AFFAIRS HELD AT 12h30 ON TUESDAY 10 AUGUST AT THE WORLD TRADE CENTRE.

Present:	H. Corder	(T.C. Fundamental Rights)
	L. du Plessis	(T.C. Fundamental Rights)
	J.D. de Bruyn	(T.C. Rep. Discrim. Legl.)
	J.C. Heunis	(T.C. TEC)
	Z.M. Yacoob	(T.C. Fundamental Rights)
	G.H. Grove	(T.C. Fundamental Rights)
	F. Venter	(T.C. Constitution)
	M.J. Erasmus	(T.C. Rep. Discrim. Legl.)
	J. Dugard	(T.C. Rep. Discrim. Legl.)
	S.K. Ndlovu	(T.C. IEC)
	H.R. Laubscher	(T.C. IEC)
	F. Ginwala	(T.C. IEC)
	R. Rosenthal	(T.C. IEC)
	G. Devenish	(T.C. Constitution)
	D. Moseneke	(T.C. Constitution)
	A. Chaskalson	(T.C. Constitution)
	W.H. Olivier	(T.C. Constitution)
	B.M. Ngoepe	(T.C. Constitution)
	M. Olivier	(T.C. Constitution)
	S. Nene	(T.C. Fundamental Rights)
	K. Moroka	(T.C. Rep. Discrim. Legl.)
	P. Langa	(T.C. Rep. Discrim. Legl.)
	D. Davis	(T.C. IEC)
	F. van der Merwe	(Sub-Committee) (Chair)
	M. Maharaj	(Sub-Committee)
	M. Emmett	(Minutes)

1. Welcome and Introduction

- 1.1 Mr Van der Merwe welcomed those present
- 1.2 It was noted that the purpose of the meeting was to discuss the recommendations presented in the report prepared by Professors Dugard and Erasmus entitled: **The Effect of Discriminatory Legislation on Democratic, Free and Fair Elections** (Addendum A)
- 1.3 It was noted that members were disconcerted by the fact that the time of the meeting had been changed at short notice and by the apparent general lack of concern for the work loads and time constraints experienced by members of Technical Committee.
- 1.4 Professor Erasmus was appointed rapporteur for the meeting.

2. Presentation of the Report

- 2.1 **Option One: Do nothing. Keep the present position. (Ref. Item 4.1 of the discussion document.)**

2.2. **Option Two: Introduce an interim Bill of Rights incorporating rights relating to the electoral process. (Ref. Item 4.2 of the discussion document)**

The problems identified if this option is preferred pertain to features of an interim Bill of Rights. It was considered that it might be more feasible to establish an electoral code or mini Bill of Rights to deal with rights affecting participation in elections alone.

It was also emphasised that an interim Bill of Rights could give rise to litigation unrelated to elections and the issue of whether or not it is desirable to allow the courts to be engaged in litigation unrelated to the electoral process would need to be given attention.

2.3 **Option Three: An Independent election commission with political structures. (Ref. Item 4.3 of the discussion document)**

This option relates to political protection and it is questionable whether political remedies will be sufficient.

2.4 **Option Four: A “mini Bill of Rights” that protects elections only - enforced by a new special tribunal (Ref. Items 4.4 in the discussion document)**

2.5 **Option Five: A “mini Bill of Rights” that protects election rights only enforced by the existing courts and enforcement agencies only with necessary modifications. (Ref. Item 4.5 of the discussion document)**

Professor Dugard explained that Option Five deals with elections only. Courts monitoring the implementation of the Bill would not be responsible for dealing with cases, for example, to do with freedom of expression unrelated to elections.

The “mini-bill” would operate both vertically and horizontally. The issue of which bodies would enforce such a bill of rights (with reference to Options Four and Five) would have to be given consideration. It was proposed that special courts be established in all SPR's. In addition a law enforcement mechanism would be required to ensure that decisions were carried out.

In terms of Option Five, the Chief Justice would select judges from each of the local or provincial judicial divisions and the Negotiating Council would compile a list of assessors. The “mini Bill” would be enforced by existing structures such as the police. The disadvantage of this Option is that existing courts lack legitimacy.

5. **General Discussion**

In the discussion which followed the presentation of the report a number of suggestions, concerns and questions of clarification were raised:

- 3.1 The Option of a special electoral force is practical for a number of reasons. The question of the incorporation of the TBVC states is complicated. In addition a Bill of Rights calls for formal proceedings which are not quick enough for elections.

Special election courts with special rules of procedure and practice are needed.

3.1 The Technical Committee on Fundamental Rights During the Transition had adopted a unanimous position with regard to the Options presented. Option Five was favoured in terms of enforcement but the substance of the code was of concern. It would be confusing to have one chapter on fundamental rights and a separate chapter on election rights. The Committee had isolated a list of rights which would pertain to the electoral process, subject to Section 28 on general limitations. A general limitation in the spirit of Section 28 of the Report containing additional restrictions pertaining to electoral rights would be incorporated. (**Ref. Page 3-4 of the Seventh Report of the Technical Committee on Fundamental Rights**): Paragraphs 9, 10, 11, 12, 14, 15, 16, 18. These clauses relate to:

- * Freedom of Expression
- * Assembly, Demonstration and Petition
- * Freedom of Association
- * Freedom of Movement
- * Citizens Rights
- * Political Rights
- * Access to Court
- * Administrative Decisions

Most rights contained in the group of protected rights applied vertically and it was emphasised that they would have to apply horizontally as well.

With regard to discriminatory legislation the Committee proposed that a special commission be set up to examine the statutory process and give advice.

3.3 A specific electoral code with both affirmative and negative dimensions, enforceable against parties and organisations which would function as an adjudication mechanism was being proposed by the Technical Committee on the Independent Electoral Commission. The IEC's brief is to draw parties and candidates into a commitment which is enforceable by special tribunals constituted as part of an adjudication directorate.

3.4 The transitional constitution will take up to the day of the election and there is no overlap. With regard to the issue of overlapping it is essential to cut out areas as clearly as possible for participating parties.

3.5 The "Higher Code" proposed by the Technical Committee on the Repeal of Discriminatory Legislation would have both horizontal and vertical application and would cease to exist immediately after elections.

3.6 To ensure the levelling of the playing fields a game with specific rules and a legitimate referee is demanded. Offending legislation should be removed to ensure democratic, free and fair elections.

Whether the choice is for a fundamental rights regime prior to the implementation of a new constitution or offending legislation is repealed how will the problem of violence

be addressed and how can the implementation of democratic laws be ensured? Will a "mini Bill of Rights" be effective when the problem is the day to day activity of electoral campaigning? Offending laws have to be identified and removed to clear the path.

- 3.7 The Technical Committee on the Transitional Executive Council (TEC) perceives the TEC's objective as the promotion of conditions for free and fair elections and for that reason it is proposed that the TEC has wide-ranging powers. Have these powers been taken into account, with specific reference to the proposed electoral code?
- 3.8 The Technical Committee on the Repeal of Discriminatory Legislation held discussions with the Technical Committee on the TEC on the instruction of the Negotiating Council and as a result was of the impression that the TEC would be the over-arching political structure and the TEC would have links to the TEC structures. However, judicial as well as political remedies are needed.
- 3.9 The problem of identifying discriminatory legislation is that the TBVC states claim in many instances that their legislation is not repressive. The same applies to the self-governing territories. The identification of repressive legislation has much broader implications. For example, there are repressive municipal by-laws. Elections are due in April next year and it is not feasible to identify all repressive legislation before the proposed election date.

In addition, certain rights, e.g. property rights, are controversial and it will take time for these to be debated in the Negotiating Council.

- 3.10 The theoretical distinction between political and judicial functions is not helpful. Are the TEC's powers and functions adequate?
- 3.11 The Technical Committee on the Repeal of Discriminatory Legislation proposed a tribunal with the power to strike down a law if it interfered with the electoral process. There would also be the right of speedy appeal.

The Committee was under the impression that all laws governing self-governing territories were by their nature discriminatory. In a submission one of the self-governing territories claimed that they had no discriminatory laws. A self-governing territory cannot be expected to repeal its own foundations. However, a court could have the power to repeal laws.

- 3.12 The nature of the remedy is in essence administrative. What is needed is a restraining and directive order, e.g. regarding access to town halls. That is not the business of a judicial tribunal. What is needed is an authority to make recommendations which are restraining and directive and which can intervene. The Independent Electoral Commission could perform this function.
- 3.13 It may be possible to formulate a code in a way which makes clear that the code is geared to elections. If there is a suspension law it could become the last statute to take precedence over all other statutes.

- 3.14 Option Five is favoured with one qualification: the formulations in a "mini code: correspond as closely as possible to a Bill of Rights so as not to confuse issues as far as jurisprudence is concerned. Whether remedies are administrative or not a tribunal could deal with questions to do with the striking down of laws.
- 3.15 It is important to distinguish between discriminatory legislation, a code of conduct for elections and a Bill of Rights. The issue of whether or not to have a Bill of Rights is political but it is agreed then it must dovetail with a code of conduct.
- 3.16 An electoral code of conduct would bind political parties to behave in a particular way. Only a small selection of clauses dealing specifically with elections would be required. A justiciable code dealing with elections needs to be established. This task cannot be performed administratively.
- 3.17 A proliferation of structures should be avoided. If the powers of the TEC and the IEC are not adequate then the Electoral Act should be geared to deal with this.
- 3.18 An ongoing watchdog commission which can recommend repeal by proclamation is recommended. Perhaps this could be supervised by the Negotiating Council. Alternatively some body with the power to repeal or amend legislation should be tasked to identify offending legislation on an ongoing basis.
- 3.19 Options Four and Five are needed to deal with levelling the playing fields and for electoral purposes.
- 3.20 It would not be expeditious to create a situation where endless legislation is referred to a tribunal for assessment.
- 3.21 Should the IEC be given the power to suspend legislation?
- 3.22 The ad-hoc striking down of laws is problematic/capricious. There would have to be a procedure for examination either by the IEC or by way of a political decision by the TEC.
- 3.23 A tentative proposal is for a body to investigate and scrutinize legislation and make recommendations. This would probably need to be the IEC or the TEC.
- 3.24 What is needed is a code of conduct not a bill of rights and this should be grafted onto the IEC or the TEC. There should be no attempt to legitimize existing judicial structures.
- 3.25 A "mini Bill of Rights" or a complete one cannot be introduced and adjudicated upon before the new constitution. In principle there is no distinction between a short or a long bill of rights. Implementation in the constitution beforehand is the issue.
- 3.26 The problem is the effect of immediate implementation and of being thrown into a legal system with no legitimacy. The functions of the IEC are fundamentally a matter of politics. The Option (Five) of looking at narrowly defined rights essential to free

and fair elections and judicial authority as proposed in this option is the most feasible option..

3.27 It would be a mistake to set up a whole set of new tribunals. One tribunal should be charged with a number of responsibilities.

3.28 The two proposals are a "Higher Law" for levelling the playing fields and an electoral code.

4. Recommendations

The following recommendations were agreed to:

4.1 The Technical Committee on the Independent Electoral Commission will draft a "code" dealing with the freedom of the individual to participate in the elections (as opposed to a code for political parties). Towards this end they will receive an input from the Technical Committee on Fundamental Rights During the Transition.

4.2 The Technical Committee on the Independent Electoral Commission will continue its work on developing the adjudication functions of the Commission which include examination of the need for a tribunal to adjudicate a code as proposed in 4.1.

4.3 Participating parties should be called upon to repeal offensive legislation identified.

4.4 A recommendation that a commission or body be charged with the identifying of legislation offending against free political participation on an ongoing basis, and that the identified legislation could then be repealed or amended by proclamation was agreed upon but not supported by all members.

5. Closure

The meeting closed at 14H40.

ADDENDUM A

REPORT BY THE TECHNICAL COMMITTEE ON THE REPEAL OF DISCRIMINATORY LEGISLATION TO THE SUB-COMMITTEE : 2 AUGUST 1993

THE EFFECT OF DISCRIMINATORY LEGISLATION ON DEMOCRATIC, FREE AND FAIR ELECTIONS

1. ASSIGNMENT

How to reconcile the proposals of the Technical Committees on Fundamental Rights, the Independent Electoral Commission, Repeal of Discriminatory Legislation and Constitutional Issues with respect to the structures to be established for the period of the election campaign preceding the April 1994 elections.

The following outline is submitted by the convenors of the Committee on the Repeal of Discriminatory Legislation., It is done in response to a request by the Planning Committee after a meeting on Monday, 2 August 1993.

2. ASSUMPTIONS

- 2.1 Elections are essential for a peaceful transition to a new dispensation.
- 2.2 Everything possible should be done to ensure acceptance of the election results. (Angola's spectre to be avoided).
- 2.3 A large number of laws empower executive and other action which can hamper free and fair participation in the electoral process. (Private action could have the same effect).
- 2.4 These laws cannot all be identified and repealed in time for the electoral process to take place.
- 2.5 A comprehensive electoral structure is needed to ensure democratic, free and fair elections. This will be provided through the IEC.
- 2.6 Rules and enforcement machinery are necessary. This will address different needs such as :
 - 2.6.1 The problem of violence
 - 2.6.2 A code for political parties. (Being drafted by the TEC).
 - 2.6.3 An Electoral Act. (Being drafted by IEC).
 - 2.6.4 Rules ensuring democratic, free and fair political activity for individuals and parties. This is the concern of the present submission.
- 2.7 Effective, legitimate and visible sanctions and protection are required.

3. PROPOSAL

Five possible approaches on how to deal with the need identified in 2.6.4 are hereinafter discussed. If a final choice can be made in the immediate future, legislation can be adopted and the chosen mechanism be implemented in time.

4. FIVE POSSIBILITIES

- 4.1 Do nothing. Keep the present position.
- 4.2 A comprehensive bill of rights to be implemented soon (September 1993?)

- 4.3 An independent election commission with political structures.
- 4.4 A "mini Bill of Rights" that protects election rights only - enforced by a new special tribunal.
- 4.5 A "mini Bill of Rights" that protects election rights only enforced by the existing courts and enforcement agencies with necessary modifications.

5. OPTION ONE

Not to be considered. Existing law is inadequate and the structures illegitimate. Will not produce free and fair elections. Risks too high.

6. OPTION TWO

* It will be difficult to obtain political agreement before September on the rights not relating to the elections. The controversial aspects preventing agreement on a bill of rights now relate to matters not affecting election rights. These rights included in a comprehensive Bill of Rights that would not be included in a "mini Bill of Rights" (options 4 and 5) and that have or will give rise to prolonged debate in the programming council are :

- * Affirmative action : Article 2(3)
- * Right to life (does this abolish the death penalty?) : Article 3
- * Economic activity : Article 21
- * Labour relations : Article 22
- * Property : Article 23
- * Environment : Article 24
- * Children : Article 25
- * Education : Article 27

(ten other controversial clauses that would not be included in a mini Bill of Rights are Articles 4, 5, 6, 7, 8, 13).

It will be much easier to obtain speedy political approval for a Bill of Rights that excludes such rights and which limits itself to election rights.

- * A comprehensive Bill of Rights in place during the election period will give rise to immediate challenges to law and administrative practices unrelated to the elections. Consequently at the very time that the judicial system should be available to hear election complaints it will be occupied with complaints brought by individuals and groups on matters unrelated to the elections.
- * Similar complaints have been raised against the Bill of Rights proposed by the Technical Committee. The proposed Bill of Rights will also be considered by the judiciary, professional law groups, etc., if it is to enjoy credibility. This will take considerable time. It is unrealistic to expect a comprehensive Bill of Rights to be prepared in a short time.

7. OPTION THREE

Political Protection through an Independent Election Commission.

7.1 Advantages

- * Can be linked to the new political umbrella provided by the IEC and TEC.
- * High profile
- * International participation

7.2 Disadvantages

- * Are political remedies really sufficient?
- * Political remedies in the present atmosphere will be based on compromises reflecting wide ranging views. Will be watered down.
- * Could take long to work out.
- * What sanctions to be adopted if compliance and acceptance do not follow?
- * Typical judicial remedies are the proven, final remedies when infringements of human rights (including those pertaining to elections) occur.

8. OPTION FOUR AND OPTION FIVE

Mini Bill of Rights that Protects Election Rights Only

Options four and five both envisage a limited Bill of Rights that protects only those rights relating to the elections. It will therefore protect equality and the freedom of speech, expression, assembly, association, demonstration, movement, political rights and access to information but only insofar as they relate to the elections. A mini Bill will:

- (a) Declare the basic rights referred to above.
- (b) Contain a clause to the effect that the courts supervising this Bill will only have jurisdiction to adjudicate on such rights if they affect the election.

For Example:

- (1) A court would consider a complaint to enforce freedom of speech if someone was prevented from addressing an election rally. But it would not entertain a complaint that the banning of a magazine portraying explicit oral sex violated the right to freedom of speech.
- (2) A court would consider a complaint under the equality clause that a woman had been denied the right to address a political meeting on the ground that only men might address such a meeting. But it would not entertain a complaint that a woman had been discriminated against in her employment on grounds unrelated to the elections.

A mini Bill will operate both vertically and horizontally. It will be possible to enforce it against all state agencies and against private individuals or groups that seek to deny election rights. It will therefore, for example, be enforceable against -

- * the Johannesburg City Council if it denies party A the right to demonstrate in the streets, but permits party B to exercise such a right;
- * a farmer who prohibits his farm workers from attending a political meeting;
- * a man who prohibits his wife and daughters from voting.

8.1 OPTION FOUR envisages that a mini Bill will be enforced by -

- * special courts presided over by "judges" who are not currently serving as judges or magistrates;
- * specially appointed law enforcement officers not attached to the present court structures of security forces.

8.1.1 Advantage

The problem of legitimacy will be overcome.

8.1.2. Disadvantage

It will be very difficult to establish special structures of this kind to serve the whole of South Africa (including the TBVC States).

8.2 OPTION FIVE envisages that the mini Bill will be enforced by the existing courts as modified.

It is proposed that the Chief Justice be empowered to establish a special panel of judges for each region drawn from the existing judiciary. Such a panel would serve on a special election court. A single judge assisted by two assessors would hear complaints. The list of potential assessors would be compiled by the Negotiating Council. Such assessors could be, but need not be, lawyers. Decisions of such a court would be enforced by the existing structures (deputy sheriff, police) assisted by representatives of the Peace Secretariat.

Example

A trader in Pietersberg tells his staff that if they vote in the elections he will dismiss them. A staff member may appeal to a special election court attached to the Transvaal Provincial Division. The court will be presided over by Judge X, appointed by the Chief Justice to serve on a panel of judges to hear such complaints. Judge X will be assisted by two assessors drawn by lot from a panel of assessors appointed by the Negotiating Council. The three person court decides by majority vote (that is, the judge may be overruled by the two assessors). If the court rules against the trader he

will be advised to withdraw his threat. If he refuses he may be arrested for contempt of court.

8.2.1 Advantages

- * More practical than option four.
- * The modification to the existing structures go some way towards overcoming problem of illegitimacy
- * No new enforcement machinery necessary.

8.2.2 Disadvantage

Some use is made of the existing structures seen to be illegitimate in some quarters.

REPORT OF SUB-COMMITTEE TO THE PLANNING COMMITTEE ON: THE "HIGHER CODE" PROPOSED BY THE TECHNICAL COMMITTEE ON THE REPEAL OF DISCRIMINATORY LEGISLATION, ON THE IMPLEMENTATION OF A BILL OF RIGHTS AT AN EARLIER DATE, ON ENFORCEMENT MECHANISMS AND RELATED ISSUES

1. The Negotiating Council referred a number of issues relating to the work of the Technical Committee on the Repeal of Discriminatory Legislation to the Planning Committee for recommendations - See the attached document.
2. The Planning Committee instructed the Sub-Committee to discuss these issues with the Technical Committees involved.
3. The Sub-committee had various discussions with Technical Committees and this culminated in a joint discussion with the full committees on:
 - * the Repeal of Discriminatory Legislation
 - * FHR
 - * Constitutional Issues, and
 - * the IEC.
4. Draft Minutes of the discussions are attached. The recommendations emanating from the meeting are as follows:
 - (i) The Technical Committee on the Independent Election Commission will draft a "code" dealing with the freedom of the individual to participate in the elections (as opposed to a code for political parties). Towards this end they will receive an input from the Technical Committee on Fundamental Human Rights.

- (ii) The Technical Committee on the Independent Election Commission will continue its work on developing the adjudication functions of a Commission which will include examination of the need for a tribunal to adjudicate a code as proposed.
 - (iii) Participating parties should be called upon to repeal legislation offending against free political participation.
 - (iv) A recommendation that a commission or other body be charged with the identifying of legislation against free political participation on an ongoing basis, and that the identified legislation could thereafter be repealed or amended by way of proclamation, was agreed upon but not supported by all members.
5. The Sub-Committee supports the recommendations. As far as recommendation (iv) is concerned, the Independent Election Commission could very well be the body identifying offending legislation.