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G

TECHNICAL COMMITTEE
ON THE
REPEAL OF DISCRIMINATORY LEGISLATION

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 Code's 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 The committee has been asked to prepare a report which would include a schedule dealing with laws to be repealed and laws to be amended.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 enactments for scholars and historians to study. (Such a study would also involve an examination of the laws of local authorities, statutory bodies and functionaries.)

2.2 Disadvantages of option 1.1

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

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

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

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

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

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

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

- 2.2.5** Repealing or amending of legislation will have to be implemented by eleven different legislative bodies, numerous local authorities and other lawmaking persons and bodies. The likelihood of obtaining uniformity on non-discrimination and free political activity from eleven different legislative bodies is

small. If no uniformity in legislation is obtained, this will inevitably result in discrimination because one cannot justify a doctrine of "separate but equal" in different regions of South Africa in matters relating to free elections and equality.

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

2.3 Advantages and disadvantages of option 1.2

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

The advantages of such as code are the following:

- 2.3.1** Consensus. To us it seems there is general agreement on the part of all political parties that the election should be free and fair and preceded by a period of free political activity, without discrimination on the grounds of race, sex, religion, ethnic origin or political opinion etc.
- 2.3.2** The likely delays pointed out above could be avoided.
- 2.3.3** Such a higher code could be used to measure and to set aside any law, administrative act or private activity in violation of the code.
- 2.3.4** The parties taking part in the negotiating process should all be given an opportunity to endorse such a higher code. This will give it a uniform legitimacy. The adoption of such a higher code by all the parties in the negotiating process will send out a positive signal to all the people of South Africa that consensus has been achieved on certain principles and that real progress has been made.
- 2.3.5** An independent judicial or administrative body charged with enforcing such a code is more likely to be acceptable to parties than the procedure outlined in option 1.1.
- 2.3.6** The same standards will apply in all parts and sectors of the

country and would lead to uniformity, predictability and certainty.

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

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

3. **Reasons for adopting option 1.2**

The ultimate aim of the electoral process must be to provide results which will be accepted by all participants as free and fair. All political parties participating in the preceding campaigns and the election itself must be prepared to live with the outcome of the process. The "Angolan Spectre" must be avoided at all costs. It should not be possible for any participant to cast doubt on the fairness of the whole electoral process and jeopardise the establishment of a democracy. In order to achieve this objective all practices that could subsequently be cited as having impeded free political activity must be addressed and remedied timeously in terms of the higher code.

4. **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.

REPEAL OF DISCRIMINATORY LEGISLATION

TECHNICAL COMMITTEE REPORTS

FRIDAY 11 JUNE 1993

TECHNICAL COMMITTEE ON THE REPEAL OR AMENDMENT OF LEGISLATION IMPEDING FREE POLITICAL ACTIVITY AND DISCRIMINATORY LEGISLATION

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1. The Committee has Identified the Following
Two Ways of Proceeding to Accomplish its
Task
2. Advantages and Disadvantages of each Option
3. Reasons for Adopting Option 1.2
4. Mechanisms for Implementing the Code
5. General Principles and Powers to be Contained
in a "Higher Code"
6. Conclusion

FINAL REPORT - 1 JUNE 1993

6.

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- (a) Discriminatory Laws
- (b) Laws that May Impede Free and Fair
Elections
- (c) South Africa

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2. Discriminatory Laws Which Flow From the Laws
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CONFIDENTIAL
THIS REPORT IS EMBARGOED UNTIL 12H00
ON TUESDAY 1 JUNE 1993

**FINAL REPORT TO THE NEGOTIATING COUNCIL OF
TECHNICAL COMMITTEE NO. 7, THE COMMITTEE DEALING
WITH THE REPEAL OR AMENDMENT OF DISCRIMATORY
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 elections. 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 the 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 fall 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 483 (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 OF APARTHEID**

ACT/ORDINANCE NUMBER	SHORT TITLE	REASON FOR REPEAL OR AMENDMENT
110 of 1983	Republic of South Africa Constitution Act	Provides for the present racially based three Houses of Parliament with exclusion of blacks.
100 of 1976	Status of Transkei Act	Grants independence to Transkei and thus creates a separate territory/state for an ethnic group.
89 of 1977	Status of Bophuthatswana Act	Grants independence to Bophuthatswana and thus creates a separate territory/state for an ethnic group.
107 of 1979	Status of Venda Act	Grants independence to Venda and thus creates a separate territory/state for an ethnic group.
110 of 1981	Status of Ciskei Act	Grants independence to Ciskei and thus creates a separate territory/state for an ethnic group.
8 of 1978	Bophuthatswana Border Extension Act	Expansion of Borders of Bophuthatswana.
2 of 1980	Borders of Particular States Extension Act	Expansion of borders of TBVC states.
38 of 1927	Black Administration Act	Provides for the Administration of Black affairs and designates the State President as Supreme Chief of all blacks in the RSA.
68 of 1951	Black Authorities Act	Provides for the establishment of certain black authorities and defines their functions.
26 of 1970	National States Citizenship Act	Provides for citizenship of self-governing black territories.

21 of 1977	Self-governing Territories Constitution Act	Provides for the establishment of legislative assemblies and executive councils in the self-governing 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.
102 of 1982	Black Local Authorities Act	Provides for the establishment of local committees, village councils and town councils for black persons. Qualification of voters racially based.
45 of 1979	Electoral Act	Blacks excluded from electoral process.
117 of 1979	Local Government Bodies Franchise Act	Voting rights limited to persons registered as voters in respect of a House of Parliament
8 of 1962	Local Government Ordinance (Orange Free State)	Racial disqualifications regarding the right to vote or to become a councillor.
20 of 1974	Municipal Ordinance (Cape)	Racial disqualifications in respect of voters, representatives of voters and councillors.
18 of 1976	Divisional Councils Ordinance (Cape)	Racial disqualifications in respect of voters, representatives and councillors.
25 of 1974	Local Authorities Ordinance (Natal)	Racially Based
18 of 1976	Durban Extended Powers Consolidated Ordinance (Natal)	Racially based (group areas mentioned).
17 of 1939	Local Government Ordinance (Transvaal)	Racially based.

16 of 1970	Municipal Election Ordinance (Transvaal)	Racially based
4 of 1984	Coloured and Indian management Committees Ordinance (Transvaal)	Racially based.
22 of 1962	Local Government (Extension of Powers) Ordinance (Transvaal)	Racially based.
46 of 1959	Representation between the Republic of South Africa and Self-Governing Territories Act	Although repealed in part, it still forms the legislative cornerstone of the self-governing territories.
86 of 1988	Promotion of Constitutional Development Act	Although not implemented it is a constitutional law premised on apartheid.
73 of 1986	Restoration of South African Citizenship Act	Fails to restore citizenship to all South Africans deprived of South African citizenship due to creation of TBVC states.
80 of 1986	Joint Executive Authority for Kwazulu and Natal Act	Partnership between self-governing territory and Natal.

2.

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

ACT NUMBER	SHORT TITLE
39 of 1976	National Education Policy Act
70 of 1988	Education Affairs Act (House of Assembly)
47 OF 1963	Coloured Persons Education Act
3 of 1987	Development Act (House of Representatives)
61 of 1965	Indians Education Act
12 of 1968	Indians Advanced Technical Education Act
4 of 1987	Housing Development Act (House of Delegates)
27 of 1951	Black Building Workers Act
90 of 1979	Education and Training Act
27 of 1981	Technikons (Education and Training) Act
91 of 1984	University Staff (Education and Training) Act
104 of 1987	Community Welfare Act (House of Representatives)
81 of 1976	Aged Persons Act (particularly section 23)
44 of 1957	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.

LAWS WHICH DISCRIMINATE ON GROUNDS OF SEX AND RELIGION

Sex

ACT NUMBER	SHORT TITLE
44 OF 1949	Citizenship Act
73 of 1986	Restoration of South African Citizenship Act (Section 5)
72 of 1986	Identification Act (Sections 43 and 44)
96 of 1991	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.

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 2 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	SHORT TITLE	REASON FOR REPEAL OR AMENDMENT
30 of 1977	Public Security Act (Transkei)	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.
32 of 1979	Internal Security Act (Bophuthatswana) As amended by Acts 39 of 1985, 5 of 1986, 13 of 1986, 2 of 1988.	Provides for a prohibition on organizations, publications and gatherings; the restriction of persons; detention without trial and wide discretionary powers.
13 of 1982	National Security Act (Ciskei) As amended by Acts 35 of 1983, 33 of 1985, 4 of 1991 and Security Amendment Decree 1992	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.
13 of 1985	Maintenance of Law and Order Act (Venda)	A replica of the Internal Security Act, 1982 of the RSA before its amendment in 1991.
40 of 1985	Bophuthatswana Security Clearance Act	
1 of 1988	Republic of Bophutatswana constitution Amendment Act	

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	SHORT TITLE	REASON FOR REPEAL OR AMENDMENT
3 of 1953	Public Safety Act	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 in an unrest area. Jurisdiction of the courts ousted to a great extent.
74 of 1982	Internal Security Act	Empowers Minister of Law 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.
67 of 1976	Parliamentary Internal Security Commission Act	Establishes a Parliamentary Internal Security Commission.
52 of 1973	Gatherings and Demonstrations in the Vicinity of Parliament Act	Prohibits demonstrations in the vicinity of Parliament.
71 of 1982	Demonstrations in or near Court Buildings Prohibition Act	Prohibits demonstrations in or in the vicinity of court buildings.
103 of 1992	Gatherings or Demonstrations in or near the Union Buildings Act	Prohibits demonstrations at the Union Buildings.

31 of 1974	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.
42 of 1974	Publications Act	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.
26 of 1989	Disclosure of Foreign Funding Act	Regulates the disclosure of the receipt of money from outside the RSA by or for certain organizations or persons.
51 of 1968	Prohibition of Foreign Financing of Political Parties Act	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 actions 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 criterion 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 coming to 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. In 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 elections 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 Electoral Commission (area of another Technical Committee) which will form part of a 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 be cleared through the negotiating structures.

- 5.5.5 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 of 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 new 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 rulings 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 the 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 and solicit the support of voters peacefully, subject to such qualifications prescribed by law as are necessary in a democratic society.¹

5.10.5 Assembly

All South Africans have the right to assemble peacefully and without arms and to 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, which shall include freedom of the press and of other media. For the 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 of 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.

¹ The references to "prescribed by law" will in the majority of instances refer to the Electoral Act which will contain provisions on, for example, the periods when opinion polls will be prohibited. The existing Electoral Act will have to be scrutinized and updated. It does e.g. not provide for proportional representation.

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 and societies of South Africa.
- 5.10.8.3** Special care is to be taken in order to ensure the full participation of 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 freedoms 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 a restriction or qualification
 - (d) identify the provision in the Code on which such restriction or 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, on 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 an emergency.