



# SOUTH AFRICAN PRISONERS ORGANISATION FOR HUMAN RIGHTS

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**THE SOUTH AFRICAN PRISONERS  
ORGANISATION FOR HUMAN RIGHTS  
(SAPOHR) SUBMISSION TO CODESA ON  
THE PRISONER FRANCHISE.**

**JULY 1993**

**Submission proposals on page ten.**

It concerns SAPOHR that the level of attention given to the question of people behind bars is lacking. Non-white prisoners in particular seem to be the forgotten people who endure the harshest of apartheid's manifestations. Scant regard is had for rehabilitation or education in prisons to prepare prisoners for re-entry into society. Emphasis on punishment is taken to its extreme with widespread abuse of human rights, and human denegration and exploitation.

The administration of "Justice" in this country ignores that the root cause of crime is apartheid: a crime against humanity. The answer to criminality is not harsher punishment and more prisons as has been the strategy of the present government. Apartheid society itself, as it is organised, is highly conducive to criminality, and therefore it is society that must be changed in order to make it possible to live in, to make it human and humane.

Indeed the very existence of CODESA is premised on this need for change. The various liberation organisations know only too well the inhumanity of, not only apartheid in its official form imposed in 1948, but of the three and a half centuries of racial oppression and exploitation.

We as South Africans stand now at the brink of change. Change that is moulded by us. To exclude the concerns of prisoners is to exclude the concerns of many South Africans and will leave us all with the deep scars of apartheid. Prisons affect the lives of a large proportion of South Africans. To address their concerns, to hear their voice, as victims, as members of families and communities, and as South Africans is crucial to the construction of a new South Africa.

## **SOCIAL, ECONOMIC AND POLITICAL CONTEXT OF PRISONERS**

That criminality is largely a function of social, economic and political forces is not a new or radical realisation. It is also well known that those most disadvantaged in any society are most represented in crime statistics; as victims and perpetrators.

The character and degree of people's disadvantage, oppression and marginalisation in apartheid is determined by interconnected factors such as sex, race/ethnicity, class, age, sexual preference and so on.

The non-white majority of South Africans have had to contend with exclusion from the social, political and economic processes and benefits of our country. Further, apartheid has strived to disorganise and divide through means including segregation under the policy of "separate development". The result has been a society fraught by social and structural inequality, exploitation, dispossession, cultural denegration, impoverishment, violence, division. A society of crime against its people.

### **Economic Inequality**

In their first *Violence in South Africa Report*, COMSA cited the enormous wealth-gap in South Africa as the root cause of crime and violence. In their second Report they cite that "the richest five percent of the population in SA own 88 percent of the wealth, while over 50 per cent of the population (and 60.5 percent of the African population) lives below the poverty level..." This has been compounded "with drought and - until recently- falling gold prices [which have] lead to a continuous economic decline for the last four years..." (COMSA, 1993 May, p70).

### **Unemployment and Under-education**

South Africa is conservatively estimated to have over 50% unemployment (or over 9 million people). The same conservative estimates put the youth figure (up to 29 years old) at 55%. Hartshorne estimates that there are over two million young people between ages 7 and 17 who have no schooling at all. Every year close 300 000 young people are added to the conservatively estimated 5 to 6 million non-literate South Africans, and that there are approximately 225 000 students per year who do not go beyond primary school education. (Hartshorne, K. 1990).

Through the implementation of government policy more money is spent on white education and training. Skilled and professional employment was largely reserved for whites.

### **Townships and Squatter Camps**

Part and parcel of apartheid has been the extensive uprooting of communities and homes as the white minority appropriated areas for their exclusive use. District Six and Triomf are merely two examples of a widespread dispossession of the land and livelihood of many. This has coupled with forced migrant labour to see literally millions of South Africans live in overcrowded, unhealthy shanty-towns and squatter camps with little or no facilities. Orange Farm, Boipatong, Cape Flats. The list is long.

### **Violence and Crime**

COMSA's second report tables Human Rights Commission figures of 3476 deaths from political violence in 1992. The figure for January to March of this year was 531. The *Star Newspaper* (Johannesburg) published statistics showing Johannesburg had the highest murder rate in the world (1 in 672, diminishing New York's second place at 1 in over 6000). Baragwanath Hospital in Soweto is described as the Casualty of a bloody war zone where it is common to see patients on floors and for the queue of casualties awaiting emergency treatment to extend to the grounds outside. Cape Flats outside Cape Town is said to be the "most crime infested place in the world"

Across the country the lives of the majority of South Africans is predominated by violence, inside prisons and in our communities, at the hands of the State, and at the hands of fractured, intolerant and or desperate members of our own communities. Crime and violence are endemic.

### **Justice and Correctional Service Systems**

These environmental factors combine which with a draconian "Justice" system to form a climate in which we have over 97 000 sentenced persons in prison on any day. Mr Justice Johannes Kriegler of the Transvaal Bench stated in February this year that there are another 20 000 awaiting trial prisoners on any day. He also said 70 000 people are imprisoned annually without the benefit of legal representation, a large proportion of whom are under the age of 30. Harshorne estimated in 1990 that there were 9 000 juveniles (under the age of 17) in detention many of whom are in adult prisons. The *Violence in South Africa Report* (COMSA) May 1993, quoted the Legal Aid Board to say that, (p51)

"fewer than 20% of the accused persons standing trial in district and regional courts had received legal assistance. It was also estimated that more than 100 000 undefended persons were sentenced to jail each year [in 1991/1992].

COMSA makes the observation that,

"Few countries in the world have given such prominence to the use of imprisonment in their sentencing and correctional philosophies as has South Africa. There are reported to be about 193 prisons in contemporary South Africa housing approximately 110 000 persons. ...about one fifth of all prisoners are awaiting trial. (p52)

COMSA reports that it was told that "Far too many accused of non-violent crimes found themselves remanded in custody, often because they lacked access to legal advice at the time of their appearances in court.." (p51)

And things are getting worse: COMSA says "[a] ccording to the Minister for Correctional Services, Mr Adrian Vlok in January 1992, the country's prisons population was rising at a rate of a thousand prisoners a month." COMSA comments that

"As a result of the new sentencing policies ... there is likely to be a substantial increase in number of persons held in South African prisons. This increase will push the rate of imprisonments towards 400 per 100 000 of the population or higher. The current rate is said to be about 380 per 100 000 - a rate which is already among the highest in the world. " (pp52-53)

President De Klerk recently (April) announced that the Government intends to introduce stricter penalties and may again impose the death penalty. COMSA said in this regard that "the current moratorium on the carrying out of death sentences may well be lifted."(53) This is important keeping in mind that "[u]ntil 1990, when a moratorium was placed on execution, their use of capital punishment was also one of the highest in the world". (COMSA,p79) The Human Rights Commission reports that there were 296 people on death row in August last year (Vol 5 No.8). Blacks are the overwhelming majority (over 90%) of those sentenced to death. It is well established that for the same offences a Black person is several times more likely to receive the death penalty than are whites.

Hence we see clearly that the social, economic and political factors of apartheid are unemployment, homelessness, poverty and exploitation; poor living conditions, poor education and poor health; desperate lack of facilities; repression of cultural, kinship and familial systems; denial of civil and political rights, over-zealous punishment, detention and imprisonment; community division, high crime rates, violence, child abuse, domestic violence, rape, substance abuse; fear, desperation, frustration and alienation. This is the environment in which the non-white majority of South Africans struggle, one that is highly conducive to crime. And this is why the question of prisons and prisoners is a central one.

Whilst this scenario continues in South Africa black and white South Africans face a bleak future. This highlights the crucial importance of beginning the task of redressing the apartheid legacy now! And what is made clear from the above is the crucial need to involve the concerns of prisoners in redressing and rising above this morbid legacy.

## **OUR SUBMISSION:**

### **A. Introduction**

Various players including South African liberation organisations - including but not limited to the ANC, SACP, AZAPO and PAC - and national and international organisations have contributed their ideas in the present democratisation process. A consensus has emerged that the system of proportional representation is desirable for our country. To SAPHOR's knowledge, a relevant and fundamental issue remains undiscussed. That is the eligibility for the franchise of persons detained, awaiting trial and sentenced come election day on the 27 April 1994. SAPOHR submits that *it is a matter of vital urgency to discuss this question, place it on the agenda and to ensure that prisoners do have voting rights during the elections.*

We say to all parties concerned: Prisoners are also a part of the 18 million South Africans for whom the country's first democratic election on 27 April 1994 is the first taste of formal political rights.

We are in full agreement with COMSA's assertion that,  
"Massive change is required in... criminal justice in South Africa... The present system of justice remains marred in its apartheid trappings. It is a system which is still largely administered by white south Africans for a clientele which is overwhelmingly non-white." (p79)

They go onto list some of the deficiencies of the system:

- a lack of access to legal advice for most persons caught in the system;
- detention for the purpose of interrogation;
- restrictive bail provisions;
- widespread use of imprisonment for most crimes;
- thinly developed community based corrections programme.

SAPOHR is not alone in saying we cannot achieve a non-racial, non-sexist, democratic South Africa until we address the needs of those South Africans in jail. Are they to be denied their voice in the reconstruction because they are the victims of apartheid?

Thabo Mbeki of the ANC said recently:

We must, by liberating ourselves, make our own history. Such a process by its nature imposes on activists the necessity to plan and therefore requires the ability to measure cause and effect; the necessity to strike in correct directions... and consequently the development of the skill of combining the necessary and the possible."

Thabo Mbeki's reference to pursuing the necessary and the possible should serve as a guide to us.

## **B. THE POSSIBLE AND THE NECESSARY**

### **1. The prisoner vote**

SAPOHR strongly submits that it is both absolutely necessary and logistically possible to implement an equitable scheme for whereby the vote can be extended to (at the very least part of) the sentenced prison and police custody population.

What may initially sound like a radical call is in fact one that is receiving serious attention internationally. Some countries have already established the right to and mechanisms for the prisoner franchise.

Moreover SAPOHR has established, through personal communications with the Department of Correctional Services head quarters in Pretoria (Major Venter, the Assis Leftenant to General Bryn), that white prisoners have in the past voted in elections.

SAPOHR submits that this right must be preserved and extended to ALL prisoners who qualify in the same way that white prisoners do. It is absolutely unacceptable that white inmates vote if the same rights and mechanisms are not extended to all non-white inmates.

#### **1.1 Eligibility**

It goes without saying that those awaiting-trial prisoners must be ensured the vote. If these people are denied the vote on the basis that they are in prison you effectively treat them as guilty without having heard their right to trial.

SAPOHR argues that this right must be extended, if not to all prisoners, at the very least to those serving sentences for less serious offences. For example those convicted of theft or break and enter. This submission does not presume to set the criteria, but suggests eligibility on the basis of a ten year or less sentence of imprisonment. This would include the majority of people behind bars.

It should go without saying that besides criteria of offence type, prison term and adult age, other factors such as sex and ethnicity/race must not be determinants.

Criterion for eligibility need to be established in ways that are at once sensitive to broader community concerns and the requirements of progress and democracy in all the arms of our government.

### 1.2. International Examples: Australia and Canada

Legislation and measures have been adopted in other countries providing the framework for prisoner voting eligibility and implementation. Australia serves as a good example. There the *Commonwealth Electoral Act 1918* (Australian Commonwealth), section 96 A provides that

"(1) Subject to section 93, a person who is serving a sentence of imprisonment is entitled to remain enrolled for the Subdivision (if any) for which the person was enrolled when he or she began serving the sentence.

(2) An eligible person who is serving a sentence of imprisonment but who was not enrolled when he or she began serving the sentence is entitled to be enrolled for:

(a) the Subdivision for which the person was entitled to be enrolled at that time;

(b) if the person was not so entitled, a subdivision for which the person's next of kin is enrolled;

(c) if neither of paragraphs (a) and (b) is applicable, the Subdivision in which the person was born; and

(d) if none of the preceding paragraphs is applicable, the Subdivision with which the person has the closest connection.

(3) In subsection (2), 'eligible person' means a person who, under section 93, is entitled to enrolment."

Section 93 reads;

"..(8) A person who:

(a) by reason of being of unsound mind, is capable of understanding the nature and significance of enrolment and voting;

(b) has been convicted and is under sentence for an offence punishable under the law to the commonwealth or of a State or Territory by imprisonment for 5 years or longer;...

is not entitled to have his or her name placed on or retained on any electoral Roll or to vote at any ... election."

Last year in Canada the right to vote was declared by its most senior courts to be a fundamental democratic right and that laws removing the voting rights of prisoners were unconstitutional (see the 1992 Canadian cases *Belcowski v. R* and *Sauve v. R*). Consequently legislation has been introduced to provide for prisoners vote.

Needless to say policy and measures suited to South Africa have to take into account the complexities of our country, and thus overseas examples can only play an informing and exemplary role. The limit in the Australian provisions excluding prisoners sentenced to 5 or more years is hardly applicable to South Africa where

sentences are much harsher/longer than the Australian ones. SAPOHR submits that if a limit of this sort is desirable appropriate cut off should be no less than 10 years.

## 2. Implementation

SAPOHR recognises the enormity of the task of taking fair, open and democratic elections into jails. Indeed outside prisons the task is difficult although not uniquely so to South Africa. But rather than this being a reason to ignore the issue altogether, it is reason to give it comprehensive attention. SAPOHR has already been told by the Department of Correctional Services that, whilst the decision to allow voting in prisons is one for the Department of Justice to make, it does not oppose such a move.

SAPOHR takes issue with the claim that this is for the present regime's "Justice Department" to decide. It is for the parties to Codesa to decide the shape and form of our first democratic election. It is Codesa we urge to extend the franchise to those behind bars in South Africa.

There would be a significant role for Commonwealth Observer Missions, the United Nations, non-government organisations and other bodies in the implementation, monitoring and carrying out of elections in prisons.

### 2.1. Logistics of voting on the day

The means and the materials for a prisoners ballot or postal vote must be comprehensively, promptly and simply established. Possible ways of providing prisoners with the means to vote are mobile polling and ballot stations and the postal vote.

In this regard Australia provides an example. Entitled "Mobile Booths- prisons", Section 226A of the Australian legislation, provides

"(1) The Electoral Commission may make arrangements with the Controller General of Prisons for a State or Territory for the taking of the votes of persons confined in prisons...

(2) The Electoral Commission may appoint electoral visitors for the purposes of this section.

(3) ...an electoral visitor shall visit the prison for the purpose of taking the votes of persons confined in the prison...

(4) When visiting a prison, an electoral visitor shall:

(a) take to the prison a ballot-box, ballot-papers and anything else necessary for taking of votes at the prison; and

(b) subject to subsection (5), be accompanied by a polling official and such scrutineers (if any) as wish to attend.

(5) A visit to a prison shall be made:

(a) on such day;

(b) at such time; and

(c) in accordance with such conditions;

as are fixed by or under the arrangements applicable to the prison."

In Australia ordinary postal voting provisions also apply to all those entitled to vote.

### 2.2. Monitoring and supervision

The very nature of South African prisons and police cells necessitates careful and extensive voting supervision and monitoring by independent bodies to ensure free and open voting by prisoners. Problems of gangsterism, orchestrated violence and coercion by authorities are extensive. It has already been alluded to that the majority of white prison authorities have extreme right wing sympathies. Further, it was brought to the attention of SAPOHR earlier this year that some prisons were opening their doors to the Inkhata Freedom Party to recruit prisoner support. These biased and often coercive measures need to be ensured against.

### 2.3. Voter Education



A prisoner education program must be implemented at the soonest possible moment. Education on enrolment, choice and process of elections is taking place in the wider community. The same steps must take place behind bars.

Education and information on the various parties to the elections must be made available by all means possible to ensure free, open and informed voting.

### **Conclusion**

The Government and the ANC agree on the need for setting up a Transitional Executive Council (TEC), which would supervise key arms of government in the run up to elections. Prisons are part of the administrative arm of government.

It is this Council which must draft the policy, structure and implementation of the first democratic electoral system. It is the Council which must ensure that all South Africans participate in next year's election.

SAPOHR strongly submits that such steps are both absolutely necessary and possible for the process towards a human rights culture which our country desperately needs both now and in the future. As COMSA says;

"A Government which is not representative - no matter how good its intentions - is not in a position to consult effectively with the communities it seeks to serve." (72)

And prisoners in all prisons throughout South Africa are a part of the South African community. They are also the victims of apartheid and must also be the contributors and beneficiaries of the new South Africa! A non-racial, non-sexist, democratic South Africa demands that they have the vote.

This submission is not intended to be a comprehensive policy document but rather to put this crucial issue on Codesa's agenda. We trust that it will be received and attended to with the vigour and good faith that has characterised the tremendous efforts of South Africa's progressive forces.

## SUBMISSION PROPOSALS OF THE SOUTH AFRICAN PRISONERS ORGANISATION FOR HUMAN RIGHTS TO CODESA

1. That Codesa acknowledge the abhorrence of apartheid and the role of prisons in it;
2. That Codesa acknowledge the particular need to address the concerns of all people in or affected by prison as a matter of central importance to the creation of a new non-racial, non-sexist democratic South Africa;
3. That Codesa ensure the Transitional Executive Council establish an administrative body that oversees the legislative and administrative extension of the democratic right to vote, in our first non-racial elections and all subsequent elections, to prisoners throughout South Africa;
4. That the Election Transition Council charge this administrative body with the duty of:
  1. Making the necessary consultations, research reports and policy;
  2. Drafting the necessary legislative papers;
  3. Creating the international and multi-party election monitoring committee which will see to:
    - a. Election fairness, openness and democratic;
    - b. Prompt and open and fair Election education;
    - c. Creation and provision of all necessary financial, material, structural and regulatory means;

for and in the vote of prisoners <sup>in the</sup> election in all prisons throughout South Africa.
5. That Codesa act promptly to ensure these measures are implemented and carried out comprehensively, in good faith and in the spirit of a new non-racial, non-sexist, democratic South Africa for all who live in it.