

TRANSCRIPTION

MEETING OF THE NEGOTIATING COUNCIL WITH THE TECHNICAL COMMITTEE ON THE REPEAL OF DISCRIMINATORY LEGISLATION

21 JULY 1993

Chairman

Ladies and gentlemen we have a quorum and I am going to ask that we resume our meeting. Welcome to the Technical Committee representatives and we apologise for having kept you waiting for so long. I just need to dispose of a matter in relation to our previous discussion before we give attention to your report and that is that in the process of our discussions a number of areas of difference were identified and I omitted to mention these before I close the earlier section of the meeting. These were in relation to 2.2. where there was a difference about whether the formulation should be wide or narrow. In relation to three, that is the right to life. Then the addition under 2 of the right to vote and then number 30 and that is related to the question of eviction. Now, with your consent, what I would like to do is to refer these differences to the Planning Committee and ask them to look into establishing some mechanism which will help us to bridge these differences, in addition to whatever we want to do in relation to making submissions to the Technical Committee.

Mrs Camerer

Mr Chairperson sorry, you had embarked on this when I thought, you know, is???? looking through the other Committees documents. Could you just mention those points again, I am sorry.

Chairman

I will do that. It is 2.2, 3, the addition to section two in relation to the right to vote being given to, no it was the right to vote and then the item on eviction. Those were the four where we seemed to have, at this point in time, had a???? of differences and in as much as we have set up mechanisms for the IMC and IEC differences to be resolved in a particular way, which you approved this morning. Can I suggest that you ask the Planning Committee to look into establishing similar mechanisms in relation to these items. Is that agreed? Thank you very much. We then give attention to the Third Report of the Technical

Committee on Repeal or Amendment of Discriminatory legislation and ask their representative to briefly capture the contents of this report and draw our attention to the matters that we need to consider today. Prof Erasmus.

Prof Erasmus

Chairperson when we last met with this Council we were instructed to liaise with three other committees to address the problem of potential areas of overlap. We did so and last week we met with the Technical Committees on the TEC the IEC and Fundamental Right and what we have done now is to summarise our latest report by way of two diagrams and you've got it in front of you. After our discussions with the other Committees, we are still of the conviction that the original proposal put forward by our Committee, namely that, in order to address the problem effectively of how to deal with discriminatory laws in the campaigning period before the elections, in other words to make sure that there is going to be free and fair elections, that in stead of trying to through all the laws and going to all the respective legislatures in the country and trying to identify all the subordinate legislation and the by-laws and the executive powers in terms of existing laws, in realising that its not going to be politically feasible and that we haven't got the time and certainly that we are probably going to miss some of the important areas in stead of following the route of trying to repeal very possible bit of legislation in the country. We have originally proposed the idea of a, what we then called a "Higher Code", Electoral Code, equipped with proper machinery in order to make sure that effective political electioneering campaigning can take place before the elections. Now this first diagram explains that position. If you look at the diagram that horizontal line there, represents the MPNP and then we have indicated two points there, A and B. Point B is the important one that refers to the date of the elections as proposed and accepted next year in April. Now our real concern, our focus is that immediately after that election the outcome must be accepted by all the parties. We are concerned that if it would be possible for any of the parties to refer to incidents and occurrences taking place in the period before, in that period between A and B, which we call the period of campaigning electioneering. If any incident or any (Inaudible) demand or lack of remedy which was requested during that period can subsequently be used by any of the political parties as a justification for not accepting the results. We will have, we believe, a very difficult position and we somewhere in our recent report call it the "Angolan ?????". We realise that many

other things like addressing the problem of violence all have to do with this, but our concern and our interpretation of our mandate was that we must plan pre-emptively in order to make sure that proper remedies and proper structures will be available for that period which we call the period between A and B, and that date of September 1993 isn't really of any significant it was simply selected to illustrate a point that there will be a substantial period before that final election when the campaigning and final electioneering will take place. So if you turn then to the second diagram and we depart from the assumption that we make that there is going to be this need, and secondly, that an interim constitution, if you return to the first diagram again please, we make another important assumption and that is, as we understand the drift of things here, that we may be wrong and then off course the whole argument will have to be addressed differently, but if it is going to be true that the interim constitution containing a interim bill of rights and containing effective enforcement machinery is only going to come about after the election, then there will be a need for some machinery, some enforcement mechanisms for the time running up to the election. If you can have an effective Bill of Rights tomorrow and effective machinery for its implementation, off course those things that we are concerned about will be contained in it and then off course it will be binding and effective. That is something that we cant decide on. We only understand the process here as pointing out the technical and political difficulties of having it before the time. Now, the second diagram really says that, it explains our meeting with the other two technical committees, or the other three and we do not really detect any overlap in our work, between ourselves and the Committee on the TEC and the one on Fundamental Rights. We do however had a very, I think, fruitful discussion with the IEC Commission and that diagram there explains what they are dealing with at the moment and where our Code fits in terms of our original proposal. I think the two important things that the IEC is working on, I don't know what happened yesterday and what they were working on last night, but as explained to us last week, they are proposing two very important things; a Code for Political Parties and An Electoral Act. Those are different from the Code, the Electoral Code that we are proposing. A Code for Political parties binds the political parties and their officials and the way they behave in the electioneering period. An Electoral Act, as we know it, deals more with the technicalities of an election. Our Code, our proposal is aimed at containing those fundamental principles which pertain to and which are related to a free democratic election process, things like the freedom to have meetings, freedom of

expression, freedom of association of the press, of canvassing, freedom from intimidation, equality in a certain sense as we have explained in our other reports. Those must be the principles which will be available to every political party and every citizen during the campaigning. So, if for example, as we say in our last report, a particular party up in a small town is prevented from a local authority to have a meeting or farm workers are not allowed to go to a political meeting. Those people and parties who are detrimentally affected by a governmental or a private decision or behaviour of that kind should have the effective remedy available immediately and that is why propose as enforcement mechanism, what we call the electoral tribunal which is really a specialised court, which can apply this supreme code. So, the net effect at the end of the day will be instead of listing all the laws and trying to scrap them beforehand and even if you could succeed doing that you can in any case not address properly the problem of private behaviour. We say in stead, let's agree on a set of fundamental principles, make it effective and then every single party or individual who has a complaint because of a denial to exercise any of these rights must then be able to go to this tribunal and obtain an immediate expedition and effective remedy. That is why we propose there that it must have a central seat and a number of regional seats in order to make possible accessibility and must be properly equipped through legislation to issue all the orders and sanctions which will be necessary to achieve the goal that we are listing in our proposal. That in a nutshell, chairperson is what these two diagrams and the discussions with the other Commissions produced.

Chairman

Thank you Prof Erasmus. Can you give me some indication of which other key decision are we required to take here.

Prof Erasmus

Pardon

Chairman

What are the key decisions we are required to take here today?

Prof Erasmus

Well we need an indication, we need an instruction, Chairperson whether this route is acceptable and should be developed because if this proposal of a "Higher Code" and the required machinery is indeed accepted it means that it will have to be worked out, the Code itself will have to be drafted properly and then will have to be passed through legislative structures to be effective. Secondly, we will have to obtain some clarity as to how that Code will operate viz a viz the IEC. What we have discovered after our talks with the IEC is that our proposal, originally for an electoral ombud is already covered by their proposal and therefore we suggested that that falls away. But they have agreed with us that they also recognise the need for this Electoral Code so that the line their connecting our Committee with the IEC has to be cleared and it seems to me that some of the proposals that they are putting forward will provide an umbrella structure for our code and our tribunal to fit in, but exactly how that is to be done depends on whether this principle is acceptable to the council or not.

Chairman

Quite clearly you are also then saying that we require some enforcement mechanism as well.

Prof Erasmus

As we have indicated there on the second diagram, yes, which will be of judicial nature, that is very important.

Chairman

How does that differ from a constitutional court or an ombudsperson that the Fundamental Rights Committee is talking about?

Prof erasmus

There is overlap. If we can have a properly equipped constitutional court which can also apply this. This is really only a summary of some of the rights which one will in any case see in a Bill of rights. If there is immediately going to be a properly equipped constitutional court and a Bill of Rights then that falls away.

Mr Wessels

Mr Chairman listening to Prof Erasmus. He sounds very convincing, but having just listened to Adv Yacoob, he also sounded very convincing, and I think the matter is however to me almost confusing in the sense that I believe what we would like to achieve is we would like to have the Bill of Rights with all its mechanisms in operation as soon as possible. I can however see some merit in what Prof Erasmus has said and I wonder if it would not be appropriate if we would really to ask the two Commissions to, on this particular subject of and fields of overlap, bring out a joint report to us because we have now had the benefit of listening to the one and to the other, but lets have the benefit of a joint report of both of them.

Chairman

Thank you.

Prof Erasmus

Chairperson I need some clarification there as to the exact nature of the uncertainty now. We say quite clearly, if there is going to be an effective set of principles and machinery, lets call it in terms of the work of the Committee on Fundamental Rights, say there proposal on a comprehensive supreme Bill of Rights. If that proposal is accepted, it is being implemented to cover that period between A and B so that every single political party experiencing the type of difficulty we have just indicated and then off course it must also apply horizontally, we want to make that point, not only vertically to cover private activity infringing on free and fair democratic electioneering. If all those machinery and principles will be in place, say within the next month or so, then our existence falls away, then our proposal is being covered. So we cant really clear that particular point up by working with the Fundamental Rights Group because we are going to say the same things. The important thing is not what we say but whether it is going to be implemented at a early enough date to cover the period of electioneering.

Chairman

So that issue hasn't been discussed with that Technical Committee. So, that is one of the difficulties that we have. Let me take a few more speakers and then let's see how we can bring these thoughts together. Mr Desai, Mr Rajbansi, Mrs Camerer.

Mr Desai

I have a question to ask. Is the, on the second diagram, is the enforcement and this is the crux of the matter, the enforcement of rules in the run up to the elections, is your Committee, Prof Erasmus, aware of the proposal by the IEC of the tribunals. Are these the same tribunals you are referring to.

Prof Erasmus

If I have to answer that now Chairperson, we discussed this. They call their directorates, they have got various directorates there and they also have discussed and explained to us the role of the existing courts, but last week when we met it was agreed between the two of us that this type of tribunal, this judicial body, really its a court - it is a court of a limited lifespan, they recognise the need for that but at that stage they haven't worked out a structure of this nature. That is why we think this is an area where we could sort of probably work together. They haven't covered this particular area last week when we met. It will therefore be a different tribunal.

Mr Rajbansi

Chairman the Prof mentioned that if we adopt, take the other route, if the Bill of Rights is accepted then there will be no need for us to protect these particular ????. I am very much concerned that why we are going to establish a mechanism for enforcement we might be including in that mechanism, like the tribunal, certain powers which may be, you know like a military government, compared to a military government. They will have the power to nullify legislation. They will have the power to nullify any executive act in the country, selfgoverning states, TBVC states. That in my opinion is too sensitive and it will be too controversial and I believe, Mr Chairman, that until such time that we don't have the other proposals it will be too dangerous for us to consider giving such a tribunal ????? powers.

Chairman

Do you want to respond?

Prof Erasmus

If you want me to respond chairperson

Chairman

Not really, you can take note of the comment. Mrs Camerer.

Mrs Camerer

Chairperson the point. It seems to me listening to Prof Erasmus that the supreme principle for electoral Code can be the Higher Code by any other name, I mean, or the Fundamental Rights Code or whatever it is. I think we could become thoroughly confused with charters and codes operating concurrently or in conflict with each other and forums and tribunals and constitutional courts. I think it is impossible, as far as we are concerned to, Chairperson for these two committees to operate in isolation from each other on these issues. Prof Erasmus has mentioned freedom from of association, other absolutely essential rights for the election period but I mean we have heard all about that from the other Technical Committee and there is, I just feel that the whole question of enforcements and implementation and when these codes come into operation must surely be done by the Committees together. Especially at this crucial time when the other Committee is about to embark on the whole question of enforcement mechanisms and timeframes.

Chairman

Let me try to see if we can get some of those interconnected factors in a line so that we can begin as a Council to see where they overlap and how we actually deal with them. we are saying that in essence the most important/ the highest code that we might be talking about, other fundamental human rights for the transition/ Higher Code as you actually call it. If those two are overlapping and they can in fact be the same, your concern really is that that Higher Code/ Fundamental Rights should come into effect as soon as they have been approved here. In other words they should not come into effect only after the election, but during the period that you indicate between A and B. Am I right?

Prof Erasmus

You are right Chairperson with one small qualification. Our Code is a more limited and more confined code. It is not a complete comprehensive Bill of Rights. It contains only those principles, corresponding to our mandate, which deals with free and fair elections. Therefore you will not find something like the right to life or abortion or those matters, or

property or those things being dealt with in our Code at all.

Chairman

But the existing proposal before us from the Technical Committee on Fundamental Human Rights would incorporate all the considerations.

Prof Erasmus

Let's call that thing what the Technical Committee on Fundamental Rights is working on by its proper name which is a Bill of Rights. A Bill of Rights must inevitably include the rights that we see necessary to be protected for the period between A and B.

Chairman

So, as long as we have the Bill of Rights as part of the transitional constitution, there is no difficulties ????.

Prof Erasmus

Absolutely right if you have that Bill of Rights and the implication is it can be judicially enforced than there is no need to have our thing.

Chairman

Ok, you have two qualifications though. The first is that the application should be from point A to B, not only from point B. That is right, not only from point B.

Prof Erasmus

That is right.

Chairman

Your second concern is verticality and horizontality.

Prof Erasmus

Absolutely right Chairperson.

Chairman

Now I don't know, we might not be able to resolve those particular points of view at this stage. What I might want to suggest for your consideration ladies and gentlemen is that having understood that there is overlap that we say that this Technical Committee then has no need to actually draft a Higher Code, because all those elements we are agreed are contained in the Bill of Rights. Secondly, that we ask the Planning Committee to look into what mechanisms need to be employed or what suggestions they can make in respect of the date of implementation of that Bill of Rights and secondly, the issue of verticality and horizontality pending the report from that particular Technical Committee. Without that Technical Committee here that issue actually can't be resolved either. So some other mechanism needs to be evolved that will help us to bring this together. Would you be in agreement with that? Are you with me. I am saying that this Technical Committee has raised two issues. We are not in a position without the other Committee present to actually raise those issues now. The Planning Committee must look into this, establish some mechanism to resolve these particular issues and make a recommendation to us. Are we agreed on that. Ok. The second factor then Prof Erasmus is the Code for Political Parties which the IEC Technical Committee is going to draft and we take note that that is actually going to be formulated and it actually provides for certain guarantees in terms of your diagram as well. If that is so, what you indicate in your diagram as the Electoral Code is in fact your Higher Code. Am I right?

Prof Erasmus

That is right Chairperson.

Chairman

So there is now no further Code to be considered.

Prof Erasmus

As far as our work is concerned, not.

Chairman

Then the next question is the relationship between the Bill of Fundamental Rights and the

work of the IEC. That seems to be an area of concern.

Prof Erasmus

You are right chairperson, because.

Chairman

Can you spell that out for us.

Prof Erasmus

The link between the work of the IEC and Fundamental Rights Commission lies in the fact that there must be effective remedies available for the period between A and B. The IEC is just as concerned I think as any other person in the Council or any of the other Committees that that period between a and B must be such that it can subsequently be recognised and ratified as free and fair and democratic. It mustn't be possible to identify or pin point any happening there as justifying the non acceptance. It is a pre-emptive machine that has to be provided for. I think the IEC's focus is more concentrated in the sense that it wants to have this first election a success. The work of the Fundamental Rights Commission is of a longer term nature. It wants a proper interim constitution to be in place in this country for the whole of the period that it will take the elected Constituent Assembly, and we don't know how long that is going to be to write a new constitution which will also contain a Bill of Rights. So we must have democratic and Rule of Law government from day one after the elections next year. Our concern and the IEC's concern is what happens with the period before.

Chairman

That in a sense is linked to the recommendation that we have accepted a little earlier that the Planning Committee give consideration to that particular issue.

Prof Erasmus

And may we also add that in one of our first reports, I think the second one, we pointed out that there is another important principle for the effective implementation of principles with respect to democratic elections and that is uniformity of application. In other words, in area

A say down in the Cape the same principles must be applied for the period between A and B, as say in any other part of the country or in the TBVC countries or whatever part of South Africa, in terms of the original boundaries. So, uniformative application is also an important thing.

Chairman

Can we then add that as the other recommendation to the Planning Committee, that it needs to look into this issue of uniformity of application. Ladies and gentlemen do you accept that? Alright. Than then removes the third point that we have. The fourth issue as I understood it prof, is the question of enforcement mechanisms and I think that the earlier comments are quite valid. We now have ??? of tribunals, courts etc, emerging as recommendations from different Technical Committees. The Fundamental Rights Committee has suggested a set of those, the IEC, I think has some of those in mind and now you also see this as necessary for the purposes of enforcing the Bill of Rights. Now, quite clearly ladies and gentlemen we require again the Planning Committee to apply its mind to this issue. In other words, how do we bring these various recommendations together such that we avoid the overlaps, we harmonise the recommendations coming from the various Technical Committees and the instruct one or more of them to begin to elaborate how these particular tribunals will work. Will you find that recommendation acceptable and Prof does that meet your requirement, at this stage?. If the Planning Committee applies its mind to this issue as quickly as possible, perhaps early next week you can have an answer in respect of what kind of work you need to do in your Technical Committee.

Prof Erasmus

Chairperson it seems to me that you are slowly sending us on vacation. I accept what you are saying.

Chairman

If you want to voluntarily accept any work you are quite welcome to do so.

Prof Erasmus

We are so concerned about the baby that we have created, we want to actually impose it

ourselves.

Chairman

Please feel free Prof, we make recommendations via the liaison mechanism that you have with the Planning Committee in relation to how do we solve the problem of the overlaps.

Prof Erasmus

We are perfectly happy with the way you are defining and identify the problem. That is exactly the way we see it. Pointing out and making a qualification that our focus is a more limited one, a more immediate one. We are relatively worries about electioneering. De facto, electioneering has started already in this country.

Chairman

Those are the only points that I could isolate as the key areas, with your help, that we need to give attention to now. Are the any others?

Prof Erasmus

I may add that in the second report that we have submitted, and I don't think the members of the Council really had the time to read through that report, but there we have added a Draft Code already containing proposals on the machinery, on the principles, on the sanctions, on the remedies, on the staffing, on the infrastructure etc. So that could be given to any other Committee or Commission that you eventually decide on to tackle the problem of bringing the work together.

Chairman

It should that you had appropriate foresight on the matter. The last point as I understand it prof is the question of proposals emanating from your Committee which would enable the Council to make decisions about pieces of legislation that could be repealed immediately and prior to the Higher Code/ Bill of Rights coming into effect, which in the earlier meeting with you were areas of concern and which constitutes the first part of your second report as well. How do we deal with that?

Prof Erasmus

Well I think my other colleagues will have views on this but we have, in our reaction from some of the political parties and from some of the homeland governments we discovered a certain problem and that pertains to the need that we have identified earlier and that is uniformity of application. Some of the responses that we received say and make the point that there is no discriminatory laws left in those areas. So there is nothing to be repealed, which emphasises the point made earlier that is that not only laws can effect the period between A and B but also executive powers and executive behaviour undertaken in terms of empowerment through rather safe pieces of legislation as they exist on the statute books that could pertain to things like local management committees or a local government or the powers of local bodies or whatever was security and safety measures. So, and of course, existing laws do not cover the problem of private behaviour, so we have to some extent now focused on the second route, the Higher Code route in order to create a safety net that will indeed, as Mr Rajbansi has pointed out, our proposal, he is completely right, our proposal has far reaching consequences. If the structure that we are proposing, this court tribunals properly equipped it will have the power of nullifying, declaring certain existing laws or exercise in terms of laws, as invalid. Indeed, let me point out that is exactly the type of judicial function that the supreme court will undertake. That is typical of a democratic instrument called a constitutional court. So, that is far reaching in the sense of its newness for this country but it is not in conflict with the idea of democratic government at all. So we haven't really pursued the avenue of trying to propose to all the maybe legislatures in this countries a list of laws other than that contained in our second report which should be repealed, because in all honesty, Chairperson, we think it, politically speaking, and we can't judge that, I admit that, but we venture this opinion that politically seeking in the limited period available its going to be extremely difficult to repeal all those laws and let me make a final point, the body that we are proposing which will exercise the same function as the constitutional court will only, if a certain piece of legislation is being put before our tribunal, only that article or that sub-section that has an impact on free and fair election or which refers to an activity by an official of the state or whatever, only that particular article or that clause will be declared null and void when it makes it against the Code not the whole law, the rest of it will stand.

Chairman

Can we get some very quick and brief guidance from the House on the fact of this matter. How do we deal with this particular part of the second report of the Technical Committee in relation to specific pieces of legislation is that a matter that you would like to consider now, consider later, differ or refer it to the Planning Committee for some recommendation. I see some nods but can I hear some voices.

Mr Wessels

The Planning Committee would be wise Sir.

Chairman

I see it is getting late in the afternoon now. Is that recommendation acceptable? Is there any opposition, if not are there any other matters that you would like to raise with us professor. On that note let me try to assure you that we will ask the Planning Committee to consider this matter very quickly and clarify your brief with the consent of this Council, hopefully very early next week in order that you clearly understand what is required of you and with those words on behalf of all of us, thank you very much for all your patience.