

MULTI-PARTY NEGOTIATING PROCESS

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FAX TO: MEMBERS OF THE TECHNICAL COMMITTEE ON THE
REPEAL OF DISCRIMINATORY LEGISLATION:

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FROM: MELODY EMMETT

DATE: THURSDAY 5 AUGUST 1993

RE: MEETING WITH THE SUB-COMMITTEE OF THE PLANNING
COMMITTEE


Herewith a copy of a report prepared by Professor Erasmus following a meeting held last Monday which was attended by members of the Sub-Committee, Dr F. Venter (Convenor of the Technical Committee on Constitutional Affairs); Professor L. du Plessis (Convenor of the Technical Committee on Fundamental Rights during the Transition) and Professors Erasmus and Dugard.

The Sub-Committee has requested a follow up meeting for next Tuesday 10 August at 11H30. The meeting will be held in Room No. 1 (First Floor)

All members of the Technical Committees on the Independent Electoral Commission, Constitutional Affairs, Fundamental Rights during the Transition and your Committee are requested to attend.

Please advise me as soon as possible whether you will be available for this meeting so that I can arrange flight bookings, etc.

Many thanks,


Melody Emmett
for the Sub-Committee

P.S. This is the same meeting which was originally scheduled for Monday 9 August at 14.15.

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

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

1. ASSIGNMENT

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

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

2. ASSUMPTIONS

- 2.1 Elections are essential for a peaceful transition to a new dispensation.
- 2.2 Everything possible should be done to ensure acceptance of the election results. (Angola's spectre to be avoided).
- 2.3 A large number of laws empower executive and other action which can hamper free and fair participation in the electoral process. (Private action could have the same effect).
- 2.4 These laws cannot all be identified and repealed in time for the electoral process to take place.
- 2.5 A comprehensive electoral structure is needed to ensure democratic, free and fair elections. This will be provided through the IEC.
- 2.6 Rules and enforcement machinery are necessary. This will address different needs such as:
 - 2.6.1 The problem of violence.

- 2.6.2 A code for political parties. (Being drafted by the IEC)
- 2.6.3 An Electoral Act. (Being drafted by IEC).
- 2.6.4 Rules ensuring democratic, free and fair political activity for individuals and parties. This is the concern of the present submission.

2.7 Effective, legitimate and visible sanctions and protection are required.

3. PROPOSAL

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

4. FIVE POSSIBILITIES

- 4.1 Do nothing. Keep the present position.
- 4.2 A comprehensive bill of rights to be implemented soon (September 1993?).
- 4.3 An independent election commission with political structures.
- 4.4 A "mini Bill of Rights" that protects election rights only - enforced by a new special tribunal.
- 4.5 A "mini Bill of Rights" that protects election rights only enforced by the existing courts and enforcement agencies with necessary modifications.

5. OPTION ONE

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

6. OPTION TWO

A comprehensive Bill of Rights.

6.1 Advantages

- * It could be useful to have an interim Bill of Rights that protects all fundamental rights operating during the election period.
- * South Africans will be introduced to the concept earlier. (September 1993 versus April 1994).

6.2 Disadvantages

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

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

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

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

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

7. OPTION THREE

Political Protection through an Independent Election Commission.

7.1 Advantages

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

7.2 Disadvantages

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

8. OPTION FOUR AND OPTION FIVE

Mini Bill of Rights that protects election rights only.

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

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

For example:

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

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

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

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

- * special courts presided over by "Judges" who are not currently serving as judges or magistrates;

- * specially appointed law enforcement officers not attached to the present court structures or security forces.

8.1.1 Advantage

The problem of legitimacy will be overcome.

8.1.2 Disadvantage

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

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

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

Example:

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

8.2.1 Advantages

- * More practical than option four.

- * The modification to the existing structures go some way towards overcoming problem of illegitimacy.
- * The involvement by the MPNP in the appointment of the assessors will create some degree of legitimacy.
- * No new enforcement machinery necessary.

8.2.2 Disadvantage

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