

To the Technical Committee on the Independent Electoral Commission

Date : 12 May, 1993

ELECTORAL (CONSTITUENT ASSEMBLY) BILL, 1993

To establish an independent electoral commission to conduct and supervise elections, to provide for a code of conduct of political parties and to regulate the voting of voters and the election of members of the Constituent Assembly and to provide for incidental matters.

1. Application of Act

- 1.1 The provisions of this Act shall apply in respect of the Constituent Assembly elections and incidental matters thereto.
- 1.2 In the event of any conflict between this Act and earlier legislation regulating elections, this Act and the regulations made thereunder shall prevail.
- 1.3 Save where the context otherwise provides, the provisions of this Act shall apply to the national territory as identified and designated in 1910.

2. Independent Electoral Commission

- 2.1. An Independent Electoral Commission shall be nominated by the Multi Party Forum [or the Transitional Executive Council] and formally appointed by the State President.
- 2.2. The Commission shall consist of
 - 2.2.1 not less than seven and no more than eleven members of integrity and suitable qualification all of whom shall be eligible voters.
 - 2.2.2 four persons from the international community who shall be appointed by the State President upon the recommendation of the Multi Party Forum. [Transitional Executive Council]
- 2.3. All decisions of the Commission shall be taken by means of a vote and a simple majority shall be sufficient to bind the Commission. In the event of a deadlock, the President of the Commission who shall be appointed by the members of the Commission and who shall be a member of the Commission, shall have a casting vote.
- 2.4. No person shall serve as a Commissioner if such person:
 - 2.4.1 remains an official or office bearer of any political party or political organisation; or
 - 2.4.2 appears on a party list as a candidate for the election.

3. Status of Independent Electoral Commission

- 3.1. The Commission shall have the sole responsibility for the organisation, conduct and supervision of the election in terms of the provisions of this Act.
- 3.2. The Commission shall be independent of all governmental structures. Its sole responsibility to any other organ of government shall be to provide written reports to the Transitional Executive Authority on its decisions in respect of the organisation and conduct of an election.
- 3.3. The Commission shall be the supreme body in respect of the elections and shall have exclusive jurisdiction to apply and interpret this law. Its decisions shall be final.
- 3.4. The South African Government shall provide the funds necessary to finance the expenditure of the Commission, which funds shall be made over to the Commission from the Central Revenue Fund.
- 3.5. A revenue account shall be established by the Commission and all funds made over to it shall be paid into such account and all expenses and disbursements incurred by it shall be drawn from such account.
- 3.6. The Auditor General shall audit the books and accounts of the Commission.

4. Powers and Functions of the Independent Electoral Commission

- 4.1. The Commission shall have the sole responsibility to organise and conduct the elections and to make such arrangements as are necessary to ensure that the elections are conducted honestly and fairly.
- 4.2.1 The Commission shall certify to the TEC the fairness and freeness of the election. The Commission shall, in addition to such certification, be empowered to decide on such measures as it may deem necessary to correct or rectify substantial or material irregularities or unfairness in the elections.
- 4.2.2 The Commission shall, in addition to the certification, decide on the measures that it considers necessary for the parties to follow where, in its opinion, the election was partly or wholly unfair.
- 4.3. All powers of Ministers of State, governmental and local authorities in respect of the organisation, conduct and supervision of an election shall be derived solely from the Commission and shall be transferred to the Commission.

- 4.4. In particular and without limiting the general powers of the Commission as contained in paragraph 4.1 of this clause, the Commission shall:
- 4.4.1 apply the electoral system agreed to by the parties at the Multi Party Forum;
 - 4.4.2 identify the criteria for voter identification;
 - 4.4.3 designate the applicable voting areas and polling stations; including mobile polling stations;
 - 4.4.4 determine where voters may cast their votes;
 - 4.4.5 promulgate regulations governing procedures for the casting of postal votes where the voter is incapable of voting in person because of his or her illness or physical infirmity or physical disability or advanced age or because of her pregnancy;
 - 4.4.6 endeavour to ensure that each qualified voter be identified in advance of such election; but each qualified voter who produces his or her ID document or passport shall be entitled to vote whether or not he or she has been identified in advance;
ALTERNATIVELY:
ensure that, save for the production of an ID document or a passport at the actual vote, each qualified voter shall be identified in advance of such election;
 - 4.4.7 determine the extent to which existing law restricts free political activity, including access to voters, and shall promulgate regulations repealing or amending these;
 - 4.4.8 establish boards or appropriate machinery which shall have the power to hear a dispute concerning electoral irregularities, provision of venues for meetings, access to voters, intimidation and the breaches of the conduct for political parties or any other matter referred to the Commission, subject to a decision of such board or mechanism being referred to the Commission which shall act as an appeal tribunal.
 - 4.4.9 have the power to direct any governmental authority, including the police and the Defence Force or any other body or person to perform and execute tasks necessary for the implementation and conduct of the election;
 - 4.4.10 work in collaboration with the Independent Media Commission to ensure that all political parties participating in the election be given reasonable and fair access to all public broadcasting and television networks by means of an applicable code of broadcasting conduct, provided that the Commission shall be the final arbiter in the application of the provisions of such code;
 - 4.4.11 determine the extent, if any, of party political advertising in the electronic media;
 - 4.4.12 formulate and publish a code of conduct with which every political party and each participant in the election shall comply together with applicable sanctions for breach of such code;
 - 4.4.13 formulate and publish binding guidelines for the financing of the political campaigns of political parties. Such guidelines shall include a requirement of public disclosure of each contribution in excess of R10 000,00 to a

- political party and the identity of the contributor;
- 4.4.14 prepare, develop, initiate and implement educational programmes for voters in the election. Such programmes shall be designed to ensure that all eligible voters understand the voting procedures and know about the secrecy of the ballot. The Commission shall prepare as soon as is practicably possible after its constitution a budget for the financing of such programmes to be tabled before the Transitional Executive Authority which, subject to its approval, shall make the necessary funds available to the Commission;
- 4.4.15 administer such funds as may be allocated by the Commission for the purposes of assisting political parties in the organisation of their respective political campaigns. Such funds shall be allocated to political parties by means of retrospective reimbursement of expenditure properly proved and further in the ratio of the percentage of votes cast for each such party in the election. Such money shall be allocated in advance to the Commission by the Government;
- 4.4.16 enrol monitors nominated by international bodies as official observers, be responsible for their deployment in monitoring the elections and receive reports from such observers as to the conduct of such elections; in this regard we would propose the appointment of an observer agency to co-ordinate the monitoring work, preferably the United Nations or a combination of international bodies.
- 4.4.17 appoint subcommittees and regional councils which will perform such tasks as the Commission deems necessary to achieve the objective of the Commission. Such subcommittees shall be solely accountable to the Commission and such decisions as are taken by a subcommittee will be subject to appeal to the Commission;
- 4.4.18 act as an adjudicator and arbitrator on any matter related to the election process and the election referred to it by political parties, political organisations and the public including disputes referred to it by the Transitional Executive Council in terms of the procedures laid down in the Transition to Democracy Act;
- 4.4.19 appoint electoral officers and other officials as it deems fit;
- 4.4.20 make any other arrangements and promulgate any regulations which it, in its sole discretion, deems necessary for the attainment of its functions and purposes.

5. Persons entitled to vote

- 5.1 All South African citizens who have attained the age of 18 years shall be eligible to vote for the purposes of this clause.
- 5.1.1 Citizens, for the purpose of this clause, shall include all citizens of Transkei, Venda, Bophuthatswana and Ciskei.

5.2 A person shall be deemed to be a citizen by reason of any one of the following grounds:

5.2.1 Birth in South Africa;

5.2.2 At least one of such a person's parents was a South African citizen;

5.2.3 Marriage to a South African citizen;

5.2.4 Residence in South Africa for a continuous period of at least five years immediately prior to the registration of this Act.

5.3. Any person so entitled to vote as provided in paragraphs 5.1 and 5.2 shall exercise his/her vote in the area determined by the Commission.

6. Persons not entitled to vote

No person shall be entitled to vote if he or she:

6.1. has been convicted of any corrupt or illegal practice under this Act;

6.2. is subject to an order of court declaring him or her to be of unsound mind or mentally disordered or mentally defective;

6.3. is detained as a mentally ill person under the Mental Health Act (Act 18 of 1973) or similar statute in the case of a person resident in an independent state so defined.

7. Voter Identification

7.1 The Commission shall draw up regulations concerning the identification of voters. If it considers it necessary, it may provide for a system of voter identification cards.

7.2 In establishing proof of voting age, place of birth and citizenship, all appropriate methods of proof of identity shall be taken into account, including inter alia, passports, identity documents, birth certificates, baptismal certificates, school reports and affidavits.

8. Party Lists for Election to Constituent Assembly

8.1. No person shall be eligible for inclusion on a party list unless such person is eligible to vote and is not serving a current term of imprisonment.

8.2. Each person nominated on a party list shall confirm in writing his/her consent to such nomination and his or her confirmation that he or she is

legally competent to become a member of the Constituent Assembly by virtue of being an eligible voter.

- 8.3. If a person whose name appears on a party list dies before the election takes place or withdraws consent or is withdrawn by a political party for any reason, the political party on whose list the person's name appeared may nominate a person to replace the candidate.
- 8.4. Each party shall furnish to the Commission a list of persons in respect of each region as defined in the Transition to Democracy Act in which it intends to contest the election and shall furnish a second list to the Commission in respect of candidates nominated for election on the national list as provided for in the Transition to Democracy Act.

9. Registration of Political Parties

- 9.1. The Independent Electoral Commission shall register as a political party any organisation which wishes to contest the elections for the Constituent Assembly if:
 - 9.1.1 It is satisfied that it is an object of such organisation to propose a list of persons to contest the election to the Constituent Assembly;
 - 9.1.2 the organisation provides a deposit of R100 000,00 with the Independent Electoral Commission, such deposit being forfeited in the event of the organisation failing to obtain 3% (percent) of the votes cast in the elections;
 - 9.1.3 The organisation provides the Independent Electoral Commission with an original copy of its constitution together with the signatures of 20 000 persons qualified to vote;
 - 9.1.4 The organisation provides a written undertaking that it will abide by the Code of conduct for parties and will accept the decisions of the Commission and the result of the election;
 - 9.1.5 the organisation provides the Independent Electoral Commission with
 - 9.1.5.1 the name of the organisation;
 - 9.1.5.2 the full names and signatures of the national officers;
 - 9.1.5.3 the business address and postal address of the head office of the organisation and postal addresses of its provincial or regional offices.
- 9.2. Upon registration the Independent Electoral Commission shall issue such an organisation with a certificate of registration.
- 9.3. Two or more political parties which have mutually agreed thereto may be registered for the purposes of the election as one political party and may assume for the purposes of the elections any name which such parties

deem appropriate.

9.4. Upon the date set by the Independent Electoral Commission as nomination day each political party shall submit to the duly designated officer of the Commission a list of persons proposed by such party for its lists for election to the Constituent Assembly.

9.5 The Commission shall register the symbol or logo of each party.

10. Polling Districts and Polling Stations

The Independent Electoral Commission shall in its sole discretion as soon as practicable after its establishment but after consultation with duly authorised representatives of registered political parties divide South Africa into as many polling areas as it deems appropriate for the fair and efficient conduct of an election. All polling venues should be accessible to all voters.

11. Hours of Poll

The poll shall commence at 06:00 and shall close at 22:00. There shall be 3 days for polling one of which shall not be a working day. The officer duly appointed by the Independent Electoral Commission to preside at the polling station shall be entitled to permit voters to remit a vote in the event that such voter is in the perimeter of the polling station by 9:00 p.m (21H00).

12. Appointment and Powers of Presiding Officers

The Independent Electoral Commission shall appoint presiding officers for each polling district and where applicable for each polling station.

13. Where persons vote

13.1. Save in the case of postal votes recorded in terms of duly promulgated regulations issued by the Independent Electoral Commission, a voter shall vote in the region in which he or she resides or works.

13.2. Notwithstanding paragraphs 13.1, the Independent Electoral Commission may promulgate regulations authorising that persons may vote in another area if it deems it suitable for the fair and efficient conduct of the election.

14. No voter to vote more than once

14.1. A voter shall, whether or not his or her name appears on more than one voters list or more than once on the same list, be entitled to vote once only for the election of candidates to the Constituent Assembly and subject to paragraph 14.2 a voter shall not be entitled to vote unless such person produces an identity document or a voter identification card.

14.2. In the event that a voter fails to establish his or her identity as provided for in paragraph 7. the voter shall be required to make an affidavit to the effect that he or she is eligible to vote and that he or she has not voted in another district.

14.3. Such votes as are cast in terms of paragraph 14.2 must be verified by the Independent Electoral Commission during the counting of such votes.

14.4. A person who makes a false affidavit shall be guilty of an offence and liable to conviction and penalties as prescribed hereunder.

14.5 The Commission shall draw up regulations to ensure that means are identified to ensure that persons do not vote more than once.

15. Manner of Voting

The voting at the election shall be by secret ballot which shall in substance be conducted in accordance with procedures promulgated by the Independent Electoral Commission, which shall inter alia make provision for illiterate, blind and physically incapacitated persons to cast their vote. The ballot form should be single-columned and in alphabetical order.

16. Counting of Votes

The Independent Electoral Commission shall appoint a returning officer for each polling district.

17. The Chief Returning Officer

The Independent Electoral Commission shall appoint a chief returning officer who shall not be an office bearer of or member of any political party or a candidate for election.

18. Offences

- 18.1. The Independent Electoral Commission shall promulgate regulations as soon as is practicable after its constitution prohibiting corrupt practices relating to the election campaign and voting, undue influence, bribery, illegal persuasion, or intimidation of voters.
- 18.2. The Commission shall be empowered to provide for appropriate punishment in the event of a person being convicted by the appropriate court of law for the commission of one or more offences specified in paragraph 18.1. Such punishment may include the imposition of a fine, a term of imprisonment, prevention from voting or being a candidate for election or campaigning for any other candidate for elections.
- 18.3 The Commission shall ensure that the taking of public opinion polls and the publication of the results of such polls shall be restricted in the two weeks prior to the election. No such poll shall be published in the period of fourteen days before the election. In addition, the Commission shall ensure that persons and agencies taking such polls clearly identify the conditions and procedure for the taking of such polls and which political party, organisation or person has requested or paid for the poll.

19. Procedure for complaints in respect of electoral irregularity

- 19.1. Any duly authorised representative of a political party or eligible voter shall be entitled to make application to the Independent Electoral Commission in the manner prescribed by regulation by such body in respect of any electoral irregularity being a breach of any of the provisions of this Act and on any of the provisions of such regulations which the Commission publishes from time to time.
- 19.2. The Commission shall as soon as it is practicable have the application considered in terms of the procedures laid down by it and shall make its decision known by means of a written ruling, a copy of which shall be provided to the applicant or his or her duly authorised representative. The decision of the Commission shall be final.

**EXPLANATORY MEMORANDUM ON THE ELECTORAL (CONSTITUENT ASSEMBLY) BILL
1993**

1. The African National Congress submits its proposals on the establishment of the machinery for the conduct of elections to the Constituent Assembly in the form of a Bill. Although the language used in the proposed measure may not be exactly that of a parliamentary drafter's version, the sense it attempts to convey could form the basis for such legislation.
2. The preamble provides in general terms, for the purpose of the Bill. It is now agreed that the first elections should be conducted by a body which enjoys the confidence of all sectors of our society and that it should be authorised to act independently and have adequate powers.
3. The definitions clause will be inserted when there is agreement on the text of the proposed legislation.
4. Section 1 refers to the matters. Firstly, the context for the Bill is the election for the Constituent Assembly. Second, as there must be uniform legislation for an election throughout South Africa, the Bill stipulates that its area of application is the national territory as established in 1910. The agreement of the "TBVC states" to the election process for the Constituent Assembly will entail acceptance of the provisions of this measure. Third, the law must provide for resolving any conflict between this Act and earlier legislation, which is basically the Electoral Act 45 of 1979 as amended and added to. The Independent Electoral Commission may wish to substitute its own rules for the existing ones or to amend them and therefore to continue some of the earlier provisions. But for the avoidance of doubt, it is made clear that this Act and the regulations made by the Commission shall have precedence.
5. Section 2 constitutes the Independent Electoral Commission. Because of the importance of its role, it is proposed that it be neither too small nor too unwieldy in composition. Members shall serve in a full-time capacity and shall be persons who enjoy the confidence of South Africans. Therefore, it is suggested that a Commissioner should divest herself or himself of any office in a political party for the duration of the Commission's terms and must not play a direct role in the election as a candidate. In addition to South African citizens, it is proposed that four "External Commissioners" be appointed, to provide expertise to the Commission and a measure of impartiality and external supervision.
6. Decisions of the Commission must be taken expeditiously. The addition of external appointees therefore makes it possible that such decisions can be taken by a simple majority of the Commission. As such, Commissioners will provide the element of detachment and impartiality.

7. Section 3, dealing with the status of the Commission, is the heart of the proposal. Section 3.1 provides for the Commission to have sole control over the whole election. It provides for the Commission's independence and, in order to ensure speed of decision-making, for the finality of its decisions.
8. Section 4 refers to the powers of the Commission. In a transitional situation, a body which acts as a referee must have the authority to determine whether the election was "free and fair". This the Commission is entitled to do and it will report to the Transitional Executive Council. In addition, Section 4 authorises the Commission to propose or to take corrective action, including putting parties on notice where it considers that the behaviour of a party, its officials or members, is not consistent with the demands of a free and fair election.
9. The electoral system decides the method by which the electors will vote. Whether the election should be conducted on the first-past-the-post system or by proportional representation on a list system is a matter for the Multi-Party Process to determine and not the Commission (Section 4.4.1).
10. The Commission is given the discretion to determine the criteria for identifying voters. It may decide whether a voter's register is necessary or whether the issuing of voters' cards to eligible voters will suffice. In any event, the production of a passport or identification document at the actual voting station is sufficient evidence of citizenship and entitlement to vote. Identification of voters must take into account a multiplicity of methods of proof (Section 7.2).
11. Entitlement to vote has to be distinguished from identification. In common with other countries, entitlement to vote is determined by citizenship. It takes into account that racial and gender factors or practices are echoed in present laws and, to that extent, amends existing citizenship rules.
12. Voting must be in person, on one of the three designated days set aside for the elections in the area determined by the Commission (Section 5.3). The only exception to personal voting is the proposal for postal voting by persons incapable of voting in person because of illness or physical infirmity or physical disability or age or pregnancy (Section 4.4.5). No other provision for postal voting is made to ensure that there is no abuse and, at the same time, fairness for all parties.
13. The Commission is authorised to set up sub-committees and councils to enable it to perform its functions. It may therefore devise the best method for the efficient pursuit of its tasks. In addition, it can establish mechanisms for the investigation and hearing of complaints.
14. If the Commission is to perform its functions satisfactorily as the guardian of the electoral process, it must be able to instruct in the last resort any person (including departments and security personnel) to perform necessary tasks (Section 4.4.9), have the ultimate authority where it shares a function with

another body (Section 4.4.10) and enforce rules and procedures such as a Code of Conduct for Political Parties on the parties, officials and participants in the election (Section 4.4.12).

15. Provision is made for binding guidelines for the financing of political campaigns (Section 4.4.13), assistance towards the election expenditure of parties (Section 4.4.15), regulation of political advertising in the electronic media (Section 4.4.11) and the regulation of public opinion polls (Section 18.3).
16. Section 19 deals with the requirements covering the registration of political parties. In addition to the requirements laid down in this section, the Commission will have the standard power to refuse registration if the name or the symbol of a party is similar to or identical with the name of another party; the organisation of the ballot, including the arrangements for the ballot paper; and the security of the electoral process.
17. The Commission will liaise with international (including regional) official observers and monitors and in co-operation with these bodies will be responsible for their deployment in monitoring the elections. These monitors will report to the Commission which shall take their observations into account, together with its own assessment, in coming to a decision on any matter (Section 4.4.16).
18. The provisions relating to party lists for elections to the Constituent Assembly (Section 8 and Section 9.3 and 9.4) are based on the assumption that the electoral system will be by way of the List System based on proportional representation. Under this system, a party obtains a number of seats in proportion to the total number of votes it wins. Hence, the treatment of irregularities and breaches of electoral rules, etc., are not based on a constituency-type election as in the Tricameral System but on the responsibility of parties and those who must account on behalf of the party.
19. It is necessary, in our view, to lay down in the parent act the number of days as well as hours of voting in which the election is held (Section 3). These are matters of great significance and cannot be left to the Commission. This provision takes into account geographical, employment and social conditions in our country.
20. The other provisions are common form features of any electoral law. The African National Congress will be pleased to provide to the Technical Committee supplementary documentation to explain the reasons for and justification of specific proposals or to expand on this memorandum.