C·O·D·E·S·A

WORKING GROUP 1

SUBGROUP 1

INTERNAL SUBMISSIONS

VOL 3

CONVENTION FOR A DEMOCRATIC SOUTH AFRICA

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AFRICAN NATIONAL CONGRESS

Submission to Sub-Group 1 of Working Group I
"Completing the Reconciliation Process" - Levelling the Political Playing Fields:
The amendment and/or repeal of laws militating against free political activity including the elimination of all discriminatory legislation.

DO WE NEED AN INTERIM BILL OF RIGHTS?

1. This Sub-Groups has spent three sessions identifying the areas where existing legislation may need the intervention of the Codesa process. In this exercise, particular pieces of legislation have been identified and some broad principles concerning the approach to different areas have been projected by some delegations. The African National Congress has submitted a document which identifies areas of intervention and has proposed the extent of changes in the law to ensure that there is a proper climate for free political activity.

2. Two different approaches can be identified as to the manner and approach to the repeal of or amendment to illiberal or racist legislation.

3. Firstly, there is a group of delegates which would support the identification of as many provisions of the existing law and regulations as possible and propose their repeal or amendment. This group recognises that such an exercise cannot be comprehensive in its sweep and could be immensely time-consuming because a discussion in the Sub-Group would be required on each item of legislation.

4. Therefore, this group of parties and organisations proposes that provision should be made for broad legislation for certain agreed civil and political rights and freedoms during the transition period.

5. The African National Congress fully supports this approach. However, it considers that it would be unfortunate to refer to this as an Interim Bill of Rights, which is the second approach, propounded in this Sub-Group and in another Working Group. Our reasons are as follows:

6. The issue of a bill of rights belongs to the stage of constitution-making and not to the interim period which is generally expected to be of limited duration. Codesa has no authority to draft a document of a constitutional nature; it can only set out constitutional principles, a task which it is performing with credit. Extensive constitutional amendments can only confuse the public and create the impression that Codesa is doing the work that the Constituent Assembly ought to do.

7. A Bill of Rights is a complex and complicated package and should not be pre-empted at this stage. It is a key structure of the Constitution and its adoption requires open debate, where the public can be involved through their submissions. As one testimony to the Law Commission put it, "Unless the people take it to their hearts, no Bill of Rights will serve or even survive ... To work, the Bill must gain acceptance from the broad majority of South Africa's [people] and the way it is drafted, presented and legislated must at all times take this need into account."

8. The issue of legitimacy cannot be escaped. Since the Bill of Rights will provide for fundamental or a higher law, it can only be promulgated as part of a constitution-making process where a written constitution receives a popular mandate. It does not mesh easily into the present constitutional order with its reliance on parliamentary sovereignty and would necessitate a radical departure from the underlying philosophy of the present order. Public discussion in a Constituent Assembly would assist in the creation of the culture which would make legislators, the public and even the judiciary recognise the way the Bill of Rights operates and the extent of the radical departure from the present system.

9. The debate about an Interim Bill of Rights and what categories of rights should be incorporated in the Bill would unnecessarily enmesh the Sub-Group and Codesa in a lengthy, divisive and inconclusive exercise which would delay the process of identifying the process of the repeal/amendment of offending legislation.

10. The most fundamental objection is that as long as we in South Africa have racial discrimination in parliament and in the government itself, reflected in the Tricameral approach, a bill of fundamental rights is an absurdity. A Bill of Rights, even in a rudimentary form must be associated with and provide the impetus for equality, non-discrimination and democracy. Dr F. van Zyl Slabbert, in his evidence to the Law Commission, with which the majority of witnesses, concurred, said: "I can think of nothing more calculated to destroy the positive good that a Bill of Rights can bring about to us than to be seen and function as part of discriminatory legislation."

11. A Bill of Rights needs a proper system of enforcement enjoying general support. We will therefore need a Constitutional Court - on which there is now a consensus - which will emerge from and not precede the Constitution. The important power of judicial review of the Bill of Rights cannot be vested in the current judiciary whose composition, orientation and functioning reflect the current state of political inequality and distortions. The true guardians of such a Bill can only be the Constitutional Court.

12. For the levelling of the political playing field, in the transitional phase, a reasonable amount of certainty and clarity is required so that parties and activists know their rights and obligations in advance of any proposed activity. By their very nature, the provisions of a Bill of Rights are drawn in broad terms, rather than in the precise language of legislation. In the long term, courts provide specificity to the standards laid down in the Bill of Rights. But in the transitional phase, a Bill of Rights will provide for uncertainty as only litigation, especially to strike down offending legislation, could clarify whether a law - notorious or not-offends against the provisions of a particular part of the Interim Bill of Rights. To resolve such controversies you need concrete cases before the courts, for which plaintiffs armed with adequate resources and time are required. It cannot be seriously contended that such an approach can speedily and comprehensively provide for an adequate protection of rights.

13. Conversely, administrations, the police and public servants must also have speedy access to the extent of their rights and obligations. This is especially true in relation to the regulation of meetings, assemblies, access to voters and party members, broadcasting and the myriad activities associated with an election. These officials specific provisions to which they can turn to. After all, this is the way that civil servants have been trained. Only when we have established a culture based on a proper Bill of Rights can we envisage public servants anticipating what the Constitutional Court will say and do. In the meantime. laws must be changed so that these public officials recognise the concrete limits to their power.

14. An Interim Bill of Rights is also a contradiction in terms. Fundamental rights cannot be interim or provisional. It is precisely because the African National Congress values a Bill of Rights so much that we guard zealously the name and concept.

15. The African National Congress therefore recommends to the Sub-Group that as we cannot anticipate the principal debate on the Constitution, we should therefore not entertain the idea of an Interim Bill of Rights.

16. Instead, we should concentrate on identifying those laws which require repeal or amendment and which would be included in a General Law Amendment Act. Security and emergency legislation which requires change would also be included in this general act. In addition we propose a Freedom of Expression, Association and Assembly Act which would strengthen the civil and political rights and whose speedy enforcement could partly be vested in the Independent Election Commission and partly in the courts.

23 March 1992

ac/hdv\powers

PRINCIPLES CONCERNING EMERGENCY POWERS

1. In deciding whether, in the short term, an interim or transitional government, or, in the longer term, a future government, should be entrusted with emergency powers, four principles will have to be decided, namely -

(a) whether there is a need for powers to declare a state of emergency and to promulgate emergency measures;

(b) whether legislation providing for such powers should be of a temporary or permanent nature;

(c) whether any or all actions taken in terms of such legislation should be made objectively justiciable by the Supreme Court; and

(d) whether legislation providing for emergency powers should provide for the inviolability of certain fundamental rights.

1.1 These four principles or questions will be dealt with <u>seriatim</u> hereunder.

<u>Ad (a)</u>

2.1 It is a generally recognized principle that in times of

emergency, extraordinary measures are not only justified but essential to safeguard the national security and to ensure the safety of the public and the maintenance of public order. the Public Safety Act, 1953 (Act No. 3 of 1953), presently empowers the State President to declare a state of emergency in the whole of the Republic of South Africa or in a specified area, as the case may be, and to make such regulations as appear to him to be necessary or expedient for providing for the safety of the public, or the maintenance of public order and for terminating the state of emergency.

2.2 Subject to what is said down below, these powers should be retained and subject to further discussions the basis of declaring a state of emergency could be -

> "*if there is a grave threat to the sovereignty or national defence of the Republic, or if circumstances have arisen which seriously threaten the safety of the public or the maintenance of public order and the ordinary law of the land is inadequate to enable the Government to ensure the sovereignty or national defence of the Republic, or the safety of the public or to maintain public order*".

2.3 Presently, in terms of section 19 of the Republic of South Africa Constitution Act, 1983 (Act No. 100 of 1983), the executive authority of the Republic, in regard to general affairs, is vested in the State President acting <u>in consultation</u> with the Ministers who are members of the Cabinet. In <u>Nkwinti v Commissioner of</u>

Police and Others 1986(2) SA 421 (ECD) it was aptly pointed out that in declaring the state of emergency the State President acted, not on the advice of the Cabinet, but after consultation with the Cabinet. Therefore, whether the State President is required to consult with whoever, he will still have to apply his own mind to the matter. He should not become a rubber stamp to anybody.

2.4 With a view to a interim period, it is foreseen that provision will have to be made for consultation with the interim or transitional Cabinet or relevant body of authority. What degree of representation of interests outside of the normal governmental channels is warranted is a matter which will have to be discussed.

Ad (b)

3.1 It is generally accepted that emergency measures should:

(a) Be in force only as long as necessary, in other words be temporary.

(b) Commensurate with the gravity of the circumstances necessitating it.

(c) Commensurate with the geographical extent of the emergency situation.

3.2 To ensure that the declaration of a state of emergency and

emergency measures are temporary, there are basically two models:

3.2.1 Legislation which are temporary and which can be put into operation by an authority (such as the State President) for a limited period of time (for example 6 months or 12 months). Usually the additional powers granted by such legislation is spelt out in that legislation and no or very limited provision is made for promulgating further additional powers. (The British Prevention of Terrorism (Temporary Provisions) Act 1989 is an example in this regard). The reason why the extraordinary powers are spelt out in the Act itself, is that the legislator should consider the extension of the operation of the Act from time to time and at the same time ensure that the provisions commensurate with prevailing circumstances.

3.2.2 Legislation which is permanent on the statute book, but provides for the declaration of a temporary state of emergency and the issuing of emergency regulations. (E.g. the Public Safety Act 3 of 1953). From the State's point of view the power to issue emergency regulations gives a very flexible instrument.

3.2.3 In both systems mentioned in paragraphs 3.2.1 and 3.2.2 respectively, a system of ratification e.g. within 30 days by the governing body should be built in e.g that two thirds of the governing body should be in favour of -

(a) the putting into operation of the temporary Act; or

(b) the declaration of a state of emergency and the regulations issued in respect thereof.

3.2.4 A disadvantage of the system of temporary legislation is that if circumstances changes dramatically within a short period and the Act is inadequate, it would require the legislator to convene if it is not in session at that stage. On the other hand ratification in either system would require the legislator to convene if it is not in session at the time that ratification should take place as stipulated.

3.2.5 It appears that, provided that the necessary checks and balances are built in, there is not much difference between the two systems. It is, however, important at this stage to decide on one of the systems in order to formulate any legislation in this regard.

4. Ad (c)

4.1 Presently in the Public Safety Act, 1953, apart from containing a so-called ouster clause in section 5B, the powers conferred on the State President are in subjective terms, such as "***if in the opinion of the State President***" or "***as appear to him to be necessary or expedient***".

4.2 In various cases the Appellate Division held that in cases where the subjective test applies the objective existence of the fact or state of affairs, is not justiciable in a court of law. The court can interfere and declare the exercise of the power

invalid only where it is shown that the repository of the power acted mala fide or from ulterior motive or failed to apply his mind to the matter. In the case of the objective test, the objective existence of the jurisdictional fact as a prelude to the exercise of the power in question is justiciable in a court of law. If the court finds that objectively the fact or state of affairs did not exist, it may declare invalid the purported exercise of the power.

4.3 Regarding the Public Safety Act, 1953 in its present form and the regulations promulgated in terms thereof it was held -

(a) that whether the jurisdiction of the courts is impaired in legislation by an indemnity clause or a direct ouster, the courts will still review actions to decide whether the action taken was indeed taken in terms of the empowering legislation;

(b) that, as a result of section 5B of Act 3 of 1953, the issuing of vague regulations is permissible;

(c) that the power of the State President to issue emergency regulations, although it may be equated to the powers of Parliament to legislate, is not for that reason beyond the review of the courts.

4.4 With a view to preventing any abuse of emergency powers, the Public Safety Act, 1953, could be amended by repealing the ouster

clause in section 5B, and by amending the remaining provisions in order that in future not only the declaration of a state of emergency, but also the exercise of any powers in terms of emergency regulations, will be objectively justiciable by the Supreme Court.

Ad (d)

5.1 Regarding the question whether it should be stipulated in the emergency legislation which rights may not be derogated from, this aspect should be developed in tandem with a bill of rights. A future bill of rights should stipulate which rights may not be suspended or circumscribed even during war or an emergency. The bill of rights proposed by the Law Commission for example provides that -

> "*Legislation relating to the state of emergency or regulations made thereunder shall not permit, authorize or sanction the cruel or inhuman treatment of persons, the retroactive creation of crimes, detention without trial, indemnity of the state for acts done during the state of emergency or the subjective discretionary use of force by an officer of the state or government*".

5.2 The Public Safety Act, 1953, presently provides that retroactive offences may not be created and that regulations may not be issued in respect of elections, lawful trade-union activities and military service.

5.3 Regarding detention without trial, it is internationally accepted that such a practice is permissible during times of extreme emergency, but must be subject to proper control and review, and must permit access by lawyers and family. Notification to relatives should be obligatory as well as the provision of reasons for detention and a limitation of the period of detention.

6. The Government's position must be borne in mind in considering the above, namely that adaptation to Security Legislation including the powers governing emergency situations are to be developed in accordance with the needs of the moment in tandem with transitional arrangements.

INYANDZA NATIONAL MOVEMENT

INYANDZA SUBMISSION ON THE REMAINING DISCRIMINATORY LEGISLATION AND ITS VIEW WITH REGARD TO REPEAL, AMENDMENTS AND/OR

It is our strongest view and belief that almost 99 % of the Country's Legislation was enacted to oppress and restrict the disenfranchised majority on the one hand and advance and uplift the standard of living of the white electorate on the other. This status quo therefore barred the voteless masses from active participation in all the means of production of our country.

Our strongest conclusion therefore is that all the legislation of the land are discriminatory in nature and therefore have to be repealed. However there are those least ones which need amendments during the interim.

The legislation identified is divided into those dealing with :

(a) LAND
(b) EDUCATION
(c) THE CONSTITUTION

(a) **LAND**

1. DEVELOPMENT TRUST AND LAND ACT NO. 18 OF 1936 - This Act places restrictions on land transactions between blacks and other persons.

2. NATIONAL STATES CITIZENSHIP ACT NO. 26 OF 1970 - This Act provides for citizenship by certain blacks of territorial authority areas of self-governing black territories i.e. creating black national states.

3. SELF-GOVERNING TERRITORIES CONSTITUTION ACT NO. 21 OF 1971 - This Act provides for the establishment of legislative assemblies and executive councils in black areas and provides for the powers, functions and duties of such assemblies and councils.

   The Act provides that the State President may declare any area for which a legislative assembly has been established to be a self-governing territory.

   Self-governing territories may only legislate on matters specified in schedule 1 of the Act and on no other matters. Their legislation on schedule 1 matters has to be sanctioned by the State President.

2/.....

2 and 3 specifically were made for the purpose of granting citizenship to blacks in those national states or self-governing states so as to exclude them from S.A. Citizenship. Those areas so set aside are not reliable regions and confer no self-determination on those states. If Codesa is to decide on regions to form part of a Federation state, then these regions or units will have to be based on viability.

4. BLACK LOCAL AUTHORITIES ACT NO. 102 OF 1982 - This Act provides for the establishment of local committees, villages councils and town councils for black persons in certain areas and for the appointment of a Director of Local Government.

5. BLACK AUTHORITIES ACT NO. 102 OF 1982 - This Act provides for the establishment of certain black authorities including tribal authorities, regional authorities and territorial authorities.

6. CONVERSION OF CERTAIN RIGHTS TO LEASEHOLD ACT 46 OF 1984 - Need for full ownership by blacks.

Related acts:-

7. BLACK ADMINISTRATION ACT NO. 38 OF 1927 - to be repealed.

8. BLACK COMMUNITIES DEVELOPMENT ACT 4 OF 1984 - to be repealed.

9. BLACK LABOUR (TRANSFER OF FUNCTIONS ACT) 88 OF 1980 - to be repealed.

10. PROVINCIAL GOVERNMENT ACT 33 OF 1986 - to be repealed.

(b) **EDUCATION**

Acts which provide for the creation of black schools, universities and segregated education are to be abolished as Education must be placed under one body to ensure equal opportunity and equal learning.

1. Education and Training Act No. 90 of 1979 as amended by Act No. 52 of 1980 - This Act provides for the control of education for blacks by the Department and Training.

2. Education Affairs Act (House of Assembly).

(c) CONSTITUTION

THE REPUBLIC OF SOUTH AFRICA CONSTITUTION ACT NO. 110 OF 1983 should be abolished in its entirety as well as legislation incidental thereto as it is the pillar of apartheid.

CITIZENSHIP ACTS :

1. THE SOUTH AFRICAN CITIZENSHIP ACT NO. 44 OF 1949 should also be abolished as it gives foreigners a right to acquire citizenship easily more than South Africans.

2. NATIONAL STATES CITIZENSHIP ACT NO. 26 OF 1970 also provides for citizenship of a homeland being conferred on any black person by virtue of his ethnic group irrespective of the location of that person.

PUBLICATIONS ACT NO. 42 OF 1974 also needs to be repealed as it creates an anonymous body which is responsible for censorship without disclosing the membership of such a body. This may lead to the censorship being used against any organisation for purposes of silencing it.

AFFECTED ORGANISATIONS ACT NO. 31 OF 1974 makes provision for the declaration of affected organisations which are prohibited from asking for and receiving funds from abroad for political reasons. It naturally follows that since all political parties have been unbanned, this statute no longer serves its intended purpose.

DISCLOSURE OF FOREIGN FUNDING ACT NO. 26 OF 1989 :

This Act makes provision for certain organizations which are to seek permission to canvass for funds for any purpose whatsoever and the said funds are to be used only for the purpose they were given. This law makes it an offence not to get the permission or to fail to furnish any further information required from the organisations.

THE PROHIBITION OF FOREIGN FINANCING OF POLITICAL ORGANISATIONS ACT NO. 51 OF 1968 : It is imperative that this Act be abolished as it prohibits political parties from receiving foreign funds for purposes of campaigning for elections inside South Africa. Obviously this legislation would not be in the interests of all South Africans with due regard to the imminent elections.

THE INTERNAL SECURITY ACT NO. 74 OF 1982 AND NO. 44 OF 1950 have to be revised entirely and Section 29 of Act 74 of 1982 which deals with detention without trial must completely be abolished as it has been the scurge of all South Africans since it was enacted.

Venda.

SUBMISSION TO WORKING GROUP I SUB GROUP I.

THE POSITION OF POLITICAL REFUGEES.

As a sequel to the resolution of Sub-Group I that the Venda Government, Kimoko Progressive Party, United People's Front and Inyandza National Movement meet and make proposals to the sub group regarding the position of political refugees, we wish to propose as follows:

1. That all refugees in South Africa, the TBVC States and self governing territories be treated in accordance with international accepted standards under the auspices of the High Commissioner for Refugees.

2. That an independent body be formed by CODESA to look into the registration of all refugees in consultation with the High Commissioner for Refugees.

3. That all areas where there are refugees be identified.

4. That the South African Government refrain from awarding premature citizenship to immigrants and mercenary refugees immediately.

5. That we are aware that white refugees are treated different and therefore propose that all refugees irrespective of colour or race be treated equally.

6. That we condemn in the strongest terms any deportation or repatriation of the refugees whilst the civil war is still on and before reconstruction services are rendered.

7. That we condemn any form of exploitation of the refugees by farmers and business people.

8. That we condemn in the strongest terms the alleged sale of refugees.