

CHAPTER 2

Legal Framework

The constitution and other legal structures supporting the apartheid regime in South Africa prohibited free political association by the majority of South Africans and denied them the franchise. Free and fair multi-party, non-racial elections were impossible under such conditions and so an entirely new legal environment had to be created.

Transitional Legal Framework

The new transitional legal structures established to facilitate the organisation of such elections included a new Interim Constitution which came into effect on 27 April 1994, a Transitional Executive Council (TEC), an Electoral Act, an Independent Electoral Commission (IEC), an Independent Media Commission (IMC) and an Independent Broadcasting Authority (IBA). The Interim Constitution will be replaced by a new constitution to be adopted by the new National Assembly within two years of these April 1994 elections. The TEC Act lapsed upon the assumption of office by the members of the first Cabinet as provided for in the Interim Constitution. The IEC and the IMC were to be dissolved on a date fixed by the State President by proclamation in the Gazette.

The Interim Constitution

The Interim Constitution confers the franchise on every South African citizen of 18 years or over and any one who, though not a citizen, has been accorded the right to exercise the franchise through an Act of Parliament.

A regime of fundamental rights is provided for in this Interim Constitution. This includes equality before the law and equal protection of the law; the right to life; freedom of expression; freedom to assemble and demonstrate peacefully; freedom of movement; and the freedom to form and to participate in the activities of a political party.

The Interim Constitution provides for a Constitutional Assembly with two Houses of Parliament, the National Assembly and the Senate. The Constitutional Assembly is charged with the task of drawing up a permanent Constitution within two years. In doing so the Assembly will be bound by the Constitutional Principles inscribed in the Interim Constitution.

The National Assembly consists of 400 members elected in accordance with a system of proportional representation. The seats are filled in the following manner:

- (a) 200 seats from regional lists submitted by the political parties, with a fixed number of seats reserved for each region as determined by the commission for a particular election, taking into account available scientifically based data in respect of voters, and representations by interested parties. The representation for these current elections in respect of the various regions is as follows:

Western Cape	– 21 seats
Eastern Cape	– 28 seats
Northern Cape	– 4 seats
Natal	– 40 seats
Orange Free State	– 15 seats
North-West	– 15 seats
Northern Transvaal	– 20 seats
Eastern Transvaal	– 14 seats
Pretoria-Witwatersrand-Vereeniging	– 43 seats

and

- (b) 200 seats from national lists submitted by the respective political parties.

The Senate consists of 10 Senators for each of the nine Provinces, nominated by the parties represented in the provincial legislatures, proportionate to their strengths in the respective legislatures.

Any party with more than five per cent of the vote is entitled to a seat in Cabinet. The President is elected by a simple majority in parliament. Any party with 20 per cent of the vote or, if there are none such except for the winning party, this party and the second largest party, will each nominate an Executive Deputy President with whom the President must consult on major decisions including the allocation of portfolios in Cabinet.

These arrangements are mandatory and are to last for five years, that is three years beyond the adoption of the final Constitution, and until the next election.

Under the Interim Constitution, each Province will have its own legislature, an executive council of not more than 10 people and a regional head of government, or Premier. Each party with more than 10 per cent of the provincial vote is entitled to a seat in the provincial cabinet.

The Transitional Executive Council (TEC)

This body was established by the Transitional Executive Council Act of 1993. The object of the TEC in conjunction with all legislative and executive structures at all levels of government in South Africa, was to facilitate and promote the preparation for and transition to a democratic order in South Africa. The TEC was required to pursue its objectives by creating and promoting a climate for free political participation and by promoting the conditions conducive to the holding of free and fair elections. It commanded a range of powers and advised the State President on the appointment of members of the IEC.

Each government, political party or organisation which at any time participated in the Multi-party Negotiating Process and which met the stipulated conditions for participation, was entitled to appoint one representative to the TEC.

The TEC operated through a series of sub-councils which were subject to its general control and supervision. These included sub-councils on:

- (a) Regional and Local Government and Traditional Authorities
- (b) Law and Order, Stability and Security
- (c) Defence
- (d) Finance
- (e) Foreign Affairs
- (f) Intelligence
- (g) The Status of Women.

Each government and administration was required to keep the TEC informed and provide it with copies of any proposed legislation, including regulations and by-laws which had a bearing on the objectives of the TEC. Where the TEC or the sub-council concerned had reason to believe that a decision or action of any government, administration, political party or organisation was likely to have an adverse effect on the attainment of the objectives of the TEC, it had power to take action against the offending body. In the event of such action the TEC had to allow the body concerned to make representations. Any such direction given by the TEC or the sub-council concerned had to be complied with except where the disputes procedure under the TEC Act was successfully invoked by the body concerned.

The Electoral Law

The new Electoral law, called the Electoral Act 1993, which provided the legal framework for the organisation of free and fair non-racial multi-party elections came into force in January 1994. It had many special features, some of which were unique, which were considered necessary in the circumstances of South Africa to ensure the conduct of free and fair elections.

The main features of the Electoral Act included:

- (a) an Independent Electoral Commission to be established to administer the provisions of the Electoral Act itself. The principal task of the IEC was to create an environment which generated confidence in the electoral process and the secrecy of the ballot and to conduct the elections. The IEC was established by a separate Act which is discussed briefly below in this chapter.
- (b) the establishment of an interim party liaison committee whose function was to establish liaison between the IEC and the political parties represented thereon regarding election matters. The party liaison committee also served as a forum in which parties discussed matters of concern with a view to avoiding infringements of the Electoral Code of Conduct, a copy of which is at *Annex XI*. In effecting any appointment of electoral officers, the IEC was required to invite submissions from the party liaison committee on proposals regarding such appointments.
- (c) the appointment of and control of electoral officers and staff.
- (d) the extension of the franchise to any person of the age of 18 years or older who is a citizen of or permanently resident in South Africa and who is in possession of a voter's eligibility document, which could be any one of the following:
 - (i) an identity document or a temporary identity certificate issued in terms of the Identification Act of 1986 or any other applicable law of the Republic, as the case may be;
 - (ii) a Temporary Voter's Card;
 - (iii) a valid travel document issued in terms of any law of the Republics of Transkei, Bophuthatswana, Venda and Ciskei;
 - (iv) a reference book issued in terms of the repealed Blacks (Abolition of Passes and Coordination of Documents) Act of 1952;
 - (v) an identity document referred to in section 13 of the Population Registration Act of 1950; and
 - (vi) a valid South African passport for the purpose of voting at any foreign voting station.
(Conditions for permanent residence were defined by the Alien Control Act of 1991, Section 25.)
- (e) the registration of political parties and their lists of candidates.
- (f) detailed provisions to govern the preparation and conduct of polling and the determination of the result.

The IEC and Administration of Elections

Under the Electoral Act and the Independent Electoral Commission Act, the responsibility for the organisation and conduct of elections was given to the

IEC. Both Acts envisaged that the IEC was to operate as an independent body in the execution of its functions. The main features of the Commission were as follows:

(a) *Objectives*

- (i) to administer, organise, supervise and conduct free and fair elections for the National Assembly and all other legislatures in terms of their Constitutions and the Electoral Act;
- (ii) to promote conditions conducive to free and fair elections;
- (iii) to determine and certify the results of elections and to certify to what extent such elections had been free and fair;
- (iv) to conduct voter education; and
- (v) to make and enforce regulations for the advancement of such objectives.

(b) *Membership*

The IEC consisted of 11 South Africans and five non-voting Commissioners chosen from the international community in a non-representative capacity. Commissioners were appointed by the State President upon the advice of the TEC. A similar procedure was followed in the appointment of the Chairperson and Vice-Chairperson of the Commission.

(c) *Administrative Structure*

The IEC had two directorates, the Election Administration Directorate and the Election Monitoring Directorate.

- (i) The Administration Directorate consisted of a Chief Director and one or more Deputy Directors and such other officials as the IEC considered necessary to appoint to enable the Directorate to perform its tasks effectively. The Chief Director had powers, duties and functions conferred upon him or her under the Electoral Act and the IEC Act. The principal functions included the preparation for the elections, that is:
 - the appointment of electoral officers;
 - selection of voting sites; and
 - the acquisition and distribution of election materials.
- (ii) The Monitoring Directorate was required to operate independently of the Administration Directorate and consisted of a Chief Director and such other officials as the IEC considered necessary to appoint to enable the Directorate to perform its tasks effectively. The functions of the Monitoring Directorate included the following:
 - appointment of monitors to observe and report upon the electoral process, including political meetings, canvassing, advertising and other campaigns;

- facilitating the roles of both national and international observers and providing them with information and assistance;
- investigating alleged infringements of the Electoral Code of Conduct and other alleged electoral offences;
- inviting or co-ordinating meetings between the various registered political parties participating in the elections with a view to mediating and resolving issues and disputes arising in the course of the elections.

(d) *International Advisory Committee*

The Act provided that a committee to be known as the International Advisory Committee to advise the IEC on any matter regarding the performance of its functions may be established. The committee would consist of persons other than citizens of South Africa from the international community appointed by the State President upon the advice of the TEC. This committee was not established in the end.

(e) *Adjudication*

The IEC Act provided for an adjudication structure consisting of an Election Adjudication Secretariat, a system of Electoral Tribunals and Electoral Appeal Tribunals, and a Special Electoral Court.

(f) *Electoral Officers, Monitors and Staff*

The appointment of electoral officers, monitors and staff of the IEC was governed by provisions of both the Electoral Act (sections 7–13) and the IEC Act (sections 15, 20 and 24). The Electoral Act set out the functions, duties and powers of provincial electoral officers, district electoral officers and deputy district electoral officers, presiding officers, counting officers, voting officers and enumerators who assisted counting officers.

The Independent Media Commission (IMC)

This body was established under the Independent Media Commission Act of 1993. The principal features of the Media Commission were:

(a) *Independence*

The Media Commission was required to function without any political or other bias or interference. It was wholly independent and separate from the state, the government and its administration or any political party, or from any other functionary or body directly or indirectly representing the interests of the state, the government or any political party.

(b) *Objectives*

The primary objectives of the Media Commission were to:

- (i) ensure equitable treatment of all political parties by broadcasting services; and
 - (ii) ensure that state-financed publications and state information services were not directly or indirectly used to advance the interests of any political party during the election period, so as to promote and contribute towards the creation of a climate favourable to free political participation and a free and fair election.
- (c) *Appointment of Media Commissioners*

The Commission consisted of a Chairperson and not more than six other members. The members of the Commission were appointed by the State President on the advice of the TEC. The Chairperson was required to be a retired judge of the Supreme Court of South Africa; or a practising advocate or practising attorney of at least five years standing or a magistrate with at least 10 years appropriate experience. At least two of the Commissioners were required to have experience in the field of broadcasting media and at least one in the field of the print media.

- (d) *Functions*

The Commission was required to monitor all broadcasting services in South Africa and enforce compliance by broadcasting licensees with the provisions of the IMC Act relating to party election broadcasts, political advertisements and equitable treatment of all political parties; and to monitor all state-financed publications and state information services, during the election period.

Where the Commission found a broadcasting licensee, the publisher of a state-financed publication or any state information service to have contravened the provisions of the IMC Act, it could order the respondent to pay such fine as the Commission determined; or it could make an order prohibiting the respondent from carrying on his or her broadcasting services for such period as the Commission determined during the period of the Commission's existence.

The Independent Broadcasting Authority (IBA)

Establishment

The Independent Broadcasting Authority was established by an Act whose primary object was to provide for the regulation of broadcasting activities in the Republic in the public interest. The authority was required to, inter alia, promote the provision of a diverse range of sound and television broadcasting services on a national, regional and local level which cater for all language and cultural groups and provide entertainment, education and information. It was also required to promote, through the granting of broadcasting licences, the

development of public, private and community broadcasting services which were responsive to the needs of the public.

Independence

The Authority was required to function without any political or other bias or interference and to be wholly independent and separate from the state, the government and its administration, any political party or any other functionary or body directly or indirectly representing the interests of the state, the government or any political party.