

**THIRD REPORT TO THE NEGOTIATING COUNCIL ON CONSTITUTIONAL
PRINCIPLES BY THE TECHNICAL COMMITTEE ON
CONSTITUTIONAL MATTERS
27 May 1993**

1. Introduction

- 1.1 We were requested by the Planning Committee to develop our Second Report on Constitutional Issues (19 May 1993) so as to formulate a comprehensive set of constitutional principles, and in particular principles on the powers and functions of regions to serve the purpose suggested by us in paragraph 6.3 of our Second Report.
- 1.2 We do not think that any good purpose will be served by attempting to analyse each of the submissions made to us in order to indicate the type of constitution that is contemplated by the various participants, or how they differ from one another. We have considered all the proposals put to us, and have decided that we can best give effect to the request from the Planning Committee by formulating a set of constitutional principles for debate in the Negotiating Council. In formulating these principles, we have drawn on the Codesa documents, and on our own knowledge and experience as well as the submissions of the participants.
- 1.3 The principles that we offer for debate do not accord wholly with the submissions of any of the parties, and we appreciate that they are likely to meet some resistance from all of the participants. It seems to us, however, that areas of agreement, disagreement and possible compromise will emerge from the debate on our report, and that in the process, the participants may be able to find a solution along the lines suggested by us in paragraph 6.3 our Second Report (19 May 1993). For the sake of clarity we deal with general constitutional principles and principles on SPR's in separate paragraphs. Together they constitute one body of constitutional principles.

1.4 We have not yet had a response to paragraph 3.6 of our Second Report. In the circumstances we do not intend dealing in this report with the question of confederation. How, if at all, a confederation can be accommodated within one set of constitutional principles may depend on that response.

2. **General Constitutional Principles**

- 2.1 The constitution of South Africa shall provide for the establishment of a single sovereign state with a democratic system of government and a common South African citizenship.
- 2.2 The constitution shall be the supreme law of the land, shall be binding on all organs of government, shall prohibit racial and all other forms of discrimination and promote racial and gender equality and national unity.
- 2.3 There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.
- 2.4 The judiciary shall be competent, independent, legitimate and impartial and shall have the power and jurisdiction to safeguard and enforce the constitution and all fundamental rights.
- 2.5 There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters roll, and in general, proportional representation.
- 2.6 Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.
- 2.7 Formal legislative procedures shall be adhered to by legislative organs at all levels of government.
- 2.8 The diversity of languages, cultures and religions shall be acknowledged, promoted and protected.
- 2.9 Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.
- 2.10 All shall enjoy universally accepted fundamental rights, freedoms and civil liberties, protected by entrenched and justiciable provisions in the constitution.
- 2.11 The legal system shall ensure the equality of all before the law and an equitable legal process. The principle of equality before the law includes laws, programmes or

activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

- 2.12 The status of traditional leaders shall be acknowledged and recognised in an appropriate manner in the constitution. Unless provided otherwise by legislation, indigenous law shall be applied to the extent that it is compatible with the provisions of the fundamental rights contained in the constitution.
- 2.13 Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.
- 2.14 Amendments to the constitution shall require special procedures involving
specified majorities.

3. **Principles dealing with the allocation of powers to different levels of government**

- 3.1 Government shall be structured at national, SPR and local levels.
- 3.2 At each level of government there shall be democratic representation.
- 3.3 Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively.
- 3.4 The powers and functions of each level of government shall be defined in the constitution. Amendments to the constitution which alter the powers, boundaries, functions or institutions of regions shall in addition to any other procedures specified in the constitution for constitutional amendments, also require the approval of a specified majority of the legislatures of the SPR'S, and if the amendment concerns specific SPR's only, the approval of the legislatures of such SPR's will also be needed.
- 3.5 The powers and functions of each level of government may include exclusive and concurrent powers, as well as the power to perform functions for other levels of government on an agency or delegation basis.
- 3.6 Each level of government shall have fiscal powers which will be defined in the constitution.

- 3.7 A Financial and Fiscal Commission, including representatives of each of the SPR'S, shall be constituted to advise the national government on the distribution of financial and fiscal resources.
- 3.8 Fiscal and financial allocations by the national government to SPR governments shall be made on an equitable basis after taking into account the national interest, disparities within SPIES, the advice of the Financial and Fiscal Commission, the population and developmental needs, administrative responsibilities and other legitimate interests of each of the SPIES.
- 3.9 The following criteria shall be applied in the allocation of powers to the national government and the SPR governments:
- 3.9.1 General*
- 3.9.1.1 The level at which there is most control over the quality and delivery of services, should be the level responsible for the execution of the programme or the delivery of the services.
- 3.9.1.2 The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the territorial, functional or institutional integrity of the SPIES.
- 3.9.1.3 In the event of a dispute concerning the legislative powers allocated by the constitution concurrently to the national and SPR governments, precedence shall be given to the legislative powers of the national government.

*In dealing with this issue we have made extensive use of the report on Constitutional Options and their Implications for Good Government and a Sound Economy prepared by a group of experts which consisted largely of South Africans of different political persuasions, published in March 1993 by the Consultative Business Movement.

- 3.9.1.4 Where it is necessary for the maintenance of national standards, the maintenance of economic unity, the maintenance of national security or the prevention of action taken by one SPR which is prejudicial to the interests of another SPR or the country as whole, the constitution shall empower the national government

to intervene through legislation or such other steps as may be defined in the constitution.

- 3.9.1.5 The essential principles of the constitution including the fundamental rights contained therein shall apply to all organs of the state at all levels of government.

3.9.2 National Government

- 3.9.2.1 Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government.

- 3.9.2.2 Where uniformity across the nation is regarded as important with regard to a particular function, then power over that function should be allocated predominantly, if not wholly, to the national government.

- 3.9.2.3 Where minimum standards across the nation are regarded as important for the delivery of public services, the power to set such standards should be allocated to the national government.

- 3.9.2.4 The power to promote inter-SPR commerce and protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.

3.9.3 SPR Government

SPR governments shall have such powers, either exclusively or concurrently with the national government, as may be necessary, inter alia, for the purpose of regional planning and development, and the delivery of services and aspects of health, welfare and education, within their boundaries.

3.9.4 Concurrent Powers

Where mutual co-operation is essential or desirable or where it is important to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the SPR governments.

3.9.5 Residual Powers

Powers which are not specifically allocated in the constitution to the national government or to an SPR government, shall vest in the national government, alternatively in the SPR governments. (This is a fundamental issue which calls for a political decision).

4. **Asymmetry**

Certain parties have made submissions to our committee that the constitution should make provision for SPR asymmetry. Regional asymmetry may manifest itself in the following ways:

4.1 Geographical and demographic asymmetry

It stands to reason that a measure of geographical and demographic asymmetry will exist amongst SPR'S. If such asymmetry becomes disproportionate and creates possibilities of economic decline or disruption of inter-regional relationships, constitutional mechanisms could be applied to rectify the position (eg adjustment of SPR borders on a basis of consent by the people concerned and approval by the respective SPR's as well as the national legislature).

4.2 Asymmetry in respect of functions and powers

There can be asymmetry in the allocation of powers and functions. In the submissions to our Committee it has been suggested that SPR's may require different powers and functions depending on their location, the nature and extent of the development that has taken place in a particular SPR, and even the composition of the population. It has been suggested that asymmetry could be extended not only to powers and functions, but also to matters such as SPR citizenship, and the recognition and use of languages.

4.3 Institutional asymmetry

There can be asymmetry in the institutions of government, ie different types of legislatures, different electoral systems etc. There can also be asymmetrical institutions, ie different institutions for the accommodation and recognition of traditional leaders, and linguistic, cultural and religious groups etc.

4.4 Temporal Asymmetry

SPR governments, institutions, functions and powers may be phased in at different times.

We have not dealt with asymmetry as a principle because it is not clear to us what the views of all the parties are on this issue. The principles that we have formulated are of general application and ought not to hamper a debate on asymmetry.

5. Matters requiring the consideration of the Negotiating Council:

- 5.1 Matters such as the powers, functions and boundaries of the SPR's and local governments in the interim depend on decisions to be taken by the Negotiating Council in regard to the process of transition and can only be dealt with after such decisions have been taken.
- 5.2 The process of decision making with regard to the allocation of exclusive, concurrent or residual powers specifically to different levels of government, is a matter requiring political negotiation in the light of this report. The final model should be one which, inter alia, is financially viable and conducive to effective public administration, and which promotes national unity, legitimate regional autonomy and cultural diversity.

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THIS REPORT IS EMBARGOED UNTIL 12H00
ON FRIDAY 28 MAY 1993