

**SECOND SUPPLEMENTARY REPORT ON CONSTITUTIONAL
PRINCIPLES FROM THE TECHNICAL COMMITTEE ON
CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL**

23 JUNE 1993

1. Introduction

During the debate in the Negotiating Council a number of issues were raised in regard to paragraphs 2 and 3 of our Third Report. We respond to those issues below, indicating what decisions are necessary to enable us to prepare a final schedule of constitutional principles in a consolidated form. Where there has been no comment, we set out the Constitutional Principles without amendment or comment. When issues have been raised, we identify them, and point to what is necessary for the purposes of the finalisation of the principle. We treat the general Constitutional Principles and the Principles dealing with the allocation of powers to the different levels of government, together, showing where appropriate, the numbering in our Third Report where this differs from the present numbering.

2. **The 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.**

The question was raised whether the words "non-sexist" and "non-racial" should be added before the words "sovereign state" in line two. We were instructed to reconsider the matter. We confirm our view that this is covered by paragraphs 2.2, 2.10 and 2.11 and that there is no constitutional need to include these words. We can take the matter no further. The Negotiating Council must decide.

- 2.2 **The Constitution shall be the supreme law of the land, shall be binding on all organs of government, shall prohibit racial, gender 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 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 language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.**

(This principle was reformulated in the First Supplementary Report)

The question was raised whether it should be made clear in the language of paragraph 2.8 itself, that as far as culture is concerned, the protection, and encouragement for its promotion should be subject to the provisions of the fundamental rights contained in the constitution. We expressed the view that paragraphs 2.2 and 2. 10 met this concern. We are still of this view. If

specific reference to the fundamental rights is required in paragraph 2.8 the following words can be added: **"provided that this is done subject to the provisions of the fundamental rights contained in the constitution."**

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.**

The debate has to be finalised and a decision taken.

2.10 **AB 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 according to indigenous law of traditional leadership shall be recognised in the Constitution. Indigenous law shall be recognised and applied by the courts subject to the provisions of the fundamental rights contained in the Constitution (and to legislation dealing specifically therewith).**

A number of issues in regard to the wording of this provision were raised during the debate in the Council, and we have also received additional written submissions in regard to this principle.

The distinction between constitutional principles and constitutional provisions needs to be kept in mind in dealing with this matter. We have had regard to all the submissions we have received and concerns expressed and have reformulated paragraph 2.12. A final decision needs to be taken as a matter of principle in regard to inclusion or exclusion of the words in brackets. (See paragraph 5.6 of our First Supplementary Report.)

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.

2.15 Government shall be structured at national, SPR and local levels.
(3.1 of Third Report)

2.16 At each level of government there shall be democratic representation.
(3.2 of Third Report)

2.17 Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which promotes national unity, legitimate regional autonomy and cultural diversity.
(3.3 of Third Report)

This principle has been reformulated in response to a suggestion that the last sentence of paragraph 5.2 of our Third Report should be incorporated as a principle.

2.18 The powers and functions of national and SPR governments shall be defined in the Constitution. Amendments to the Constitution which alter the powers,

boundaries, functions or institutions of SPR's 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, alternatively, if there is such a chamber, a specified majority of a chamber of parliament composed of regional representatives, and if the amendment concerns specific SPR's only, the approval of the legislatures of such SPR's will also be needed.

(3.4 of Third Report)

A proposal was made to insert the underlined words, and no objection was raised to this.

- 2.19 **A framework for local government powers, duties, functions and structures, shall be set out in the Constitution. The comprehensive powers, duties, functions and other features of local government shall be set out in parliamentary statutes and/or SPR legislation.**

(3.5 of Third Report)

An amendment dealing with local government powers was proposed during the debate. No objection was raised during the debate to the proposed amendment. The wording we have adopted is our edited version of the proposal.

- 2.20 **The powers and functions of the national and SPR levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.**

Shall has been substituted for "may " in line 2 in accordance with the debate in the Council.

- 2.21 **National and SPR governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in paragraph 2.19 shall make provision for appropriate fiscal powers and functions for different categories of local government.**

(3.6 of Third Report. This has been reformulated. See comments under paragraph 2.23)

2.22 Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that SPR's and local governments are able to provide basic services and execute the functions allocated to them in the Constitution.

(This is a new formulation. See comments under paragraph 2.23).

2.23 A Financial and Fiscal Commission, representing inter alia each of the SPR'S, shall recommend equitable fiscal and financial allocations to the SPR governments after taking into account the national interest, disparities within the SPR's as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the SPR'S.

Comment on paragraphs 2.21- 2.22 and 2.23

During the debate on paragraphs 3.3, 3.6, 3.7 and 3.8 of our Third Report, a number of issues were raised concerning the fiscal powers and functions of different levels of government and the method of allocating fiscal and financial resources so as to ensure that this is done on an equitable basis. We have had regard to the debate and to written submissions made to us. In particular we have noted the concern that SPR and local governments should have access to funds needed to enable them to carry out their responsibilities and provide necessary services. We have also noted that local government is in a special position because of the different categories that will exist and that this will have to be accommodated in the Constitution. Taking these matters into consideration, we have reformulated paragraphs 3,6, 3.7 and 3,8 of our Third Report. The reformulated provisions are paragraphs 2.21, 2.22 and 2.23.

2.24 The following criteria shall be applied in the allocation of powers to the national government and the SPR governments:

General:

2.24.1 **The level at which there is most control over the quality and delivery of services, should be the level responsible and accountable for the execution of the programme or the delivery of the services.**

(3.9.1.1 of Third Report)

The words "and accountable" have been added as proposed during the debate.

2.24.2 **The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the SPR'S.**

(3.9.1.2 of Third Report)

The word "geographical" has been substituted for "territorial" as proposed during the debate.

(Note: The position of paragraph 3.9.1.3 of the Third Report has been changed. See Paragraph 2.28 below).

2.24.3 **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.**

(3.9.1.4 of Third Report)

It has been contended that overriding powers of the national government should be confined to conflicts arising in the field of concurrent powers, and that paragraph 3.9.1.4 of our Third Report went further than is necessary for that purpose. In this context attention has been drawn to the reference in our report to the report of the independent experts published by the Consultative Business Movement on which we have placed reliance, and it is said that this report wrongly relies on the German constitution which in effect deals only with overriding powers in the context of concurrent powers. It is correct that the

German constitution deals with the override in the context of concurrent powers. The passage that is referred to in the comment we received is from page 36 of the CBM Report which deals with co-ordination of the exercising of powers which prima facie is concerned with concurrent powers. This is confirmed by the following passage from page 38 of that Report:

So far, the powers of the centre to override the regions has been discussed solely in relation to concurrence. It also has a wider application. The centre would necessarily have to possess the power to take action to uphold the fundamental norms specified in the National Constitution vis-a-vis the regions, when judicial mechanisms were either inappropriate or inadequate.

We agree, and are of the opinion that there is a need to make clear that where national priorities such as those specified in paragraph 2.24.3 conflict with SPR competencies, the national priorities should prevail. Paragraph 2.24.3 specifies the high objective criteria, "necessary", and the particular priorities to which it refers, are of crucial national importance.

- 2.24.4 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. (3.9.1.5 of Third Report)

National Government

- 2.25.1 **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.** (3.9.2.1 of Third Report)

- 2.25.2 **Where uniformity across the nation is required for a particular function, then power over that function should be allocated predominantly, if not wholly, to the national government.**
(3.9.2.2 of Third Report)

In the light of the debate we have substituted the words "required for" for the words "regarded as important with regard to". This is a more objective criterion.

- 2.25.3 **Where minimum standards across the nation are important for the delivery of public services, the power to set such standards should be allocated to the national government.**
(3.9.2.3 of Third Report)

The words "regarded as" have been deleted in line I.

- 2.25.4 **The determination of national economic policies, and 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.**
(3.9.2.4 of Third Report)

The words "The determination of national economic policies, and," have been introduced.

2.26 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.

(3.9.3 of Third Report)

2.27 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.

(3.9.4 of Third Report)

2.28 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.

(3.9.1.3 of Third Report)

A number of issues were raised in regard to this paragraph. It was suggested that a way should be found of resolving conflicts without providing that the legislation of the national government should take precedence. Paragraph 2.28 addresses the possibility of conflicting legislation in the field of concurrent powers. This will happen only when there is both conflicting legislation and overlap of legislative competence which cannot be resolved by the court through a construction of the provisions of the constitution. In such circumstances the need for legislative certainty requires the court to prefer one legislative enactment over the other. The national government will only have the competence if the legislation is relevant to a national interest, and, it is for that reason that we formulated the clause so as to give preference to the national legislation. That seems to us to be consistent with constitutional practice.

2.29 Residual Powers

The Constitution shall specify how powers which are not specifically allocated in the constitution to the national government or to an SPR government, shall be dealt with.

(3.9.5 of Third Report)

A comprehensive allocation of powers in the constitution (as contemplated by these principles) makes the question of residuality of less importance. In practice residuality would amount to no more than establishing the allocation of ancillary powers to those powers and functions attributed to national and SPR governments.

EMBARGOED (PAGES 1-12)
UNTIL DELIVERY/TABLING IN
NEGOTIATING COUNCIL MEETING