

THE SEVENTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL

30 JUNE 1993

1 Introduction

At the end of the meeting of the Negotiating Council on Thursday 24 June 1993, the chairman summarised the debate by indicating that we are required inter alia to -

- 1.1 Synthesize proposals on the table into a systematic form and present a model/scenario in respect of the "bottom up" approach.
- 1.2 ... explore further the "equilibrium" offered in paragraph 4 of (our) Sixth Report creating common ground and bridging the differences among participants.
- 1.3 Look into the establishing of SPR Governments and Legislatures at the time of the national election (and) how these will be linked with the national structures.

From this it would appear that we are required essentially to develop two scenarios, one describing a constitution making process in which preference is given to the drafting of SPR constitutions, the other describing a possible via media that may meet the preferences of the different schools of thought represented in the MPNP.

We deal with the first scenario in par 3 below, and with the second in par 4.

2. State of the debate regarding Process

- 2.1 Analyses and suggestions regarding process and submissions received in previous reports

2.2 Avoiding terminological traps

In the political debates in the Negotiating Council, in some of our instructions, and consequently in some of our Reports, terminology is employed that in our view is not politically or legally accurate and does not promote clarity of the issues,

Firstly, as we have indicated in our Sixth Report, it is less than accurate to refer to a "bottom-up" as opposed to a "top-down" process: both schools of thought contain elements of national and sub-national negotiations, decision making and implementation.

Secondly, it appears that a distinction between a one- and two-phased process produces more confusion than clarity: the "bottom-up" approach has been associated with a one phased constitution making process, but, as appears from par 3 below, that scenario also requires more than one phase.

We propose to avoid the labels that may cause confusion in this Report and to present our proposals, especially in par 4, in non-partisan technical language.

3. Scenario for a "bottom-up" constitution making process

- 3.1 In our Sixth Report we describe the principal features of the bottom up constitution making process and draw attention to the fact that the proposals that support this process differ as to detail and as to process. In this report we address the main differences and make suggestions as to how they could be brought together so as to constitute a single scenario.
- 3.2 There is broad agreement amongst those who favour this process that federalism should be agreed upon as a constitutional principle, and that the federal states should be established on the basis of residuality and asymmetry. We give a brief description of residuality in paragraph 4.3 of the schedule to our Sixth Report, and of asymmetry in paragraph 4 of our Third Report.
- 3.3 There is also broad agreement that constitutional principles should be developed as a framework for the formulation of SPR powers and functions, and that the boundaries of the SPRs that will constitute the federal units will have to be agreed upon by the MPNP.

3.4 The IFP proposes that a Commission be appointed to assist "political formations " to develop the boundaries of the federal units and the constitutional principles according to which the powers and functions of the SPRs will be determined. The KwaZulu government proposed that a Technical Committee "in consultation with regional representatives (as they presently stand) and relevant experts" should delineate the relevant boundaries. There were no other specific suggestions from those favouring the bottom up process as to how the SPR boundaries should be established.

3.5 The Negotiating Council has already established a Commission on the Demarcation/Delimitation of Regions and asked our committee to formulate constitutional principles for debate and discussion by the Council and to consider and report on the structures, powers and functions of SPR'S. On the basis of debates and discussions, including those that have already taken place, it should be possible for the Negotiating Council to take a decision on the constitutional principles, and when the Commission's report is received, to take a decision on the boundaries of the SPR units.

3.6 When a decision has been taken on the constitutional principles and the boundaries of the SPRS, the SPRs will become involved in the process. Suggestions as to how this should be achieved include the establishment of an MPNP at SPR level; decision making by "elective representatives"; and the establishment of SPR constituent assemblies.

3.7 The IFP contends in its submissions to us that because of "the unique characteristics of the region of KwaZulu/Natal" it should be assumed to be a region and treated differently to other SPRS. According to its contention the organisation by the South African government of a referendum for the final ratification of the Constitution of the State of KwaZulu/Natal which was approved by the KwaZulu Legislative Assembly on December 1 1992 is a mandatory condition.

3.8 The government of KwaZulu does not advance such a contention. According to its proposals Regional Constituent Assemblies should be elected to formulate constitutional proposals for their SPRs and these proposals should be the basis of negotiations in a reconstituted MPNP which "will be the main arena for the contestation of the various constitutional proposals put forward... "

3.9 In dealing with the way in which SPRs will take decisions, and the claim that KwaZulu/Natal should be treated as a special case, it must be appreciated that the SPRs do not presently exist. They will not come into existence unless and until the existing legislation is amended to make provision for the creation of new SPRs in accordance with decisions that may be taken by the MPNP. None of the boundaries of the TBVC states, the self-governing Territories, or the Tricameral Parliament, is likely to coincide with the boundaries of the SPRs; nor do the elected representatives of such existing bodies have a mandate from the people who would be entitled to vote in SPR elections under a non racial and democratic system.

3.10 Neither the boundaries nor the electorates of future SPR's are likely to coincide with those of existing bodies. In the circumstances, and although other possibilities may exist, it seems to us that the proposal that SPR Constituent Assemblies be elected for each of the SPRs is an appropriate way in which to determine the views of the SPRs for the purposes of the bottom up process.

3.11 The next stage of such a process will be for the SPRs to formulate their proposals for their own constitutions and for a national constitution. The question as to how such decisions will be taken within the SPRs is not addressed in any of the proposals submitted to us. If the bottom-up process is adopted this question will have to be addressed.

- 3.12 The question of levelling the playing fields for the purposes of the elections is addressed in only one of the submissions. According to that submission steps will have to be taken in order to enact a new electoral law, an independent broadcasting authority, a media watchdog, joint control of the security forces, the disbandment of private armies etc. This issue is not within the terms of reference of our committee but would have to be addressed if the bottom up process were to be followed.
- 3.13 When each of the SPRs has finalised its proposals for its own constitution and for the national constitution, the focus of the negotiations will return to the MPNP. At this stage the concern will be to co-ordinate the different proposals and to establish whether they can be accommodated in the national constitution. If there are differences between the proposals, those favouring the bottom up process support the view, that the accommodation can be made on an asymmetrical basis.
- 3.14 Some of the proposals seem to contemplate that the MPNP will be obliged to accept decisions taken at SPR level as long as they are in accordance with the constitutional principles. Others accept that the MPNP will have the final say, and will not be bound to accept the SPR proposals. This question will have to be resolved if the bottom-up process is adopted.
- 3.15 To facilitate the process it has been suggested that a committee or committees of experts or a Commission be appointed to participate in the process at all levels. Technical assistance could facilitate the work of the SPR constituent assemblies and a Commission could have a useful role to play in co-ordinating the submissions coming from the SPR'S.

- 3.16 Most of the proposals call for a referendum at SPR level to approve the SPR constitutions or as well as a referendum at national level to approve the national constitution. One of these proposals suggests that the SPR referenda and the national referendum be held at the same time, but the others favour the SPR referenda being held before the national constitution is drawn. Since SPR constitutions have to be co-ordinated with the national constitution it seems appropriate that the SPR referenda be held before the national constitution is finalised. The national constitution can then be put to a national referendum. If the national referendum fails to approve the constitution, the MPNP can continue the process, until the necessary approval by referendum is secured.
- 3.17 Responsibility for supervising the referenda would depend on decisions taken in regard to how the "playing fields should be levelled". One proposal is that a special commission be appointed to assume responsibility for such purposes, which would presumably include the supervision of the elections for regional constituent assemblies as well. This question is outside the terms of reference of our committee but as pointed out in paragraph 2.12 will have to be addressed if this process is adopted.
- 3.18 In one of the proposals it is suggested that the SPR proposals be debated within the MPNP, enlarged to include as a second chamber consisting of representatives from each of the SPR constituent assemblies, and that the approval of both chambers be required for decisions. Other proposals contemplate that the MPNP will continue in its present form.
- 3.19 The proposals envisage a constitution making process which does not require any change in the present constitutional order until a new national constitution is adopted. This means that existing structures will remain in place until the new constitutions have been approved and enacted into law.

3.20 When the constitutions have been adopted elections will be held under them for the national parliament and the SPR parliaments.

3.21 Making a choice

3.21.1 In our view two of the issues which have given rise to the differences as to process, concern on the one hand the boundaries, powers, and functions of SPRS, and on the other, the question whether there should be SPR constitutions, and if there are, how their provisions should be determined. The matters raised in paragraphs 2 and 3 of the resolution of the 24th June 1993 are relevant to these issues. In paragraph 4 of this Report we exploit further the equilibrium tentatively advanced in our Fifth Report. Thus we help to bridge the gap which still exists between the two processes.

3.21.2 We have indicated in our previous reports that a choice has to be made as to the constitution making process to be followed. The Negotiating Council should be in a position to address this crucial issue after this report, and our Fourth, Fifth and Sixth Reports have been considered and debated.

4 Scenario for bridging differences regarding the process of constitution making

SPR'S: AN EQUILIBRIUM BETWEEN THE TOP-DOWN AND BOTTOM-UP APPROACHES

4.1 Introduction

In the Sixth report (par 1) It was suggested that a balance between the "topdown" and "bottom-up" approaches could possibly be achieved. If it is possible to find this balance, the differences concerning the constitution making process, might be resolved.

4.2 In par 4.1 of our Sixth Report, it was suggested that, as a point of departure in finding an equilibrium between the two approaches, the constitutional principles pertaining to SPR autonomy currently under debate in the Council should be finalised. These constitutional principles, indicate essential features of both the nature and form

of a future South Africa. Not only is such a future state defined as a constitutional state in which the constitution shall have the character of a supreme law, but the form of state also emerges clearly as a decentralised one with regional autonomy. In fact, there is nothing in these principles which stands in the way of federalist aspirations. This coincides with our view previously expressed in par 3.4 of our Second Report:

There is no universally accepted definition of federalism, and we are not convinced that in a discussion on the form of state, it would be useful or indeed possible to use a point of departure preconceived concepts such as unitary or federal states. We should like to reiterate our view contained in our First Report that a more expeditious way of dealing with the matter of form of state would be to consider all those separate issues which have a bearing on the form of state.

4.3 The question has been raised during the debates of the Negotiating Council whether these principles would be sufficiently binding on the processes of constitution making to ensure their application and actual implementation. It speaks for itself that were these principles simply to be regarded as useful guidelines during the different phases of constitution making, the relevant concerns would not be allayed. In this regard, two interrelated matters must be considered, namely, first the legally binding force of the constitutional principles once they have been adopted by the MPNP; and second, their actual implementation.

4.4 The legal force of the constitutional principles adopted by the MPNP

It will be necessary to imbue the constitutional principles with a legal force which will be binding on the constitution making body. (See also paragraph 4.1 of our Fifth Report). In other words, once adopted, these constitutional principles will not simply be directives or guidelines, but will form the basis of the work of the constitution making body.

4.5 The practical application and implementation of the constitutional principles

In their present form, the constitutional principles are stated as principles for a future democratic South Africa. Being stated as principles, they are not prescriptive in so far as their actual implementation is concerned. They bind the constitution making body, but leave it free within the limitations they impose to develop the precise terms and mechanisms of the constitution. For instance, the principle that amendments to the constitution shall require special procedures involving specified majorities, leaves it to the constitution makers to determine these special procedures involving specified majorities. In similar vein, the constitutional principles do not prescribe the way in which SPR governments should be made up, elected, and exercise their powers and functions. Furthermore, the principles relating to SPR's do not, at this stage, define the different phases of their implementation. More clarity on this matter will undoubtedly afford greater assurance of the part of parties favouring a bottom-up approach and bring about the necessary equilibrium between the two approaches:

4.6 Implementation of the constitutional principles pertaining to SPR's in the pre-electoral, TEC phase.

Given the time factor, it is not envisaged that the TEC or its Sub-council for Local and Regional Governments will be able to institute or sanction newly created governments. However, in its levelling of the playing fields, in accordance with the constitutional principles, the TEC and its Sub-council will have to ensure that the groundwork for the establishment of future SPR's is undertaken. This work will mainly concern the rationalisation and co-ordination of existing administrations in the light of the recommendations of the Commission on the Demarcation/Delimitation of Regions. It can be foreseen that the mapping-out of future regional

dispensations, especially as regards their geographies and administrations, will be undertaken during this TEC phase.

4.7 Implementation of the constitutional, principles pertaining to the SPR's during the transitional phase

It is during the transitional phase that regional dispensations - in accordance with the constitutional principles embodied in and prescribed by the constitution for the transition - will have to be established on the geopolitical foundations worked out during the preceding TEC phase. Establishment of SPR governments, it is suggested could be undertaken in the following manner:

4.7.1 SPR representatives elected on national level are instructed to draw up and propose their SPR dispensations. This could be done separately or collectively. In other words, should the SPR representatives elect to join forces, they could work out and propose a standard SPR constitution (with possibilities for asymmetry); or alternatively, the SPR representatives for the different SPR's could propose different dispensations for their respective constituencies. What is important, however, is that all proposals for the SPR dispensations - whether in the form of a standard constitution, or separate constitutions - must conform to the constitution principles. The SPR representative could also be instructed to propose the procedures by which SPR dispensations are to be ratified. In this respect, it must be pointed out that the constitutional principles in any case imply the approval by SPR representatives on a national level for their respective SPR dispensations. (CF Principle 2.18)

4.7.2 Once approved and ratified by the constitution making body, SPR dispensations could then be implemented and SPR governments installed through appropriate

electoral processes. Depending upon the circumstances, the installation of all SPR governments need not be contemporaneous since it could happen that through consolidation of administrative structures during the TEC phase, one SPR is poised to have its own government almost immediately , while another SPR may need more time for the installation of its government. (For instance, such as asymmetry in the installation of SPR governments occurred in Spain during its time of reconstruction and democratization.)

4.7.3 SPR constitutional dispensations, approved, ratified and implemented during the time of transition, will finally be included and form part and parcel of the constitution to be adopted by the constitution making body.

4.8 **Conclusion**

The process of SPR constitution making as suggested by our Committee endeavours to establish an equilibrium between the bottom-up and top-down approaches in the sense that SPR constitutional dispensations are not left entirely in the hands of the national constitution making body. Further, SPR dispensations and their implementation will not be suspended until a final national constitution has been adopted and implemented. Moreover, in terms of our suggestions, through their national representatives, SPR's are empowered to draw up their own constitutional dispensations, thereby fulfilling the requirements of subsidiarity and grass-root democracy. Obviously, in acceptance of our Committee's suggestions for finding an equilibrium between the two approaches, implies a somewhat detailed regulation in the transitional constitution of the procedures to be followed by the constitution making body for the approval, ratification and implementation of SPR dispensations. Stated differently, the MPNP will have to agree on the principles and procedures in terms of which the constitution making body will adopt and implement SPR dispensations. It stands to reason that without such a preestablished basis, agreed upon by the MPNP and embodied in the constitution for the transitional period, the suggested equilibrium will lack binding legal

force. In our view, however, this requirement of including a definite set of procedures in the constitution for the transitional period, in accordance with which the constitution making body must approve of and implement SPR dispensations, does not introduce anything differing fundamentally from that which has been suggested so far.

As explained under par 4 above, the constitutional principles - including the principles pertaining to SPR's - will have to be included in the constitution for the transitional period in order to have the necessary binding force. Moreover, it is imperative that the constitution for the transitional period will in any case constrain procedural provisions for the making of the final constitution by the constitution making body. A special section on the approval and implementation of SPR dispensation will therefore in our opinion, encroach upon the views held by parties favouring the so called two-phase method of constitution making.