

**THIRD SUPPLEMENTARY REPORT ON CONSTITUTIONAL  
PRINCIPLES OF THE TECHNICAL COMMITTEE ON  
CONSTITUTIONAL ISSUES TO  
THE NEGOTIATING COUNCIL  
30 JUNE 1993**

**1. Introduction**

When the Constitutional Principles were revisited during the debate in the Negotiating Council a number of issues were raised. As we did in our Second Supplementary Report, we now indicate where the debate has not yet been concluded. Where there has been no comment we have set out the Constitutional Principles as they appeared in our previous reports. Where issues have been raised we identify those issues. Amendments or additions are identified by underlining the relevant words, and deletions are indicated by square brackets.

**2. 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] a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.**

This principle was reformulated to incorporate the underlined words in accordance with a proposal accepted during the debate. The wording we have adopted is our edited version of this proposal.

A suggestion was made that the word single before "sovereign state" be deleted. It is our opinion that the word single does not have a specific meaning in this regard. A decision needs to be taken.

**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.**

A decision is still required as to whether the following specific reference to fundamental rights should be added to this principle: **"provided that this is done subject to [the provisions of] fundamental rights contained in the constitution."**

Another approach suggested during the debates is an addition to 2.10 or to another principle, which would make the application of all or specific principles subject to the fundamental rights regime. We suggest that this matter be revisited during the debate on paragraph 2.12.

- 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 on this principle has not yet been concluded. The following submission was received:

"The right of self-determination of peoples is acknowledged. The right is exercised through cultural and linguistic groups/minorities and formations in:

- \* Practising their own cultures;
- \* Using own languages;
- \* Forming organs of civil society;
- \* Determining their own political status through legislative and executive powers in the form of territorial autonomy;
- \* participating effectively in decisions on the national and regional level.

These rights shall, on the basis of non-discrimination and free association, be recognised and protected."

"Collective rights of self-determination in forming, joining and maintaining organs of civil society" as in the current wording of this principle, is a different notion from "the right of self-determination of peoples" as in the proposed alternative.

The notional difference lies in the fact that the bearers of the first mentioned rights (a collection of individuals, "including linguistic, cultural and religious associations") could be distinguished from the bearers of the second ("peoples").

The proposed amendment will also have an impact on political rights. A decision needs to be taken on the formulation of this principle.

- 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.**

It was suggested that this principle be reformulated to accommodate the amendment to 2.1. As the principle in 2.1 is now phrased in positive terms and not as a prohibition, no amendment to the present principle should be necessary.

- 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).**

The following suggestion was submitted to the Negotiating Council :

"The institution, status and role of Traditional Leaders shall be acknowledged in the Constitution. Indigenous law shall be applied to the extent that is compatible with the provisions of fundamental human rights contained in the Constitution."

It was agreed to leave the matter in abeyance to allow for further informal discussions in this regard. This matter still has to be finalised.

We reiterate the fact that the word "status" in this context is a legal term indicating the standing or position in law, particularly in terms of indigenous law, of traditional

leaders. "Status" in this context can therefore not be interpreted as reflecting on example social and financial esteem.

- 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.**
- 2.16 **At each level of government there shall be democratic representation.**

The question was raised in the debate whether this principle would affect traditional institutions. It is suggested that traditional structures generally cannot be described as a "level of government" in this context. There is however a potential area of conflict between democratic representation and traditional institutions, which may affect the manner in which some traditional communities function. Should traditional structures however also perform the task of government (eg at SPR or local level), the principle as formulated will allow communities to decide democratically whether the traditional institutions must be retained for that purpose.

- 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.**

It has been suggested by a participant that the words "including fiscal powers" be introduced after the word "powers" in line two. Fiscal powers are dealt with in paragraph 2.21, 2.22 and 2.23. It is suggested that the proposed addition be debated in the context of paragraphs 2.21, 2.22 and 2.23.

- 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.

- 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.
- 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.
- 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.
- 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.

(See comment below in 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 from revenue collected nationally, 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.

One of the participants suggested that the words "from revenue collected nationally" should be added in line three after the words "SPR governments".

The use of these words in paragraph 2.22 and 2.23 raises the question whether the SPR's should have a right to fiscal and financial resources other than revenue collected nationally.

It was also suggested by a participant that the word **determine** should be substituted for the word **recommend** in line two.

This also requires further debate.

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

General:

Subject to the other provisions of paragraph 2.24 whenever it is practical to do so, powers, functions and the delivery of services should be allocated to the level of government closest to the people concerned.

The addition of this paragraph has been suggested by one of the participants. The formulation is somewhat ambiguous and may be in conflict with 2.24.1. The principle contained in the paragraph needs to be debated.

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.**

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.**

2.24.3 **Where it is necessary for the maintenance of essential national standards, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable 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.**

One of the participants suggested the insertion of the underlined words. The suggestion was that "unreasonable" be inserted before "prejudicial" in line four. We however suggest that it would be more appropriately placed as indicated.

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.**

National Government

2.24.5 **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.**

2.24.6 **Where uniformity across the nation is required for a particular function, then legislative power over that function should be allocated predominantly, if not wholly, to the national government.**

One of the participants suggested the insertion of the word "legislative" in the second line. We think it would be appropriate.

2.24.7 **Where minimum standards across the nation are [important] required for the delivery of public services, the power to set such standards should be allocated to the national government.**

One of the participants suggested the insertion in the second line. We think it would be appropriate.

2.24.8 **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.**

2.24.9 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.**

There are two proposals in the alternative to the amendment in paragraph 2.24.9. The first option proposes that the words after "as" (in the second line) be deleted and be replaced by "defined in the constitution". The motivation for this amendment is that there is no point in identifying areas of a few examples only. The list of examples should either be extended or eliminated.

The second option, which applies only if the preceding proposed amendment is defeated, proposes:

- \* In the third line the deletion of "for the purpose of" and substitute this with "in respect of local government" and
- \* In the fourth line, the deletion of "aspects of health, welfare and education" and the substitution of "major aspects of health, housing, police, welfare, education and culture"

We acknowledge the shortcomings of the original wording. Debate on this matter will assist us in drafting another formulation.

#### Concurrent Powers

**2.24.10 Where mutual co-operation is essential or desirable or where it is required [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.**

It was suggested during the debate that the word "important" be replaced with the word "required" to provide for a more objective criterion. We support this suggestion.

**2.24.11 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.**

#### Residual Powers

**2.24.12 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. Proposed additions**

The following additional principles have been proposed by participants:



- \* Notwithstanding the provision of any other clause, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected.
  
- \* The independence and impartiality of a Commission for Administration, a Reserve Bank, an Auditor general and an Ombudsman shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the Civil Service.
  
- \* Every member of the security forces (police, military and intelligence) shall be required to perform his or her duties and functions and exercise his or her powers in the national interest and shall be prohibited to intentionally further or prejudice party political interest.

The inclusion of these suggested principles have not yet been debated fully.