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REPUBLIEK VAN BOPHUTHATSWANA

TONA YA MERERO YA PUSO, YA PHEMELO LE YA DIPHOFO TSA SELEGAE
THE MINISTER OF STATE AFFAIRS, OF DEFENCE AND OF CIVIL AVIATION
DIE MINISTER VAN STAATSANGELENTHED, VAN VERBEDIGING EN VAN BURGERLIKELUGVAART

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The Director
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Sir

**BOPHUTHATSWANA GOVERNMENT'S SUBMISSION TO THE TECHNICAL
COMMITTEE ON CONSTITUTIONAL MATTERS**

Attached hereto, please find our Government's submission to the Technical Committee concerned regarding the main elements of a draft federal-type constitution.

Your particular attention is drawn to paragraph 8 of the submission, which contains our proposal regarding Bophuthatswana's position in a future South African constitutional dispensation.

Yours faithfully

H. Ferreira
Office of the
Minister of State Affairs,
Civil Aviation and Defence.

SUBMISSION BY BOPHUTHATSWANA GOVERNMENT

MAIN ELEMENTS OF A DRAFT CONSTITUTION

1. Supremacy of the Constitution

- 1.1 The Constitution of the Republic of South Africa shall constitute supreme law and its provisions shall be binding on all authorities and persons in South Africa.
- 1.2 Governmental process on all levels of government, national, regional and local, shall only take place in accordance with the constitution.
- 1.3 Any law, regulation or other governmental action which is in conflict with the constitution shall be declared null and void by a competent court of law.
- 1.4 The organisation of the South African state is based on the following principles:
 - * three levels of government, each entrusted with guaranteed powers shall form the basis of all governmental activities and processes;
 - * the powers and functions of the respective levels of government contained in this constitution, shall be interpreted in a manner which is consistent with a federal form of government; and
 - * the constitutional court shall act as guardian of the constitution and it shall declare any legislation or other governmental action which is in conflict with the constitution, null and void.

2. Composition of South Africa

- 2.1 The Republic of South Africa is united country, with its legislative and executive institutions composed and its governmental processes conducted in accordance to, and in the furtherance of a federal framework and principles.¹

¹ This entails that the functioning and the interpretation of the constitution have to be done a manner which is reconcilable with federal principles.

- 2.2 The Republic is composed of the national government, the following regions, ----, and local governments.
- 2.3 The regions and national government derive their powers and functions from the constitution. The existence of local government is protected by the national constitution, although the exact powers and functions of local governments shall be a matter for the respective regions to decide upon.²
- 2.4 In the interpretation of the constitution respect will be paid for the importance that decisions are taken at the level of government which is closest to the people and which could most effectively render a particular service or execute a governmental function.³

3. Composition of the National Institution

The national institutions shall be composed of the President, the Executive and Parliament.⁴

3.1 President

3.1.1 Powers and Functions

- (i) The President is entrusted with the executive powers and functions of the state, and he/she exercises it on advice of the executive.⁵
- (ii) The President also exercises certain ceremonial functions which shall be regulated by national law.

² Regional governments will therefore be responsible for the functional matters of local governments, but may not encroach upon their existence.

³ This is in essence the principle on which subsidiarity is based.

⁴ A decision need to be taken on this whole chapter.

⁵ This entails a "weak" president. Provision could be made for a "stronger" president along the lines of the USA.

- (iii) The President shall, on advice of the Executive, represent the Republic in its international relations, conclude treaties on behalf of the Republic and shall receive and accredit envoys on behalf of the Republic.⁶
- (iv) The President may from time to time address the houses of Parliament on matters of national importance.
- (v) The President may not hold any other public office.

3.1.2 Election of President

The President shall be elected by both houses of Parliament during a joint session, from a list of candidates provided by the house of regions. The successful candidate must receive the support of 75% of the members present. In addition the President must receive 50% support from at least two-thirds of the regional representatives.⁷

3.2 The Executive

3.2.1 Composition

- (i) The executive shall be composed in a manner which is conducive to national unity;
- (ii) The president shall appoint the members of the executive in accordance with the following principles:⁸

* all political parties who receive more than 10% of the public support in an election, will be afforded the opportunity to nominate a number of members in accordance to the support that such a party has received;

* the names of the members of the executive shall be placed before both houses, who in separate sessions shall approve the names with a two-third majority vote of confidence; and

⁶ All these actions are done on the advice of the executive.

⁷ Various options are available which may require further discussion.

⁸ Various other options are available.

* the members of the executive may nominate an additional three members to the executive for reasons that they may deem fit.⁹

3.2.2 Powers and Functions

- (i) The executive shall take decisions on the basis of consensus in a manner which is based of the standing rules agreed to by the members of the executive;¹⁰
- (ii) the executive shall be responsible individually and collectively for the introduction of bills, the administration of national legislation, the protection of the constitution and all other matters which have been delegated to it by law by the national parliament.

3.3 National Parliament

The National Parliament shall be composed of two houses with equal powers, namely, the House of People and the House of Regions.

3.3.1 House of People

- (i) The House of People shall be elected in general, free, direct, equal and secret elections based on universal franchise;
- (ii) every South African citizen above the age of eighteen be eligible to vote and to be elected to the house of people;
- (iii) the electoral system used will be based on the principles of proportional representation in accordance with the list system. Half of the members shall be elected from a national list of candidates and the other half from regional lists of candidates;
- (iv) a 1% threshold shall be required for a political party to be afforded representation in the House of People;¹¹

⁹ Such members may come from minority parties or they may have a certain know-how that is deemed important by the executive.

¹⁰ Absolute consensus may be an ideal, but to entrench it in the constitution may lead to deadlocks.

¹¹ A decision need to be taken on the required threshold. Given the importance to accommodate minority parties, the percentage should be as low as possible.

- (v) the House of People shall be composed of 400 representatives. The number of seats per region shall be determined every ten years according to the size of the population of such region; and
- (vi) all other matters regarding the election shall be regulated by national legislation in accordance with the principles set out above.

3.3.2 House of Regions

- (i) The regions shall participate through the House of Regions in the legislative and administrative process of the national government;
- (ii) each region shall have equal representation (5) in the House of Regions. The regions shall each have one vote;¹² and
- (iii) the regional representatives shall be elected to the House of Regions by the governments of the respective regions in a manner which is determined by each region. ¹³ (alternatively and preferably, they could be elected directly by the voters in a region).

3.3.3 Relationship between the Houses

- (i) The two houses of Parliament shall be equal in status;
- (ii) ordinary legislation need to be supported by a majority in both houses of Parliament before it can be promulgated by the president;
- (iii) amendments to the constitution must be supported by 70% of each of the houses of parliament, in addition to 60% of the regional assemblies;¹⁴ and

¹² Various options are available. This issue may require further deliberations.

¹³ They could also be elected directly. The system of indirect elections is applied in Germany and increases the influence of the regional governments in national matters.

¹⁴ Various options are available.

- iv) a system of committees of which the detail shall be provided for by law, shall be established between the houses in order to facilitate agreement, prevent deadlocks and consider compromises.

4. Principles Governing the Relationship between National and Regional Governments

The following principles will be used by the courts and other organs of government as interpretative instruments and guidance in order to govern the relationship between the national and regional governments;

- 4.1 The principle of subsidiarity shall be applied in order to ensure that decisions are taken at the level of government which is closest possible to the people;
- 4.2 the national government shall not use its powers in any way as to encroach on, or limit the territorial, functional or institutional integrity of the regions;
- 4.3 where there is a dispute concerning the interpretation of concurrent powers, the principle of subsidiarity shall be used to determine which level is responsible for a matter;
- 4.4 the national government shall be responsible for matters which have a direct impact on the uniformity of the republic, the formulation of minimum standards and the protection of the economic common market in order to ensure the free flow of people, goods, services, capital and labour;
- 4.5 the regional governments shall be responsible for matters related to the matters of regional concern such as regional police, planning and development, the rendering of services such as welfare, pensions, and health care, the recognition of cultural and other regional diversities and residual matters which have not explicitly been allocated to a particular level of government by the constitution;
- 4.6 the distinctiveness of the various regions are respected and provision is therefore made for asymmetry in regard to institutions and functions of the respective regions;
- 4.7 asymmetry of institutions entail that the regions may within the principles provided by the national constitution, determine their own regional constitutions; and
- 4.8 asymmetry of powers and functions entail that different powers may be granted to the respective regions, depending on the history of the particular region, economic resources, institutional capacity and the will of the people in the particular region.

5. Institutional Integrity of Regions

5.1 Each region shall have the right to establish democratic governmental institutions for the purpose of governing the region, provided that such institutions conform with the following principles:¹⁵

- * the fundamental rights of all individuals as defined in the national bill of rights must be respected and protected;¹⁶
- * all individuals shall have a vote of equal value on a universal and single voter's roll;
- * an electoral system based on the principles of proportional representation shall form the basis for regional elections;¹⁷
- * the regional constitution shall guarantee the right of individuals to participate in general, free, direct, equal and secret elections; and
- * the governmental process in the regions shall be based on the principles of representative, accountable and responsible government.

5.2 Any question regarding the adherence to the national constitution and the said principles by a regional constitution, shall be decided by the constitutional court.

5.3 Regional constitutions shall for the purposes of the first democratic dispensation take effect on the same day as the national constitution.

5.4 The subsequent ratification of amendments to the respective regional constitutions shall be subjected to approval by the regional governments before they take effect. The regional governments may only withhold its ratification if the said principles are not adhered to.

¹⁵ Within these principles regions may decide upon matters such as the demarcation of electoral districts, the provision of advisory bodies, accommodation of traditional leaders, composition of the legislature and the executive, etc.

¹⁶ Provision could be made for a regional bill of rights, in addition to the national bill of rights.

¹⁷ Each region can therefore decide the particular electoral system that it wants to employ.

- 5.5 The constitutional court shall adjudicate any disputes that may arise from the withholding of such ratification of amendments to the regional constitutions.
- 5.6 The maximum size of the regional legislatures and executives shall be determined by national legislation.
- 5.7 Each regional constitution shall contain provisions regarding the procedures that need to be followed in order to amend the regional constitution.
- 5.8 In each of the regions, provision shall be made for local governments in which the people shall be represented by a body chosen in general, free, equal and secret elections.
- 5.9 The local governments in the respective regions shall have the right to, in accordance with the national and regional constitutions, regulate on their own responsibility all the affairs of the local community according to the powers and functions allocated to them.

6. Territorial Integrity of Regions

- 6.1 The territorial integrity of the regions shall be respected by all. The national and regional governments shall take the required steps in order to ensure that the integrity of regional territories are not violated.
- 6.2 The boundaries of regions may only be altered according to the procedures provided for by the national constitution, in order to ensure that the regions by their size, resources and capacity are able to fulfil the functions allocated to them by the national constitution.
- 6.3 Any alteration of regional boundaries shall take due account of the following criteria in order to ensure a balanced demarcation:
- * regional, historic and cultural ties
 - * economic expediency, resources and viability
 - * the opinion of the population;
 - * institutional capacity and infrastructure
 - * regional policy; and
 - * the requirements of regional and town planning and development.
- 6.4 The alteration of regional boundaries must be preceded by the following steps:
- * A request by the regional assembly of the affected region that the matter be investigated in accordance with the national constitution, or a request by 70% of the House of Regions that the matter be investigated by a demarcation commission;

- * An investigation by the demarcation commission and the involvement of public opinion by means of oral and written evidence, opinion surveys and other measures to test the will of the people;
- * the recommendations of a demarcation commission in which account was taken of the criteria for demarcation as indicated in paragraph 6.3;
- * a 60% majority of people voting in a referendum on the question supporting such alterations put before them by the respective regional assemblies; and
- * a 60% majority of the House of Regions supporting the proposed alteration.

7. Functional Integrity of Regions

- 7.1 The functional integrity of regions, meaning their right to take autonomous decisions and execute and administer laws, shall be respected.
- 7.2 Specific powers and functions are granted to regions on an exclusive basis. The regions may in terms of these powers make laws applicable to the whole or a part of their respective territories.
- 7.3 The following powers and functions are, inter alia, granted to the national government and regions on the basis of concurrency:
- * tertiary education
 - * radio and television
 - * health
 - * transport
 - * agriculture
 - * policing and public order
 - * environment, forests
 - * mineral and energy
 - * marriage and divorce
 - * registration of births and deaths
 - * land matters
 - * harbours
 - * water
 - * correctional services
 - * housing
 - * VAT
 - * personal income tax
 - * company tax
 - * mining tax

Should a conflict arise between national and regional legislation, the principles provided in paragraph 4 shall be used to decide on the validity of legislation.

7.4 The national government shall have the right to override regional legislation only in as far as is absolutely necessary, on concurrent matters if the following circumstances exist:

- * the matter cannot effectively be regulated by the legislation of the specific region;
- * the legislation of a particular region might prejudice the interests of other regions or the nation as a whole;
- * the maintenance of legal and economic unity, especially the uniformity of living conditions, necessitates such national legislation.

7.5 The constitutional court shall adjudicate any disputes that may arise between the regions and the national government regarding the employment of the override provision.

7.6 The national and regional governments shall be autonomous and independent of each other in their fiscal administration. In the exercising of their fiscal powers they shall take account of the requirements of overall economic equilibrium.

7.7 The specific powers and functions are allocated to the national government as part of its exclusive responsibility. The national parliament may in terms of these powers make laws for the whole or a part of South Africa. These are inter alia:

- * Foreign Affairs
- * Monetary policy
- * Posts and telecommunications
- * Citizenship
- * Research development
- * Weights and measures
- * Energy
- * Economic common market
- * Inter-regional trade and commerce
- * Census
- * Commission of administration

7.8 Amendment of the Constitution

Any amendment of the national constitution should adhere to the following requirements:

- 7.8.1 Provision shall be made for a permanent Standing Committee of Constitutional Reform which shall be responsible for investigating the success in which the constitution is functioning and consider possible amendments to improve its functioning;
- 7.8.2 The Committee shall be composed of an equal number of members of each house of parliament, with each region having at least one representative;
- 7.8.3 The activities of the Committee shall be open to observers of the regional assemblies, who may participate in the discussions without having a vote;
- 7.8.4 Constitutional amendments shall meet the following requirements before they take effect;
- * the Standing Committee shall recommend such proposed amendments, with at least a 60% majority of each of the representatives of the two houses in the committee supporting the amendments;
 - * the proposed amendments be supported by 60% of the regional assemblies within a specific period after they have received it from the Standing Committee for their comment or ratification; and
 - * the proposed amendments be supported by 70% of both houses of the national parliament.
8. Constitutional Arrangements between the Republics of South Africa and Bophuthatswana
- 8.1 Bophuthatswana shall be an associate member of the Republic of South Africa.¹⁸
- 8.2 The Parliament of the Republic of Bophuthatswana shall elect — representatives to both houses of the National Parliament.
- 8.3 Representatives elected in terms of paragraph 8.2 above shall not have the right to vote in any of the houses of the National Parliament, except in matters regarding this constitution.
- Such representatives shall, however, have the right to participate in all debates of the National Parliament.
- 8.4 The provisions of all laws passed by the National Parliament shall only apply to Bophuthatswana after it has been voted upon by the Bophuthatswana Parliament and passed as laws by that Parliament.

¹⁸ An agreement between the respective governments to this effect has to be reached.

- 8.5 All agreements and treaties between the respective states in force and effect on date of enactment of this constitution, shall so remain in force and effect.
- 8.6 All agreements and treaties entered into by the Government of the Republic of South Africa shall apply to Bophuthatswana after its ratification by the Parliament of Bophuthatswana.