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Demokratiese Party
Democratic Party

DEMOCRATIC PARTY : SUBMISSION TO THE
TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES

1. INTRODUCTION

The Third Draft Outline of the Constitution (20 August 1993) needs to be amended in certain important respects. This submission addresses three of these, namely devolution of power, amending procedures and other important matters.

2. DEVOLUTION OF POWER

It has been agreed that there should be significant devolution of power to SPRs. We do not believe that the Third Draft Outline adequately provides for this. Strengthening these clauses will facilitate a more inclusive and peaceful democratisation process. Accordingly, we propose:

2.1. The following amendments should be made to Schedule 7, Constitution Principles:

2.1.1. Principle XVII
In the third line, after "powers", insert "and financial resources".

Motivation: To ensure that financial allocations from national revenue are taken into account in this context as well.

2.1.2. Principle XVIII
(a) In the fifth line, after "majority of", insert "two-thirds of"

(b) In the fifth and sixth lines, delete "alternatively, if there is such a chamber, a specified majority of a Chamber of parliament composed of SPR representatives".

Motivation: As worded at present individual SPRs could be stripped of their powers, functions, or institutions against their will if a majority of representatives from all SPRs are happy to lose such powers, functions or institutions.

- 2.1.3. Principle XXI
In the second line, after "Constitution", insert
"and which shall include the right to levy taxes".

Motivation: Clarity in respect of SPR powers to levy taxes.

- 2.1.4. Principle XXII
Add an additional sentence:
"In addition, SPR and local governments shall be entitled to funds from revenue collected nationally to finance adjustments and upgrading which are necessary to correct imbalances caused by past discriminatory practices".

Motivation: As SPR and local governments will have to deal with many of the residual effects of the past practices of apartheid administration, it is unrealistic to expect people within a particular area to finance on their own the adjustments and upgrading which are necessary to correct these imbalances.

- 2.1.5. Principle XXIII
(a) In the second line, delete "SPR", and substitute "national, SPR and local"
(b) Add the following sentence:
"Such recommended allocations shall be adhered to unless two-thirds of each House of Parliament agrees to an amended allocation".

Motivation: The needs of all three levels of government need to be considered and the Commission's recommendations should not simply be able to be ignored.

- 2.1.6. Principle XXIV 1
In the first line
(a) before "level" and substitute "lowest"
(b) delete "most"

Motivation: To make clear that devolution of power is intended wherever practical.

- 2.1.7. Principle XXIV 6
 In the first line
 (a) delete "required" and substitute "necessary"
 (b) after "function", insert "to be performed effectively".

Motivation: For greater clarity and to provide a more objective yardstick.

- 2.1.8. Principle XXIV 7
 In the first line, delete
 "required" and substitute "necessary".

Motivation: To provide a more objective test

- 2.1.9. Principle XXIV 9
 Delete and replace with the following:

9. SPR governments shall have powers, inter alia:
- 9.1. for the purposes of regional planning and development and the delivery of services; and
- 9.2. in respect of important aspects of education, health and welfare as well as other aspects of government dealing with specific socio-economic and cultural needs and the general well-being of the inhabitants of the SPR.

These powers shall be exclusive unless any other constitutional principle requires that one or more of them be exercised concurrently with the national government.

Motivation: Existing principle too weak and vague. Principles, as a whole, provide many criteria for allocation of powers to national government, but very few specific criteria of what should be exclusive to SPR and local government.

- 2.1.10. Principle XXIV 10
 In the first line, delete
 "or desirable".

Motivation: To provide a more objective test.

2.2. The following amendments should be made to the Constitution itself:

2.2.1. Clause 60(2)
Delete and replace with the following:
"A Bill which affects the boundaries or the exercise of powers or function of particular SPRs, but not all SPRs equally, shall also be approved by a majority of the Senators of that or those particular SPRs.

Motivation: To make provision for more than one but not all SPRs being affected by a Bill and to include boundaries as these can be as important as powers and functions of SPRs.

2.2.2. Clause 118(1)
Add the following:

- (p) Education, excluding tertiary education
- (q) Health services
- (r) Local government
- (s) Housing
- (t) Welfare services
- (u) SPR taxation
- (v) SPR public works

Motivation: The current functions are wholly inadequate, consist largely of local government responsibilities and are even less than those given to the provinces.

2.2.3. Clauses 118(3), (4), (5), (6), (7) and (8)
Delete whole clauses and substitute:

"(3) An SPR government shall, subject to the provisions of subsection (4), have full legislative competence for SPR purposes, and Parliament shall subject to the provisions of subsections (5) and (6), have concurrent legislative competence in the following functional areas:

- (a) Tertiary education
- (b) Agriculture
- (c) Nature conservation (excluding schedule 1 national parks)
- (d) The environment
- (e) SPR and local policing
- (f) SPR correctional services

- (4) If parliament exercises its concurrent legislative competence in terms of subsection (3), the legislative competence of an SPR government shall be constrained only to the extent that the relevant parliamentary legislation deals with such matters and expressly or by implication limits the legislative competence of SPR governments.
- (5) Parliament shall have overriding legislative powers on matters falling within the functional areas specified in subsections (1) and (3) provided and only to the extent that:
- (a) minimum standards across the nation are necessary for the delivery of public services; or
 - (b) uniformity across the nation is necessary for a particular function to be performed effectively.
- (6) Parliament shall only exercise its concurrent legislative competence in terms of subsection (3) to the extent that:
- (a) 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; or
 - (b) it is necessary for 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; or
 - (c) mutual co-operation is essential or where it is required to guarantee equality of opportunity or access to a government service
- (7) Whilst this Constitution remains in force, and subject to its provisions, the legislative competencies of an SPR referred to in subsections (1) and (3) shall not be the consent of such SPR legislature.

- (8) Executive power relating to all functional areas in which an SPR government has exclusive or concurrent legislative competence, shall vest in the SPR executive."

Motivation: To set out more clearly the division of responsibilities and under what circumstances the national parliament can intervene in SPR matters.

2.2.4.

Clause 121 (2)

- (a) In the second line, delete "SPRs" and substitute "national, SPR and local governments".

Motivation: The needs of all three levels of government must be taken into consideration.

- (b) Add the following sentence:

"Such recommended allocations shall be adhered to unless two-thirds of each House of Parliament agrees to an amended allocation".

Motivation: Commission's recommendations should not simply be able to be ignored.

2.2.5.

Clause 121(6)

Delete and replace with the following:

"(6) An SPR government shall be competent to levy taxes and surcharges after consultation with the Financial and Fiscal Commission".

Motivation: Taxing powers are crucial to autonomy.

2.2.6.

Clause 121(7)

Delete Clause and substitute:

"(7) An SPR government shall not be entitled to levy taxes which detrimentally affect 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."

Motivation: Standardisation of wording with Constitutional Principles.

- 2.2.7. Clause 124(4)
In first line, delete "in" and substitute "after".

Motivation: SPR legislatures should be free to write their own constitutions subject only to the prescribed broad parameters.

- 2.2.8. Clause 124(5)
In the third line, delete "passed by two thirds of its members".

Motivation: SPR constitutions are subject to Constitutional Principles and the provisions of the new constitutional text. If it is necessary / desirable for approval by Constitutional Assembly, a special majority should not be required.

- 2.2.9. Clause 124(6)
In third line, delete "third" and substitute "tenth".

Motivation: Within reasonable limits, one wants to make access to the Constitutional Court easy rather than difficult.

3. AMENDING PROCEDURES

It is essential that changes be made to ensure that the agreements of the Negotiating Council are adhered to.

3.1. Change to the Constitutional Principles

Principle XIV

Add ", which majorities shall be not less than two-thirds in each House of Parliament."

Motivation: Special procedures and specified majorities are too weak to give full effect to the intention of a degree of entrenchment.

3.2. Changes to Third Draft Outline of Constitution

- 3.2.1. Clause 39(1)
Delete and substitute:
"Parliament shall continue for a period of five years unless it is dissolved under Chapter 5 or it decides to dissolve sooner by way of a resolution passed by a two-thirds majority at a joint sitting."

Motivation: Members of parliament will be disinclined to agree to a new constitution quickly if it results in an early termination of their terms of office.

- 3.2.2. Clause 67(3)
In the fourth line, delete "40" and substitute "20".

Motivation: It is undesirable that one or two large parties should end up designating the whole panel.

- 3.2.3. Clause 68(3)
In the first line, delete "Should the Constitutional Assembly fail" and substitute:
"If after two years, the Constitutional Assembly has failed".

Motivation: This makes it clear that the Constitutional Assembly has to keep trying for at least two years before other mechanisms are resorted to. Otherwise there is nothing to prevent a majority resorting to deadlock-breaking mechanisms after two days or two months.

- 3.2.4. Clause 68(7)
In the second line, delete "sixty per cent" and substitute
"two-thirds".

Motivation: Resorting to a referendum should be to check whether the members of the Constitutional Assembly are correctly reflecting the wishes of the electorate or not. It should not be a mechanism to water down the degree of consensus required.

3.3.5.

Clause 68(8)

Delete whole clause and substitute:

"If a new constitutional text has not been approved after the requirements of subsection (1) to (7) have been followed, the Constitutional Assembly shall have a further six months in which to approve a new constitutional text by two thirds of all its members, failing which Parliament shall be dissolved by the President and a general election shall be held for a new Parliament in accordance with the provisions of this Constitution."

Motivation: After the Constitutional Assembly has seen the results of the referendum, it should be given six more months to try to reach agreement.

3.2.6.

Clause 68(9)

Delete whole clause and substitute:

"If a new Parliament is elected in terms of subsection (8), the provisions of subsections (1) to (8) shall apply mutatis mutandis provided that if Parliament is once again dissolved and a further general election held, subsection (11) shall come into operation".

Motivation: If two series of attempts to reach agreement have failed, the interim Constitution with certain necessary amendments would become operative.

3.2.7.

New: Clause 68(11)

If no new constitutional text is approved in terms of subsections (1) to (9), (a) constitutional amendments can be approved by two-thirds majorities of the members of each of the National Assembly and the Senate, (b) Parliament shall be dissolved by the President and general elections held for a new Parliament at least once every five years and (c) the President shall appoint the Cabinet.

Motivation: Consequential if one is to provide for amendment to the Constitution, regular elections and phasing out of forced power-sharing in the Cabinet.

4. OTHER IMPORTANT MATTERS

- 4.1. The following amendment should be made to Schedule 7, Constitution Principles:

Principle XXV
In the first line, delete
"Notwithstanding the provision of any other clause".

Motivation: It is doubtful whether this principle is a constitutional principle at all. It is already dealt with in the Chapter on Fundamental Rights. There is no justification for it to enjoy an importance greater than any other principle.

- 4.2. The following amendments should be made to the Constitution itself:

- 4.2.1. Clause 43(1)(b)
In the second line, after "Assembly", insert "prior to the dissolution of Parliament".

Motivation: While it is important that members do not go to parliament under false pretences, it is also important to build in some flexibility into the system, particularly during a transitional period.

- 4.2.2. Clause 66(2)
In the third line, delete
"third" and substitute "tenth".

Motivation: One third plus one members would be able to block a clause anyway. Hence, one wants to grant access to the Court to a smaller proportion of the Assembly.

- 4.2.3. Schedule 5
Clauses 12 and 13
Delete both clauses.

Motivation: Particularly at this transition stage, it makes a mockery of creating SPR legislatures, inter alia, to write SPR constitutions, if a voter only has a single ballot. Voters must be able to record their preferences in respect of the National Assembly and, with a separate vote, SPR legislatures.

4.3. GENERAL

It is desirable that the Constitution for the transition adheres to the Constitutional Principles as closely as possible so that changes to be made by the Constitutional Assembly are potentially reduced to a minimum and unnecessary disruption in government structures and administration are avoided. Amendments should be made wherever necessary to give effect to this requirement.

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