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CONSTITUTION REPORTS FIRST SUPPLEMENTARY REPORT ON CONSTITUTIONAL PRINCIPLES

15 JUNE 1993

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EMBARGOED (PAGES 1-7) UNTIL DELIVERY/TABLING IN NEGOTIATING COUNCIL MEETING

FIRST SUPPLEMENTARY REPORT ON CONSTITUTIONAL PRINCIPLES BY THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL

15 JUNE 1993

1. Introduction

In response to the debate in the Negotiating Council on 3 June 1993 regarding the draft constitutional principles contained in paragraph 2 of our Third Report, and subsequent submissions to us, we have given further consideration to paragraphs 2.2, 2.4, 2.8 and 2.12, which were referred back to us by the Council for reformulation.

2. Paragraph 2.2: Gender

It was agreed that at the meeting of the Council that paragraph 2.2 should be amended to include "gender" in line two. As amended it will read:

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.

3. **Paragraph 2.4: Judiciary**

It was agreed at the meeting of the Council that Paragraph 2.4 should be amended to delete "legitimate" in line one. As amended it will read:

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.

4. **Paragraph 2.8: Diversity of language and culture**

4.1 We were asked to reconsider the formulation of paragraph 2.8 in the light of the debate in the Negotiating Council. In our view the question of religious freedom does not require specific mention in paragraph 2.8. It is a universally accepted freedom and is covered by paragraph 2.10. We have had regard to the debate and to the International Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities adopted by the United Nations General Assembly on 18 December 1992. Consistently with the way in which language and culture is dealt with in that Declaration, we suggest that Paragraph 2.8 should be amended and reformulated as follows:

2.8 The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.

4.2 In one of the submissions to us it was suggested that paragraph 2.8 should also acknowledge the "diversity of peoples". We are of the opinion that such diversity in all its relevant aspects is covered by the general constitutional principles, which on the one hand recognises and protects cultural and linguistic diversity, and on the other prohibits discrimination.

5. Paragraph 2.12 : Traditional leaders and indigenous law:

5.1 Indigenous or customary law is an established system of immemorial rules which have evolved from the way of life and national events of the people, the general context of which was and is a matter of common knowledge and adherence, coupled with precedents applying to specific cases. It is a system of law of ancient origin and is largely still unwritten outside Natal and KwaZulu. Even though the greater part of indigenous law is unwritten and therefore sometimes looked at with uncertainty as to the precision thereof, sight must not be lost of the fact that historically it has successfully provided indigenous communities with rules necessary for their orderly existence.

Notwithstanding deep social and economic changes in our society, indigenous law continues to play an important role in the daily lives of a great many South Africans.

5.2 Indigenous law could find a favourable reception in the democratic political environment that is being planned, if it is allowed to develop spontaneously in a given jural community. It may require reform, particularly as far as the position of women, children and the right of individual ownership are concerned, and in our view the constitution ought not to inhibit the reform that may be desirable.

5.3 With regard to the compatibility of fundamental rights with indigenous law it should be noted that most of the instruments concerned with human rights mention the protection of cultural rights on a basis consistent with equality. Paragraph 4 of the preamble of the 1981 African Charter on Human and People's Rights urges states to take into consideration "the virtues of their historical tradition and the values of African civilization"; article 18(2) gives definition to this ideal by obliging states "to assist the family which is the custodian of moral and traditional values recognised by the community".

Neither of these provisions is remarkable in itself, but when viewed in the overall context of the Charter (which makes no reference to individual rights in marriage) they suggest a strong commitment to preservation of the foundation of African culture: the family.

The Draft Declaration of the Rights of Indigenous Peoples adopted on 14 August 1992 (of the Working Group on Indigenous Populations which is a sub-committee of the UN Commission on Prevention of Discrimination and Protection of Minorities), prepared for adoption by the UN General Assembly during 1993 (the UN Year of Indigenous People) recognises in the seventh preambular paragraph "the urgent need to respect and promote the rights and characteristics of indigenous people, especially their right to their laws, territories and resources, which stem from their history, philosophy, cultures, spiritual and other traditions as well as from their political, economic and social structures". The operative paragraph 8 of the Draft Declaration specifically provides for the right of indigenous peoples "to revive and practise their cultural identity and traditions, including the right to maintain, develop and protect the past, present and future manifestations of their cultures", whereas the operative paragraph 16 recognises the "right to the full recognition of their own laws and customs, land-tenure systems and institutions..."

5.4 It should be kept in mind that international declarations and conventions universalising human rights were the product of modern jurisprudence, and for many historical, political and other reasons, to a large extent neglected the indigenous doctrines of rights. Unfortunately to some degree this is still the prevailing situation in South Africa. Where a society is in fact culturally plural, as South Africa is, the recognition of indigenous law gives effect to the accepted constitutional principle acknowledging cultural diversity. The infrastructure for the legal enforcement of indigenous law already exists.

Chiefs' and headmens' courts have jurisdiction to apply indigenous law, and even magistrates' courts and the Supreme Court may now take judicial notice of customary law.

5.5 It is suggested that a symbiotic approach between indigenous law and fundamental rights may be developed (ultimately growing into a hybrid system). This should not prove a threat to important aspects of indigenous law such as the payment of lobola or bogadi. The diversity of the systems of indigenous law could justify the allocation of powers in respect thereof to the SPRs.

5.6 A submission has been made to us that:

> ...ordinary legislation cannot modify indigenous law. However, both legislation and indigenous law are to be subject and conditioned to all constitutional sources of law, including federal and state constitutions.

It is further contended in the same submission that:

> ...indigenous law is recognised and protected only to the extent that it conforms with democratic requirements and with the overall blueprint of society.

There seems to be general acceptance that in the event of conflict, fundamental rights should prevail over indigenous law. It was however clear from the debate in the Negotiating Council on paragraph 2.12 of our Third Report that certain participants took the view that indigenous law should be made subject to legislation. This raises a question for decision by the Negotiating Council, namely:

> Should the legislature have the power to amend or repeal provisions of indigenous law?

5.7 It was agreed that the status of traditional leaders should receive appropriate recognition in the constitution. In one of the submissions to us it is said that acknowledgement of the status of traditional leaders is not sufficient and that the constitution should specifically recognise "the institution of traditional leaders, including the traditional councils as established by customary law and usages". As long as the constitution recognises the status of traditional leaders as well as indigenous law (which acknowledges the institution of traditional leaders), it is our opinion that this concern will be met.

5.8 We suggest that paragraph 2.12 of our Third Report be reformulated as follows:

> **The status of traditional leaders shall be recognised in the constitution. The constitution shall provide for the recognition of indigenous law and its application by the courts. Indigenous law shall be applied subject to the provisions of the fundamental rights contained in the constitution.**

Depending on the outcome of the debate on paragraph 4.6.2, the following words may have to be added at the end of the final sentence:

"and to legislation dealing specifically therewith".

6. Response to further submissions

6.1 We have recieved comments and questions from certain participants on matters raised by us in our Third and Fourth Reports. Some request us to undertake research, and provide them with advice. We consider that this is the responsibility of the participants themselves and not our responsibility. Some seek to reopen issues which we understood to have been resolved at the meeting of the Negotiating Council on 3 June 1993. We consider that we can only do this if instructed to do so by the Negotiating Council. Some raise

issues relevant to the debates which are still to take place on our Third and Fourth Reports which will presumably be raised by the participants concerned when these Reports are debated in the Council.

6.2 We are concerned that if we are expected to reply in detail to all the issues and question raised with us by participants, we will be diverted from the tasks assigned to us by the Negotiating Council and will be unable to address them efficiently and expeditiously. We have considered all the submissions made to us, and are of the opinion that there is no need to add to this Report, which in our view is complete, and sufficient to facilitate the debate in the Council on all relevant issues.