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SUBMISSION BY THE GOVERNMENT OF THE REPUBLIC OF BOPHUTHATSWANA ON THE SECOND REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES

This submission deals exclusively with paragraphs 3.5 and 3.6 of the report under consideration.

The initial remarks contained in paragraph 3.5 are indeed correct, in that a confederation, per definition, is not a form of state. Equally correct, however, is the remark that the constitutional systems of the respective states may reflect confederal agreements and arrangements. We are of opinion that a new South African constitution may just as well provide for confederal arrangements between South Africa and Bophuthatswana, while simultaneously providing for a federal-type constitutional dispensation to cater for the needs and aspirations of the SPR. In this context, the concepts of regionalism/federalism and confederalism are not mutually exclusive, but can rather be complementary, given some innovative reasoning and thinking. The application of the idea of asymmetry of powers can also be considered in this regard.

The classic definitions and examples of confederations are well known and do not call for further elaboration. It may even be better to disregard all of it for the time being, in order to approach this whole matter with an open mind in designing a constitutional model sui generis, perhaps even including new terminology to describe it.

Relevant and applicable aspects of such a model might be found in one or more of the following precedents:

1. Berlin

The purpose of this document does not allow for a comprehensive description of the history of Berlin's special status, save to say that it originates from the Allied agreements on the Occupation of Germany as drafted by the European Advisory Commission in 1944-1945 and subsequently confirmed by the respective governments' parties.

The Constitution of Berlin, September 1, 1950, stated in article 1: (1) Berlin is a German Land and at the same time a City; (2) Berlin is a Land of the Federal Republic of Germany; (3) The Basic Law and the laws of the Federal Republic of Germany are binding on Berlin.

In terms of this Constitution and statements by the Allied Kommandatura Berlin (the four-Power administration established in July 1945), the arrangement between the Federal Republic and Berlin included the following aspects:

* In the transition period the City Council could establish by law that any specific law of the Federal Republic could be applicable in Berlin also without change;
* The Berlin House of Representatives could make any single, or group of Federal laws, applicable to Berlin by means of a Mantelgesetz (Cover Law);
* Regarding international treaties, the Federal Republic would include Berlin within the terms of the Federal Republic's international undertakings and the Berlin Senate would implement in Berlin the relevant undertakings of the Republic and, furthermore, the Republic would inform the Berlin Senate of important international treaty negotiations affecting the interests of Berlin;
* Berlin could adopt the same legislation as that of the Federal Republic, in particular regarding currency, credit and foreign exchange, nationality, passports, emigration and immigration, extradition, the unification of the customs and trade area, trade and navigation agreements, freedom of movement of goods, and foreign trade and payment arrangements.

Although by virtue of a reservation of the Western Allies, the Federation does not govern Berlin, the Quadripartite Agreement on Berlin of 3 September 1971 has reaffirmed the close ties between the then West Berlin and the Fedral Republic, whose federative structure has historical roots and is designed to preclude the abuse of central state power. Berlin elects twenty-two members to the Bundestag by the Berlin House of Representatives, but they only have restricted voting rights in the Bundestag.

It is important to note that, notwithstanding Berlin representation in the Bundestag, the Berlin House of Representatives still had the choice of whether or not to take over Federal laws in order to validate it in Berlin.

2. The Commonwealth of Puerto Rico

Puerto Rico, after being ruled by Spain for nearly 400 years, was ceded to the United States of America in 1898 under the Treaty of Paris. In 1900, the US Congress adopted the Organic Act, allowing Puerto Ricans to elect only members of the lower house and a resident commissioner to represent the island in the House of Representatives, where he could speak, but not vote. The act exempted Puerto Rico from federal tax laws, but declared that other statutory laws of the US would have the same force and effect in Puerto Rico as in the US.

A new Organic Act, adopted in 1917, made provision for a popularly elected Senate, a bill of rights and the granting of US citizenship upon Puerto Ricans. A later amendment allowed the people to elect their own governor, who could appoint all the department heads.

Congress's Public Law 600, approved in 1951, (a) authorised the Puerto Rican people to draft and adopt their own constitution, (b) repealed the internal-government provisions of the Organic Act and (c) kept the rest of it, including the economic provisions, in effect under a new title- the Puerto Rican Federal Relations Act.

The Constitution of the Commonwealth of Puerto Rico's basic features of the system of government were indistinguishable from those set forth in the US state constitutions, allowing Puerto Rico approximately the same control over its internal affairs as the other states. Residents, although US citizens, do not vote in national elections and are still represented in the US Congress by a resident commissioner, who has a voice but no vote in the House of Representatives.

In terms of the Federal Relations Act, the rights, privileges and immunities of US citizens in Puerto Rico are protected as though the latter were a state of the Union. It further prohibits export duties on exports from the island to the USA and allocates taxes on property, income, internal revenue, licenses, royalties, etc., to the insular and municipal governments. Section 9 of the Act gives laws of the USA, not locally inapplicable, the same force and effect in Puerto Rico as in the US, except the internal-revenue laws.

3. The French Community

The French Constitution of 1958 includes a section which deals with the French Community. The term "Community" refers to the entity comprising the French Republic and the member states of the Community. These states, however, were not states in terms of international law, but rather states in terms of domestic law, being the former French colonies which had gained increasing internal autonomy. These states were allowed, by way of referendum, to decide whether they wanted to belong to the Community or not. The states which had opted to remain within the Community could then again decide whether they wanted to retain their status of former overseas territory or become member states of the Community.

Certain member states of the Community, however, wanted to become independent without leaving the Community. Agreements were thus concluded between the French Republic and these states- the Republics of Mali and Madagascar, resulting in their independence. The French Constitution was subsequently amended to provide that a member state could by way of agreements become independent without thereby ceasing to be a member of the Community. The agreement-based Community presently links France to the Republic of Madagascar, Senegal and each of the four states of Equatorial Africa, i.e. Congo, Chad, Gabon and the Central African Republic.

The confederal-type structure of the Community by agreement is, however, largely theoretical, as none of the collegiate institutions has actually been set up.

Conclusion

These are some examples of a "non-classical" approach to this issue, which indicates a need, in certain exceptional cases, for an original, innovative and flexible approach.

31 May 1993