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The Response of the Conservative Party on the Report of the Technical Committees on Self-determination, Form of State, the Future of the TBVC- States and other related Matters

Ad ~~par~~ 3. Self-determination

(We refer you in this regard to the speech by adv. Tom Langley MP, made on behalf of the Conservative Party during the session of the Negotiating Council on 18 May 1993.)

In addition we emphasise the following:

The Part of the Report that deals with self - determination is, to say the least, most disappointing.

From a constitutional and international law point of view this is the most distorted discussion on self- determination I have read in my entire academic life.

The report starts of with reference to self- determination as one's own choices, one's own potential etc (my underlyning), Self- determination is by no means an individual right but a right of peoples and nations, (droit des peuples). One could quote thousands of references in international law to substantiate this. See the world expert Verdross- Simma, *Universelles Völkerrecht*, p. 318.

The reference in par. 3.1 to "the general right of self- determination of individuals" is not only wrong, but a legal monstrosity. So is also the reference that self- determination is the "expression of a basic urge to be master of one's own destiny" It is, as is indicated above, a right of peoples.

As to the meaning of "Self" in self- determination see Wilson, *International Law and the Use of Force by National Liberation Movements*, p 79 et seq.

Ad par 3.2

The definition of the right of self- determination given in this paragraph is narrowed to "the liberation of countries and peoples from colonial rule, foreign subjection and external domination" This tipe of formulation comes directly from the Soviet line of thinking on self- determination. See in this regard two world experts on self- determination and soviet law: Prof Daniël Thürer, *Das Selbst-bestimmungsrecht der Völker*, 22 *Archiv des Völkerrechts*, 1984 and Boris Meissner, *Der Sowjetische Nationsbegriff und das Selbstbestimmungsrecht der Völker*.

Ad par 3.4

It has previously been indicated that there is no such thing as "the individual's rights to self- determination".

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Ad par 3.5

Self-determination, although it is interlinked with human rights, must clearly be distinguished from human rights. The one (self-determination) operates on the international field within the ambit of international law as a right of peoples, whilst human rights have by nature an individual character. The nearest one could get to speak of self-determination operating in domestic law is to make the distinction between external and internal self-determination; like Lombardi does. According to him internal self-determination guarantees the free economic, social and cultural development of a people and the prohibition on a state authority not to discriminate against minority groups. See Lombardi, Bürgerkrieg und Völkerrecht, 1976, p 176.

Excursion: The most accepted definition of self-determination is the one in the 1966 Conventions:

"All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

Ad par 4 : Form of State

The discussion of the form of state, is perhaps, with the exception of selfdetermination, the most disappointing part of the report.

This conclusion rests on two premises:

- (1) Whilst one would have expected the contrary under this heading "form of state", the point of departure is again the unitary state. This unitary state must -- also in this part of the report -- serve as a broad vehicle for a conglomerate nationlike constitution; without making room for the realization of the selfdetermination of peoples or, at least, the aspirations the various peoples of South Africa might have in this regard. This "unitary state" concept within which framework the various ethnic peoples are forced together is, to our mind, a deadly recipe for future ethnically orientated conflict or, perhaps, even a civil war of the style of Bosnia - Herzogowina. Mixed "nation states" which is also envisaged by the NP and the ANC for South Africa have the tendency, either at its inception or later, to break up. This has been proved only recently in the last two years in Yugoslavia and in the previously existing Soviet Union, where a socialist federation-type of unitary state had splitted up in the Russian federation consisting of 25 republics and the 14 sovereign independent republics; forming the Confederation or the Commonwealth of Independent States. This Confederation model is by analogy, the form of state which the Conservative Party envisages for South Africa, or to put it, otherwise, this model, in an

adopted form lies at the heart of the constitutional model of the Conservative Party.

- (2) By definition the plain meaning of the "form of state" has in the legal and political science literature a much wider scope and application than that which is understood in the report of the technical committee viz. such concepts as the separation of powers, the entrenchment of fundamental rights, the powers of the judiciary, the boundaries, powers and functions of the regions etc.

In the legal (constitutional) literature world wide on the "form of state", it is recognised that the most fundamental question which must be answered, is whether the state envisaged is a union, a federal state with large or little powers on top, a peoples state (a volkstaat) and whether these states merely operate as single states or within the framework of a confederation.

Only after this fundamental question relating to the external features of the form of state is addressed, then one could apply your mind to the internal features of the form of state viz. what kind of democratic system should be introduced e.g. a Westminster model or a consociational democracy or a social-democratic or a socialist state.

See in this regard prof Karl Doehring, Allgemeine Staatslehre, Heidelberg, 1991, p. 94 et seq. and Van Vuuren, Politieke Alternatiewe vir Suid-Afrika, RGN, 1982, pp 109 - 298. If one accepts a truly "westernised" democratic system then one addresses one's mind to such concepts as have been mentioned in par 4 and in par. 6.1 to 6.4

But to reiterate : the external features of the form of state must be determined first and foremost as has been indicated above.

Ad par 7: Interim Constitution

The Conservative Party firmly rejects a interim constitution and the proposed drafting process envisaged in subparagraphs 7.1 and 7.2

This premise is based mainly on three grounds

- (1) According to our view the present Parliament is the only constitutional body that could and should transfer its powers to newly created constitutional bodies;
- (2) An interim constitution will to our mind, be a overhasty drafted document, incomplete by nature, with legal lacunae and with little, if any, legal certainty.

The well known Prof Doehring Allgemeine Rechtslehre , pp. 100 -102 choose legality in contradistinction to legitimacy.

- (3) With an interim- constitution one runs the risk that these interim- arrangements could, with the force of mass action, force of arms and the like of the newly created government, become permanent arrangements; this perpetuating the incompleteness and legal uncertainty of the interim- constitution.

Ad par9: Future of the TBVC- States

Again, in the part of the report that deals with the future of the TBVC- states, one finds the same "old" story. It is not the future of the TBVC- states that is discussed, but the point de départ is again the unitary state of which, the TBVC- states will form part. In other words, incorporation is taken for granted and no arguments are advanced whether or not there should be incorporation. The normal scientific method weighing up pro's and con's is not applied. Therefore, no balanced conclusion could be reached.

The view of the Conservative Party is a no- prescriptive one ; it is for these states themselves to determine their own constitutional future.

To this one must add: in international law recognition of a state is not a prerequisite for the legal existence of a state.

Concluding Remarks:

The Conservative Party reserves its right to elaborate on this response. Furthermore we request the opportunity at an opportune time to give oral evidence and argue our case on our constitutional model re Confederation and relevant constitutional principles with reference to international and national literature.

With Regards

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3.50 p.m.

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