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GOVERNMENT OF THE REPUBLIC OF BOPHUTHATSWANA

INITIAL SUBMISSION TO THE RESPECTIVE TECHNICAL COMMITTEES

2. Constitutional Matters

The Bophuthatswana Government is convinced that the only practical and suitable solution to the question of a South African constitution, is to be found in a federal/regional constitutional dispensation.

Annexure "A" attached to this submission contains various reasons favouring this form of state, as well as criteria for the demarcation of states/regions and the process of demarcation. The annexure is to be treated as part of this document.

Regarding the process to be followed in deciding on a constitution, this Delegation submits the following chronological order:

- (a) The parties to the Multi-party Negotiation Process agree on the form of state and the applicable constitutional principles, in particular the powers and functions of state/regional governments;
- (b) Such principles are then conveyed to a panel of experts to draft a constitution accordingly;
- (c) Simultaneously with paragraph (b) above and in interaction with it, people at ground-level negotiate and determine state/regional constitutions, also in accordance with the principles decided on at the central level;
- (d) Both national - and state/regional constitutions are then submitted to the Multi-party Negotiation Process for consideration and approval;
- (e) The next step is a referendum in which the electorate decides on both constitutions, in regional context on the specific state/regional constitution;
- (f) Parliament passes the national constitution; and
- (g) Elections take place on national and state/regional level, in terms of the new constitutions.

The most obvious advantages of this process are:

- * It is logical in the sense of having the form of state and constitutional principles in place before the drafting at either level commences;
- * It is democratic to the largest possible extent by involving the representative of the Multi-Party Negotiation Process at national level and the states/regions themselves at the next level in the creation-process, thus ensuring inclusivity;
- * It eliminates intricate and time-consuming interim arrangements and provides a better opportunity for elections to take place during the first quarter of 1994;
- * It is in accordance with international practice of employing experts to draw up constitutions.

660 59

64

ARGUMENTS IN FAVOUR OF FEDERALISM

When putting the case for federalism the following arguments could be of importance:

The Geographical Argument

Larger countries rather than small countries need more provisions for regional autonomy and more supporting federal institutions. Most of the larger countries have federal constitutions - countries like Brazil, Mexico, Argentina, India, U.S.A., former U.S.S.R., Nigeria and Canada. South Africa is also considered a large country.

Social Arguments

Plural societies which are sharply divided along religious, ideological, linguistic, cultural, ethnic or racial lines tend to adopt forms of state which can to some extent accommodate these divisions and would therefore rather opt for federalism. Examples are: Canada, India, Switzerland and the former U.S.S.R. South Africa could fit into this category as well.

What makes federalism a most interesting subject in this regard is that it is entwined with the issue of community. It is inseparable from one of the most fundamental social questions: What constitutes a community? Unless federalism does sustain communities that feel themselves to be such, it is hard to justify. And this is exactly what people in areas like Natal, the Orange Free State, Western Cape and Western Transvaal feel they are.

By sustaining subnational communities with some residual degree of governmental independence and distinctiveness, federalism also gives individuals the choice of where to live. It is from this point of view that some people argue that the social functions of federalism are more significant than the political and governmental ones.

Economic Arguments

- (1) The underlying justification for federalism in rational choice theory derives from the distribution of public preferences for various public goods. Given regional variations in the demand for a particular public good, government production of the good can closely match the preferences of more individuals through a decentralised system of government. Each jurisdiction can then respond to local preferences precisely, rather than having the central government produce a uniform level of the collective good. This efficiency can be enhanced through the market-like conditions of residential mobility, allowing like-minded individuals to migrate to jurisdictions offering a "market basket" of public goods corresponding with their own preferences.
- (2) A basis for allocating governmental functions can also be found in the argument that welfare is maximised when individual preferences match jurisdictional boundaries. Mancur Olson calls this concept the

"principle of fiscal equivalence." He suggests that inefficiencies will occur when: (1) the collective good reaches beyond the boundaries of the government that provides it; or (2) the collective good reaches only a part of the constituency that provides it.

Political Arguments

- (1) The principle benefit of a federal system is that it constitutes a check on abuses of government power.
- (2) Sensitivity to the diverse needs of a heterogeneous society is another important benefit of a federal system.
- (3) Federal systems provide increased opportunities and citizen initiatives, through democratic processes. It is maintained, for example, that the multiple power centres and access points in a federal system may enhance governmental responsiveness and improve the process of representation.
- (4) Federal systems provide more opportunity for innovation and experimentation on a regional basis in tackling economic and social problems.
- (5) Federal systems heighten the responsiveness of government results from competition among the states for a mobile citizenry.
- (6) Federal systems guarantee stability in intergovernmental relations to the benefit of the people.

Federalism as a Constitutional Value

Federalism connotes values which are essential for a free society.

- (1) At its deepest level, federalism is linked with individual liberty and self-government. Federalism is one of the structural devices to protect liberties.
- (2) Participating in government at the local and state level - and later also on the central level - is an education in citizenship.
- (3) Federalism simultaneously aims to achieve national unity while preserving state diversity. Achieving both of these ends creates ambiguities and tensions. One by-product of this dialect is a continuing dialogue on first principles of government, a dialogue among ordinary citizens as much as among officials and experts.
- (4) Federalism is premised on the diversity of the people. To the extent that federalism permits diverse manners and mores to flourish, it encourages idiosyncrasies, experimentation, and self-expression.
- (5) The ultimate value underwritten by federalism is the right of choice. No value is more basic to self-government. Federalism reinforces this value and does so at levels of government closer to the people, where choices are more likely to be effective and to have meaning.

The Structure of Federalism.

To guarantee a federal form of state the following structures should be achieved:

- (1) a division of powers and functions between first and second tiers of government;
- (2) a rigid constitution, preferably with institutions outside central parliament also participating in procedures to change the constitution; and
- (3) an independent judiciary protecting the constitution.

Bibliography

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660 62

67

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1. Reasons for a federal-type form of state for South Africa

The present debate on regional government in South Africa is still loaded with emotions, historical experiences and even hidden agendas. It is of the utmost importance to the country and its people that the question of regional government should be addressed in as objective a manner as possible, free from dogmatic and ideological considerations.

One of the most rewarding ways of discussing the prospects and pitfalls of regional government is to compare the experiences of various countries around the world. Obviously each country has its own unique circumstances and there is no "ideal" model, but the experiences of various developing and developed countries are at least an indication of what may be installed for South Africans. In our efforts to develop a constitution suited to our needs, we ought to take note of the experiences of others, otherwise we may be doomed to relive their failures.

1.1 Prospects of regional government

It is quite clear from international experiences in countries such as India, Malaysia, Brazil, Canada, the USA, Germany, Switzerland and Nigeria that regional government may have the following prospects which, if employed and developed correctly, may be of service to South Africa:

* Democratization

Regional government could encourage more effective public participation in the decision-making and governmental process which leads to decisions that are as close as possible to those of the interested parties. In a country with the population and territorial diversity that South Africa has, a highly centralized system may be counterproductive in that it could not fully accommodate the will of the general electorate. Regional government therefore deepens the democratic process by creating a multiplicity of levels and institutions where the population could become involved in decision-making and governmental processes.

* Conflict management

Democratically elected and legitimate regional government may help to prevent, defuse or manage conflict by providing for different centres of powers whereby regions may adopt policies suitable for their own unique needs. It goes without saying that where applicable, such regional policies have to comply with national standards and guidelines. Regional government may not necessarily

68

prevent all conflict, but it creates a framework for managing the conflict that is inherent in a society such as South Africa's. It provides an opportunity to accommodate a diversity of interests without losing sight of the importance of nation building.

* **Accommodates unity and diversity**

Regional government can provide the opportunity to combine through representative institutions, the benefits of national unity and regional diversity and interests. South Africans should not adopt an "either ... or" approach to unity and diversity as if they have to choose between them. Countries with circumstances similar to those of South Africa have shown that an "and ... and" approach is required, where the recognition of diversity builds national unity and vice versa. An overemphasis on either diversity or unity could be detrimental to stability and democratic government.

* **Legitimate processes**

Regional government could develop, encourage and enhance the local and regional involvement of various interest groups in governmental processes. Such involvement creates a better understanding among the population of the constraints under which the government operates, but it also subjects political leaders to the expectations and needs of the populace. Decentralization and transfer of power to regional and local governments is therefore frequently associated with an increased legitimacy in decision making because it provides greater opportunity for the electorate and its representatives to influence the formulation and implementation of policy.

* **Improved communication**

Regional government brings government closer to the people which in turn leads to improved communication between the people, the regional and the national government. Improved communication is not only a bottom-up but also a top-down process. It enhances the ability of interest groups to communicate their needs and influence policy while at the same time the regional government can tailor its policies more effectively to suit local needs.

* **Checks and balances**

Regional government not only ensures that there are various centres of power where decisions take place, it may also be a way of giving the population representation in national institutions. This means that regions could be actively involved in the development of national policies while also being responsible for the implementation and tailoring of such policies. The various centres of powers prevent the misuse of power at any single level of government, given the fact that all

69

levels are accountable to the population and have an interdependency on one another.

*** Minority protection**

Regional government can play a significant role in reducing and preventing ethnic conflict and competition by allocating certain culturally related matters to regions. International experience shows that even if regional populations are heterogeneous, regional government provides minorities with more effective ways of communicating their needs. It should be stressed that the ethnic homogeneity of regions ought not to be a purpose on its own, but that a sensitivity to ethnic factors may prevent the conflicts that a highly centralized state may experience.

*** Economic management**

Regional government and involvement could play a vital role in the more effective and successful management of national and regional economic development. Local and regional managers and officials are better placed to identify and respond to popular needs. By being able to formulate and implement regional economic development plans within the framework of national guidelines, regional government enhances its ability to address local needs. It has been recognized in many developing countries that socio-economic development programmes are best planned and administered by the level of government which is closest to the people in that particular regard.

*** Balanced growth**

Regional governments could play a key role in creating conditions for balanced growth within the different areas of South Africa. This is particularly critical in South Africa where, for historic reasons, significant intraregional and urban-rural disparities exist. Regional structures could maximize the benefits to be derived from intranational comparative advantages, and backward and forward linkages and could ensure the optimal utilization of resources. Inequalities between regions could, as international experience shows, be counteracted by a deliberate national policy of interregional transfers.

2. Criteria for demarcation of regions

Various proposals concerning how to demarcate South Africa have been made during the last eighteen months, but very little thought has gone into identifying the criteria that could be used as a yardstick to evaluate and compare the respective proposals. The aim of this proposal is to identify a variety of criteria that have been used internationally to demarcate regions. Such criteria could then form the basis for evaluating the proposals of the various political parties. It should be

70
65

8

emphasized that these criteria should not be used in isolation or in a manner which overemphasizes one factor to the detriment of others. A balance between the various criteria should be obtained in order to provide an integrated approach to demarcation.

* **Historical boundaries**

In most countries historical boundaries are used as the point of departure for demarcating regions. South Africa has various types of historical boundaries that can be considered, such as the provinces, homelands and traditional government areas.

* **Sense of belonging**

The way that the regional population relates to "its" region and the communality of interests has to be considered.

* **Compactness of region**

Regions should be compact, not fragmented and scattered across the country as the present homelands are. Regions are relative permanent features and should not be gerrymandered to serve short-term political needs.

* **Urban/rural balance**

A proper balance should be maintained between urban and rural interests. In certain circumstances rural areas may benefit from the inclusion of large urban areas while in other cases attention may be focused on the problems experienced by the urban area to the detriment of rural communities.

* **Economic resources and ability**

It is impossible to accrue to all regions exactly the same economic resources, but the point of departure should be that a region should at least have certain minimum resources at its disposal. It goes without saying that structures will have to be provided to ensure a fair allocation of revenue to poorer regions.

* **Infrastructure and institutional capacity**

Regions should at least meet certain basic infrastructural requirements such as transport, a communication system and the ability to maintain and operate it. It should also have access to basic institutional requirements relating to administrative and technological know-how, organizational capacity and training facilities.

9

Natural boundaries

Natural boundaries such as rivers and mountains may affect not only people's sense of identity but may also be the basis of various interests and residential patterns.

Ethnic criteria

The composition of the population in various ethnic groupings needs to be considered without emphasizing ethnic homogeneity. Ethnic groups may reside in certain concentrations and political, social and economic factors require that such density patterns be taken into account.

3. Process of demarcation

The process leading to demarcation is at least as important as the demarcation itself. Demarcation is much more than a technical, clinical exercise void of emotional and political reality. If regional governments are afforded legislative functions it is crucial that the general public should also be involved in deciding what the character and demarcation of a region should be. Without an inclusive process people may feel removed and distanced from regional government, which in turn could lead to a legitimacy crises.

The following proposals can be made regarding the process of demarcation:

The process should simultaneously bear elements of a top-down and bottom-up approach. Political leaders at national level ought to serve as catalysts to encourage regional discussions, while regions should start forming their own identity by embarking upon multiparty discussions.

Basic agreement ought to be obtained among the various parties firstly on what has to be done to institute regional government and secondly on a time frame for doing it. Agreement on these points will prevent the use and misuse of regional government as part of party political agendas with the subsequent uncertainty this will cause.