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REPABOLEKI YA BOPHUTHATSWANA



REPUBLIC OF BOPHUTHATSWANA

REPUBLIEK VAN BOPHUTHATSWANA

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SUBJECT: ..Bop Gov Submission to TC.....
..on Conditional Issues.....

NO OF PAGES: ...7.....
(INCLUDING THIS ONE)

MESSAGE:

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COMMENTARY ON THE FOURTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL - SUBMISSION BY THE GOVERNMENT OF THE REPUBLIC OF BOPHUTHATSWANA

This Government is of the firm contention that the boundaries, powers, functions and responsibilities of SPR must be finally determined before an election takes place and, likewise, that all decisions on regional implications be taken before elections. We are opposed to a transitional phase, as it is unnecessary and delaying in the process of finding an acceptable constitution.

Having stated this, we, however, comment on the Report as presented, in the following way:

Ad Paragraph 1.5

The importance of a legal framework during the transition ought to be argued and specified. (*Quare: Is there a difference between legal/statutory and constitutional ?*)
Some of the most important reasons are:

- * The transitional phase requires the maximum constitutional arrangements possible to ensure sufficient legal certainty and effectiveness. In essence, there should be no juristic difference between the completeness of a 'transitional' and a 'final' constitution.
- * Experiences throughout the world show that if regions do not have a "voice" during the negotiations and transitional phase, they run the risk of not being treated properly afterwards. Thus, if there is not effective SPR government during the transition, it will be difficult to establish it afterwards.
- * The transitional phase may last longer than anticipated. This will stress the importance of having complete constitutional arrangements in place as early as possible.
- * The positive features of SPR government, e.g. democratisation, prevention of conflict and protection of minorities, are specifically necessary in the transitional phase. To postpone the formation of legitimate SPR government "to a later date" will indeed counter the said objectives.

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Ad Paragraph 2.1

This assumption is questioned on two aspects. Firstly, the political question is whether or not the territories will have consented to incorporation by the date of election. Secondly, there is the legal and practical question, namely, if complete incorporation can be attained by April 1994? The differences in the legislation of the said territories and the administrative arrangements required for incorporation need to be carefully assessed to determine if this is a realistic assumption.

We stress that the Bophuthatswana Government views this only as an assumption and not as a factual statement at all.

Ad Paragraph 2.2

The problems surrounding incorporation are clearly reflected in this paragraph.

- (a) What is meant by "the consolidation of the political authority" ? Does it imply elected or non-elected institutions, to whom must be reported, who will be responsible for governmental processes, what will happen to conflicting administrative and other regulations and is it at all possible to divide the executive power (administration) from the legislative (political) power in such a way ?
- (b) Clarification of "continuity of services" is necessary. It is not at all realistic to assume that by April 1994 all bureaucratic structures, including the removal of personnel, etc. will have been integrated at SPR level. Integration of the TBVC states in particular will be accompanied by the centralisation of certain functions (e.g. defence), in itself an aspect which can be time-consuming.

It is obvious that much consideration of what is really attainable by April 1994 is still necessary. Only then can decisions regarding political authority, continuity, etc. be taken.

Ad Paragraph 3.1

Are these the only options? Without debating the merits, one can argue that a third option would be to retain the TBVC states, but that they take certain steps over a specific period to integrate with the new SPR. Joint political structures between the SPR and TBVC states can even be created to promote uniformity (EC model, JEA in Natal).

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3.1.1 : The transitional phase must be both legitimate and democratic. It does not make sense to make control more representative, but not more democratic. It can, in any case not form a foundation for legal processes over the next 5 to 7 years.

3.1.2 This may be the more difficult option in terms of time, but the more preferable one in terms of effective and democratic governmental processes.

Why does paragraph 3.1.1 refer to "interim" and 3.1.2 to "transitional" - are different interpretations intended ?

Ad Paragraph 3.2

Even more important is the fact that the models will impact on the intended time frames. It will take considerable time to implement wholly elected SPR governments, particularly so if the incorporation of the TBVC states has to be done first.

Ad Paragraph 3.3

The overlap of the two models should not be overestimated. On the contrary, there are fundamental differences between the two:

- (a) The one presupposes administrative decentralisation (present provinces), while the other presupposes other decision making and executive structures;
- (b) The objectives of reconstruction and rationalisation will thus differ;
- (c) The underlying competencies of the respective models differ radically, namely, administrative versus legislative;
- (d) The importance of a constitutional body will have a greater effect on model 1 than on model 2. Be careful not to view the overlap as a difference in nuance - it is more than that.

Ad Paragraph 3.4

Effective administration can not be viewed as separate from legitimate and effective governmental processes in general. Administrations, in order to be effective, must be politically controlled, accountable and led by a democratically elected executive. There is, therefore, a need for clarity on what is meant by "administration".

The fundamental question in paragraph 3 is to what extent will the constitution making body be bound by the status quo of transitional arrangements? In other words, can the CMB re-create completely or should the transitional arrangements be improved and refined?

Ad Paragraph 4.1

It has already been argued that the transitional phase must be approached carefully. It will be dangerous to treat the SPR's powers in the transitional phase superficially. This is after all the phase where the advantages of SPR government have to be utilised to the maximum. If SPR government is not thoroughly settled in the interim, it will not allay suspicions regarding government at all.

Ad Paragraph 4.2

Considerably more debate is needed before the proposal in this paragraph can bridge the gap between the two models. Answers to questions like the following have to be given:

- * What is meant by a flexible allocation of powers?
- * What does "supervision" by the CMB entail? It puts SPR in a rather weak position.
- * Who is responsible for decision-making on SPR level?

Ad Paragraph 4.3.1

What is meant by provisional boundaries? For what reasons will the CMB be able to amend demarcation? By this, it is not implied that there should not be room for amendments. However, to talk about provisional demarcations is taking it too far and creates uncertainty.

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Ad Paragraph 4.3.2

The principle of elected SPR government is acceptable. However, the question raised is, why these institutions should only be provisional and whether it is sensible to use the results of a national election to establish SPR.

Ad Paragraph 4.3.4

Three uncertainties arise. Firstly, it is not clear what the relationship between regions and the central parliament during the transitional phase will be. Will SPR decisions also be subject to supervision by parliament? This will be totally unacceptable. Secondly, it is not clear what is meant with "general terms" to define the powers of SPR.

It is the interest of legal certainty and stability that all three levels of government should have clarity about their respective powers/competencies? International experience shows that "general" definitions of competencies are normally interpreted to the detriment of regions. Thirdly, it is not clear why the CMB has to ab initio decide on powers after all, it doesn't make sense to consolidate administrations, transfer powers and start a governmental process, only to change it at a later stage. More clarity should thus be obtained about the reviewing powers of the CMB.

Ad Paragraph 4.4.4

It does not make sense to have complete governments with decision-making powers in place, only to be replaced or adjusted after the transition period. The period of constitutional development should, as far as possible build on the previous. Better guarantees should thus be provided to ensure that powers and/or boundaries should not be tampered with.

Ad Paragraph 5.1

The list of proposed powers is in line with international precedents. However, three questions should be posed. Firstly, to which extent the regions may exercise these powers without unjust intervention by the central parliament? Is this list thus concurrent powers or is it exclusive powers? Secondly, there is the question whether provision should not during the transitional phase be made for the asymmetrical division of powers. That would imply that regions with less experience/resources/demands should not necessarily possess the same powers as other regions. Thirdly, it is mentioned that only aspects of this list of powers could be given to SPR. Even though it may be accepted in principle, SPR should demand that more clarity be given about this division.

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Ad Paragraph 6

This is a fundamental principle, namely, that SPR governments, even during the transitional phase, should be elected on a responsible and democratic basis.

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