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**C O N S T I T U T I O N
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S I X T H R E P O R T**

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NEGOTIATING COUNCIL MEETING**

**SIXTH REPORT OF THE TECHNICAL COMMITTEE ON
CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL
23 JUNE 1993**

1. Introduction

1.1 In view of the submissions received, the Negotiating Council adopted a resolution at its meeting on 17 June 1993, requesting the Technical Committee on Constitutional Issues to consider and report on:

1.1.1 alternative ways of drafting and adopting a new constitution, including the bottom-up and top-down approaches, and

1.1.2 alternative views regarding the need for SPR-constitutions and different options for such constitutions.

1.2 We annexe to this report a schedule in which the different approaches to the bottom-up constitution making process are analysed. From our analysis of all relevant submissions, and points raised in the debates of the Negotiating Council a bottom-up constitution making process emanates. In particular, it appears to us that the parties favouring a bottom-up process are largely motivated by the following considerations:

- * There is no guarantee that a proportionately elected constitution making body will favour or tolerate the establishment of autonomous SPR's, especially if the majority of the members of such a constitution making body are members of a party or parties which favour a centralized form of state and government.
- * Existing regional institutions which are presently functioning as autonomous governments, and in certain instances form the political bases of some of these parties, will be abolished.
- * SPR interests, and indeed the whole rationale for SPR's as is currently debated in the MPNP, may be side-lined or even be discarded in a national constitution drafted by an elected constitution making body.

In our opinion, there is every reason to be sensitive and aware of the concerns of these parties.

2. **The Bottom-up and Top-down Approaches**

2.1 We used the terms "bottom-up" and "top down" in this report because they have been colloquially used in the Negotiating Council. The terminology could, however, be misleading. In the schedule to this report we set out in detail the various proposals which have been made concerning the "bottom-up" process. It appears from this analysis, and from our previous reports, that the distinction between the "bottom-up" and the "top-down" process is a distinction on the one hand between a regional constitution making process and on the other, a national process. The "bottom-up" process seeks to accommodate regional interests in

various ways, including in the case of some submissions regional elections, and national interests through the MPNP. The "top-down" process seeks to accommodate national and regional interests through the national election of the constitution making body in which regional interests are also represented.

- 2.2 The two stage process as it has developed through CODESA and the MPNP seeks to find a compromise between the two approaches. We have pointed to this in previous Reports, and have suggested that a detailed set of constitutional principles could be a bridge between the two extremes, which if pursued and strengthened could provide a solution to the conflict concerning process. It is in this context and at the specific instance of the Negotiating Council that we have explored the possibilities of bridge building.
- 2.3 Both approaches relate to the processes of constitution-making and in particular, the ways in which SPR autonomy must be established. Whereas the top-down approach, foresees a national constitution-making process to map out and establish such SPR autonomy or autonomies, the bottom-up approach foresees various mechanisms and procedures whereby SPR autonomy is in the first instance acknowledged as federalism and established either beforehand or simultaneously with the national constitution-making process.
- 2.4 Parties favouring the bottom-up approach, although they differ as regards their views on the establishment of SPR autonomy and the participation of SPR representatives in the overall, national constitution-making process, share the common view that SPR autonomy must not entirely be left in the hands of a constitution making body established by a national election. Two parties advanced what in our view is a constitutionally controversial proposal that their SPR should be acknowledged as a "sovereign member state of the Federal Republic of South Africa" which would then devolve some of its powers and functions upwards to the

national government. Furthermore, in conformity with the bottom-up approach, parties favouring such an approach, generally insist on having entrenched SPR constitutions.

2.5 Seen pragmatically, the bottom-up approach as propagated by these parties presents certain difficulties:

- * As evidenced by the submissions referred to in the schedule to this report, different bottom-up approaches reflect variations as regards the entire constitution-making process. Whereas some parties suggest that SPR-constitutions should be negotiated and endorsed solely on SPR level, others are of the opinion that SPR constitution-making bodies should be elected not only to draw up SPR-constitutions but also to contribute to the process of national constitution-making.
- * Generally, some parties favouring a bottom-up approach, proceed from an existing state of affairs which cannot be sustained, or they assume a state of affairs which constitutionally does not presently exist. Thus, a party representing a TBVC government supports a bottom-up approach without indicating how the TBVC state will be accommodated in a future SPR or SPR's. Also, it is found that parties representing the interests of an existing self-governing territory which under present constitutional law, is in the position of a subordinate entity, assume that such self-governing territory will accede to a constitutional status which would enable it, as part of a newly demarcated region, to lay claim to exclusive powers and functions in the constitution making process.

- * From a practical point of view, the bottom-up approach could take up more time and increase the risks of deadlock in that the current negotiating process would have to be suspended until such time as SPR constitutions have been drafted.

3. **SPR Constitutions**

- 3.1 Intrinsically bound up with the bottom-up approach as advocated by some parties and explained above, is the insistence on having SPR constitutions either before or together with the adoption of a national constitution. However, it is difficult to conceive of a process in which SPR constitutions could be adopted and implemented independently from a national constitution.
- 3.2 Opposition to the adoption of separate SPR constitutions has been raised in a submission to us, principally on the basis that they would be divisive, and a threat to national unity and would diminish the role of the elected constitution making body.

4. **An Equilibrium**

A balance between top-down and bottom-up approaches could possibly be achieved. Such an equilibrium, which may assuage concerns and apprehensions and put the matter of SPR constitutions in another perspective, could be attained in the following way if agreement is reached on the drafting of a constitution for a transitional period.

- 4.1 The deliberation and adoption of general constitutional principles pertaining to SPR autonomy which is presently being undertaken by the Negotiating Council.

- 4.2 If these constitutional principles are adopted, the Negotiating Council will have to decide how the principles pertaining to SPR autonomy will be incorporated and applied in the constitution for the transitional period. In this respect, special regard will have to be given to existing boundaries and institutions, the recommendations of the Commission on the Demarcation/Delimitation of Regions, and the role and functions of SPR representatives in the national legislature in the transitional period. It may very well be that the constitution for the transitional period could create mechanisms for consolidating SPR administrations and the election of SPR representatives both on national and SPR level.
- 4.3 If SPR government is instituted for the transitional period, the constitution making body could call on these SPR governments or representatives, to propose their separate SPR constitutions (or one standard SPR constitution) in conformity with the constitutional principles adopted by the MPNP, to be authorised by or incorporated in the "final" constitution.
- 4.4 It might be possible for the constitution making body to approve the coming into operation of SPR constitutions before the adoption of a final constitution.

**SCHEDULE TO THE SIXTH REPORT OF THE TECHNICAL COMMITTEE ON
CONSTITUTIONAL ISSUES**

Analysis and interpretation of submissions and proposals.

1. In previous reports we have drawn the participants attention to the two broad approaches to the constitution making process, which emerges from the parties' respective proposals. In particular, in our Second Report we examined the proposals of all the parties and concluded that, barring the confederal option, there are two broad categories or proposals. In the first category, one finds the proponents of a single phased transition who also contend for the Multi Party Negotiating Process ["MPNP"] being the constitution making body for the national constitution. On the other hand, a further category of proposals supports a two-phased transition and the adoption of the final constitution by an elected constituent assembly. As we stated in our Fourth Report, [para. 5.1] this divergence of views amongst the participants, is "a difference of substance and not of terminology". In our Second Report we further pointed out that "no significant progress can be made by the parties without a significant resolution of what appears to be mutually exclusive approaches to the constitution making process".

2. In this report we examine more closely the approach which favours final constitution making by the MPNP and the one stage constitutional transition. Of course, this classification and name-tags may be expedient to describe this approach but are less than accurate. The actual proposals of the parties are complex and entail several steps or stages.
 - 2.1 The parties who filed submissions in support of this mode of constitution making process and content are:
 - 2.1.1 Kwa-Zulu Government;
 - 2.1.2 Inkatha Freedom Party;

- 2.1.3 Bophuthatswana Government;
- 2.1.4 Ciskei Government, and
- 2.1.5 The Afrikaner Volksunie "AVU"

3. Whilst in broad outline the proposals from these parties have a certain commonness, significant variation of detail of the proposals which are described hereunder would therefore reflect the broader picture. We will however make reference to divergences where relevant or necessary. Hereunder we deal with the features of the proposals under various headings.

4. **Form of State:**

4.1 It is argued that the issue of the form of state must be resolved and disposed preliminarily to any determination affecting both the modalities of the process of transformation as well as the constitutional principles to be embodied in any future constitution. A predetermined type of state, that is a federal, confederal, regional or unitary state would condition the process of transformation. Put otherwise, the process of transformation needs to be shaped in order to produce a predetermined type of state. It is consequently argued that a unified centralised process of transformation, centred around the notion of a constituent assembly is not likely to produce the breakdown of the present unitary state into member states organised on the basis of the federal principle. It is further argued that the MPNP should not focus on a constitution making body and transitional constitution until the form of state has been considered. To do otherwise "would be to put the process before substance, to permit the fundamental determination on the substance to be conditioned by the procedural decisions".

4.2 The proponents of the preliminary determination of form of state in the negotiating process, advance various reasons for their viewpoint. Such reasons relate, amongst other things, to political expediency, constitutional dogmatics, the determinative

relationship between the form of state and the constitution making process and the component structures of the constitution.

4.3 The form of state contended for is described in the following broad terms:

4.3.1 A federal system in which "all powers should be reserved to the region/state while only those powers which cannot be adequately exercised at region/state level should be devolved upwards to the federal government".

4.3.2 Such a form of state should be informed by the principles of subsidiarity, residuality and asymmetry. The notion of subsidiarity requires the taking of decisions at the lowest possible level. So to speak, all services and governmental functions and powers should be handled or exercised by the lowest level of government capable of handling such function, powers or services. On the other hand, residuality is a qualification of the notion of subsidiarity. According to the concept of residuality only those powers which cannot be exercised adequately and properly at local level should be devolved upwards to the federal level.

4.3.3 On this proposal of form of state, autonomous [sometimes referred to as "independent"] federal states would come into being as part of the "Federal Republic of South Africa". Such a federal system is "intended as a system of splits of sovereignty between the member states and the federal government".

4.4 It is also argued that a federal system should be established on an asymmetric basis. Some of the parties hold that it is conceivable that a portion of South Africa could be organised as a unitary state and that such a portion would entertain a

federal relation with one or more regions of the territory organised as a federal system.

5. **Constitutional transition to a federal state:**

The constitutional transition envisaged entails two matters. The first of these is the constitution making process and the second would be the transitional process from the existing constitutional dispensation to the envisaged new constitution or constitutions for South Africa. The parties who support the prior determination of the form of state, also support a specified method of constitution making and transitional process. Hereunder, we set out some of the broad features envisaged in the constitution making process and transition.

- 5.1 The MPNP should determine preliminarily the form of state. No decisions on the constitutional principles, component structures and of the constitution or the transitional process should be made until the form of state has been determined.
- 5.2 The MPNP should, in the light of the form of state agree upon constitutional principles which should include entrenched regional borders, and entrenched powers and functions of SPR's.
- 5.3. The MPNP must agree on the demarcation of SPR boundaries. None of the parties deal with what appears to be the inevitable consequence of such geographic demarcation being the integrity of the existing borders and constitutional authority of the TBVC states.
- 5.4 The agreed form of state, and constitutional principles would be referred by MPNP to a panel of experts who would be instructed to prepare a draft national constitution.



5.5 People "at ground level negotiate and determine" SPR constitutions' within each newly demarcated SPR. The method of determination of SPR constitutions vary from proposal to proposal:

5.5.1 The IFP and KwaZulu government proposal

- The Inkatha Freedom Party ["IFP"] and Kwa-Zulu Government ["KZG"] propose that at this stage elections be held in every SPR.
- Such elections could be held by April 1994 after which constituent assemblies in each SPR could be brought in to being with a specific mandate to formulate constitutional proposals and to choose representatives to a Federal Council of the MPNP. Armed with a democratic mandate, the SPR representatives, elected from the respective constituent assemblies would form a distinct structure of the MPNP being the Federal Council. In this way the MPNP would become a bicameral structure made up of elected representatives in the Federal Council and of the present unelected delegates in the MPNP. The Federal Council would deliberate in all matters which affect SPR's in the constitution making process directed at the national constitution.
- The bicameral national negotiating forum will debate constitutional proposals and also appoint a constitution making body from its ranks.
- A panel of experts will be requested to prepare a draft national constitution. The experts and the constitution making body will interface to produce a final national constitution.
- No specific reference is made in the proposal to the actual adoption of the SPR constitutions. It can, however, be inferred that the SPR

constitutions will be adopted by the SPR constituent assemblies before or simultaneously with the national constitution.

5.5.2. Bophuthatswana proposal:

The Bophuthatswana proposal in this regard is that people at ground level must negotiate and determine the SPR constitution, simultaneously with the drafting of the national constitution by a panel of experts. It is, however, unclear how the people at ground level would negotiate and determine SPR constitutions. Once the SPR and national constitutions have been drafted these would be submitted to the MPNP for consideration, co-ordination and approval.

5.5.3. Ciskei proposal:

The Ciskei too proposes that the SPR's should write their own constitutions. Their proposal provides no specification of how these constitutions would have to be written. The approval and adoption of the constitutions would occur through referenda within the SPR or in regional multi-party conferences. Presumably, the approved SPR constitution would be forwarded to MPNP where the national constitutions would be prepared and would give "recognition to regional initiatives and delegation of powers.....".

5.5.4. AVU proposal:

The AVU also submits that the regional states write their own constitutions. No particulars have been furnished about the processes envisaged for the drafting and adoption of such SPR constitutions.

Once the SPR constitutions have been adopted as proposed hereabove these would be submitted to the MPNP for coordination and synchronisation with the national constitution.

7. When the MPNP has approved the national and SPR constitutions a national referendum will be held to endorse the national and SPR constitutions.
7. Thereafter legislative processes would be set in motion to adopt national and SPR constitutions. This proposal implies that the South African parliament as well as the TBVC legislatures would take all such legislative measures as are necessary to give legislative effect to the national and SPR constitutions.
8. Finally, elections at national and SPR levels would take place in terms of new constitutions. In this regard, the IFP/KZG proposal national elections would be for the "lower house" whereas the already elected SPR representatives could serve as members of the national senate. In terms of this proposal it would still be necessary to have elections for SPR legislatures under their own new SPR constitutions.
9. For the sake of completeness it may be useful to point out that the foregoing approach to constitution making and transition:
 - 9.1 rejects the notion of a two-phased transition to a final national constitution;
 - 9.2 rejects the establishment of an elected constituent assembly or constitution making body;
 - 9.3 opposes the establishment of any transitional arrangements such as a transitional executive council, elections leading to a constituent assembly, an interim government or the drawing of any transitional constitution;

9.4 resists the holding of any election at national level at any stage before the SPR constitutions have been predetermined by the SPR's themselves;

9.5 would be against the termination or amendment of the present constitutional dispensation including that of the TBVC states prior to the final adoption of a final constitution for the SPR's and the national constitution.

10 It is contended by these parties that in this way the constitution making process and transition would be "bottom-up". The process of institution building and transition would commence at SPR level and would culminate in a national referendum and ultimately national elections. This process is seen as being premised on "grass roots democracy" or "bottom-up democracy" as it engages a large number of people at local level to participate in the SPR constitution making process. It may be added that in the IFP/KZG proposal, it is said that final national elections could be held during or before September 1994. It is, however, noteworthy that none of the other proposals dealt with hereabove propose an electoral process preceding SPR constitution making.

