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FIVE

**CONSTITUTION
REPORTS
FIFTH REPORT**

15 JUNE 1993



**EMBARGOED (PAGES 1-13)
UNTIL DELIVERY/TABLING IN
NEGOTIATING COUNCIL MEETING**

**THE FIFTH REPORT OF THE TECHNICAL COMMITTEE ON
CONSTITUTIONAL ISSUES
TO THE NEGOTIATING COUNCIL
15 JUNE 1993**

1 Background

1.1 The *Draft Resolution on Constitutional Issues* presented to the Negotiating Council by the Planning Committee on 1 June 1993, contains the following paragraph:

2. *There is a need for the adoption of a Constitution for the transitional period, the text of which is agreed to at the Multi-Party Negotiating Process:*

2.1 *Which shall be drafted in accordance with the constitutional principles agreed upon in so far as they may be applicable;*

2.2 *Which will provide, inter alia, for justiciable fundamental rights, the structure of national and regional governments and their respective powers, functions and authority; and*

2.3 *As well as which will provide for the procedures relating to the drafting and adoption of a Constitution by the elected constitution-making body.*

1.2 Despite reservations made by some of the participants in regard to paragraph 2 of the draft resolution, there was general agreement that we should proceed in terms of paragraph 3. Paragraphs 3.3 and 3.4 require us to make recommendations to the Negotiating Council on:

3.3 *The procedures to be followed in the drafting and adoption by the Multi-Party Negotiating Forum of a Constitution for the transitional period.*

3.4 *The procedure to be followed thereafter in the drafting and adoption of a constitution by an elected constitution making body.*

1.3 Our understanding of this instruction and the debate in the Negotiating Council is that we were to proceed on the premise that despite the reservations concerning paragraph 2 of the draft resolution (quoted above), consensus might be reached once the details of the transitional process and structures contemplated in paragraph 2 have been developed and debated.

1.4 A few participants have suggested in submissions to us that we have misunderstood our instructions as set out in paragraph 3 of the Draft Resolution. We have considered these submissions, but are of the opinion that the manner in which we are proceeding is clearly in accordance with our instructions, and our Fifth Report has been prepared on that basis.

2 Outline of the process

- 2.1 The process whereby an elected constitution making body will formulate and adopt a new constitution in accordance with agreed constitutional principles is discussed in paragraph 5 of our Second Report.
- 2.2 The legislative framework that has been advocated for the entire process makes provision for:
- 2.2.1 A Transitional Executive Council.
 - 2.2.2 An Independent Electoral Commission.
 - 2.2.3 An Independent Media Commission.
 - 2.2.4 A constitution for the transitional period which will make provision for the holding of elections for the government of the country during the constitution making phase, and the functioning of the elected constitution making body.
- 2.3 Whether or not it is desirable to establish a Transitional Executive Council, an Independent Election Commission and an Independent Media Commission, and if it is, the legislation necessary for such purposes, is being dealt with by other technical committees, and we are not required to make any recommendations thereon. We are required in terms of our instructions to deal with a constitution for the transitional period, and it is that issue that we address in this report.

3 The development and formalisation of a Constitution for the transitional period

- 3.1 The Constitution for the transitional period should emerge cumulatively from the development of a political consensus within the MPNP. The exact formulation of different parts of the text of this Constitution should be developed in the light of the reports of the relevant Technical Committees appointed by the Negotiating Council, and the debates thereon in the Council.

The work of other institutions such as the Commission on the Demarcation/Delimitation of Regions will also be material.

- 3.2 Since the MPNP does not have legislative powers, the Constitution for the transitional period will have to be adopted formally by Parliament. This means that the final text agreed upon, should conform to all the technical requirements of a draft Bill.

4 Elements of a constitution for the transitional period

- 4.1 The constitutional principles will bind the constitution making body established by the Constitution for the transitional period, and should also be taken into account in the drafting of the transitional Constitution itself.

- 4.2 We propose to develop draft texts dealing with the elements of the Constitution for the transitional period in sequence. In developing the text, agreement should in our view be sought systematically. For this purpose we recommend that the elements of the Constitution for the transitional period be considered in the order set out below.

- 4.2.1 *The composition and functioning of the elected body*
Components of this element of the Constitution will include:

4.2.1.1 If it is to function as a national legislature, its composition for such purpose, its election and the way in which it will take its decisions.

4.2.1.2 Its composition as a constitution making body, its election and the way in which it will take its decisions.

4.2.1.3 How disputes in regard to decisions will be resolved and deadlocks broken.

4.2.2 ***The composition and functioning of the national executive***
Considerations under this heading include:

- 4.2.2.1 Participation in the executive.
- 4.2.2.2 The location and nature of the powers and functions of the Head of State and executive government.
- 4.2.2.3 The constitutional relationship between the executive and the legislature.

4.2.3 ***The location of the judicial power, the composition of the judiciary and the nature of the judicial function***

Matters to be addressed in this respect will include:

- 4.2.3.1 Adjudication of the provisions of the Constitution, including the protection of fundamental rights and adherence by the constitution making body to the constitutional principles.
- 4.2.3.2 The appointment and jurisdiction of judicial officers.
- 4.2.3.3 Continuity of the judicial function.

4.2.4 ***Fundamental Rights***

This element is being dealt with by the Technical Committee on Fundamental Rights during the Transition.

4.2.5 ***Powers, functions and structures of SPR's during the transitional period***

The powers and functions of SPR's during the transition are dealt with in our Fourth Report. In addition to the matters

addressed in our Fourth Report, the following will have to receive consideration:

- 4.2.5.1 Legislative and executive structures within the SPR's during the transition.
- 4.2.5.2 The formulation of the powers and functions of the national and SPR governments during the transition.
- 4.2.5.3 Representation of SPR interests in national institutions.
- 4.2.5.4 The process of rationalisation of existing administrations within the SPR boundaries.

4.2.6 ***Other matters, structures, procedures and arrangements***

These will include:

- 4.2.6.1 A preamble.
- 4.2.6.2 National symbols and official languages.
- 4.2.6.3 Possibly a special procedure for the establishment of the final SPR structures, powers and functions by the Constitution making body.
- 4.2.6.4 Finance.
- 4.2.6.5 Other institutions.
- 4.2.6.6 General and transitional provisions.

4.2.7 We deal below with aspects of the preceding matters which will have a bearing on the structure of the constitution, and for that reason, should be given priority by the Negotiating Council when the constitution for the transitional period is debated. The structures can then be developed in accordance with the debates and decisions of the Council. In each instance, before

formulating the specific issues that call for decision, we discuss the context in which the issues have arisen.

5 **Matters affecting the structure of the constitution for the transitional period**

5.1 *Composition and functioning of the elected body*

5.1.1 In the debates in the Negotiating Council and in their submissions to us, some of the participants make the point that a constitution can always be amended or replaced by parliament in accordance with procedures prescribed for that purpose. On that basis it is argued that it is fallacious to refer to a "transitional constitution" and contend that a complete and comprehensive constitution should be drawn up by the MPNP at this stage. It is correct that constitutions can be amended. There is, however, a difference between drawing up a constitution for the indefinite future, and drawing up a constitution for a transitional period of limited duration, in the knowledge that during that period a body elected for that purpose will be given the specific task of drawing up a new constitution for the indefinite future. It is the difference between creating a structure which is intended to endure, and creating a structure which is intended to be changed. The fact that the first might not endure, or that the second might not be changed, does not alter the distinction. The difference between the participants in their approach to this issue, is a difference of substance and not of terminology. It is the difference to which we have consistently referred in our reports, between those who believe that the new South African Constitution should be drawn up and adopted by the MPNP, and those who believe that it should be drawn up and adopted by an elected constitution making body. A two phased process, with built in checks and balances referred to in our previous reports, is a

possible solution to this difference which is one of the most fundamental of all the differences between the parties.

5.1.2 In dealing with the composition and functioning of the body that will be elected to draw up the constitution, the first question is whether it should be vested only with constitution making powers, or whether it should be vested with legislative powers as well. Although this issue has been raised in submissions made to us and it has been argued that the elected body should function only as a constituent assembly and not as a legislature, it seems to be implicit in the instruction to us to address the issue of the drafting by the MPNP of a constitution for the transitional period, that provision should be made for the elected body to have both legislative and constitution making powers.

5.1.3. The second question concerns the composition of the elected body. In the detailed submissions that have been made to us some parties favour a bicameral, others a unicameral structure. The bicameral structure generally makes provision for a National Assembly of 400 members, and a smaller senate to be elected on a regional basis. The unicameral structure seeks to accommodate regional interests through an electoral system, which makes provision for half the members to be elected on regional lists. A decision needs to be taken on this issue, both in regard to the constitution making process and the legislative process. As far as the legislative process is concerned, it has been suggested that special procedures may be necessary for legislation dealing with the budget, appropriations, and regional affairs.

5.1.4 As far as the constitution making process is concerned, there is support for the proposition that decisions should be taken by a two thirds majority (though 70% has also been suggested) subject to time limits, and the application of dispute resolution or deadlock breaking mechanisms if the time limits are not met. A decision needs to be taken on these issues. Dispute resolution and deadlock breaking procedures which have been suggested include the reference of disputes to the leaders of political parties for possible resolution by them, the references of disputes to technical experts for reports, new elections, referenda, and a combination of such procedures.

5.1.5 We therefore suggest that consideration be given in the first instance to the following issues:

5.1.5.1 Should the elected body have legislative as well as constitution making powers?

5.1.5.2 Should the elected body be constituted as a unicameral or a bicameral structure?

5.1.5.3 If a unicameral structure is favoured, how many members should it have, should provision be made for regional interests to be represented in the structure through the electoral system, and how should decisions be taken -

- * in the constitution making process; and
- * in the legislative process?

5.1.5.4 If a bicameral structure is favoured, how should each of the houses be elected, how many members should each have, what role should each perform, and how should decisions be taken -

- * in the constitution making process; and
- * in the legislative process?

5.1.5.5 Should the process of adopting the constitution make provision for dispute resolution procedures, and deadlock breaking mechanisms, with set time frames?

5.1.6 If it is possible to achieve consensus on most or all of these issues, we will be able to develop a more detailed framework dealing with the composition and functioning of the elected body.

5.2 *The composition and functioning of the national executive*

5.2.1 *Participation in the executive during the transitional period*

5.2.1.1 In the interests of inclusivity and acceptability of government and administration in the period following the elections, there may be reasons for the establishment of an executive composed of representatives of the political parties emerging from the elections with significant support.

- 5.2.1.2 One approach to achieve a multi-party executive would be to allow the ordinary political process to run its course, which may possibly lead to the formation of a coalition government.
- 5.2.1.3 Another approach (which is being advocated by some of the participating parties), would be to provide for a procedure in the constitution whereby a multi-party executive may be composed, while simultaneously affording the parties with significant support a choice to participate in such executive or not.
- 5.2.1.4 A decision needs to be taken on this issue by the Negotiating Council to enable us to formulate a draft on the relevant constitutional provisions.
- 5.2.2 Regarding the location and nature of the functions of the head of state and executive government, the following matters call for consideration:
- 5.2.2.1 How will the head of state be elected for the transitional period?
The only suggestions so far made to us have been that the head of state should be a President elected by the legislature. This seems to be the most practical method in the circumstances.
- 5.2.2.2 What powers and functions should be vested in the head of state?
Apart from the usual ceremonial functions, the head of state may be vested by a constitution with executive and legislative functions.

5.2.2.3 The relationship between the head of state and the legislature and the executive

This relationship depends upon the powers and functions vested in the head of state and the checks and balances imposed on the exercise of such powers and functions by the constitution. One participant has suggested that certain presidential powers should be exercised together with the executive, or together with the leaders of political parties participating in the executive.

5.2.2.4 How the head of state can be removed from office?

Provisions are usually made for a method whereby a President can be impeached by the legislature and removed from office.

5.2.3 *The executive during the transitional period*

A decision needs to be taken as to how the cabinet will be appointed and composed and how it will function.

5.2.4 *The constitutional relationship between the executive and the legislature during the transitional period*

The measure of separation of powers relating to the legislative and executive functions will determine questions regarding, inter alia, assent to legislation, the accountability of the executive to the legislature, whether ministers may be appointed only from the elected ranks of the legislature or otherwise, the question whether draft legislation may be initiated by ordinary members of the legislature or only by ministers, and the right of the head of state and ministers to address the legislature on their own initiative or only on

request/demand by the legislature. Debate and agreement on these matters in the Negotiating Council is called for.

5.3 The judicial function under the Constitution for the transitional period

In order to enable a beginning to be made in the framing of constitutional provisions regarding the judiciary, clarity on the following crisp issues is necessary:

- 5.3.1 How should the judiciary be appointed?
- 5.3.2 Should the judiciary be given the jurisdiction to decide issues emanating from the provisions of the Constitution, including conformity of constitutional legislation to the binding constitutional principles and the protection of fundamental rights?
- 5.3.3 Should judicial structures other than the ordinary courts be established for the adjudication of constitutional matters?
- 5.3.4 Should a special Constitutional Court be established, and if so, how should it be appointed, should it be an integral part of the existing judicial structures or should it have a separate and independent existence?

6. **Outstanding matters**

- 6.1 The issues concerning the SPR's during the transitional period raised in paragraph 4.2.5 above will be addressed by us in the light of the debate and the decisions taken in response to our Third and Fourth Reports.
- 6.2 We propose to deal with the issues raised in paragraph 4.2.6 after the framework of the constitution has been developed.

CONSTITUTIONAL MAKING PROCESS A FRAMEWORK

1. The Technical Committee on Constitutional Issues has been requested to make recommendations to the Negotiating Council on, *inter alia*, " **the constitution making process to be followed, including the structures that need to be established for that purpose**".

2. The recommendations contained hereunder are conditioned by three critical considerations contained in the draft Resolution on Constitutional Issues being that the Negotiating Council would endeavour to reach agreement on:
 - 2.1 constitutional principles;

 - 2.2 the detailed principle dealing with allocation of powers at different levels of government, and

 - 2.3 the adoption, at the Multi-Party Negotiating Process, of a constitution for the transitional period.

3. The Draft Resolution is open to no other interpretation than that the constitution making process envisaged by the Council would or should occur in more than one phase. Three phases of constitution making are readily identifiable, being:

- 3.1 Phase 1: **pre-election transition** covers the present period [including deliberations of the MPNP] up to actual elections in 1994.
 - 3.2 Phase 2: **post election transition** includes the period immediately after the elections up to the adoption of a final constitution by the constituent assembly, and
 - 3.3 Phase 3: **post constituent assembly period**
4. Hereunder appears the structural and functional framework of the envisaged constitution making process. At this stage no details relating to the duties and form of each contemplated institution or step has been set out. Most of the steps set out hereunder are a subject of separate detailed enquiry by other technical committees or commissions. Once a particular constitution making model has been adopted by the parties in principle the necessary particularity may be inserted in respect of each process, step or structure.

5. **Phase 1: pre-election transition:**

Pre-election transition contemplates the following matters, steps or processes which will have to be decided upon or implemented by the MPNP:

- 5.1 adoption of constitutional principles
- 5.2 adoption of principles of regional government
- 5.3 determination of the date of elections for a constitution making body
- 5.4 determination and the adoption of procedure for the incorporation of :
 - 5.4.1 TBVC countries, and
 - 5.4.2 self-governing national states

5.5 the adoption of the recommendation of the Commission on Demarcation of Regions.

5.6 the establishment of:

- 5.6.1 Transitional Executive Council
- 5.6.2 Independent Media Commission
- 5.6.3 Independent Electoral Commission
- 5.6.4 Commission on Security Matters

5.7 adoption of a constitution for the transitional period.

6. **Phase 2: post-election transition**

As a sequel to the election of a constitution making body, the following steps or process will have to be implemented in the manner specified in the constitution for the transitional period or some other binding instrument promulgated or brought into force in terms of the constitution for the transitional period.

- 6.1 establish [transitional] National Executive government [cabinet]
- 6.2 establish [transitional] Regional Executive governments
- 6.3 establish constituent assembly - [transitional] National Assembly
- 6.4 establish [transitional] regional legislatures, [if any]
- 6.5 draft and adopt new constitution .

7. Phase 3: post -constituent assembly period:

- 7.1 election in terms of the final constitution
- 7.2 establishment of the following structures
 - 7.2.1 national assembly
 - 7.2.2 national executive government
 - 7.2.3 regional executive government
 - 7.2.4 regional legislatures
- 8. Some of the parties have proposed that the present MPNP draw the final constitution subject to such a constitution being amended by the legislature in terms of amendment procedures contained in the constitution. This proposal implies a one phase transition, which entails the following steps, or processes:
 - 8.1 adoption of constitutional principles
 - 8.2 adoption of a detailed principle on regional government
 - 8.3 adoption of recommendations of the Commission on Demarcation of Regions
 - 8.4 establishment of regional executive government
 - 8.5 establishment of regional legislative government
 - 8.6 determination of an election date
 - 8.7 holding of national elections
 - 8.8 establishment of national executive government and legislature.
- 9. The so called "bottom-up" constitution making process implies that finality in drafting and adopting of the national constitution can only occur once the regional

constitutions have been drawn and the regional governmental structures have been established. We respectively point out that if this one stage " bottom-up" constitution making process were to be adopted immense practical difficulties would emerge.

**RESPONSE BY THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES
TO SUBMISSIONS RECEIVED FROM CERTAIN PARTICIPANTS IN RESPONSE
THE THIRD REPORT AND FORTH REPORTS OF THE COMMITTEE**

1. We have received comments on our Third and Forth Reports from the Inkatha Freedom Party, the KwaZulu Government, the Bophuthatswana Government and the Afrikaner -Volksunie. We deal briefly with these responses in our report.

2. An underlying theme of the responses from each of the participants is that greater powers should be allocated to the SPR's than is allowed for in our Third Report. We appreciate that these participants favour the granting of more extensive powers to the SPR's than is contemplated by the provisions contained in paragraph 3 of our Report. On the other hand, paragraph 3 of our report allocates more powers to the SPR's than some of the other participants have allowed in their submissions to us. Our report offers a compromise between the two conflicting positions on a basis which seems to be both reasonable and rational in the circumstances which exist in South Africa. Our reports were unanimous in so far as the allocation of powers to National Government and the SPR's is concerned, is consistent with the report of the deliberations of the independent experts of different political persuasions to which we refer in the footnote to paragraph 3 of our Third Report. We do not think that good purpose will be served by addressing all the issues which have been raised. In the main, they relate to the constitution making process and the question whether the constitution should be made by the MPNP or an elected constitution making body. These participants want the powers, functions and boundaries of the SPR's to be fixed by the MPNP and to be protected against subsequent change by an elected parliament or constitution making body. These are matters of principle which ought to be debated in the Negotiating Council, and not independently with us. We deal briefly with some of the contentions advanced to us by these participants in their comments on our Third and Forth Reports.

3. **The Inkatha Freedom Party and the KwaZulu Government**

3.1 We received two documents from each of the Inkatha Freedom Party and KwaZulu Government, one commenting on the constitutional principles referred to in our Third Report, and the other commenting on the terms of our Forth Report. Since the documents are substantially in the same form we respond to both sets of documents in this paragraph.

3.2 A number of questions are asked concerning the applicability of the constitutional principles to a federal structure of government. We are satisfied

that the constitutional principles contained in our Third Report are entirely consistent with federalism, that this option is not precluded by the principle that South Africa should be a single sovereign state, and that SPR's and the National Government could be required to comply with all the constitutional principles without the result being inconsistent in any way with federalism. The constitution itself would be binding on all levels of government, though particular provisions might be relevant only to the National Government, or an SPR Government. Insofar as the principles are of general application, we consider that they should be binding on the SPR as well as the National Government, and we would not favour any system of SPR Government which did not require the SPR's to conform with such principles.

- 3.3 A number of questions are directed to the use of sovereignty. If it is contemplated that sovereignty should vest in the SPR's so that each is constituted as a sovereign state, allowing only such powers to the National Government as they may from time to time choose to give to it, as is suggested in the constitutional proposals of the KwaZulu Government, the resultant structure would be more in line with confederalism than federalism. We indicated clearly at the time we presented our Third Report that paragraph 2.1 of the general constitutional principles is not consistent with confederalism, which contemplates the existence of more than one sovereign state within the borders of South Africa.

4. The Bophuthatswana Government

- 4.1 The Bophuthatswana government makes it clear that it does not accept the assumption of the reincorporation made in paragraph 2.1.(A) of our Forth report. This is a question of debate within the Negotiating Council.
- 4.2 Questions are raised in regard to the political authority which will exist over the areas which were formerly within the TBVC states if reincorporation were to take place, and how continuity of services is to be dealt with. We will

address some of these issues in reports which are presently in the process of being prepared and which will be submitted to the Negotiating Council as soon as they are ready.

- 4.3 The main theme in the comments by the Bophuthatswana Government is that it is undesirable for an elected constitution making body to be in a position to take decisions concerning the powers, boundaries and functions of the SPR's that are inconsistent with the provision of the constitution adopted in the MPNP for the transitional period. It contends that:

"It does not make sense to have complete governments with decision-making powers in place, only to be replaced or adjusted after the period of transition. 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."

The same reasoning underlies the reasons of those who contend that SPR's should not be established at the transitional stage.

Our report is a compromise between the view of those participants who favour a system of regional administration being implemented during the transitional period, making use of existing provincial structures and the legislative framework which presently regulates them, and those who seek to have the powers, boundaries and functions of the SPR's finalised and established before elections take place. This is the fundamental conflict to which we have referred, and the thrust of all our reports has been to attempt to find a compromise between the two positions, whereby principles are established at the MPNP, but final decisions are taken at the elected constitution making body.

5. Other Participants

Apart from the large issues of where and by whom decisions should be taken, with which we have already dealt, the comments of the Afrikaner-Volksunie concerns matters which need to be debated in the Negotiating Council. This is also the case in respect of comments which we have received from the Democratic Party, the National People's Party and the Cape Traditional leaders.

