

CONSTITUTIONAL ASPECTS OF THE REINCORPORATION
OF THE TBVC STATES INTO SOUTH AFRICA

1. General

The reincorporation of the TBVC States cannot be done by unilateral action on the part of South Africa.

The reincorporation of the TBVC States can only be effected through cooperation between the states concerned, i.e. through multilateral or bilateral reincorporation. The whole question of reincorporation of the TBVC States into South Africa involves aspects of both the international and municipal law.

1.1 International Law

It is true that the independence of the TBVC States has never been recognised by the international community with the result that these states are still being viewed as being part of South Africa.

South Africa has structured its relations with them along international guidelines.

As far as international law is concerned, it seems that the most appropriate way of the acquisition by the RSA of title to the territories of the TBVC States i.e. their reincorporation into South Africa, shall be by way of cession. Cession rests on the principle that the right of transferring its territory is a fundamental attribute of the sovereignty of a state. Cession of territory will be valid if it sufficiently indicates an intention to transfer sovereignty from one state to another.

The reincorporation of the TBVC States will take the form of voluntary cession by the TBVC States of their territory to the RSA. Such cession is usually done by treaty.

The RSA and TBVC States shall thus have to conclude a multilateral treaty or individual bilateral treaties to effect the transfer of territory from the TBVC States to the RSA.

The reincorporation treaty shall provide the legal basis of the sovereignty of the RSA with regard to their "newly" acquired territory and the position of existing agreements, legislation, acquired rights, citizenship and

other legal implications of reincorporation will have to be agreed upon and provisions to that effect must be included in the reincorporation treaty.

As far as international law is concerned the process of reincorporation will be completed with the conclusion of such a reincorporation treaty.

1.2 Municipal law

It is of paramount importance that all municipal law requirements with regard to the reincorporation of the TBVC States into South Africa are met. The first steps on the road to reincorporation of these states would be the actual decision by the TBVC States to ask for their reincorporation into South Africa and the decision by South Africa to reincorporate them. The TBVC States and South Africa must conclude a reincorporation treaty through which the TBVC States shall transfer the sovereignty over their territories to South Africa.

All aspects of the loss of sovereignty, including the legal consequences, and the practical implications thereof as well as the implementation of such reincorporation must be dealt with in this treaty.

The next step in the process of reincorporation will be the incorporation of the reincorporation treaty into the municipal laws of the various states in question. It is trite law that in South Africa, as well as the TBVC States, the conclusion of a treaty or agreement by the Government is an executive and not a legislative act. As a general rule the contents of an international instrument so concluded does not automatically form part of the municipal law. Only by way of the legislative process is the incorporation of an international instrument into the municipal law effected.

The TBVC States will be required to repeal their Constitutions or any other decrees in terms of which their sovereignty was granted and guaranteed.

On the South African side the Status Acts which granted independence to the TBVC States will also have to be repealed.

Both the TBVC States and South Africa will therefore have to initiate legislation. This legislation, together with the new constitution of the new South Africa, will be the final steps in the reincorporation process.

2. LEGAL CONSEQUENCES OF REINCORPORATION

2.1 General

When there is a definitive replacement of one state by another in respect of sovereignty over a given territory in conformity with international law, "state succession" arises.

In general the process involved with regard to state succession, is that of a permanent displacement of sovereignty or legal competence which includes political events such as the reincorporation of the TBVC States into the RSA.

State succession or the change of sovereignty has an influence on many aspects of "state life", including the position of existing agreements, on acquired rights, contractual obligations and national debts.

2.2 Legal Consequences of Reincorporation

2.2.1 Existing Agreements

The status of existing agreements greatly depends upon the form which the actual change of sovereignty will take, for example, whether it is to entail a unitary or federal state. The nature of the new constitutional dispensation will therefore be the guiding principle to establish the actual status of existing agreements after reincorporation.

Owing to the uncertainties involved, the modern tendency is to deal expressly with the status of agreements in the reincorporation treaty.

In the event of the TBVC States becoming members of a federal state, the position of the existing agreements will depend in principle upon provisions of the constitution of the federal state. If the provisions of the constitution are such that the member states possess no international personality and no treaty-making capacity, then the agreements of the former TBVC States will be terminated in their entirety.

2.2.2 Existing legislation

There is no rule of international law obliging the successor state to maintain the former municipal legal system, i.e. the existing legislation. Any municipal law rights which have evolved into vested or acquired rights must, however, be respected by the successor state, in this case South Africa. Existing legislation is usually kept intact as far as it is not inconsistent with the laws of the successor state. The general rule seems to be that unless inconsistency occurs, the laws in force in the ceded territory are unaffected by the change until repealed by the new state.

If the TBVC States are reincorporated into a unitary South Africa, all legislation inconsistent with South African legislation shall fall away. The principle of continuity of legislation is only a presumption, which is displaced by positive legislative enactment, and if the new sovereign evinces the intention to introduce uniform law in the acquired territories, this intention will prevail.

The treaty of reincorporation may provide that all laws in force immediately prior to the date of reincorporation which are not inconsistent with those of South Africa, shall remain in force until repealed or amended.

If the TBVC States are reincorporated into a federal system, the constitution of that federation will determine which legislation of the TBVC States will continue to be in force.

2.2.3 Citizenship

The majority of writers have asserted that upon change of sovereignty the inhabitants of the territory concerned forfeit the nationality of the predecessor state and become *ipso facto* nationals of the successor state.

2.2.4 Other legal consequences of reincorporation

2.2.4.1. Continuance of pending legal actions

This can be achieved by way of a provision in the reincorporation treaty and following enactments to the effect that all criminal prosecutions initiated in the course of the TBVC States prior to the date of reincorporation shall be continued as if such

prosecution had been initiated after the date of reincorporation in the courts of South Africa.

2.2.4.2. Jurisdiction of the Courts

This is a matter that must also be dealt with.

2.2.4.3. The position of public property and public funds of the TBVC States

It is generally recognised that the successor state takes over the public funds and public property, whether movable or immovable, of the predecessor state, if such property is linked with or located in the territory to which the question of succession relates.

2.2.4.4. The position of the Administration, including the civil service and armed forces

A state which acquires territory from another has a complete discretion as to the manner in which it will be administered. The governmental agencies of the predecessor state lose their competence at the moment of the change of sovereignty and any official function performed by them after that date is valid only in so far as it is sanctioned by the new government.

2.2.4.5. State debt

This is an issue that has to be dealt with.

2.2.4.6. State archives

The effect of the loss of sovereignty on the position of State archives will be one of negotiation.

3. ENSURANCE OF PUBLIC ACCOUNTABILITY OF ACTION TAKEN FOR THE PURPOSE OF REINCORPORATION

When public accountability for actions taken for the purposes of reincorporation of the TBVC States is considered, it must be borne in mind that such actions shall not be justiciable. The reason for this is that reincorporation of the TBVC States via treaty is an act of state, performed by the executive by virtue of its

prerogative in foreign affairs. Acts of state are not justiciable, meaning that no one will be able to challenge the validity of such a decision.

Public accountability of officers of the TBVC states that was created through legislation, shall have to be dealt with in the reincorporation treaty and the enactment thereof. Transitional provisions in this regard also need to be made. To ensure the continued accountability for official deeds, a provision can be made that any powers vested by law in the Government, Minister or other official in the Republics of the TBVC States shall be deemed to have been vested in the Government of the Republic of South Africa and all powers, duties and functions which so vested in any Board, Commission or other legislative authority shall vest in the corresponding Board, Commission or authority in South Africa from the date of reincorporation.

4. CONSTITUTIONAL STEPS TO BE TAKEN TO EFFECT REINCORPORATION

4.1 Reincorporation steps

Reincorporation can only be achieved by way of negotiations and via a multi- or bilateral reincorporation treaty.

4.2 Steps to be taken by the TBVC States

- The intention to transfer sovereignty to South Africa and be reincorporated into South Africa must exist.
- If the people agree with the reincorporation plan, the actual request to South Africa for reincorporation must be made.
- The negotiation of a multilateral or bilateral reincorporation treaty/treaties,

4.3 Steps to be taken by the RSA

- The intention to reincorporate the TBVC States into South Africa must exist.
- If the people agree with reincorporation and the requests for reincorporation were received from the TBVC States, the negotiation of the reincorporation treaty/treaties can begin.

4.4 Reincorporation treaty/treaties

- The reincorporation treaty/treaties shall provide the legal basis of the sovereignty of the RSA with regard to the territory of the TBVC States.
- All aspects of the loss of sovereignty and its legal consequences must be dealt with in this treaty/treaties.
- The treaty/treaties can also establish a steering/standing committee to facilitate the reincorporation of the TBVC States into South Africa.

4.5 Legislative steps

- The TBVC States will each have to repeal their constitutions or other decrees granting them independence.
- South Africa will have to repeal the Status Acts through which independence were granted to the TBVC States.
- All the States will have to pass simultaneously similar legislation enacting the provisions of the reincorporation treaty/treaties and thus incorporate it in the municipal law.
- This legislation together with the new constitution of the new South Africa will be the final steps towards the reincorporation of the TBVC States into South Africa.
- After the promulgation of these legislative actions the TBVC States will again be part of South Africa.

1.0. TRANSKEI AND VENDA.

1.1. They are ready to surrender their "sovereignty" and enter into a process of reincorporation immediately after the April 27 elections.

1.2. For this reason, processes should be set in train to elaborate all the necessary measures that would have to be taken to integrate their state structures into the structures visualised for a democratic South Africa.

1.3. The population within their areas will participate in the elections, in the same way as the electorate in the rest of South Africa would.

1.4. Accordingly, the TEC, IEC and other structures will be operational in these areas, as well as any other relevant provisions as may be contained in the "interim constitution" and other agreements, germane to the issue of the holding of free and fair elections and the transition to democracy.

1.5. N.B. The above reflects the positions that had been agreed at CODESA II. Subsequent to the decision of the last NEC meeting to urge reincorporation before the elections, subject to consultation with Venda and Transkei, the NWC, having engaged in such consultation, decided to confirm our support for the CODESA II positions indicated above.

2.0. CISCHEI.

2.1. They also say that reincorporation should take place after the elections.

2.2. They however proceed from an entirely different standpoint with regard to process.

2.3. They propose that once the framework for SPR's, the SPR boundaries and the constitutional principle on SPR are agreed, mini-CODESA's should be held in each of the SPR's to draft the SPR constitution, within the global framework of what would have been agreed in the MPNP.

2.4. These SPR constitutions would then be "final", being subject to amendment according to provisions that would be included in the SPR constitution.

2.5. SPR elections would then be held in terms of these

constitutions - possibly at the same time as the national elections.

2.6. The Ciskei would then lose its "sovereignty" once these elections were held and also enter into the process of reincorporation.

2.7. N.B. This is contrary to our own scenario in terms of the constitution-making process and have therefore opposed it.

3.0. BOPHUTHATSWANA.

3.1. They have not accepted the principle of reincorporation and continue to insist that the decision concerning the relationship between Bophuthatswana and a democratic South Africa can only be taken by Bophuthatswana once the CA has completed its work.

3.2. They however want to stay in the negotiations process. Accordingly, they propose:

3.2.1. That they assume an "associate" status with South Africa, which should:

3.2.1.1. Permit the BOP parliament to appoint 2/3 persons to sit in the elected CA and National Assembly, but without voting rights in the latter;

3.2.1.2. Ensure that legislation passed by the Assembly applies to BOP as well; and,

3.2.1.3. Enable the BOP administration to commend the "final" constitution to the population in BOP, once this constitution had been completed, including those provisions dealing with the future of BOP, which might be incorporation within a region.

3.3. As for the April 27 elections:

3.3.1. All South Africans within BOP would have the right to vote: therefore all necessary measures would be taken to ensure free and fair elections;

3.3.2. SPR representatives could also be elected, with BOP defined within such SPR electoral boundaries as would have been agreed in the MPNP.

3.4. N.B. For obvious reasons we have rejected this proposal.

ends