

McHCU-38-2-1

**SECOND REPORT OF THE TECHNICAL COMMITTEE ON
CONSTITUTIONAL ISSUES TO THE NEGOTIATING
COUNCIL: 19 MAY 1993**

1. Introduction

1.1 The resolution adopted by the Negotiating Council at its meeting on 18 May 1993 records broad agreement that the most suitable form of government for the future will be one which involves the allocation of powers to central and regional governments. We were asked to take into account the concerns and views of delegates expressed at the meeting of 18 May, and in their submissions to us, and to undertake the following tasks:

- 1.1.1 Provide the Negotiating Council with a report on constitutional principles.
- 1.1.2 Consider and report on the structures, powers and functions of states/provinces/regions (SPR).
- 1.1.3 Present proposals on various issues pertaining to the constitution-making process.
- 1.1.4 Provide the Negotiating Council with recommendations on how best the discussions within the Negotiating Council on these issues should be structured.

These issues are interrelated and consistently with the debate in the Negotiating Council, can be approached on an holistic basis.

1.2 The debate on the constitution-making process and the powers and functions of the SPR foreshadowed in the written representations that we have received from participants is likely once again to reflect the tension identified, for example 6.4 and 7.1 in our First Report to the Negotiating Council (13 May 1993). On the one hand a concern as to the legitimacy of the constitution-making process which underlies the position of many participants, that the constitution be drawn up by an elected body; on the other a concern reflected in the position of other participants that their interests will not adequately be protected if decisions are taken by a majority in a democratically elected constitution-making body.

- 1.3 The question is whether these two positions can be reconciled through the mechanism of developing a set of constitutional principles at the Negotiating Forum, which will be binding on the elected constitution-making body and provide sufficient assurances to meet the objections to a process which requires the constitution to be drawn up by an elected body.
- 1.4 Our task is to help in the structuring of the discussions and thereby to facilitate the negotiations. It is in that spirit that we have addressed the instructions given to us by the Negotiating Council on the 18 May.
- 1.5 The key to unlocking the differences that exist, and enabling the process to move forward, is to develop a set of constitutional principles. These should be sufficient to offer assurance to those who are concerned that their interests will not be adequately protected if the constitution is drawn up by an elected constitution making body, without being so detailed as to pre-empt the work of an elected constitution making body. They should guarantee that the constitution will be democratic in substance as well as in form, that basic rights will be respected and upheld, and that mechanisms will exist to prevent the abuse of power by the government of the day.
- 1.6 In this report we address:
 - 1.6.1 An approach to the formulation of constitutional principles, drawing on the work done in that regard at Codesa and the representations of the participants to us. We look at the common ground that exists and make suggestions that may help to take the process forward.
 - 1.6.2 We deal specifically with the SPR and make suggestions as to what may be necessary to provide the assurances that are sought in regard to the integrity and viability of the SPR.
 - 1.6.3 We locate our suggestions in the context of the broader debate involving self-determination and the form of state, and the process of constitution making.

2. An Approach to Constitutional Principles

In its Declaration of Intent on the Negotiating Process of 7 May 1993, the Negotiating Council committed itself inter alia:

- 3.1 To reach agreements on binding constitutional principles, the constitutional framework and the constitution-making process in terms of which elections will be held.

In the Negotiating Council's mandate to the Technical Committee on Constitutional Issues of 18 May 1993, this Committee was instructed, inter alia, to: Provide the Negotiating Council with a report on constitutional principles.

The Technical Committee also received submissions from various participating parties on constitutional principles.

The following paragraphs reflect the preliminary conclusions of the Technical Committee based upon a consideration of the relevant documents.

2.1 On the purpose and nature of a set of constitutional principles

Constitutional principles could play an important role in providing participants with the security they need in the process of constitutional transition with regard to future opportunities for political participation and other basic concerns. (Refer to the First Report of the Technical Committee on Constitutional Issues to the Negotiating Council : 13 May 1993 paragraph 5) The principles should therefore incorporate basic rights of political participation, multi-party democracy, checks and balances, separation of powers and secure SPR representation in order to ensure that a future constitutional system provides for the protection of minority and regional interests.

The principles should provide a clear framework for the drafting and adoption of a future Constitution.

The principles should not have the character of constitutional provisions as such, but they should establish clear parameters within which a future Constitution must be drafted.

The principles must be formulated in clear language which is capable of effective judicial interpretation and adjudication.

Although the principles and constitution making process are related, it may be desirable to reach agreement on constitutional principles first. This could facilitate agreement being reached on the constitution-making process. In drafting such principles, regard may be had to other precedents, international instruments, the CODESA documents and the submissions of parties.

2.2 Emerging consensus

It appears from the documents and submissions that we have considered, that with a few exceptions, consensus so far has emerged in relation to the following:

- (a) Democracy in the form of universal adult suffrage at all levels of government.

- (b) **Supremacy of a rigid Constitution, whereby the validity of all laws and all acts of government is made subject to consistency with the provisions of the Constitution, such consistency being justiciable by an independent judiciary.**
- (c) **The inclusion in the Constitution of a set of fundamental rights authoritatively protecting the individual in a non-discriminatory manner against the state and all its organs.**
- (d) **The constitutional separation of the executive, legislative and judicial powers.**
- (e) **The constitutional distribution of the powers of government among democratically elected national, regional and local institutions.**
- (f) **Constitutional recognition and accommodation of the variety of cultures and religions being practised, and languages used by various segments of the population.**

It should be noted that the above wording is not intended as formulations of constitutional principles as such, but simply to indicate areas of consensus.

3. **Structures, Powers and Functions of the SPR: Remarks relevant to the form of state and confederation:**

3.1 In our First Report of 13 May 1993, point 4, it was stated:

"The second report of the Planning Committee to the Negotiating Council (29/4/93) deals with the form of state in paragraphs 3.2.1 and 3.2.2. We are in substantial agreement with the views expressed in these paragraphs.

The form of state will be shaped by decisions in regard to the structures of the Constitution. Concepts such as the separation of powers, the entrenchment of fundamental rights, the powers of the judiciary, the boundaries, powers and functions of the regions, and the like, all have a bearing on the form of state."

From the submissions received from the parties as well as the discussions of our First Report in the Negotiating Council on 18 May 1993, it is evident that most parties consider the form of state as a matter directly linked to the way in which powers and functions of the state are distributed on central, regional and local level and the way in which these powers and functions are exercised.

3.2 A primary observation must be made: all states in the world, whether unitary or federal, must decentralize government powers and functions in order to achieve effective government. Considerations of scale (i.e. physical proportions of countries), diversity of people and economies, etc. all influence the degree of decentralization. Decentralization in the modern state is a fact of life and is made possible through many constitutional mechanisms, e.g. delegation of powers and functions, deconcentration of government activities, etc. Generally, and broadly stated, it can be said that decentralization in the modern state rests on the principle of devolution of powers which, in turn, assures that government is brought close to the people and the principle of subsidiarity is given effect to. In all states, decentralized government has to be performed by state institutions, on central, regional and local level. It is wrong to assert that the unitary state does not apply mechanisms of decentralization; in fact, some unitary states abound with structures and institutions at regional and local levels which all assure a high measure of decentralized government. The major distinguishing feature between the unitary state and the other form of state organisation which can be broadly labelled "federal", is that in the unitary state the central government retains the ultimate say over the distribution as well as the exercise of government powers and functions. (This does not mean, however, that the central government in exercising this ultimate authority, can act at will and ignore constitutional requirements and procedures).

3.3 An analysis based on the empirical evidence provided may very well conclude that a particular state exhibits so many federal characteristics and complies in so many respects with the federal idea, that it can be called a federation. Conversely, that its characteristics are such that it can more appropriately be called unitary. This is, however, a consequence of and not necessarily the determining factor of the constitutional order and governmental structures.

3.4 To conclude: There is no universally accepted definition of federalism, and we are not convinced that in a discussion on the form of state, it would be useful or indeed possible to use as a point of departure preconceived concepts such as unitary or federal states. We should like to reiterate our view contained in our First Report that a more expeditious way of dealing with the matter of form of state would be to consider all those separate issues which have a bearing on the form of state.

Handwritten note:
 Subsidiarity
 principle

3.5 Finally, some remarks must be made about a confederation. A confederation is not a form of state since confederation, per definition, is a combination of separate, independent states which finds its basis for cooperation and cohesion, not in one constitutional system (although, of course, the respective constitutional system of the independent, separate states may reflect confederal agreements and arrangements), but according to rules of international law. Being of an international nature, each of the confederal states should enjoy international recognition in order to have their confederal pact sanctioned by international law. A clear example of a confederation which was not sanctioned by international law, is the confederation of the Republic of South

Africa and its TBVC states. International recognition of the independent status of the separate states in the confederation will to a very large extent depend on how these states gained their independence.

Independence founded on partition and secession which does not conform to international norms of human rights and self-determination (ie. mutual agreement by the mother

country and the secessionist state based on the free and voluntary expression of the will of the people concerned) is unlikely to meet with international approval. Furthermore, it would be difficult to promote confederal ties of mutual trust, cooperation and support between independent states which do not necessarily hold the same convictions about democracy or, do not subscribe to the same norms on human rights and liberties. In the latter respect, the European Confederation of States in the form of the European Community provides a clear example of the type of co-operation that is required.

- 3.6 It would be helpful if participants in the Negotiating Council in favour of confederation as an option would provide us with more clarity on their proposals and in particular the territory and population of the envisaged separate state, and how it will meet the international law requirements of secession and self-determination.

4. The Integrity and viability of the SPR

- 4.1 Following upon the Codesa debates there seems to be broad agreement that provision should be made for organs of government at central and SPR levels and that for this purpose the constitutional principles should require:

- 4.1.1 Democratic representation at each level of government.
- 4.1.2 Appropriate and adequate legislative and executive powers and functions to be vested in each level of government to enable each to function effectively.
- 4.1.3 The entrenchment of such powers and functions in the Constitution.
- 4.1.4 The general principles of the Constitution, including fundamental rights to be applicable at each level of government.
- 4.1.5 Provision to be made for tasks to be carried out at different levels of government on an agency or delegation basis, where this would be appropriate.

- 4.2 In addition to these areas of broad agreement there are proposals from participants that the constitutional principles should also address:

- 4.2.1 Procedures for amending the provision of the Constitution entrenching SPR boundaries, powers and functions.

- 4.2.2 The fiscal powers of and financial allocations to the SPR.
- 4.2.3 The distinction between exclusive and concurrent powers, and how conflicts arising out of the exercise of concurrent powers should be addressed.
- 4.2.4 Whether residual powers - i.e. those not specifically allocated to the central government or the SPR in the constitution, should vest in the central government or in the SPR.
- 4.3 There are sound reasons for the constitutional principles to address each of the matters referred to in paragraph 4.2. By doing so, the Negotiating Forum may be able to provide all the assurances necessary to guarantee the integrity and viability of the SPR, without pre-empting the work of any elected constitution making body. A decision as to process could then be taken in the knowledge that the integrity and viability of the SPR are not disputed.
- 4.4 **Amendments to the constitution**
- 4.4.1 We think that consideration should be given to the need for special procedures to be followed in regard to amendments to the boundaries, powers and functions of the SPR.
- 4.4.2 This offers an assurance that the SPR will be protected against the whims of a central government wishing to concentrate its power. There is a recent example in our own history of this having been done, and it is reasonable that the Constitution should contain safeguards against such actions.
- 4.4.3 Because circumstances change and the future can never be foreseen, constitutions should be capable of being amended to meet changed circumstances. Possibly some objective standard should be prescribed which would be justiciable in a court if disputed. Provision could also be made for a special role for the SPR in the making of any amendments which affect their boundaries, powers or functions.
- 4.5 **Fiscal powers and financial allocation**
- 4.5.1 It stands to reason that SPR's will have divergent financial and developmental capabilities.
- 4.5.2 Provision could be made for a fiscal commission to be involved in the allocation process, and for an objective standard to be followed (i.e. reasonable, having regard to the national interest and the interests of the SPR) which would be justiciable and a safeguard against the abuse of power.

4.6 Exclusive or concurrent powers, and residual powers

- 4.6.1 Any constitution that makes provision for the allocation of powers to more than one level of government, has to address the issue of where particular powers reside.
- 4.6.2 The Codesa principle that "appropriate and adequate" legislative and executive powers and functions shall be vested in each level of government to enable each to function effectively, does not specify where residual powers will lie, nor does it specify the basis for the allocation of powers either exclusively or concurrently, or how possible conflicts in respect of the exercise of concurrent powers will be resolved. Whilst there are no clear rules for determining these issues, we think that there is a need to address them in the Negotiating Council and to establish whether they can be made the subject of a constitutional principle or principles.
- 4.6.3 Where there are concurrent powers, the Central Government usually has an overriding power, but this can be made subject to objective criteria to prevent abuses. We suggest that this be debated, as well as the site of residual powers, and possible criteria for determining how the allocation of powers should be made.
- 4.6.4 The question of asymmetry of powers has been raised by a number of participants. It is a matter which calls for careful consideration. We would appreciate receiving a more detailed explanation of what particular participants have in mind so that we can deal with this matter in a later report.

5. CONSTITUTION MAKING PROCESS

- 5.1 From the proposals on the constitution making process submitted to us on Constitutional Issues by the participants, it appears that:
 - 5.1.1 There exists an overall unanimity that South Africa, [including the TBVC states] requires a new constitutional dispensation to replace the present one;
 - 5.1.2 The parties hold divergent views on the constitution making process and consequently on the process of transition to a new constitutional order;
 - 5.1.3 The proposals of the parties on the creation of a new constitution or constitutions for South Africa evince substantive differences on two cardinal issues:
 - 5.1.3.1 The structure, composition and function of the constitution making body, and
 - 5.1.3.2 The mechanism of transition from the present to a new constitutional order.

5.2 The proposals of the parties

There are differences between the various proposals. They have been developed over a period of time, during which positions have been modified in part to meet the concerns of some of the participants. Allowing for differences in emphasis and detail, the proposals of the parties may be classified within two categories:

- 5.2.1 On constitution making, an elected constituent assembly acting as a national constitution making body, on the one hand, and the present Negotiating Forum ["MPNP"] acting as a constitution making body, on the other.
- 5.2.2 On constitutional transition, a one phase transition or two or more phases of transition.

5.3 The structure, function and composition of CA.

One proposal which in broad terms has the support of a number of parties is that a CA should draw up and adopt the final new Constitution, subject *inter alia* to the following important qualifications.

- 5.3.1 Members of the CA shall be elected on the basis of a non racial unqualified franchise including citizens of the TBVC States, in an electoral system based on regional and national proportional representation within the CA.
- 5.3.2 The CA shall be sovereign and not limited in any way in its constitution making mandate subject to what is stated hereinbelow:
- 5.3.3 The CA shall fashion a new constitution within the framework of binding the general constitutional principles agreed upon in the MPNP.
- 5.3.4 The CA shall be required to adopt the new constitution within fixed time frames, by predetermined and entrenched adoption procedures and shall be subject to an agreed dead-lock breaking mechanism.
- 5.3.5 Regional boundaries for purposes of elections of the CA shall be determined by the Multi Party Negotiation Council upon the recommendation of the Commission on demarcation of SPR.

5.4 The other proposal, supported broadly by participants opposed to the CA, is that the present negotiation forum should draft and adopt the final national constitution/s subject to the following:

- 5.4.1 The MPNP should agree beforehand on the form of state, the boundaries, powers and functions of SPR as well as on constitutional principles;
- 5.4.2 A panel of experts appointed by MPNP should draft the national constitution:

- 5.4.3 Simultaneously, or in interaction with the drafting of the national constitution, "people at ground level" must negotiate and determine SPR constitutions in accordance with the constitutional principles set at national level.
 - 5.4.4. The constitutions of regions or states shall be drawn up and adopted by regional, multi party fora, or referenda, or regional constituent assemblies.
 - 5.4.5. Legislative organs of the respective SPR shall pass their national and SPR constitution.
 - 5.4.6. Elections shall take place on a national as well as SPR levels in terms of the new national and respective regional constitutions.
- 5.5 One of the participants appears to propose that the present negotiating forum draft and adopt a transitional constitution:
- 5.5.1 Which will be drafted in accordance with and amended or replaced by and only within the framework of agreed, justiciable and specially entrenched constitutional principles;
 - 5.5.2 Which shall be a fully fledged constitution;
 - 5.5.3 Which shall not be amended or repealed in any other manner or by any other procedure than that prescribed by its own provisions;
- 5.6 Whilst subscribing to the views of the general category described in 5.4 hereabove, one of the parties holds a distinct view that:
- 5.6.1 The demarcation, powers and functions governing at least two States - "an Afrikaner state and the new South Africa there might be more", should be negotiated beforehand by all interested parties, presumably within the multi-party negotiation process.
 - 5.6.2 Such constitutions of the confederal states or states within a commonwealth should be legislated into power by the existing South African parliament. It is argued that only the present parliament can lawfully transfer its powers to the new states.

5.7 Transitional/interim process

Two broad approaches emerge from the submissions of the parties in respect of constitutional transitional arrangements:

- 5.7.1 The group that favours constitution-making in the MPNP:
 - 5.7.1.1 Rejects the notion of a two-phased transition to a final national constitution;

- 5.7.1.2. Consequently, they oppose the establishment of a transitional executive council, elections leading to a CA, the CA itself, an interim government of national unity, or any form of transitional authority, and a transitional constitution;
- 5.7.1.3. They seek prior determination of the form of state and, obviously of SPR boundaries, functions and power;
- 5.7.1.4. They all support the principle of asymmetrical SPR powers and of the principle of a "bottom up" constitution making process in terms whereof the regions draft and adopt separate, distinct and autonomous constitutions, on the one hand, and the MPNP adopts the national constitution which will not override the autonomous constitutions of the SPR.
- 5.7.1.5. They resist the holding of elections at a national or regional level at any stage before the SPR constitutions have been predetermined by the SPR themselves.
- 5.7.1.6. They all oppose the termination or amendment of the present constitutional dispensation including the TBVC states prior to the final adoption of the constitutions for the SPR and the national constitution.
- 5.7.1.7. All but one which advances a confederal model, propose a "federal" constitutional order within one country.

5.7.2 The two-phased model generally speaking is characterised by:

- 5.7.2.1 The determination of the constitutional principle by the MPNP;
- 5.7.2.2 The demarcation of regions by the MPNP for purposes of elections;
- 5.7.2.3 Installation of a transitional executive council. [Some parties hold that the TEC should function in terms of the transitional constitution whilst others hold that it should function in terms of agreements by the MPNP.]
- 5.7.2.4 The adoption of a transitional constitution
- 5.7.2.5 A firm election date should be proclaimed and a formal election process should commence.
- 5.7.2.6 Once elections have been held:
 - 5.7.2.6.1 The new parliament will be installed [some parties advocate for legislative as well as constitution making functions by the new parliament].
 - 5.7.2.6.2 A new multi-party executive government will be structured, and

5.7.2.6.3 Newly structured regional, [including TBVC states] and local government levels will be phased in, and

5.7.2.7 The constituent assembly/parliament adopts [on some versions amend, the transitional constitution] a new constitution replacing the transitional one.

6. PROPOSALS OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES.

6.1 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. Historically two predictable modes of constitution making have come to be:

6.1.1 *Pouvoir Constituant* - has been utilised to create a new constitution following upon a new and distinct historical moment such as a total collapse of a regime or a revolution. In this case the new constitution would not owe its existence to the old.

6.1.2. *Pouvoir Constitué* - existing constitutional order is amended and thus the new order derives its legitimacy and continuity from the old.

6.2 The present constitutional impasse exhibits features of both of the aforementioned approaches. Here it may be said that the new constitution cannot derive its legitimacy, popular acceptability and democratic character from the existing constitutional dispensation. A mere amendment of the existing constitutional order would not suffice. The major source of legitimacy would be a democratic process signifying an irreversible and "cleansing" break from an undemocratic constitutional order. On the other hand it may be argued that a new constitution may not and cannot come into being without the explicit co-operation of the existing constitutional order.

6.3 Can the differences that exist in regard to the process be resolved? A possible solution which may be worth exploring in the Negotiating Council is the careful and sensitive formulation of a mutually acceptable principle of regional government, adequate constitutional principles and provision for the democratic creation and adoption of a final constitution.

6.4 Each of the following constitutional processes could be examined in that context and given effect to as instruments of reconciling the competing concerns of the parties:

- 6.5 Adequate principle of regional government including:
- 6.5.1 The idea of a special role for regions in the formal amendment procedure of the constitution, especially on matters affecting regions;
 - 6.5.2 The concept of regional representation in the central legislature;
 - 6.5.3 A list of justiciable criteria limiting the exercise of the override to prevent the party at the centre from exercising such powers for the purpose of penalising regional opponents;
 - 6.5.4 Agreed criteria for the determination of regional boundaries, and powers.
- 6.6 Justiciable and binding constitutional principles.
- 6.7 Special majorities.
- 6.8 Entrenched and justiciable rights.