

EMBARGOED UNTIL TABLING IN THE
NEGOTIATING COUNCIL

**FOURTH SUPPLEMENTARY REPORT ON CONSTITUTIONAL
PRINCIPLES OF THE TECHNICAL COMMITTEE ON
CONSTITUTIONAL ISSUES TO
THE NEGOTIATING COUNCIL
26 JULY 1993**

1. Introduction

Subsequent to our previous reports on Constitutional Principles and the debate in the Negotiating Council, the Negotiating Forum on 2 July 1993 adopted a set of Constitutional Principles. The Negotiating Forum agreed that the Constitutional Principles shall be binding on the constitution making body and that the justiciability thereof shall be ensured by a constitutional court or tribunal. These Constitutional Principles will be set out fully in our Eighth Report.

In this report we deal only with outstanding matters and with certain typographical and grammatical errors in the Constitutional Principles adopted by the Forum (see Volume 1 of the "Reports and Recommendations" from the Council to the Forum on 2 July 1993, pages 11-17). Deletions are indicated by square brackets and additions by underlining. Principles not yet agreed on are printed in italics. In this report we identify the relevant Principles by the same numbering as was used in our Third Report and the "Reports and Recommendations" before the Negotiating Forum.

2. Constitutional Principles

2.1 The Constitution of South Africa shall provide for the establishment of one sovereign state, [with a democratic system of government] a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

Corrected text: **The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.**

2.18 The powers and functions of national and SPR governments shall be defined in the Constitution. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of SPR's shall in addition to any other procedures specified in the Constitution for constitutional amendments, also require the approval of a specified majority of the legislatures of the SPR'S, alternatively, if there is such a chamber, a specified majority of a chamber of parliament composed of regional representatives, and if the amendment concerns specific SPR's only, the approval of the legislatures of such SPR I will also be needed.

It was suggested that the first sentence should be amended to read

"The powers, functions and institutions of national and SPR governments shall be defined in the Constitution. "

In view of the unresolved debate concerning SPR constitutions, it may be better to leave this open, so that the constitution making body can authorise SPR's to adopt their own constitutions in which SPR institutions will be defined. Having regard to the recommendation contained in our Eighth Report concerning the development of SPR constitutions, the proposed inclusion will unduly curtail the development of SPR structures in terms of such constitutions.

It was also suggested that the word "alternatively" be replaced with "and". In regard to the amendment of those parts of the Constitution relating to SPR'S, there are two possibilities. Firstly the constitution could be changed by a specified majority of all the legislatures of the SPR'S, alternatively by a specified majority of a chamber of parliament (senate) composed of regional representatives. The first method of amendment involves the representatives of people of the regions more directly. However it results in a more rigid constitution which is more difficult to change. By means of the second method amendments could be effected more expeditiously and the members representing the different regions can engage in a wider and more inclusive debate within a single forum.

It should further be noted that the second method could, depending on the composition of and voting procedure in the second chamber, produce a different result than would emerge from the first method. This difference could be diminished by requiring the representatives of each SPR in the second chamber to vote en bloc on amendments of this nature.

Prescribing both methods will render the procedure more cumbersome without thereby necessarily achieving the presumed goal of effectively entrenching SPR interests better. It also creates the possibility of conflict occurring between the SPR's and the second chamber.

These considerations require further debate, before the Negotiating Council can come to an informed agreement.

2.24 The following criteria shall be applied in the allocation of powers to the national government and the SPR governments:

2.24.1 The level at which there is most control over the quality and delivery of services, should be the level responsible and accountable for the execution of the programme or the delivery of the services.

Suggested corrected version:

The level at which most control can be exercised effectively over the quality and delivery of services, should be the level responsible and accountable for the quality and the delivery of the services and such level shall accordingly be empowered by the Constitution to do so.

The amendment are suggested in order to clarify the meaning of the Principle.

2.24.9 SPR governments shall have such powers, either exclusively or concurrently with the national government, as may be necessary, inter alia, for the purpose of regional planning and development, and the delivery of services and aspects of health, welfare and education, within their boundaries.

It was suggested that the reference to "aspects of health,welfare and education" in the concluding words of the principle was inappropriate and that the reference should have been to criteria rather than to specific functions.

In the light thereof we propose that the Principle be formulated as follows:

2.24.9 SPR governments shall have powers, either exclusively or concurrently with the national government, inter alia:

2.24.9.1 for the purposes of regional planning and development and the delivery of services; and

2.24.9.2 in respect of aspects of government dealing with the specific socioeconomic and cultural needs and the general well being of the inhabitants of the SPR.

In view of the previous discussions in the Negotiating Council, we are of the opinion that consideration should be given to the addition of the following sentence to principle 2.8:

Culture shall not be promoted in a manner which would prejudice persons who do not adhere to such culture.

2.27 [Every] Members of the security forces (police, military and intelligence) and the security forces as a whole shall be required to perform [his, her] their duties and functions and exercise [his, her] their powers in the national interest and shall be prohibited from furthering or prejudicing party political interest.

The changes are proposed for obvious grammatical reasons.

3. Principles on self-determination

The following submissions on self-determination of peoples was put forward to the Council:

- 3.1 The right of self-determination of peoples, which allows them to determine their own political status through legislative and executive powers in the form of territorial independence and autonomy, is acknowledged.

This is a principle of international law which is subject to the limitations referred to in our previous reports on confederalism. For the reasons set out in particular in paragraph 3.3 of our Second Special Report on Confederalism, we cannot recommend the introduction of this principle. The inclusion of a single principle of international law concerning self-determination of peoples, in the context of a set of constitutional principles for the constitution of South Africa, will obfuscate matters and contribute nothing to the constitution making process that is envisaged by the MPNP. Stated differently, we fail to see why the international law principle of self-determination of peoples should influence or bind a constitution making body in its tasks of giving content and effect to the constitutional principles for South Africa to be agreed upon by the MPNP.

- 3.2 The right of self-determination of peoples is acknowledged. The right is exercised through cultural and linguistic groups/minorities and formations in:

Practising their own culture,

Using own languages;

Forming organs of civil society;

Participating politically effectively on the national and regional level in order to determine their political aspirations in legislature and executive in a particular region.

These rights shall, on a basis of non-discrimination and free association, be recognised and protected.

The proposed principle as formulated, corresponds in general terms to our views on the collective right of self-determination set out in paragraph 3.4.2 of our First Report. In the context of municipal law, however, an unqualified reference to the right of self-determination of peoples is open to misinterpretation. Furthermore, we are of the opinion that the right of self-determination within the context of municipal law has been adequately addressed in the following Constitutional

Principles discussed and adopted by the Negotiating Council: Principle 2.2 on non-discrimination; Principle 2.5 on Multi-Party Democracy; Principle 2.8 on the acceptance of linguistic and cultural diversity; Principle 2.9 on collective rights of self-determination; Principle 2. 10 on the enjoyment of universally accepted fundamental rights; and Principle 2.13 on the participation of minority political parties.

For these reasons, we do not recommend the inclusion of this principle.