

SOUTH AFRICA MULTI-PARTY NEGOTIATING PROCESS NEGOTIATING  
COUNCIL TECHNICAL COMMITTEE: CONSTITUTIONAL ISSUES  
SUPPLEMENTARY REPORTS 1-4 1993





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**EMBARGOED (PAGES 1-7) UNTIL DELIVERY/TABLING IN  
NEGOTIATING COUNCIL MEETING**

**FIRST SUPPLEMENTARY REPORT ON CONSTITUTIONAL PRINCIPLES  
BY THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES  
TO THE NEGOTIATING COUNCIL**

**15 JUNE 1993**

**1. Introduction**

In response to the debate in the Negotiating Council on 3 June 1993 regarding the draft constitutional principles contained in paragraph 2 of our Third Report, and subsequent submissions to us, we have given further consideration to paragraphs 2.2, 2.4, 2.8 and 2.12, which were referred back to us by the Council for reformulation.

**2. Paragraph 2.2: Gender**

It was agreed that at the meeting of the Council that paragraph 2.2 should be amended to include "gender" in line two. As amended it will read:

**2.2 The Constitution shall be the supreme law of the land, shall be binding on all organs of government, shall prohibit racial, gender and all other forms of discrimination and promote racial and gender equality and national unity.**

3. **Paragraph 2.4: Judiciary**

It was agreed at the meeting of the Council that Paragraph 2.4 should be amended to delete "legitimate" in line one. As amended it will read:

**2.4 The judiciary shall be competent, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the constitution and all fundamental rights.**

4. **Paragraph 2.8: Diversity of language and culture**

4.1 We were asked to reconsider the formulation of paragraph 2.8 in the light of the debate in the Negotiating Council. In our view the question of religious freedom does not require specific mention in paragraph 2.8. It is a universally accepted freedom and is covered by paragraph 2.10. We have had regard to the debate and to the International Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities adopted by the United Nations General Assembly on 18 December 1992. Consistently with the way in which language and culture is dealt with in that Declaration, we suggest that Paragraph 2.8 should be amended and reformulated as follows:

**2.8 The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.**

4.2 In one of the submissions to us it was suggested that paragraph 2.8 should also acknowledge the "diversity of peoples". We are of the opinion that such diversity in all its relevant aspects is covered by the general constitutional principles, which on the one hand recognises and protects cultural and linguistic diversity, and on the other prohibits discrimination.



5. **Paragraph 2.12 : Traditional leaders and indigenous law:**

5.1 Indigenous or customary law is an established system of immemorial rules which have evolved from the way of life and national events of the people, the general context of which was and is a matter of common knowledge and adherence, coupled with precedents applying to specific cases. It is a system of law of ancient origin and is largely still unwritten outside Natal and KwaZulu. Even though the greater part of indigenous law is unwritten and therefore sometimes looked at with uncertainty as to the precision thereof, sight must not be lost of the fact that historically it has successfully provided indigenous communities with rules necessary for their orderly existence.

Notwithstanding deep social and economic changes in our society, indigenous law continues to play an important role in the daily lives of a great many South Africans.

5.2 Indigenous law could find a favourable reception in the democratic political environment that is being planned, if it is allowed to develop spontaneously in a given jural community. It may require reform, particularly as far as the position of women, children and the right of individual ownership are concerned, and in our view the constitution ought not to inhibit the reform that may be desirable.

5.3 With regard to the compatibility of fundamental rights with indigenous law it should be noted that most of the instruments concerned with human rights mention the protection of cultural rights on a basis consistent with equality. Paragraph 4 of the preamble of the 1981 African Charter on Human and People's Rights urges states to take into consideration "the virtues of their historical tradition and the values of African civilization"; article 18(2) gives definition to this ideal by obliging states "to assist the family which is the custodian of moral and traditional values recognised by the community".



Neither of these provisions is remarkable in itself, but when viewed in the overall context of the Charter (which makes no reference to individual rights in marriage) they suggest a strong commitment to preservation of the foundation of African culture: the family.

The Draft Declaration of the Rights of Indigenous Peoples adopted on 14 August 1992 (of the Working Group on Indigenous Populations which is a sub-committee of the UN Commission on Prevention of Discrimination and Protection of Minorities), prepared for adoption by the UN General Assembly during 1993 (the UN Year of Indigenous People) recognises in the seventh preambular paragraph "the urgent need to respect and promote the rights and characteristics of indigenous people, especially their right to their laws, territories and resources, which stem from their history, philosophy, cultures, spiritual and other traditions as well as from their political, economic and social structures". The operative paragraph 8 of the Draft Declaration specifically provides for the right of indigenous peoples "to revive and practise their cultural identity and traditions, including the right to maintain, develop and protect the past, present and future manifestations of their cultures", whereas the operative paragraph 16 recognises the "right to the full recognition of their own laws and customs, land-tenure systems and institutions..."

- 5.4 It should be kept in mind that international declarations and conventions universalising human rights were the product of modern jurisprudence, and for many historical, political and other reasons, to a large extent neglected the indigenous doctrines of rights. Unfortunately to some degree this is still the prevailing situation in South Africa. Where a society is in fact culturally plural, as South Africa is, the recognition of indigenous law gives effect to the accepted constitutional principle acknowledging cultural diversity. The infrastructure for the legal enforcement of indigenous law already exists.



Chiefs' and headmens' courts have jurisdiction to apply indigenous law, and even magistrates' courts and the Supreme Court may now take judicial notice of customary law.

5.5 It is suggested that a symbiotic approach between indigenous law and fundamental rights may be developed (ultimately growing into a hybrid system). This should not prove a threat to important aspects of indigenous law such as the payment of lobola or bogadi. The diversity of the systems of indigenous law could justify the allocation of powers in respect thereof to the SPRs.

5.6 A submission has been made to us that:

...ordinary legislation cannot modify indigenous law. However, both legislation and indigenous law are to be subject and conditioned to all constitutional sources of law, including federal and state constitutions.

It is further contended in the same submission that:

...indigenous law is recognised and protected only to the extent that it conforms with democratic requirements and with the overall blueprint of society.

There seems to be general acceptance that in the event of conflict, fundamental rights should prevail over indigenous law. It was however clear from the debate in the Negotiating Council on paragraph 2.12 of our Third Report that certain participants took the view that indigenous law should be made subject to legislation. This raises a question for decision by the Negotiating Council, namely:

Should the legislature have the power to amend or repeal provisions of indigenous law?



5.7 It was agreed that the status of traditional leaders should receive appropriate recognition in the constitution. In one of the submissions to us it is said that acknowledgement of the status of traditional leaders is not sufficient and that the constitution should specifically recognise "the institution of traditional leaders, including the traditional councils as established by customary law and usages". As long as the constitution recognises the status of traditional leaders as well as indigenous law (which acknowledges the institution of traditional leaders), it is our opinion that this concern will be met.

5.8 We suggest that paragraph 2.12 of our Third Report be reformulated as follows:

**The status of traditional leaders shall be recognised in the constitution. The constitution shall provide for the recognition of indigenous law and its application by the courts. Indigenous law shall be applied subject to the provisions of the fundamental rights contained in the constitution.**

Depending on the outcome of the debate on paragraph 4.6.2, the following words may have to be added at the end of the final sentence:

**"and to legislation dealing specifically therewith".**

## **6. Response to further submissions**

6.1 We have received comments and questions from certain participants on matters raised by us in our Third and Fourth Reports. Some request us to undertake research, and provide them with advice. We consider that this is the responsibility of the participants themselves and not our responsibility. Some seek to reopen issues which we understood to have been resolved at the meeting of the Negotiating Council on 3 June 1993. We consider that we can only do this if instructed to do so by the Negotiating Council. Some raise



issues relevant to the debates which are still to take place on our Third and Fourth Reports which will presumably be raised by the participants concerned when these Reports are debated in the Council.

- 6.2 We are concerned that if we are expected to reply in detail to all the issues and question raised with us by participants, we will be diverted from the tasks assigned to us by the Negotiating Council and will be unable to address them efficiently and expeditiously. We have considered all the submissions made to us, and are of the opinion that there is no need to add to this Report, which in our view is complete, and sufficient to facilitate the debate in the Council on all relevant issues.



**EMBARGOED (PAGES 1-12)**  
**UNTIL DELIVERY/TABLING IN**  
**NEGOTIATING COUNCIL MEETING**

**SECOND SUPPLEMENTARY REPORT ON CONSTITUTIONAL  
PRINCIPLES FROM THE TECHNICAL COMMITTEE ON  
CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL**  
**23 JUNE 1993**

**1. Introduction**

During the debate in the Negotiating Council a number of issues were raised in regard to paragraphs 2 and 3 of our Third Report. We respond to those issues below, indicating what decisions are necessary to enable us to prepare a final schedule of constitutional principles in a consolidated form. Where there has been no comment, we set out the Constitutional Principles without amendment or comment. When issues have been raised, we identify them, and point to what is necessary for the purposes of the finalisation of the principle. We treat the general Constitutional Principles and the Principles dealing with the allocation of powers to the different levels of government, together, showing where appropriate, the numbering in our Third Report where this differs from the present numbering.



## **2. The Constitutional Principles**

- 2.1 The Constitution of South Africa shall provide for the establishment of a single sovereign state with a democratic system of government and a common South African citizenship.**

The question was raised whether the words "non-sexist" and "non-racial" should be added before the words "sovereign state" in line two. We were instructed to reconsider the matter. We confirm our view that this is covered by paragraphs 2.2, 2.10 and 2.11 and that there is no constitutional need to include these words. We can take the matter no further. The Negotiating Council must decide.

- 2.2 The Constitution shall be the supreme law of the land, shall be binding on all organs of government, shall prohibit racial, gender and all other forms of discrimination and promote racial and gender equality and national unity.**
- 2.3 There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.**
- 2.4 The judiciary shall be competent, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the constitution and all fundamental rights.**
- 2.5 There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters roll, and in general, proportional representation.**
- 2.6 Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.**



- 2.7 **Formal legislative procedures shall be adhered to by legislative organs at all levels of government.**
- 2.8 **The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.**

(This principle was reformulated in the First Supplementary Report)

The question was raised whether it should be made clear in the language of paragraph 2.8 itself, that as far as culture is concerned, the protection, and encouragement for its promotion should be subject to the provisions of the fundamental rights contained in the constitution. We expressed the view that paragraphs 2.2 and 2.10 met this concern. We are still of this view. If specific reference to the fundamental rights is required in paragraph 2.8 the following words can be added: **"provided that this is done subject to the provisions of the fundamental rights contained in the constitution."**

- 2.9 **Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.**

The debate has to be finalised and a decision taken.

- 2.10 **All shall enjoy universally accepted fundamental rights, freedoms and civil liberties, protected by entrenched and justiciable provisions in the constitution.**



**2.11 The legal system shall ensure the equality of all before the law and an equitable legal process. The principle of equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.**

**2.12 The status according to indigenous law of traditional leadership shall be recognised in the Constitution. Indigenous law shall be recognised and applied by the courts subject to the provisions of the fundamental rights contained in the Constitution (and to legislation dealing specifically therewith).**

A number of issues in regard to the wording of this provision were raised during the debate in the Council, and we have also received additional written submissions in regard to this principle. The distinction between constitutional principles and constitutional provisions needs to be kept in mind in dealing with this matter. We have had regard to all the submissions we have received and concerns expressed and have reformulated paragraph 2.12. A final decision needs to be taken as a matter of principle in regard to inclusion or exclusion of the words in brackets. (See paragraph 5.6 of our First Supplementary Report.)

**2.13 Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.**

**2.14 Amendments to the constitution shall require special procedures involving specified majorities.**

**2.15 Government shall be structured at national, SPR and local levels.**  
(3.1 of Third Report)



- 2.16 At each level of government there shall be democratic representation.  
(3.2 of Third Report)
- 2.17 Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which promotes national unity, legitimate regional autonomy and cultural diversity.  
(3.3 of Third Report)

This principle has been reformulated in response to a suggestion that the last sentence of paragraph 5.2 of our Third Report should be incorporated as a principle.

- 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's will also be needed.  
(3.4 of Third Report)

A proposal was made to insert the underlined words, and no objection was raised to this.

- 2.19 A framework for local government powers, duties, functions and structures, shall be set out in the Constitution. The comprehensive powers, duties, functions and other features of local government shall be set out in parliamentary statutes and/or SPR legislation.

(3.5 of Third Report)

An amendment dealing with local government powers was proposed during the debate. No objection was raised during the debate to the proposed amendment. The wording we have adopted is our edited version of the proposal.

- 2.20 The powers and functions of the national and SPR levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

Shall has been substituted for "may" in line 2 in accordance with the debate in the Council.

- 2.21 National and SPR governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in paragraph 2.19 shall make provision for appropriate fiscal powers and functions for different categories of local government.

(3.6 of Third Report. This has been reformulated. See comments under paragraph 2.23)

- 2.22 Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that SPR's and local governments are able to provide basic services and execute the functions allocated to them in the Constitution.

(This is a new formulation. See comments under paragraph 2.23).



- 2.23 A Financial and Fiscal Commission, representing inter alia each of the SPR's, shall recommend equitable fiscal and financial allocations to the SPR governments after taking into account the national interest, disparities within the SPR's as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the SPR's.

Comment on paragraphs 2.21, 2.22 and 2.23

During the debate on paragraphs 3.3, 3.6, 3.7 and 3.8 of our Third Report, a number of issues were raised concerning the fiscal powers and functions of different levels of government and the method of allocating fiscal and financial resources so as to ensure that this is done on an equitable basis. We have had regard to the debate and to written submissions made to us. In particular we have noted the concern that SPR and local governments should have access to funds needed to enable them to carry out their responsibilities and provide necessary services. We have also noted that local government is in a special position because of the different categories that will exist and that this will have to be accommodated in the Constitution. Taking these matters into consideration, we have reformulated paragraphs 3.6, 3.7 and 3.8 of our Third Report. The reformulated provisions are paragraphs 2.21, 2.22 and 2.23.

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

General:

- 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.  
(3.9.1.1 of Third Report)

The words "and accountable" have been added as proposed during the debate.

- 2.24.2      **The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the SPR's.**

(3.9.1.2 of Third Report)

The word "geographical" has been substituted for "territorial" as proposed during the debate.

(Note: The position of paragraph 3.9.1.3 of the Third Report has been changed. See Paragraph 2.28 below).

- 2.24.3      **Where it is necessary for the maintenance of national standards, the maintenance of economic unity, the maintenance of national security or the prevention of action taken by one SPR which is prejudicial to the interests of another SPR or the country as whole, the constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the constitution.**

(3.9.1.4 of Third Report)

It has been contended that overriding powers of the national government should be confined to conflicts arising in the field of concurrent powers, and that paragraph 3.9.1.4 of our Third Report went further than is necessary for that purpose. In this context attention has been drawn to the reference in our report to the report of the independent experts published by the



Consultative Business Movement on which we have placed reliance, and it is said that this report wrongly relies on the German constitution which in effect deals only with overriding powers in the context of concurrent powers. It is correct that the German constitution deals with the override in the context of concurrent powers. The passage that is referred to in the comment we recieved is from page 36 of the CBM Report which deals with co-ordination of the exercising of powers which prima facie is concerned with concurrent powers. This is confirmed by the following passage from page 38 of that Report:

So far, the powers of the centre to override the regions has been discussed solely in relation to concurrency. It also has a wider application. The centre would necessarily have to possess the power to take action to uphold the fundamental norms specified in the National Constitution vis-a-vis the regions, when judicial mechanisms were either inappropriate or inadequate.

We agree, and are of the opinion that there is a need to make clear that where national priorities such as those specified in paragraph 2.24.3 conflict with SPR competencies, the national priorities should prevail. Paragraph 2.24.3 specifies the high objective criteria, "necessary", and the particular priorities to which it refers, are of crucial national importance.

- 2.24.4      **The essential principles of the constitution including the fundamental rights contained therein shall apply to all organs of the state at all levels of government.**  
(3.9.1.5 of Third Report)

## National Government

- 2.25.1        **Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government.**

(3.9.2.1 of Third Report)

- 2.25.2        **Where uniformity across the nation is required for a particular function, then power over that function should be allocated predominantly, if not wholly, to the national government.**

(3.9.2.2 of Third Report)

In the light of the debate we have substituted the words "required for" for the words "regarded as important with regard to". This is a more objective criterion.

- 2.25.3        **Where minimum standards across the nation are important for the delivery of public services, the power to set such standards should be allocated to the national government.**

(3.9.2.3 of Third Report)

The words "regarded as" have been deleted in line 1.

- 2.25.4        **The determination of national economic policies, and the power to promote inter-SPR commerce and protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.**

(3.9.2.4 of Third Report)



The words "The determination of national economic policies, and," have been introduced.

2.26 SPR Government

**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.**

(3.9.3 of Third Report)

2.27 Concurrent Powers

**Where mutual co-operation is essential or desirable or where it is important to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the SPR governments.**

(3.9.4 of Third Report)

2.28 **In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national and SPR governments, precedence shall be given to the legislative powers of the national government.**

(3.9.1.3 of Third Report)

A number of issues were raised in regard to this paragraph. It was suggested that a way should be found of resolving conflicts without providing that the legislation of the national government should take precedence. Paragraph 2.28 addresses the possibility of conflicting legislation in the field of concurrent powers. *This will happen only when there is both conflicting legislation and overlap of legislative competence which cannot be resolved by the court*

*through a construction of the provisions of the constitution.* In such circumstances the need for legislative certainty requires the court to prefer one legislative enactment over the other. The national government will only have the competence if the legislation is relevant to a national interest, and, it is for that reason that we formulated the clause so as to give preference to the national legislation. That seems to us to be consistent with constitutional practice.

## 2.29 Residual Powers

**The Constitution shall specify how powers which are not specifically allocated in the constitution to the national government or to an SPR government, shall be dealt with.**

(3.9.5 of Third Report)

A comprehensive allocation of powers in the constitution (as contemplated by these principles) makes the question of residuality of less importance. In practice residuality would amount to no more than establishing the allocation of ancillary powers to those powers and functions attributed to national and SPR governments.



**THIRD SUPPLEMENTARY REPORT ON CONSTITUTIONAL  
PRINCIPLES OF THE TECHNICAL COMMITTEE ON  
CONSTITUTIONAL ISSUES TO  
THE NEGOTIATING COUNCIL  
30 JUNE 1993**

**1. Introduction**

When the Constitutional Principles were revisited during the debate in the Negotiating Council a number of issues were raised. As we did in our Second Supplementary Report, we now indicate where the debate has not yet been concluded. Where there has been no comment we have set out the Constitutional Principles as they appeared in our previous reports. Where issues have been raised we identify those issues. Amendments or additions are identified by underlining the relevant words, and deletions are indicated by square brackets.

**2. Constitutional Principles**

- 2.1 The Constitution of South Africa shall provide for the establishment of a single 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.

This principle was reformulated to incorporate the underlined words in accordance with a proposal accepted during the debate. The wording we have adopted is our edited version of this proposal.

A suggestion was made that the word single before "sovereign state" be deleted. It is our opinion that the word single does not have a specific meaning in this regard. A decision needs to be taken.

- 2.2 **The Constitution shall be the supreme law of the land, shall be binding on all organs of government, shall prohibit racial, gender and all other forms of discrimination and promote racial and gender equality and national unity.**
- 2.3 **There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.**
- 2.4 **The judiciary shall be competent, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the constitution and all fundamental rights.**
- 2.5 **There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters roll, and in general, proportional representation.**
- 2.6 **Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.**
- 2.7 **Formal legislative procedures shall be adhered to by legislative organs at all levels of government.**



**2.8 The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.**

A decision is still required as to whether the following specific reference to fundamental rights should be added to this principle: **"provided that this is done subject to [the provisions of] fundamental rights contained in the constitution."**

Another approach suggested during the debates is an addition to 2.10 or to another principle, which would make the application of all or specific principles subject to the fundamental rights regime. We suggest that this matter be revisited during the debate on paragraph 2.12.

**2.9 Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.**

The debate on this principle has not yet been concluded. The following submission was received:

"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 cultures;
- \* Using own languages;
- \* Forming organs of civil society;
- \* Determining their own political status through legislative and executive powers in the form of territorial autonomy;
- \* participating effectively in decisions on the national and regional level.

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

"Collective rights of self-determination in forming, joining and maintaining organs of civil society" as in the current wording of this principle, is a different notion from "the right of self-determination of peoples" as in the proposed alternative.

The notional difference lies in the fact that the bearers of the first mentioned rights (a collection of individuals, "including linguistic, cultural and religious associations") could be distinguished from the bearers of the second ("peoples").

The proposed amendment will also have an impact on political rights. A decision needs to be taken on the formulation of this principle.

- 2.10 **All shall enjoy universally accepted fundamental rights, freedoms and civil liberties, protected by entrenched and justiciable provisions in the constitution.**
- 2.11 **The legal system shall ensure the equality of all before the law and an equitable legal process. The principle of equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.**

It was suggested that this principle be reformulated to accommodate the amendment to 2.1. As the principle in 2.1 is now phrased in positive terms and not as a prohibition, no amendment to the present principle should be necessary.



- 2.12 **The status according to indigenous law of traditional leadership shall be recognised in the Constitution. Indigenous law shall be recognised and applied by the courts subject to the provisions of the fundamental rights contained in the Constitution (and to legislation dealing specifically therewith).**

The following suggestion was submitted to the Negotiating Council :

"The institution, status and role of Traditional Leaders shall be acknowledged in the Constitution. Indigenous law shall be applied to the extent that is compatible with the provisions of fundamental human rights contained in the Constitution."

It was agreed to leave the matter in abeyance to allow for further informal discussions in this regard. This matter still has to be finalised.

We reiterate the fact that the word "status" in this context is a legal term indicating the standing or position in law, particularly in terms of indigenous law, of traditional leaders. "Status" in this context can therefore not be interpreted as reflecting on example social and financial esteem.

- 2.13 **Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.**
- 2.14 **Amendments to the constitution shall require special procedures involving specified majorities.**
- 2.15 **Government shall be structured at national, SPR and local levels.**

**2.16 At each level of government there shall be democratic representation.**

The question was raised in the debate whether this principle would affect traditional institutions. It is suggested that traditional structures generally cannot be described as a "level of government" in this context. There is however a potential area of conflict between democratic representation and traditional institutions, which may affect the manner in which some traditional communities function. Should traditional structures however also perform the task of government (eg at SPR or local level), the principle as formulated will allow communities to decide democratically whether the traditional institutions must be retained for that purpose.

**2.17 Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which promotes national unity, legitimate regional autonomy and cultural diversity.**

It has been suggested by a participant that the words "including fiscal powers" be introduced after the word "powers" in line two. Fiscal powers are dealt with in paragraph 2.21, 2.22 and 2.23. It is suggested that the proposed addition be debated in the context of paragraphs 2.21, 2.22 and 2.23.

**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's will also be needed.

- 2.19 A framework for local government powers, duties, functions and structures, shall be set out in the Constitution. The comprehensive powers, duties, functions and other features of local government shall be set out in parliamentary statutes and/or SPR legislation.
- 2.20 The powers and functions of the national and SPR levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.
- 2.21 National and SPR governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in paragraph 2.19 shall make provision for appropriate fiscal powers and functions for different categories of local government.
- 2.22 Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that SPR's and local governments are able to provide basic services and execute the functions allocated to them in the Constitution.

(See comment below in paragraph 2.23)

- 2.23 A Financial and Fiscal Commission, representing inter alia each of the SPR's, shall recommend equitable fiscal and financial allocations to the SPR governments from revenue collected nationally, after taking into account the national interest, disparities within the SPR's as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the SPR's.

One of the participants suggested that the words "from revenue collected nationally" should be added in line three after the words "SPR governments".

The use of these words in paragraph 2.22 and 2.23 raises the question whether the SPR's should have a right to fiscal and financial resources other than revenue collected nationally.

It was also suggested by a participant that the word **determine** should be substituted for the word **recommend** in line two.

This also requires further debate.

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

General:

Subject to the other provisions of paragraph 2.24 whenever it is practical to do so, powers, functions and the delivery of services should be allocated to the level of government closest to the people concerned.

The addition of this paragraph has been suggested by one of the participants. The formulation is somewhat ambiguous and may be in conflict with 2.24.1. The principle contained in the paragraph needs to be debated.

- 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.**



2.24.2        The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the SPR's.

2.24.3        Where it is necessary for the maintenance of essential national standards, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one SPR which is prejudicial to the interests of another SPR or the country as whole, the constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the constitution.

One of the participants suggested the insertion of the underlined words. The suggestion was that "unreasonable" be inserted before "prejudicial" in line four. We however suggest that it would be more appropriately placed as indicated.

2.24.4        The essential principles of the constitution including the fundamental rights contained therein shall apply to all organs of the state at all levels of government.

#### National Government

2.24.5        Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government.

2.24.6       Where uniformity across the nation is required for a particular function, then legislative power over that function should be allocated predominantly, if not wholly, to the national government.

One of the participants suggested the insertion of the word "legislative" in the second line. We think it would be appropriate.

2.24.7       Where minimum standards across the nation are [important] required for the delivery of public services, the power to set such standards should be allocated to the national government.

One of the participants suggested the insertion in the second line. We think it would be appropriate.

2.24.8       The determination of national economic policies, and the power to promote inter-SPR commerce and protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.

2.24.9       SPR Government

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.



There are two proposals in the alternative to the amendment in paragraph 2.24.9. The first option proposes that the words after "as" (in the second line) be deleted and be replaced by "defined in the constitution". The motivation for this amendment is that there is no point in identifying areas of a few examples only. The list of examples should either be extended or eliminated.

The second option, which applies only if the preceding proposed amendment is defeated, proposes:

- \* In the third line the deletion of "for the purpose of" and substitute this with "in respect of local government" and
- \* In the fourth line, the deletion of "aspects of health, welfare and education" and the substitution of "major aspects of health, housing, police, welfare, education and culture"

We acknowledge the shortcomings of the original wording. Debate on this matter will assist us in drafting another formulation.

#### Concurrent Powers

- 2.24.10      Where mutual co-operation is essential or desirable or where it is required [important] to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the SPR governments.

It was suggested during the debate that the word "important" be replaced with the word "required" to provide for a more objective criterion. We support this suggestion.

- 2.24.11      **In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national and SPR governments, precedence shall be given to the legislative powers of the national government.**

#### Residual Powers

- 2.24.12      **The Constitution shall specify how powers which are not specifically allocated in the constitution to the national government or to an SPR government, shall be dealt with.**

### **3. Proposed additions**

The following additional principles have been proposed by participants:

- \*      Notwithstanding the provision of any other clause, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected.
  
- \*      The independence and impartiality of a Commission for Administration, a Reserve Bank, an Auditor general and an Ombudsman shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the Civil Service.



- \* Every member of the security forces (police, miliary and intelligence) shall be required to perform his or her duties and functions and exercise his or her powers in the national interest and shall be prohibited to intentionally further or prejudice party political interest.

The inclusion of these suggested principles have not yet been debated fully.

**TECHNICAL COMMITTEE**

**ON**

**CONSTITUTIONAL ISSUES**

**COMBINED REPORTS**

**26 JULY 1993**

**EMBARGOED  
UNTIL TABLING IN THE  
NEGOTIATING COUNCIL**



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**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's 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 amendments 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.

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