

RESOLUTION ON CONSTITUTIONAL ISSUES

African National Congress

51 Plein Street Tel: (011) 330-7236 :  
Johannesburg 2001 Fax 011-330-2119 HAVING NOTED:

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1993 -06; 02 The clear linkage between constitutional principles, the constitution-making process and constitutional structures, powers and functions of SPR as apparent in every paragraph 6.3 of the Second Report of the Technical Committee on Constitutional Issues.

NEGOTIATIONS COMMISSION

IT IS RESOLVED THAT:

1 The Negotiating Council proceeds to negotiate and endeavour to agree on

TO : REGIONAL SECRETARIES the constitutional principles recommended by the Technical Committee as

set out in paragraph 2 of its Third Report, and the detailed principle dealing

with the allocation of powers to different levels of government as set out in

paragraph 3 of its Third Report.

FROM : HASSEN EBRAHIM

(Administrator) There is a need for the adoption of a Constitution for the transitional period,

the text of which is agreed to at the Multi-Party Negotiating Process:

2.1. Which shall be drafted in accordance with the constitutional principles

DATE : JUNE 02, 1993 agreed upon in so far as they may be applicable;

2.2. Which will provide, inter alia, for justiciable fundamental rights, the structures of national and regional governments and their respective

SUBJECT: RESOLUTION - 01 JUNE 1993 powers, functions and authority; and

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: 230 : As well as which will provide for the procedures relating to the  
Kindly find under cover hereof a copy of the resolution drafting and adoption of a Constitution by the elected constitution-

unanimously agreed to by the Multi-Party Negotiating Process making body.  
meeting on the 01 June 1993. As you will note the ANC - Now therefore the Negotiating Council instructs the Technical Committee on  
refers to the Transitional Constitution as the Transition to Constitutional Issues to make recommendations to it on:

Democracy Act. This is

so was the submission made to the MPNP 3.1. The powers, functions and structures of the SPR during the

and accepted. In this regard, we also attach hereto a copy of transitional period; the Technical Committee report dealing with this matter.

3.2. The constitution-making process to be followed, including the  
a v structures that need to be established for the purpose;

Please expect Bulletins Numbers 26 and 27 giving a report on  
: 3.3. The procedures to be followed in the drafting and adoption by the  
developments in due course. Multi-Party Negotiating Forum of a Constitution for the tra  
nsitional  
period;

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

(\ pages.

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The People Shall Govern!

CONFIDENTIAL

THIS REPORT IS EMBARGOED UNTIL 1200 Second Report (19 May  
ON FRIDAY 28 MAY 1993 consutunonai pnnciples and principles on SPR's in separate paragr  
aphs.

Together they constitute one body of constitutional pnnciples. Â¢

1993). For the sake of clanty we deal with general

THIRD REPORT TO THE NEGOTIATING COUNCIL ON CONSTITUTIONAL 4  
PRINCIPLES BY THE TECHNICAL COMMITTEE ON We have not yet had a response (o paragraph 3.  
6 of our Second Report. In the  
CONSTITUTIONAL MATTERS

i ces we do not intend dealing in this report with the questio t  
27 May 1993 circumstance & po question o

confederauon. How. if at all, a contederauon can be accommodateg â\200\230within

Introduction one set of constitutional pnnciples may depend on that response.

LL We were requested by the Planning Committee to develop our Secona Report : General C  
onstitutional Principles

on Constitutional Issues (19 May 1993) so as to formulate a comprehensive

set of consututional principles. and in particular principles on the powers and â\200  
\230 The constitution of South Africa shail provide for the establishment of a single

functions of regions to serve the purpose suggested by us In paragrapn 6.3 of sovereign  
state with a democratic system of government and a common South

our Second Report. Atrican ciuzenship.

We do not think that any good purpose will be served by attempting to analyse , The con  
stitution shall be the supreme law of the land. shall be binding on ail  
each of the submissions made to us in order to indicate the type of constitution organs  
of government. shall prohibit racial and all other forms of

that is contemplated by the various participants. or how they differ from one discrimin  
ation and promote racial and gender equality and national unity.

another. We have considered all the proposals put to us. and have decided that  
we can best give effect to the request from the Planning Committee by | : There shall b  
e a separation of powers between the legislature. executive and  
formulating a set of consututional pnnciples for debate in the Negouaung | judiciary, w  
ith appropriate checks and balances to ensure accountability.

Council. In formulating these pnnciples, we have drawn on the Codesa | responsiveness a  
nd openness.

documents, and on our own knowledge and experience as weil as the | -  
submissions of the participants. ; The judiciary shall be competent. independent, legiu  
mate and impartial and

A shall have the power and jurisdiction to safeguard and enforce the constitution  
The principles that we offer for debate do not accord wholly with the and ali fundament  
al rights.

submissions of any of the parties, and we appreciate that they are likely to  
meet some resistance from all of the parucipants. [t seems to us, however, : There shal  
l be representative government embracing multi-party democracy.

that areas of agreement, disagreement and possible compromise will emerge regular elect  
ions, universal adult suffrage, a common volers roll, and in

from the debate on our report, and that in the process, the participants may general, p  
roportional representation.

be able to find a solution along the lines suggested by us in paragraph 6.3 our

TECHNICAL COMMITTEE/CONSTITUTION AL SSUEM

THIRD REPORTS MAY 199) TECHNICAL COMMITTEE/CONSTITUTION AL. (SSLES

TYGRD REPORT/D MAY 1999

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Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.

Formal legislative procedures shall be adhered to by legislative organs at all levels of government.

The diversity of languages, cultures and religions shall be acknowledged.

promoted and protected.

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.

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

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.

The status of traditional leaders shall be acknowledged and recognised in an appropriate manner in the constitution. Unless provided otherwise by legislation, indigenous law shall be applied to the extent that it is compatible with the provisions of the fundamental rights contained in the constitution.

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

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TYERD REPORTS MAY 199)

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> 14 Amendments to the constitution shall require special procedures involving specified majorities.

Principles dealing with the allocation of powers to different levels of government

3.1

Government shall be structured at national, SPR and local levels.  
At each level of government there shall be democratic representation.

Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function

effectively

The powers and functions of each level of government shall be derived in the constitution. Amendments to the constitution which alter the powers, boundaries, functions or institutions of regions 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. and if the amendment concerns specific SPR's only, the approval of the

legislatures of such SPR's will also be needed. ,

The powers and functions of each level of government may include exclusive and concurrent powers, as well as the power to perform functions for other

levels of government on an agency or delegation basis.

Each level of government shall have fiscal powers which will be derived in the constitution.

A Financial and Fiscal Commission, including representatives of each of the SPR's, shall be constituted to advise the national government on the

distribution of financial and fiscal resources.

TECHNICAL COMMITTEE RECONSTITUTIONAL SSCES  
THIRD REPORT MAT 10)

Fiscal and financial allocations by the national government to SPR governments shall be made on an equitable basis after taking into account the national interest, disparities within SPR's, the advice of the Financial and Fiscal Commission, the population and developmental needs, administrative responsibilities and other legitimate interests of each of the SPR's.

The following criteria shall be applied in the allocation of powers to the

national government and the SPR governments:

#### 3.9.1 General!

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

the services.

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

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.

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In dealing with this issue we have made extensive use of the report on Constitutional Options and then implications for Good Government and a Sound Economy prepared by a group of experts which commenced largely at South Africa of different political persuasions, published in March 1993 by the Constitutional Movement.

TECHNICAL COMMITTEE/ CONSTITUTIONAL. WISEY  
THIRD REPORTS MAY 199)

3.9.1.4 Where it is necessary for the maintenance of national

standards, the maintenance of economic unity or the

maintenance of national security or the prevention of  
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action taken by one SPR which is prejudicial to the interests of another SPR or the country as a whole, the constitution shall empower the national government to intervene through legislation or such other steps as may

be derived in the constitution.

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

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.

Where uniformity across the nation is regarded as important with regard to a particular function, then power over that function should be allocated predominantly, if not wholly, to the national

government.

Where minimum standards across the nation are regarded as important for the delivery of public services, the power to set such standards should be

allocated to the national government.

TECHNICAL COMMITTEE/CONSTITUTIONAL ISSUES.  
THIRD REPORT'S MAY 1)

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.

#### 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.

#### Concurrent Powers

Where mutual co-operation is essential or desirable or where it is important to guarantee equality of opportunity or access to government service, the powers should be allocated concurrently to the

national government and the SPR governments.

#### Residual Powers

Powers which are not specifically allocated in the constitution to the national government or to an SPR government, shall vest in the national government, alternatively in the SPR governments. (This is a

fundamental issue which calls for a political decision).

TECHNICAL COMMITTEE/CONSTITUTIONAL SUBCOMMITTEE  
THIRD REPORT MAY 1971

#### Asymmetry

Certain parties have made submissions to our committee that the constitution should make provision for SPR asymmetry. Regional asymmetry may manifest itself in the following ways:

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##### Geographical and demographic asymmetry

It stands to reason that a measure of geographical and demographic asymmetry

will exist amongst SPR's. If such asymmetry becomes disproportionate and creates possibilities of economic decline or disruption of inter-regional

relationships, constitutional mechanisms could be applied to rectify the position (eg adjustment of SPR borders on a basis of consent by the people concerned and approval by the respective SPR's as well as the national

legislature).

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There can be asymmetry in the allocation of powers and functions. In the submissions to our Committee it has been suggested that SPR's may require different powers and functions depending on their location, the nature and extent of the development that has taken place in a particular SPR, and even the composition of the population. It has been suggested that asymmetry could be extended not only to powers and functions, but also to matters such as SPR citizenship, and the recognition and use of languages.

## Institutional asymmetry

There can be asymmetry in the institutions of government, i.e. different types of legislatures, different electoral systems etc. There can also be asymmetrical institutions, i.e. different institutions for the accommodation and recognition of traditional leaders. and linguistic, cultural and religious groups etc.

TECHNICAL COMMITTEE/CONSTITUTIONAL ISSUES  
THIRD REPORT (2002/2343 MAY 199)

SENT BY: ANC Â» 2- 6-93 311:554M ; 9 ANC NEG COMMISSION-27 21 4465646 s#11/11

#### 4.4 Temporal Asymmetry

SPR governments, institutions, functions and powers may be phased in at different times.

We have not dealt with asymmetry as a principle because it is not clear to us what the views

of all the parties are on this issue. The principles that we have formulated are of general

in principle and ought not to hamper a debate on asymmetry.  
Paragraph 8 on asymmetry

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Matters requiring the consideration of the Negotiating Council:

3.1 Matters such as the powers, functions and boundaries of the SPR and local governments in the interim depend on decisions to be taken by the Negotiating Council in regard to the process of transition and can only be dealt with after

such decisions have been taken.

The process of decision making with regard to the allocation of exclusive, concurrent or residual powers specifically to different levels of government, is a matter requiring political negotiation in the light of this report. The final model should be one which, inter alia, is financially viable and conducive to effective public administration, and which promotes national unity, legitimate regional autonomy and cultural diversity.

TECHNICAL COMMITTEE CONSTITUTIONAL ISSUES.  
THIRD REPORTS MAT 1)

SENT BY: ANC > 2- 9-93 :10:04AM ; ANC NEG COMMISSION= 1#23/23

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(11) Allocations by the national government to local governments shall ordinarily  
be made only via an SPR government.

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Status of bilateral decisions.

## Elections

a Date of Elections

anes Voter Identification and Registration

2.3. Voter Eligibility

2.4. Independent Electoral Commission including its powers, duties and functions.

20a. The Role of the International Community

2.6. Administration of the electoral process.

## Free Political Activity

3.1, Climate for free political activity in the TBVC and self governing areas.

i Covert operations

i i Repressive legislation

3.4. State controlled media (including those in the bantustans).

## Constitution Making Body

4.1. Composition

4.2. Constitutional principles

4.3. Special Majorities

4.4. Time Frames and deadlock breaking mechanisms

4.5. Threshold

4.6. Constitutional Panel/ arbitration

## Interim Government

Â\$.1. Legislature

1.45 Composition and Structure

1.2: Decision making procedure

## Executive

i a Composition

5.2.2. Presidency

5.2.3. Decision-making

5.3. Regional Administration

5.4. Reincorporation of TBVC areas

5.

5.

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6. Transitional Executive Council
- 6.1. Confirmation of WG3 proposals
- 6.2. Terms of reference of the Sub-Council for Defence, Law and Order and Foreign Affairs.

ds independent Media Commission

- 7.1. Composition

â\200\230Pathe Terms of Reference

8. Unilateral Restructuring

- 8.1. Economy

- 8.2. Media

- 8.3. Health/ Education/ Social welfare

- 8.4. Local Government

- 8.5. Land

9. Multilateral Negotiations

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NEGOTIATIONS INTERNAL  
COMMISSION MEMORANDUM

All Members of the Negotiations  
Commission

HASSEN EBRAHIM  
ADMINISTRATOR

Date: 18 June, 1992

Subject: NEGOTIATIONS COMMISSION  
MEETING

The Commission will be holding a meeting on Sunday morning (20 June) at 11h0000 to 13h00 on the 9th Floor in the Boardroom. It will deal with the preparations for the last week of multi-party negotiations prior to the scheduled Forum which takes place on the 25th June. It will also deal with the reports from each of the Technical Committees.

This is an important meeting. Please attend.

The Great Debate

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meets

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ee . Monday, 26 April - Tueiday, 27 April

DAY 1: Monday, April 26

08:30 - 09:h00 Registration, tea & coffee

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TIERS OF GOVERNMENT sn Min heal Sicillsicshieninigosaia

09:00 - 10:10 Central, regional & local governments: Who does what? Myre

10:10 - 11:20 Regions: Where and why? K\o\ Q. a

11:20 - 11:50 ' Tea & coffee

11:50 - 13:00 Collecting Wea Vw  
and redistributing taxes

13:00 - 14:10 Lunch

THE STATE & CIVIL SOCIETY

14:10- 15:20 -- Ensuring accountability uk { ee

15:20 - 15:50 Tea & coffee

15:50 - 17:00 Democratising security & the public service uk oe

17:00 - 18:30 Reception

UOzst'%

DAY 2: Tuesday, April 27

08:30 - 09:00 Tea & coffee

A DEMOCRATIC ECONOMY

09:00 - 10:10 Property rights & the land issue AWRinlen ft

10:10 - 11:20 What rights should be included in a bill of rights? YN ~ en

11:20 - 11:50 Tea & coffee She he ee eS

11:50 - 13:00 Opening up the economy ate Â» Ba7000 | Â¥y

13:00 - 14:10 Lunch â\200\224

RIGHTS

14:10 - 15:20 Affirmative action P\\5v0 A

15:20 - 15:50 Tea & coffee

15:50 - 17:00 Helping the poor: : 5 oe

Health, housing, education |

17:15 - 18:00 Press conference

SENT BY: ANC wetti- 5-90 3 DÂ°D0PM ; \_ ANC. NEG COMMISSION= 021 222626;# 2/ 2

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NEGOTIATIONS COMMISSION

.. TO Â°: MEMBERS OF LEGAL AND CONSTITUTIONAL AFFAIRS  
} COMMITTEE.

FROM : HASSEN EBRAHIM  
(Administrator)

DATE : May 11, 1993  
SUBJECT; NATIONAL NEGOTIATIONS CONSULTATIVE FORUM

Kindly be advised that the next forum would now take place on the 15th May and not the 8th May 1993 as indicated. It was thought that the purpose of the Commission would better be served if it was held after the NWC Lekgotla and not before. We make apology for the inconvenience caused. The meeting will be in Johannesburg. The venue of the meeting would be confirmed in due course.

Please attend.  
Ford.

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