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To : THE TECHNICAL COMMITTEE CONSTITUTIONAL AFFAIRS  
MULTI-PARTY NEGOTIATIONS' PROCESS  
WORLD TRADE CENTRE

From : DHM Gibson MP and AJ Leon MP : Democratic Party

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Re : **DEMOCRATIC PARTY RESPONSE TO THE FIFTH REPORT :**  
**CONSTITUTIONAL ISSUES (15/6/93)**

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Hereunder is the Democratic Party response to the issues and questions ventilated in the Fifth Report of the Technical Committee on Constitutional Issues to the Negotiating Council of 15 June 1993. This should be considered as the preliminary DP response in respect of the report, which we have endeavoured to make as comprehensive as possible. This response does not attempt to address all issues in detail because it is felt that the broad framework should first be agreed before all the detail is provided. Attention is also drawn to the DP submission dated 13 May 1993 to the Technical Committee on Constitutional Issues (Mem A5, Volume 1, Submissions).

Reference to the "MPNP" means the Multi-Party Negotiations' Process, currently sitting at the World Trade Centre, Kempton Park.

1. **AD PARAGRAPH 4**

**ELEMENTS OF A CONSTITUTION FOR THE TRANSITIONAL PERIOD**

1.1. **Ad Paragraph 4.1 - constitutional principles to be binding :**

All the constitutional principles which appear hereunder in respect of the constitution-making body to be established for the transitional period will be binding for the entire period.

We believe that not only must the constitutional principles bind the constitution-making body, but they must do so in a fashion which will make them inviolable and which will, in the event of a dispute, render them capable of relatively easy adjudication.

- 1.2. For adjudication purposes, we believe that a full bench of the Appellate Division of the Supreme Court of South Africa should be constituted. It is probably necessary, for the purposes of representivity and competence, to constitute a special constitutional chamber of the Appellate Division for the same purpose. However, we believe that the judges so appointed to such a chamber, if this route is acceptable, should be chosen in a transparent manner by a specially-constituted Judicial Services Commission consisting of the most senior members of the various branches of the organised legal profession in South Africa and certain senior members of the judiciary, including the Chief Justice of South Africa. The recommendations of the Commission should be made binding on the State President and the special chamber of the Appellate Division should be, in fact, operational prior to the first day of the first sitting of the constitution-making body or legislature. A failure to agree on either the formulation of such a proposal or indeed on the desirability of such a body to make the necessary appointments must then mean that the existing Appellate Division will sit to adjudicate disputes in respect of constitutional principles.

1.3. Ad 4.2.1/5.1 - the composition and functioning of the elected body :

The Democratic Party is of the view that the constitution, at any moment in time, is the only constitution then in existence. In other words, phraseology such as "interim constitutions" or "transitional constitutions" is legally and constitutionally meaningless. Whichever constitution is intended to operate for the interim or transitional period will be the only constitution in existence. Therefore, such a constitution will remain the constitution of South Africa for however long it is in place until it is amended or replaced.

Accordingly, the Democratic Party approves of the so-called "two-phase process" which is referred to in paragraph 5.1.1 of the Fifth Report, provided that the checks and balances are sufficiently strong and enduring to create a meaningful bridge between the MPNP and the constitution-making body/First Parliament (which we refer to hereafter as the "CMB").

1.4. Ad 5.1.2 - the composition and functioning of the CMB :

The Democratic Party's stated policy position is that the CMB should be vested with only constitution-making powers and that the legislative powers should remain with the present Parliament subject to various vetoes from other parties outside of it. However, the pace and nature of the process at the MPNP leaves us no option but to accept this so-called "one track" approach, ie, the combination of both the legislature and constitution-making body in one institution. In view of the fact that there is general agreement that the CMB should sit both as a constitution-maker and as a legislature, we strongly reiterate our insistence that strong, meaningful and

effective checks and balances be built in to ensure that the CMB abides by the principles agreed to at the MPNP, and that the legislature be prevented, legally, from abrogating its commitment to those agreed constitutional principles.

2. We now turn our attention to the detailed questions which are posed in paragraph 5.1.5, and thereafter, which in our view constitute a summary of the preceding paragraphs, especially paragraphs 5.1.3 and 5.1.4.

- 2.1. Ad 5.1.5 - the elected body :

Ad 5.1.5.1 : As "constitution-making" can only be given effect to through legislation, either by way of amendment to or replacement of an existing constitution, it is axiomatic that the elected body must also have constitution-making powers.

- 2.2. Ad 5.1.5.2 : We believe that the elected body should be constituted as a bi-cameral structure

*Motivation*

*It is accepted modern constitutional practice that a necessary check and balance on the activities of the one house of Parliament is another, differently composed, chamber of Parliament. This is consistent with the philosophy of modern constitutionalism. As will appear hereunder, a growing consensus is emerging in South Africa about the need for strong regional (as well as strong central) government. Therefore an upper house which represents the regions and the various regional interests of the*

*country, can serve an inclusive function in respect of the various regions of South Africa and place them at the centre of the political process. In addition, it is a very useful legislative device to confer certain specific powers on an upper house and certain other powers on a lower house, over and above their concurrent legislative functions. The dual role of the CMB as a constitution-maker and as a legislature will ensure that there is sufficient work for both chambers.*

2.3. Ad 5.1.5.3 : Not applicable.

2.4. Ad 5.1.5.4 :

2.4.1. Bi-cameralism

2.4.1.1. The lower house ("National Assembly") should be elected on the basis of universal adult franchise for South African citizens over the age of 18.

2.4.1.2. The National Assembly should be elected on the basis of proportional representation for each of the parties, with a minimum cut-off of 1% required to achieve representation therein.

2.4.1.3. The National Assembly should consist of 400 members, with 300 members to be elected from the various regions ("SPRs") of South Africa, on the basis of party lists drawn up for each SPR, and 100 members to be elected from national

lists compiled by the various political parties. The Democratic Party believes that this system should operate for the first election only. After the lapse of the CMB, the 300 SPR members should be elected from 100 multi-member constituencies, each electing 3 members to the National Assembly. An additional 100 members would be elected from a national list.

2.4.1.4. The exact allocation of seats per SPR, for the purposes of the distribution of the 300 SPR seats, will be determined by the independent electoral commission after the votes have been counted in the first election. They will be allocated to accord with the actual number of votes cast in each SPR reflected as a proportion of the total of the 300 seats.

2.4.1.5. For the purposes of the first election of the CMB, as distinct from elections for SPR legislatures, each voter should only have one ballot paper but such ballot should be counted twice: once for the national list and a second time for the SPR in which the vote is cast. (The voter should be issued with a second ballot paper for the

purpose of electing the SPR legislature. (See paragraph 5.2 below)).

2.4.2. The second chamber (the Senate)

2.4.2.1. We believe it is impractical for the Senate to be directly elected by the voters in the first election. However, thereafter the Senate should be elected by universal adult franchise and on the basis of proportional representation, with a minimum of 4 and a maximum of 9 senators for each SPR based on the number of registered voters in that SPR.

2.4.2.2. For the purposes of the first election (and for constituting the upper house of the CMB), the Senate should consist of members chosen in the following manner :

- A separate electoral college will sit for each SPR. Each such electoral college will comprise all the members of the national assembly elected from the SPR party lists plus all the members elected to serve in the regional legislature of that SPR, (which should be elected simultaneously with the election of members of the national

assembly in terms of our proposals contained in paragraph 5 below).

- Proportional representation will be used to ensure that the balance of party support reflected in the composition of each electoral college is mirrored in the Senate.
  
- Each SPR electoral college will be entitled to elect a minimum of 4 senators. Those SPRs which in the first election cast 3 times as many votes as the SPR with the smallest number of votes cast, shall be entitled to one additional senator; those with numbers of votes cast 4 times greater, to 2 additional senators; those with numbers of votes cast 5 times greater, to 3 additional senators; those with numbers cast 6 times greater, to 4 additional senators; and those with numbers of votes cast 7 times or more than 7 times greater, to a maximum of 5 additional senators.

*Motivation*

*We believe that the Senate should be representative of all the SPRs in South Africa,*



*together with their varied interests. It should also make provision to reflect, on a less strict basis than the National Assembly, the population distribution determined by the numbers of votes cast in the first election. We believe this provides a suitable hybrid between strict population representivity and the over-compensation of smaller regions by the provision of a minimum number of senators. However our proposal has the merit of not simply equalising every region regardless of the population distribution.*

2.4.2.3. Duration of the Senate

The Senate, as constituted above, shall endure for the life of the first Parliament or for 4 years, whichever is the longer period.

2.4.3. General legislative powers of the two chambers

2.4.3.1. The Senate shall have the power to introduce bills, subject to review by the National Assembly.

2.4.3.2. The Senate shall have the power to review all bills introduced by the National Assembly, subject to the following qualifications :

- (a) The Senate will not be able to reject the budget or any other money bill, and similarly may not introduce same.
  
- (b) The Senate will have special powers to approve treaties and to approve senior appointments to public service (including the defence force and the police) and the diplomatic corps, recommended by a Senior Appointments Commission of the State. In addition it will approve new appointments to the judiciary on the advice of the Judicial Services Commission (see paragraph 1.2), and approve the appointment of the ombud and the auditor-general.
  
- (c) The National Assembly will also have the power to introduce bills, subject to review by the Senate (see paragraph 2.4.3.2 above). The National Assembly shall enjoy all residual legislative and functional powers, not specifically reserved for the Senate.

(d) In respect of the abovementioned powers (which excludes constitution-making legislation and the powers, duties and functions of SPRs which are dealt with specifically below), there shall be a system of inter-house standing committees with the following specific powers and operating as follows :

- (i) the standing committees will have a multi-party character and be as representative of each house as possible;
- (ii) the members of each house will vote separately;
- (iii) the standing committee will be empowered to introduce legislation to Parliament;
- (iv) there will be one standing committee established to oversee the activities of the security forces, and one to oversee "clandestine" operations by the intelligence services;

- (v) there will be one standing committee for each department of State, which will scrutinise each budget vote for submission to Parliament, and which will have the power to summon the minister, the chief accounting officer and any other official to account for money expended during the previous financial year, and the intended expenditure during the forthcoming financial year.

2.4.4. The powers of the chambers of Parliament in respect of drafting the new constitution

2.4.4.1. In respect of the drawing of the new constitution, those sections of it which do not relate to SPRs and the Bill of Rights, will have to be approved by a 70% majority in the National Assembly.

2.4.4.2. However, once the new constitution is approved by the National Assembly, and it thereafter becomes the governing instrument of the country, a different procedure will be adopted in respect of amendments to it. We envisage a two-thirds majority in the National Assembly and

Senate, sitting separately, will be required to effect any amendments.

2.4.4.3. We believe that the any amendment to the powers, duties, functions and boundaries of SPRs, as agreed to by the MPNP, must be dealt with on a different basis: We therefore propose that any such amendment to such agreed matters will require a majority of 70% of both the National Assembly and the Senate, sitting separately, plus a majority in at least three-quarters of the SPR legislatures affected thereby.

2.4.4.4. As regards the constitutional principles agreed to at the MPNP, we believe that these must be impregnable and therefore incapable of amendment for the life of the CMB. The motivation here is that a principle is not capable of an amendment if it is agreed to by sufficient consensus at the multi-party negotiation process.

2.4.4.5. In respect of the Bill of Rights for either the transitional period, or the Bill of Rights subsequently finalised by the constitution-making body, this should only be amended with a 75% majority of both houses of Parliament sitting

separately, plus approval from 75% of the legislatures of the SPRs voting by a similar margin.

*Motivation*

*The Bill of Rights should represent the core values common to the whole society. Amendments to it should not be considered lightly, nor countenanced unless they enjoy the highest measures of popular support. The Bill must act as the individual's guardian against majoritarian impulses, howsoever composed.*

2.5. Ad 5.1.5.5 - The process of adopting a constitution and dispute resolution procedures, deadlock-breaking mechanisms and time frames

We do not believe that any deadlock-breaking mechanism or time frame should be built into the currency of the CMB except for a general limitation of its life span to a maximum period of 4 years. If no agreement is reached on a new constitution during this period, an election will have to be held and the constitution-making process will have to continue thereafter.

*Motivation*

*We know of ways to limit the legislative powers of a legislature and of ways to prescribe the manner in which it may make decisions, but we know of no mechanism by which one can compel a legislature to make decisions*

*and, more so, to compel it to make decisions within a specific time frame, outside of a general expiration of its constitutional life span.*

3. **Ad paragraph 5.2 - the composition and functioning of the National Executive**

We have taken the view that sub-paragraph 5.2.1 is dealt with in 5.2.3 as a series of specific questions/proposals, which will be addressed hereunder.

3.1. **Ad 5.2.2 - The location nature and functions of the Head of State and Executive Government :**

3.1.1. **Ad 5.2.2.1 : The election of the Head of State for the transitional period**

The President should be elected at a joint sitting of both houses of Parliament. He or she should be elected on the basis of an eliminative ballot requiring a 50% plus one majority to be duly elected.

*Motivation*

*We believe that for practical purposes for the CMB this is the only method of election which will ensure that the president enjoys the confidence of at least half the members of both houses of Parliament. We believe that after the first election and once the constitution has been finalised, both a president and a vice-president should be elected by the entire electorate of South Africa for a fixed period of 4 years.*

3.1.2. Ad 5.2.2.2 : The powers and functions to be vested in the Head of State

Before addressing this issue, we indicate that we are of the view that the President does not need to be a member of Parliament in order to qualify for election, and furthermore, should he/she be a member of Parliament at the time of his/her election, then he/she will forthwith cease to be one after his/her election. We further believe that the office of vice-president should only be instituted after finalisation of the constitution by the CMB.

3.1.2.1. The president, in addition to being Head of State, shall have no additional legislative powers or powers other than those which follow :

- (a) he/she will be commander-in-chief of the defence force and will preside over meetings of the high command of the defence force;
- (b) he/she will appoint the Prime Minister and will appoint Cabinet Ministers in the manner determined in accordance with the provisions dealt with in paragraph 3.4.1 below;



- (c) subject to the provisions of paragraph 3.4.2 below, he/she will be available to resolve deadlocks which may occur in the Cabinet;
- (d) he/she will shape foreign policy and will appoint ambassadors subject to confirmation by the Senate, in the manner prescribed above in paragraph 2.4.3.2.(b);
- (e) he/she will negotiate treaties, subject to approval by the Senate, and sign them on behalf of the government;
- (f) subject to the specific provisions of the Bill of Rights, he/she may declare states of national emergency;
- (g) he/she may proclaim referenda and plebiscites;
- (h) he/she may commute criminal sentences or grant partial or complete pardons, or declare amnesties, subject to the other provisions of the constitution and the Bill of Rights relating thereto;

- (i) he/she may confer awards, decorations and titles of honour;
- (j) He/she may communicate with the National Assembly and the Senate by message, and will annually address both houses on the state of the Nation.

3.2. Ad 5.2.2.3 - The relationship between the Head of State and the legislature and the Executive

3.2.1. The details of this inter-relationship are dealt with below when we consider the question of the Executive during the transitional period (paragraph 3.4). However, in addition to the remarks which appear hereunder, we would draw your attention to various provisions of the Namibian constitution which we believe to be apposite to this principle (Government Gazette of the Republic of Namibia No.2 - 21 March 1990). Article 40 details the Executive duties and functions. It states :

"The members of the Cabinet shall have the following functions:

- (a) to direct, co-ordinate and supervise the activities of ministries and government departments, including parastatal enterprises, and to review and to advise the President and the National

Assembly on the desirability and wisdom of any prevailing subordinate legislation, regulations or orders pertaining to such parastatal enterprises, regard being had to the public interest;

- (b) to initiate bills for submission to Parliament or to route them to Parliament having first routed them through standing committees;
- (c) to formulate, explain and assess for Parliament the budget of the State and its economic development plans and to report thereon;
- (d) to carry out such other functions as are assigned to the Cabinet by law or are incidental to such assignment;
- (e) to attend meetings of Parliament and to be available for the purposes of any queries and debates pertaining to legitimacy, wisdom, effectiveness and direction of government policy;
- (f) to take such steps as authorised by law to establish such economic organisations, institutions and parastatal enterprises on behalf of the State as directed or authorised by law;

- (g) to formulate, explain and analyse for members of Parliament the goals of foreign policy and relations with other States and to report thereon;
- (h) to formulate, explain and analyse for members of Parliament the directions and content of foreign trade policy and to report to Parliament thereon;
- (i) to assist the President in determining which international agreements are to be concluded, acceded to or succeeded to and to report to Parliament thereon;
- (j) to advise the President on the state of national defence and the maintenance of law and order and to inform Parliament thereon;
- (k) to issue notices, instructions and directives to facilitate the implementation and administration of laws administered by the Executive, subject to the terms of the constitution or any other law;
- (l) to remain vigilant and vigorous with the purpose of ensuring that the scourges of apartheid, tribalism and colonialism do not again manifest themselves in any form in a free and

independent Namibia and to protect and assist disadvantages citizens who have historically been the victims of these pathologies."

3.2.2. We strongly believe that article 41 of the Namibian constitution needs to be incorporated into the constitution for the transitional period and thereafter. It reads :

"Ministerial accountability

All Ministers shall be accountable individually for the administration of their own ministries and collectively for the administration of the work of the Cabinet, both to the President and to Parliament."

3.2.3. We also believe that article 42 of the Namibian constitution needs to be incorporated into our constitution. It reads :

"(1) During their tenure of office as members of the Cabinet, Ministers may not take up any other paid employment, engage in activities inconsistent with their position as Ministers, or expose themselves to any situation which carries with it the risk of a conflict developing between their interest as Ministers and their private interests.

(2) No members of the Cabinet shall use their positions as such or use information entrusted to them confidentially

as such members of the Cabinet, directly or indirectly to enrich themselves (or their families)."

3.3. Ad 5.2.2.4 - Replacement and removal of the President

3.3.1. Should the President cease to hold office for any reason during the life of the CNB (either by way of death or resignation or removal), then the successor President shall be elected in exactly the same manner as the first President was elected.

3.3.2. The President may only be removed from office as a result of an impeachment procedure which will culminate in a 70% vote in favour of impeachment by members of both houses sitting together.

3.4. Ad 5.2.3 - The Executive during the transitional period

3.4.1. The Cabinet should consist of 20 members. For the duration of the life of the CMB, or for 4 years, whichever is the longer period, the following provisions shall apply :

3.4.1.1. the Cabinet will be appointed by the President who will be obliged to offer appointments to the parties elected to the National Assembly in direct proportion to their representation therein, provided that this will not apply to parties which are allocated fewer than 5% of the seats in the National Assembly;

- 3.4.1.2. no party will be obliged to accept seats in the Cabinet or to serve therein;
- 3.4.1.3. each individual member of the Cabinet will be appointed by the President acting on the advice of the leader of the party in the National Assembly which is entitled to the Cabinet seat/s;
- 3.4.1.4. the allocation of specific portfolios will be designated by the President acting on the advice of the Prime Minister and in consultation with the leader of the party in the National Assembly whose member is appointed to such portfolio;
- 3.4.1.5. the Prime Minister will be appointed by the President from the ranks of the Cabinet;
- 3.4.1.6. the President shall be obliged to terminate the appointment of any member of the Cabinet (including the Prime Minister) if the National Assembly by a majority of its members resolves that it has no confidence in that Minister;

However, for the period described above, the President will be obliged to appoint a successor Minister from the ranks of the qualifying party on

the recommendation of the party leader concerned. This will also apply in the event of the death or resignation of a member of the Cabinet;

- 3.4.1.7. provision should also be made for the appointment of deputy ministers, who will not be serving members of the Cabinet and who need not be members of either house of Parliament. However, the maximum number of deputy ministers permissible, at any one time, will be restricted to 10, that being one half of the total number of possible Cabinet Ministers, and they will be appointed in a manner similar to the method used in the appointment of the members of the Cabinet.

*Motivation*

*We believe that the foregoing is the best possible compromise aimed at encouraging the inclusion of all parties with meaningful electoral support in the country, in the governance of South Africa. This attempt at inclusivity can never override the basic principles of parliamentary democracy and we believe that the checks and balances and provisions proposed above, will enable Parliament to exercise a democratic rein over the Executive while ensuring that the Executive is able to*



*function within the bounds of the constitution and within the spirit of the agreement arrived at by the MPNP.*

3.4.2. The decision-making process in the Cabinet during transition

In respect of decision-making in the Cabinet the following procedure shall be adopted :

3.4.2.1. Save in respect of the budget and the other money bills, the Prime Minister, who will chair every meeting of the Cabinet, will assess consensus on any agenda item at the Cabinet meeting. If there is dissent within the Cabinet, and any Minister requests a vote, then the particular matter shall be put to a vote. A two-thirds majority of the Cabinet Ministers present and voting shall constitute "sufficient consensus" for a decision to be taken on any particular item or aspect of legislation and any member who dissents therefrom shall be entitled to reserve his/her position and publicly declare his/her dissent.

3.4.2.2. In respect of the budget and monetary bills a simple majority of the Cabinet Ministers present and voting shall be sufficient to achieve consensus.

3.5. Ad paragraph 5.2.4 - the constitutional relationship between the Executive and legislature during the transitional period

3.5.1. Subject to the Executive being accountable to Parliament in the manner prescribed, there shall be a maximum separation of powers and functions between the legislature, the Executive and the judiciary.

3.5.2. Assent to legislation

Refer to paragraphs 2.4.3 and 2.4.4 above.

3.5.3. The accountability of the Executive to the legislature

Refer to paragraphs 3.2 and 3.3 above.

3.5.4. The appointment of Ministers

Ministers may only be appointed from the elected ranks of the legislature provided that, for the purposes of this provision, elected members shall include members of the Senate.

3.5.5. The initiation of legislation

Draft legislation may be initiated by ordinary members of the legislature, provided that such private member's legislation is first approved by a special parliamentary committee charged with approving private member's parliamentary legislation.

3.5.6. Right to address Parliament

The President may address a session of parliament (joint or several) at any time of his choosing, provided he gives proper notice thereof. Ministers will be regarded as ordinary members of Parliament, save and except when they are introducing legislation, when special provisions will apply to their time allocation and related matters.

4. Ad paragraph 5.3 - the judicial function under the constitution for the transitional period

4.1. Ad 5.3.1 - how should the judiciary be appointed?

Members of the Appellate Division, and members of the constitutional chamber of the aforesaid division, shall be appointed on the recommendation of a Judicial Services Commission as contemplated in terms of paragraph 1.2 above, subject to the consent of the Senate. Existing members of the Appellate Division of the Supreme Court of South Africa shall be deemed to have been appointed in the aforesaid manner if their appointment occurred prior to the introduction of this constitution.

Members of the Provincial and Local Divisions of the Supreme Court and the Magistracy - appointed after the introduction of this Constitution - shall also be appointed by the Judicial Services Commission or its sub-committees, but shall not be subject to the approval of the Senate. Existing members of the Supreme Court and lower courts shall be deemed to have been appointed in terms of the procedure detailed in this paragraph.

4.2. Ad 5.3.2 - Powers of the judiciary in respect of constitutional interpretation under this head

4.2.1. The judiciary, in principle, should have jurisdiction to decide issues emanating from the provisions of the constitution. It is our view that the question of determining the fidelity, or otherwise, of legislation to the binding constitutional principles of the MPNP should be determined by the Appellate Division in the manner set out in paragraph 1.2 above. In respect of all other constitutional issues, including the conformity of legislation to the Bill of Rights, this should be determined by the Provincial Regional or Local Divisions of the Supreme Court, in the first instance, with a final appeal lying to the Appellate Division or a special constitutional chamber thereof.

4.2.2. Ad 5.3.3 - Additional judicial structures created to adjudicate constitutional matters

Refer to paragraph 4.2.1 above.

4.3. Ad 5.3.4 - The creation of a special constitutional court

See the comments made in respect of paragraph 4.2.1 above.

5. AD PARAGRAPH 6 - OUTSTANDING MATTERS : SPR'S

5.1. Attached hereto is the Democratic Party's submission to the technical committee on constitutional issues to the Negotiating Council, annexed marked "Annexure A".

- 5.2. In addition thereto, it is our view that separate ballot papers should be issued on polling day for the election of the CMB to enable separate votes to be cast for members of the SPR legislatures.
- 5.3. Generally, each SPR legislature shall have the same number of members as the number of the National Assembly members elected to the CMB from SPR party lists, provided that each SPR legislature shall consist of a minimum of 25 members and a maximum of 75 members.

Dated at JOHANNESBURG this 9th day of July 1993.

# DEMOCRATIC PARTY SUBMISSION TO THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL

(Refer to Fourth Report dated 3 June 1993)

## TRANSITIONAL ARRANGEMENTS FOR SPR'S

### 1. TIME PERIODS INVOLVED

#### Pre-Transition Period:

Effectively this period extends from the present to the date of an election for a constitution-making body and the subsequent formation of such constitution-making body/Parliament and government of national unity.

#### The Transition Period:

The period between the election for a constitution-making body/ Parliament and the adoption of a new constitution by that body.

### 2. INSTITUTIONAL FRAMEWORK

During the pre-transition period present governments will be in place, but if the formation of a Transitional Executive Council (TEC) is approved, substantial sections of government will be put under the supervision of the TEC and its various sub-councils. One of the sub-councils will be the Sub-Council on Regional and Local Government. According to the Fifth Report of the Technical Committee on the Transitional Executive Council, the said sub-council will have the power to "set up committees to assist it in the exercise of its power and functions".

During the transition period, an elected constitution-making body, doubling up as a parliament, will be in place on the national level. On SPR level, the Fourth Report of the Technical Committee on Constitutional Issues submits two models of interim SPR's:

- a) "The first envisages the establishment of interim regional administrations within existing provincial boundaries for the purpose of phasing out apartheid structures, rationalising existing administrations and ensuring the provision of services in the transitional period.
- b) The second contemplates the establishment of fully fledged transitional regional governments within boundaries demarcated for the purposes of the elections, and with elected legislative executive structures".

### 3. POLICY

The Democratic Party believes that fully fledged SPR's<sup>1</sup> with constitutionally entrenched powers and functions, separate elected political authorities and separate administrations should be created at the earliest opportunity. We thus fully support alternative (b) referred to above.

The Democratic Party believes that the following policy aims should guide the transition from current structures to fully-fledged SPR's:

- 3.1. Maximum powers and functions should be devolved to SPR's or their precursors at the earliest opportunity. At the same time, maximum powers should be devolved to local government structures, taking cognisance of available capacity at local government level, as well as any interim arrangements being generated at local government level;
- 3.2. Workability and practicability;
- 3.3. Ensuring the uninterrupted delivery of social services;
- 3.4. The accommodation of the plurality of administrative procedures and the integration of the diverse administrative systems currently in existence, into coherent structures;
- 3.5. Regional bureaucracies should be minimised, and local government structures should be strengthened.

### 4. REGIONAL BOUNDARIES

On 28 May 1993 the Negotiating Council of the Multi-Party Negotiating Process (MPNP) appointed a commission on the demarcation/delimitation of regions. The commission has declared its intention to submit a report to the Negotiating Council by the end of July. It can thus be assumed that regional boundaries will be set within the next two to three months.

### 5. EXISTING STRUCTURES

The following structures/regional governments are currently in existence within the boundaries of greater South Africa:

- 5.1 Four so-called independent states (TBVC states)

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<sup>1</sup>The Democratic Party favours full Federal States with entrenched powers. The powers which we believe should be exercised on SPR level, are set out in Annexure A.

- 5.2 Six self-governing territories
- 5.3 Four provincial administrations
- 5.4 An existing co-operative structure in Natal-Kwazulu, the Joint Executive Authority, as well as proposed Joint Executive Structures to be created in terms of the Joint Administration of Certain Matters Act and the Regulation of Joint Executive Action regarding Certain Land Act, passed by Parliament in June this year.
- 5.5 Multi-lateral structures existing between the SATBVC states, as administered by SECOSAF.

The Technical Committee on Constitutional Issues of the MPNP currently works on the assumption that the TBVC States and the self-governing territories will have been reincorporated into South Africa at the time of the coming into operation of the constitution for the transitional period.

## 6. PROPOSALS FOR TRANSITIONAL ARRANGEMENTS

Throughout the pre-transition and transition periods, administrative and political responsibility at SPR level should, as far as possible, go hand in hand.

### 6.1 Pre-Transition Period:

The Democratic Party bases its proposal regarding transitional arrangements during this period on the following assumptions:

- (a) A TEC will be formed, will have a Sub-Council on Regional and Local Government, which Sub-Council will have the power to form sub-committees. Further, that the TEC will have the powers and functions in relation to regional and local government as set out in the Fifth Report of the Technical Committee on the Transitional Executive Council, including those powers set out in Addendum A to the said Fifth Report. (Powers regarding proposed legislation and executive action by any participating government or administration.)
- (b) That the TBVC States and self-governing territories will be re-incorporated de jure on the day of the election for the constitution-making body.

The powers referred to in (a) above, would require careful supervision by the Sub-Council of the TEC. As the transitional period will be particularly volatile and liable to instability, it is proposed that a sub-committee of the Sub-Council of the TEC on Regional and Local Government be appointed for each of the TBVC states, each of the self-governing territories, each of the four provincial administrations, and that the sub-committee for Kwazulu and sub-committee for Natal jointly supervise the JEA. Similar arrangements can be made for other joint executive structures to be created.



These sub-committees should be constituted by members of the political parties represented on the TEC, provided that the members of any particular sub-committee should be representative of the most important political parties of that particular territory or state or province. Moreover, the secretary to the sub-committee should be the most senior government official of the territory, province or state concerned.

These sub-committees should also supervise the rationalisation of the SPR administrations into administrative authorities for each of the SPR's demarcated in terms of 4 above.

In addition the DP suggests that the possibility should be considered of establishing functional (as contrasted with area-bound) sub-committees of the Sub-Council on Regional and Local Government to oversee the rationalisation of the delivery of social services e.g. Health, Welfare and Education, on SPR level.

It is further suggested that the Commissions for Administration of the central government, the self-governing territories and the TBVC states should begin meeting together as soon as possible under the supervision of a sub-committee of the Sub-Council on Regional and Local Government with a view to facilitating the rationalisation of services.

Government administration on SPR level should be rationalised as soon as:

- SPR's are demarcated, and
- the Transitional Executive Council is installed, and
- regional powers and functions are known and agreed to by the MPNP.

## 6.2. Transition Period

The DP believes that:

- 6.2.1 The constitutional principles that will apply to, as well as the powers and functions of SPR's during the transition period, should be decided upon by the MPNP;
- 6.2.2 Such principles, functions and powers should be embodied and written into the constitution for the transition period together with other checks and balances, including a Bill of Rights;
- 6.2.3 Legislatures with such original legislative powers as decided in terms of 6.2.1 should be elected for each of the SPR's for the transition period, and the respective executives of the SPR's should be drawn from such elected legislatures;
- 6.2.4 Transitional arrangements at national level should, as far as possible, be mirrored on SPR level in respect of, inter alia;

- 6.2.4.1 SPR constitutions for the transition period, provided that such constitutions shall be compatible with the national transitional constitution;
- 6.2.4.2 Governments of "national unity" at SPR level;
- 6.2.4.3 Powers given to SPR legislatures, in conjunction with the national constitution-making body, to change SPR constitutions with a requisite majority.

SPR legislatures should be elected on the same day as representatives to the constitution-making body are elected. It is important that voters be given a separate vote on national and on SPR levels, as it is very likely that some voters may wish to support different political parties on the national and SPR levels respectively. This would imply that each political party would have at least a national list of candidates and a list of candidates for each of the SPR's which that political party wishes to contest.

From the votes cast for political parties on SPR level, there can be constituted, on a proportional representation basis:

- (a) SPR representatives who are full members of the national Transitional Parliament and constitution-making body, and/or;
- (b) SPR representatives who are members of the Transitional Parliament sitting as the constitution-making body, or only when sitting as a national legislature; and/or;
- (c) an upper house with equal legislative powers, and/or;
- (d) SPR legislatures, doubling up as constitution-making bodies for their respective SPR's, subject to 6.2.4.1 above.

*The DP firmly believes that:*

1. *SPR representatives who are full members of the national transitional parliament and constitution-making body should be elected (alternative (a) above);*
2. *In addition, separate SPR legislatures, doubling up as constitution-making bodies for their respective SPR's, should be elected on the same day as the national transitional parliament (alternative (d) above).*

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## ANNEXURE A

The Democratic Party believes that the federal or central government should exercise only those powers essential to the national interest. All other powers should be exercised by the SPR/state and local government.

The state governments could, inter alia, handle the following powers:

- Health services
- Local government
- licensing
- Town planning
- Management of urbanisation
- Housing
- State taxation
- Nature conservation and environmental services
- Tourism promotion
- Regional development (rural and industrial)
- Agriculture
- Forestry
- Manpower
- Roads
- Education
- Culture
- Police
- Prisons
- Administration of Justice
- Gaming
- Land settlement.