

**PROCEDURES TO BE FOLLOWED IN THE DRAFTING AND ADOPTION BY
THE MPNP OF A TRANSITIONAL CONSTITUTION**

1. Background

In the *Draft Resolution on Constitutional Issues* presented to the Negotiating Council by the Planning Committee on 1 June 1993, the following paragraph, which was supported by a number of participants, appeared:

- 2. 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 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 powers, functions and authority; and
 - 2.3 ... which will provide for the procedures relating to the drafting and adoption of a Constitution by the elected constitution-making body.

Our understanding the instruction in terms of paragraph 3.3 of the Draft resolution (which, as part of paragraph 3, was adopted unanimously by the Negotiating Council) is that we must proceed on the premise that the process and constitutional structure envisaged in paragraph 2 of the draft resolution (quoted above) may meet the approval of all participants when the details of such process and structure have been developed.

2. The development and formalisation of a transitional Constitution

In terms of the thinking reflected in the draft resolution of 1 June, the text of the transitional Constitution should emerge from the cumulative development of political consensus within the MPNP.

The exact formulation of different components of the text of the transitional Constitution will be developed within the framework of the instructions of the relevant Technical Committees appointed by the Negotiating Council, and it will be co-

determined by the work of other institutions such as the Commission for the Demarcation of Regional Boundaries and the Independent Elections Commission.

In view of the fact that the MPNP does not have legislative powers, the transitional Constitution will have to be adopted formally by Parliament. It should however be clear that all parties participating in the MPNP that are also represented in Parliament, will be bound by the agreement concerning the precise wording of the transitional Constitution. The implication is therefore that no amendments to the agreed text will be adopted by Parliament without the concurrence of the MPNP. This would further mean that the final text agreed upon, will have to conform to all the technical requirements of a draft Bill.

3. Elements of a transitional Constitution

Despite the fact that the constitutional principles enunciated in our Third Report are primarily designed to be incorporated in the transitional Constitution in a manner that, by means of their justiciability, will bind a constitution-making body established by the transitional Constitution, the principles should also serve as a guideline for the design of the transitional Constitution.

In the development of the transitional Constitution, agreement should in our view be sought systematically. For this purpose it is recommended that the elements of the transitional Constitution be considered in the order set out below. We propose to develop draft texts dealing with the elements falling within our mandate in sequence.

3.1 *The composition and functioning of the national legislature.* Components of this element of the transitional Constitution will include:

3.1.1 The composition of the legislature as constitution-making body, its election and its procedures.

3.1.2 The composition of the legislature as national law-giver, its election and its procedures.

- 3.2 ***The composition and functioning of the national executive.*** Considerations under this heading will include:
- 3.2.1 Political participation in the executive.
 - 3.2.2 The location and nature of the powers and functions of the Head of State.
 - 3.2.3 The location and nature of the powers and functions of government and administration.
 - 3.2.3 The constitutional relationship between the executive and the legislature.
- 3.3 ***The location of the judicial power, the composition of the judiciary and the nature of the judicial function.*** Matters to be addressed in this respect will include:
- 3.3.1 Adjudication of the provisions of the transitional Constitution, including the protection of fundamental rights and adherence by the constitution-making body to the constitutional principles.
 - 3.3.2 The appointment of judicial officers.
 - 3.3.3 Continuity of the judicial function.
- 3.4 ***Fundamental Rights.*** This element of the transitional Constitution should, to a large extent, be the product of the work of the Technical Committee on Fundamental Rights during the Transition.
- 3.5 ***Powers, functions and structures of SPR's during and after the transitional period.*** Regarding the powers and functions of SPR's during the transition, reference should be made to our Fourth Report. In addition to the matters addressed in the Fourth Report, and concerning SPR structures, the following will have to receive consideration:

- 3.5.1 Consolidation of the legislative and executive powers and functions within a SPR.
 - 3.5.2 The location of the legislative and executive functions and powers of a SPR.
 - 3.5.3 SPR representation in national institutions.
 - 3.5.4 Method and procedure for the establishment of SPR structures in a "final" dispensation.
- 3.6 *Other matters, structures, procedures and arrangements.* These will include:
- 3.6.1 A preamble.
 - 3.6.2 National symbols and official languages.
 - 3.6.2 Finance.
 - 3.6.3 Other institutions (eg. an Ombudsman, a Fundamental Rights Commission, etc.)
 - 3.6.4 General and transitional provisions.
- 4. Elements of a transitional Constitution requiring priority consideration at the MPNP**

In order to facilitate the expeditious production by the Technical Committee of draft texts of sections of the transitional Constitution, we request the Negotiating Council to give consideration to the following issues as a matter of priority:

- 4.1 Should the national legislature be composed unicamerally or bi-camerally?
- 4.2 Should the transitional Constitution provide for multi-party participation in the national executive?

- 4.3 Should a Constitutional Court be established by the transitional Constitution?
- 4.4 Should the legislative and executive structures of the SPR's be elected or appointed?