

**THE FOURTH REPORT OF THE TECHNICAL COMMITTEE ON
CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL
3 JUNE 1993.**

1. Introduction

1.1 The process of transition contemplated by the Resolution submitted by the Planning Committee to the Negotiating Council on 1 June 1993 requires agreement to be reached by the Multi-Party Negotiating Forum on:

1.1.1 General Constitutional Principles

1.1.2 A constitutional principle on the allocation of powers to different levels of government

1.1.3 A constitutional framework which makes provision:

1.1.3.1 For the election of a Constitution Making Body which will adopt a constitution;

1.1.3.2 For government at national, regional and local levels during the period between the election for a constitution making body, and the adoption of a new constitution by that body - the transitional period;

1.1.3.3 For the establishment of structures for national, regional and local government, the powers that each level of government will have, the way each will function and take decisions during the transitional period, and the manner in which the different levels of government will relate to one another.

- 1.2 The Resolution requires us to make recommendations to the Negotiating Council on:
 - 1.2.1 The powers, functions and structures of the SPR during the transitional period;
 - 1.2.2 The constitution making process to be followed, including the structures that need to be established for that purpose;
 - 1.2.3 The procedures to be followed in the drafting and adoption by the Multi-Party Negotiating Forum of a constitution for the transitional period;
 - 1.2.4 The procedure to be followed thereafter in the drafting and adoption of a constitution by an elected constitution making body.
- 1.3 The issues which we have to address are once again inter-related and the tension which we have previously identified between decisions to be taken by the MPNP, and decisions to be taken by the Constitution Making Body is likely to arise at each stage of the process.
- 1.4 In this report we will address the powers, functions and structures of the SPR during the transitional period. We will do this in the context of our previous reports and in the knowledge that decisions taken in relation to the SPR during this period, have a bearing on the constitution making process as a whole, and on the functioning of the elected Constitution Making Body.
- 1.5 The need to make provision for a legal framework to regulate SPR government between the adoption of a constitutional framework by the MPNP, and the adoption of a new constitution by the elected Constitution Making Body cannot be questioned. The nature of that framework depends, however, to some extent upon the way in which the transitional framework is conceptualised. We deal with this later in our report.

2. Assumptions regarding the constitution-making process and the establishment of regional government

To enable us to formulate concise suggestions regarding the powers, functions and structures of SPR's during the transitional period, we have to make certain assumptions relating to the constitution making process:

2.1 Due to the variety of structures at present in existence (in particular the Provincial Governments, the TBVC states and the Self-governing Territories), various scenarios are possible depending upon the continuation or not of those, or some of those structures when a transitional constitution comes into effect.

For the purposes of this Report we therefore assume that:

- (a) **Transkei, Bophuthatswana, Venda and Ciskei will have been reincorporated into South Africa at the time of the coming into operation of the transitional constitution;**
- (b) **The operation of the constitutional legislation underlying the institutions of the Self-governing Territories (Act 21 of 1971) and related measures will have ceased at the time of the coming into operation of the transitional constitution.**

2.2 The variety of existing regional and second-tier administrations will not be capable of instant rationalisation, whatever geographical or structural form the transitional regional dispensation may take. Personnel and infrastructures of each of the existing administrations will have to be taken into consideration in the process of inevitable rationalisation.

We therefore assume that the transitional constitution will make provision for the consolidation of the *political* authority over all the existing administrations and the infrastructure within each SPR established for the period of transition, and that the greatest measure of continuity of

employment and services will be ensured during the process of rationalisation.

3. The different approaches to SPR's in the transitional period

3.1 Broadly, two models of interim SPR's have been proposed:

3.1.1 The first envisages the establishment of interim regional administrations within existing provincial boundaries for the purpose of phasing out apartheid based structures, rationalising existing administrations and ensuring the provision of services in the transitional period.

3.1.2 The second contemplates the establishment of fully fledged transitional regional governments within boundaries demarcated for the purposes of the elections, and with elected legislative and executive structures.

3.2 These models have implications for the divisions of powers between national government and SPR's in the transitional period, the structures and composition of those SPR's and the effective powers of an elected CMB.

3.3 The two models overlap to the extent that they both envisage the reconstruction and rationalisation of existing second tier structures of government, an agreed distribution of the function of government between the national and regional levels in the transitional period, and the adoption of a final constitution by an elected Constitution Making Body.

3.4 No matter how the transition is conceptualised, three matters are clear:

- * First, that the framework will have to make provision for effective regional administration during the transitional period.

- * Secondly, that this will have to be done in way which has regard to the regional authorities (including the TBVC states), which may be in existence when the new arrangements are implemented.
- * And finally, that this must all be done in way which is compatible with the powers and functions of the elected Constitution Making Body.

4. **The allocation of powers to SPR's during the transition**

- 4.1 The process of the allocation of powers and functions between different levels of government is always a complex task. It is particularly difficult to undertake this task for a transitional period, when the nature of the final constitutional order has not been settled.
- 4.2 It would be more appropriate in these circumstances to have a flexible allocation of powers, which at SPR level could be exercised subject to the supervision of the Constitution Making Body and a broad based government of national unity. If this were to be done, the distinction in the emphasis in the two models to which we have referred between administration on the one hand and government on the other could be bridged.
- 4.3 As long as the demarcated boundaries are broadly acceptable, a way forward could be the acceptance of a model in which:
 - 4.3.1 Provisional regions are established in accordance with the demarcated boundaries;
 - 4.3.2 Provisional regional authorities are established on the basis of the electoral results within such regions;
 - 4.3.3 Powers consistent with criteria such as those contained in our Third Report are vested in the Provisional Regional Authority;
 - 4.3.4 Such powers are stated in general terms and are made subject to the supervision of the Constitution Making Body.

4.4.4 This would enable the foundations for SPR governments to be established and the necessary rationalisation to be undertaken, without finalising the precise boundaries of the SPR's and the precise areas of competence of the different levels of government. Those tasks would be left to the Constitution Making Body to accomplish within the framework of the constitutional principles and the detailed principle dealing with the allocation of powers to different levels of government.

5. Suggested allocation of powers and functions of SPR's during the transition

With reference to the criteria to be applied in the allocation of powers between national and SPR governments set out in paragraph in 3.9 of our Third Report, it is our view that during the transition SPR Governments could be entrusted with powers pertaining to the following functional areas, within the framework described in paragraph 4:

- 5.1 The imposition of SPR taxes
- 5.2 Appropriation of revenue
- 5.3 Health services
- 5.4 Welfare
- 5.5 Education
- 5.6 The environment
- 5.7 Local government
- 5.8 Town planning
- 5.9 Tourism and recreation
- 5.10 Agriculture
- 5.11 Public media
- 5.12 Public works and roads
- 5.13 Traffic control
- 5.14 Local policing and law enforcement
- 5.15 Casinos, racing and gambling

- 5.16 Transport
- 5.17 Cultural affairs
- 5.18 Traditional authorities
- 5.19 Protection services
- 5.20 Markets and pounds
- 5.21 Fish and game preservation

The allocation of specific elements of these functional areas to SPR's and other levels of government requires expertise in the field of public administration. Such detailed allocation should be done at the time of the drafting of the transitional constitution.

6. Structures of the SPR's during the transitional period

The exact structures of the SPR's are matters to be negotiated and agreed upon. However, these structures, including the form of regional government, should be democratic and in accordance with the Constitutional Principles as developed in our previous Reports.

7. Outstanding matters

We will deal with the other matters set out in paragraph 1.2 in subsequent reports.