

MEMO

INTRODUCTION

The Constitutional Committee met on Friday 7 August 1992 to consider and formulate its position and recommendation on the issue of regions. This matter has been discussed at numerous previous meetings and this document represents the final position arrived at. All positions were arrived at unanimously, unless otherwise stated.

The Constitutional Committee considered regional demarcation and related matters in relation to the following:

1. elections;
2. regional government during the period of transition; and
3. proposals for regions to be put forward as part of the ANC's constitutional proposals at the Constituent Assembly.

These matters should be clearly separated.

1. DEMARCATIION OF REGIONS FOR PURPOSE OF ELECTIONS

The proposal that half the seats in a Constituent Assembly be allocated to regions implies that elections cannot take place until such regions have been demarcated. The Constitutional Committee is of the view that if we are to proceed with regional lists, then the provincial boundaries as at 1910 (excluding Walvis Bay) would be the only acceptable option.

To accept any other demarcation of regions for purpose of elections will create serious problems namely:

- a) The sovereignty of the Constituent Assembly will be undermined.

Any demarcation will inevitably have to be accompanied by the installation of regional governments in the demarcated regions. Whilst in theory it may be transitional, in practice because of the impact thereof, they would be virtually permanent. It would be difficult if not impossible for the Constituent Assembly to effect any change.

- b) To demarcate new regions prior to the elections will cause considerable delay. It will mean elections will have to wait until demarcation has taken place. This process can take a very long time - even years. There can therefore be no certainty as to when elections can take place.

The advantage of the provincial boundaries lies in the fact that they already exist and will cause the least practical problems in implementation as well as the least inconvenience and upheaval. Furthermore the use of the provincial boundaries will cut out any delay in elections.

2. DEMARCATION OF REGIONS FOR PURPOSE OF REGIONAL GOVERNMENT DURING THE TRANSITIONAL PERIOD

The Constitutional Committee has noted the two phase period of transition which seems to be likely. Phase I seems to be the preparatory stage during which the playing field is levelled and elections occur. Phase II of the transition is the period from the time of elections until the Constituent Assembly has completed its work and the first democratic government installed. The question is what does the ANC say about regional government during these two phases. The Constitutional Committee considered the issue of demarcation of regions as well as functions and powers during this period.

In relation to the above the Constitutional Committee believes that during this period the only viable option is to adopt the provincial boundaries as at 1910. Nothing must be done to undermine the sovereignty of the Constituent Assembly. It must also be borne in mind that transitional government (Phase II) will be in existence whilst the Constituent Assembly is doing its work. The Constituent Assembly will be seriously undermined if its hands are tied or if conflict developed between it and the interim regional governments with regard to issues being discussed at the Constituent Assembly. It must be remembered that some forces may seek to use regional structures for purposes of mobilisation.

With regard to interim regional government, the Constitutional Committee is of the view that its powers and functions should be clearly, specifically and narrowly defined. The central government should always have concurrent and overriding powers. Powers and functions should be similar to those granted to provincial councils under the old union constitution eg licences, health, roads, traffic matters, horse racing, aspects of housing, aspects of culture, libraries and museums.

The issue of fiscal powers is extremely important and they must be strictly limited to matters arising from the abovenamed functions. Under no circumstances whatever, should it be agreed that income tax or value added taxes etc be removed from the hands of central government. The existence of separate state taxes and separate city taxes has caused severe problems in the United States. It is impossible in the US to introduce any uniform system of taxation. The German model is much better, in that central government is responsible for collection of taxes as well as for equalisation.

The following further issue must also be noted:

The tricameral administration as well as the various homeland administrations (including TBVC) should be and can easily be organised within the framework of the provincial boundaries. Reincorporation must be taken as given and that process must begin in Phase I of transition.

3. ANC PROPOSALS FOR REGIONS TO BE PUT TO THE CONSTITUENT ASSEMBLY

This issue must be clearly separated from issues discussed under 1 and 2 above. In this regard the ANC document on regions prepared by the Constitutional Committee should be adhered to.

As to powers, the same proposals set out above should be incorporated. It is also recommended that the ANC should propose the establishment of a reincorporation commission, so as to ensure the harmonious reincorporation of the homelands. The House of Assembly administration can be used as a basis for reincorporation of all the administrations into a single national administration. Basically the provincial administrations can also be used as the basis for administration in the various regions. Some adjustments will however be necessary.

SHOULD THE REGIONAL (PROVINCIAL) GOVERNMENT IN THE INTERIM PERIOD BE ELECTED OR APPOINTED?

The question arose whether in the transition period there should be an elected Council plus an Executive Committee and Administrator or whether there should be a Regional Executive Committee appointed by Central Government.

a) An appointed Executive Committee

It is felt that we should not give regional/provincial government undue stature during the period of transition, so as to reduce the possibility of regional mobilisation against the Constituent Assembly. It is suggested that the Regional Executive Committee be appointed by the National Interim Government.

b) An elected Council

There was no unanimity on this question. There is a view that there should be an elected Regional Council with elections taking place simultaneously with the elections for the Constituent Assembly. With regard to the Regional Executive Committee three options exist:

- 1) The National Interim Government appoints the Administrator and his/her Regional Executive Committee.

- 2) The Administrator is elected by the Regional Council and he/she then appoints members of the Executive Committee.
- 3) The Regional Executive Committee is appointed on a proportional basis with parties having representation in accordance with the number of seats which they have won in the region.

**CAPE TOWN**  
**27.08.92**

## LOCAL GOVERNMENT, THE CONSTITUTION AND NEGOTIATIONS

### 1. INTRODUCTION

- 1.1 Local government - the provision of services at the level which most intimately and deeply affects individuals - will be one of the most important battle-grounds during the constitutional debate.
- 1.2 The debate about 'participatory democracy', which will be one of the rallying slogans of the National Party's policy document to be adopted in September will obscure the basic premise of the regime's proposals which is that at this level, what have been called 'community-sensitive' functions (by the Thornhill Report in 1990) such as welfare, education and hospital services and other matters affecting 'community life' must be administered by the 'community' at the local level.
- 1.3 The proposals of the National Party concerning local government (Rapport, 25 August 1991) are vague and incomplete but it would not be wrong to say that they are premised on a continuation of the effects of the Group Areas. The electoral system may be different from the national system of proportional representation, it is suggested, but could be based on the 'ward' system which will result in a geographical or territorial use of the present areas demarcated by apartheid. It appears that although tenants would be able to vote, the interests of registered property owners 'should be taken into account. Most significantly, 'Neighbourhood Committees' are proposed, although this is not a finalised proposal to give effect to matters which affect such a neighbourhood 'most directly', a revamped version of 'own affairs'.
- 1.4 In order to understand the background to these proposals, we must refer them to the constitutional model which has been in the process of preparation for some time and whose principal features have been represented in the Rapport leak and in the speeches of President de Klerk, Dr Viljoen and the Thornhill report on local government. It is to these basic assumptions that we must turn.

### 2. GOVERNMENT'S CONSTITUTIONAL PARADIGM

- 2.1 The Rapport disclosure begins with the 'key conception' which is 'participatory democracy'. In normal democracies, this concept refers to the right of individual citizens to influence policy formulation, for the government of the day to be receptive to the demands of the citizen and to enable citizens to complain about

infringements of their rights. In the language of the present government, the concept undergoes changes. Their view is that the majority party must not govern alone but that all parties with minimum support must be enabled to govern at every level of government which means at central, regional and local level.

- 2.2 This concept of 'participatory democracy' is what President de Klerk earlier called 'power sharing', the concession of a role to the representatives of people previously disenfranchised but without 'surrender' of power, an emotive dismissal of the majority principle.
- 2.3 In January 1991, the Bureau of Information produced the most coherent statement of government policy in South African Profiles, an official publication. In this document, it was made clear that the 'population has to be given a say in decision-making affecting the widest possible spectrum of its interests' and that 'individuals have the right to constitutional protection and representation of their collective, communal or regional interests if they so desire' (my emphasis).
- 2.4 Race will not therefore play a direct or overt role but interest groups will be represented at all levels, without one group being able to dominate another (a motion first propounded by Britain in 1970 when in the midst of racial rule, Britain insisted that a majority should not dominate a minority). In order to ensure this, the following 'structural elements', among others, have been proposed by the regime:
- (i) the maximum devolution of decision-making powers;
  - (ii) decision-making by consensus (i.e. a veto for minorities);
  - (iii) a legislature (consisting of two chambers) which will provide for special representation in one house and joint representation in the other;
  - (iv) the maximum possible division of the executive, legislative and judicial authorities;
  - (v) three fully fledged levels of government.
- 2.5 The regime considers that 'simplistic' or 'unsophisticated' majority rule is not necessarily democratic and certainly not suited to South Africa's special situation. Therefore, to ensure what it perceives to be the 'maximum application of democratic principles, the interests of all individuals and politically relevant

groups would have to receive adequate care within the processes of government. The Bill of Rights it dismisses as providing protection for minorities 'only indirectly'. Instead, the regime opts for three methods of minority protection which are promptly reflected in the Rapport disclosures. These are:

- (i) Participation in the decision-making process.  
Therefore, the Cabinet will not be composed of the representatives of the majority party or by a voluntary coalition as in Namibia but by a compulsory multi-party coalition chosen proportionally by reference to party strength. This will be constitutionally entrenched as will the provision that instead of a President, there will be an Executive College or Presidential Council of 3-5 persons.
- (ii) Representation in the legislature.  
The regime has revised its original idea that the upper house should be made up of 'cultural' groups. Instead, South Africa will be divided into 9 regions, with constitutionally entrenched powers. The upper house will comprise of representatives of regions.
- (iii) Autonomy in matters of exclusive interest to minority groups.  
This is simply a revamped version of Section 100(1)(viii) and section 14 of the tricameral parliament's 1983 Act defining 'own affairs' as matters which 'specially or differentially affect a population group in relation to the maintenance of its identity and the upholding and furtherance of its way of life, culture, traditions and customs'.

2.6 Local government in the context of the constitutionally entrenched powers of regions will therefore play a very important part in creating and maintaining a curtain of (racial) privilege, especially if the lowest tier of such government, neighbourhood committees, is seriously pursued.

2.7 These proposals must also be seen in the context of what is now proposed (and leaked in the Rapport article) as a federal approach to the Constitution. The dreaded word is not used directly but the effect of having 'three fully fledged levels of government' is to impose a federal form of government, with a constitutionally-entrenched provision for local government.

2.8 The African National Congress, throughout its modern history, has made adherence to a unitary form of government as one of its cardinal principles of policy. This has most recently been reflected in the discussion

document on Constitutional Principles of April 1991. But a unitary State is not to be confused with a highly centralised, impersonal or over-bureaucratized state under which we live at present. The Principles document supports governmental structures and institutions which are based on 'democratic principles, popular participation, accountability and accessibility'. Therefore, it adheres to an approach which supports the need for 'strong and effective central government to handle national tasks, strong and effective regional government to deal with the tasks of the region and a strong and effective local government to ensure local involvement in handling local issues'.

2.9 So, where do we depart from the regime's approach?

2.10 The departure has to be seen in the fundamental distinction between a unitary state and a federal state.

### 3. FEDERALISM AND THE UNITARY STATE

3.1 There has been a revival of federalism in recent years among those who want to protect 'minorities' and who support limited government. The Kwa Natal Indaba proposals for the whole of South Africa anticipated a federalist option based on regional governments each with their own special composition. Dr Roelf Meyer, anticipating the National Party's present proposals for 9 regions 'each with their own government' made a call 'for support for a federal state' in August 1990.

3.2 In any event, the emphasis on special arrangements for regions and a local option for third tier government, with constitutional entrenchment of these structures and their powers, as recent proposals have demanded, together with a plethora of statements on constitutional reform made by members of the Government on devolution, presuppose models which are very different from accepted principles of devolution or decentralisation.

3.3 It is therefore necessary to clarify what devolution is not about.

3.4 In a federation, sovereignty is divided between two levels of government, with the federal government sovereign in some matters and the provincial or 'state' governments being sovereign in others. Each within its own sphere exercises its powers without control from the other, and neither is subordinate to the other. It is this feature which distinguishes a federal from a unitary constitution. In a unitary government final authority (or 'sovereignty') rests with the central government; if provincial governments exist, they are subordinate authorities,



deriving their power from the central legislature, which may overrule them at any time by the ordinary legislative process.

- 3.5 Secondly, the allocation between federal and provincial governments is set out in a written constitution and the basic terms of the constitution are 'entrenched' in that they cannot be amended at the sole discretion of the region or combination of regions. Changes may only be brought about by a variety of procedures laid down in the constitution. Federations also have two houses of parliament, the 'upper' house having special powers in relation to matters affecting regional interests, with disputes between the centre and the periphery being resolved ultimately by a constitutional court. These disputes as to who has authority to do what are very contentious.
- 3.6 Federal arrangements - based on the 'inherent' rights of separate governmental bodies - usually provide for financial resources to be divided between the federal and provincial governments to match their respective responsibilities under the constitution.
- 3.7 South Africa has been administered as a unitary state since 1910 and the system of control and supervision and the division of functions have become part of the culture of our society. Proposals which simply modify the existing system are attempts to ensure limited government in institutional form and to frustrate the consequences of majority rule. Proposals for geographical or 'racial' federation ignore the need for a recognition of the political and economic unity of South Africa. This is not a matter of sentiment or aspiration. Unity is important for an effective role in international relations; it is crucial for the central management of the economy and for the redistribution of resources in favour of the less prosperous parts of South Africa, as well as for undoing the patterns of discrimination which the majority have undergone.
- 3.8 Disparities in size and economic strength, resulting in the overwhelming economic and political strength of the PWV area would make a federation so 'unbalanced as to be unworkable', a recognition from the British Royal Commission on the Constitution 1969-1973 (paragraph 531) which ought not be ignored. As the Royal Commission also pointed out, 'Federalism was designed and is appropriate for states coming together to form a single unit, and not for a state breaking up into smaller units' (paragraph 526).
- 3.9 It is for these and other reasons that the African National Congress, in adopting the Constitutional

(v) The municipal franchise will not necessarily be limited to people who live in the area. The interests of tenants will have to be balanced with the interests of property owners and ratepayers, whatever this means. It may, of course, mean that those who own property may be given additional votes, in the vein of the 'business' vote in Britain where companies and businessmen were provided with additional votes, until their abolition in 1948.

## 5. OUR REACTION

- 5.1 These proposals will entrench privilege, status and domination at the local government. They are inconsistent with democracy and majority rule. We offer instead protection by way of institutional guarantees of various kinds where the powers of government will be limited. Instead, they offer a diffusion of power which will weaken the central authorities to such an extent that South Africa will truly be ungovernable.
- 5.2 The regime, by releasing proposals or suggestions for constitutional reform in dribs or drabs, is attempting to lock us in negotiations about fundamental aspects of structures for government which really are the domain of a Constituent Assembly. The Harare and UN Declarations of 1909 anticipate that agreement should be reached on the principles of government of a free South Africa at the All Party Congress stage. These principles are of a general nature dealing with the nature of a free and democratic order - multi-party system, one-person-one-vote on a common role. By inserting the details as to how the cabinet will be instituted and even the way elections shall take place at local government level, the regime goes beyond what is necessary under the Declarations, attempts to subvert the demand for a Constituent Assembly and to ensure that our resources will be dissipated by participation in numerous working groups looking at details at a premature stage.
- 5.3 There is general agreement that apart from a parliament and cabinet at the centre, there ought to be regional and local government, on the basis that certain tasks can only be efficiently and fairly administered at a regional and local level. The organisation of all government shall be on the basis of non-racialism, non-sexism and democracy. Local government will operate under the Bill of Rights which ensures that the principles of non-discrimination, equal protection of the law, affirmative action shall apply and other provisions of the Bill of Rights shall ensure that local authorities are bound by a higher law which not even parliament may easily change.

- 5.4 We have also proposed that the office of Ombud should be created and this office has special resonance in local government as her jurisdiction will cover allegations of partisanship in the allocation of resources, maladministration and corruption.
- 5.5 We have proposed that local government should be based on participatory principles with a high degree of accountability.
- 5.6 There should therefore be a general provision on local government in the Constitution in the context of a unitary state. But we must clearly reject any proposal which will deny majority rule at any level, will ensure the maintenance of power in the hands of the minority through multiple voting or a property-based franchise or the maintenance of cultural or racial exclusive zones by the protection of 'norms and standards' of alleged communities.

**KADER ASMAL**

**CAPE TOWN, 27 AUGUST 1991**

**SAG/ANC BI-LATERAL**  
**6 NOVEMBER 1993**

**REPORT OF THE SUB-COMMITTEE ON LOCAL GOVERNMENT**

1. The Committee dealt with Chapter 10 of the Transitional Constitution and agreed that:
  - 1.1 Certain reformulations were necessary and that a meeting should take place with representatives of the Technical Committee on Constitutional Issues to finalise these matters. No material difference of opinion existed.
  - 1.2 The question whether a juristic person who is the owner of property and liable for the payment of assessment rates, service charges or levies should have a maximum of one vote per local government could not be resolved and the matter is referred to the Plenary Session of the bi-lateral.
  
2. The draft local Government Transition Bill was discussed.
  - 2.1 The following matters could not be resolved and were referred to the Plenary Session of the bi-lateral: -
    - (i) The concept of Ward Councils (see pp 14, 16 and 31)
    - (ii) The demarcation of Wards (see pp 21 and 51)
    - (iii) Voting rights for juristic person (see 1.2 above)
  
  - 2.2 The following matters were raised but the sub-committee is confident that by redrafting a solution will be found at sub-committee level: -
    - (i) the definition of "statutory" and "non statutory"
    - (ii) the issue of delivery of electricity by local governments

- 2.3 The sub-committee noted agreement amongst the two parties that elections should take place before the end of 1994. The reference to "within 24 months" in clause 10 should fall away. The position of the TMA who may be in favour of the pre-interim arrangement of appointed local government executive councils for a longer period, will have to be considered. (The Government pointed out that the criteria for delimitation of wards will also influence the position of the TMA.)

3. GENERAL

The Sub-Committee also reached agreement on <sup>a</sup> strategy to give effect to the National Campaign as reported to Plenary on 27/10/93, viz to tackle fears and normalise the payment for services.