

EMBARGOED UNTIL TABLING IN THE NEGOTIATING COUNCIL

**THIRTEENTH REPORT OF THE TECHNICAL COMMITTEE
ON CONSTITUTIONAL ISSUES
TO THE NEGOTIATING COUNCIL
16TH SEPTEMBER 1993**

1. Introduction

There are a number of matters regarding the Constitution for the period of transition addressed in our previous reports, on which no definitive decisions have as yet been taken by the Negotiating Council. We require instructions on these matters to enable us to finalise the constitutional text. There are also various matters which have not yet been addressed by us, which should be included in the Constitution. We are in the process of preparing texts and accompanying reports on those matters.

In Part I of this report we set out preliminary proposals for a chapter of the Constitution dealing with local government, a draft of which is contained in the addendum

In Part 11 stock is taken of some of the most important outstanding matters requiring the urgent attention of the Negotiating Council.

Part I

Local Government

2. Considerations relating to the chapter on local government

Due to a number of factors, mostly of an historical, political and financial nature, the current situation regarding the development of a restructured system of local government seems to be fluid and unpredictable.

We are aware of the existence of the Local Government Negotiating Forum, but have not had the benefit of insight into its work or any results of its endeavours.

We have found very little guidance for the drafting of a chapter on local government in submissions received from participants in the MPNP.

We have taken note of the relevant provisions of the *Transitional Executive Council (Draft) Bill* approved by the Negotiating Council on 7 September 1993.

A number of the Constitutional Principles contained in Schedule 7 of the draft outline of the Constitution for the period of transition currently under discussion by the Negotiating Council

contain provisions directly relevant to a future system of local government. These are Principles VII, XV, XVI, XVII, XIX, XXI, XXII, XXIV 4 and XXIV 9.

We have not dealt specifically with the role of traditional leaders in local government because this is an aspect of the broader question which has been referred to the Planning Committee.

In the addendum to this report we present a draft text for the chapter in the Constitution on local government with a view to facilitating the debate.

3. The draft text

The draft text contains three sections, respectively dealing with the establishment and status of local government, local government finance and a transitional arrangement concerning existing local governments.

Section 140(1) is intended to accord local government the constitutional status of a

level of government and to provide for its further regulation by parliamentary and SPR legislation.

Section 140(2) ensures the democratic nature of local government and affords it a measure of autonomy. The autonomy of a local government regarding its physical environment is specifically provided for in **section 140(8)**.

Section 140(3) sets out the matters that must be regulated in detail by statute, though with due consideration of all the relevant provisions of the Constitution. The powers and functions to be exercised, and the services to be rendered by local government are related in **section 140(7)** to the maintenance of the well-being of local communities.

Section 140(4) provides for the categorisation of local governments (eg cities, towns, villages) and the concomitant differentiation of powers and functions, and also prescribes some important criteria for the determination of the status of a local government.

Section 140(5) requires consultation with a local government before its status is changed.

Section 140(6) would establish a procedure whereby local government is afforded a fair opportunity to express its opinion on draft legislation which will, if adopted, materially affect local government boundaries, powers and functions.

Section 140(9) expressly grants *locus standi* (the right to engage the court and to be heard) in the Constitutional Court to local governments in matters concerning their competences.

Local government finance is addressed elsewhere in the Constitution and we recommend that this matter be dealt with more extensively in chapters 9 and/or 11 in the interests of clarity and comprehensiveness. Against this background **section 141(1)** is intended to afford local government

financial viability by empowering it to levy taxes and to raise revenue. In the proviso, local governments would however be prevented from raising service charges for profit - we consider this to be a limitation justifiable on the grounds of transparency and accountability of government.

Section 141(2) entitles local government to equitable allocations in the area of intergovernmental financial transfers.

Section 142 is intended to provide for continuity of existing local governments against the background of the process of the restructuring of the third tier of government.

Part 11 Outstanding Matters

4. Matters relating to the Constitution requiring the consideration of the Negotiating Council

The lists below reflect an overview of most of the issues that need to be addressed in order to enable us to complete the outline of a draft Constitution.

4.1 Matters raised in previous reports

- (a) The text of the preamble
- (b) National symbols
- (c) Languages
- (d) The final wording of the chapter on Fundamental Rights
- (e) The electoral system
- (f) Deadlock-breaking mechanisms in the process of constitution-making
- (g) Various issues relating to the national executive

- (h) Various issues relating to the judiciary
- (i) The terminology relating to SPRs (states or provinces or regions)
 - (j) The competences of SPRs
- (k) The consolidation and rationalisation of public administration (especially on the SPR level), which is also related to the question of the reincorporation of the TBVC states
- (l) SPR finance and fiscal affairs, including an orderly regulation of financial matters prior to and immediately after the election
- (m) SPR constitutions and the role of SPRs in the further deployment of a new constitutional dispensation
- (n) Traditional leaders.

4.2 Matters not yet considered

- (a) The Ombudsman and a Human Rights Commission
- (b) Financial provisions of a general nature
- (c) The Auditor-General
- (d) The Reserve Bank

- (e) The composition and operation of the Financial and Fiscal Commission
- (f) The Commission for Administration and the Public Service
- (g) All armed forces and the police
- (h) Protection of the organs of civil society
- (i) Various general, transitional and technical provisions relating to, inter alia, the status of international law, continuity of existing laws and the legal system, and definition, construction and commencement clauses.

ADDENDUM TO THE 13TH REPORT (CONSTITUTIONAL ISSUES)

CHAPTER 10

Local Government

Establishment and status of local government

140. (1) Local governments shall be established for the residents of areas demarcated in terms of law and the functioning and structure of local government shall be regulated by law.

(2) A local government shall be elected democratically and shall be entitled to regulate its own affairs within the limits prescribed by law, which shall guarantee the democratic functioning of such local government.

(3) The boundaries of the area of a local government, the election of its members, the qualifications of voters, the powers and functions of local governments, the formal legislative procedures to be adhered to and all other matters necessary or incidental to local government shall, subject to the provisions of this Constitution, be provided for by law.

(4) A law providing for or relating to local government may make provision for categories of local government with differentiated powers and functions according to considerations of demography, income, physical and environmental conditions and other factors which justify or necessitate such status.

(5) The status of a local government shall not be changed without prior consultation with the local government concerned.

(6) A bill which materially affects the boundaries, powers or functions of local governments shall be published for comment in the *Government Gazette* or the *SPR Gazette* as the case may be, and local governments affected thereby shall be given a reasonable opportunity to make written representations in regard thereto to the legislature concerned.

(7) A local government shall be entitled to exercise those powers and functions and to provide such services as may be necessary to maintain and promote the well-being of the residents of the area of the local government,

(8) Conduct affecting the physical environment of a local government area shall be permissible only after consultation with the local government concerned and shall not be undertaken against the wishes of such local government unless such conduct is reasonably required in the national interest.

(9) A local government shall be entitled to approach the Constitutional Court in any matter relating to the encroachment or threatened encroachment upon its competences under this Constitution or any other law.

Local government finance

141. (1) A local government shall be entitled, subject to the provisions of this Constitution, to levy taxes and raise revenue for the purpose of exercising its powers and functions: provided that service charges shall be raised solely for the purpose of recovering the cost of such services.

(2) A local government shall be entitled to an equitable allocation by the SPR government of the revenue referred to in section 121.

Continuation of existing local governments

142. A local government existing at the commencement of this Constitution shall, subject to any changes lawfully made by a competent authority, continue to exist and shall exercise its powers and functions in accordance with the provisions of this Constitution and any other law consistent with those provisions.

