

Inkatha Freedom Party

SUBMISSION TO THE MANAGEMENT COMMITTEE
ON THE DOCUMENT TITLED

"PROPOSAL ON THE DRAFTING OF A NEW CONSTITUTION"

TABLED BY THE
SECRETARIAT OF THE CONSTITUTIONAL ASSEMBLY

Introduction

The above captioned document tabled by the secretariat has the purpose of setting out the process to be used in the development of a new constitution for the country. The importance of this document can not be over-emphasized. The process to be used is likely to influence the substantive outcome. More importantly, the acceptance and correctness of the process will determine the legitimacy and acceptance on the constitution, and any flow of the process is likely to become a flow of the constitution.

Therefore, the IFP is committed to assisting the Secretariat in its difficult task of proposing an acceptable process for the drafting of the new constitution. In this constructive spirit of cooperation with, and assistance to the Secretariat, the IFP wishes to draw attention on some clear flaws in the above captioned document, so that the Secretariat may eliminate them resubmitting a new improved draft.

In this respect the IFP invites all the parties to avoid accepting a defective process when with some additional work and consideration a process beyond reproach may be identified and developed. The IFP also wishes to put on the record that its criticisms of the above captioned document should not be understood as a criticisms of the Secretariat, for they relate to concededly unintended, yet possible, consequences and implications arising out of the Secretariat's proposal.

The Black Hole Dilemma

There is black hole in the sequence of stages and events described in the Secretariat's proposals.

This black hole is capable of sucking into itself and destroying any claim of fairness, transparency and accountability advanced in support of the constitution-making process.

Step I - Seven parties make submissions for each Block of each of the six Theme Committees stating their positions on all relevant issues.

Step 2 - Each Theme Committee finalizes a report for each Block for a total of about sixty Reports. These Reports are not the result of any negotiations and must merely describe all the details of contentious and non-contentious issues. They are drafted by the Theme Committees assisted by technical experts and tabled with the Constitutional Committee. This means that no Report shall choose among conflicting constitutional options and alternatives.

BLACK HOLE - It is not clear what happens in the black hole. Ostensibly the Constitutional Committee will refer the same Report to the Constitutional Assembly and the 490 members of the Constitutional Assembly will "debate" these Reports. Alternatively, the Constitutional Committees somehow produce an extremely detailed draft Resolution to be ratified by a Constitutional Assembly which would be structurally incapable of truly debating its details.

Step 3 - The "Constitutional Assembly" as a body 'speaks' with such clarity, determination, precision and detail that its instructions can be immediately translated by a group of lawyers into constitutional text in a "purely technical and politically neutral exercise". This "technical" work would take place under the supervision of the Theme Committee concerned and related experts.

Step 4 - This text is referred to the Management and Constitutional Committees "for approval". Given the initial statement that "drafting should be directed by the Constitutional Assembly", it seems that this approval would not be tantamount to political negotiations comprising redrafting, but would rather be a mere control of accuracy.

This process will proceed from the 'first political agreements', implying that each piece of text would be put "in a pigeon hole" on the basis of a theory developed at the World Trade Centre predicated on the possibility that once all the pieces have been finalized the whole text will be reconsidered and re-analyzed, which in fact never happened.

The issue is:

Where are the relevant political decisions going to be made and what are the rules governing such decision making process?

The only answer seems to be that the decisions are going to be made somewhere in the 'black hole'

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and that no rule has yet been developed to deal with the structure of the decision making process. In the final analysis it seems that those who will operate in the 'black hole' will decide the constitution and the future of our country.

The implications of these considerations are worsened by the fact that it would be impossible to debate, analyze and decide on some sixty complex Reports before the target dates, as per current scheduling of Constitutional Committee and/or Constitutional Assembly meetings and available debating time. Time pressure might create even greater incentives to produce solutions out of the black hole rather than on the basis of accountable and transparent procedures.

Law Advisers

The IFP believes that it would be a national disaster if the next constitution were written with the same style characterizing the present interim constitution. A constitution should be written not in the style and language of ordinary legislation but in constitutional semantics. In fact, the norms of a constitution are not subject to textual interpretation, but primarily to contextual interpretation. Constitutional norms are meant to shape the process of constitutional adjudication driven by Constitution Court and are not primarily meant to be applied by judges on the basis of standard legal syllogisms.

Our constitution should be drafted with the same style employed by the great modern European constitutions, written in countries which have no less technical capability of writing complex and abstruse legalese than has South Africa. The fact that they chose a different path should make us think. Proper constitutional analysis will show that from a constitutional adjudication viewpoint there is greater semantic solidity in the German Constitution than in our interim Constitution which offers no compelling directive to support the long-term activity of a constitutional court.

A constitution must also be a document which can be taught to children in schools and read by all literate citizens. and should therefore not resemble the tortuous and often incomprehensible text of the interim constitution,

State Law Advisers carry the experience and the tradition of ordinary legislation drafting and should not be involved in any capacity whatsoever in the drafting of our new constitution which should rely exclusively on the independent panel of seven experts and on the thirty experts working in the Theme Committees. There is no reason to believe that

these experts might not be capable of taking into account any consideration which can be raised by the State Law Advisers.