

## INKATHA FREEDOM PARTY

### COMMENTS ON THE DOCUMENT ENTITLED: "REPORT OF THE TECHNICAL COMMITTEE TO THEME COMMITTEE I"

February 9, 1995

The IFP is not in a position to subscribe to, and must object to the above-captioned document.

1. preliminary, it must be noted that the constitution-making process as it is presently envisioned and structured will not allow political parties to make any substantive submission to either the Constitutional committee or the Constitutional Assembly. Therefore, all parties' inputs are to be made in Theme Committees and will be considered in the further stages of negotiation and constitution-making only to the extent that they are embodied in the report of a Theme Committee. In other words any issue raised in a party's submission which is not part of a Report will not longer be considered in further stages of constitution-making and is going to be obliterated.
2. Accordingly, the Constitutional Assembly has given the binding instruction that all Theme Committees provide details of all issues which have been raised within their respective scope of work, including the parties' submissions. Specifically, the Constitutional Assembly has instructed each Theme Committees to draft a Report which is to list all contentious and non-contentious issues and shall contains and describes the full of such issues as they have been proposed by each Party concerned. Reference is made to the Resolution adopted by the Constitutional Assembly on October 31, 1994.
3. The Constitutional Assembly has also decided that Theme Committees shall not be negotiating fora but shall Thereby be a conduit of information and positions to the Constitutional Committee. Therefore, their activities should be limited to collect, collate and organize the various parties'

positions on all relevant issues. Theme Committee' Reports shall reflect the purpose of the Theme Committee and shall be an inventory of positions and arguments discussed in a Theme Committee in each relevant Block.

4. The Reportback of Theme Committee 1 should be an extensive document. The IFP can not accept a double-spaced one-and-a-quarter page draft Report attempting to summarize very complex issues submitted by parties.
5. The IFP specifically objects to the intention shown in many places of the Report which tries and reconcile different positions. It is not the role of the Report to use very broad expressions, which in their generality may seem to subsume and reconcile the details of conflicting positions expressed by the various parties. This attempt to reconcile positions avoiding their characterizing details so as to subsume the "contention" into broad and often meaningless generalities is not a legitimate exercise. Specifically, a broad range of issues raised in the IFP submission, which in the opinion of the IFP are germane to the identification of the character of the state, are not even mentioned in the Report. For instance the following issues raised by the IFP are not listed.
  - Supremacy of the constitution : paragraphs 2 and 3
  - Separation of powers : paragraphs 2, 3 and 4, 5, 6 and 7
  - Type of democracy : paragraphs 1, 2 and 3
  - Representative democracy : paragraphs I [second part] 2, and 3
  - Participatory democracy : paragraphs 1, 2, 3 and 4 Transparent and accountable democracy : paragraphs 1. 2, 3 and 4 Type of state : paragraphs 1, 2 and 3

All these issues relate to the fundamental characterization of the State as a unitary or a federal State or to the constitutional structuring of or democratic society on the basis of the principle of pluralism or of the principle social organism.

6. The entire set of IFP thematics have been completely ignored in the above captioned document, and the IFP requests that its entire submission be included in one form or the other in the Report. The IFP does not see how the Theme Committee can decide to take out any single statement made by the IFP in its submission without either becoming a negotiation forum or failing to provide full details about the relevant contentious issues or non-contentious issues. No statement made by the IFP in its submission is either not germane to Block 1, or is redundant, or can be further summarised without eliminating fundamental characterizing details.
7. The Report may not contain only those common-denominator issues which are addressed by all parties, for this would allow any party to frustrate discussion on relevant and necessary issues by virtue of its non-taking positions of them. The Constitutional Assembly has instructed that all issues be taken from the Theme Committee to the following stage of consideration.
8. Specifically, the IFP objects to point II-G of the report which indicates that there is agreement on

17

the statement that South Africa shall be an 'undivided state'. The IFP believes that Provinces shall not be part of the strictu sensu "state" but should rather be an autonomous entities organized under the constitution and independent from the State.

9. The IFP also objects to all the other points which have been listed as non-contentious issues. In fact, they are non-contentious only to the extent that, and because of the fact that none of the relevant and characterizing details submitted by the IFP in its position paper have been taken into account and reported on. The issues of transparency, accountability and political representation may be mentioned in this regard.

Moreover, the list of 'non-contentious points' also lists items which have not been addressed by the IFP because they will be the subject of submissions in subsequent Blocks. If the Theme Committee wishes to consider items which are not part of this Block 1, such as separation of State and Church, it should make reference to the IFP Preliminary Submission to the Constitutional Assembly which lists IFP preliminary

positions and viewpoints which were not covered in the submission made for Block 1.

10. With respect to the issues indicated as 'contentious points', the IFP raises also an objection. In fact, the list of issues is not descriptive of the issues at hand and fails to define the constitutional dimensions and the terms of the political debate with respect to each relevant issue. In this respect reference can be made inter alia to the issues of pluralism and the autonomy of civil society, the autonomy of Provinces with respect to list of powers and relation between levels of government, and the relation between the supremacy of the constitution and provincial autonomy, the fundamental division of powers between any level of government and civil society, and whether South Africa should be a liberal, a social or a socialist state. Reading the Report it could appear that none of these issues which this Theme Committee has debated for three months have ever even been considered.

Inkatha Freedom Party

ADDITIONAL  
COMMENTS ON THE DOCUMENT ENTITLED:

"REPORT OF TECHNICAL COMMITTEE  
TO THEME COMMITTEE 1  
February 10, 1995

Given the importance of the first Report of this Theme Committee, the IFP has prepared this additional submission to further elucidate and elaborate on its previous submission on this matter.

Introduction

1. Block I deals with "Democracy' and the 'Character of the State'. It is accepted that the report should encompass only issues within these headings which are not addressed in later Blocks, and in this respect the Report will have to be far more narrowly focussed U= it is at present, and many items should be deleted.
  
2. However, in dealing with Democracy and Character of the State we must be take into account all relevant details which contribute to define and identify issues. Once properly considered every point addressed in the quite short IFP submission for Block is fundaThentally germane to the identification of the most essential eleThents of a of 'democracy' and of the 'Character of a State'. We believe that the WP submission represents the minimum required amount of details to ensure that discussion is not about generalities without specific or recognizable significance'.

In its previous submission the IFP has argued that the Report contains 'Theaningless generalities'. This statement is to be assessed against the contents of the applicable Constitutional Principles. The IFP is not able to identify relevant constitutional significance in the Report on and above that which is already contained in the Constitutional Principles.

3. Possible overlaps with other Blocks within this or within other Theme Committees should not preclude the Report on Democracy and Character of the State to contain all the details which are necessary to given an appreciable degree of constitutional significance to its statements,
4. The fact that the IFP made its submission under protest should be Mentioned in the Report,

#### Non Contentious POINTS

A The statement that "the constitution shall be the supreme law of the land. It shall be binding on all organs of state at all level of government", is surely not contentious as far as the IFP is concerned. However, by itself considered and without the necessary qualification and related issues this statement is not acceptable to the IFP. We believe that the report shall also Mention the following characterising details, as contentious or non contentious as the case might W.

1. The Constitution in its entirety ~ be the supreme law of the land. therefore, the Constitution ~ be FULLY and entirely justiciable by Theans of a Constitutional Court, and shall be the parameter for the validity and legality of the legislation of Parliament.
2. The constitution shall bind not only all organs of the Republic but shall also apply to all legal relations.
3. In relation to their respective areas of constitutionally recognised autonomy, the Constitution shall be implemented not by the national government but rather by the Provinces, and by social and cultural formations, or by individuals, respectively. For instance, the constitutional right to health entrenched in the national constitution shall be implemented exclusively by the provincial legislation and administrative action.

B. The following necessary qualification to Point 'B' could make this principle a contentious one, and without this qualification the principle could not be agreed to by IFP:

2

Please, note that this heading should read Non - contentious issues , rather than “points””. 'Re Theme Committee's task is to identify and define issues not to make points.

3

However, it must be noted that the original wording of this point read: 'The law of the land and the standard against which all legislative, executive and judicial action shall be measured'. To the extent that there is a difference between these two wordings it would be for the purpose of undermining the notion of a 'rigid' constitution, of a constitutional state and of a Constitutional Court. Once again, since the Report does not give the required 'details' on this issue it is not possible to determine what the wording means and to challenge the intentions of those who might be working to undermine constitutional guarantees.

4

We must be careful not to fall into the trap of omitting relevant and important issues because they are contentious or because they have not been addressed by all parties. The Report must mention the details of contentious issues and as indicated in our previous submission it would be illegitimate to reduce the Report to a bare minimum common denominator.

20

The principle of political representation of government and regular elections should be constitutionally entrenched with respect to national, provincial and -primary- local governments (excluding local government substructures, including traditional communities.)

2. The implementation of the principle with respect to provincial and local government be within the exclusive competence of the Provinces.
  3. The electoral system is a fundamental element characterizing the form of government and the " of democracy. Therefore the constitution should set out the general principles of the model electoral system, leaving to the law the task of implementing such principles, so as to leave sufficient flexibility for future developments. The provincial electoral systems should be within the exclusive competence of provincial constitutions.
- c. The following necessary qualifications to Point 'C' could make this principle a contentious one, and without these qualifications the principle could not be agreed to by IFP:
3. In relation to their respective areas of constitutionally recognised autonomy, the Constitution should be implemented not by the national government but rather by the Provinces, and by social and cultural formations, or by individuals, respectively. For instance, the constitutional right to health entrenched in the national constitution shall be implemented exclusively by the provincial legislation and administrative action.
- D. The following necessary qualifications to Point 'D' could make this principle a contentious one, and without this qualification the principle could not be agreed to by IFP: ~WHAT TYPE OF DEMOCRACY:
- I. The principle of participatory and/or direct democracy should be constitutionally entrenched in addition to the principle of representative democracy [see infra].
  2. The principle of the autonomy of individuals as well as of economic, social, political and cultural formations should also be entrenched with respect to all activities for which any level of government does not have a compelling justification of public or national interest to regulate, control or directly exercise.
- Inter alia, the foregoing principle recognizes the autonomy of churches, political parties, professional associations, chambers of commerce, universities, arts and culture organisations, family structures, traditional communities, economic enterprises, civics, private contractual autonomy in economic and personal matters, et cetera.



3. The principles of (a) transparency, (b) political accountability and (c) civil accountability of governmental structures shall be constitutionally entrenched.

#### PARTICIPATORY DEMOCRACY:

1. The constitution shall entrench the notion of participation of affected public and private interests in the formative process of an administrative action or regulation.
2. The constitution shall entrench the notion of participation of affected public and private interests in the legislative process.
3. Provision shall be made for referenda at all levels of government to be held at the request

[This principle relates to what the constitution should require. The law may extend

proportional representation to substructure.

6

The details of the IFP proposals on suffrage, proportionality and electoral systems will be tabled in the IFP submission for the as 7th Report, per approved work program. ]

2 1

of a reasonably sIthe number of dissatisfied citizens.

4. Provision shall be made for the recognition of the nIthe to petition any government future.

#### TRANSPARENT AND ACCOUNTABLE DEMOCRACY

1. Ithe right of access to all government information and private data banks information shall be recognised in the constitution, with customary qualifications and exclusions, subject to judicial review.
2. The notion of administrative justice and judicial reviewability of all administrative actions shall be constitutionally entrenched.
- 3 . Public officials shall be personally responsible for gross negligence and malice.

4. War shall be prohibited as a Means to solve international controversies and ~ only be allowed to defend the State's sovereignty over its territory.

E. This item should not be Mentioned in this Block. If this item is to be Mentioned in this Block, the IFP would want to add the following qualification which is set out previous IFP submission to this Theme Committee as well as in the IFP Preliminary submission to the Constitutional Assembly:

The establishment of a common citizenship should not hinder the establishment of provincial citizenship with respect to the functions of the Provinces, which will be limited by the customary constitutional provisions prohibiting restrictions of inter-provincial commerce and the free circulation of goods, people, labor and services. Citizens should always be recognized on the basis of jus soli and often on the basis of ius sanguinis. Naturalization on the basis of ius sanguinis should be a right.

F. 'Elections shall proceed on the basis of proportional representation.' This is a contentious issue. Since we are bound by the relevant Constitutional Principle, only that wording should be used, which could be pleonastic'. Moreover this item is to be considered under a later block and could therefore be deleted from the Block 1 Report. Alternately, the IFP has made the following necessary qualification which could make this principle a contentious one, and without which the IFP could not agree to it.

1. The principle of political representation of government and regular elections should be constitutionally entrenched with respect to national, provincial and 'primary' local governments (excluding local government substructures, including traditional communities) &.

2. The implementation of this principle with respect to provincial and local government "shall be within the exclusive competence of the Provinces.

3. The electoral system is a fundamental element characterizing the form of government and type " of democracy. Therefore the constitution should set out the general principles of the national electoral system, leaving to the law the task of implementing such principles,

In the latest version in the Report the wording: "possibly based on regional or local constituencies" was added. Given its generality and lack of detail it is hard to tell how this qualification affects the principal statement.

a

This principle relates to what the constitution should require. The law may extend proportional representation to substructure.

22

so as to leave sufficient flexibility for future developments

The provincial

electoral systems should be within the exclusive competence of provincial constitutions.

G "South Africa shall be a sovereign, independent and undivided state." This is contentious issue. The IFP strongly and firmly rejects the notion of an 'undivided state'. Specifically, the IFP objects to point II-G of the report which indicates that there is agreement on the statement that South Africa shall be an undivided state. The IFP believes that Provinces shall not be part of the strictU sensu "state" but should rather be an autonomous entities organized under the constitution and independent from the State.

The fact that this language will prevent the establishment of a federation of states of the type constantly proposed by the IFP is confirmed by point "A" which clarifies that "all" levels of government are "organs" of the state. Simply put the IFP agrees that provinces are 'part of the Republic' but rejects the notion that they are 'organs of the State. The IFP believes that both the State and the Provinces shall exist as autonomous entities under the national constitution and as part of the so-called "Republic".

Against the technical meaning and necessary implications of the expression 'organs of the state' the disclaimer set out at the end of the Report is of little or no avail and would result in the usual clumsy argumentation that it could be conceivable to have a 'federal system' or a system 'with federal elements' in which provinces are organs of the state.

H & J The following necessary qualifications to Point "H" and "J" could make these principles contentious items, and without these qualifications the principles have no specific value once compared with what is already contained in the Constitutional Principles and could not be agreed to by IFP:

1. There shall separation of powers between national and provincial levels of government.
2. Provinces shall be the primary government of the people and shall be entitled to exercise any type of power and function which can adequately and properly be exercised at provincial level.
3. only the powers of the national government ought to be listed in the constitution, while an other powers should be left to the Provinces.
4. Provinces shall have full judicial powers in all matters of their competence.
5. National government ~ have no overrides and, as a rule, Provinces shall have exclusive powers. Both the national and the provincial levels of government shall enjoy exclusive powers. Relations between the two levels of government ~ be regulated by checks and balances, intended as a predetermined act of mutual interferences among the powers of each level of government. also based on the extension by relevancy or implication of the exclusive powers of the national level of government into the areas of competence of the Provinces. as in theory is the case in Ithe U.S. system (i.e.: interstate comTherce). in specific areas- of provincial competence, the techniques of national fraThework legislation

9 The details of the IFP proposals on suffrage, proportionality and electoral systems will be tabled in the IFP submission for the as 7th Report, per approved work program.

regulating exclusive provincial powers could also be used in matter which requires

concurrence between the national and provincial levels of government, provided just national legislation to be so detail to

actually regulate, or exercise the actual function in the matter concerned.

6. There shall be separation of powers between all levels of government and civil society.

7. Individuals as well as social, cultural, political and economic formations shall be recognized and guaranteed a sphere of protected constitutional autonomy defined by the interests which they are capable of self-regulating and administering and in respect of which no government has a compelling reason of public interest to intervene.

#### Contentious issues

This section of the Report is totally inadequate because it fails to address the 'details' of the contention as required by the Constitutional Assembly's Resolution of October 31, 1994. In our view, the fact that "details" are to be listed means the drafters of the report to itemize the areas of contention so as to make it clear to the Constitutional Committee precisely how the political parties and other submissions disagree. If the Report thereby note that there is disagreement, it would make a mockery of the Constitutional Assembly Resolution and the Briefing Document to Theme Committees and would not prepare any future debate and negotiation in the Constitutional Committee and in the Constitutional Assembly.

The IFP believes that each party's position under each contentious issue should be detailed so as to capture, for the benefit of the Constitutional Committee and the Constitutional Assembly, the nuances of contending positions.

Obviously, any of the many qualifications and necessary characterizations of the points which have been listed above as non-contentious issues could become the 'contentious issues in themselves', and could be listed among the contentious points.

Among the contentious issues which have not been listed is the debate of the 'Type of State' which was introduced by the PAC. In this respect the essential and relevant details of the " " position are as follows:

1. South Africa should be a social but not a socialist state.
2. Private property and free-market enterprise ~ be protected and the direct interference of government in economic matters shall be severely limited".
3. The constitution should contain all recognised socioeconomic rights along with constitution imperatives which mandate the legislature to operate to remove social injustice, and promote the social growth of all South Africans.

### General Considerations

The preceding part of this document points out deficiencies in the Report which relate to the IFP

10

The detailed aspects of this principles will be set out in the third Report to this Theme Committee relating to the Economic Constitution, as per approved work program.

24

only. However similar deficiencies could be noted with respect to the positions adopted by other parties in their respective submission. The analysis of these deficiencies may suggest the following considerations which have a general value with ~t to how Reports ought to be drafted. In the end it might be necessary to admit that the Report must be more analytical and comprehensive than the parties' own submission to be adequately preparatory of the next stages of debate and negotiation.

1. The Report appears to be an attempt to reconcile the divergent proposals of the political parties. This is objectionable because such reconciliation or harmonization of various proposals presupposes prior negotiation which did not take place since Theme Committee's are not negotiating fora (CA Resolutions, 31110194).
2. The Report as it stands has sifted and left out almost all the important points which the IFP submission made about the federal features and the notion of pluralism which it wants to see embodied in the constitution.

3. The Report contains only broad general statements which are open to interpretation, and the formulation of the points gives rise to ambiguity. A Report should define issues and its language should not be open to any possible interpretation, which may happen when it is opened to use language which can be and then everything to everybody concerned
4. The Report should contain all the original points of the parties indicating the features of the state and those of democracy. Where there are similarities these should be indicated without altering the original text of such points.
  - The introduction to the Report should clearly indicate what the elements of the report are so as to ensure that the original submission of the IFP which the IFP wants included in the Report should not appear as an annexure of the Report, it should be a constitutive element of the report of the Theme Committee.
6. The Report should leave out points which do not belong to Block 1 such as point I which discusses separation between State and Religion.
7. The following points should be added to the Report:
  - 7.2. Implementation of the constitution by legislative and executive action of Provinces and civil society in relation to their respective areas of constitutionally recognized autonomy.
  - 7.3. Determination of the Form of State on the basis of the following issues/questions:
    - (a) will Provinces have residual powers. which are those powers of Parliament which are immediately and necessarily reflected in a governmental line function?
    - (b) as a matter of principle, will all the powers and functions of government be assigned to and only those powers which cannot be adequately and/or properly exercised at provincial level be devolved to the national level of government on the basis of the

principle of subsidiarity/residuality,<sup>9</sup>

- (c) will provinces be provided with an area of entrenched constitutional autonomy which the central government may not destroy or change at its own will (Indestructible Provinces in an indestructible Union]
  - (d) will Provinces have final decision-making power in the area of their constitutionally recognised autonomy, or will the central government have the power to overrule them or otherwise subjugate the provincial policy making?
  - (c) subject to the need for equalisation grants, will Provinces have sufficient financial and fiscal" autonomy to support their functions and powers without depending on the discretion and control of the central government?
  - (f) will Provinces have the power to participate as Provin= in the legislative decision-Itthe process and possibly with respect to soThe executive functions of the central government?
  - (g) will the constitutional system allow for asymThetry to enable each Province to use at its own option less powers and functions than the total amount of provincial autonomy allowed under the Constitution?
- 7.4. Form of State also intended as pluralism based on a separation of powers between all levels of government and civil society. The principle of autonomy of individuals as well as economic, social, political and cultural formations shall also be entrenched.
- 7.5. Application of the constitution to relation other than those between organ of the state and citizens
- 7.6 The principle of participatory and/or direct democracy, and techniques of entrenched thereof. The constitution shall entrench the notion of participation of affected public and private interests in the formative process of an administrative action or regulation. The constitution shall also entrench the notion of participation of affected public and private interests in the legislative process.



7.7 To the extent that the Report sees that soThe parties are not addressing all the issues which are eTherging the Report should also promote and guide further discussion. The Report could table for future consideration and parties' submission of other items/issues which are eTherging as relevant eleThents of the overall characterization of the future state and of democracy. For instance since September, the IFP has tabled the following issues:

provision for referenda at all levels of government to be held at the request of a reasonably small number of dissatisfied citizens.

the right to petition any government structure

the right of access to all government information as well as to private data banks with customary qualifications and exclusions, subject to judicial review.

entrenchment of the notion of administrative justice and judicial reviewability of

26

principle of subsidiarity/residuality.

(c) will Provinces be provided with an area of entrenched constitutional autonomy which

the central government may not destroy or change at its own will.

[indestructible provinces in an indestructible Union]

(d) will Provinces have final decision-making power in the area of their constitutionally recognised autonomy, or will the central government have the power to overrule them or otherwise subjugate the provincial policy making?

(c) subject to the need for equalisation grants, will Provinces have sufficient financial and fiscal autonomy to support their functions and powers without depending on the discretion and control of the central government?

- (f) will provinces have the power to participate as Provinces in the legislative decision-making process and possibly with respect to some of the executive functions of the central government?
- (g) will the constitutional system allow for asymmetry to enable each Province to use at its own option less powers and functions than the total amount of provincial autonomy allowed under the Constitution?

- 7.4. Form of State also intended as pluralism based on a separation of powers between all levels of government and civil society. The principle of autonomy of individuals as well as economic, social, political and cultural formations shall also be entrenched.
- 7.5. Application of the constitution to relations other than those between organs of the state and citizens
- 7.6. The principle of participatory and/or direct democracy, and techniques of participation shall be entrenched. The constitution shall entrench the notion of participation of affected public and private interests in the formative process of an administrative action or regulation. The constitution shall also entrench the notion of participation of affected public and private interests in the legislative process.
- 7.7. To the extent that the Report sees that the parties are not addressing all the issues
  - t j
  - u é j(
  - u é ü