

Inkatha Freedom Party

PRELIMINARY OBSERVATIONS
ON BLOCK ONE REPORTS
TABLED WITH THE CONSTITUTIONAL COMMITTEE
FEBRUARY 13,1995

Conclusion

- I All Reports should be sent back to their respective Theme Committees to:
 - a. flesh out all relevant issues,
 - b. list all details of contentious and non-contentious issues,
 - c. take into account public inputs and civil society's submissions,
 - d. take into account criticisms and suggestions expressed in the Constitutional Committee.
2. The Constitutional Committee must clarify the purpose of debating the Reports and the subsequent steps in the constitution drafting process.
- 3 . The issue of the relevance of international mediation with respect to the constitution-making process is to be solved.

Rejecting the Reports

This document has the purpose of supplementing the IFP presentation with respect to the documentation tabled for the February 13, 1995 meeting of the Constitutional Committee. The relevant documentation, received at 4:00 p.m. of Friday February 10, 1995, raises a variety of very important issues which would be difficult to discuss in the short time allocated to the Constitutional Committee meeting. By submitting this documentation for the record, the IFP will be able to reduce the length of its presentation during the meeting.

The Constitutional Committee has received a number of Reports from the Theme Committees. It was intended that parties could caucus before the Constitutional Committee debate, but no time for this purpose was allowed in the schedule.

The IFP rejects all the Reports before the Constitutional Committee and requests that all Reports be returned to the respective Theme Committees for further analysis and elaboration. Specifically, the Constitutional Committee must request that the Theme Committees abide by the terms of the October 31, 1994 Resolution of the Constitutional Assembly and that the Reports fully discuss and report on all details of contentious issues and all details of non-contentious issues.

At the outset it must be stressed that the Constitutional Committee has the prerogative to analyze de novo any submission it receives from any of the Theme Committees, and that no member of the Constitutional Committee is deemed to have accepted a Theme Committee's Report merely because the members of his/her party on the specific Theme Committee agreed on, or did not raise an objection to the wording of the Report.

The reasons for the IFP's rejection of the Reports relate to the specific characteristics and contents of each of the Reports and will be discussed in detail below. However, as a general consideration it may be noted that Reports are the result of over six months of framework discussions in each Theme Committee and are meant to tackle the most important framework issues within the scope of each Theme Committee, which issues have been assigned to all Blocks I in the work-program.

These Reports are making a mockery of our task of drafting a new Constitution. Before elections the IFP opposed the notion of a Constitutional Assembly, but we have taken our constitution-making task very seriously. In reading these Reports we have the impression that we came to Cape Town not to debate the details of fundamental constitutional issues but rather to play marbles.

The Reports are supposed to contain details of issues. An analysis of the Reports shows that no constitutional issues has been identified in its characterizing elements and no detail is given about what can easily be found in party's positions. Not only do the Reports contain no "details", but from a constitutional viewpoint they contain no "issues" as well. Moreover, the Reports are built on the basis of statements which are so vague as to have little or no constitutional significance and it is hard to tell what each Report is suggesting. No detail of contentious or non-contentious issue provided.

In some cases, such as Theme Committee No. 1, the Report merely restates the normative value of the applicable Constitutional Principles, without adding anything and totally ignoring the details of parties' and civil society submissions. This Theme

Committee No. I Report should be the most important and therefore its flaws should be analyzed as a test case of what is going on in the Theme Committees. In fact, the IFP has submitted to Theme Committee No. I over 50 single-spaced pages of detailed constitutional issues, analysis and proposals, all of which were germane to Block 1

Report, and yet the Report turned out to be less than two double-spaced pages. The same applies to the other Theme Committees.

Furthermore, each Theme Committee has avoided the preliminary issue of the Form of State which necessarily underlines any intelligent discussion of any Report for Block 1. Theme Committee 5 went as far as to eliminate from its work program the specific indication of the agenda item related to "Single or Split Judiciary?". At the World Trade Centre we witnessed Reports which also refused to address the issue of the Form of State, so that federalism could be excluded by default. The same process seems to be replicated here, and the reading-of the Report suggests, without stating it, that the establishment of South Africa as a federation of states is excluded.

Our country deserves to witness a full scale and open debate on the issue of federalism, at least once in the long history of constitutional negotiations. This debate has never taken place and can no longer be delayed.

Finally, the IFP objects to the fact that the Reports took no account of, and failed to report on the inputs received from civil society. If this attitude were to continue, it would be useless to continue the public participation program. What is the point of soliciting inputs if we ignore them?

Life in the Black Hole

On February 10, 1995 the Management Committee approved the Secretariat proposal on the drafting of the constitution. On January 30, 1995 the same document was tabled in the Constitutional Committee and was rejected with specific instruction that the Secretariat substantially rethinks and amends its proposal. The Secretariat made no amendment to its proposal and tabled it again with the Management Committee where it was approved notwithstanding IFP objections.

Enclosed herewith as Attachment A page 7 is a document tabled by the IFP in the Management Committee which objects to the structure of the constitution-making process showing that there is a "black hole" in the proposals tabled by the Secretariat. The attached document showed that all relevant decisions will be made in the "black hole". Unfortunately, no one seems to know or be willing to tell us how and when the real decision-making in the black-hole shall take place..

We are now operating in the "black hole" for we have received the Reports from the Theme Committees and we are in the process of debating them. But what is the purpose of our debate?

From the document approved by the Management Committee, we know that as soon as we reach a "political agreement", some constitutional text will be drafted. We also know that only the

Constitutional Assembly may direct the constitution drafting, and that text drafting shall be a pure "technical activity" to be conducted in full adherence to instructions from the Constitutional Assembly. However, how do we go from the Reports before the Constitutional Committee to an instruction of the Constitutional Assembly so detailed that a lawyer may translate such an instruction into constitutional text with a "purely technical exercise"? What happens after our debate? Who decides and what are the rules governing such decision making? Where is the answer to be found and who has the power to declare to us what the right answer is?

International Mediation

All Reports fail to advise the Constitutional Committee that the IFP made all its submissions to each Theme Committee under protest, indicating that each Theme Committee and the Constitutional Committees should not consider or debate the matters contained in the Reports until international mediation has taken place. As a point of information, enclosed herewith as Attachment B, page IQ is a document which relates to the status of international mediation in terms of the Agreement for Peace and Reconciliation and which addresses many of the questions raised by members of the Constitutional Committee during previous debates, and was tabled with the "3Ms task group" appointed by Cabinet.

Theme Committee No. 1 Report

Theme Committee No. I Report is the most distressing example of failures and flaws which can also be found to a greater or lesser extent in all other Reports. For this reason the IFP has specifically objected to this Report. The IFP written objection is enclosed herewith as Attachment C, page 16. In order to provide greater clarity of the shortcomings of this Report the IFP has drafted a schematic analysis of its flaws as they relate to the IFP's submissions only and to issues raised during the work of the Committee. This document is enclosed herewith as Attachment D, page 19. Clearly if other parties were to cross-reference the Report to the contents of their respective submissions they would also be likely to find that the Report does not contain details of their positions.

It can also be noted that the specific wording of point G, which is fully discussed in Attachment-D. closely reflects the wording Codesa's Declaration of Intents which the IFP could not accept, as well as the wording of the June 15, 1993 Resolution of the Multi-party Negotiating Council which drove the IFP out of the World Trade Centre.

Theme Committee No. 2 Report

In order to provide greater clarity on the shortcomings of this Report the IFP has drafted how the Report should have read so as to accommodate the details of the IFP submissions and the discussions held in the Theme Committee. This document is enclosed herewith as Attachment E @, page 28. Clearly if other parties were to cross-reference the Report to the contents of their respective submissions they would also be likely to find that the Report does not contain details of their positions, and Attachment E would need to be extended and supplemented accordingly,

It can be noted that little in this Report can be identified which has
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significance on and 4 above what is already contained in the Constitutional Principles, with the exception of points 2.2. 1. and 2.4.2 Point 2.2.1 seems to

register agreement on the parliamentary rather than the executive form of government. However, since the Report fails to give the required "details" of this ostensibly non-contentious issue, one wonders if the expression "parliamentary form of government" is used in its technical meaning or rather on its generic meaning. In fact, the parties' submissions seem to be quite divided on the issue of executive versus parliamentary form of government.

This issue is one of the cornerstone issues within the scope of work of Theme Committee No. 2 and yet the Report gives no guidance on the aspects and elements of this issue. The other cornerstone issue is the question of mono-cameral versus bicameral system, which is not even mentioned in the Report, even if it was extensively discussed in parties' submission. It is logically impossible to make submissions and write Reports for any the subsequent Blocks of Theme Committee No. 2 if these two issues have not been fully and satisfactorily dealt with.

The IFP is quite uncertain on the meaning of point 2.2.3 which states that "Parliament shall have the Supreme power to make laws". The IFP firmly rejects this wording to the extent that it can be considered a mitigation of the principle set out in point 2.4.2 which states that the Constitutional Court shall have the power to nullify Acts of Parliament in conflict with the constitution, and to the extent that this wording may undermine the full implications of a "rigid" constitution and of a "constitutional state" in which the constitution and not Parliament is sovereign and supreme.

Theme Committee No. 4 Report

In order to provide greater clarity on the shortcomings of this Report the IFP has redrafted the Report respecting the format of its third draft, so as to show how the Report should have been written to accommodate the details of the IFP's submissions and the discussions held in the Theme Committee. This document is enclosed herewith as Attachment F & page 37. Clearly if other parties were to cross-reference the Report to the contents of their respective submissions they would also be likely to find that the Report does not contain the details of their positions, and therefore Attachment F_ would need to be extended and supplemented accordingly.

Moreover, the IFP objects to point 1. 1. I of the Report which grossly misstates the meaning of the interim Constitution in saying that "Chapter 3 primarily refers to the rights of natural persons. [...] therefore [the [Bill of Rights should] exclude juristic persons" (compare with section 7 (3) of the constitution and related recent jurisdictional applications). For the record it can be mentioned that the IFP has made the submission mentioned in section 2.1.2.

-Re IFP objects to section 7. 1.1 of the Report which defers the issue of whether the Bill of Rights should apply to juristic persons to a legal opinion to be rendered by the Technical Committee. for this is an eminently political issue.

Crime Committee No. 5 Report

The IFP objects and rejects the new work program of this Theme Committee which has been redrafted to sideline the crucial and preliminary issue of whether South Africa should have a single or a split judiciary, which issue relates to the Form of State question. Against this disguised and subterfuge-like decision, the Theme Committee has proceeded to take evidence which is consistent only with the notion of a single judiciary. For instance if the judiciary were to be split along the same functional lines of legislative and executive functions, as the IFP proposes, all matters related to magistrate and small claim courts would fall within the competence of provincial judiciaries, and would be regulated exclusively by provincial constitutions and legislation, and not by the national constitution.

The IFP further objects to the fact that the composition, powers and functions of the Constitutional Court no longer represents a separate Report in any of the Blocks of this 'Theme Committee. In the original work program the Constitutional Court was the object of Report 3 of Block 2. Looking at what is happening in other Theme Committee the IFP fears that this change is motivated by the desire to question whether we should have a rigid constitution and a constitutional state in which parliament is not the supreme law-maker. In Theme Committees Nos. 1 and 2 the ANC has advanced the idea that parliament should be the supreme law maker.

Attachments:

Page 7 - Annexure A

Page 10 - Annexure B

Page 16 - Annexure C

Page 19 - Annexure D

Page 28 - Annexure E

Page 37 - Annexure F