

BLOCK 2 (a) ONE SOVEREIGN STATE  
(b) SUPREMACY OF THE CONSTITUTION

The Freedom Front makes the following submissions:

(a) ONE SOVEREIGN STATE

- (i) The concept of 'one sovereign state' in Constitutional Principle I does not presuppose that the form of state should necessarily be unitary.

Constitutional Principle I was based on the preamble to the Declaration of Intent adopted by Codesa 1 in 1992, which referred to a future, 'undivided' South Africa and to the future South Africa as a 'united' state. Inkatha's initial reluctance to sign the Declaration of Intent, because it feared that the Declaration could be interpreted as prescribing a unitary state as opposed to a federal state, disappeared when it was formally made clear that 'any proposal consistent with democracy' (including federalism) could be freely submitted to the Convention.

The understanding referred to above is as it was, in February 1995, one of the cornerstones of the constitutional process. The report on Block I from Theme Committee I to the Constitutional Assembly was based on the premise that the concept 'South Africa shall be a sovereign, independent and undivided state' (0 under 'Non-contentious Points') 'shall not preclude the state being structured along federal lines nor shall it preclude any party from arguing in favour of federalism'.

The concept 'one sovereign state' in Constitutional Principle 1 should be read in the light of the Constitutional Principles as a whole, some of which prescribe limitations on the central Authority in favour of provincial autonomy.

Examples of the above-mentioned limitations occur inter alia in the following:

Constitutional Principle XVIII((2) (powers and functions of provinces not to be substantially less than or substantially inferior to those provided for in the transitional Constitution);

Constitutional Principle XVIII(4) (special procedures, special majorities, etc., required for amendments to the Constitution altering the powers, boundaries, functions or institutions of provinces);

Constitutional Principle XXI (criteria to be applied in the allocation of powers to the national government and the provincial governments, which indicate that the national government should have the ultimate power only in specified fields (wide though they are) and that the level at which certain decisions can be taken most effectively should be the level empowered by the Constitution to do so);

Constitutional Principle XXII (national government not to exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces);

Constitutional Principle XXXIV (contemplated constitutional provision for a notion of the right to self-determination by certain communities in certain circumstances).

The Constitutional Assembly is bound by all the Constitutional Principles. It cannot interpret the phrase "one sovereign state" in Constitutional Principle 1 in a vacuum, but should do so in the context (inter alia) of Constitutional Principle XXXIV, which envisages various methods of giving effect to the concept of self-determination, including the creation of appropriate territorial entities within the Republic. It should be borne in mind that Constitutional Principle XXXIV was superimposed on all the other Constitutional Principles at a special session of Parliament aimed at an all-inclusive settlement representing the major parties participating in South Africa's first democratic general election. Constitutional Principle XXXIV does not detract from Constitutional Principle 1, but adds a rider to it.

The aim of the submission above is not to expound fully the Freedom Front's submissions in respect of Constitutional Principle XXXIV, but merely to place the phrase 'one sovereign state' in Constitutional Principle I in its proper perspective.

#### (b) SUPREMACY OF THE CONSTITUTION

The concept of a constitutional state means that no organ of state (not even Parliament itself) is above the constitution: sovereign power in such a state vests in the constitution. However, as Parliament has the power to alter the Constitution (in

accordance with its provisions) it is imperative that appropriate checks and balances be introduced in the Constitution. In this re~ Constitutional Principle XV : 'Amendments to the Constitution shall require special procedures involving special majorities'. The very purpose of this requirement is to preclude the possibility of the 'tyranny of the majority' in Parliament. In some states this possibility is reduced by the requirement that constitutional change requires approval of certain majorities of voters in referenda.

Supremacy of the constitution in the present context refers not only to the constitutional state mentioned above, but also to the following : that the Constitution is the highest law in the land, and all other law (statutory and common law) is subject to it, i.e. the latter would be void or invalid to the extent of any conflict between the two; and international law, in so far as it may be part of South African law, is likewise subject to the same limitation.

The Freedom Front wishes to point out that this submission is a general statement of principle, and that the appropriate checks and balances referred to above should be spelled out in subsequent reports of relevant Theme Committees (e.g. Theme Committee I and/or 2 and/or 3).