Inkatha Freedom Party

THEME COMMITTEE No. 1
BLOCK No. 2
SUBMISSION ON EQUALITY
AND 'ONE, SOVEREIGN STATE"

PART 1
"ONE SOVEREIGN STATE"

SOVEREIGNTY

1. Constitutional Principle I requires that the constitution establishes a "one sovereign state".

2. Constitutional Principle I does not require that the state have the monopoly of sovereignty nor does it require that the attributes of sovereignty be ascribed exclusively to the state. In fact in modem constitutionalism the "state" is not sovereign, but rather it is the "people" who are the bearers of sovereignty.

3. The people are sovereign and they exercise their sovereignty through and/or by means of the state. The notion that the state, and not the people, is sovereign conflicts with any known principle of modem constitutionalism as well as with all the other Constitutional Principles of Schedule 4. For this reason we must accept that Constitutional Principle I contains a fundamental and incurable incongruity which forces us to isolate and disregard the normative value of the expression "sovereign state" as impossible, unacceptable and meaningless when compared to the other Constitutional Principles.

4. The notion of a "sovereign state" is to be disregarded. The sovereignty must be ascribed to the People who are to exercise it in terms of the Constitution. This means that the sovereignty of the people would primarily

be exercised by means of the govermnental structures set out in the Constitution, but not exclusively. In fact the People --regarded both as individuals and as members of the social, cultural and economic formations to which they belong-- should be recognized a sphere of constitutional entrenched autonomy in which they are "sovereign" such as the case of human rights protection. Furtherinore, the people may exercise their sovereignty directly by means of referenda and other institutions of direct or participatory democracy, which were discussed in the IFP's submission for Block No. 1.

5. The recognition that the "People" are sovereign, carries the following necessary normative consequences:

a. The People have inherent rights which the constitution does not "grant" upon them but must "recognize" and protect. This notion is captured by the following proposed text:

Inherent Rights and Obligations
The Republic acknowledges and recognizes that all individuals have the natural right to life, liberty and the pursuit of happiness, and to the enjoyment of the rewards of their own industry; that all individuals are equal and entitled to equal rights, opportunities and protection under the law, and that all individuals have corresponding obligations to the State and a general obligation of social responsibility to the people of the Republic,

The "state" is only one of the means or channels of sovereignty. The "state", the "people" [both as individuals and as institutions of civil society] and the other structure of government fortn the "Republic". The Republic equates to South Africa as it is shaped by the Constitution. In the Republic the "residual sovereignty" belongs to the people: These notions may be captured by the following proposed text:

Source of Government

All political power is inherent in the people. All govermnent originates with the people, is founded only upon their will, and is instituted only for the good of the people as a whole. Government shall respect and encourage the exercise of the power of the people to organize and regulate their interests autonomously.

Rule of Freedom
All conduct and activities which are not prohibited shall be permitted. The Republic may prohibit and regulate conduct and activities for a demonstrable State's interest founded on public interests and welfare.

All powers not reserved by this constitution to the State shall belong to Provinces and to the people respectively.

[The Republic shall nourish the people's right to the pursuance of happiness both as individuals and as members of their social formations].

Other Powers
Individuals and social, cultural, religious and political formations when exercising their powers or their autonomy within the freedom and liberties recognized and guaranteed by this constitution, shall have equal standing as the powers of the Federal Republic.

In the normative content of the foregoing provisions is the link between the recognition that the people are sovereign and the notion of social, cultural and economic pluralism which the IFP has often submitted to this Theme Committee.

C. The Constitution is to be written in the name of "We, the people". A strict application of Constitutional Principle I would force us to write a constitution in the name of the "State"! People should be constitutionally regarded not only as individuals but also as members of

social, cultural and economic formations. The following is the IFP proposed language:

*WE., the people o*f *South Africa,* mindful of our unique and diverse heritage, inspired by the desire to secure the blessings of democracy, freedom and pluralism for our and future generations, respecting the equality of all men and women, recognizine the right of people to organize themselves in autonomy and indelpendence at all levels of society. desiring to ensure that individual rights and liberties are accompanied by obligations of social solidarity to others, determined to guarantee that the rights of all people are protected both as individuals and members of social and cultural formations, do now ordain and establish this constitution for the Federal Republic of South Africa to provide the people of South Africa and the member States with a Federal government to serve their individual and collective needs, wants and aspirations.

The language of this proposed Preamble, which will be more fully discussed in our submission for Block No. 10, shows the connection between recognition of the people" as the sovereign and pluralism, which goes beyond the political philosophy of the French revolution based on the non-recognition of any subject other than the state" and the "individuals". In fact, since the end of WWI there has been increasing awareness that "intermediate formations" are also entitled to constitutional recognition and protection.

PROVINCIAL AUTONOMY

1. As indicated above, the notion of sovereignty being ascribed to the "state" rather than to the people" is to be disregarded, and therefore has also no bearing on provincial autonomy.

2. The IFP has made extensive submissions on provincial autonomy, both in this and in other Theme Committees, to which reference is made.

The IFP has made a clear proposal for the establishment of a federation of provinces either on a symmetric or an asymmetric basis.

3. Provinces shall not be "organs" of the state. To us, the word "state", as used in the Constitutional Principles and as it shall be used in the next constitution, refers only to the central government, its agencies and instrumentalities. Provinces are autonomous entities which exist immediately under the constitution on the same level as the "state" entity, with their own competence. From a legal viewpoint, the constitution re-establishes the "state" as a legal entity which exists because of the constitution. The constitution also establishes provinces which are entities to the same extent as the state. Several Constitutional Principles determine criteria for the distribution of powers and functions between the state and the provincial entities. In terms of the Constitutional Principles the state entity is subject to the constitution which "shall be binding on all organ of the state at all levels of government" [CP IVI. In terms of CP XVIII Provinces may adopt, and therefore are subject to their own constitutions which have the necessary and implicit purpose of "binding all the organs of the Province at all levels of government]" Also in terms of CP XVIII, the power of adopting provincial constitutions shall be "defined in the [national] Constitution", which will ensure that Provinces and provincial constitution-making are bound by the national Constitution to the extent desired and determined by the Constitutional Assembly. This proves that in terms of the Constitutional Principles there is no legal or logical necessity in the conclusion that Provinces are organs of the State, which conclusion would destroy the foundation of a federal system.

4. The IFP contends that the "Republic" must be divided into one "state" and into autonomous Provinces'. The "state" shall not be sovereign, and depending on one's perspective it may be said that the people are sovereign or a constitution written in the name of the people is sovereign. It is often said that in a constitutional state the constitution not the state is sovereign.

PLURALISM

(including minority participation, community self-determination "monarchies"and the "volkstaat" issue)

1. The IFP has tabled in this and other Theme Committees a comprehensive vision of political, social, economic and cultural pluralism, the main features of which are:

a. the people shall have the "residual" sovereign powers;

b. the people, regarded both as individuals and social, economic, and cultural formations shall be entitled to a sphere of constitutionally entrenched autonomy defined by the interests they are able to administer and regulate by themselves, and in respect to which no government can show a compelling reason of public interest to regulate them;

It may be recalled that when in May 1993 Constitutional Principle I was adopted at the WTC after about three hours of debate on the point, at the suggestion of Mr. Slovo the words single sovereign state" were substituted with the words "one sovereign state" specifically to accommodate those who wanted to ensure that the state would not be "single", i.e. the only entity to the exclusion of Provinces as separate entities, and that the "one state" could also be "divided".

c. establishment of a federal system in which the Provinces -- rather than the central government-- are the primary government of the people and only powers which cannot be adequately and properly exercised at provincial level are devolved upward to the central government;

d. protection of political minorities in Parliament by means of adequate provisions of parliamentary and electoral law;

e. participatory democracy, including necessary participation of affected interests in legislative and administrative decision-making process, referenda, right to petition, et cetera;

f. special human right protection for collective interests; and

g. limitations on the scope and role of all levels of government, with special regard to economic matters.

2. "Minority participation" shall be adequately catered for within the parameters of a comprehensive vision of pluralism. Therefore, in a properly structured federal system, there is no need for mandatory power sharing.

3. "Self-determination" may not be reduced to "community self-determination" but should be the fundamental idea which inspires the establishment of a federation of provinces based on the principle of pluralism. The notions of "community" or "corporate" self-determination are likely to become the sugar-coating for the bitter pill of a constitution which repudiates both federalism and pluralism, and as such they should be rejected. True and full-fledged self-determination should prevail and the building-block ideology of a federal and pluralistic constitutional order.

4. A "monarchy" is a political form of societal organization on a territorial basis headed or symbolized by a monarch.. A cultural movement does not exercise "political" powers on a territory and is not a monarchy. A person's entitlement to use the name of "king" does not make him a monarch or anything more than a cultural or ceremonial figure. It is only the existence of a Kingdom which makes a monarchy. Simply put, a king without a kingdom is not a monarch, while a monarchy and a kingdom are mutually necessary implications

5. The Kingdom of KwaZulu-Natal exists as a living historical reality, and its right of self-determination shall be fully recognized and protected.

Because of its right of self-determination the Kingdom of KwaZulu-Natal is entitled to its autonomy and self-rule within the parameters of a federal relation with the rest of South Africa, irrespective of what type of government the rest of South Africa chooses to ordain for itself. Within the autonomy of the Kingdom, the position of His Majesty the King of KwaZulu-Natal shall be recognized as the constitutional monarch of the Kingdom who reigns but does not govern.

PART 2
EQUALITY

The Principle of "formal" equality shall be entrenched in the constitution.

Usually a reference to the principle of equality can also be found in the Preamble: This matter will be discussed more completely in our submission for Block No. I 0. However the following IFP proposed verbiage may show how equality intertwines with the other fundamental notions which underline the constitutional order and may be expressed in the Preamble:

> *WE, the people of South Africa,* mindful of our unique and diverse heritage, inspired by the desire to secure the blessings of democracy, freedom and pluralism for our and future generations, respecting the equality of all men and women, recognizing the right of people to organize themselves in autonomy and independence at all levels of society, desiring to ensure that individual rights and liberties are accompanied by obligations of social solidarity to others, determined to guarantee that the rights of all people are protected both as individuals and members of social and cultural formations, do now ordain and establish this constitution for the Federal Republic of South Africa to provide the people of South Africa and the member States with a Federal government to serve their individual and collective needs, wants and aspirations.

The principle of formal equality may include the following

a. equal protection of law, which historically is its the first formulation
b. equal entitlement to rights provided for in the law, which is a more advanced formulation of (a)
c. equal dignity or equal social dignity, which is a constitutionally entrenched political concept with relevant legal implications in constitutional adjudication

Inherent Rights and Obligations

The Federal Republic of South Africa acknowledges and recognizes that all individuals have the natural right to life, liberty and the pursuit of happiness, and to the enjoyment of the rewards of their own industry; that all individuals are equal and entitled to equal rights, opportunities and protection under the law, and that all individuals have corresponding obligations to the Federal State and a general obligation of social responsibility to the people of the Federal Republic.

Equality

All citizens of the Federal Republic of South Africa have equal social dignity, shall be equal before the law and shall share an equal right of access to political, social and economic opportunities irrespective of sex, race, colour, sexual orientation, language, traditions, creed, religion, political affiliation and belief, and social and personal status.

The Federal Republic of South Africa shall remove social and economic hindrances which operate as a factual limitation on the freedom and equality of all its citizens, prevent their human and social growth and diminish their equal access to political, economic and social opportunities. For this purpose the Federal Republic of South Africa may take measures in favour of segments of the population requiring special assistance.
[the underlines words refer to formal equality]

In addition to formal equality the Constitution shall entrench the principle of "substantive" equality. In order to achieve substantive equality the law may treat individuals differently, rather than equally, so as to recognize and adjust to existing social, cultural and economic differences.

For instance, while the principle of formal equality would require that everybody pays an equal amount of taxes, the principle of substantive equality justifies the fact that people are taxed differently in "proportion" of their income or wealth.

It is said that at times formal equality may justify discrimination not " against" but rather in "favour of" particular individual or collective interests. This formulation has gained recognition and support and has become constitutionally accepted even is not logically tenable, for rarely does a differentiation in favour of some not detract from the position of others, and is not therefore accompanied by a differentiation "against". For instance, once the tax system is no longer "proportional" but becomes "progressive" those on the higher tax bracket are discriminated against in favour of those in the lower tax bracket.

Therefore, substantive equality is usually anchored to a constitutionally entrenched political goal, such as "removing the social injustice". The IFP has suggested that the following goal be stated:

(1) remove social and economic hindrances which operate as a factual limitation on the freedom and equality of all its citizens, prevent their human and social growth and diminish their equal access to political, economic and social opportunities.

This language derives from established and tested European jurisprudence and has the merit of avoiding the vague and pernicious notion of "social justice", focusing on the notion of those "hindrances" which make formal equality insufficient or at times even meaningless.

However, the most salient characteristics of formal equality is the type of implementing techniques to be used to achieve the goal set out under (1) above. There are various options, and different verbiage is used to describe them. In synthesis, the following could be used as reference points:

a. promotion of access to equal opportunities
b. entitlement to equal access to socio-economic opportunity
c. entitlement to equal socio-economic opportunities
d. entitlement to equal socio-economic positions, which usually means mandatory redistribution

The debate seems to be focusing on the alternative between options (b) and (c). The difference between the two approaches may be exemplified with respect to affirmative action programs in public employment. Under option (a) the government would merely make a special effort to advertise the job openings among members of the "protected class". In terms of option (b) the government would need to set up special programs for training or provide other form of assistance to enable the members of the protected class to qualify and get the jobs, for which they would still need to compete with everybody else. Under option (c) the job opportunities would be reserved only for the members of the protected class irrespective of their qualifications. Similar distinctions would apply in other fields of social intervention. At times it might be difficult to draw a clear distinction between options (b) and (c) while on other occasions the two options support substantially different approaches to social problems.

Historically the IFP has abided by the culture of self help and self reliance as the real path for social growth and liberation of the oppressed people of our country. The IFP does not believe that a culture of entitlement will help in developing sound and long-lasting solutions to our problems. For this reason the IFP has always sponsored alternative (b). The IFP also suggests that the expression "affirmative action" not be used in the constitution, because, even if it is highly politically charged, it has less normative value and constitutional

significance than other language, among which the one proposed by the IFP, whiz:

(2) All citizens shall share an equal right of access to political, social and economic opportunities

The Republic of South Africa shall remove social and economic hindrances which operate as a factual limitation on the freedom and equality of all its citizens, prevent their human and social growth and diminish their equal access to political, economic and social opportunities. For this purpose the Republic of South Africa may take measures in favour of segments of the population requiring special assistance.

The Combination of (1) and (2) above defines the main characteristics of substantive equality. However, the most important aspects in the system of constitutional equality relates to its enforceability, implementation and development over time. Any type of substantive equality is a vague but constitutionally charged test which cannot be applied by an ordinary judiciary which operates on the basis of legal syllogisms. Therefore, there is a necessary connection between substantive equality and constitutional adjudication being conducted exclusively by a Constitution Court. While a Constitutional Court can be charged with the task of developing constitutional policies which implement and interpret the Constitution, the ordinary judiciary shall merely abide by the jurisprudence of the Constitutional Court and by the law.

The IFP rejects the proposal that substantive equality ought not to be mentioned in the Constitution and should be left to the political agendas of political parties. The IFP also rejects the notion of making substantive equality part of the text of the constitution but relegating it to a section of the constitution which from a constitutional viewpoint is not "constitution" but is merely political directives and enunciation of principles without any force of law. Substantive equality is part of the guaranteed constitutional protection of almost all European countries.

Finally, the last aspect of equality relates to its field of application and it applies almost identically to both formal and substantive equality. The IFP has suggested the following language, which reflects both commonly used international standards as well as the language of the interim Constitution

> (3) 1 irrespective of sex, race, colour, sexual orientation, language, traditions, creed, religion, political affiliation and belief, and social and personal status.

It is important to stress that no discrimination shall take place on the basis of "personal status", since this is the field where the most insidious forms of discrimination are taking place in our country. It can be noted that this criterion, as all the aspects of equality, are subject to a rule of reason. In the final analysis only discrimination which cannot be reasonably justified are unconstitutional, as it is stated in world-wide constitutional jurisprudence on matters of equality. Depending on the development of Constitutional jurisprudence, "personal status" might end up also subsuming the guarantee against discrimination on the basis of "age", which is typical of advanced democracies, but at this juncture might not be appropriate to be prescribed in the Constitution.

It should also be noted that the principle of equality may be implemented and enforced exclusively by the central Govemment, or alternatively by the central Government and the Provinces in their respective areas of jurisdiction. The IFP believes that the principle of equality should be entrenched in the national constitution but should be implemented by the Provinces with respect to the matters of their competence (i.e. employment/labor, education, welfare, family law et cetera). The Republic might have the power to coordinate this implementing role of the Provinces.

In the development of a constitution, the principle of equality is usually explicated in respect to some legal relations which are particularly constitutionally "sensitive". Among them:

a. the equal and free exercise of all religions and beliefs in the State
b. equal rights, obligations and dignity of spouses
c. equal access to educational opportunities
d. equal access of women to political, social and economic opportunities
e. equal access to housing opportunities
f. equal right to vote
g. equal right to access job opportunities