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JOINT SUBMISSION OF THE INKATHA FREEDOM PARTY, THE KWAZULU GOVERNMENT, THE AFRIKANER VOLKSUNIE, THE CONSERVATIVE PARTY, THE BOPHUTHATSWANA GOVERNMENT AND THE CISKEI GOVERNMENT TO THE TECHNICAL COMMITTEE ON CONSTITUTIONAL MATTERS AND TO THE NEGOTIATING COUNCIL ON A PROCESS OF TRANSFORMATION CAPABLE OF ESTABLISHING, AMONGST OTHERS, FEDERALISM

JUNE 28, 1993

1.1 This submission has been prepared in response to the Sixth Report of the Technical Committee on Constitutional Matters [the Technical Committee]. The participants who prepared this joint submission believe that the Sixth Report of the Technical Committee does not satisfy the instructions received from the Negotiating Council on June 17, 1993. In fact it was our understanding that the Technical Committee was instructed by the Negotiating Council to satisfy our request for additional technical information, namely for the development of a so-called "Model C" of transition to democracy [see *infra*]. It is beyond doubt that since the Sixth Report should have addressed our request for additional information, our interpretation of the instructions given to the Technical Committee should be preferred over other possible interpretations.

1.2 Moreover, the Minutes of the meeting of the Negotiating Council held on June 17, 1993 make it clear that the Technical Committee had been instructed to develop a "constitutional model", rather then merely criticizing and misconstruing our submissions. This conclusion is also corroborated by the fact that the instructions given to the Technical Committee were the expression from a compromise position worked out on the basis of the draft Resolution submitted by the IFP on June 15, 1993. That Resolution would have required the Council to stop its consideration of constitutional principles until a "Model C" process had been fully developed by the Technical Committee. Our understanding of the compromise is that the Technical Committee was instructed to develop a "Model C" transition process while the Council would have continued to consider the other Reports of the Technical Committee, even if no final agreement could have been reached until a fully-fledged "Model C" process has been tabled.

2. It is clear that the Sixth Report does not contain a recommendation by the Technical Committee on how a "Model C" transition process could be feasible and viable in the South African context. In fact, the Technical Committee has successfully developed and submitted to the Council a "Model B" transition process which is contained in the second part of the Third Report, in the Fourth and the Fifth Report.

FIRST DRAFT

3.1 The "Model A" transition process can be described as a straight run to a Constituent Assembly on the basis of the ANC's Harare Declaration.

3.2 The "Model B" is a two-stage transition process which will empower a Constituent Assembly within some pre-agreed constitutional parameters which ostensibly would circumscribe and limit its discretion. The two-stage transition process could accommodate a power-sharing agreement or a government of national unity, and would not necessarily call for the establishment of SPRs prior to the adoption of the final constitution, which could take place after as much as five years from elections. This conclusion is not negated by the possibility that the interim constitutional parameters, [i.e. transitional constitution] would contain a constitutional mandate to the new government to establish such regions, for no mechanism has been provided to compel the new government to comply with such a mandate. Consequently under "Model B" the TBVC states and self-governing territories are likely to be reincorporated into the existing four provinces, which could be provided with more extensive powers.

Due to the fact that the constitutional parameters which provide the framework to the operation of the Constituent Assembly are transitional in nature, they would necessarily provide for a very limited number of powers in the SPRs, and would necessarily establish relations between the SPRs and national government which contain overriding powers at legislative level within which the concurrent exercise of functions would be framed. For the same reason the transitional constitution would be deficient in terms of human rights protection and guarantees such as a jurisdictional Constitutional Court and jurisdictional resolution of conflicts between SPRs and the national government.

3.3 "Model C" is a straight-run to a final constitution which establishes federalism in South Africa prior to, or at the same time as, the holding of new elections. Therefore, under "Model C" the new federal government would be empowered in a federal system along with state governments.

The next constitution of South Africa could be amended by virtue of reinforced but standard procedures for amendment of rigid constitutions. Such procedures would be modelled after established constitutional models and would contain no deadlock-breaking mechanisms capable of allowing a 51% majority to change the constitution or other techniques which would compel the amendment of the constitution.

The federal constitution should contain a fully-fledged Bill of Rights which meets the high international

standards of human rights protection. Federalism would be defined as a system which leaves to the member states all residual powers and allocates to the national government only those powers which must be exercised at national level on the basis of the notion of residuality. "Model C" is the model which details the stages of constitutional development, the structures and the procedures required to achieve this predetermined outcome.

4. The Technical Committee felt it relevant to discuss our motivations in endorsing and requesting a "Model C" transition process. We are now therefore forced to rectify the misperception of the Technical Committee about the real compelling need to opt for a "Model C" transition process.

4.1 We believe that the first imperative of constitutional negotiations is to reach a comprehensive political settlement, and that this can not be postponed until after elections. It is clear that the powers, functions and autonomy of the SPRs are a fundamental element in the process of such a political settlement. Therefore, we believe that it is essential that a full agreement on the form of state be reached prior to the holding of elections and that such agreement be reflected and entrenched in a final but amendable constitution.

We believe the holding of elections and the empowerment of a new government outside the parameters of a final political settlement would, in the South African context, be a sure recipe for civil war and disaster.

4.2 We believe that a federation is the only way to ensure peace and prosperity in our country and the sooner it is established, the better it will be. The harsh historical reality of our country is that many social and cultural formations have developed antagonism and mistrust against the idea that they could governed by only one government. The notion of empowering only one government to rule over the entire country can not please all social and cultural formations, while several governments within a federal structure can do so. There are many who would rather be governed by their own governments or by a government of their own choice at regional level, and because of this they would accept what they perceive as a potentially hostile and insensitive government at the national level.

Moreover, we believe that only a federation would establish a system of checks and balances capable of defeating the totalitarian and centralistic forces operating in South Africa so as to ensure true political pluralism. In fact, a federation will allow the political survival of political formations which are not a force of government at national level but which could be a force of government at regional level. As we

indicated in our submissions, federalism is also the best framework to ensure cultural, social and economic pluralism in South Africa and to protect the protection of autonomy of civil society from undue interferences of government.

4.3 We also believe that the country will not withstand and survive five years of prolonged constitutional negotiations and we see no reason whatsoever to delay the finalisation of the process of constitutional development of our country. To us, the only explanation, but not justification, for a two-stage transition process is to accommodate a power-sharing agreement or a government of national unity. We believe that this political objective of those who want to survive as a force of government after the next elections, irrespective of whatever suffrage they achieve at elections, does not justify the enormous cost to the country which will follow a lengthy two-stage transition process.

4.4 Finally the one-stage transitional process will ensure that SPRs are established with residual and autonomous powers, while in the two-stage transition process the establishment of SPRs is not guaranteed.

5.1 We believe that the final constitution of South Africa should be produced in a process which recognises the autonomy of the SPRs to determine their own constitutions. We also believe that there is an objective need for SPR constitutions [see: Annexure A].

5.2 Our approach is a synthesis of top-down constitutional development with ground-up democracy building. In fact, we do not wish to deny the essential role and need for the unifying process of negotiation at the national level [top-down approach]. However, we maintain that regions should be entitled to participate in the process of constitutional development with an autonomous role which should lead them to identify in autonomy their powers, functions and boundaries within the parameters and the limits set forth by the negotiation process at central level.

We do not believe that the boundaries, powers and functions of the SPRs should be determined in a unified process at national level, even if such process receives inputs from the regional level.

5.3 The process of constitutional development leading to the establishment of SPRs needs to be consistent with its predetermined outcome. We contend that the SPRs should be established as sovereign members of a Federal Republic of South Africa in a federal system of split and shared sovereignty established on the basis of the provisions set forth in the federal constitution.

In this respect, the Technical Committee misconstrued our approach, confusing the process with its result. It is a conceptual rather than a historical consideration that once the process is concluded the powers of the Federal Republic of South Africa will be seen as deriving from the powers of the member states and from the sovereignty of the people. This does not mean that the sovereignty of the Federal Republic of South Africa is "devolved upward" from the SPRs to the national government. Rather, with the adoption of the constitution for the Federal Republic of South Africa provision will be made for the recognition of the residual sovereignty of the member states so that a federal system resembling the United States federation can be established. In this respect, the SPRs constitutions could be entrenched at the time of adoption of the constitution for the Federal Republic of South Africa and could be maintained until such time with a the meta-juridical status of a highly authoritative political document [see *infra*]. The agreement on the process will ensure that SPRs constitutions will be entrenched and will acquire full legal recognition, before the holding of elections.

6.1 We have agreed to advocate a common process proposal as originally indicated in the Resolution tabled by the IFP on July 15, 1993 and supported by all of us. According to this process proposal, SPRs constitutions should be negotiated and endorsed solely at the SPR level. However, their drafting should be contained and guided by parameters established at national level and their ratification could take place only once it has been verified that they comply with such parameters, with the exception of the Constitution of the State of KwaZulu/Natal.

6.2 At this point we have not indicated how SPRs constitutions should be adopted and we have made no representation supporting the idea of elected SPR constitution-making bodies. We have indicated that a specific statutory commission should ensure that SPRs constitutions are drafted and adopted through processes which are broadly representative of the affected interests, providing that the essential element of democracy will be guaranteed through the ratification of the SPRs constitutions by popular referenda, organised under the direction and the auspices of the statutory commission.

6.3 The SPR constitution-making process would contribute to the process of national constitution-making to the extent that the constitutions for those SPRs which can complete their constitution-making within the pre-agreed time-frames, would be registered and accommodated by the constitution-drafting process at national level. An analysis of the details of our process proposal will clarify how, from a technical point of view, this process

operates at a political level without limiting the legal discretion of the national constitution-making process.

6.5 There is no reason to believe that this approach would take more time than the process described in "Model B". On the contrary, this entire process is conditioned by the existing constitutional deadline of September 1994 [which under the terms of the present constitution could be extended for an additional five months.] Therefore, "Model C" would ensure the completion of the process by the end of 1994 on the basis of a one-stage transition. This is in sharp contrast with a two-stage transition which opens a process of constitutional development with no built-in deadline.

Moreover, a "Model C" approach has the additional advantage of forcing the achievement of consensus without producing deadlocks. The "Model B" provides for deadlock-breaking mechanisms which could lead to the adoption of the final constitution for South Africa by a 51% majority, thereby creating the possibility that the final constitutional dispensation for South Africa does not reflect a comprehensive political settlement among the major participants and opens the doors for disaster. The "Model C" will rely on the autonomy and independent constitution-making of the SPRs. To this aspect of autonomy and independence at local level would correspond the need to achieve consensus in the drafting of the federal constitution. This two aspect process reduces the risk of deadlocks allowing for concessions to be made at regional level which might not be carried at national level.

7.1[1] The issue of the form of state must be resolved and disposed preliminarily to any determination affecting both the modalities of the process of transformation as well as the constitutional principles to be embodied in any future constitution. A predetermined type of state, that is a federal, confederal, regional or unitary state would condition the process of transformation. Put otherwise, the process of transformation needs to be shaped in order to produce a predetermined type of state. A unified centralised process of transformation, centred around the notion of a constituent assembly is <u>not</u> likely to produce the breakdown of the present unitary state into member states organised on the basis of the federal principle. The MPNP should not focus on a constitution making body and transitional constitution until the form of state has been considered. To do otherwise "would be to put the process before substance, to permit the

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1. Section 7 is taken almost verbatim from pages 8-9 of the Schedule of the Sixth Report

fundamental determination on the substance to be conditioned by the procedural decisions." There are compelling reasons to justify the preliminary determination of form of state in the negotiating process. Such reasons relate, amongst other things, to political expediency, constitutional dogmatics, the determinative relationship between the form of state and the constitution making process and the component structures of the constitution. These reasons are fully explained under in our original submissions to the Technical Committee.

7.2. The form of state is described in the following broad terms: A federal system in which "all powers should be reserved to the region/state while only those powers which cannot be adequately exercised at region/state level should be devolved upwards to the federal government."

Such a form of state should be informed by the principles of subsidiarity, residuality and possible asymmetry. The notion of subsidiarity requires the taking of decisions at the lowest possible level. So to speak, all services and governmental functions and powers should be handled or exercised by the lowest level of government capable of handling such function, powers or services. On the other hand, residuality is a qualification of the notion of subsidiarity. According to the concept of residuality only those powers which cannot be exercised adequately and properly at local level should be devolved upwards to the federal level. These notions are more fully explained in our original submissions.

On this proposal of form of state, autonomous member states would come into being as part of the "Federal Republic of South Africa". Such a federal system is "intended as a system of splits of sovereignty between the member states and the federal government".

7.3. The federal system could be established on an asymmetric basis. This would allow the adjustment of the system to social and economic differences amongst the various regions of our country and could be achieved through provisions in the state constitutions which empower the member states to delegate upwards to the federal government the exercise of some of their functions. As an extreme possibility, it is conceivable that a portion of South Africa could be organised as a unitary state and that such a portion would entertain a federal relation with one or more regions of the territory organised as a federal system.

8.1 Our proposal envisions a constitution-making process which does not require a transitional process. The present constitutional order would last up to the adoption of the final and federal constitution of South

Africa with elections to be held under such constitution no later than the end of 1994.

8.2 The MPNP should determine preliminarily the form of state. Decisions on constitutional principles should be consistent with the agreed form of state. The new South Africa shall be established as a federal system with residual powers recognised to the member states on the basis of the principle of residuality.

8.3 The MPNP should promote the establishment of a statutory commission charged with the task of co-ordinating top-down negotiations and ground-up democracy building.

8.4 The MPNP would determine a set of constitutional principles which would guide and circumscribe the drafting and adoption of SPR constitutions. The Commission will verify the correct implementation of these principles. Within the parameters set by the MPNP the ground-up democracy-building processes would determine in autonomy regional borders and SPRs powers and functions. Our proposal provides for mechanisms to deal with possible inconsistencies between different proposals as far as boundaries are concerned.

8.5 The ground-up democracy building processes would set the premises and the mechanisms for the reincorporation of the self-governing territories and the TBVC states in the new SPRs, for instance as is provided for by the Constitution of the State of KwaZulu/Natal.

8.6 While the commission co-ordinates and supervises ground-up democracy-building processes, negotiations would continue at central level to produce a final federal constitution for South Africa. The actual drafting would be completed by a panel of experts on the basis of principles and guidelines approved by the MPNP. Alternative constitution-making processes could be considered at this stage and would still be consistent with our approach to integrate ground-up democracy-building with top-down negotiations.

8.7. Once the commission verifies that the constitutional proposals for the SPRs are consistent with the parameters set forth at central level, it will prompt the ratification of such constitutions through popular referendum. The SPRs constitutions so approved and ratified would be forwarded to the constitution-making process at central level. Such constitutions would have no legally binding value on the constitution-making process at central level and would be nothing more than very powerful popular petitions to the constitution-drafting process at central level.

9.1 The commission which we propose could be established by the end of June. By the end of July the MPNP should

finalise the principles guiding ground-up democracy building. By the end of September the commission, working in close co-operation with regional representatives, should finalise constitutional proposals for SPRs.

9.2 This of course will be possible only for those SPRs which are ready, willing and able to finalise such proposals with a degree of credibility determined by the commission within the established time-frame. The other regions will need to be provided for through negotiations at central level.

9.3 SPRs constitutions should be submitted for approval by referendum to be held on December 1, 1993. By January, 1994 such constitutions could be delivered to the constitution-drafting process at central level.

9.4 The commission would be assisting the constitution-drafting process at central level so as to ensure that the SPRs constitutions are acknowledged, registered and capitalised on in the drafting process for a federal constitution. Depending on the technique used for the drafting of the federal constitution, the drafting process at central level could be concluded within a period of two to seven months.

9.5 As soon as the drafting of the federal constitution is concluded, the federal constitution would be submitted for approval by referendum, and general elections can be held by September 1994 under the terms of the federal constitution and under the terms of the SPRs constitutions to fulfil national and regional political positions.

The constitution-drafting process at central level which we propose would reflect the technique adopted to reach consensus on the treaty establishing the international monetary system [Bretton Woods technique].

In its original submission to this Technical Committee, the IFP has already tabled a set of constitutional principles which should be handed down by the MPNP to the commission and which should guide and circumscribe the constitution-drafting process. The IFP has also tabled a proposed Bill for the establishment of the commission and for the determination of its role and function. Both documents are hereby incorporated by reference.

According our proposal a special and expedited process for approval of the Constitution of the State of KwaZulu/Natal should be established in recognition of the fact that KwaZulu/Natal has gone further ahead than any other region in the process of erecting its territory into statehood within the parameters of a federal system.

10.1 The MPNP would approve or reject in its entirety the draft constitution prepared by the experts in accordance with the principles previously set forth by the MPNP. The SPRs constitution would have been previously approved through referendum. The national constitution will be submitted to referendum. Soon thereinafter national and regional elections would take place on the same day.

10.2 Our proposal would establish federalism and entrench SPRs before the empowerment of a new government and would ensure that the existing territorial local autonomy [TBVC states and self-governing territories] are transformed into SPRs without having to be previously reincorporated into the four existing provinces. The TBVC states and the self-governing territories would be promoting ground-up democracy building processes. However, such processes would remain in a meta juridical level [not *contra legem* but *praeter legem*] and the entire process would be legitimated with the ratification of the final constitution of South Africa which would set forth, as all constitutions do, the principle of its own self-legitimation. The South African Parliament would need to adopt the necessary legislation to establish the commission and to prepare for elections, including institutions such as the Independent Media Commission, the Electoral Commission and possibly TECs.

10.3 In accordance with the draft constitution for a Federal Republic of South Africa tabled by the IFP with the Technical Committee on Constitutional Matters, a Federal Senate would represent the regions on the principle of equal suffrage.

10.4 Reference is made to the Schedule to the Sixth Report of the Technical Committee.

10.5 Our proposal does not describe entirely a bottom-up process of transition. It describes a process which integrates ground-up [bottom up] democracy building processes with the process of negotiation at central level creating mechanisms for co-ordination and harmonisation. This will ensure that South Africa comes together on the basis of the true, needs, wants and aspirations of the South African people. This process avoids delays and deadlocks and will ensure the completion of the transition by 1994.

11. As far as the Conservative Party is concerned, this report must be read in conjunction with the CP's constitutional principles set forth in paragraph 8.2.1 and 8.2.4 of its submission to this Technical Committee.

We urge the members of the Negotiating Council and the concerned public to make direct reference to the IFP original submission to the Technical Committee on Constitutional Matters. We have demanded that our proposal should be

considered by the Negotiating Council before it seeks to agree on the alternative proposal for a two-stage model which is fully described in the Third, Fourth and Fifth Reports of the Technical Committee on Constitutional Matters.

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ACTION AGENDA TO IMPLEMENT THE ONE-STAGE "MODEL C" TRANSITION

1. Agreement of a federal form of state with residual powers in the member states and powers to the central government allocated on the basis of the notion of residuality.

2. Submission to Parliament convened in special session of the Bill establishing the statutory Commission with powers and functions as per the IFP proposal and draft Bill.

3. Multiparty agreement of the broad constitutional principles which must guide and circumscribe constitution-drafting at member state level.

4. Establishment of institutions necessary to ensure free and fair elections, including IEC, IMC, TECs, et cetera. Multiparty actions to curtail violence and intimidation and jump-start economic recovery and social reconstruction.

5. Multiparty agreement on specific constitutional principles for the Constitution of the Federal Republic of South Africa.

6. Verification by the Commission that draft constitutions of member states are in compliance with the broad constitutional principles approved by the MPNP and resolution of possible boundaries conflicts.

7. Ratification by popular referenda of the member states constitutions and of the Constitution of the State of KwaZulu/Natal.

8. Appointment of a group of South African and international experts to draft the Constitution for the Federal Republic of South Africa on the basis of the specific principles adopted by the MPNP. The Federal Constitution shall recognise the State Constitutions.

8. Submission of the ratified member state constitutions to the experts.

9. The MPNP approves or rejects the draft Federal Constitution in its entirety. In the case of rejection the experts will need to draft a new one or a new panel can be appointed.

10. Ratification of the Federal Constitution by popular referendum.

11. Elections at state and federal levels.

#7018.1
June 28, 1993

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ANNEXURE A

THE NEED FOR SPR CONSTITUTIONS

1. **Constitutional autonomy.**

1.1 A constitution, or a charter is a document which organises and regulates autonomous powers. Every time an entity comes into existence by virtue of the organisation of autonomous powers, it will do so with a document which sets forth its organisation and operation. Autonomous powers are the powers of self-regulation. Autonomous entities are corporations, charitable organisations, sporting clubs and any other entity organised by individuals to self-regulate their interests. All these entities are organised and operate under the terms of a constitution, however denominated.

1.2 Regions are political autonomous entities. If SPRs are to be autonomous entities they must have a constitution which organises their structures and regulates the exercise of their powers. The IFP maintains that the SPRs must exercise autonomous powers, which means that the powers of the SPRs must be vested in them and exercised in their own name without substantial interference from the central government. Both in a regional and in a federal system, SPRs are considered autonomous entities.

1.3 Provinces are considered legal entities and in many cases might be vested with their own powers. However, they are often not considered to be autonomous because they do not have the power to regulate their own structures and to exercise their own powers without substantial interference from the central government. Provinces are not autonomous to the extent that they do not have the powers to give themselves rules (*autonomous*). The law of the central government can determine their structures and the modalities under which they exercise their powers. Autonomy requires that the entity has the power to determine by itself its rules of organisation and operation and this can be done only through a constitution or a charter or articles of incorporation.

1.4 A constitution is the articles of incorporation of an SPR. Modern constitutionalism has provided an enormous amount of consideration to support the need for constitutional autonomy. These considerations range from increased democratic participation to improved government efficiency and the perfection of the system of checks and balances. Since 1933 when Professor Ambrosini first identified the parameters of a regional state, constitutional autonomy has also been related to minority protection and the need of expressing in an institutional

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form the cultural and social diversity of a given territory.

1.5 The concept of constitutional autonomy can exist either in a system of unified sovereignty or in a system of divided sovereignty.

1.6 In a regional state, regions are not provided with the attributes of *sovranitas* but only with a *potestas*, which is a devolved and not original autonomous power. Therefore, within the parameters of a regional state, the national constitution will be organising the *sovranitas* and only the central state will be recognised as a sovereign entity. In this context the regional constitutions will have the purpose of organising the *potestas* of the region.

1.7 In all regional states regions have constitutions which serve this purpose. The parameters of the latitude which such constitutions can take, depends on the parameters of the grant of *potestas* performed by the national constitution. In other words, the regional constitutions will be limited to the organisation of the area of autonomy reserved to them by the national constitution. Within this area of autonomy each regional constitution can organise and structure the exercise of the regional powers in different fashions so as to accommodate local needs and aspirations.

1.8 This is the case in both the Italian and Spanish regions. It needs to be noted that both in Italy and Spain the respective national constitutions grant two types of *potestas* to the regions so that regions in those countries come into classes, ordinary and special-autonomy regions.

1.9 The purpose of regional constitutions in Italy and Spain is to determine forms of organisation and operation of the regions which reflect the specific characteristics, needs, wants and aspirations of the region and of the people living therein. A noticeable example in this regard is the constitution of the region Trentino-Alto Adige which is entirely structured so as to preserve the cultural diversity and peaceful co-existence amongst the German, Italian and Ladini communities living in the region.

1.10 The only alternative to regional constitutions would be the organisation of the operations and functions of the regions through an Act of Parliament which would establish the regional offices and determine how they should operate. This approach would serve the cause of administrative uniformity but would deny the intrinsic value of constitutional autonomy, and for this reason it is rejected by the IFP. This approach would turn regions into provinces.

2. Constitutional autonomy in a federal system

2.1 In a federal system as advocated by the IFP the member states would hold the residual sovereignty. This is the case in the United States where both the Federal Government and the member states share in the attributes of sovereignty in a system of split sovereignty. In the United States, because of historical reasons, the member states not only have residual sovereignty, but also original sovereignty, while to the federal system is recognised a form of devolved sovereignty on the basis of an irretrievable transfer. However, there is no equation between original sovereignty and residual sovereignty, for residual sovereignty could be a devolved one by virtue of a provision in the federal constitution.

2.2 Therefore in a federal system the state constitutions have the fundamental purpose of organising the exercise of sovereign powers. Modern constitutionalism recognises that sovereign powers can not be exercised outside the parameters of a constitution, whether such a constitution be written or unwritten. Modern constitutionalism equates the notion of sovereignty to the need for a constitution and recognises that all countries have a constitution, even if in some cases it is an unwritten constitution.

2.3 The IFP maintains that South Africa should be a federation in which to the member states are reserved all residual powers and sovereignty. In the IFP's vision, South Africa should closely resemble the United States system.

3. Relation between SPR constitutions and national constitutions

3.1 The issue could be raised of when and how should SPR constitutions be drafted and adopted? In other words should the national constitution precede the SPR constitution, or should it be done the other way around? The answer to this question cannot be found in constitutional theory but in the actual process of constitutional development of any given country. Historically there are examples of constitutional developments where the adoption of SPR constitutions preceded the adoption of the national constitution, and there are cases where the SPR constitution has been drafted and adopted on the basis of constitutional parameters set forth in the national constitution.

3.2 An interesting case in this regard is the adoption of the constitution of Sicily, an Italian region provided with a special and greater autonomy than any other region in Italy. This constitution was adopted before the adoption of the Italian Constitution and forced the Constituent Assembly of Italy not only to adopt a regional state, but also to recognise exceptional autonomy to the Sicilian

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region. In fact the constitution of Sicily provided for a Constitutional Court for the region charged, *inter alia*, with the task of assessing the constitutionality of national legislation as applied in the region. This specific jurisdiction of the constitutional court of Sicily faded out once the Italian Constitutional Court came into existence.

3.3 Therefore the path of constitutional development leading to the establishment of SPRs and of a federal system are innumerable and unpredictable. They rely completely on the strength of political events taking place on the ground, and no technical reason could be advanced to support the proposition that one type of constitutional development is more adequate to the needs of a country than another.

3.4 Constitutional continuity can be guaranteed in any type of constitutional development through well-known constitutional techniques such as ratification. It is clear that there are many aspects of constitutional development which take place at a meta-juridical level and they are then recaptured into the realm of legality and legal phenomena by subsequent enactments. This is the case of the present negotiating process, for neither CODESA nor the Multiparty Negotiation Process has any constitutional standing in law. However, it is foreseeable that future stages of the constitutional development of South Africa will ratify the product of our negotiations, thereby ensuring constitutional continuity. Similarly, the adoption and possible ratification of the Constitution of the State of KwaZulu/Natal still operates within an area which is meta-juridical, which is to say that it is not *contra legem* but is *praeter legem*.

3.5 The IFP's proposed constitution for a Federal Republic of South Africa indicates how, once the national constitution has been adopted, the constitution of the State of KwaZulu/Natal will receive ratification and legitimation within a process which ensures constitutional continuity and prevents any constitutional break (provided that the national constitution is approved in constitutional continuity.)

3.6 In this scenario proposed by the IFP, the Constitution of the State of KwaZulu/Natal would be adopted and ratified prior to the adoption of the Federal Constitution for South Africa, and this fact by itself has no bearing on any concern related to constitutional continuity. Constitutional continuity could also be ensured by the work of the statutory Commission on Regionalisation proposed by the IFP in its original submission to the Technical Committee on constitutional matters.

3.7 There are compelling reasons to believe that the drafting, adoption and possible ratification of state constitutions should precede the drafting of a federal constitution. In South Africa there are geo-political realities which share sufficient commonality of interests to justify their erection into statehood within the parameters of a unifying federal system. After decades of forced ethnic and geo-political integration brought about first by colonialism and by the regime of apartheid afterwards, it is essential that South Africa rediscovers its roots in a process of constitutional development which emanates from the true, needs, wants and aspirations of the people.

3.8 We believe that the people of regions such as KwaZulu/Natal have achieved a great deal along the path of racial harmonisation which is now expressed in a true commonality of interests. This commonality of interests justifies the recognition to such a community of the right to self-determination which is the right to ordain for themselves a government of their choice and to choose their constitutional future in autonomy.

3.9 Theoretically they would have the right to a UDI. However, the right of self-determination could be exercised to a lesser degree than the full claim of independence, and could be limited to the erection of the region into statehood within the parameters of a federation. In other corners of the country there are similar claims for self-determination and ground-up democracy building.

3.10 If we want the process of constitutional development of South Africa to be really democratic and really responsive to the needs of the people, we must ensure that the process of constitutional development receives its momentum from initiatives such as the adoption of the Constitution of the State of KwaZulu/Natal, SATSWA, the Kei State initially, and possibly a Volkstaat. Otherwise the process of constitutional development will move from preconceived ideas of what should happen; ideas which have been formulated in smoke-filled rooms in the often removed-from-reality environment of negotiations.

3.11 Our country needs to re-discover itself and regain the power to determine its own destiny at all levels of government.

3.12 Because of all these reasons the constitutions of the states need to precede the federal constitution as a matter of better constitutional development for our country. Once these state constitutions have been approved, either as legal documents or as documents existing only at the political level, there will be established parameters to guide the federal constitutional development of our country.

3.13 We submit and maintain that if federalism needs to be established, this is the best way to go about it. It is also the only way which will entrench federalism by ensuring the certainty of the outcome of the process. Any other process will be very uncertain as it would rely on the full discretion of the Constitution-Making Body to establish federalism, and to choose the form of federalism which it thinks would meet the needs of the people of the country. Ground-up democracy building allows the people of the country to choose the form of state they prefer and to give a precise mandate to the Constitution-Making Body.

3.14 There is surely no formula to establish federalism but we maintain and submit that if the process has to be designed to ensure the establishment of federalism along the lines proposed by the IFP, ground-up democracy building is the most solid and reliable way to do it. The alternative would ignore processes such as the Constitution of the State of KwaZulu/Natal and the SATSWA initiative, and this would be an act of constitutional arrogance which would carry a very negative omen on the success of the constitutional development of this country.

3.15 As far as the Conservative Party is concerned, this report must be read in conjunction with the CP's constitutional principles set forth in paragraph 8.2.1 and 8.2.4 of its submission to this Technical Committee.

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June 28, 1993
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