



**THE DEFENCE OF  
DEMOCRACY  
TRUST**

BUILDING A CULTURE OF DEMOCRACY  
ACCORDING TO THE PRINCIPLES OF FEDERALISM  
Reg No. 2146 / 92

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11/5/10/46

Patron : Sir Laurens van der Post

15 November 1993.

The Members of the Negotiation Council  
World Trade Centre

Fax : 397 2211

Dear Sirs

**THE ISSUE OF A FEDERAL OUTCOME TO  
THE MULTI PARTY NEGOTIATION PROCESS**

1. We write to give expression to our grave concern about the course of the negotiation process on the fundamentally important issue of federalism for South Africa.
2. We represent a growing group of South African academics, business and professional people who are united, either through its Board of Trustees or its Board of Reference, and irrespective of colour, creed and political party affiliation, in the conviction that without a constitutional dispensation firmly based in the fundamental characteristics of federalism, this country's future course will be directed along the path of conflict and disaster.
3. While it is for South Africans to fashion their own constitution, the lessons of our history surely compel us to the conclusion that the thorough-going dispersal of power from the centre and the meaningful empowering of SPR's, consonant with the principle of subsidiarity, are indispensable prerequisites to the future peace and prosperity of our land. This means major entrenched autonomous powers including taxing powers in the SPR's without the existence of concurrent overriding powers at the centre.
4. When powerful overseas voices who wish South Africa well, such as President Clinton, advocate a federal system of government for South Africa, surely this needs to be taken very seriously. His is a country whose goodwill, influence and international leverage can play a major role in the development of South Africa's human and economic resources. The more reason therefore that the tried and tested - and universally acclaimed - constitutional way of federalism, particularly for countries which have divided societies, should be the preferred form of state for South Africa.



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5. Given the advanced stage of negotiations it is of serious concern to us that the multi party negotiations at Kempton Park have to date failed to address the applicability of federalism, in a spirit of inclusivity, fairness and determination to objectively consider alternatives, by the production by the Technical Committee on Constitutional Issues of a draft constitution premised on a true federal model - so that it could be debated alongside that of the draft which is now being reshaped and refined and which is premised on a unitary state foundation.
6. In our opinion, this represents not merely an error of judgment, but also a potentially tragic political subterfuge, which if not corrected in the unwise and headlong rush to achieve interim constitutional finality, could spell the beginning of the end of the territorial integrity of the country.
7. In addition, the proposal that the appointment of judges to the Highest Court in the land should be a matter within the President's discretion (notwithstanding the need for him to consult) is a "Trojan horse" and would open the door to the total negation of the Bill of Rights. Furthermore, it is disturbing indeed to learn that so essential a right, that private property expropriated by Government should be paid for "expeditiously" has been called into question by certain parties of the ANC/SACP alliance, on the grounds that expeditious payment may not be possible because government might not have the funds in hand at the time. This would open the door to such cynical devices as were practised in post independence Zimbabwe when the government expropriated the foreign securities of residents and ex-residents at market prices but issued them with government bonds bearing a 4% per annum rate of interest and providing for capital repayments after only ten years in yearly tranches, which rendered them worthless.
8. Even at this eleventh hour, we appeal to you to reconsider the major failings of the draft constitutions, and of the very process itself, to empower true federalism and to ensure that the necessary guarantees are in place to ensure a truly federal outcome. To do otherwise will be to court national disaster and, we use the words advisedly, an outbreak of secessionist wars.
9. We enclose a memorandum of the Trust in amplification of its position, together with a copy of its Charter and Objects and a recent press statement.

We trust that these representations will receive your most urgent consideration.

Yours faithfully



**J R LANGEBRINK**  
**TRUSTEE**

Encl.





## THE DEFENCE OF DEMOCRACY TRUST

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Memorandum concerning federalism and the New South Africa  
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What is federalism ?  
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1. A federal state is a state which exists at two distinct levels. The division of powers between the two levels is specified in a written document and rigid [ ie. not easily alterable ] constitution which is thus often described as the sovereign entity in federal political systems.
2. The original, exclusive and autonomous powers allocated to both levels of government must be meaningful [ if not, the crucial distinction between a genuine federation and a decentralised unitary state is negated ] and each level of government must possess the necessary political and fiscal autonomy to undertake the functions allocated to it.
3. A constitutional court exists to enforce compliance with the constitution and to resolve any differences that might emerge between federal and state governments. A Bill of Fundamental Human Rights also invariably forms part of a federal constitution.

Major Advantages of Federalism  
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1. By creating additional state governments to which functions and responsibilities are allocated, a federal form of state brings government 'closer to the people'. It thus enhances the accountability of government to the governed - the essence of true democracy.
2. By effectively decentralising political and economic power and decisionmaking, federalism makes it possible for geographically large and/or culturally diverse states to avoid disintegration



and preserve the advantages of close association when conflicting interests and centrifugal forces pull states apart. The benefits of such states include economies of scale and the cultural interchange possible in multi-ethnic states.

3. By dispersing political and economic power, federal states prevent the excessive accumulation and possible abuse of governmental power at the centre, a typical feature of the old South Africa and the Soviet Union.

4. Federal states allow more latitude for policy innovation and pluralism [ given the fact of a number of distinct governments ] in tackling economic and social problems.

#### Why the New South Africa needs to be Federal

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1. South Africa is both a geographically large and culturally diverse state. A federation is therefore better suited than a unitary state to accommodating these complex structural 'givens' - especially if a democratic political system is desired.

2. There is not one state in the world which is equal in size to South Africa and democratic in character without simultaneously being federal.

3. South Africa is widely recognised as being one of the most ethnically diverse and deeply divided societies in the world. This ethnic diversity is not as common wisdom has it simply the result of apartheid and is also not something negative. Apartheid was designed to eliminate 'the problem' of diversity, but failed because it regarded diversity as a negative. Diversity is, in fact, a great strength if it is accommodated and respected as it is in a federal democracy.

4. The division and decentralisation of power which is implicit to federalism is a sine qua non for democracy in South Africa. Without federalism the ethnic conflict which is already evident will intensify for control of the centre. Regional secession - possibly accompanied by war as in the Bosnian case - becomes more likely - if not inevitable.

#### Negotiations and Federalism

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1. Despite a common-assumption that regionalism is simply a code word for federalism, the Kempton-Park constitutional negotiations have to date not produced a genuinely federal interim constitution ie. one in which both federal and state governments have distinct and meaningful powers and responsibilities.

2. To date the powers and responsibilities that have been allocated exclusively to the SPR's in the various draft interim constitutions have been largely limited to marginal issues such



as town planning, markets and pounds and regulating casino's, racing and gambling [ Section 118 ]. However, what is more important is that in terms of the various drafts SPR's will not enjoy exclusive powers over inter alia housing, education and policing.

2. The successive draft interim constitutions have in fact progressively empowered the federal or central level of government at the expense of the SPR's. This is inter alia reflected in -

- \* the wide range of concurrent powers specified in recent drafts of the constitution
- \* the absence of fiscal autonomy for the SPR's
- \* the deprivation of the power of the SPR's to pursue their own economic development inter alia through the raising of their own foreign loans
- \* the absence of provision for separate constitutions for the SPR's in recent drafts of the constitution [ such provisions existed in earlier drafts ], and
- \* the inclusion of clauses in recent drafts of the constitution which provide wide discretionary powers to central government to legislate on the exclusive areas allocated to SPR's in the interests of inter alia 'uniformity' and 'national security'.

3. The top-down nature of the constitutional negotiating process [ none of the envisaged SPR's are in fact a party to the envisaged constitutional contract ] and the surprisingly weak defense of federalism by supposedly pro-federal parties at Kempton Park makes it highly unlikely that a genuinely federal interim constitution will emerge in the teeth of determined opposition by leftwing unitarists. The nature of the process of transition and the constitutional talks themselves have had a decided unitary bias.

4. The method suggested in the draft interim constitutions for enacting a final constitution also makes a genuinely federal final constitution for the New South Africa highly unlikely.

5. The final constitution only requires, at best, the approval by two thirds of all the members of the Constituent Assembly/central parliament. In the 'worst case' scenario a final constitution can in fact be enacted by an ordinary majority of 51 % [ Section 68(9) ]. Approval by legislative bodies [ SPR's ] within the envisaged regions is not envisaged.

6. A number of the 27 constitutional principles listed in Schedule 7 of the various draft interim constitutions and which a final constitution will reflect are relevant to federalism [ principles 15, 17, 18, and 20 - 24 ], but are open ended and provide limited insurance for a federal dispensation.

What does it mean to state [ principle 17 ] that "each level of government shall have appropriate and ...powers and functions



that will enable each level to function effectively" ? To provide that the allocation of powers between the different levels of government "be made on a basis which is conducive to financial viability at each level of government .... which promotes national unity, legitimate SPR autonomy and cultural diversity" [ principle 17 ] is to effectively leave the allocation of powers to a popularly elected Constituent Assembly and to an unaccountable and as yet ill-defined Constitutional Court.

A centralist, unitarist bias is also dominant in the crucial principle 24 which lists various criteria to determine which powers be allocated to the national and SPR governments. The national government may intervene in the already limited powers allocated exclusively to the SPR's "where it is necessary for the maintenance of essential national standards, the maintenance of economic unity .... national security" and "where mutual co-operation is essential or desirable or ... required to guarantee equality of opportunity". Reference is also made to uniformity, minimum standards and "where there is necessity for South Africa to speak with one voice" - considerations which are all centripetal in consequence. The potential scope of SPR powers is further diluted by sub-principle 24[9] which provides that in event of a dispute concerning powers allocated concurrently to national and SPR governments "precedence shall be given to the legislative powers of the national government".



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**PRESS RELEASE**

**8 NOVEMBER 1993**

The Defence of Democracy Trust is committed to promote a culture of democracy according to the principles of Federalism. In the short term this means that the Trust is keenly aware, and concerned with the outcome, of the negotiation process at Kempton Park.

We are extremely concerned by the type of documentation emerging from the process at the World Trade Centre, which in our view, is not conducive to the establishment of Federalism in South Africa, and still moves within the culture of a unitary state.

We do not share the opinion propagated by large sections of the media that the recent amendments to the constitutional draft either establish or are a step forward to break the grip of the present unitary form of state. On the contrary, it seems clear to us that a major step backward has been taken in the 18th report of the Technical Committee drafted on the basis of the recent agreement between the ANC/SACP alliance and the South African government. The pretence that provinces had "exclusive" autonomous powers when these were subject to central government overrider has been dropped and what is being purveyed as Federalism by the media is now exposed as nothing more nor less than the present form of state with regional characteristics.

This 18th report transforms all the powers of the provinces into concurrent powers, where previously lists of exclusive and concurrent powers existed, and shortens the list of such powers. The list of powers are far less extensive than the powers which unitary states with regional characteristics usually accord to their regions. This list of powers is totally insufficient to establish a system which could seriously be compared with established Federal systems in the world.



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For Federal principles to operate, the powers of the provinces must be exercised in autonomy and not under the control of overriding concurrent powers of the central government. Similarly, in order to guarantee its financial independence, a province must have original taxation powers and a constitutional entitlement to a share of taxes raised at national level. For example, provinces would not have the right to levy income tax and company tax and such other minor taxes permitted to them would be subject to central overrider.

Instead of limiting the power of central government, as a Federal system does, South Africa seems poised to perpetuate in the hands of new masters, a well worn unitary system with all the levers of power in place to over-govern the lives of its citizens in the pursuit of uniformity, re-distribution and equality. Business should not have any delusions in this regard.

It is ironic indeed that a party which was so well versed in the art of manipulating power in a centralised unitary state for its own ends, is about to make it possible for its successors to do the same.

Without exclusive autonomous powers in the hands of provinces which cannot be interfered with by central government, it is apparent that the very core of Federalism has been denied. On this showing, the cause of liberty and democracy has received a major setback.

The time has come for all of South Africa's committed Federalists to take a common stand on this issue.

Issued on behalf of the Defence of Democracy Trust by Francois Marais.  
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## THE CHARTER OF THE TRUST

The Trust shall minister to the needs of the South African people in terms of the following criteria:

- All people shall enjoy the same participatory rights in the political process at local, regional and national level.
- The Trust is opposed to any form of totalitarian government. It opposes collectivism as a political and economic system. It rejects Communism and Marxist Socialism as historically proven unworkable ideologies; as philosophies which singularly fail to provide the basis for a compassionate civilisation or to meet man's pursuit of peace, prosperity and happiness.
- The Trust favours a multi-party, federal / federal-type form of government, separation of powers, autonomous powers in the regions and at the centre, and a free market economic system, with the minimum of government intervention. It believes that increasing the size and centralisation of government and increasing the functions of government all act as brakes on material progress and as destroyers of personal freedom.
- The Trust considers that the purpose of government is to advance the interests of the community and to interfere in the lives of citizens as little as possible.
- The Trust views the abuse of power and any consequent corruption on the part of government or its agents in the administration of the community or the community's affairs as morally reprehensible and totally unacceptable.
- The Trust believes in an independent judiciary and the rule of law. It believes in the right to private property. It believes that individuals should be enabled to retain and enjoy the fruits of their labour. It believes in the sanctity of the family, in individual dignity and self respect in the protection of cultural and religious diversity; in the right to privacy and equality of opportunity for all.
- The Trust upholds freedom of religion; the right to life; freedom from torture and inhuman and degrading treatment or punishment; freedom from servitude; the right to liberty and security of the person.
- The Trust favours freedom of expression and freedom of opinion in all spheres of human endeavour providing that the exercise of such rights carries with it duties and responsibilities as considered necessary in a free and democratic society.

● The Trust supports the enshrinement of an entrenched Bill of Rights in a federal / federal-type Constitution. The Trust rejects violence as a political instrument and believes that unless there is a viable culture of democracy prevalent in the body politic characterised by tolerance of differing political views and cultural and religious diversity, liberty will be gravely threatened.

● The Trust opposes nationalisation, supports privatisation, and believes that all and every effort must be made, with great urgency, to revitalise the South African economy. It believes that if the South African economy is unable to offer the promise of addressing, within a reasonable period of time, the basic economic aspirations of disadvantaged South Africans, the viability of a multi-party democracy in South Africa will be severely threatened.

## THE OBJECTS OF THE TRUST

In the light of the charter of the Trust, the objects of the Trust shall be to:

- To directly promote, develop, nurture, advance and contend for, through the medium principally of education, operating within the cultural, religious, political, socio-political and other processes, the principles and policies of a non-racial, multi-party, federal or federal type, free enterprise democracy for South Africa, constitutionally safeguarded by an entrenched Bill of Rights and an independent judiciary, in the conviction that therein lies the best means first, of securing and safeguarding civil, individual and religious liberty for the people of South Africa and of achieving national reconciliation, secondly, of protecting cultural and religious diversity and human rights and thirdly, of unlocking the Nation's human resources and potential to enable it to redress past wrongs and advance the economic and social well being of all its people;
- Receive and solicit irrevocable donations as well as funds, sponsorships, grants and inheritances both in South Africa and overseas for the fulfilment of the objects referred to in the paragraph above;
- Grant financial and material support to any beneficiary which seeks to fulfil the above objects by donation, loan or otherwise.



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