2/4/3/1/1

INKATHA

Inkatha Freedom Party

IQembu leNkatha yeNkululeko

PRELIMINARY SUBMISSION TO THE III THEME COMMITTEE ON THE RELATION BETWEEN LEVELS OF GOVERNMENT

PART I - GENERAL

Preliminary

On October 17, 1994 the Constitutional Committee has approved a document titled *Briefing Document for Theme Committees*. Within the parameter of the guidelines set out in such Document, each Theme Committee will need to define its scope of work and develop its own working agenda. During the aforesaid meeting the Constitutional Committee made the fundamental decision that Theme Committees should not be negotiation fora.

1. Guidelines for Theme Committee Work

Each Theme Committee should define its scope of work taking into account guidelines given to it by the Constitutional Committee. Since Theme Committees will be in closer contact with problems and issues, they will need to have discretion to organize their work as they best see fit. Moreover, it is not appropriate to give uniform guidelines to all six Theme Committees. Their scope of work varies and they should be given guidelines relevant to their interests.

The strict definition of the scope of work of Theme Committees is not necessary as it would limit fluidity and continuity in constitutional matters. Some overlapping of work between Theme Committees in unavoidable and is perhaps advisable to avoid defining the scope of Theme Committee work. Therefore, each Theme Committee must identify for itself the constitutional issues related and applicable to its scope of activity.

It is important that each Theme Committee understands what type of issues could be covered by its terms of reference and by its scope of work as it identifies it. Therefore, each Theme Committee should develop an agenda including

(a) a working list of issues and

(b) a set of guidelines to process information related to each issue.

Each party should make submissions to each of the Theme Committees with respect to a preliminary list of issues which they understand would fall under the scope of work of each

President: The Hon. Prince Dr. Mangosuthu G. Buthelezi
National Chairman: Dr. F.T. Mdlalose
Deputy Secretary General: Inkosi S.H. Gumede
Sub Committee Chairmen:
Political Constitutional, and Legal: Dr. D.R.B. Madide
Economic and Finance: Mr. M.A. Nzuza; Social and Cultural: Dr. F.T. Mdlalose; Elections Publicity and Strategy: The Rev. C.J. Mtetwa
Appointment and Disciplinary: Mr. E.S.C. Sithebe; Community Development: Mr. M.V. Ngema.

Theme Committee. For instance the second Theme Committee will *inter alia* list the following issues: head of state and/or head of government, executive or parliamentary form of government, bi-cameralism or mono-cameralism, proportional or constituency representation, role of the Senate, parliamentary law, legislative initiative, protection of minorities in parliament, and so on and so forth.

Once each Theme Committee has developed a preliminary identification of its scope of work, it shall conduct an analysis of possible alternatives which fall under its scope of work with respect to each item in the working list of issues. Theme Committees should promote the acquisition of technical information, expertise and testimony necessary for their respective work. They should examine each of the available historical and theoretical models in which the issues and alternatives they raise can be implemented. For instance, once the "issue" of application of the bill of rights is identified by the fourth Theme Committee as part of its scope of work, the "alternatives" are either horizontal or vertical application. A concurrent alternative is: either full and exclusive application by the national government or limited application by the national government with concurrent application by the provincial governments. The Theme Committees should be informed on the possible models relating to how far the horizontal application can be extended and about the relation between horizontal application and the need for constitutional adjudication to be conducted by a Constitutional Court rather than by an ordinary judiciary. These models will need to be cross referenced by the Theme Committees with the models related to the sharing of powers between different levels of government related to the implementation of the bill of rights.

Once each Theme Committee has identified and organized its scope of work, it will need to develop a system to organize and classify data on the basis of the issues and alternatives it has identified and has received in the various proposals submitted by political parties, organizations and the public. In this respect, while the *Overview of Submissions* prepared by the Directorate is appreciated, the concern must be expressed that this type of exercise might get ahead of the work of the Theme Committees.

2. Constitution Drafting Process

Theme Committees should be entitled not only to prepare reports, but also to clarify their thinking by means draft constitutional text to be processed in the next stage of constitution writing whenever they feel that there is a need to move discussion from matters of principle to draft constitutional text. Reports should not be intended as excluding actual constitutional verbiage when the issues at hand may be clarified by detailing proposals and concepts into actual norms and provisions.

The IFP fears that if we do not resort to the use of constitutional text when necessary, we could fall into a World Trade Centre-type of constitution making based on bottle-neck techniques which had the effect of silencing minority views, and may be used in such a way that opportunities to manipulate the process may arise. The WTC process was based on (a) consensus on constitutional principles, (b) consensus on reports written expressing principles, and finally (c) consensus on actual constitutional text based on the reports. We must avoid situations in which those who

dislike sections of constitutional text, are prevented from raising their objections to the text by their having previously agreed to the principles and/or the reports.

3. Constitutional Principles

In developing their work Theme Committees could be required to table their interpretation of the constitutional principles relevant to their work. This interpretation should be fluid and not preemptory. Since their work does not consist of actual negotiation, the Theme Committees should adopt no binding interpretation of the applicable constitutional principles. Theme Committees should merely limit their activity to correlating proposals to any applicable constitutional principle, without determining the compatibility of the proposal with the principle concerned.

4. Consensus in the Theme Committee

From the fundamental decision that the Theme Committees are not negotiation fora, the corollary necessarily follows that they shall not be engaged in decision-making. Therefore the need to determine what type of consensus is necessary to adopt a report does not arise. Each Theme Committee will limit its activity to determining whether some issues are non-contentious, whiz.: that they receive general consensus from all the members of the Committees, or whether they are contentious, whiz.: some members do not agree with others with respect to the issue concerned. Therefore, an issue is contentious when there is no general agreement on it, in which case the Theme Committee shall limit its activity to describing the respective positions in full detail without any need to determine which type of numeric majority or minority in the Theme Committee supports any of the conflicting views.

5. Contentious Views and Proposals

All reports and proposals originating from any given Theme Committee should contain a detailed overview of the all aspects of a contentious issue, and should report whatever constitutional text or concept is proposed by each of the parties or groups holding any of the conflict views. In doing so it must be ensured that each party or group concerned agrees on the form and contents of the portion of the report purporting to represent its views or proposals.

6. Role of the Secretariat and Directorate

The role of the administrative structures of the Constitutional Assembly should not become such that they lead the process. Reports should not be written by the secretariat or the Directorate, even if they are approved and modified by the Theme Committees. The work of the Theme Committees and the autonomy of the members of the Constitutional Assembly would suffer if the process is driven by documentation prepared outside of the Theme Committees.

7. Status of the Interim Constitution

Unless any of the political parties wish to make the 1993 Interim Constitution (Act 200/1993) as is, or as amended by it, its own proposal, the Interim constitution should have no status whatsoever, with the exception of the Constitutional Principles set out in Schedule 4 of the Constitution. The work of the Theme Committees should only be guided by the Schedule 4 and

should not be influenced by the contents, format or provisions of the Interim Constitution. If, at any time, any party wishes to make its own some language of the Interim Constitution it may do so. If no party does so, it means that the relevant provisions of the Interim Constitution have no standing and should not form a basis for discussion. Should any provisions of the Interim Constitution be used as the basis for discussion at the request of, and with the consensus of the parties in the Theme Committees, this shall be done on a case-by-case basis.

The IFP warns against the use of the index of the Interim Constitution as a set of references, because it would not be conducive to identifying all relevant issues and alternatives. For instance it would set aside the study on the possibility of separating the functions of head of state from those of head of government or of establishing a true federal system. It could also bind the constitution making process to the present deplorable format of the constitution text.

8. Handling of Proposals and Issues

Theme Committees should be proactive, by originating new issues over and above those which they received from the parties or the public. Accordingly, Theme Committees should not limit their activity to the mere processing of proposals and issues received from the Constitutional Committee or outside sources, but should identify their own issues during the course of their work.

9. Technical Experts

Different types of experts will be needed in addition to lawyers. There should, *inter alia*, be experts available to Theme Committees in the fields of economics, finance, tax, land affairs, environment, police, defense and other subjects which might be relevant to constitution writing.

Since the Theme Committees are not, and should not become negotiation fora, the technical experts should not be instructed by a majority or by any given party, but should be available to each party in the Theme Committee to assist it in developing its own proposals and inputs.

The role of the technical experts is not to lead the Theme Committees by the nose but to assist them. At no time should technical experts get ahead of the Theme Committees. The IFP rejects the idea, which can be read into the proposal of the National Party, to structure the work of the Theme Committees around the discussion of and/or amendment to draft constitutional proposals prepared by technical experts, which committees would arguably also be composing together the various submissions received from the parties and the public.

10. Preliminary Determination of the Form of State

The IFP requests that each Theme Committee applies its mind to complying with the constitutional provision regulating the constitution making process and demanding that "the development of a system of provincial government shall receive the priority attention of the Constitutional Assembly" [section 161 (1)]. This means that the work of the Theme Committees must precede from a preliminary determination of the form of state, whiz. whether South Africa shall be organized as a unitary, or regional/provincial, or federal or confederal state. In fact, no Theme Committee may

proceed with its work until and unless this preliminary issue is solved. In other words, to perform their respective work both the first and the fourth Theme Committees would need to know whether Provinces have residual powers, while the form of government and the role of the Senate laboring the second Theme Committee will necessarily reflect the chosen form of state, and the work of the fifth Theme Committee will be shaped by a decision on whether there should be a single or more than one judiciaries so as to complement the assignment of residual powers to the Provinces. The following simple issues are to be answered:

(a) will Provinces have residual powers, which are those powers of Parliament which are not immediately and necessarily reflected in a governmental line function?

(b) as a matter of principle, will all the powers and functions of government be assigned to the Provinces and only those powers which cannot be adequately and/or properly exercised at provincial level be devolved to the national level of government on the basis of the principle of subsidiarity/residuality?

(c) will the Provinces be provided with an area of entrenched constitutional autonomy which the central government may not destroy or change at its own will? [Indestructible Provinces in an indestructible Union]

(d) will Provinces have final decision-making power in the area of their constitutionally recognized autonomy, or will the central government have the power to overrule them or otherwise subjugate the provincial policy making?

(e) subject to the need for equalization grants, will Provinces have sufficient financial and fiscal autonomy to support their functions and powers without depending on the discretion and control of the central government?

(f) will Provinces have the power to participate as Provinces in the legislative decision-making process and possibly with respect to some executive functions of the central government?

(g) will the constitutional system allow for asymmetry to enable each Province to use at its own option less powers and functions than the total amount of provincial autonomy allowed under the Constitution?

Once there is a negative or positive answer in principle to the foregoing question, each of the Theme Committees would have sufficient guidelines to develop their respective work.

1. Format of the Constitution

The Constitutional Committee should decide at the outset on the format of the constitution to be drafted with respect to its legalese language. The 1993 Interim Constitution is a unprecedented example of a constitution which has not been written in constitutional law language but was written with the same drafting technique used for regular legislation. Consequentially, the Interim Constitution does not have constitutional semantic solidity, is filled with loopholes and uncertainty and is extremely difficult to read and understand. A constitution should be written in a form which can be understood by the people and taught to our children as a part of their education. There is no reason justifying the departure from the established drafting techniques which shaped the great European constitutions of the last fifty years.

12. 9. Public Participation

The IFP endorses the report titled *Public Participation - A Strategic Overview*, with the following reservations and qualifications.

a. Community liaison

Theme Committees should be the primary forum of interface with the public.

The public should be divided into "general public" and "affected interests". Affected interests are segments of the public which have a special standing to discuss certain subject matters, such as the case of the churches with respect to freedom of religion, or trade unions with respect to the labor provisions, or traditional authorities with respect to the preservation of traditional communities. A stable channel of communication between the Theme Committee concerned and the affected interests should be established and maintained.

Theme Committees should solicit the participation of the general public by means of adverts. The public should be consulted in a structured matter. In this respect it might be advisable to propose that Theme Committees identify a set of questions on which they will solicit and receive the inputs of the public at different stages of their work. By way of example the type of solicitation which the theme committee could promote from the public could be on the basis " should we have this or should we have that?", e.g.: should we have a proportional representation or a constituency system?

All activities that the Directorate undertakes to promote community liaison, including Sector Fora and Area Fora should be organized in consultation with all parties concerned on the basis of a consensus rule. This shall include agreement of the date, venue and format of any given event, or invitations.

The IFP has some reservations on the use of the Toll-Free Information Line. The use of this line should be limited to receiving orders for Political Party Programs and other written information available for distribution to the public, or to verify dates and venues of Area Fora, or of meetings of Theme and Constitutional Committees. This line should not be used to give out any other information, otherwise it will become an uncontrollable tool of mass communication. This also apply to the information being distributed by the Provincial Information Offices.

b. Media

There is a real risk that the media effort to be organized by the Directorate of the Constitutional Assembly could be used to support political position or propaganda needs of any given political organization. This effort will include press conferences, media liaison, divulgative newspaper articles, regular bulletins with domestic and international circulation, posters, cassette, videos and brochures, and necessarily selective live television and radio coverage of constitutional debates. The former Department of Constitutional Development, the South African Communication Services and sections of the Department of Foreign Affairs provided similar services during the Codesa talks and the Multiparty Negotiation Process and their services failed to fairly and equally

represent the positions of the various parties.

Two rules should be established:

1. At any given time each party shall be responsible to identify, phrase and package the message and the contents of any mass communication which reflect or interpret its positions and aspirations in the constitution making process.

2. The entire media and public relation effort shall be controlled by a Monitoring Committee in which the minority parties are over-represented. The Monitoring Committee will not direct but will have the power to rectify any aspect of the media effort which could damage any of the parties concerned as determined in the opinion of the party concerned. A qualified minority in the Monitoring Committee shall be authorized to request the Directorate to rectify any relevant action

The public relation and media effort organized by the Directorate and by the constitution making process of the Constitutional Assembly will need to interface with a broader discussion taking place in South African society. Clearly the Constitutional Assembly may not be responsible for the organization of such discussion, but will need to adjust its structure and procedures to interface and liaise with it. The IFP will submit another position paper which addresses some of the issues related to this process of interfacing with the debate in the rest of society.

PART II -
ISSUES IDENTIFICATION AND AGENDA

(please note that the indication of the IFP positions is of use also in assisting the indentication of the relevant issues)

TYPE OF POWERS TO BE ALLOCATED TO PROVINCES

ISSUE: What are the powers and functions from which to choose in determining the powers which should be allocated to the provinces?

ALTERNATIVES: Powers could be identified on the basis of several models.

AGENDA: We should identify all relevant powers of a parliament and all relevant powers of a government. Special attention should be given to those powers of parliament which do not necessarily translate into a governmental line functions or powers of government, the so called residual powers.

IFP POSITION: It will be important to focus our attention on the fact that the most important powers, the so-called residual powers do not necessarily translate into governmental line functions or powers of government. Residual powers should be left with the provinces.

ALLOCATION OF POWERS TO PROVINCES

ISSUE:	Should the constitution list the national powers, the provincial powers or both? Moreover, once identified, should any subject matter of provincial competence extend also to judicial functions in addition to legislative and administrative functions?
ALTERNATIVES:	The three possibilities of listing powers can give rise to different models depending on the allocation of the residual powers. Moreover, provinces may have full judicial powers in the matters of their competence or reduced or limited judicial powers
AGENDA:	Special attention should be given to federal models such as the United States, the European Union and Germany against models of regional/provincial states such as Italy and Spain.
IFP POSITION:	The IFP believes that only the powers of the national government ought to be listed in the constitution while all other powers should be left to the provinces. The IFP believes that provinces should have full judicial powers in all matters of their competence.

RELATION BETWEEN POWERS

ISSUE:	What institutional technique of coordination should be employed to regulate the relation between national and provincial levels of government.
ALTERNATIVES:	The following are generally recognized alternatives: (a) mutually excluding national and provincial exclusive powers with an open set of national interferences on provincial powers , or (b) national framework legislation with either provincial (bi) concurrent powers or (bii) exclusive powers, or (c) national overrides with either provincial (ci) concurrent powers or (cii) exclusive powers (d) national general principles of legislation with either provincial (di) concurrent powers or (dii) exclusive powers.
AGENDA:	Each system and each alternative should be carefully analyzed to determine how in other countries national policies are made compatible with the need to protect provincial autonomy.
IFP POSITION:	There shall be separation of powers between national and provincial level of government. National government shall have no overrides and Provinces shall have exclusive powers. Both the national and the provincial levels of government shall enjoy exclusive powers. Relations between the two levels of government shall be regulated by checks and balances, intended as a predetermined set of mutual interference among the powers of each level of government, based of the extension by relevancy or implication of the exclusive power of the national level of government into the areas of competence of the provinces, as in theory is the case in the U.S. (i.e. interstate commerce). In specific areas of provincial competence, the techniques of national framework legislation regulating exclusive provincial

powers could also be used, as previously proposed by the IFP.

FISCAL AUTONOMY

ISSUE: Should provinces have the fiscal and financial autonomy to support their functions?

ALTERNATIVES: There could be a unified system of revenue raising and taxation or there could be two parallel ones, one for the provinces and one for the national level. The provincial level could also, or alternatively, be assigned a predetermined share of the revenues collected by the national government.

AGENDA: The various alternatives should be studied with special attention to how each of them relates to the need for equalization and to equalization grants and transfers of the national government.

IFP POSITION: The IFP believes that provinces shall have original and residual taxing and revenue raising powers on the basis of a parallel system of taxation. The constitution may also provide for a predetermined share of nationally collected revenues to be transferred to provinces, for equalization purposes.

ENTRENCHMENT OF PROVINCIAL AUTONOMY

ISSUE: What techniques should be used to prevent the natural tendency of central government to corrode on provincial autonomy.

ALTERNATIVES: Broadly speaking there are political guarantees and guarantees deriving from the court system, specifically the constitutional court. All these guarantees work against provisions in the constitution which entrench constitutional autonomy.

AGENDA: All the various techniques to entrench provincial autonomy should be listed and considered. As a subsequent step, it should be verified how each of these techniques is guaranteed by means of judicial review, constitutional adjudication or constitutionally predetermined political dynamics. The study of how the Supreme Court of the U.S. has failed to protect the constitutional autonomy of member states should receive particular attention.

IFP POSITION: Provincial autonomy shall be indestructible, and no national legislative or executive action shall be valid if it encroaches on provincial autonomy. The constitutional court should judge any conflict between provinces and national levels of government. In addition, provinces should have the opportunity of influencing by means of their own judicial system how the national constitutional court interprets the constitutional provisions which define their autonomy.

ROLE OF CONSTITUTIONAL COURT IN PROTECTING PROVINCIAL AUTONOMY

ISSUE: Should there be a ling between Constitutional Court and provinces?

ALTERNATIVES: The resolution of "conflicts between powers of the state" is the typical means of protection of provincial autonomy. However, the Constitutional Court is usually wholly appointed by representatives of the national government. The

provinces could participate in the composition of the constitutional court, or the constitutional court should integrated when hearing case related to provincial autonomy.

AGENDA: Identify options and models

IFP POSITION: Each provincial legislature should elect judges from its own provincial court system to sit on the Constitutional Court as additional judges when the Constitutional Court adjudicates a conflict between the central government and that particular province. When assessing the compatibility of national legislation with provincial constitutions the Constitutional Court should be bound by the interpretation of the provincial constitution adopted by the court of final instance in the provincial court system.

PRINCIPLE OF SUBSIDIARITY:

ISSUE: What is involved in the principle of subsidiarity?

ALTERNATIVES: Application of the principle based on "efficiency": powers are allocated to the level of government which can more efficiently exercise them, OR an application of the some principle on the basis of allocation of powers to the lower level of government capable of exercise them, even it is not the most efficient solution, as long as it is a "practical" one.

AGENDA: Study of the notion of subsidiarity in the European Union and other federal models

IFP POSITION: The Provinces shall be the primary governments of the people and shall be entitled to those powers and functions which can be properly and adequately exercised at provincial level. Only those powers which cannot be adequately or properly exercised at provincial level should be devolved upward to the central level, which shall enjoys only those powers specifically listed in the constitution.

LOCAL GOVERNMENT

ISSUE: Should the constitution provide for a system of local government.

ALTERNATIVES: There could be a uniform system of local government or a system which varies from province to province within each province. The system of local government could be provided for in the constitution or left to the discretion of the law or to the autonomy of the provinces.

AGENDA: The system of local government in countries such as United States, Germany, Belgium and Switzerland should be studied to understand how diversity in local government structures accommodates the needs of a plural society.

IFP POSITION: The national constitution should entrench the notion that local government should be entirely regulated by means of provincial constitutions and legislation. This is necessary to allow a system of local government which reflects local administrative needs as well as the plural nature of South African society. In fact, the local government system will need to reflect a variety of realities ranging from traditional communities to metropolitan

areas. This calls for fluidity and suggest the non-advisability of entrenching in the constitution any given type of local governement system.

PROVINCIAL CONSTITUTIONS

ISSUE: Should the constitution allow for provincial constitutions.

ALTERNATIVES: The applicable constitutional principle would prohibit the constitutional assembly from completely deleting the power of provinces to have their own constitution to determine their executive and legislative structures as they best see fit. However, the process of approval of provincial constitutions could be changed as well as their scope of application.

AGENDA: The relation between provincial autonomy and the organization of provinces by means of provincial constitutions should be fully analyzed with special attention to the different functions served by provincial constitutions and federal systems as opposing provincial/regional states.

IFP POSITION: Provinces shall be entitled to adopt their own constitutions in autonomy without the preemptive control of any organ of the national governement, provided that such constitution shall not exceed the area of autonomy recognized to the provinces and that such limitation be fully reviewable by the constitutional court.

ASYMMETRY

ISSUE: Should the constitutional provide for asymmetry between the powers and functions of each of the provinces?

ALTERNATIVE: The constitution could provide for a system of virtual but not necessarily asymmetry, or could entrench asymmetry or could exclude it.

AGENDA: The system of entrenched asymmetry in provincial/regional states such as Italy and Spain should be analyzed against the system of virtual asymmetry of federal systems such as the United States. Furthermore, the situation of special and unique arrangements should be considered with specific regard to cases where the political entity entertains a federal on a confederal relation with another political entity.

IFP POSITION: The IFP believes that the national constitution should provide for the maximum degree of provincial autonomy. Its province would be free to opt to exercise lesser amount than the autonomy they are entitled to if such province is not ready, willing or able to exercise any legislative or administrative concerned. Furthermore the IFP believes that the issue of federalism cannot be settled by virtue of majoritarian rule and that even if the rest of South Africa wishes to organize itself as a unitary state regions such as KwaZulu-Natal should be entitled to receive the autonomy they demand and coexist with the rest of South Africa on the basis of a federal relation.

PROVINCIAL AUTONOMY AND ECONOMIC UNITY

ISSUE: How does the segmentation of government affect economic unity?

ALTERNATIVES: The segmentation of government could lead to the segmentation of economic environments or could take place in a unified economic environment.

AGENDA: Unified economic environments such as Switzerland, Germany and European Union should be analyzed to determine how and why the segmentation of government has adversely affected, but has actually preserved the economic unity of the region concerned.

IFP POSITION: The IFP believes in the segmentation of governement not in the segmentation of the economic continuum. The IFP believes that the segmentation of governments has no necessary bearing on the preservation of economic unity.

SENATE

ISSUE: Should the provinces be entitled to participate as provinces in the legislative and/or executive decision making of the national government?

ALTERNATIVES: The different types of functions which the Senate serves in the constitutional system depend on its (a) role (b) composition and appointment (c) functions.

AGENDA: The role of the Senate in established federal systems should be fully analyzed, both with regard to legislative functions of the Senate and the functions of controlling national executive competencies.

IFP POSITION: The Senate should not have less legislative authority than the one given to the other legislative chamber. The Senate should represent the provinces and its members should derive directly from the provinces either through appointment or through indirect elections. Each province shall be equally represented in the Senate. The Senate should have the specific power to control executive functions such as defense and foreign affairs in which provinces have no competence.

0663