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CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 1

***CHARACTER OF
DEMOCRATIC STATE***

REPORT OF BLOCK 1

10 FEBRUARY 1994

REPORT FROM THEME COMMITTEE 1

I) INTRODUCTION:

A preliminary report was completed by the sub-committee together with the technical experts. The latter were given the task to extract contentious and non-contentious points from party submissions pertaining to Block 1.

After debate and modification at the Theme Committee meetings of the 8th and 9th February 1995, we are pleased to report that the Theme Committee was able to find consensus on the following eleven points as embodying the character and nature of a democratic state.

II) NON-CONTENTIOUS POINTS:

- A) The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.
- B) There shall be a multi-party political system, premised on regular elections, universal adult suffrage and a common voters' roll.
- C) Fundamental rights of the person shall be protected in an entrenched Bill of Rights, justiciable by an independent judiciary.
- D) The normative values underlying the Constitution shall be accountability, democracy, equality, freedom and transparency.
- E) There shall be a common South African citizenship.
- F) Elections shall proceed on the basis of proportional representation, possibly based on regional or local constituencies.
- G) South Africa shall be a sovereign, independent and undivided state.
- H) There shall be three levels of government i.e. National, Provincial and Local.
- I) There shall be separation of legislative, executive and judicial powers in the State.
- J) The Executive shall be accountable to Parliament.

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- K) The recognition and protection of collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, on the basis of non-discrimination and free association, and possible constitutional provision for a nation of the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the state or in any other recognized way.

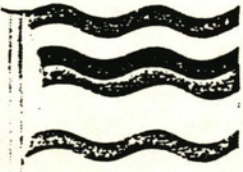
The following points were identified as contentious points:

III) **CONTENTIOUS POINTS:**

- A) The nature (legislative, executive, administrative and judicial) and extent of the powers of the various levels of government.
- B) Whether Parliament shall be bi- or unicameral in structure.
- C) Parliament's supremacy as a law-maker.
- D) The nature and extent of representation and rights of cultural and linguistic minorities, including group self-determination.
- E) The constitutional entrenchment of minority party participation in government.
- F) Government shall be by majority rule.
- G) The content and constitutional entrenchment of participatory democracy.
- H) South Africa shall be a secular state.

The IFP raised objection to the format and content of the preliminary report. The following document dated the 9 February 1995, was tabled by the IFP and it was agreed by the Theme Committee that the document should be attached to the report which would be submitted to the Constitutional Committee for further discussion.

It was resolved at the Core Group meeting, held on the 10 February 1995, that Principle G under non-contentious points, shall not preclude the State being structured along Federal lines nor shall it preclude any party from arguing in favour of Federalism.



INKATHA

Inkatha Freedom Party

Iqembu leNkatha Yenkululeko

COMMENTS ON THE DOCUMENT ENTITLED:

"REPORT OF THE TECHNICAL COMMITTEE TO THEME COMMITTEE I"

February 9, 1995

The IFP is not in a position to subscribe to, and must object to the above-captioned document.

1. Preliminarily, it must be noted that the constitution-making process as it is presently envisioned and structured will not allow political parties to make any substantive submission to either the Constitutional Committee or the Constitutional Assembly. Therefore, all parties' inputs are to be made in Theme Committees and will be considered in the further stages of negotiation and constitution-making only to the extent that they are embodied in the report of a Theme Committee. In other words any issue raised in a party's submission which is not part of a Report will not longer be considered in further stages of constitution-making and is going to be obliterated.
2. Accordingly, the Constitutional Assembly has given the binding instruction that all Theme Committees provide details of all issues which have been raised within their respective scope of work, including the parties' submissions. Specifically, the Constitutional Assembly has instructed each Theme Committees to draft a Report which is to list all contentious and non-contentious issues and shall contains and describes the full details of such issues as they have been proposed by each Party concerned. Reference is made to the Resolution adopted by the Constitutional Assembly on October 31, 1994.
3. The Constitutional Assembly has also decided that Theme Committees shall not be negotiating fora but shall merely be a conduit of information and positions to the Constitutional Committee. Therefore, their activities should be limited to collect, collate and organize the various parties' positions on all relevant issues. Theme Committees' Reports shall reflect the purpose of the Theme Committee and shall be an inventory of positions and arguments discussed in a Theme Committee in each relevant Block.
4. The Report of Block 1 of Theme Committee 1 should be an extensive document. The IFP can not accept a double-spaced one-and-a-quarter page draft Report attempting to summarize very complex issues submitted by parties.

5. The IFP specifically objects to the intention shown in many places of the Report which tries and reconcile different positions. It is not the role of the Report to use very broad expressions, which in their generality may seem to subsume and reconcile the details of conflicting positions expressed by the various parties. This attempt to reconcile positions avoiding their characterizing details so as to subsume "contention" into broad and often meaningless generalities is not a legitimate exercise. Specifically, a broad range of issues raised in the IFP submission, which in the opinion of the IFP are germane to the identification of the character of the state, are not even mentioned in the Report. For instance the following issues raised by the IFP are not listed.

- Supremacy of the constitution : paragraphs 2 and 3
- Separation of powers : paragraphs 2, 3 and 4, 5, 6 and 7
- Type of democracy : paragraphs 1, 2 and 3
- Representative democracy : paragraphs 1 [second part] 2, and 3
- Participatory democracy : paragraphs 1, 2, 3 and 4
- Transparent and accountable democracy : paragraphs 1, 2, 3 and 4
- Type of state : paragraphs 1, 2 and 3

All these issues relate to the fundamental characterization of the State as a unitary or a federal State or to the constitutional structuring of or democratic society on the basis of the principle of pluralism or of the principle social organicism.

6. The entire set of IFP thematics have been completely ignored in the above captioned document, and the IFP requests that its entire submission be included in one form or the other in the Report. The IFP does not see how the Theme Committee can decide to take out any single statement made by the IFP in its submission without either becoming a negotiation forum or failing to provide full details about the relevant contentious issues or non-contentious issues. No statement made by the IFP in its submission is either not germane to Block 1, or is redundant, or can be further summarized without eliminating fundamental characterizing details.
7. The Report may not contain only those common-denominator issues which are addressed by all parties, for this would allow any party to frustrate discussion on relevant and necessary issues by virtue of its non-taking positions of them. The Constitutional Assembly has instructed that all issues be taken from the Theme Committee to the following stage of consideration.
8. Specifically, the IFP objects to point II-G of the report which indicates that there is agreement on the statement that South Africa shall be an "undivided state". The IFP believes that Provinces shall not be part of the *strictu sensu* "state" but should rather be an autonomous entities organized under the constitution and independent from the State.
9. The IFP also objects to all the other points which have been listed as non-contentious issues. In fact, they are non-contentious only to the extent that, and because of the fact that none of the relevant and characterizing details submitted by the IFP in its position paper have been

taken into account and reported on. The issues of transparency, accountability and political representation may be mentioned in this regard.

Moreover, the list of "non-contentious points" also lists items which have not been addressed by the IFP because they will be the subject of submissions in subsequent Blocks. If the Theme Committee wishes to consider items which are not part of this Block 1, such as separation of State and Church, it should make reference to the IFP Preliminary Submission to the Constitutional Assembly which lists IFP preliminary positions and viewpoints which were not covered in the submission made for Block 1.

10. With respect to the issues indicated as "contentious points", the IFP raises also an objection. In fact, the list of issues is not descriptive of the issues at hand and fails to define the constitutional dimensions and the terms of the political debate with respect to each relevant issue. In this respect reference can be made *inter alia* to the issues of pluralism and the autonomy of civil society, the autonomy of Provinces with respect to list of powers and relation between levels of government, and the relation between the supremacy of the constitution and provincial autonomy, the fundamental division of powers between any level of government and civil society, and whether South Africa should be a liberal, a social or a socialist state. Reading the Report it could appear that none of these issues which this Theme Committee has debated for three months have ever even been considered.

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ANNEXURE A
PARTY SUBMISSIONS



INKATHA

Inkatha Freedom Party

Iqembu leNkatha Yenkululeko

471

THEME COMMITTEE No. 1 CHARACTER OF THE DEMOCRATIC STATE

FIRST REPORT ON DEMOCRACY AND CHARACTER OF THE STATE¹

SUPREMACY OF THE CONSTITUTION:

1. The Constitution in its entirety shall be the supreme law of the land. Therefore, the Constitution shall be fully and entirely justiciable by means of a Constitutional Court, and shall be the parameter for the validity and legality of the legislation of Parliament.
2. The constitution shall bind not only all organs of the Republic but shall also apply to all legal relations.
3. In relation to their respective areas of constitutionally recognized autonomy, the Constitution shall be implemented not by the national government but rather by the Provinces, and by social and cultural formations, or by individuals, respectively. For instance, the constitutional right to health entrenched in the national constitution shall be implemented exclusively by the provincial legislation and administrative action.

SEPARATION OF POWERS (Form of State):

1. There shall be separation of powers between national and provincial levels of government.
2. Provinces shall be the primary government of the people and shall be entitled to exercise any type of power and function which can adequately and properly be exercised at provincial level.
3. Only the powers of the national government ought to be listed in the constitution, while all other powers should be left to the Provinces.
4. Provinces shall have full judicial powers in all matters of their competence.

¹ The IFP makes this submission under protest, for the Constitutional Committee should withhold consideration of the matters covered in this report and further development of the work program so as to allow international mediation to take place.

5. National government shall have no overrides and, as a rule, 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 interferences among the powers of each level of government, also based on the extension by relevancy or implication of the exclusive powers of the national level of government into the areas of competence of the Provinces, as in theory is the case in the U.S. system (i.e.: interstate commerce). In specific areas of provincial competence, the techniques of national framework legislation regulating exclusive provincial powers could also be used in matter which requires concurrence between the national and provincial levels of government, provided that national legislation shall not be so detail to actually regulate, or exercise the actual function in the matter concerned.
6. There shall be separation of powers between all levels of government and civil society.
7. Individuals as well as social, cultural, political and economic formations shall be recognized and guaranteed a sphere of protected constitutional autonomy defined by the interests which they are capable of self-regulating and administering and in respect of which no government has a compelling reason of public interest to intervene.

WHAT TYPE OF DEMOCRACY:

1. The principle of participatory and/or direct democracy should be constitutionally entrenched in addition to the principle of representative democracy [see *infra*].
2. The principle of the autonomy of individuals as well as of economic, social, political and cultural formations should also be entrenched with respect to all activities for which any level of government does not have a compelling justification of public or national interest to regulate, control or directly exercise.
Inter alia, the foregoing principle recognizes the autonomy of churches, political parties, professional associations, chambers of commerce, universities, arts and culture organization, family structures, traditional communities, economic enterprises, civics, private contractual autonomy in economic and personal matters, et cetera.
3. The principles of (a) transparency, (b) political accountability and (c) civil accountability of governmental structures shall be constitutionally entrenched.

REPRESENTATIVE DEMOCRACY:

1. The principle of political representation of government and regular elections should be constitutionally entrenched with respect to national, provincial and "primary" local governments (excluding local government substructures, including traditional communities)².
2. The implementation of this principle with respect to provincial and local government shall be within the exclusive competence of the Provinces.

². This principle relates to what the constitution should require. The law may extend proportional representation to substructure.

3. The electoral system is a fundamental element characterizing the form of government and the type of democracy. Therefore the constitution should set out the general principles of the national electoral system, leaving to the law the task of implementing such principles, so as to leave sufficient flexibility for future developments³. The provincial electoral systems should be within the exclusive competence of provincial constitutions.

PARTICIPATORY DEMOCRACY:

1. The constitution shall entrench the notion of participation of affected public and private interests in the formative process of an administrative action or regulation.
2. The constitution shall entrench the notion of participation of affected public and private interests in the legislative process.
3. Provision shall be made for referenda at all levels of government to be held at the request of a reasonably small number of dissatisfied citizens.
4. Provision shall be made for the recognition of the right to petition any government structure.

TRANSPARENT AND ACCOUNTABLE DEMOCRACY

1. The right of access to all government information and private data banks information shall be recognized in the constitution, with customary qualifications and exclusions, subject to judicial review.
2. The notion of administrative justice and judicial reviewability of all administrative actions shall be constitutionally entrenched.
3. Public officials shall be personally responsible for gross negligence and malice.
4. War shall be prohibited as a means to solve international controversies and shall only be allowed to defend the State's sovereignty over its territory.

TYPE OF STATE

1. South Africa should be a social but not a socialist state.
2. Private property and free-market enterprise shall be protected and the direct interference of government in economic matters shall be severely limited⁴.
3. The constitution should contain all recognized socio-economic rights along with constitutional imperatives which mandate the legislature to operate to remove social injustice, and promote the social growth of all South Africans.

³. The details of the IFP proposals on suffrage, proportionality and electoral systems will be tabled in the IFP submission for the 7th Report, per approved work program.

⁴. The detailed aspects of this principles will be set out in the third Report to this Theme Committee relating to the Economic Constitution, as per approved work program.

SUBMISSION BY THE ACDP THEME COMMITTEE ONE

I DEMOCRACY

1. We would like to see a multi-party democracy with regular elections.
2. A common citizenship for all and a system of voting based on a common voters roll and proportional representation.
3. There must be a clear separation of powers between the legislative, executive and judiciary.
4. All basic God-given human rights must be protected by law.
5. The government in power must be subject to the constitution which must be the supreme law of the land.
6. The individual's right to life, liberty and property must be guaranteed and protected.

II CHARACTER OF STATE

1. To ensure that the government is kept as close to the people as possible, we would like to see a small but effective central government and strong provincial and local governments.
2. The powers of the central and the provincial governments must be clearly defined and entrenched in the constitution.
3. Parliament, as the law maker, shall comprise of two Houses, viz., the National Assembly and the Senate, which will be representing provinces at national level.



616

30/01/95

30 JANUARY 1995

THEME COMMITTEE 1 - SUBMISSION BY THE PAC

DEMOCRACY AND THE CHARACTER OF THE STATE

PAC believes in the classical definition of democracy, viz, a government of the people by the people for the people. It, thus, believes that all citizens of South Africa are the people, naturally entitled to a democratic rule.

The entirety of the constitution shall enshrine legal principles that buttress and protect the democratic rights of all citizens of the South African State.

Allegiance to the state shall be premised on the visible democratic actions and processes followed by the government of the state.

Periodic elections of the government should be constitutionally established and protected.

The Constitution shall be the supreme law of the country.

The bearing of rights by the individual citizens of the state shall not be based on any phenomenon except citizenship. There shall, therefore, be no regard to race, class, status, sex or religion in the exercise and enjoyment of rights.

The constitution shall legally and philosophically view the citizens as of equal worth in everything within its ambit.

The state shall be a constitutional one. Parliament shall be the supreme law maker under the sovereignty of the constitution.

There shall be a unitary state aiming to merge the culturally heterogeneous people of this land into one politically, economically and socially homogeneous nation through politically unhindered evolutionary process.

A Bill of Human Rights shall protect the fundamental and non-fundamental rights of all citizens without any regard to race, culture, sex, class, status or creed. It is only the right of the individual that shall be protected.

The government shall be accountable to the civil society via its elected representatives, the National Assembly, primarily, and directly through its social formations when such a need does arise.

There should be one legislative chamber, the National Assembly with revisionary process of the statute making resting with the Select Committees.

The executive of the government shall be accountable to Parliament.

An independent constitutional court shall be the bulwark of the rights of citizens.

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There shall be a three tier government, viz ,

- (a) National
- (b) Provincial and
- (c) Local

The provincial and Local governments must serve the purpose of the decentralisation of administrative functions and also that of representing and enlightening the National government on the peculiar problems and wishes of their respective domains.

M Dyani - MP

ANC SUBMISSION TO THEME COMMITTEE ONE ON THE CHARACTER OF THE STATE AND DEMOCRACY

CHARACTER OF STATE

- 1) South Africa shall be a united and undivided nation.
- 2) The Constitution shall commit the country to a non-racial and non-sexist order based on the inherent dignity of all persons.
- 3) There shall be a Bill of Rights guaranteeing all accepted human rights including socio-economic rights that shall be applicable against all sources of power.
- 4) South Africa shall be a multi-party democratic state.

DEMOCRACY

- 5) There shall be regular elections on a common voters' roll based on adult universal suffrage.
- 6) There shall be elected government at Regional and Local levels whose powers shall be set out in the Constitution, but whose powers shall be subject to the need for national uniformity, national reconstruction and development and the values in the Bill of Rights.
- 7) Government shall be formed by the majority party.
- 8) Parliament shall be the supreme law-maker, and the expression of the will of the people. The executive will be accountable to Parliament.

NATIONAL PARTY PROPOSALS : DEMOCRACY AND THE CHARACTER THE STATE

The concept of "democracy" as encapsulated in the letter and spirit of the Constitutional Principles, implies the following fundamental characteristics:

1. A Constitutional State (Rechtsstaat) based on an entrenched Constitution which constitutes the supreme law. The formal aspects of the Constitutional State include:
 - (i) the vertical and horizontal separation of powers in a balanced way, and which will prevent the abuse of power by any organ of state at all levels;
 - (ii) the principle of legality viz the basis of all state action is the law, of which the Constitution forms the basic normative standard;
 - (iii) the protection of fundamental rights and freedoms in a justiciable and entrenched bill of rights;
 - (iv) state action shall be transparent, predictable and proportional to the objective(s) it sets out to achieve;
 - (v) an independent judiciary shall protect and enforce the

Constitution and all fundamental rights;

- (vi) the exercise of state power shall be controllable and within set limits.

The material aspects of the Constitutional State imply that all organs of state will exercise their powers with a view to the advancement of the higher values which are encapsulated in and reflected by the spirit of the Constitution and which, e.g., include the promotion of a rights culture and respect for the Constitution by all state organs as well as by the citizenry.

2. One sovereign state, a common citizenship, and adult suffrage based on a common voter's roll.
3. Representative Government at all levels of government viz national, provincial and local. This principle implies proportional representation in all legislative and executive structures.
4. A multi-party system and regular elections.
5. An electoral system based on proportional representation, which may possibly include elements of geographical representation.
6. Transparent, anti-totalitarian and accountable government.

7. The vertical separation of power shall be founded on autonomous and original powers for each level of government.
8. At the national level Parliament shall comprise of two Houses viz, the National Assembly and the Senate. The Senate shall represent the provinces at national level and its members shall be empowered to act authoritatively on behalf of the provinces.
9. Levels of decision-making will be determined with regard to the quality and effectiveness of the rendering of services in accordance with the principle of subsidiarity.
10. The role and function of civil society and its institutions shall be recognised and protected as will collective rights of self-determination of inter alia, linguistic, cultural and religious groups. The viability of corporate self-determination, as a method for furthering these objectives and the letter and spirit of Constitutional Principle XII, should be explored.
11. Loyalty to the single sovereign state shall be premised on the enhancement of national reconciliation whilst, simultaneously, the richness of the diversity of language, culture and religion shall be protected and conditions for their promotion be encouraged.

12. The preamble shall embody the encompassing and encapsulating philosophy of the Constitution and should, as such, have normative value.
13. The principle of the Constitutional State (Rechtsstaat) and the Constitution as the Supreme Law, shall be inviolable and non-repealable.
14. Proposals regarding national symbols and official languages will be put forward in due course.

In the final analysis the "democracy" envisaged in the Constitutional Principles and with which the new Constitution shall comply, shall be premised on the values of freedom and equality. Those values imply:

- that the state obtains its value by securing the liberty of the people;
- that no discrimination on whatever grounds shall be tolerated or allowed in the pursuit to achieve substantive equality for all;
- the minority must have the right to political opposition and the chance to itself becoming the majority;

- that the majority has to respect the liberty of the people and the rights of the minority. Hence, "the majority" is not identical with "the people" and "the state" is not identical with "society".

THEME COMMITTEE ONEDEMOCRACY AND THE CHARACTER OF THE DEMOCRATIC STATESubmission by the Democratic Party

The Democratic Party believes that the hallmark of the democratic state is the existence of a representative system of government which makes possible the reasonably regular alternation of government, or the realistic possibility of this through free and fair elections at regular intervals.

In our deeply divided society, in which voting along racial lines was a characteristic of our first free election, the problem is very much that of how will democracy prove compatible with the racially based voting that seems likely to continue? Put another way, how does one avoid the tyranny of the majority which has so characterized other deeply divided societies in Africa and elsewhere? In these societies the nationalist party wins the founding election, further entrenches itself in power in future elections and forms a mutually parasitical relationship with the state until removed by a coup or, after long decades, by a convulsive election.

The DP believes that 50% + 1 gives a party the right to govern (because that is democracy), but 50% + 1 does not give a party exclusive right to unfettered power. In any democratic state worthy of the name there have to be checks on the executive.

Examples of these include regular free and fair elections, freedom of the media and information, and the protection of Human Rights.

In terms of constitutional principle XIV of Schedule 4 of the interim Constitution, the final Constitution is obliged to provide for the "participation of minority political parties in the legislative process in a manner consistent with democracy". The Democratic Party believes that this constitutional injunction will be best furthered by a constitution containing the following provisions:

- (1) Supremacy of the Constitution over the ordinary law. (The Interim Constitution (I.C.) provides that the constitution shall be the supreme law - Sec.4 and principle 4)
- (2) The maximum devolution of power. For this reason the DP supports federalism, since it distributes power, brings government closer to the people, is a defence against tyranny and accommodates pluralism. (The I.C. makes provision for the establishment of provinces and local government with provincial legislative and executive authorities with exclusive and coordinate powers principles - 16, 18, 19, 20, 22.)
- (3) The power of the Federal Government and the States to be specially defined and entrenched. (The I.C. lays down the powers of the provinces in Schedule 6 of the Constitution Sec 61 provides for limited entrenchment.)

- (4) A system of voting based on Proportional Representation (P.R.). (The I.C. makes provision for P.R. in Sec. 40 principle 8.)
- (5) Protection of all basic human rights of each citizen under a justiciable Bill of Rights. (The I.C. makes provision for the protection of Fundamental Rights in Chap 3 principle 2).
- (6) A separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness. (This is provided for in Schedule 4 (VI) of the I.C.)
- (7) The creation of the office of Public Protector and a Commission to safeguard Human Rights and gender rights. (The I.C. makes provision for both of these under Chap. 8)

DIE VRYHEIDSFRONT / THE FREEDOM FRONT

THE SPIRIT AND THE VISION OF THE CONSTITUTION

1. INTRODUCTION.

What do we expect from the new, final constitution? What ideas must inspire the constitution? How can the Constitution correct the wrongs of the past? Can we expect the Constitution to ensure a better future for South Africa and how can we best secure this better future by means of a specific constitution written with a view of the specific needs of the people of South Africa? These are the questions we ask when we talk about the spirit and the vision of the Constitution.

2. THROUGH CONSENSUS — ACCEPTABILITY AND LEGITIMACY OF THE NEW CONSTITUTION.

The new Government is important and it has a great responsibility to govern in such a way that the country will rise from agony and strife to greatness and peace. But even more important than the new government of the day and certainly of more lasting importance for all governments that will come is the constitution we are about to write. It is the signal and the qualification of the new start.

The Constitution must therefore command the respect of all peoples and South African citizens. It is an effort to obtain once and for all legitimacy of government. Due regard must therefore be given to all opinions and the search for consensus must be painstaking. The Constitution must win the hearts and the minds of the people(s) of South Africa.

It must not bring discord. It therefore will reflect the crisis in which this country finds itself and indicate the hope we have of transcending the conflicts of the past and moving into a new future. It must bring solutions and certainly not create new problems. Constitutions are more than academic formulations of legal principles that relate to the functioning of the state. They grow from the agony of human suffering and from the determination of the creative human mind.

3. MADE IN SOUTH AFRICA.

What has been happening in the hot spots all over the world is happening in SA today as we attempt the writing of a constitution for all the people of this land. It happened in South America, Portugal, Spain, Africa and many other areas. Decades of suppressive control of different shades make way for popular constitutionalism in search of peace and progress.

The constitution we make must be truly South African however. It will reflect the South African political situation because of the essential political nature of constitutionalism. We cannot suffice with a description in general terms of

the distribution of powers and functions within different constitutional models. It must be related to and constructed upon the specifics of the political realities of South Africa. What we are after is constitutional legitimacy which is often more validated by political and social realities than by formal legal criteria.

The historical experience of countries like Britain and the USA differ substantially from that of countries in Africa and Asia. This will affect approaches to and the evaluation of their political and constitutional practices. Issues for instance like ethnicity and nationhood makes the application of British liberal constitutionalism or the proverbial American melting pot philosophy in an undiluted form in developing countries a strategy with considerable risk. The successful introduction of liberal constitutionalism presupposes the existence of a homogenic society based on established shared value-systems and cultural life and it also presupposes a general level of political education with all components of society.

As in other parts of Africa it will be fatal to introduce from above foreign western orientated constitutional practices rather than allow a genuine community based democratic culture to grow from below. Such imposition could be authoritarianism in itself. The spirit of the Constitution must emanate from the people (all the people) if it is to be accepted by the people as their own.

4. SECURITY TO THE INDIVIDUAL AND PARTICULAR GROUPS.

Above all the constitution must bring security to the individual and particular groups.

In accordance with international concepts of human rights, which have, in particular, been shaped since World War II, the fundamental rights of the individual must be guaranteed. The Constitution must invite personal loyalty and dedication with all citizens.

It is in the context of generally-recognised fundamental rights referred to above, but qualified by statutory provisions and other agreements, that the formulation of the concept of self-determination in South African context must be considered.

Although the concept of self-determination of peoples arose in the context of the oppression of colonial peoples by their mother countries, its ambit has been extended by modern developments in international law.

To a large extent modern concepts of self-determination acknowledge the self-determination of minorities inside sovereign states. These minorities often constitute cultural entities, of whom individual members are linked by language and religion. The interests of such a group have been recognised not only in legal theory, but also in the provisions of the constitutions of a number of modern states. Modern examples of minority protection or autonomy, often also on the level of local government, appear from the constitutions of a number of states, e.g. Switzerland, Canada, Germany, Spain and Belgium.

The examples referred to above may serve as analogies for the Afrikaner situation, but the overriding consideration in formulating a concept of self-determination in the context of South Africa is the unique circumstances

existing in South Africa. A balance should be negotiated between the desire of the Afrikaner for self-determination and the ideal of peaceful well-being of the larger whole of society.

5. CONCLUSION

World wide discussions in different situations have come up with articulated features of genuine constitutionalism, which could be formulated as follows:

It is a commitment to limitations on ordinary (also majoritarian) political power; it revolves around a political process, one that overlaps with democracy in seeking to balance state power and individual and collective rights; it draws on particular cultural and historical contexts from which it emanates; and it resides in public consciousness. (Greenberg e.a. (ed) Constitutionalism and democracy. Transitions in the contemporary world. O.U. Press. 1993).

Recapitulation

The Freedom Front sees the spirit and the vision of the Constitution as including:

1. Freedom for all. No arbitrary domination by any political party.
2. Control of state power over individuals and over citizens in collective context.
3. Conflict resolving and the pursuit of lasting peace.
4. Promoting respect for all components of the pluralist SA society and yet providing the value system for seeking common objectives.
5. Inviting loyalty of all citizens.
6. Bringing stability, development and progress to a conflict-ridden society.
7. Ensuring conditions and opportunities for the full development of the potential of the creative minds of all citizens.
8. Ensuring a system of equitable justice for all in society.
9. Creating space for the free unlimited development of the Afrikaner and of all cultures in accordance with the accepted universal values of human rights.
10. Creating a constitutional framework for the devolution of political power.
11. *Achieving acceptability and legitimacy through consensus*

DIE VRYHEIDSFRONT / THE FREEDOM FRONT

DEMOCRACY

1. INTRODUCTION.

When we try to become more specific about the spirit and the vision of the constitution we must first and foremost say that the constitution must constitute a state and promote a culture that is in essence and in practice democratic.

Democracy is not a magic formula in the form of a slogan that will simply solve all problems. Different people understand different things under democracy. Also the concept and the practice have gone through a long history with many adaptations. Certainly many disguised dictators used the popular concept of democracy to suit their own purposes.

Finer in his book, Comparative Government, says the following of the term democracy. "No political term have been so subjected to contradictory definitions as 'democracy' and 'democratic' since it has become fashionable and profitable for every and any state to style itself in this way."

However, even though we must be aware of all the misuse of the term democracy and of the great variety of practical applications, the system of democratic government allows, and even of the potential pitfalls we may face, democracy still remains the most acceptable form of government. It is also good to remember that democracy has brought stability, growth and hope for many peoples who suffered from authoritarian regimes, who brought them untold suffering.

2. DEMOCRACY AND STABILITY.

Furthermore, in the last two decades democracy has shaped a considerable number of stable societies, of which some are in Africa. The inequities and instability of alternative systems that have been employed by way of experimentation have even moved the International Monetary Fund to put the existence of a stable democracy in government as a prerequisite for the supply of any monetary aid. It is also important to note that in the assessment of the IMF whether a country is a true democracy or not, the protection and treatment of minorities in such a state is the yardstick and not merely whether a system of one person one vote exists. A properly structured democracy and stability goes hand in hand.

3. CONSTITUTIONAL REGULATION FOR DEMOCRACY - UNIVERSAL DEMANDS.

For the purposes of this presentation we propose to refrain from academic discussions about all the aspects of democracy in its long history. We would rather select those accepted features of democracy, that have direct bearing

to our situation and therefore to the constitutional process. In doing so we need to look to the past asking ourselves what needs to be done by way of constitutional regulation to change to a system that would be more genuinely in line with true democracy to build upon for the future.

The most common definition of democracy is government by the people.

This means:

- 3.1. Participation in government must be by all the adult people of South Africa. Never again must there be any one group of people dominating others by unilateral decision against their will. The principle of democracy must be adhered to, i.e. that government can only take place with the consent of the governed. This will be the only basis for lasting peace.
- 3.2. We believe, though, that the constitution must be negotiated and eventually written with the serious desire to invite loyalty and agreement of all significant components of South African society. The constitution must create unity, not try to enforce it.

4. DEMOCRACY AND OUR PLURALISTIC SOCIETY.

4.1. Having stated in 3 the universal demands of an inclusive democracy which we accept as the basis of true freedom, we in the Freedom Front submit with respect that the "people" which is to govern in South Africa should not be seen as a conglomerate of individuals. We believe that South African society consists of more than a specific number of individuals in that the communal aspects within our pluralistic society is well expressed and not all in one single way. As examples we want to list the following:

- * The desire expressed by the Zulu king for a kingdom.
- * The need expressed by many traditional leaders to be included in the democratic solution through some form of structures of internal self-government.
- * The desire expressed by many Afrikaners to be free to exercise selfdetermination, which includes a territorial component.

We are convinced that true democracy is flexible enough to accommodate the realities of the pluralistic society in a way that will suit the unique SA complexities, some of which we have mentioned above. We draw attention to the fact that in many situations in the world workable solutions have been hammered out for similar problems and that they have enhanced unity and strengthened statehood. They have brought peace and prosperity with growing mutual respect.

We must warn that our society is, for debatable reasons admittedly, still a deeply divided society that may not fit the pattern of British or American models based on individualism and functioning in a standardised culture. We can ignore these realities only at our own peril. Part of the problem, according to F van Zyl Slabbert and David Welsh (South Africa's Options - strategies for sharing power, 1979, p.32) is that the democratic

model of society was developed in the relatively homogeneous societies of the West, and exported by them, largely through the instrumentality of colonialism, to much of the Third World. The general concept of democracy, as expounded above, must necessarily be made to fit heterogeneous societies, in which group interests require special protection. If some satisfactory solution is not found to accommodate the strongly developed sense of national pride or ethnic coherence of certain groups within the overall structures of democracy, these groups will feel disempowered and suppressed by a political majoritarianism that will inevitably alienate them and set the scene for future discord. For they will see their fate clinched by what they can only consider as disrespect or disdain for what they consider is their "own". The problem of dissenting minorities must be addressed. Therefore modern democracy has developed to much more than simple majoritarianism and one man one vote. In this regard the right of self-determination of a community (e.g. the Afrikaners) is of such importance that it has been entrenched in the Constitutional Principles.

- 4.2. Similarly the concept or ideal of a strong state can only be enhanced by co-opting all significant groups as willing partners in this state, even if that means asymmetric arrangements on the powers and functions of substructures within the state.

It can make the regional dispensation more meaningful for there can develop a sense of identity and intense loyalty in addition to the fact of regional administration.

5. DEMOCRACY AND LOCAL GOVERNMENT.

- 5.1. Furthermore we want to make the point that a strongly developed local government system closely related to the communities will best serve the democratic ideal of government by the people. It is generally agreed that the system of direct democracy which operated in the Greek city states like Athens probably represent the safest and more genuine manifestations of democracy.

While we cannot employ the system of direct democracy to the larger and diverse societies and states that we have today and therefore have to rely on representative democracy at all levels of government, it is also true that the closer involvement of people and communities with government at local level allows for the better implementation of democratic ideals. It is probably the place where a divided South African society will best be trained in the virtues of democratic behaviour.

We also propose that communities who, for reasons of cultural coherence wish to run their own community life, be allowed to do so according to the principle of freedom of association. In this respect, for instance, we insist on the availability of public educational facilities for all children in every place but we also want education to be a community concern where the education of its children can be done according to the particular cultural demands of each community.

- 5.2. We furthermore expect that at the local level the position of

traditional leaders should be respected within the general democratic principle of government by the people.

We would also want to see accepted traditional leaders who represent their communities to become a structured part of civic government at the local and possibly at other levels of government as well. The concept of representation is at stake here. If the traditional leader represent his or her community this leader must be included in structures of civic government.

The meaningful incorporation of this fact of versatility of South African society in the constitutional framework needs to be looked at very carefully. The question is how to employ that reality within the context of a democratic culture that is based both on existing diversities and the dynamics of change in an effort to build unity in the whole and achieve stability all along. This is in the first instance a challenge at the local level.

6. DEMOCRACY - GENERAL PRINCIPLES.

- 6.1. The essential goal of democratic government is the pursuit of the common good for society, which must be negotiated in the forum of the people and agreed to.

It is not acceptable that the state can control and determine the lives of its citizens in an arbitrary fashion. In a democratically structured society the rights of the individual to life, to property, to freedom, etc. must be constitutionally enshrined and judicially guaranteed.

The citizen must be adequately protected also against administrative malice, inefficiency and arbitrary treatment, including discrimination. In addition to judicial redress an effective system of the Ombudsman or public protector must be provided for by the constitution.

- 6.2. Representation must be authentic. Elections must be free and fair and it must be possible for the judiciary to scrutinize the nomination of representatives. We believe that a code of conduct for political representatives must be agreed upon and in the case of proportional representation the list of candidates in order of priority must be published ~~sc~~ before an election for public scrutiny and possible judicial investigation in the cases where objection is registered.

The past has taught us that where legitimacy is in doubt respect for and loyalty to government fail. Legitimacy must be the constant demand. We also propose therefore a system where even during the term of appointment such representatives can be impeached by public demand of a substantial nature. Accountability must be accompanied by available constitutional measures for suspension and dismissal from office.

- 6.3. The standard checks and balances in democracy against abuse of power must be included. This includes the administrative, legislative and judicial levels.

- 6.4. At the same time the constitution must create overall trust, hope and loyalty that could facilitate peace and prosperity in society with general acclamation of a kind that would never again give rise to the need for resistance and revolutionary activity similar to that which we had in the past and caused severe measures from the state for the sake of maintaining its position.
- 6.5. We believe that the freedom of the press must be constitutionally guaranteed and that the critical surveillance of public events by the press must be welcomed at all times.

We also believe that public control of the SABC must effect diligent scrutiny of any form of abuse.

The independence of the SABC must be constitutionally enshrined.

