

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

JUNE 28, 1993

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

1.2 Moreover, the Minutes of the meeting of the Negotiating Council held on June 17, 1993 make it clear that this Technical Committee had been instructed to develop a

"constitutional model"â\200\235, rather than merely utilising and misconstruing our

submissions. This conclusion is also corroborated by the fact that â\200\230b instructions given to the Technical Committee were the expression from a compromise position worked out on the basis of the draft Resolution submitted by the IFP on June 15, 1993. That Resolution would have required the Council to stop its consideration of constitutional principles until a "Model C" process had been fully developed by the Technical Committee. Our understanding of the compromise is that the Technical Committee was instructed to develop a "Model C" transition process while the Council would have continued to consider the other Reports of the Technical Committee, even if no final agreement could have been reached until a fully-fledged "Model C" process has been tabled.

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

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

2.2 The "Model B" is a two-stage transition process which will empower a Constituent Assembly within some pre-agreed constitutional parameters which ostensibly would circumscribe and limit its discretion. The two-stage transition process could

--

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

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

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

B S < i A

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

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

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

We believe that the first imperative of constitutional negotiations is to reach a comprehensive political settlement, and that this can not be postponed until after

elections. It is clear that the powers, functions and autonomy of the SPRs are a

4.2

4.3

4.4

5.1

fundamental element in the process of such a political settlement. Therefore, we believe that it is essential that a full agreement on the form of state be reached prior to the holding of elections and that such agreement be reflected and entrenched in a final but amendable constitution.

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

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

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

national level but which could be a force of government at regional level. As we ...  
indicated in our submissions, federalism is also the best framework to ensure civil  
racial harmony

-social and economic pluralism in South Africa and to protect the protection of  
the autonomy of civil society from undue interferences of government.

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

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

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

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

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

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

In this respect, the Technical Committee misconstrued our approach, confusing the process with its result. It is a conceptual rather than a historical consideration that once the process is concluded the powers<sup>231</sup> of the Federal Republic of South Africa will =

be seen as deriving from the powers of the member states and from the sovereignty of the people. This does not mean that the sovereignty of the Federal Republic of South Africa is "devolved upward" from the SPRs to the national government.

« Rather, with the adoption of the constitution for the Federal Republic of South Africa

W+ provision will be made for the recognition<sup>230</sup> of the residual <sup>230</sup>sovereignty of the member -

- <sup>230</sup>states so that a federal system resembling the United States federation can be established. In this respect, the SPRs constitutions could be entrenched at the time of adoption of the constitution for the Federal Republic of South Africa and could be maintained until such time with a the meta-juridical status of a highly authoritative political document [see infra]. The agreement on the process will ensure that SPRs constitutions will be entrenched and will acquire full legal recognition, before the holding of elections.

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

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

L

popular referenda, organised under the direction and the auspices of the statutory commission.

The SPR constitution-making process would contribute to the process of national constitution-making to the extent that the constitutions for those SPRs which can complete their constitution-making within the pre-agreed time-frames, would be registered and accommodated by the constitution-drafting process at national level. An analysis of the details of our process proposal will clarify how, from a technical point of view, this process operates at a political level without limiting the legal discretion of the national constitution-making process.

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

Moreover, a "Model C" approach has the additional advantage of forcing the achievement of consensus without producing deadlocks. The "Model B" provides for deadlock-breaking mechanisms which could lead to the adoption of the final constitution for South Africa by a 51% majority, thereby creating the possibility that the final constitutional dispensation for South Africa does not reflect a comprehensive political settlement among the major participants and opens the doors for disaster -

"Model C" will rely on the autonomy and independent constitution making of the SPRs.

- To this aspect of autonomy and independence at local level would correspond |

the need to achieve consensus in the drafting of the federal constitution. This two -

aspect process reduces the risk of deadlocks allowing for concessions to be made at

regional level which might not be carried at national level.

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

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

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

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

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

On this proposal of form of state, autonomous member staies would come into being as part of the "F ede'al Republic of South Africa". Such a federal system is "intended as a system of sp 13- cf' soverelgnnty between the member states .and ihe federal

governmientâ\200\235. <HRReTEE g PTG,

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

Our proposal envisions a constitution-making process which does not require a transitional process. The present constitutional order would last up to the adoption of the final and federal constitution of South Africa with elections to be held under such constitution no later than the end of 1994.

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

~The MPNP should promoie the establishment of a statuiory commission charged with the task of co-ordinating top-down negotiations and ground-up democracy building.

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

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

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

Once the commission verifies that the constitutional proposals for the SPRs are consistent with the parameters set forth at central level, it will prompt the ratification of such constitutions through popular referendum. ~ The SPRs constitutions so

77 approved and ratified would be forwarded to the constitution-making process<sup>235</sup> and

- central level. Such constitutions would have no legally binding value on the constitution-making process at central level and would be nothing more than very powerful popular petitions to the constitution-drafting process at central level.

The commission which we propose could be established by the end of June. By the end of July the MPNP should finalise the principles guiding ground-up democracy building. By the end of September the commission, working in close co-operation with regional representatives, should finalise constitutional proposals for SPRs.

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

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

The commission would be assisting the constitution-drafting process at central level so as to ensure that the SPRs constitutions are acknowledged, registered and capitalised on in the drafting process for a federal constitution. Depending on the

~ would represent the regions on the principle of equal suffrage  
P g P P e g

technique used for the drafting of the federal constitution, the drafting process at central level could be concluded within a period of two to seven months.

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

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

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

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

â\200\234The MPNP would approve or reject if its entirety the draft constitution prepared by

the experts in accordance with the principles previously set forth by the MPNP. The SPRs constitution would have been previously approved through referendum. The - . - national constitution will be submitted to referendum. Soon thereafter national and regional elections would take place on the same day.

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

In accordance with the draft constitution for a 2 Federal Republic of South Africa tabled by the IFP with the Technical Committee on Constitutional Matters, a Federal Senate

-  
-

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

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

process avoids delays and deadlocks and will ensure the completion of the transition by 1994.

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

We urge the members of the Negotiating Council and the concerned public to make direct reference to the IFP original submission to the Technical Committee on Constitutional Matters. We have demanded that our proposal should be considered by the Negotiating Council before it seeks to agree on the alternative proposal for a two-stage model which is fully described in the Third, Fourth and Fifth Reports of the Technical Committee on Constitutional Matters.

-  
=,

o

#7018

FLd