

**THE DETERMINATION OF THE FORM OF STATE AND
OF A PROCESS OF TRANSFORMATION OF SOUTH AFRICA
CAPABLE OF ESTABLISHING FEDERALISM**

a) Background

There is a ripeness and an urgency to the determination of the form of state and for the negotiation of the process of transformation. The Government has submitted a proposal on regionalisation inclusive of power-sharing and other interim arrangements which substantially diverts from the process recommended by CODESA II Working Group III. This proposal has been actively negotiated with the ANC which according to the ANC NEC's resolution dated February 19, 1993 seems to have accepted the fundamental principles of the Government's proposal. These developments have put on the table with urgency and importance both the issue of the form of state and the issue of the process of transformation. At this point these issues must be determined as a preliminary matter and prior to the resumption of fully-fledged negotiations on other constitutional issues.

b) Negotiation of the Process

The Multiparty Negotiation Process shall determine a new process of transformation starting from a determination on the form of state. The IFP does not wish to be called to merely rubber stamp any understanding on the process and related time frame reached outside the negotiating forum,

The IFP rejects the notion that an election date can be determined until and unless an agreement on the process and related time frame has been finalised. The IFP detects a great risk in fixing any frame of references for the election date before the determination of the process, and before the process has reached a substantial point of maturity and development. As it would be politically impossible to postpone the election date once it has been fixed, there is the substantial risk that final stages of the process would not be finalized. This is particularly true if one of the major participants opposes them. For instance if the Codesa process were to be adopted, those who oppose the notion of a fully-fledged transitional constitution could very well purposefully delay the process of its negotiation and approval, so that under the pressure of an impending election date an agreement would forcefully be reached on something less than a fully fledged constitution. In the final analysis an undetermined process driven by an election date serves the purposes of centralistic and totalitarian forces which drive the process outside the parameters of broad political consensus and settlement including all the participants to the process.

Before beginning to negotiate the substance of the future constitution for South Africa, there must be an understanding on the process which will produce it, and on the necessity, or lack thereof, of interim arrangements such as power-sharing in a government of national unity. At this stage the issue of a transitional constitution and a Constituent Assembly (or other constitution drafting body) shall be negotiated and resolved.

We stand by the rejection of a transitional constitution, transitional power-sharing arrangements and a Constituent Assembly.

The IFP has proposed a process for the drafting of the final constitution for South Africa which does not require interim arrangements. This process will allow the finalisation of the transformation of our society by September 1994 with the ability to extend into March 1995 to accommodate possible delays.

According to the IFP proposal the Multiparty Negotiating Process should agree on a set of constitutional principles which would be handed down to a group of experts who would implement them in a fully-fledged constitutional draft. This draft would be returned to the Multiparty Negotiating Process for approval or rejection in its entirety, and once approved it would be submitted to popular ratification by referendum. An election would follow the referendum and a new government for South Africa would be empowered under the new constitution.

This process would do away with the notion of a Constituent Assembly and would avoid the risk that the constitution drafting exercise be hijacked by the demagoguery of liberation and be the reflection of the political vision of one or two participants rather than of a broad compromise which accommodates the essential needs of all the participants. More importantly, this process would allow the establishment of federalism, which a sovereign Constituent Assembly is not likely to produce, and, as indicated *infra*, it would also reflect the true needs, wants and aspirations of the people on the ground.

The IFP wishes to note that the Constituent Assembly need not be a legislative body, nor does it require a transitional government and a transitional constitution. An Act of Parliament could allow the election of a Constituent Assembly with the exclusive task of drafting the Constitution in accordance with the principles expressed by the Multiparty Negotiating Process and no later than July 1994. While the Constitution is being drafted the present government would continue to be in power.

Our proposal for a process to finalise the new constitution for South Africa requires a preliminary determination on the form of state. Our proposal has significant advantages over the proposals of the Government and the ANC/SACP alliance which have a number of elements in common.

It becomes essential that the Government and the ANC/SACP are willing to reconsider the entire process of transformation of our society and be open to accept different proposals and strategies. The issue of the process must become a preliminary matter for negotiation to be resolved before we enter discussions on aspects of the new constitutional dispensation for South Africa.

c) Form of State and Ground-up democracy building

The task of the Multiparty Negotiating Process shall be to entrench at an early stage and once and for all the issues related to the form of state or distribution of powers. We have expressed on many occasions, that it is not reasonable to negotiate who should draft the constitution and how the constitution should be drafted until and unless there is a determination on what type of constitution is to be drafted. We want to force all parties to express their vision on the two fundamental issues of federalism and pluralism.

It is the IFP position that the Multi-Party Negotiating Process shall agree that a federal and pluralistic state should be erected.

Once the issue of federalism is positively resolved the Multiparty Negotiation Process shall also determine a set of parameters and guidelines to allow the democratic process of ground-up democracy building. In fact, the establishment of federalism is quite unlikely to happen through a top-down process, as any form of downward devolution of powers could be accompanied by overriding powers and other controls. Federalism is a system of split sovereignty between the central and the state levels, and, therefore, the establishment of federalism should begin with ground-up democracy building processes which reclaim on an autonomous and original basis a limited amount of sovereignty to the states through the exercise of the regions of ordaining state governments within the parameters of a federal system.

Moreover, many regions of our country have expressed the intense political desire to erect themselves into statehood within a South African federal system. We do not believe that the process of transformation of our society should be controlled exclusively from centralised multi-party negotiations, and we have often taken the position that there must be an interaction between democratic transformations taking place at a regional level and the negotiating process at central level.

We have indicated that as long as the process of erecting regions into statehood respects a pre-agreed set of constitutional principles and relies on the will of the people, such processes should be registered and encouraged by negotiations taking place at central level. Accordingly, it should be the responsibility of the Government to organise referenda to allow the people of the regions to express themselves on constitutional drafts prepared by their elective representatives or by special regional Constituent Assemblies convened for such purposes.

This shall especially apply to the final ratification by referendum of the Constitution of the State of KwaZulu/Natal approved by the KwaZulu Legislative Assembly on December 1, 1992. The organisation by the Government of a referendum for the final ratification of the Constitution of the State of KwaZulu/Natal is a mandatory condition of our negotiations.

Once the Multiparty Negotiation Process positively resolves the issue of federalism, it shall produce a set of agreed essential constitutional principles to be used to guide the ground-up democracy building processes. This is to say that if such processes at local level respect the principles set forth by the Multiparty Negotiation Process the resulting state constitutions shall be registered and respected by the negotiating process at central level. In this respect the Multiparty Negotiation Process will be "directing" the ground-up democracy building processes.

In the December 10 Memorandum to the State President, the Inkatha Freedom Party tabled for the consideration of all parties a set of constitutional principles which should guide the ground-up democracy building processes. They are attached herewith as Annexure I/I.

The IFP has proposed the establishment of a Commission on regionalization which will have the purpose of interfacing the ground-up democracy building process with negotiations at the central level.

This Commission will have two tasks:

- 1) Attend to and supervise the process of ratification of the Constitution of the State of KwaZulu/Natal as adopted by the KwaZulu Legislative Assembly.
- 2) Assist political formations in developing constitutional proposals to identify the boundaries and the powers of new regions for South Africa in addition to KwaZulu/Natal.

The Commission will also assist the planning or negotiating forum to develop and approve the set of constitutional principles mentioned earlier which are to be used to guide and lead the formulation of constitutional proposals embodying the powers and boundaries of the new regions.

The Commission will receive the complete constitutional proposals which have been finalised through its assistance and which embody the powers and boundaries of any given region. A deadline will be set to complete these drafts. It will be the task of the Commission to verify the compliance of these constitutional proposals with a set of constitutional principles developed by the negotiating forum in co-operation with the Commission. Once the Commission has verified that the constitutional proposals comply with such principles, it will seek the negotiating forum's permission and guidance [advise and consent] to attend and supervise the submission of such constitutional proposals to popular approval by free and universal fair referendum within the concerned region. Alternative proposals could be submitted to referendum, and the people will decide which one they prefer. This can be easily achieved even in the case where the proposals cover different territories.

Given the unique characteristics of the region of KwaZulu/Natal the ratification of the Constitution of KwaZulu/Natal will be main-streamed. The process described above is designed to ensure that the boundaries and powers of the regions are identified and decided by the concerned interests in a contest which still allows the central forum of negotiation to assess their reasonableness with reference to social, economic, demographic and historic considerations as well as in view of the interests of other regions.

All referenda will be held on or before December 1, 1993, so as to allow the finalisation of the regional constitutional proposals prior to the completion of the drafting of the final constitution of South Africa.

It needs to be stressed that the Commission will be promoting the popular approval of regional constitutions which from a technical and legal stand-point will have only the status of very influential and authoritative proposals: they would not be laws. Therefore, these regional constitutions ratified by the people at the end of a process piloted by the Commission will not be binding on the constitution drafting process. However, undoubtedly they are going to have a very determining political influence on the nature and the wording of the

final constitution of South Africa. In fact, it would be politically unlikely and unwise to ignore the democratically expressed sovereign will of the people.

A further advantage of the IFP proposal is that it requires and justifies no type of power-sharing arrangement. It also ensures that the transitional process in South Africa is completed by September 1994, without a lengthy, excruciating and uncertain transition which would wear away the economic and social fibre of our society. The IFP proposal does not preclude that the first democratic government of South Africa be formed as a government of national unity, if the majoritarian political party so wishes.

Additionally the IFP proposal could allow both for symmetry and asymmetry in the resulting constitutional dispensation of South Africa. The IFP proposal registers the fact that not all regions are at the same starting point. On the contrary, the region of KwaZulu/Natal has gone ahead and finalised a proposal through a democratic process which now needs to be completed. The recognition that different regions have different needs and are at a different stages of maturity on the path of autonomy and possible statehood means that some regions may not be able or willing to finalise the process and they will need to be provided for through the process of negotiation at central level and in the drafting of the constitution of South Africa.

The IFP proposal obviates all the institutional and political risks associated with the proposal for regionalisation advanced by the Government.

The attached graphic describes the IFP proposal both with reference to the constitution drafting process relying on the use of a group of experts, as well as with reference to the possibility that an elected CMB be empowered for the exclusive purpose of drafting the new constitution for South Africa. [Annexure I/2]

Attached as Annexure I/3 is also a proposed Bill for the establishment of the Commission on Regionalisation.

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MEMORANDUM FOR PRESENTATION TO H.E. MR FW DE KLERK
STATE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

BY MANGOSUTHU BUTHELEZI, CHIEF MINISTER OF KWAZULU AND
PRESIDENT OF THE INKATHA FREEDOM PARTY

PRETORIA : DECEMBER 10, 1992

[...OMISSIS...]

I put forward the following list of constitutional principles as vital for the formation of a new democratic South Africa. Each state should adopt a constitution embodying the principles set forth herein:

- * "Rigidity" of the constitution and its supremacy over any other source of law. The exercise of the powers of the federal government in the states must be consistent with the state's constitution. Special procedures shall be set forth to amend the constitution.
- * There must be federalism, with residual powers in the members states. The powers of the state should be exercised as close as possible to the recipients of its services, either through internal decentralisation or through the creation of autonomous regions. The principle of democratic participation in administrative and legislative activities should be implemented throughout the constitutional system.
- * There must be a full list of internationally recognised human rights, including personal, collective, social, economic, labour, family and political rights. Fundamental rights shall be entrenched and not amendable. People should be respected and protected both as individuals and as members of the social and cultural formations they belong to and with which they identify.
- * There must be an adoption of the lists of modern collective rights, such as the right of the media, the right to access information, the right to a clean environment, consumer protection, et cetera.
- * There must be a mandate to the government to remove social apartheid by developing equal access to all social, economic and political opportunities for all citizens irrespective of race, sex, colour or creed. It is the duty of the State to assist the needy and the less protected segments of the population, to assist the victims of apartheid, to improve the condition of women and senior citizens, and to provide social welfare and assistance.
- * Cultural and political minorities must be given full protection through constitutional mechanisms which ensure their political representation and participation and power sharing. There must be a guarantee of personal and collective autonomies with special regard to cultural, educational, personal and family matters.

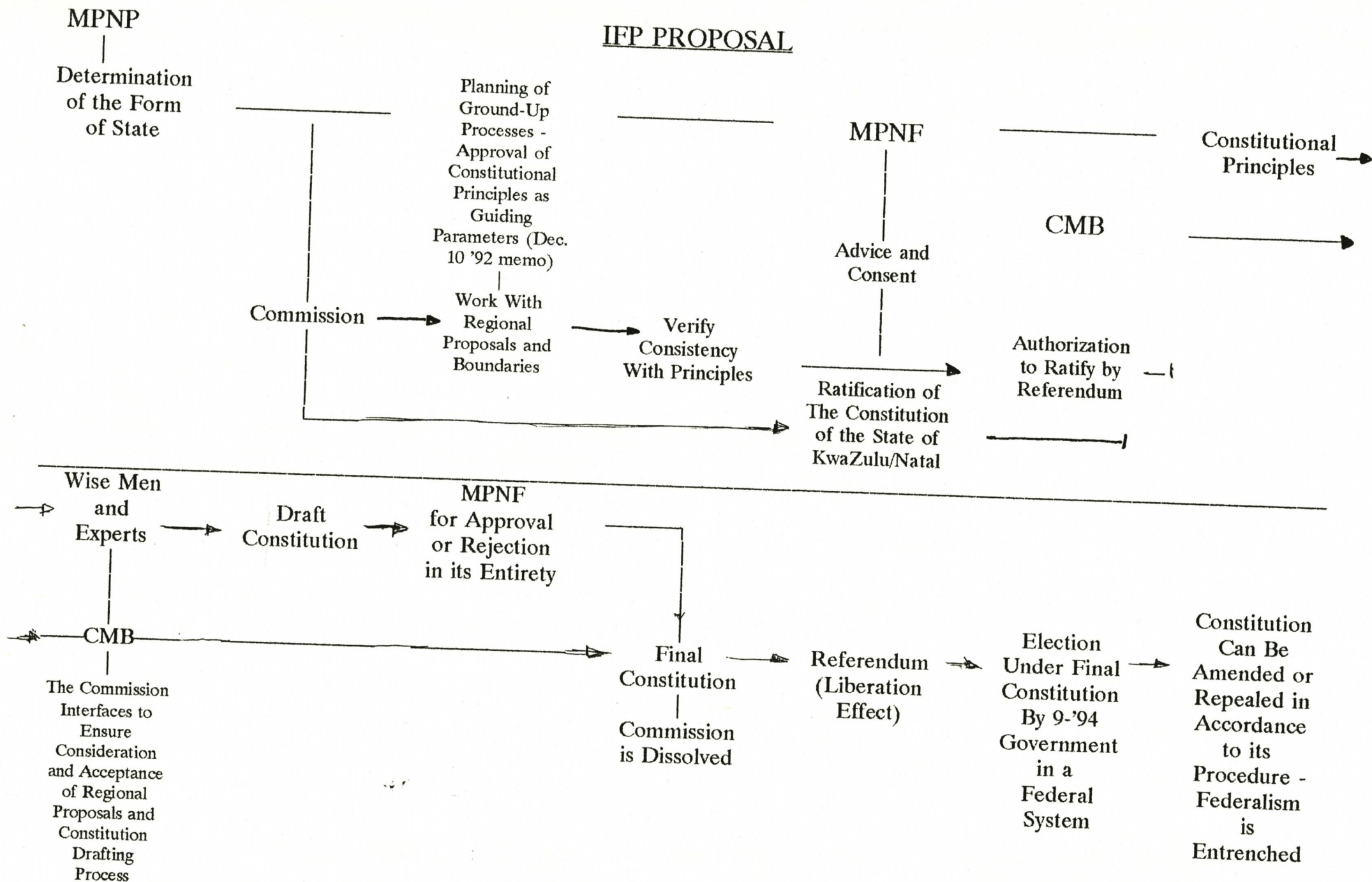
- * There must be full protection of private property and free enterprise.
- * Privatisation and limits to the State's direct intervention in the economy must be guaranteed. The role of the government should be to regulate not to operate the private sector.
- * The State must have the power to plan economic development and use monetary tools of intervention within the framework of co-ordination at federal level. Civil society shall participate in any economic planning. Monetary policies shall be determined independently from the political process by a central bank.
- * There must be a parliamentary form of government.
- * Constitutional mechanisms must be provided to ensure the correct and non-politicised functioning of the public administrations, such as the civil service commission.
- * Constitutional mechanisms must be provided to prevent the uncontrolled growth of government, such as the civil service commission and a judicial relief commission.
- * There must be respect for the integrity of civil society in all its forms, and civil society must be empowered to participate in the constitutional development of the state.
- * Constitutional mechanisms must be provided to ensure that political parties do not interpose themselves between government and individuals or social and cultural formations. There must be constitutional options to promote a political life based on the discussion of issues rather than vague ideological alliances.
- * Traditional and customary law shall be protected provided that it is not inconsistent with the constitution and the role of traditional leaders should be preserved.
- * The State shall have residual taxation powers and there shall be limits to the taxation powers of the federal government.
- * There must be constitutional provisions to ensure sound management of State finance, including an independent auditor and a balanced budget provision. There must be provisions to ensure the fairness of the tax system.
- * The independence of the judiciary must be guaranteed and the prosecuting function must be removed from political control. There must be an accountability of judges to an independent body, such as a judicial service commission which will also directly administer the judicial services.
- * The State must be vested with the right to organise and maintain a state militia and limits to the federal military powers in the state.
- * Delicate matters such as the holding of elections and the creation of constituencies shall be mandated to an independent entity such as an electoral commission, with the possibility of judicial review on its actions.

* Checks and balances shall also be ensured by providing some of the independent powers with their own budgets not prepared by the government but directly submitted by them for the approval of the legislature. Qualification and guarantee for all individuals exercising public function shall be detailed to guarantee independence and prevent conflicts of interest.

* There must be a strong and effective Constitutional Court. When possible the resolution of conflicts must be removed from the political arena and brought into the field of jurisdictional constitutional adjudication. Civil society should be empowered for this purpose.

* Provision must be made for an Ombudsman who shall act as a public advocate to redress and prevent human rights violations and monitor that the development of the legal system is consistent with the Constitution.

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IFP PROPOSAL TO ERECT FEDERALISM IN SOUTH AFRICA

BACKGROUND

Federalism is not a constitutional issue which can be resolved by majoritarian rule. There is an internationally recognised right to self-determination which entitles homogeneous or harmonious communities living in a given territory to choose their destinies and ordain for themselves the government which best fits their needs, wants and aspirations. This is to say that a unitarian form of government cannot be imposed on a region and on a community which does not want to have that government as their own. Therefore it is legitimate for a single region or large community to express a federalistic demand which must be registered by the process of transformation of our society.

The KwaZulu Legislative Assembly adopted the Constitution of the State of KwaZulu/Natal as representative of the needs, wants and aspirations of both KwaZulu and Natal. It is the duty of the Government to test through a referendum whether the Constitution adopted by the KwaZulu legislative assembly truly expresses the demands of the region and of the communities living therein.

The process of ratification of the Constitution of the State of KwaZulu/Natal needs to be integrated within the overall process of negotiation for a new constitutional dispensation for South Africa. This process should provide for sufficient mechanisms to allow other regions of South Africa to express their desire to choose a federal system as their own form of government.

For these reasons the IFP will introduce in Parliament the following Bill, on which the IFP solicits the support of all political parties.

A BILL

To hold a referendum on a constitutional proposal of the KwaZulu Legislative Assembly and to establish a Commission which will gather information and coordinate the formulation and ratification of constitutional proposals for the autonomous governance of regions within a unified and coordinated system of government for South Africa under a new Constitutional dispensation.

1. Definitions

As used in this Act the following terms shall have the meaning set forth herein:

"Constitution of the State of KwaZulu/Natal" shall mean the proposal adopted by the KwaZulu Legislative Assembly on December 1, 1992 and attached herewith as Annexure 1;

"Commission" shall mean the Commission on Regionalization established in this Act.

"Negotiating Forum" shall mean the Multi-Party Planning or Negotiating Forum or Constitution Making Body engaged at any given time in the negotiation and/or drafting of the principles and/or of the text of a new democratic constitutional dispensation for South Africa.

2. Ratification of the Constitution of the State of KwaZulu/Natal

The State President is empowered and directed to organize a referendum in coordination with the KwaZulu Government to be held in the province of Natal and in the territory of KwaZulu. All bona fide and legitimate residents of the territory of KwaZulu and of the province of Natal as per the date of the introduction of this legislation to Parliament of eighteen years of age or older, irrespective of race or sex or personal and social conditions, shall be entitled to vote at the referendum.

The referendum shall ask the electors: "do you intend to support and ratify the Constitution of the State of KwaZulu/Natal", and shall call for a Yes or No answer.

The Referendum shall be held on or before October 26, 1993

3. Establishment of a Commission on Regionalization

A Commission on Regionalization shall be established. The Commission shall consist of nine members appointed by the State President

- (a) with the advice and consent of a body consisting of the representatives of the signatories of the National Peace Accord with additional members appointed by the State President to represent political formations which did not sign the National Peace Accord, or
- (b) from a list of persons nominated for that purpose at the request of the State President by political parties or organizations which in his opinion have a relevant role to play in the process of democratic transformation of South African society in the case the body referred to under (a) above fails to make its recommendations after having been requested by the State President to do so.

The Commission shall be established by April 25, 1993.

4. Powers and Duties of the Commission on Regionalization

The Commission shall have the following powers and duties:

1. Attend to and supervise the process of ratification of the Constitution of the State of KwaZulu/Natal.
2. Assist political formations in developing constitutional proposals to identify the boundaries and the powers of new regions for South Africa in addition to KwaZulu/Natal.
3. Interface with the Negotiating Forum so as to develop a set of constitutional principles to guide and limit the formulation of constitutional proposals embodying the powers and the boundaries of the new regions.
4. Receive finalized constitutional proposals embodying the powers and the boundaries of any given region on or before July 7, 1993, verify their compliance with the set of constitutional principles referred to under (3) above, and, with the advice and consent of the Negotiating Forum, authorize, attend and supervise the submission of such constitutional proposals to popular approval by free, universal and fair referendum within the concerned region on or before December 1, 1993.
5. Interface with the Negotiating Forum so as to ensure that the constitutional proposals embodying the powers and boundaries of regions and approved by referenda held in the regions are adequately registered and considered in the process of drafting a new constitutional dispensation for South Africa.

The Commission shall be dissolved with the adoption of a new democratic constitutional dispensation for South Africa.