

MEMORANDUM FOR PRESENTATION AT A MEETING WITH H.E.

PROF. ANTONIO LA PERGOLA, EMERITUS CHIEF JUSTICE OF THE ITALIAN
CONSTITUTIONAL COURT, MEMBER OF THE EUROPEAN PARLIAMENT AND
PRESIDENT OF THE VENICE COMMISSION
BY MANGOSUTHU BUTHELEZI, CHIEF MINISTER OF KWAZULU, SOUTH AFRICA
AND PRESIDENT OF INKATHA FREEDOM PARTY

ROME : APRIL 26, 1993

Your Excellency, it is a great pleasure for me to have the opportunity to meet with somebody such as yourself who has gathered such vast experience both in political as well as in constitutional matters. You have been offered the unique opportunity to consider the intimate functioning of democracy from many observatories and I think that your experience can be compared to no one else's.

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As Chief Justice of the Italian Constitutional Court you have had the opportunity to guide the process of, implementation of the Italian constitution, while as Minister in the Italian Government you have had the opportunity to share in the daily care of running your country. Your vision broadened with your., participation in the European Parliament and your horizons were further amplified by your participation in the process of democratisation of all Eastern European countries. In this respect, I feel I can say, your Excellency, that a man such as yourself is a true father of democracy.

For this reason I was overjoyed when the Italian Ambassador in South Africa conveyed to me the willingness of the Venice Commission to participate in the troubled process of the democratisation of South Africa. Your personal experience and the experience of the Venice Commission will be of enormous assistance in our search for options and solutions to accommodate the great complexities of our country.

South Africa presents constitutional and institutional problems which do not resemble those experienced in any other country I know of, and for this reason I believe that a successful constitutional solution for South Africa is likely to resemble nothing ever seen before. This element of novelty has often been a characteristic for success of many constitutional models. This can surely be said about the United States Constitution which created an unprecedented

model for democracy and freedom which has withstood the test of time.

The greatest difficulty faced by our Nation at this point in time is the risk of falling for simplistic solutions which do not reflect the true nature of our country and its complexity. Ours is a nation of nations which has gathered together different types of social and cultural formations. It is also a country in which powerful totalitarian and autocratic forces are at work. Therefore, our country is faced with the need for deeply-rooted constitutional and institutional reforms which go over and above the dismantling of apartheid. Apartheid was not only a system based on racial discrimination and segregation, but was also an autocratic and centralised system of government which controlled in depth various levels of social and economic life.

We have taken the position that the true liberation of the great oppressed Black masses cannot be achieved in South Africa unless the entire system of government is changed. Since 1972 I have advocated federalism as the only condition for peace, prosperity and democracy in South Africa. I need not explain to you the great advantages of a federal system as far as checks and balances are concerned. However, I can stress that these advantages are particularly necessary in a South African context when it becomes imperative to empower at regional level the great masses of Black people who have been excluded for many decades from any form of civil and political responsibility.

Moreover, South Africa is not a country which can be governed by majoritarian rule where the winning party controls all the functions of government and to the minority is left only the possibility of becoming the majority in the future. In the South African context it becomes essential that the form of state, as well as the structure of government, should ensure the possibility that different political parties share governmental power at the same time. This can easily be achieved in a federal system which segments governmental functions at various levels of government and allows for different political parties to be in power in different places at the same time.

Our political vision is based not only on federalism but also most of all on the notion of pluralism. We have been advocating that the new constitutional dispensation for South Africa shall protect and entrench pluralism in all its forms, including political pluralism intended as special protection for political minorities, social and cultural pluralism and economic pluralism. In the South African context social and cultural pluralism can be achieved by limiting the role of government and recognising to the people, both as individuals and as members of the 5001st and cultural formations to which they belong, the right to organise themselves in autonomy.

This type of pluralism is very well known to European experience and it is for sure entrenched in the Italian constitution. In the South African context this type of pluralism includes the recognition of the right of self-regulation for institutions such as traditional structures, trade unions, universities, arts and culture, professional organisations, family structures and other social and cultural formations.

To us protecting economic pluralism in the South African context means not only to ensure the protection of private property and free market economy, but also to develop an intense programme of privatisation of the large South African para-statal. It is impressive to see the similarities between the political vision of the Inkatha Freedom Party and the recent events in Italy. With an overwhelming majority, the Italian people expressed their will through referenda to promote the privatisation of the Italian parastatal and they have been soliciting more intense forms of regionalisation and devolution to lower levels of government.

It was of great interest to us to note that the people of Italy have abolished the Ministries of Agriculture and Arts and Culture on the basis of the fact that these functions are better exercised exclusively at regional level rather than by the Central

Government. To us this is a self-evident truth and yet our federal vision for South Africa has found fierce and violent opposition from the ANC/SACP alliance.

In our vision the South African Federation should be structured so that the residual powers are left with member States in accordance with the model of the United States. Therefore, we think that regionalism rather than federalism will not be a solution capable of addressing and solving the needs of the South African situation. In a regional model, only powers of local interest are transferred to the regions. Even if the regional model is pushed towards greater forms of devolution in accordance with the principles of subsidiarity, only those powers which can be proven to be better exercised at regional level are going to be devolved to the

regions, but the residual powers will be left with the Central Government.

This model is not acceptable to us as it would prevent the regions/states from developing all-encompassing policies including the regulation of criminal matters and definition of the basic parameters of the economic system. This will include the power to adopt a criminal code and a commercial code, as is the case in the United States Federation. In the South African context it is very important to accommodate the different locations and particularities of regions. For example, we would like to see in the State of KwaZulu/Natal that the commercial code guarantees an advanced system of trade and commerce, compatible with international standards and practices.

Other regions have problems which will need to be registered through local codes. A powerful argument could be made with respect to the fact that the power of adopting criminal and commercial codes are better exercised at central level and therefore this power would not be allocated to the regions under the concept of subsidiarity. In the South African context this consideration has a great bearing on the problem of addressing the social injustices of our Nation and redressing the social problems created by apartheid. The effort of addressing the imbalances of our society needs to be adjusted to the different situations of each region. What needs to be done in terms of affirmative action and promotion of equal access to all social and economic opportunities in the region of KwaZulu/Natal, is going to be different from the type of problems faced in the Transkei region or in the region surrounding the territory of the present state of Bophuthatswana.

Therefore we embraced and advocated a concept of residuality which demands that only those powers which need to be exercised at central level be devolved upwards to the Federation. When you have had an opportunity to study the Constitution of the State of KwaZulu/Natal - and we rely on your vast knowledge of the United States federal system - I trust that you will share the opinion expressed by others that the Constitution of the State of KwaZulu/Natal reserves to the Federal Government extensive and penetrating powers which are far in excess of those originally reserved to the Federal Government by the US Constitution. I want to stress this point to indicate that our vision of a Federation calls for a unified South Africa where the Federal Government can adopt and implement far-reaching policies and exercise a unified role of political and social leadership.

As a scholar of federalism you know well that unfortunately there is no formula which spells out how to transform a unitary, centralised and autocratic state into a Federation. Historic indications show that federations usually come about from the organisation of regions into states as a preliminary stage to the formation of a Federation. Even in the Italian experience, the region where you come from, the beautiful land of Sicily, adopted its regional constitution before the adoption of the Italian Constitution. We followed a similar process with the adoption of the Constitution of the State of KwaZulu/Natal which is a Constitution which will need to be read within the parameters set forth by the Constitution of the Federal Republic of South Africa once this is approved.

Many of the provisions of our regional Constitution might need to be reconciled with the federal structure and this is a process which has been undertaken in other historic contexts. In this respect the experience of the constitution for Sicily which established a High Court for the region and operated for many years as a regional Constitutional Court until the Italian Constitutional Court was established, is a case in point.

I think that in the South African context the member states should maintain their state constitutional courts even if a Constitutional Court is established at Federal level. This is justified by the fact that Constitutional Courts are necessary to implement "long constitutions" which are made necessary by the development of modern constitutionalism. The need to characterise state constitutions as state constitutions also arises out of the particularity of a federal system in which state constitutions are often the forerunners of social and political developments which are registered at a later time by the federal constitutional process.

In this respect, it is significant that all the civil rights legislation and developments in human rights in the United States of America were preceded by provisions of State constitutions and State legislation. In the South African context this may lead to the fact that State constitutions, such as the Constitution of the State of KwaZulu/Natal, may end up having a far more extended Bill of Rights than a Bill of Rights entrenched in the Federal constitution, and this once again will reflect an adjustment to local realities.

Even if there is a growing consensus in the international community that South Africa should be a Federation, the ANC/SACP alliance is still determined to preserve the present unitarian centralised and autocratic state. The South African state is such that it controls social and economic realities at all levels in a centralised and very authoritarian fashion. The United States Government has taken the official position that a Federation should be established in our country. In addition, other countries have given indications that the process of transformation of South Africa should lead to greater liberalisation as far as social and economic structures are concerned.

We have undertaken this process with the adoption of the Constitution of the State of KwaZulu/Natal which as you will notice respects the integrity of our civil society and empowers civil society with very important constitutional functions. Our Constitution limits the role of government and extends the concept of autonomy from territorial autonomy to personal and collective autonomy so as to ensure cultural and social pluralism. As you have heard from our representatives who met with the Venice Commission, our institutional and constitutional vision is diametrically opposed to the one expressed by the ANC/SACP alliance. This difference of vision is reflected in the different proposals related to the process of transformation of our society.

The ANC/SACP alliance has reached an agreement with the ruling National Party on a process which will prevent the establishment of federalism and is not likely to change the fundamental characteristics of South African society. We fear that while this will dismantle apartheid, it will at the same time maintain the pre-existing structures and authoritarian characteristics of South Africa. It can be said that this process will cut off the head of the apartheid monster but it will preserve its body so that the nature of the beast will not change.

I hope that you and the Venice Commission will be more intimately involved in the process of transformation of South Africa. As you do so, you will notice how the major issue now relates to the process of transformation itself. We in the Inkatha Freedom Party have been proposing a process of transformation which can ensure the establishment of federalism and pluralism in our country, while the ANC/SACP alliance and the South African Government hold firm on a process proposal which in my opinion is an absolute recipe for evil - war. Their proposal calls for elections before the fundamental constitutional framework is in place and will prolong constitutional negotiations for a period of five years. I hope that during further meetings we will have the opportunity to discuss and analyse the complexities of this situation and that through our work we can ensure peace and prosperity for one of the most beautiful lands on the planet.

We are both men of great political experience and I will not hide from you the fact that the risks of the present situation are enormous. The ANC/SACP alliance has called for six weeks of mass action which will exacerbate the present climate of violence. The ANC/SACP alliance still maintains its private army, uMkhonto weSizwe, which has led to a militarisation of political life in South Africa. During the last few years over 250 leaders and office bearers of the Inkatha Freedom Party have been killed by a systematic plan of mass assassination. We are experiencing a low intensity civil war which since 1984 has claimed the lives of over ten thousand people. The ANC's private army, which in many international circles is still characterised as a liberation army, has no function whatsoever in relation to the dismantling of apartheid and is operating as a tool of political pressure against

its political opponents, namely the Inkatha Freedom Party and the Zulu Nation.

In this situation it would be unconscionable to allow the empowerment of a new government outside the rigid system of checks and balances set forth in a final constitution. Too often in the African context elections outside the parameters of a final

constitution do not solve problems, but rather open the doors for disasters of great magnitude. This is the path on which South Africa is now walking, and I tremble when I consider the possible consequences of this irresponsible course of action.

The National Party seems to have given away constitutional guarantees in consideration of a power-sharing agreement with the ANC/SACP alliance which will entitle it to share power for a five-year period. According to their scheme, during this five years of power-sharing a new constitution should be drafted. I believe to do so will prolong the climate of violence and negotiations about the fundamental rules and structures of our society and will lead to the disintegration of the economic and social fabric of our country.

For this reason, have determined to be fair and unwavering in my commitment to ensure that the liberation process 'is accompanied by strong and internationally acceptable constitutional structures and guarantees. The stakes are frighteningly high and I don't feel that after 40 years of political struggle and leadership of my Nation that I can give away the long sought-after guarantees of freedom and democracy for power-sharing compromises and unworkable solutions which will lead our country into destruction.