



# INKATHA

Inkatha Freedom Party

Iqembu leNkatha yeNkululeko

## WORKING GROUP 2

POSITION PAPER OF THE INKATHA FREEDOM PARTY  
FOR SUBMISSION AT THE CODESA MEETING OF FEBRUARY 6, 1992

### INTRODUCTION

The Inkatha Freedom Party has no intention of bargaining away the future of South Africa's people through participating in a negotiating process which seeks quick expedient results at the expense of enduring principles. The foundations for the future multi-party democratic order need to be carefully laid and sufficient time should be allowed for reconciliation. The new South Africa must be responsibly and well governed into existence and the IFP will strenuously resist any suggestion that there should be constitutional leaps in the dark in trying to get there.

It is public knowledge that the Inkatha Freedom Party and its predecessor, Inkatha yeNkululeko yeSizwe, have devoted a considerable amount of thought, research and effort into finding constitutional arrangements that would transform South Africa from an apartheid state into a stable, harmonious, democratic and prosperous country for all its people. The famous Buthelezi Commission was followed by the equally successful KwaZulu/Natal Indaba. In addition the IFP has maintained contact with and comprehensively studied the constitutional law and practice of major democracies in the world.

### GENERAL CONSTITUTIONAL PRINCIPLES

- 1.1 The Inkatha Freedom Party hereby sets forth those fundamental principles which must be enshrined in, and may not be contradicted by, any other provisions of the future South Africa Constitution. As such, these principles are the cornerstones of each of the sections of the constitution. The constitution drafting process shall identify the various options and formulate the constitutional provisions to implement these principles. Such principles shall also be the basis of constitutional interpretation and jurisprudence.
- 1.2 These principles are arranged by and reflect the subject matter encompassed in modern constitutionalism. They are listed here according to the organization and structure employed in the writing of modern constitutions. However, this should not preclude a different arrangement of sections or subject matter.

Nor should it prejudice the issue of whether constitutional principles should be spelled out in the constitution or merely extrapolated from its provisions.

## **2. FUNDAMENTAL PRINCIPLES: GENERAL**

- 2.1 In the peoples of South Africa reside the sovereignty of South Africa, whether exercised as individuals or as groups. The constitution shall be the supreme law of the land and the source of inspiration for all governmental action. All acts, measures and decrees contrary to the constitution shall be judicially declared null and void.
- 2.2 All citizens shall enjoy equal protection of the laws and be afforded equal opportunity in the market place. This shall include the prohibition on any discrimination based on sex, race, religion, and personal status. However, this principle shall not preclude affirmative action programmes.
- 2.3 The constitution shall meet the test of social dignity. It shall declare the right of all individuals to the pursuit of happiness. It shall assert the duty of the state to guarantee, protect and actively promote the social dignity of the South African peoples, both as individuals and as members of groups. To achieve such goals, the state shall strive to remove economic and social obstacles and barriers which preclude equality of opportunity, equal social treatment and economic self-sufficiency for all the peoples of South Africa.
- 2.4 The constitution shall list the social functions of the state: national security, economic and social development, environmental protection, promotion of the quality of life, protection of the family, public education, public housing, and social and medical assistance.
- 2.5 Since South Africa is a pluralist society, political, social and ethnic pluralism shall be protected. National, linguistic, cultural and native identities, practices and traditions shall likewise be protected and promoted. Special attention shall be given to the needs and aspirations of indigenous peoples.
- 2.6 All South Africans shall be under a constitutional duty to make their contributions to the security and general welfare of the state.
- 2.7 South Africa shall conform both its legal system and its foreign policy to the norms of international law and cooperation.

## **3. HUMAN RIGHTS PRINCIPLES**

- 3.1 South Africa shall recognize and guarantee all human rights, civil, political, social, cultural, religious and economic.
- 3.2. The constitution shall list in detail the fundamental rights

possessed by all South Africans, guided by the formulations set forth and proclaimed in the International Bill of Rights of the United Nations, in the European Convention on Human Rights and especially in the Africa's Banjul Charter on Human and Peoples' Rights.

- 3.3 The human rights provisions listed in the constitution shall not exclude the recognition of other human rights, identified on the basis of constitutional principles and on the changing social, economic and human growth and development of South African society. This principle will support an "evolutive clause" in the constitution, authorizing new forms of human rights protection against human rights violations not yet predictable.
- 3.4 All justiciable human rights shall be immediately enforceable, with appropriate procedures to provide redress and the termination of any violations.
- 3.5 Human rights shall not be breached or transgressed. Their exercise may be limited but never denied. Even in emergency situations, entrenched human rights shall be protected in their essential core.

#### **4. PRINCIPLES CONCERNING SOCIAL AND POLITICAL RIGHTS**

- 4.1 South Africa shall recognize the rights of individuals as members of social and economic organizations, including but not limited to the right to form and join trade unions, the right to strike, and the right to collective bargaining.
- 4.2 Political rights must insure effective participatory democracy. This includes the right to establish political parties. It also encompasses access to all non-privileged government information and access to government owned means of mass communication.
- 4.3 Political rights are designed to serve the objective and cause of democratic debate. No private or non-governmental military force shall be permitted.
- 4.4 Government shall not establish nor support any given religion. State and church shall be separate.
- 4.5 Colleges, universities and schools of professional education shall be autonomous.

#### **5. PRINCIPLES CONCERNING ECONOMIC RIGHTS**

- 5.1 South Africans shall enjoy a free market economy. Nationalization shall not be the policy of the state. Nationalization shall be permitted only when the free market can not reliably provide a particular need, and only upon a special majority vote of the legislature. Private property shall be protected. Expropriation shall be limited to a showing of public need and fair and expedited compensation shall be provided.

Expropriation decisions shall be subject to judicial review.

Foreign investments shall be encouraged and protected and the repatriation of profits allowed.

- 5.2 State intervention in the economy shall be limited to planning for the achievement of stable economic growth by creating opportunities for private enterprise. The state shall implement privatization of all government enterprises not inherent in the nature of government (e.g. defence, courts, taxation) and which can be operated more efficiently in the private sector.

A privatization commission shall be established. The commission shall have a predetermined limited life span renewable if needed. It shall be staffed with technical individuals and shall plan the privatization process so as to benefit the economy and avoid corruption and nepotism. It shall have the power to initiate legislation on privatization and shall work with the central and regional agencies implementing the privatization legislation to ensure efficiency, absence of corruption, and expediency.

- 5.3 The central bank shall be autonomous and shall have the right to determine interest rates and currency emission.
- 5.4 Government shall operate on balanced budgets. Approval of an unbalanced budget or a government deficit for necessary borrowing for future development shall require a special legislative majority. Government spending shall be checked by an independent auditing entity. In many countries, this entity has proven to be valuable in offsetting corruption and nepotism as well as governmental waste and inefficiency.
- 5.5 The tax system shall be fair and progressive. It shall not be a burden on production and investment.
- 5.6 Monopolies shall not be permitted and all practices in restraint of trade and competition shall be prohibited.

## **6. PRINCIPLES ON THE STRUCTURE OF THE STATE**

- 6.1 Human and social rights and freedoms shall be guaranteed under a state structure which respects relevant logical, economic, territorial, cultural, linguistic and historical considerations. Historically, authoritarianism, dictatorship widespread corruption and the absence of individual and group rights flourish only in centralized and unitarian forms of government.
- 6.2 Democracy is best protected by a system enshrining separation of powers and checks and balances. We traditionally separate the legislative, executive and judicial branches and their respective powers over each other to achieve horizontal checks and balances. We secure vertical checks and balances by the separation of powers between the national federal government and state, regional and local governments.

- 6.3 Subsidiarity has become the key word in the constitutional planning of the European Community. It is the doctrine that nothing should be done on the Community level which cannot be done better at local levels. And local government is more capable and more sensitive to specific local needs and aspirations.
- 6.4 It is only in the centralized and unitarian state that one particular political faction can exclude all others from political participation and healthy democratic debate. Germany, the United States and other federal states often experience the situation where one political party is in power in the national government and another party controls the lander or state.
- 6.5 Regional governments are not only more democratic but more practical. Where government is closer to the people (i.e. where tiers and layers of government are removed), there is greater efficiency and cost savings, plus increased governmental effectiveness.
- 6.6 Such considerations are particularly important in South Africa where the central government has conspicuously failed to meet regional geopolitical interests.
- 6.7 Regional government must be the rule and central government the exception. The constitution shall list the powers and functions of the central government, those of the regions and those which are shared.
- 6.8 The boundaries of the regions/states shall be identified on the bases of historic, linguistic, economic and geopolitical considerations.
- 6.9 The constitutions shall set forth the principle that the residual powers vested in the regions/states should preferably be exercised through local governments on the basis of further decentralization and local autonomy (i.e. the creation of regions in the states, or the creation of provinces in the regions). The governments of the regions/states and the local governments should allow for broad public participation and participatory democracy.
- 6.10 The constitutions of the regions/state shall be approved by the Constitutional Court for conformance with the principles of the South African constitution.
- 6.11 Local governments in the regions/states shall be chartered in accordance to a uniform law adopted by the regions/states. Such law would respect and authorize exceptions from the general rules for traditional territorial governments. After approval, but before publication, this law would be verified for compliance with the constitution and the national interests. Disputes would be resolved before the Constitutional Court. This type of checks and balances follows the successful Italian model, subsequently in the constitutions of other countries.

6.10 The constitution shall ensure that regions\states have independent taxing powers.

## 7. PRINCIPLES ON THE ORGANIZATION OF GOVERNMENT

7.1 The government shall be divided into legislative, executive and judicial branches. The three branches of government shall be separate. Each branch shall be provided with effective powers to check and balance the functions exercised by the other branches.

### 7.2 The legislature

7.2.1 The legislature shall represent the people of South Africa on both a territorial and a population basis. The territorial chamber is designed to ensure protection of regional interests and its members shall be chosen by the legislatures of the regions/states. The other house shall be chosen on the basis of proportional representation and constituency.

7.2.2 The legislature shall effectively control the operations of government and the civil service, investigate their activities, and demand and receive government reports. It shall be open to public participation by popular legislative initiative, through reports from the ombudsman, by public hearings and by other techniques of participatory democracy. The legislature shall be deemed an "open parliament."

7.2.4. Members of the legislature shall be guaranteed the privileges and immunities necessary to promote the independent and undisturbed exercise of legislative functions.

7.2.5 An independent electoral commission shall be established to correct any impropriety in the elections process, both prior to and during the actual balloting.

### 7.3 The Executive

7.3.1 The executive shall be accountable to the legislature. The head of state shall not be the head of government. Government shall function on the basis of wide-based consensus and shall enjoy the confidence of both houses of the legislature. The fact that one of the houses is elected on the basis of regions/states will promote the formation of a coalition government with a broad consensual basis. This will achieve and maintain national cooperation and reconciliation.

7.3.2 The head of state shall be elected by indirect suffrage by individuals elected for that purpose on the basis of electoral principles which ensure that all territorial formations in the state (regions/states) receive adequate representation.

The executive is designed not to be a weak and impotent

executive, nor to be a domineering executive which can govern without a broad consensus. It is designed to be an effective and fully empowered executive to be responsive to the needs, wants and aspiration of the people and to govern with parliamentary consensus. The position of the executive in the legislature shall be effective but not domineering. It shall not control the legislature's agenda nor have an unqualified and broad veto power.

7.3.4 Governmental action shall be conducted in strict compliance with the laws adopted by the legislature and shall be subject to judicial review. Governmental rules and regulations to implement legislation shall likewise be subject to judicial review.

7.3.5 An independent civil service commission shall be established to select civil servants, monitor the efficiency and fairness of government, conduct independent investigations of alleged cases of corruption, nepotism, inefficiencies and malfunctions, and provide regulatory relief by soliciting changes in rules and regulations. The commission shall also ensure that the civil service is representative of all population groups.

#### 7.4 The Judiciary

7.4.1 The judiciary shall be independent and the status of the judges shall be protected from any potential influence.

7.4.2 An independent judicial service commission shall be established to recommend the selection and appointment of judges. It shall also supervise the lower courts and appoint local magistrates. It shall prescribe the qualifications of judicial personnel and set the criteria for the advancement of judges, their transfers and assignments. They shall hear complaints and exercise disciplinary authority. They shall also develop educational programs for the training of newly designated judges.

7.4 The constitution shall set forth the jurisdiction of both the central and the regional/state courts. It shall also indicate the general criteria under which matters of regional/state law can be heard or reviewed by the central state court system.

7.5 The constitution shall give proper consideration to administrative courts, tax courts, labour courts and specialized courts dealing with tribal and customary law; it shall also prohibit the creation of special ad hoc or post facto tribunals and the jurisdiction of military courts over civilians.

7.6 The constitution shall set forth the privileges and immunities of judges necessary to ensure their independence and impartiality, as well as the criteria for the selection of the members of the judicial service commission.

## 8. PRINCIPLES ON THE GUARANTEE AND PROTECTION OF THE CONSTITUTION

- 8.1 Constitutional government must be ensured by the creation of enforcement mechanisms and human rights must be protected by the establishment of their own implementation machinery.
- 8.2 As the supreme law of the land, the constitution may only be amended, modified or derogated by legislative action by a special majority, ratified by a popular referendum. The republican form of government and fundamental human rights may not be subject to constitutional amendment.
- 8.3 Any law adopted in South Africa in conflict with the constitution shall be null and void *ab initio*. Judicial review, applicable to the legislation of both the central government and the regions/states, shall be exercised by the Constitutional Court. Because the new constitution will be so different from the existing constitution, it should be interpreted by a new court rather than through the existing legal system. Further, the establishment of a distinctive court with this express function will foster specialized expertise and uniformity of result.
- 8.4 The Constitutional Court shall be independent, with the power to adopt its own rules of organization, operation and procedure. The justices shall be selected through the participation of various branches of government from the best legally trained individuals who have proven impartiality and dedication to constitutional principles. They need not to be South African citizens; on the contrary it would be desirable to enlist the knowledge and experience of racially neutral foreign lawyers.
- 8.5 The jurisdiction of the Constitutional Court shall be invoked when a constitutional issue is raised "which is not obviously without merits." This broad standard, adopted by the European constitutional courts, is necessary in providing appropriate judicial relief under a new and novel constitutional order. Political parties and other interest groups recognized by the Constitutional Court, in accordance to its rules, shall have the power to bring direct actions. The decisions of the Court shall have retroactive effect.
- 8.6 The Constitutional Court shall also adjudicate conflicts between the central state and the regions/states and those between the various regions/states. Its jurisdiction shall extend to all matters requiring special constitutional adjudication.
- 8.7 The office of ombudsman shall serve as the nation's public advocate, representing the people against the government. It shall investigate alleged violations of rights and privileges granted by the constitution and secure such rights through the courts as appropriate. It shall have access to both the central and regional executive and legislative branches to enforce rights administratively as well as pursuing judicial action. It shall also propose legislation as appropriate and work with central and regional agencies on matters affecting the interest of the public.



8.8 The ombudsman shall maintain offices throughout the nation in order to be accessible to members of the public in the enforcement of their human rights.

**9. CONCLUSION**

The IFP's vision for South Africa is that of a social state, made possible by free enterprise and market economics, which will continually strive for social and human development. It is a state where human rights are not only protected and enforced but their exercise encouraged and nourished. We advocate state and regional structures designed to bring government ever closer to the people so that they may better participate in the democratic process.

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## 2. CONSTITUTION MAKING PROCESS AND BODY

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- 1.1 Issues related to the constitution-making body and its process are intertwined with issues related to the transitional period.
- 1.2 It is essential that constitutional provisions are drafted by people who are not involved in the daily care of government and under the pressure of special interest groups. Constitution drafters must be objective and must be detached from the political process. They must be free to look to the future of South Africa and be free to make determinations which might not be immediately popular or politically wise. They must exercise technical knowledge and competence and not use their constitutional roles as stepping stones to political preferment.
- 1.3 The constitution making process must also have the imprimatur of political representation and popular approval. Political representation can be achieved through the recognized political leaders and popular approval through referenda.
- 1.4 It would not be advisable to hold elections to appoint the constitution drafters. An election for this purpose would require the adoption of a new electoral law. The provisions of a new electoral law can not be written until the structure of the South African state is clearly defined. An electoral law could not be adopted merely on the basis of the regional, autonomist, or federal principles without defining the boundaries of those regions or states.

Furthermore, the constitution drafting process will determine what type of representation should form the legislature. Most likely this representation will combine representation of the people with representation of state/regions, territories, social entities, of other groups. The electoral law has to reflect this approach which can only be specified in the constitution. The adoption of an electoral law prior to the adoption of the constitution would prejudice the core of the constitution negotiation.

- 1.5 An election would also exacerbate the present situation of widespread violence. This would jeopardize the serenity of the constitution-making process. In fact, the constitution making-process is already in progress, and with the conclusion of the Codesa meeting the first half of this process will be completed. A political campaign characterized by violence, in the middle of the constitution making process, would be a extremely counterproductive.

The tones of the debate would be necessarily exasperated, players would be changed and the entire process would be seriously jeopardized. Given the lack of strong and credible constitutional institutions at the present time, a serious break

in the present constitution making process might bring South Africa into chaos.

1.6 The constitution-making process must be continued, not interrupted.

1.7 The following are the steps to be taken:

1. The Codesa meeting will be concluded with a document which embodies and specifies all the principles and terms of reference of the constitution. This document will be detailed even if it will be general in nature. The document will also include a list of recognized political formations in South Africa, which will also include political formations which did not participate at the Codesa meetings.
2. The Codesa document will be submitted to the voters for approval. The referendum will be called by a law of the current legislature, and will be on the basis of a single state-wide constituency which will include all South African citizens of age. A majority of the validly casted votes, not including blank ballots, shall approve the Codesa document.
3. A Constitution Drafting Convention [CDC] shall be established. Each recognized political formation shall designate its representatives to the CDC. Each recognized political formation will appoint the same number of members. One third of the membership of the CDC will be reserved for appointments made by the trade unions, employers' organizations, the chambers of commerce, the universities and other predetermined social formations.
4. The function of the CDC will be to draft the constitution in strict compliance with the terms of the Codesa document. A special committee of the CDC not involved in drafting activities shall verify that any proposed language is consistent with the Codesa document. The CDC shall prepare the draft constitution and adopt the electoral law.
5. In pursuance of the electoral law adopted by the CDC a referendum and a general election shall be held to approve the constitution. A majority of the validly casted votes, not including blank ballots, shall approve the constitution. The general election will fill all the representative positions provided for in the constitution. Should the voters not approve the constitution, the legislature voted in office in the general election will also sit in as a constitutional assembly.
6. The transitional government will cease office within a predetermined period from the general election.