



# INKATHA

Inkatha Freedom Party

Iqembu leNkatha yeNkululeko

WHY THE INKATHA FREEDOM PARTY OBJECTS TO THE IDEA OF THE NEW CONSTITUTION BEING WRITTEN BY A POPULARLY ELECTED ASSEMBLY (WHETHER CALLED "CONSTITUENT ASSEMBLY" OR CALLED BY ANY OTHER NAME) :

The position of those who claim that the new South African constitution should be written by a popularly elected assembly (usually called a "constituent assembly") is that, since the essence of democracy is the making of law by the whole of the people (via their elected representatives), full democracy must entail the making by a popularly elected assembly not only of ordinary legislation but also of the law of the constitution - the highest law of the land (to which all ordinary legislation is subordinate). This position, though superficially compelling, is in fact based upon demonstrably faulty reasoning - a fact which becomes apparent when one considers the purpose of having a constitution in the first place.

Purposes of the constitution

The logical way in which to approach this matter is first to clarify the purposes of the constitution: what is a constitution for? Once we are clear about what a constitution is for, then certain propositions about how it should be written follow as a matter of logic. And the most important of these propositions is that, notwithstanding the superficial attractiveness of the constituent-assembly idea, the constitution should not be written by a popularly elected assembly (by whatever name called).

Protecting individuals

What, then, is the constitution for? What is this constitution business all about? In the first place, it is about protecting certain especially important rights and freedoms of individuals - rights and freedoms to which individuals should be entitled irrespective of their colour, race, creed, economic position etc. and irrespective of the political doctrines espoused by the government of the day and of the political complexion of future parliaments or legislative assemblies - by listing these rights and freedoms (in words agreed upon by the writers of the constitution) in a part of the constitution traditionally called the "Bill of Rights" and then declaring that this Bill of Rights is to prevail over any subsequent legislation with which it is inconsistent.

Bill of Rights

- President: The Hon. Prince Dr. Mangosuthu G. Buthelezi
- National Chairman: Dr. F.T. Mdlalose
- Deputy Secretary General: Inkosi S.H. Gumede
- Sub Committee Chairmen:
- Political Constitutional, and Legal: Dr. D.R.B. Madide
- Economic and Finance: Mr. M.A. Nzuza; Social and Cultural: Dr. F.T. Mdlalose; Elections Publicity and Strategy: The Rev. C.J. Mtetwa
- Appointment and Disciplinary: Mr. E.S.C. Sithabe; Community Development: Mr. M.V. Ngema.

"One man,  
one vote"

In other words, it is about protecting individual rights and freedoms by setting limits to the sort of subsequent legislation which may validly be enacted. Now, in a democratic state - the sort of state which all of us are working for - this subsequent legislation will be the creature of future assemblies (called "parliaments", "legislative assemblies" or whatever) periodically elected by the whole of the people on the basis of universal adult suffrage ("one man, one vote"). For ease of exposition, such future assemblies are hereinafter referred to by the composite name "parliament" - though the use of this word (in the singular) should not be interpreted as prejudicing the Inkatha Freedom Party's well-known federalist position. The purpose of the Bill of Rights - one of the most important parts of the constitution - is, then, to set limits to what parliament may validly do by way of legislating. To take an extreme example, parliament may not, for instance, validly legislate to the effect that all private owners of property are to be dispossessed if such legislation would be inconsistent with the Bill of Rights. And it may not validly legislate so as to give government the power to imprison people without trial if legislation to that effect would be inconsistent with the Bill of Rights. And so on. In practice, parliament will of course be dominated, at any one time, by whichever party (or coalition of parties) holds the majority of seats therein. And, on the assumption that all ordinary legislation is to be passed by a majority (whether simple or special) of votes in parliament, it follows that in practice a sufficiently large majority will (subject only to the content of the Bill of Rights) be able to secure the valid enactment by parliament of whatever legislation it may want. The Inkatha Freedom Party has no problem about this result: it is a normal feature of parliamentary democracy that, in the ordinary course of events, the majority - even a simple majority - will have its way. However, the important words in the foregoing are the words "subject only to the content of the Bill of Rights". The whole purpose of the Bill of Rights is to ensure that the rights and freedoms set forth therein are protected even against legislation favoured by a future majority (however large). In other words, the purpose of the Bill of Rights is, in practice, to set limits to the legislative power of majorities. Why should one want, in a democratic state, to restrict the power of majorities? The answer is that history is replete with examples of majorities perpetrating injustices upon minorities by means of legislation. Electorates have not always been noted for the political wisdom (or for the morality) of their majorities, and it is salutary to remember that Hitler was elected. If you believe that the power of the majority (or of a majority of such-and-such a specified size) should be completely unfettered, then you must accept that your view entails the repudiation of the entire concept of an entrenched Bill of Rights.

Inviolability  
of rights

Either you do want a Bill of Rights, or you do not. If you do not, then you must reconcile yourself to the possibility that all private owners of property may one day legally be dispossessed or that you may one day be legally imprisoned without trial. If you do, then you must accept that circumscribing the power of majorities is the name of the game. Virtually every civilised country on the globe - with the exception of Britain (whose constitution is unwritten, is of very ancient origin and is in many respects anomalous) - has an entrenched Bill of Rights and is proud of it. And the Inkatha Freedom Party wants an entrenched Bill of Rights for South Africa. But, since circumscribing the power of majorities is the entire purpose of having a Bill of Rights, it is sheer nonsense to suggest that the writing of the Bill of Rights (or of the constitution of which it forms a part) should itself be entrusted to a majority (which, of course, it would be if the constitution were to be written by a popularly elected constituent assembly). To put the matter in other words, an important function of the constitution is to place limits upon the sort of legislation which a popularly elected assembly (parliament) may pass. To entrust the writing of the constitution to the first popularly elected assembly (a "constituent assembly") is to defeat this object at the outset.

Getting  
rid of  
government

Let us now consider another of the purposes of the constitution. An important part of the constitution's purpose is to ensure that government is easily removable - removable, that is to say, by a simple formal procedure (an election) which is constitutionally guaranteed to take place within a certain limited period of time. Why should we want the government to be easily removable? This question requires some thought. Virtually all political philosophy since Aristotle has revolved around the question "Who should govern?" Various answers to this question have competed for favour - the wise, the brave, the rich, the majority, the proletariat, "the people", the old, the well-born and so forth. It is submitted that all of these answers miss the point - that the sine qua non of freedom for ordinary people is that they should be able to get rid of their government easily if they do not like it. In other words, it is not the composition of government which is of primary importance, but the removability of government. If you have a government which is (either by law or in fact) irremovable then, regardless of its colour, its professed philosophy, its political rhetoric, its slogan or its composition, it will in time become increasingly oppressive and totalitarian. If human history teaches anything, it teaches that. Therefore, the name of the game is "easy removability of government". This object is not secured by a simple constitutional provision to the effect that there shall be an election every so many years.

If, when election time comes round, the incumbent government control the television, the press, the armed forces, the churches, the entire administration of justice, the nation's finances and so forth, then they will in fact be irremovable. The constitution must therefore ensure that government is never able to get into this strong position - that the government will be easily removable in practice as well as in theory. Now, if the constitution is written by a popularly elected constituent assembly, then it will necessarily be written by a body dominated by that party which is foreseeably likely to form the first government (since that is the party which will have won the greatest number of seats in the constituent assembly). And this party will, quite understandably, be less enthusiastic than others about ensuring the easy removability of government. In fact, it will have a positive incentive to ensure that government is, in so far as is possible, irremovable. For this reason, too, the whole idea of the constitution's being written by a popularly elected assembly (by whatever name called) is, notwithstanding the superficial attractiveness of arguments to the contrary, inherently unsound (and, indeed, inherently anti-democratic).

"Worst enemy"

Then there is what may conveniently be called "the worst-enemy argument". You may have a fairly shrewd idea about who is likely to form the first government, but you cannot foresee the future course of history. You cannot tell who will be in government in ten years', or fifteen years', time. Imagine that, at some unspecified time in the future, your worst enemies are in government. How safe will your rights be? The constitution must protect your rights even in the event of government falling into the hands of your worst enemies. This, also, is part and parcel of what a constitution is all about. But if the constitution is written by a popularly elected constituent assembly then it will of necessity be being written by a body dominated by that party which is foreseeably likely to form the first government, and they will be less exercised than others by the possibility that government may one day fall into the hands of their worst enemies. Indeed, they will have a positive incentive to ensure that the powers of the first government are so extreme as to enable their worst enemies to be got rid of.

Rights must be protected

Electoral law

Finally, one of the purposes of the constitution is to prescribe the nation's electoral law - the law dealing with such matters as registers of electors, geographical constituencies, boundary commissions, the mode (proportional representation?; first-past-the-post?; some other system or combination of systems?) by which representatives will be elected, and so forth. But constitution-writing by a popularly elected constituent assembly presupposes that such an assembly has been popularly elected, and this in turn presupposes the prior existence of a national electoral law. And in this sense the constituent-assembly idea is "putting the cart before the horse".

Analytical reasons

The above are the main analytical reasons why we repudiate the idea of a popularly elected constitution-writing body. They are reasons whose cogency is in no way dependent upon the existence of any particular sociological circumstances peculiar to South Africa, and they are reasons supported by logical arguments which we believe to be so unassailable as to justify our questioning the motives of anyone who, having absorbed these arguments, continues to advocate the writing of the new constitution by a popularly elected constituent assembly. We, also believe that there exist, in the present state of affairs in this country, certain additional reasons for objecting to the constituent-assembly idea - and these additional reasons are articulated below. But, because these additional reasons are, in a sense, circumstance-dependent in a way in which the reasons outlined above are not, we shall first address (in anticipation) an argument which may at first appear to be an answer to at least some of our above objections but which in fact is not. This argument revolves around the present activity of Working Group 2 of CODESA in formulating (within its "First Assignment") certain constitutional principles ("the CODESA principles") and goes as follows:-

Additional reasonsA false argument

"Inkatha's objections to what they call "the constituent-assembly idea" are aimed at the concept of a popularly elected assembly having a free hand in the writing of the new South African constitution. But in fact the proposed constituent assembly will not have a free hand; because it will be bound by the CODESA principles. It is these principles which should be looked to for the protection of important individual rights and freedoms, for the ensuring of the easy removability of government, for the safeguarding of peoples' rights against their "worst enemies" in government and so on, for these principles (agreed upon by "sufficient consensus" within the meaning of CODESA's standing rules (and democratically validated by referendum before the work of the constituent assembly starts)) will constitute a parameter within which the constituent assembly will be obliged to remain. If the constituent assembly writes a constitution which is inconsistent with (or which does not incorporate) the CODESA principles, then its constitution will be pro tanto invalid (by reason of its being ultra vires the CODESA principles)."

Refuting  
the false  
argument

The trouble with this argument ("the parameter argument") - besides the fact that it does not even purport to answer our point about electoral law - is that it begs the whole question of the degree of specificity or detail with which the CODESA principles are to be formulated. This point may perhaps be best appreciated by considering the respective positions of the proposed constituent assembly at each of the two ends of a hypothetical spectrum, ranging from extreme vagueness at one end to extreme detail at the other, of possible sets of CODESA principles. At the extremely vague end of the spectrum, the CODESA principles state merely that the constitution should contain an entrenched Bill of Rights (without in any way attempting to prescribe the content of such Bill) and should incorporate "proper checks and balances" (without in any way prescribing what these "checks and balances" are to consist of). These principles amount to little more than a statement to the effect that the new constitution should be a good one. They are quite incapable of acting as a parameter for the formation of an ultra-vires doctrine binding the popularly elected constituent assembly. At the extremely detailed end of the spectrum, the CODESA principles amount to a fully-drafted constitution - leaving nothing whatsoever for the constituent assembly to do. It is vain to argue that somewhere along this spectrum there must be a point which represents the "happy medium". Wherever you are on the spectrum, you face the same problem: to the extent to which the CODESA principles are generalised and vague, they will in fact be incapable of acting as an effective parameter; to the extent to which they are specific, detailed and precise, they will render the constituent assembly redundant. For this reason the Inkatha Freedom Party repudiates not only the constituent-assembly idea but also the parameter argument designed to rescue the intellectual respectability of that idea. Further, the Inkatha Freedom Party maintains that it is incumbent upon all of us in Working Group 2 to demonstrate that the *raison d'être* of Working Group 2 goes beyond its merely lending some spurious substance to the parameter argument.

Vagueness  
of CODESA  
principles

Detail

No "happy  
medium"

Sociological  
circumstances

For the sake of completeness, we shall now enumerate our additional reasons for objecting to the constituent-assembly idea. We would stress that we acknowledge these additional reasons to be dependant for their cogency upon the existence of the particular sociological circumstances currently characterising the politics of South Africa. However even if these circumstances were to cease to exist overnight - a ludicrously unlikely logical possibility - the cogency of our above arguments from the purposes of the constitution would in no way be affected.

Our additional reasons are as follows:-

Violence

1. In the present conditions of inter-party, inter-tribal and inter-factional violence in South Africa, elections for a constituent assembly would be at best a charade and at worst a propaganda-and-intimidation competition. The majority of our population have no direct experience of the electoral process and would feel constrained to vote in favour of whichever party they had the greatest perceived reason to fear in the event of their registering a vote against that party. Electoral confidence in the secrecy of votes would be minimal.

Stakes too high

2. In an election in which the winner was to enjoy domination of that body charged with the task of writing the constitution, the stakes would be dangerously high. Such an election would, in effect, be a formalised or ritualised form of civil war. It is quite unrealistic to suppose that an election of this nature would not greatly exacerbate such level of violence and intimidation as already exists.

Demography

3. Given the demographic composition of South Africa, there is a real risk that smaller ethnic groups would be so dwarfed in a popularly elected constituent assembly as to be deprived of any possibility of making a meaningful impact upon the eventual outcome - to the serious prejudice of the internationally accepted principle of self-determination.

Emotional atmosphere

4. The commencement of any constitution-writing process in South Africa will, it is to be hoped, mark the final capitulation of one of the world's most reviled and repulsive racist regimes. In the jubilant but highly-charged emotional atmosphere to which this event may be expected to give rise, it is unlikely, to say the least, that a constituent assembly composed of elected politicians answerable to their several constituencies will have either the necessary detachment or the inclination to focus adequately upon the complex issues which will still require to be addressed if the constitution is to act as an effective guarantee of future liberty and good government. In particular, the Inkatha Freedom Party fears that the whole question of proper provision for regional and local government will receive inadequate attention.

Detachment necessary

Federalism

As is by now well-known, the Inkatha Freedom Party, as champion of the concept of federalism in the new South Africa, holds the exclusive vesting of very substantial original powers of legislation, administration and adjudication in regional governments to be a necessary condition of future good government, of the protection of liberty and of the avoidance in our country of a situation wherein local interests are ignored or obliterated by, an over-powerful central government sitting in Pretoria or elsewhere.

Conclusion

In conclusion, the Inkatha Freedom Party rejects the idea of a popularly elected constitution-writing body firstly because the entrusting to such a body of the task of writing the new constitution would have the effect of defeating at the outset various important purposes of a constitution and secondly because sociological and political circumstances currently characterising South African public life are such that special risks would inevitably attach to the writing of a new constitution by such a body.