



INKATHA

Inkatha Freedom Party

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WORKING GROUP II

PROPOSALS OF THE INKATHA FREEDOM PARTY ON THE BODY AND PROCEDURES FOR DRAFTING A NEW CONSTITUTION.

1. There is a fundamental difference between the body procedures for drafting a unitary constitution and that required for the drafting of a federal constitution. Therefore the prior question to be answered is what form of constitution we are aiming at? The body and procedures for drafting of a new constitution cannot be determined without making the choice between a federal and unitary structure of government.
2. It is a well known fact that the IFP favours the creation of a new federal Republic of South Africa. For this reason the IFP proposals will tend to follow the principles that apply to Federal constitutions.
3. The IFP proposals are also based on the experience that has been gained in constitution making in other parts of Africa and the world. In this connection it should be noted that the numerous constitutions produced in Africa have all been the result of a constitutional conference which produced a constitution followed by elections resulting in a new Parliament and Government. The establishment of a constituent Assembly to draw up a new constitution for Namibia is a lone exception to the process that has obtained in the rest of Africa
4. The idea of a Constituent Assembly appears to the IFP to be wholly inappropriate for the conditions which apply in our country. It is admitted that Codesa itself does not derive its Legitimacy from the popular vote of all the people in the country. Apart from anything else such a body as Codesa could never bind a sovereign elected body such as a Constituent body to anything. A Constituent assembly in the exercise of its sovereignty as the only popularly elected body in the country could conceivably determine its own procedures, ignore all agreements entered into at Codesa and eventually proceed to do as it sees fit.

5. Despite words to that effect there is no constituent assembly that draws up a constitution. Invariably such a body appoints legal experts and technicians to draw up a constitution. This brings us back to the IFP proposals that Codesa itself could appoint such legal experts and technicians to draw up a constitution which would be put for approval by the people in a Referendum. The programme of doing this by way of a Constituent Assembly is long and incorrect way of achieving the same result.
6. Every Federal constitution has been constructed by existing States, Provinces or Regions. The constitution of the United States of America was produced by the representatives of thirteen states comprising the original thirteen colonies in America. The Federal constitution of Germany was produced by forty-eight states of the former German confederation. In Canada the ten provinces were the basis on which the Canadian federation was built. In each of these cases the distribution of power between the states and Federal government was determined by the states. Nowhere in history has a sovereign parliament, elected on a unitary basis ever created a genuine federation. The idea that a Constituent assembly elected by the entire population on unitary basis still leaves the federal option open, is a political chimera. The IFP considers that all proposals for a Constituent assembly and/or Transitional parliament are premature.
7. As we have already stated ~~the~~ above a sovereign elected body cannot be limited by any decisions taken by its predecessors or by non-sovereign bodies such as Codesa. In a federation the constitution is sovereign and an independent judiciary has got power to declare invalid the laws passed by parliament. In a unitary state it is parliament which is sovereign and all that the judiciary can do with the laws passed by such a parliament is to apply them. In fact even the people are not the legal sovereign in a unitary state. Furthermore the acts of one parliament such as the Tricameral Parliament or an Interim parliament are not binding on a Sovereign parliament. Once established a sovereign parliament can make its own laws and ignore any previous agreements or arrangements.
8. In a country with a history of conflict such as ours it would be in the interest of long term stability to strive for a new constitution based on consensus and not by imposed majority. The advocates of the constituent assembly have tried to modify the negative effects of the majoritarian principle by suggesting a two-thirds majority for the validity of the constitutional proposals. This would still imply a potential opposition of one third of our huge population to the fundamental law of the country. It is a risk South Africa cannot afford.

9. It is ironic that supposedly well-informed people should endeavour to link the concept of a federal state with the ideas of the National Party or even of apartheid. The whole system of institutionalised racism in South Africa was imposed by the parliamentary majority of a unitary state. No governing party in South Africa has ever advocated a federal system of government in eighty-two years. Indeed even now the ruling National party is proposing a power-sharing constitution in a basically unitary state. It is politically dishonest to suggest that the advocates of a federal constitution for South Africa thereby seek to retain racial privileges. This is a tendentious and emotive appeal to non-reason.
10. We have already stated that the construction of a federal constitution presupposes the existence of the states which will constitute such a federation. In this connection it should be pointed out that the electoral law which applies in a federal election differs fundamentally from the electoral law that is proper for unitary state. A federal constitution would normally provide for a lower house elected by the whole population and an upper house elected by the states which constitute the federation. Most of the proposals so far tabled suggest an electoral law based on a unitary parliamentary system.
11. There has been a general consensus that any election should be by way of proportional representation. There are numerous systems of proportional representation. Such systems differ as to whether we are talking of a unitary or a federal state. Full negotiations on the appropriate electoral system have not yet taken place in Codesa yet the cry of elections has become ever more strident. By insisting on proper and thorough negotiations the IFP is adopting the attitude of a responsible political party. It is not fear of elections that motivates the IFP to insist that all matters must be thoroughly examined. We do not wish a body such as Codesa to be guided by mere political slogans. We also totally reject the habit of ascribing motives as a substitute for proper analysis.
12. The IFP proposes that: (a) the constitution making body should be a properly constituted constitutional conference. Such a conference should prepare a constitution agreed to by consensus. This should be followed by elections held in terms of a new constitution resulting in a new parliament and government.
- (b) Alternatively agreement should be reached on the boundaries and constitutional powers of the

states that will constitute the new federal republic of South Africa. Already there is a large measure of consensus as to the number and the shape of the states that should constitute the new South Africa. What remains is to agree on the constitutional powers of such states. If such states are established now, as the IFP suggests, the states could then establish a constitution-making body to draft a new constitution.

- (c) Until such states are established there can be no change in the status of the self-governing or TBVC states.
- (d) The TBVC states can only participate in all the processes suggested at Codesa by negotiation. Sweeping statements suggesting participation of the inhabitants of the TBVC states in elections against the will of the governments of these states are reckless and ill advised.
- (e) That immediate and detailed negotiations should take place for a new electoral law with particular reference to the choice of the appropriate PR system and the basis i.e whether federal or unitary.

ON THE CONSTITUENT ASSEMBLY

1. Establishing a Constituent Assembly necessitates the prior passage of an electoral law. This requires the identification of the principles of representation -- such as setting up regions, constituencies, methods of proportional representation, etc. This is a fundamental task of constitution-making itself. Thus, establishing a constituent assembly to write the constitution is like putting the cart in front of the horse.

Romania has just followed this procedure in the preparation of its 1991 constitution and the result was a country trying to live under an electoral law for nearly a year, followed by a bad constitution.

2. A Constituent Assembly is, by definition, elected by the majority of the electorate -- and thus represents that majority. Consequently, a Constituent Assembly lacks the contributions and input of diverse minority viewpoints. The result is a constitution based on the mood and emotions of the people today and not a balanced constitution for the future.

The Colombia Constitution of 1991 is a sad example of this procedure.

3. A Constituent Assembly is necessarily composed of politicians and thus lacks the experts and technicians necessary for the making of a sound constitution.

One can see this in the 1991 constitutions of Mali and Guinea where the absence of such expertise led to a copying of the French model which is really inapplicable to their situation.

4. A Constituent Assembly is composed of politicians. As such, its members think in the short term and seek popular solutions to ensure reelection. They respond favorably to virtually all pressure groups and fail to make hard and unpopular decisions.

Thus the overlong 1988 Brazil Constitution, with voting rights for 16-year-olds and the unlimited right to strike, even for police and firefighters.

5. A Constituent Assembly for South Africa at this time would be an unnecessary interruption of the constitution process already begun at Codesa. It is not reasonable to put Codesa aside to create a new entity to explore the constitution-making process.

6. An election at this time in South Africa would exacerbate the existing situation of widespread violence.