THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CERTIFICATION OF THE NATIONAL CONSTITUTION

REPLY ON BEHALF OF THE CONSTITUTIONAL ASSEMBLY

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I N T R O D U C T I O N

1. We will deal with the main objections. The bulk of the objections relate to the powers and functions of the provinces. We submit that these objections are misconceived primarily because they misread CP XVIII(2).

2. Some of the objections to the certification of the new text do not take into account that the constitutional principles allow the Constitutional Assembly a choice of how to flesh them out or give effect to them. The insistence that the final constitution in order to enjoy legitimacy, should be written by at least two-thirds of the elected representatives of all the people of South Africa, would not be satisfied if the principles are interpreted in a manner which would require a carbon copy of the interim constitution to be produced as the new text. That there was such a choice is evidenced by the use in CP I of the words:

> "... provide for the establishment of ... a democratic system of government ..."

3. The Constitutional Assembly did not, however, have a choice but to

> "... provide for the establishment of **one** sovereign state ..."

This has an important bearing upon a number of objections, particularly in relation to the allocation of powers and functions of the provinces. The choice was made by the Constitutional Principles in favour of a unitary state which also provided, within certain parameters, what powers sub-national structures will have. In assessing the nature and extent of the discretion the Constitutional Assembly had, regard should be had to the provision in CP XX which calls for recognition of the need and promotion of -

> "... national unity and legitimate provincial autonomy ..."

4. Motala in *The Record of Federal Constitutions in Africa: Some lessons for a Post-Apartheid South Africa* refers to the Federal Constitutions of the Republic of the Congo (now Zaire), Uganda and Nigeria. He comes to the conclusion that:

> "In many emerging African nations the federal model has not resulted in the freedom and compromises identified with federal institutions, but has instead resulted in greater instability, even chaos in the experience of some governments.
>
> Introduction of the federal model of government in the African nations has generally led to a mobilisation of ethnic minorities in most instances. The notion that minority communities should have special representation has resulted in divided loyalties and has thwarted the development of national consciousness. In Nigeria, the federal system gave institutional expression to tribal politics and froze the situation as it was at the time of the departure of the colonial power. The regions created under federal plans are identified with a major ethnic community. Each region saw itself as a distinct political entity. Political parties are identified with certain regions and with particular ethnic groups. Political parties seek support from their regional and ethnic bases. There is generally no unifying national party representing common national interests. The parochialism of these political parties has severely strained the unifying mechanisms of the federal system. Nigeria exemplifies the adverse effects that a pre-occupation with regional or ethnic self-interests can have on the development of a sense of common identity."[1]

[1] Ziyad Motala: "The Record of Federal Constitutions in Africa: Some lessons for a Post-Apartheid South Africa" Arizona Journal of International and Comparative Law, Vol. 7.2 (1990) at

5. The Constitutional Assembly had a choice within the framework of the principles of formulating the new text in a manner in which it thought it could best avoid the unfortunate experience of the countries referred to by Motala.

6. The debate in relation to the advantages of federalism was a matter for the Constitutional Assembly. It was entitled to adopt the arguments dealt with by Ziyad Motala (*supra)* in *"Socio-economic Rights, Federalism and the Courts: Comparative Lessons for South Africa". s to what may be "legitimate provincial autonomy" in South Africa* Motala says:

> "... in interpreting the new Constitution the Constitutional Court should not give federalism, or state and national powers, a meaning that would allow a minority group or region the power to frustrate socioeconomic reforms taken at the centre. The Constitutional Court should recognise that mature federal systems, particularly the United States system and to a lesser extent the German system, have moved away from the static imperial conception of federalism, with rigid categories of power between the states and national government. The South African order will experience a legitimacy crisis and turmoil noticeably absent after the elections if the Court acts as a bulwark to protect the interests of the minority privileged sector by calling on the common law to interpret the vague provisions in the Constitution, or by adopting the archaic imperial notions of federalism as exemplified in the Canadian and early United States Supreme Court approach, which if adopted by the Constitutional Court in South Africa would prevent the national government from acting in important areas in the economy."[2]

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[2]Ziyad Motala: "Socio-economic Rights, Federalism and the Courts: Comparative Lessons for South Africa" SALJ 1995 Vol. 112, p. 63.

THE BILL OF RIGHTS

INTRODUCTION

7. We dealt with the bill of rights in chapter 2 of the new text and its compliance with the constitutional principles, in the chapter on bill of rights from page 19 of our main submissions: We confine this reply to some of the objections to the bill of rights.

8. Many objections have been lodged to various provisions in and omissions from the bill of rights. We do not deal with each individual objection because they are repetitive and sometimes without foundation.

ENTRENCHMENT OF THE BILL OF RIGHTS

9. The Association of Law Societies argues that CP II read with CP XV require special entrenchment of the bill of rights over and above the entrenchment of the constitution as a whole under section 74 of the new text. They argue that "CP XV requires special procedures involving special majorities for amendments to the constitution", that "CP II requires that fundamental rights, freedoms and civil liberties must be provided for and protected by entrenched and justiciable provisions in the constitution", and that, read together, "these principles require special entrenchment for the bill of rights".

10. We submit that their interpretation of the constitutional principles is unfounded. CP XV prescribes that amendments to the constitution require special procedures involving special majorities. CP II goes no further than to demand that all universally accepted fundamental rights, freedoms and civil liberties be provided for and protected by provisions which are both entrenched (by their inclusion in the constitution) and justiciable. There is no requirement of special entrenchment of the bill of rights.

HORIZONTAL APPLICATION OF THE BILL OF RIGHTS

11. The Freemarket Foundation, the Gauteng Association of Chambers of Commerce and the Institutue of Race Relations object to section 8(2) of the new text which makes the bill of rights binding on private people and corporations. They do so on the same grounds. We will deal with each of them in turn.

12. The first is that CP II implies that the bill of rights may only entrench universally accepted fundamental rights, freedoms and civil liberties. This objection misreads the principle. CP II requires the inclusion of all universally accepted fundamental rights, freedoms and civil liberties as a minimum. It does not preclude the possibility of greater protection.

13. The second is that CP IV implies that the bill of rights is to be binding only on organs of state. This objection is again founded on a misreading of the principle. It does no more than to set a minimum requirement, namely that the constitution shall bind all organs of state. It does not preclude the possibility that its reach might be extended further.

14. The third is that the horizontal application of the entrenched rights "unsettles well-established legal remedies and requires the courts to devise new remedies instead" which "is likely to

generate difficulties in interpretation and enforcement" and which would in turn render those rights incapable of enforcement. They would consequently not be "justiciable" as required by CP II.

But the rights in their vertical application are manifestly justiciable. We submit that they are similarly justiciable in their horizontal application. But even if they are not, CP II would not be offended because it demands merely that all universally accepted fundamental rights, freedoms and civil liberties be protected. It is the objectors' own case that the rights concerned do not in their horizontal application constitute universally accepted fundamental rights, freedoms and civil liberties.

15. The last basis of objection is that the horizontal application of the rights would in terms of section 8(3) call for unprecedented judicial law-making in violation of the principle of separation of powers enshrined in CP VI. But the section demands no more of the judiciary than that they develop the common law. That is a well-established function of the judiciary which does not violate the principle of separation of powers.

PROTECTION OF PRE-NATAL LIFE

16. Africa Christian Action, Human Life International, Die Nederduitse Gereformeerde Kerk, People for Life, Pro-Life, United Christian Action, Victims of Choice, and others, object to the failure of the bill of rights to protect pre-natal life by prohibiting abortion. The objections are directed particularly at the failure in section 11 to protect life from inception and at the protection in section 12(2)(a) of the right "to make decisions concerning reproduction".

17. The Reproductive Rights Alliance is an alliance of twenty non-governmental organisations including the Planned Parenthood Association, National Progressive Primary Health Care Network, Women's Health Project, the Centre for Allied Legal Studies Gender Project, Lawyers for Human Rights, Reproductive Health Research Unit and other organisations. They have made submissions in support of the new text on the lack of protection of pre-natal life.

18. We dealt with this issue in paragraph 22 on page 36 of our main submissions. The objectors do not seem to answer our fundamental submission that the varied responses to the issue of abortion in open and democratic societies based on human dignity, equality and freedom, make it clear that there is no universally accepted standard which demands the constitutional protection of pre-natal life.

PROTECTION OF THE FAMILY AND MARRIAGE

19. Action Moral Standards, African Christian Action, Christians for Truth, Human Life International, Die Nederduitse Gereformeerde Kerk, United Christian Action, Victims of Choice, Women for Responsible Rights and others, argue that there is a universally accepted right to protection of the family and marriage and that the bill of rights violates CP II by its failure to protect this right.

20. International human rights instruments afford recognition to a right to marriage and protection of the family:

(a) Article 16 of the Universal Declaration of Human Rights protects the right of men and women of full age to marry and found a family and asserts that:

> "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state".

It must be borne in mind, however, that the declaration was an aspirational statement and not a codification of international law.

(b) Article 23(1) of the International Covenant on Civil and Political Rights also asserts that:

> "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state".

(c) Article 10(1) of the International Covenant on Economic, Social and Cultural Rights similarly asserts that:

> "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children".

(d) Certain regional human rights instruments also recognise a right to protection of marriage and the family, such as article VI of the American Declaration of the Rights and Duties of Man, article 17(1) of the American Convention on Human Rights and article 18(2) of the African Charter on Human and Peoples' Rights. Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms on the other hand, recognises only the right to privacy of family life, home and correspondence.

21. The recognition of a right to marriage and protection of the family in international human rights instruments, does not require the constitutional entrenchment of those rights in domestic law. The states parties to those instruments satisfy their obligations under those instruments by respecting the right of its subjects to marriage and protection of the family under their domestic law without the need for constitutional entrenchment of that right. The international recognition of a right to marriage and the family consequently does not constitute that right a "universally accepted fundamental right, freedom or civil liberty" within the meaning of CP II. The latter principle demands the constitutional entrenchment of those rights. It is in other words concerned only with the rights, freedoms and civil liberties which are universally accepted as "fundamental" rights in the sense that they warrant constitutional entrenchment.

22. Some domestic constitutions recognise a right to marriage and protection of the family. Notable examples are article 6 of the Basic Law of Germany, article 29 of the Constitution of Italy, article 39(1) of the Constitution of Spain, article 28(1)(e) of the Constitution of Ghana, article 31 of the Constitution of Uganda and article 14(3) of the Constitution of Namibia. There is, however, no universal pattern. The constitutions of Canada, Sweden, Brazil, Kenya, Zimbabwe and Botswana for instance do not afford any protection to this right.

23. Although the bill of rights in the new text does not recognise a right to marriage and protection of the family as such, various aspects of that right are protected *inter alia* under the following provisions of the bill of rights:

(a) Under section 9 any prohibition of or restriction on marriage or other form of discrimination based on gender, sex, pregnancy, marital status, ethnic or social origin, sexual orientation, religion or culture, is prohibited.

(b) Section 10 prohibits invasion of the right to marriage and the family which would constitute an impairment of the dignity of the parties to a marriage or the members of a family.

(c) The right to freedom and security of the person under section 12(1) protects the freedom to marry and establish a family.

(d) The right to privacy in section 14 protects the privacy of the marital relationship and the home.

(e) Insofar as marriage and the family are based and organised on the grounds of conscience, religion, though, belief and opinion, they enjoy protection under section 15(1). Section 15(3) affords specific protection to marriages under any tradition or system of religious, personal or family law and systems of personal and family law under any tradition or adhered to by persons professing a particular religion.

(f) The right to freedom of association in section 18 affords protection to the right to marry.

(g) The right to freedom of movement and residence in section 21 affords protection to the right to establish a family.

(h) The rights to housing, health care, food, water and social security in sections 26 and 27 foster circumstances favourable to marriage and the family.

(i) The right of every child in terms of section 28 *inter alia* to family or parental care, protects certain aspects of family life.

(j) Sections 30 and 31 protect the cultural aspects to marriage and the family.

(k) Section 35(2)(f) recognises and protects the bond between any detainee and his or her spouse and next of kin.

24. Explicit protection of the family may undermine the protection of well-established fundamental rights. Professor Christina Murray, for instance, argues that in some quarters "the ideology of the family imposes hegemonic notions of what constitutes appropriate family forms" and notes that "it is primarily within the family that stereo-typed gender roles are constructed and entrenched."[3]

[3] "*Democracy, The Family and the African Charter on Human Rights*", ASICL Proc. 4 (1992)

25. We submit that, although a right to marriage and protection of the family enjoys some recognition in international law, it does not constitute a universally accepted fundamental right, freedom or civil liberty within the meaning of CP II.

THE PROTECTION OF INTELLECTUAL PROPERTY

26. The Association of Marketers, the Loerie Awards Committee of the Association of Marketers, the South African Institute of Intellectual Property Law and Mr. Kurt Buchmann who claims to act on behalf of some thirty-four organisations, object to the bill of rights for its failure to include specific protection of intellectual property rights. They argue that those rights constitute universally accepted fundamental rights, freedoms or civil liberties and ought therefore to have been included in terms of CP II.

27. The right to intellectual property enjoys some recognition in international law:

    (a) Article 27(2) of the Universal Declaration of Human Rights recognises a right "to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".

    (b) Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights recognises the right of every person "to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".

    (c) Certain regional international human rights instruments also recognise the same right, such as article 13 of the American Declaration of the Rights and Duties of Man and article 16 of the Cairo Declaration on Human Rights in Islam. Not all regional international instruments however recognise this right. Those that do not, include the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is significant that these leading international instruments do not recognise a right which the objectors contend enjoys universal acceptance.

28. A few domestic constitutions recognise a right to intellectual property, such as article I(8) of the Constitution of the United States and articles XXVII and XXIX of the Constitution of Brazil. They are, however, the exception. The overwhelming majority of domestic constitutions do not afford any special protection to intellectual property rights. Those which do not, include the Canadian Charter of Rights and Freedoms, the German Basic Law and the constitutions of France, India, Ghana, Kenya, Namibia, Zambia, Zimbabwe, Italy, Japan, the Netherlands, the Phillippines, Sweden, Singapore, Swaziland, Botswana and Uganda.

29. Section 25 of the new text protects property rights and sub-section 4(b) makes it clear that

"property is not limited to land". The objectors argue that intellectual property is different inasmuch as the right for which they contend, is not so much a property right as "the right of the individual to have the fruits of his intellectual effort clothed in a form which can become the subject of property rights".[4] We submit, however, that such a right does not enjoy universal acceptance as a fundamental right, freedom or civil liberty. The objectors have certainly not adduced any evidence of such universal acceptance. The absence of such a right from the constitutions of the overwhelming majority of leading democratic societies, refutes any suggestion of universal acceptance.

PROTECTION OF THE RIGHT TO LOCK OUT

30. We dealt with this matter in paragraph 34 from page 51 and in our discussion of CP XXVIII from page 85 of our main submissions. Since then Business South Africa lodged their written submissions on Friday 14 June 1996 and Cosatu is due to lodge their written submissions on Tuesday 18 June 1996 we will consider the latter submissions once they are lodged and, if it should then be necessary to supplement this reply, we will seek leave to do so.

[4]Objection of the Association of Marketers, p. 2, para. 9

THE ADMINISTRATION OF JUSTICE

INTRODUCTION

31. We deal in this chapter with the challenges to matters affecting the administration of justice under CP IV, V and VII. We dealt with these matters in the chapter on the administration of justice from page 96 of our main submissions. We confine the reply to the objections of substance.

COMPOSITION OF THE JUDICIAL SERVICE COMMISSION

32. The Association of Law Societies argue that section 178(1) of the new text enables the political party which controls the national executive, to control the appointment of the majority of the members of the Judicial Service Commission and that this possibility violates,

- the requirement of CP VI that there be a separation of powers between the legislature, executive and judiciary; and

- the requirement of CP VII that the judiciary be independent and impartial.[5]

33. The objection is misconceived. The national executive does not control the appointment of a majority of members of the Judicial Service Commission. The national executive only controls the appointment of,

- the Minister of Justice in terms of section 178(1)(d) and

- four persons designated by the president in terms of section 178(1)(j).
  In other words, the national executive controls only five of the twenty-three permanent members of the commission.

34. The President also has the power to appoint the four representatives of the advocates' and attorneys' professions respectively, but only if the number of people nominated from within those professions exceed the number of people to be appointed and in that event the president has to make a selection from the list of people nominated from within the professions. He can accordingly not be said to control these appointments.

35. But even if the national executive were able to control the composition of the Judicial Service Commission, the new text would in any event not have violated CP VI or VII. The fact that the executive might influence or control the appointment of judicial officers, does not violate the principle of separation of powers between the legislature, the executive and the judiciary. It also does not render the judiciary less than independent.

36. We accordingly submit that the objection is unfounded.

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[5] Objection of the Association of Law Societies, p. 1, para. 1.

THE INDEPENDENCE OF MAGISTRATES

37. The Association of Regional Magistrates of South Africa, the Magistrates' Association of South Africa and the Legal Staff Association of South Africa complain that the constitution does not sufficiently safeguard the independence of the magistracy. They argue that its failure to do so violates "international norms" and "the values of the new constitutional order" and for that reason does not comply with CP II, VI and VII.

38. The new text affords the independence of the judiciary including the magistracy, greater protection than it has ever enjoyed in our history. Section 165 provides in sub-section (2) that -

> "the courts are independent and subject only to the constitution and the law, which they must apply impartially and without fear, favour or prejudice",
>
> in sub-section (3) that -
>
> "no person or organ of state may interfere with the functioning of the courts"
>
> and in sub-section (4) that -
>
> "organs of state ... must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."
>
> Section 174(7) provides that judicial officers including magistrates,
>
> "must be appointed in terms of an act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice".

39. CP II does not demand any greater protection of the independence of magistrates. There cannot be said to be a universally accepted fundamental right to greater protection.

40. CP VI also does not demand any greater protection of the independence of magistrates.

41. CP VII requires the judiciary including the magistracy to be "independent and impartial". But the new text does provide for their independence and impartiality. It accordingly satisfies the principle.

LAY PEOPLE IN THE COURTS

42. The Freemarket Foundation objects to section 180(c) of the new text which provides that national legislation may provide for "the participation of people other than judicial officers in court decisions". They say that this provision violates the requirement of CP VII that the judiciary be "appropriately qualified, independent and impartial".

43. The objection is based on a misreading of section 180(c). This section does not permit lay people to be appointed as judicial officers. It permits them merely to participate in court

decisions. Lay people do so as assessors and jurors in every democratic society. The suggestion that the practice of doing so violates CP VII, is unfounded.

IMMUNITY OF THE LABOUR RELATIONS ACT

44. We deal in paragraph 84 from page 97 of our main submissions with the contention that the immunity afforded to the Labour Relations Act in section 241 of the new text, violates the requirement of CP IV that the constitution be "the supreme law of the land". Since then Business South Africa lodged their submissions on Friday 14 June and Cosatu is to lodge their submissions on Tuesday 18 June 1996. We will first consider the latter submissions before deciding whether to add to the submissions already made. If it is necessary to supplement this reply, we will seek leave to do so.

THE STRUCTURE AND FUNCTIONING OF GOVERNMENT

CHALLENGE TO THE ELECTORAL SYSTEM

45. It was as well-known to the authors of the constitutional principles as it is known to the Court that democratic systems of government vary in relation to the manner in which votes are translated into seats, by proportional representation; or single member constituencies with a simple majority of the votes cast leading to the election of a candidate known as the plurality system, or a combination of both with various permutations, each with debatable advantages and disadvantages.[6] The only limitation on the Constitutional Assembly in this respect appears on CP VIII which provides:

> "... in general, proportional representation."

46. It is submitted that the phrase may mean proportional representation in general, leaving room for further choice to be expressed in an Act of Parliament, a choice which the constitutional assembly could have and has adopted.[7]

47. It is argued (in para 99 of the DP heads) that CP VIII's requirement of a system which encompasses proportional representation 'in general' prohibits a 'pure' party list system of the type provided for in Schedule 6. The contention is that the words 'in general' signal the need to avoid what are asserted to be the 'pitfalls commonly associated with systems which aim solely at attaining the highest possible degree of proportionality.'

48. This reading of the CP is unduly restrictive. If it had been the intention to commit South

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[6] Arend Lijphart: *Critical Choices for South African Society*, (1987) at pp. 3, 4, 6, 8, 11, 158;
G K Roberts: *An introduction to Comparative Politics*, (1988) at pp. 47, 51, 67
Andrew Reynolds: *Voting for a New South Africa* (1993) at pp. 7, 9, 17, 28, 29, 38, 40, 45, 47, 51, 52, 54, 64, 74
Vernon Bogdanor: *What is Proportional Representation?*, (1984) at pp. 4, 14, 17, 30, 46, 111, 115, 156, 157, 158
TRH Davenport: *South Africa: A Modern History*, (1987) at 355
The factors that may have been considered include: an attempt to avoid the imbalances produced by other systems, between the number of votes cast and the seats gained; the demographic distribution of the population in various territories; the difficulties in demarcating constituencies without avoiding allegations of gerrymandering; the illiteracy of a substantial number of the electors; the need to promote reconciliation, and the fostering of a common South African identity and loyalty.
The Constitutional Assembly evidently took these factors into consideration. See affidavit of Hassen Ebrahim at page 289 of our main submissions

[7] Section 46 in relation to the National Assembly, s.105(1) in relation to the Provincial Legislatures and item 6 of Schedule 6 of the New text. The reasons for the choice as a result of consideration of various proposals by the Political parties appear in *Voting in 1999: Choosing an Electoral System* de Ville and Steytler (editors) Friedrich Ebert Stiftung and Butterworths 1996. The view is expressed: "As only a broad constitutional requirement is laid down, there are a number of options open to Parliament", p. 1. It is not unusual to leave it to the legislature to provide the details of the system. ibid p.3-4 and Note 9.

Africa to a particular form of proportional representation or, as the objectors allege, to prohibit any particular form, the Principle would have stated this. The use of the words 'in general' signals a recognition of the fact that many forms of proportional representation exist. It allows for any system which falls generally under the system of proportional representation but it does not specify a particular form. (This is consonant with the definition of 'general' which explicitly excludes a specific form or case - cf Concise Oxford Dictionary.) The use of the words 'in general' contradict the argument that any particular form of proportional representation is required or excluded.

49. Moreover, the argument that 'pure' proportional representation is unacceptable in terms of CP VIII begs the question. It suggests that there is some system (other than the one provided for in Schedule 6) that is proportional representation proper and that all other systems which involve proportionality are, in some way, deviations from this system. Proportional representation systems may achieve greater and lesser degrees of proportionality and some commentators refer to systems with a very high degree of proportionality as 'pure' systems. However, the term covers all systems in which positions are allocated on a proportional basis rather than on the basis of a majority or plurality basis.

50. See Vernon Bogdanor who says that is is 'a mistake to refer to "proportional representation" as if it denotes a single type of electoral system. "Proportional representation" is, in fact, a generic term denoting a number of different systems sharing only the common aim of proportionality between seats and votes. This common aim, however, does not prevent the various proportional system diverging considerably, one from another; and their political consequences, therefore, can be quite different'.[8]

51. The sense of the phrase 'in general', the function of the constitutional principles as provisions guiding but not determining the shape of the new Constitution, and the variety of systems that fall under the concept of proportional representation contradict the narrow specificity of the objectors' argument based on CP VIII.

52. It is also argued in the DP heads (para. 100) that CP VI requires a 'separation of powers ... with appropriate checks and balances to ensure accountability, responsiveness and openness' and that the list system of proportional representation provided for in Schedule 6 fails to comply with this principle. The gist of the argument is that the electoral system provides the most important check on the legislature and that, as long as voters have a choice of party only, this check fails to ensure the accountability, responsiveness or openness required by the principle.

53. We submit that the argument is not well founded. Firstly, the argument is based on the implicit assumption that the constitutional principle requires all possible checks. We submit that what is required is a system that, overall, provides an appropriate system of checks and balances.

54. A system of checks and balances may involve both internal checks 'obtained by balancing

[8] *Democracy and Elections: Electoral systems and their political consequences* ed by Vernon Bogdanor and David Butler Cambridge University Press 1983 at p.2.

parts of the government against each other' (Vile 330)[9] and external checks (or control) of government by the people.

55. The role of the electorate as an external checking mechanism is obvious and important but the constitutional principles do not require the electoral system to be designed solely as a method of checking government.

56. The new text puts in place a comprehensive system of checks and balances. A system of proportional representation, the common voters role and regular elections are but one aspect of this. The recognition in CP VI that checks and balances should be 'appropriate' allows the constitution-makers to make certain decisions about what system is suitable for South Africa. Overall, the new text is flexible on this point and Section 46 leaves the form of proportional representation to be decided by future legislators. It allows a system to be tailored from time to time to achieve a range of goals such as efficiency and stable government along with the commitment to 'accountability, responsiveness and openness' reflected in clause 1(d). But the Constitutional Assembly made a decision about the next set of elections, based on an assessment of what was appropriate in South Africa and included it in Schedule 6. This decision avoids complex voting procedures (such as a choice of candidate would introduce) and avoids the delimitation of constituencies smaller than the regional (provincial) constituencies.

57. Electoral checks on government also operate through the structuring of government in national, local and provincial spheres and through various grievance procedures outside the legislative system. For instance, while the theory, if not the practice, of a plurality system seems to be that the electorate can have grievances redressed by approaching constituency representatives, proportional representation systems use other methods. The constitutionalisation of a Public Protector and the entrenchment of a right to just administrative action contribute to this aspect of accountability, openness and responsiveness in the new text.

58. Secondly, the argument also overstates the role of an electoral system and variations in electoral systems in providing checks and balances to government power. It is based on the assumption that a proportional representation system with either a choice of candidate or constituencies (single- or multi-member but presumably smaller than the existing nine provincial constituencies) will lead to greater accountability, responsiveness and openness of legislatures than is found in the system provided for in Schedule 6 which does not have these features.

59. The underlying theory of the objectors' argument is that which relies on the basic premise of democracy that the electorate provides a check on government through exercising a choice in elections. The knowledge that voters have this power both constrains legislators in their actions and encourages them to exercise their classic checking power, that of scrutinizing executive action. The objectors then suggest that a list system which leaves the choice of candidate in party hands is likely to result in politicians who feel more accountable to party

[9] MJC Vile *Constitutionalism and the Separation of Powers* (Clarendon Press Oxford) 1967 at 330

leaders than to the electorate. On the other hand, the objectors suggest, a system of smaller constituencies brings voters closer to their representatives and thus is more likely to ensure a responsiveness to the concerns of voters.

60. Together with, for instance, the party system, the media, and pressure groups, regular elections and the universal franchise provide critical external checks on power. However, the electoral system is, in Vile's words 'a spasmodic, and a rather crude, mechanism for the control of government, although obviously its over-all psychological impact upon politicians and officials is enormous'[10]. Vile concludes that 'the historic problem of the control of government remains in spite of the transformation of the forms of government from monarchical or aristocratic or mixed system to the modern systems based on universal suffrage'.[11]

61. Moreover, comparative work on electoral systems does not substantiate the argument that a 'closed' list system of proportional representation will lead to government that is insufficiently representative, accountable, responsive or open while another electoral system will further these values.

62. Instead, studies concerned with the relationship between the method of electing representatives and the way in which representatives are linked to those whom they represent seem to suggest that electoral systems are not fundamental in determining parliamentarian/constituency relationships. Thus, in concluding a collection of studies on the subject in a range of different systems, Vernon Bogdanor states;

> "It is impossible to predict the precise consequences, but the main conclusion to be drawn from the essays in *Representatives of the People?* would seem to be that cultural factors are likely to be more important in determining parliamentarian/constituent relationships than the electoral system."[12]

63. Although the multitude of variations among systems make comparisons difficult, a text-book example is provided by a comparison between the effects of the plurality (or first past the post') system in the United States of America and Britain:

> "Parliamentary constituencies as natural communities are a sociological myth and the British MP's electoral dependence on constituencies rather than parties is, of course, a political myth. It is true only in the most formal sense. Candidate selection in all four main parties is in the hands of a small, often tiny, knot of party activists, whose political position is usually unrepresentative of the party's ordinary supporters in the constituency."[13]

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[10] MJC Vile (supra) p. 331

[11] MJC Vile (supra) p. 333

[12] *Representatives of the People? Parliamentarians and Constituents in Western Democracies* ed by Vernon Bogdanor (Policy Studies Institute: The European Centre for Political Studies: Gower 1985) at p. 299

[13] Ivor Crewe '*Mps and their constituents in Britain: How strong are the links?' in Representatives of the People? Parliamentarians and Constituents in Western Democracies* ed by Vernon Bogdanor (Policy Studies Institute: The European Centre for Political Studies; Gower 1985) at p. 62

> "Compared with his colleagues in other democracies, the American congressman represents many more constituents yet has remarkably close contact with them ... The ties remain close because of the expectations of the electorate."[14]

64. The different implications of a similar system of representation in Britain and the United States of America point to a range of factors determining the effect a system will have. It also challenges the assertion that individual accountability of members of parliament is achieved by small constituencies. The operation and effect of the party system is not determined by the electoral system.

65. There is no suggestion in the constitutional principles that accountability, responsiveness and openness must be achieved in a particular way, nor that a particular understanding of representative government is necessary. Whether a representative represents a geographical constituency "as might seem to occur in a single member system" or an interest group "such as the German Greens" is not prescribed by the Constitutional Principles.

66. Insofar as the objection is based on the power that the system grants parties, it seems ill founded: See Vernon Bogdanor 'Conclusion' in *Representatives of the People? Parliamentaries and Constituents in Western Democracies* ed by Vernon Bodganor (Policy Studies Institute: The European Centre for Political Studies; Gower 1985) at p. 293:

> "Through the complex pattern of relationships analysed in the preceding chapters, one central strand is apparent - the dominance of party in Western representative democracies. This dominance is as marked in plurality and majority systems - Britain, Australia and France - as it is in proportional systems - Germany, Italy and the Scandinavian systems - Germany, Italy and the Scandinavian countries ... Nor does the type of constituency used correlate at all well with the dominance of the party. Parties are as powerful in the single-member systems with the highly significant exception of the United States, as they are in the multi-member systems, with the equally notable exception of Ireland, and in the one national constituency system analysed, the Netherlands. Not only is representative government, then party government, but in most representative systems, party is, indeed, in Herman Finer's words, 'king'. And the sovereignty of the party seems to owe little to the electoral system which a country chooses to adopt."

67. Democratic systems of government may be mono or bicameral. A choice is evidenced by the provision in CP XXVIII(4) by the provision of -

> "... if there is such a chamber, a two-thirds majority of a chamber of parliament composed of provincial representatives, ..."

A bicameral system was chosen.[15]

68. In the absence of any specific limitation in any of the principles, all the other choices available in relation to government structures, with their advantages and disadvantages, the choice is

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[14]Phillip Williams: The United States:Members of Congress and their districts. Bogdanor at p. 66.

[15]The National Assembly, s. 46 of the New text and s. 60 NCOP both of which constitute Parliament in terms of s.42(1) in order to comply with the provisions of CP XVI

the Constitutional Assembly's, even if members of the Court may have preferred an alternative arrangement.

FLOOR CROSSING OR 'ANTI-DEFECTION' PROVISION

69. Schedule 6 of the new text stipulates that, with certain amendments, schedule 2 of the interim constitution should apply to the next election and to the loss of membership of the National Assembly or a provincial legislature. Item 13 of annexure A to schedule 6 of the new text inserts a new item (item 23A) in schedule 2 of the interim constitution. This item provides that a person loses membership of a legislature if he or she ceases to be a member of the party which nominated him or her to that legislature.

70. The IFP and DP have lodged an objection to item 23A of schedule 2 of the interim constitution as amended.

The thrust of the objections are that this item -

(a) subjects members of the legislatures to the authority of their parties in a manner inimical to accountable, representative and democratic government; and

(b) undermines universally accepted rights such as the right to freedom of expression, freedom to make political choices, and the right to stand for political office and, if elected, to hold political office.

(DP objections paras 91 and 104; IFP objections para 4.7.)

71. The constitutional principles that are alleged to have been infringed are CP II, VI, VIII and XVII.

72. These objections are closely related because, in this context, political rights and freedom of expression are means to achieve the type of government demanded by CP VI, VIII and XVII.

73. A provision like item 23A is commonly referred to as an anti-defection clause. Two main, inter-related, reasons exist for the enactment of such provisions: the desire for more stable government and a desire to avoid corruption in legislatures.

74. We contend that the use of an anti-defection provision for either or both of these purposes is not inconsistent with the constitutional principles.

Representative Democracy

75. The 'anti-defection' provision is not incompatible with 'representative democracy'. One of the most famous attempts to describe the role of a political representative is to be found in Edmund Burke's speech in Bristol.[16]

[16] 'Certainly Gentlemen, it ought to be the happiness and glory of a representative to live in the

76. Burke proceeds to describe the role of a representative as advancing the interests of the nation, rather than a local area. The speech deals at once with two different issues of representation. One is the question of whether representatives must follow a mandate or whether they are trustees, making their own decisions as to what is Wise. On this question Burke's answer is that a representative must act as trustee. The second issue concerns the focus of a representative's concern which he argues should be national.

77. But Burke was speaking in a context very different from ours. Political parties were undeveloped and constituencies small. Bogdanor comments that:

> '... it is highly doubtful if Burke's approach has much to offer to the contemporary political scientist. For, of course, the fundamental difference between our age and that of Burke is the predominant role which party plays in our political arrangements. 'Representative Government', in Herman Finer's words, is 'Party Government': and many of the functions which Burke assigned to parliament or to the individual MP are today performed by political parties.'[17] (Vernon Bogdanor 'Introduction' in *Representatives of the People? Parliamentarians and Constituents in Western Democracies* ed by Vernon Bogdanor (Policy Studies Institute: The European Centre for Political Studies; Gower 1985) at p. 4.)

78. Moreover, the inherent tension between operating in terms of a mandate and 'following one's conscience' is apparent in Burke's speech itself.[18]

79. Speaking of the meaning of representation in modern democracies, S E Finer concludes:

> "If ... we asked 'in a representative democracy who or what are represented and how?' the answer, it seems would be very confused. I will go further, in not one of the countries represented in this volume [10 European countries, Australia and the USA], save Switzerland ... can a coherent and

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strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinions high respect; their business unremitted attention. It is his duty to sacrifice his repose, his pleasure, his satisfaction, to theirs - and above all, ever, and in all cases, to prefer their interests to his own.

But his unbiased opinion, his mature judgment, his enlightened conscience, he ought not sacrifice to you, to any man, or to any set of men living ... Your representative owes you not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion ...' ('Speech to the Electors of Bristol at the Conclusion of the Poll' reproduced in Hanna Pitkin (ed) *Representation* (Atherton Press New York 1969) p 174-5 and in *Representatives of the People? Parliamentarians and Constituents in Western Democracies* ed by Vernon Bogdanor (Policy Studies Institute: The European Centre for Political Studies; Gower 1985) at p 2-3).

[17](Vernon Bogdanor 'Introduction' in *Representatives of the People? Parliamentarians and Constituents in Western Democracies* ed by Vernon Bogdanor (Policy Studies Institute: The European Centre for Political Studies; Gower 1985) at p. 4.)

[18]Pitkin points out that 'even Burke acknowledges that trusteeship "must have a foundation in" elections and consultation of the people". Hanna Pitkin "The Concept of Representation" in Hanna Pitkin (ed) *Representation* (Atherton Press New York 1969) p. 21.

> unambiguous theory of representation be given; and, hence, by the same token, neither can a theory of the duties of the representative.[19]

80. In this context, and particularly in the light of the decision to adopt a strict party list system for the next set of national and provincial elections, the provision in the new text to tie a representative elected on a party platform, to the decision that his or her party makes, cannot be said to conflict with a commitment to 'democratic representation' (CP XVII) or 'representative government' (CP VIII). On the contrary, the provision acknowledges the dominance of parties in the modern state and allows a party to adapt its policies to its perception of the national interest from time to time while binding members to the collective judgment of the party on whose platform they were elected.

81. The logic of the adoption of a electoral system based on proportional representation is to have as many voices heard as possible. The system thus encourages not only diversity but also eccentricity and marginality (this is particularly so where, as in South Africa there is no legislated threshold of votes a party must achieve to acquire a seat). A provision preventing floor-crossing complements the system by requiring individuals to maintain their positions over a reasonable length of time. It seeks to avoid shifting coalitions and short term alliances which make the development of coherent national policies to address long term problems difficult. It thus attempts to secure stability in government.

Accountable and responsive government

82. The issues of openness, responsiveness and accountability raised by CP VI have been dealt with above. The anti-defection provision may be seen as a legitimate aspect of a party-based system and particularly a system in which elections are based on a pure list system. Although some systems protect the notion of a free mandate (see Germany, for instance), it is not inconsistent with the idea that voters have chosen parties rather than individuals to bind representatives to the judgment of those parties.

83. Moreover, an anti-defection provision may also be considered a measure necessary to ensure political stability during South Africa's transition to democracy. That government and political institutions are fragile during a transitional period is well-accepted. A decision to protect the country from the potentially incapacitating effects of 'defections' by members of legislatures is justifiable provided that it does not mean that the requirements of the constitutional principles (including CP VI's requirement of checks and balances on government to ensure open, responsive and accountable government) are not met.

Fundamental Rights

84. The 'anti-defection' provision does not undermine the requirement of CP II that all universally recognised fundamental rights should be protected in the constitution. The rights which the objectors suggest are infringed are the rights to freedom of conscience, association

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[19] S E Finer 'Contemporary Context of Representation' in *Representatives of the People? Parliamentarians and Constituents in Western Democracies* ed by Vernon Bogdanor (Policy Studies Institute: The European Centre for Political Studies; Gower 1985) at p. 288).

and expression, the right to stand for political office and, if elected, to hold office and the freedom to make political choices. But, although item 23A places what some may see as a cost on exercising some of these rights, it infringes none. There is an inherent tension, considered above in the discussion of the role of representatives, between freedom of conscience and holding political office in a modern democracy. The cost of holding political office in a system such as ours is a limitation on the freedom to change political allegiance and *remain a political representative*. That this is a legitimate cost is obvious when one seeks to answer the question 'whose freedom to make political choices is protected as a fundamental right?' A system which permits a political representative to change party allegiance at will primarily respects that person's political choice. A system which limits floor-crossing places more emphasis on the electorate's support for a party reflected in an election.

85. The argument that the 'anti'defection' provision is unacceptable because it overlooks the fact that a defection may be the result of an individual's belief that his or her party has abandoned a mandated policy - and thus that the party is failing to respect the electorate's right to make political choices as well as the representative's freedom of conscience and right to make political decisions - fails. It assumes that individuals are inherently likely to be true to a mandated position while parties are more likely to be maverick. The contrary is more likely.

86. The experience in India and Malaysia, among other countries, demonstrates this.[20]

87. Moreover, the tension between rights to freedom of expression and conscience and the right to hold political office is not as great as it may seem because, as the Indian Supreme Court held in Kihota Hollohon v. Zachilhu, an 'anti-defection' provision does not remove a representative's right to speak freely in the legislature:

> Venkatachaliah J (for the majority): Parliamentary democracy envisages that matters involving implementation of policies of the Government should be discussed by the elected representatives of the people. Debate, discussion and persuasion are, therefore, the means and essence of the democratic process. During the debates the Members put forward different points of view. Members belonging to the same political party may also have, and may give expression to, differences of opinion on a matter. Not unoften the views expressed by the Members in the House have resulted in substantial modification, and even the withdrawal, of the proposals under consideration.[21]

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[20] Venkatachaliah J for the majority of the Indian Supreme Court in Kihota Hollohon v. Zachilhu 1993 AIR SC 412 at 435 para 20.
'Unprincipled defection is a political and social evil. It is perceived as such by the legislature. People, apparently, have grown distrustful of the emotive political exultations that such floor-crossing belong to a sacred area of freedom of conscience, or of the right to dissent or of intellectual freedom. The anti-defection law seeks to recognise the practical need to place the proprieties of political and personal conduct - whose awkward erosion and grotesque manifestations have been the base of the times - above certain theoretical assumptions which in reality have fallen into a morass of person and political degradation.'

[21] 1993 AIR SC 412 at 432 para 19.
See also Rodney Brazier *Constitutional Reform - Reshaping the British Political System* (1991) cited by Venkatachaliah J at 434:

88. Under schedule 10 to India's Constitution, disqualification as a member of the house is a consequence of both giving up membership of a party and 'voting or abstaining from voting ... contrary to any direction issued by the political party to which he belongs' (Tenth Schedule 2). The effect of this provision and the slightly more flexible provisions of 23A (which is not explicit on the consequences of disobeying party directions) is that if a representative wishes to express disagreement with a party, that representative must resign not only from the party but also, effectively from parliament. Rather than infringing an individual's right to hold office, this provision recognises that the office is held in terms of a party platform rather than an individual mandate.

Other jurisdictions

89. Similar provisions are found in a number of other constitutions.

Namibia: Members of the National Assembly of Namibia are elected in accordance with the principle of proportional representation. Section 48 stipulates that 'members of the National Assembly shall vacate their seats ... if the political party which nominated them to sit in the National Assembly informs the Speaker that such members are no longer members of the such political party.

Provisions of item 23A of Schedule 2 of the Interim Constitution as amended permitting changes by ordinary legislation:

90. The objectors have argued that the inclusion of sub-items (3) and (4) is an attempt to allow the legislature to ameliorate provisions which do not comply with the constitutional principles (DP para 97) or is an implicit acknowledgment that the item 23A(1) does not comply (IFP para 4.9).

91. It is clear that inconsistency with a constitutional principle cannot be cured by a provision permitting (or even requiring) certain corrective legislative action in the future. The obvious purpose of 23A(3) and (4) is different. The implementation of anti-defection provisions is a complex matter, particularly if one is alive to the fact that a certain degree of flexibility in party alignments may be desirable in an efficient legislature. Commentators on the 10th schedule to the Indian Constitution have frequently raised these problems and the need to strike a careful balance.[22]

'Does not the Member enjoy the Parliamentary Privilege of freedom of speech? How can his speech be free in the face of such party threats? The answer to the inquiring citizen is that the whip system is part of the conventionally established machinery of political organisation in the house and has been ruled not to infringe a Member's parliamentary privilege in any way. The political parties are only too aware of the utility of such a system and would fight to the last ditch to keep it.'

[22]N S Gehlot 'The Anti-defection Act, 1985 and the Role of the Speaker' (1991) 52 *The Indian Journal of Political Science* 327 describes the difficulties caused by the Indian provisions which attempted to distinguish party splits and mergers from individual 'defections'. He concludes that: The political conditions prevalent in the country at the time of the passage of the 52nd Amendment

Alternative argument concerning floor-crossing:

92. If it is found that item 23A does infringe a fundamental right, its inclusion in the new constitutional framework should nevertheless be accepted because -

(a) it is temporary - 23A applies only to the next set of elections for the national and provincial legislatures and future floor-crossing provisions would have to be included in legislation which would fall to be challenged under the bill of rights and under clause 1; and

(b) it is justified (and would be universally justified) as a limitation of rights because it furthers the right of South Africans to a democratic system of government which may not be achieved unless political stability is maintained during the transition period.

Act, 1985, warranted the dire need of such an act for maintaining political stability and public morality ... It is a matter of deep regret that its inherent flaws and drawbacks, as brought to the limelight at the time of debate in the Parliamentary proceedings in 1985, were ignored ... [they] have been, in practical terms, responsible for frustrating the objects of the Act.' (pp. 337-8).
See also: Pardeep Sachdeva 'Combating Political Corruption: A Critique of Anti-Defection Legislation' (1989) *50 The Indian Journal of Political Science* 157 and Zafar Agha and Javed Ansari 'The Defection Game' India Today January 11, 1992, p. 14 for a journalistic account of the continue problem of unprincipled defections in the guise of mergers and splits in India.

PROVINCIAL POWERS

INTRODUCTION

93. CP XVIII to CP XXIII deal with the powers of the provinces. We dealt with compliance with those principles in the chapter which commences on page 199 of our main submissions.

94. We will confine our reply to the objections raised under CP XVIII(2) ("shall not be substantially less than or substantially inferior to those provided for in this Constitution") and CP XIX ("shall include exclusive and concurrent powers").

CP XVIII(2): NOT SUBSTANTIALLY LESS OR SUBSTANTIALLY INFERIOR

The Interpretation of the Principle

95. The principle calls for a comparison of "the powers and functions of the provinces" under the interim constitution and the new text respectively.

96. It calls for an evaluation of the provinces' powers and functions taken as a whole. We agree with the NP that it calls for "a global comparative view of the net end result".[23] The question is whether the final basket of powers and functions is quantitatively and qualitatively substantially less than or inferior to the interim basket. Both the language of the principle and its purpose suggest that this must be so:

(a) The language of the principle does not call for an assessment and comparison of individual powers and functions. It speaks of "the powers and functions of the provinces" as a whole. It describes the end-product and not its make-up.

(b) The purpose of the principle also suggests this interpretation. The constitutional principles generally allow the drafters of the final text a great deal of leeway in their design of the structure and functioning of government in the new text. The constitutional principles set markers to which the new text has to conform, but leaves it to the discretion of the Constitutional Assembly to decide how to fill the spaces between the markers. It is, for instance, apparent from CP XVIII(4) that the constitutional principles even contemplate the possibility of a unicameral parliament.

The drafters of the new text are similarly allowed considerable freedom to determine the nature and scope of the powers and functions of the provinces. The new text may do away altogether with the powers and functions of the provinces under the interim constitution and may endow them with a completely new set of powers and functions. Individual comparison would then have been impossible. CP XVIII(2) should accordingly not be interpreted in a way which would render it impossible to apply in circumstances contemplated by the constitutional principles. It should be interpreted instead, in a way which renders it capable of application in all the circumstances contemplated by the constitutional principles. The natural meaning of the language of the principle yields such an interpretation namely that the

[23] NP submissions, p. 5, para. 13.

powers and functions of the provinces are to be assessed as a whole. The final basket may not be substantially lighter than the interim basket.

97. It is of course perfectly permissible in the assessment of the interim and final baskets, to look at and compare individual components of both baskets. The process of individual comparison is a natural and legitimate part of the process of determining the comparative weight of the interim and final baskets. But it is ultimately the final basket and not its individual components, which may not be substantially lighter than the interim basket.

98. The DP contends that the critical question under CP XVIII(2) is "whether, from a qualitative perspective, the text has 'taken away' any of the powers conferred upon provinces by the interim constitution."[24] We submit that this contention is unfounded. There is simply no basis upon which the enquiry whether the powers and functions of the provinces in the new text, are substantially less than or substantially inferior to those provided for in the interim constitution, could be reduced to the question whether any of those powers have been taken away. The NP are equally mistaken when they suggest that for purposes of CP XVIII(2) "the court should determine the significance of individual provisions in the context of jurisdictional areas and determine whether or not in respect of such provisions there is a substantial diminution".[25]

99. One is naturally inclined in making the comparison, to focus on the changes and to list and compare those that detract from and those that add to the powers and functions of the provinces under the interim constitution. That is an entirely permissible exercise in the process of weighing and comparing the interim and final baskets. In doing so, however, one needs to avoid two pitfalls:

(a) The first is the risk of reducing the assessment to a numerical comparison of pluses and minuses. [What one has to do, is to weigh the changes and not merely count them.] A quantitative and qualitative assessment has to be made of what has been taken away and what has been added. Such an assessment is very difficult because one is not comparing like with like. That is however what the principle demands. The court will, at the end of the day, have to make a quantitative and qualitative value judgment to determine whether there has been any substantial diminution of provincial powers and functions.

(b) The second is to bear in mind that, if there has been a net diminution of provincial powers and functions, then it has to be determined whether the diminution is "substantial". Much has been said about the shade of meaning of this word appropriate to the test under CP XVIII(2). We need to add merely that it is a relative concept. The question whether the net diminution has been substantial, cannot be answered in the abstract. The question is whether it has been substantial in relation to the whole body of powers and functions of the provinces under the interim constitution. In making this assessment, one accordingly has to have regard, not only to the changes but also to the powers and functions which have remained unchanged. The question is whether the net

[24]DP submissions, p. 20, para. 26

[25]NP submissions, p. 5, para. 13

> diminution is substantial in the context of all the powers and functions of the provinces under the interim constitution. It is accordingly important to bear in mind that, although the enquiry will obviously focus on the changes, the ultimate assessment has to be made by comparing the net diminution with all the powers and functions of the provinces under the interim constitution and asking whether it can in that context be said to be substantial.

100. Another important aspect of the principle, is that it calls for an assessment of the powers and functions "of the provinces", that is, their powers and functions individually and collectively. One has to have regard both to the powers and functions of individual provinces and to the collective powers and functions of the provinces as one of the categories or classes of organs of state. They exercise those powers, not only in the provincial sphere of government but also in the national and local spheres.

The National Council of Provinces

101. The National Council of Provinces is an innovation of the new text which very considerably enhances the powers and functions of the provinces in the national sphere of government. This innovation is particularly significant in the light of the fact that the constitutional principles clearly contemplate the possibility of a unicameral national parliament.[26] The new text not only maintains the second chamber of parliament composed of provincial representatives, but also provides for a much enhanced role of the provinces in the conduct of its business.

102. Under the interim constitution, the Senate was also meant to represent regional interests. But it has failed in this purpose. The reason is that the link between the provinces and their representatives in the Senate, is tenuous. Senators are nominated by the political parties represented in the provincial legislatures on the basis of proportional representation,[27] but then act and vote under the discipline of their party caucus rather than the control of the provincial legislature they are meant to represent. The Senate is consequently a mere mirror image of the National Assembly reflecting party political rather than regional interests. In his publication on "*The Role and Powers of Provincial and Local Governments in the New Constitution*",[28] dr. Bertus de Villiers describes the failure of the Senate thus:[29]

> "Although there has generally been agreement in South Africa on the principle of a second chamber, little debate has occurred during the drafting of the interim constitution as to its exact purposes. As a consequence, the Senate under the interim constitution has failed in more than one respect: in legislative processes it was a mirror image of the National Assembly and therefore duplicated debates; and its link with the provinces was weak. This meant that it failed to

[26] Principle XVIII(4) requires a two-thirds majority "of a chamber of parliament composed of provincial representatives", only "if there is such a chamber".

[27] section 48 of the interim constitution

[28] Published by Corporate Communications: HSRC (May 1996)

[29] at 15-16

> represent provincial views or to facilitate inter-governmental relations; as a result provincial premiers have to rely on the premiers' forum, the inter-governmental forum and their party caucuses to convey their views."

103. The new text establishes a much closer link between the provinces and their representatives in the National Council of Provinces. It does so in various ways. Provinces are now represented, not by ten delegates, but by "a single delegation ... consisting of ten delegates".[30] The delegation is headed by the provincial premier or his nominee.[31] The premier and three of the delegates are called "special delegates". All four of them have to be members of the provincial legislature.[32] The remaining six delegates are called the "permanent delegates". They are not members of the provincial legislature but they may attend and speak in their provincial legislature and its committees and may be required to do so.[33]

104. The most important innovation designed to strengthen the role of the provincial legislature in the National Council of Provinces, is the provision that each province ordinarily only has one vote cast on its behalf by the head of its delegation[34] and that the province may dictate how this vote is cast.[35] Section 65(2) of the new text provides that an act of parliament "must provide for a uniform procedure in terms of which provinces confer authority on their delegations to cast votes on their behalf". The provincial vote in the National Council of Provinces is determined and cast in this way on the following matters:

(a) Amendments to the constitution which affect the National Council of Provinces, alters provincial boundaries, powers, functions or institutions, or amends a provision that deals specifically with a provincial matter.[36]

(b) Bills within schedule 4, that is, bills on matters in respect of which the provinces enjoy concurrent legislative power.[37]

(c) Bills within schedule 5, that is, bills on matters in respect of which the provinces enjoy exclusive legislative power.[38]

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[30] Section 60(1) of the new text

[31] Section 60(2)(a)(i) and (iii) of the new text

[32] Section 61(3) of the new text

[33] Section 113 of the new text

[34] Section 65(1)(a) of the new text

[35] Section 65(2) of the new text

[36] Sections 65 and 74(1)(b) of the new text

[37] Sections 65 and 76(1) and (2) of the new text

[38] Sections 65 and 76(4)(a) of the new text

(d) Bills which provide for the legislation envisaged in sections 65(2), 163, 182, 195(3) and (4), 196 and 197 of the new text.[39]

(e) Bills which provide for legislation envisaged in section 220(3) or elsewhere in chapter 13 on finance if its affects the financial interests of the provincial sphere of government.[40]

105. The provinces in other words enjoy far-reaching powers under the new text, to participate directly in the activities of the National Council of Provinces.

106. The role of the National Council of Provinces in the enactment of legislation on provincial matters, has been considerably enhanced:

(a) The enhanced role of the National Council of Provinces, relates to all legislation subject to the procedure prescribed by section 76 of the new text, which includes the following:

(i) Bills within schedule 4, that is, on matters in respect of which the provinces have concurrent legislative authority.[41]

(ii) Bills within schedule 5, that is, on matters in respect of which the provinces have exclusive legislative authority.[42]

(iii) Bills which provide for the legislation envisaged in sections 65(2), 163, 182, 195(3) and (4), 196 and 197.[43]

(iv) Bills which provide for the legislation envisaged in section 220(3) or elsewhere in chapter 13 on finance which affects the financial interests of the provincial sphere of government.[44]

(b) The procedure providing for the enhanced role of the National Council of Provinces in other words applies generally to all ordinary bills on provincial matters and on matters in respect of which the provinces enjoy exclusive or concurrent legislative authority. It applies *inter alia* whenever parliament intervenes in the exclusive provincial legislative sphere in terms of section 44(2) or legislates in an area of potential conflict with provincial legislation under their concurrent legislative powers.

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[39]Sections 65 and 76(3) of the new text

[40]Sections 65 and 76(4) of the new text

[41]Section 76(1) and (2) of the new text

[42]Sections 42(2) and 76(4)(a) of the new text

[43]Section 76(3) of the new text

[44]Section 76(4) of the new text

(c) Under the interim constitution, such a bill is simply treated as an ordinary bill. It does not enjoy any special protection. It has to be adopted by both houses[45] but in the event of a conflict, is referred to a joint sitting of both houses at which it may be passed by a simple majority of the total number of members of both houses.[46] The National Assembly consists of 400 members[47]and the Senate of only 90 members.[48] It follows that the will of the National Assembly ordinarily prevails particularly when the party political composition of both houses is substantially the same.

(d) Under the new text, it is much harder for the National Assembly to override the National Council of Provinces on provincial matters and matters in respect of which the provinces enjoy legislative authority. It can now do so only by a two-thirds majority of all its members.[49] In other words, the National Assembly will be able to override the National Council on provincial matters and matters in respect of which the provinces enjoy legislative authority, only with a super-majority ordinarily required for constitutional amendment.

107. Some of the objectors contend that the new text detracts from the Senate's role and therefore indirectly that of the provinces, in relation to constitutional amendments. Under the new text the National Council of Provinces does play a different role but not one which is on balance inferior to that of the Senate under the interim constitution:

(a) In terms of section 62(1) of the interim constitution, the general rule is that constitutional amendments require a two-thirds majority at a joint sitting of both houses of parliament. Under section 74(1)(a) of the new text, constitutional amendments generally require only a two-thirds majority in the National Assembly. The role of the National Council of Provinces has accordingly been diminished in relation to general constitutional amendments.

(b) Section 62(2) of the interim constitution provides for the following two exceptions to the general rule:

(i) Amendments of sections 126 ("legislative competence of provinces") and 144 ("executive authority of provinces") require a two-thirds majority in each of the two houses of parliament. The Senate in other words enjoys a veto.

(ii) The boundaries and legislative and executive competences of a province may be amended by legislation targeted at one or more provinces, but not equally

[45]Section 59(1) of the interim constitution

[46]Section 59(2) of the interim constitution

[47]Section 40(1) of the interim constitution

[48]Section 48(1) of the interim constitution

[49]Section 76(1)(i) and (j)

applicable to all provinces,[50] only with the consent of its provincial legislature.

(c) The new text considerably enhances both exceptions and thereby also the direct and indirect role of the provinces:

(i) In terms of section 74(1)(b) of the new text, a two-thirds majority in the National Council of Provinces is required for any amendment which "affects the council; alters provincial boundaries, powers, functions or institutions; or amends a provision that deals specifically with a provincial matter". The veto of the National Council of Provinces is in other words much wider than that of the Senate under the interim constitution and now extends to all matters affecting the National Council of Provinces itself, all provincial boundaries, powers, functions and institutions and any other provision dealing specifically with provincial matters.

(ii) Section 74(3) also extends the second exception by requiring the approval of the relevant provincial legislature for any bill affecting the National Council of Provinces, altering provincial boundaries, powers, functions or institutions, or amending a provision that deals specifically with a provincial matter, if it concerns only a specific province or provinces and not all provinces generally.

(d) It accordingly appears that the role of the National Council of Provinces has been diminished in relation to general amendments but that its role and that of the provinces have been enhanced in relation to amendments affecting provincial matters. In the light of the significant extensions to the rights of veto of the National Council of Provinces and of the provinces themselves, over amendments relating to provincial matters, it can certainly not be said that the powers and functions of the provinces in relation to constitutional amendments, have on balance been diminished.

108. Section 126(3) of the interim constitution regulates conflicts between acts of parliament and laws passed by provincial legislatures. It is seemingly silent on conflicts between subordinate national and provincial legislation. Those conflicts are now regulated under sub-section (6) read with sub-sections (1) to (5) of section 146 of the new text. It provides in effect that both national and provincial subordinate legislation only enters into competition with other conflicting legislation, if it has been approved by the National Council of Provinces.

Although section 146(6)(a) is unclear, its purpose and effect is probably that subordinate legislation which has not been approved by the National Council of Provinces, will always yield to conflicting acts of parliament, laws of the provincial legislatures and the subordinate legislation of both which have been approved by the National Council of Provinces. It would, for instance, mean that a law of a provincial legislature or subordinate legislation under such a law which has been approved by the National Council of Provinces, will prevail over conflicting subordinate legislation of the national government which has not been so approved. This section in other words also confers upon the National Council of Provinces an important role in the regulation of conflicting legislation.

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[50] Premier of KwaZulu-Natal v. President of the RSA 1995 (12) BCLR 1561 (CC) para 23

109. Another important new function of the National Council of Provinces, is to act as arbiter in conflicts between the national government and the provinces:

(a) In terms of section 100(1) of the new text, the national executive may intervene whenever a province cannot or does not fulfil any of its executive obligations. When national government intervenes in this way, its intervention becomes subject to supervision by the National Council of Provinces and may only be continued with the latter's consent in terms of section 100(2).

(b) In terms of section 125(3) the executive authority of a province to develop and implement provincial policy, is limited to the extent that it has the administrative capacity to assume effective responsibility to do so. Any dispute concerning the capacity of a province to do so, is determined by the National Council of Provinces in terms of section 125(4).

(c) In terms of section 216(2) the national treasury may in certain circumstances stop the transfer of funds to an organ of state. In terms of section 216(3)(b) a decision to do so retrospectively lapses after thirty days "unless parliament approves it following a process substantially the same as that established in terms of section 76(1)". The latter procedure requires the support of the National Council of Provinces which can be overridden only by a two-thirds majority in the National Assembly.

110. It is accordingly clear that the role of the provinces in the National Council of Provinces and the role of the latter, have been very considerably enhanced under the new text. Dr. Bertus de Villiers[51] describes these improvements as follows:

> "Firstly it still provides for equal representation of all the provinces. This enhances the principle that provincial interests are represented and that the population or geographical size of the province is not conclusive.
>
> Secondly, the linkage between on the one hand the provincial legislatures and the executives and on the other hand the Council of Provinces has been substantially strengthened. This will have a dual benefit: the views of the provinces will be articulated more effectively in the national legislative process, while national interests will also be conveyed more effectively to the provinces.
>
> Thirdly, the Council could serve as a more efficient forum for conducting intergovernmental relations - between the national and provincial governments but also between the provinces themselves. Joint committees could be established, advisory and mediation bodies could be created and direct political interaction which currently occurs through the MINMEC's (national and provincial ministerial forums) could be enhanced.
>
> Fourthly, the role of the Council of Provinces as a legislative institution will be enhanced due to the nature of its composition. It will be more than a mere reflection of the National Assembly - it could (irrespective of party dominance) develop into a powerful voice of provincial interests. The Council will also fulfil an important role in the national legislative process - "shared rule" as a fundamental characteristic of federal-type dispensations. For instance:

[51] *The Role and Powers of Provincial and Local Governments in the New Constitution published by Corporate Communications (May 1996) pp. 16-19*

- it has the right to introduce national legislation which falls within the powers of the provinces (a73(3)

- it has to approve of any constitutional amendment which affects the provinces, their powers and territory (a74(1)

- it has to approve national legislation in all matters listed in Schedule 4. This means that if the override over provincial legislation is used, the Council has to approve of such legislation - a substantial improvement on the interim constitution

- it has the right to object, comment and propose amendments to all other national legislation which has been approved by the National Assembly. The National Assembly could after taking account of the comments, pass a bill (a75).

Fifthly the participation by representatives of local governments in the Council will enhance the status of local government and will also facilitate co-operation between all three levels. The status of local government is further strengthened by the provision that national and provincial legislation which "materially affect the status, institutions, powers and functions of local government may not be introduced" unless these national and provincial bodies have first been consulted."

Co-operative Government

111. Chapter 3 of the new text demands a relationship of inter-governmental comity which contemplates that all spheres of government and all organs of state within each sphere would maintain a relationship of trust and co-operation. Section 40(1) records that the three spheres of government are distinctive, inter-dependent and inter-related and requires of them to observe and adhere to the principles in chapter 3 and to conduct their activities within its parameters. Section 41 enumerates those principles. It demands, *inter alia*, of all spheres of government and of all organs of state within each sphere,

- to respect the constitutional status, institutions, powers and functions of government in the other spheres;[52]

- to exercise their powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere;[53] and

- to co-operate with each other in mutual trust and good faith.[54]

112. These principles of co-operative government are reinforced, extended and implemented by various provisions of the new text:

(a) Parliament must establish or provide for structures and institutions to promote and

[52]Section 41(1)(f)

[53]Section 41(1)(g)

[54]Section 41(1)(h)

facilitate inter-governmental relations.[55]

(b) Parliament must provide for appropriate mechanisms and procedures to facilitate settlement of inter-governmental disputes.[56]

(c) Any organ of state involved in an inter-governmental dispute must make every reasonable effort to settle the dispute and must exhaust all remedies before it resorts to litigation.[57]

(d) We have already discussed the role of the provinces in the national sphere via the National Council of Provinces. They participate directly[58] and indirectly[59] in the legislative process at national level.

(e) The role of the mediation committee in the enactment of legislation within the spheres of concurrent and exclusive provincial competence in terms of section 76(1) read with section 78, is a further interesting innovation to enhance inter-governmental co-operation.

(e) We have already referred to the role of the National Council of Provinces in the resolution of tension between national and provincial government in terms of sections 100(2), 125(4) and 216(3). This mechanism is obviously also designed to promote inter-governmental harmony.

(f) There are also a variety of provisions which allow for provincial participation in the formulation and execution of national executive policy. The provinces are for instance represented on the Public Service Commission[60] and have to be consulted on the determination of national policing policy.[61]

113. Some of the objectors complain that these provisions designed to make for co-operative government, impose constraints on the provinces in the exercise of their powers and functions. That is of course so. But the objectors lose sight of the fact that the same constraints are imposed on national government. The constraints on national government are moreover more significant than those imposed on the provinces, because it is the senior partner with far more extensive powers and functions than the provinces. A demand that the

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[55]Section 41(2)

[56]Section 41(3)

[57]Section 41(4) and (5)

[58]in terms of sections 74(3) and (4)

[59]in terms of sections 74(1)(b), 75, 76 and 77

[60]in terms of section 196(3)

[61]in terms of section 206(1)

partners co-operate with each other in a relationship of trust, clearly imposes a more significant burden on the senior partner than it does on the junior partners. The converse of that burden, is their right to demand its co-operation.

114. In other words, whilst it is true that the principles of co-operative government impose constraints upon the provinces, they place reciprocal constraints upon national government which on balance favours the provinces. To that extent the provinces enjoy a net enhancement of their powers and functions.

Provincial Legislative Authority

115. In terms of section 126(1) of the interim constitution, provincial legislatures have the power to make laws with regard to all matters within the functional areas in schedule 6. In terms of section 104(1)(b) of the new text, they have the power to make laws with regard to all matters in schedules 4 and 5. These schedules are compared in schedule D from page 272 of our main submissions. The more important features of the comparison are the following:

(a) All the functional areas listed in the interim constitution have been repeated in the new text. There are no true omissions. The only apparent omission is that of "Local government subject to the provisions of chapter 10" but this functional area has not been omitted altogether. It has been replaced by the following provisions:

(i) In terms of section 155(3) of the new text, provincial government still has the power to monitor the local government matters listed in parts B of schedules 4 and 5 and to see to the effective performance by municipalities of their functions in respect of those matters.

(ii) Provincial government is authorised in terms of section 155(2) to legislate for the establishment of municipalities; the provision for the monitoring and support of local government and the promotion and development of local government capacity to perform its functions and its ability to manage its own affairs.

(iii) Section 161 authorises provincial government to legislate within the framework of national legislation, for privileges and immunities of municipal councils and their members.

(b) This legislative power under the new text indeed compares favourably with the provincial legislative power over local government under the interim constitution, which was rendered practically meaningless by section 245(1) of the interim constitution. It provided until its recent amendment,[62] that local government may until 31 March 1996, not be restructured otherwise than in accordance with the Local Government Transition Act 209 of 1993. The latter date was barely a month before the deadline for the adoption of the new text. The section was recently amended to extend the prohibition in any area in which there has not yet been local government elections. For so long as this

[62] by the constitution of the RSA Amendment Act 7 of 1996 which came into effect on 29 March 1996

prohibition remains in force, the provinces do not enjoy any meaningful legislative competence in relation to local government. In Executive Council of the Western Cape v. President of the RSA[63] Kriegler J said that,

> "in respect of local government, provincial legislative competence is clearly excluded during the operation of the Transition Act".

(c) The local government area of competence has, in other words, been narrowed but not significantly so.

(d) The following areas of provincial legislative competence in terms of schedule 6 to the interim constitution, have been narrowed in schedules 4 and 5 to the new text:

(i) "Casinos, racing, gambling and wagering" now excludes "lotteries and sports pools".

(ii) "Education" previously excluded "university and technikon education" and now excludes all "tertiary education".

(iii) "Indigenous and customary law" is now made "subject to chapter 12".

(iv) "Language policy and the regulation of official languages" was previously "subject to section 3" and is now limited "to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislature legislative competence".

(v) "Police" was previously "subject to the provisions of chapter 14" and is now limited "to the extent that the provisions of chapter 11 of the Constitution confer upon the provincial legislature legislative competence".

(vi) "Roads" is now limited to "road traffic regulation", "vehicle licensing" and "provincial roads and traffic".

(e) The following areas of competence have been added to the concurrent list in schedule 4 to the new text:

(i) Administration of indigenous forests.

(ii) Disaster management.

(iii) Media service directly controlled or provided by the provincial government subject to section 192.

(iv) Pollution control.

[63] 1995(10) BCLR 1289 (CC) para. 183 and see also paras. 162h and 182

(v) Population development.

(vi) Property transfer fees.

(vii) Provincial public enterprises in respect of the functional areas in schedules 4 and 5.

(f) The following areas of competence previously in the concurrent list in schedule 6 to the interim constitution, have been upgraded to the exclusive list in schedule 5 to the new text:

(i) Abattoirs.

(ii) Ambulance services.

(iii) Provincial cultural matters.

(iv) Provincial recreation and amenities.

(g) The following new areas of competence have been included in the exclusive list in schedule 5 to the new text:

(i) Archives other than national archives.

(ii) Libraries other than national libraries.

(iii) Liquor licences.

(iv) Museums other than national museums.

(v) Provincial planning.

(vi) Veterinary services excluding regulation of the profession.

116. When we deal with compliance of the new text with CP XIX below, we consider the question whether the newly created exclusive provincial legislative competence can truly be said to be exclusive. It is for present purposes not necessary to determine this question. It suffices that under sections 44(1)(a)(ii) and (2) of the new text, national government may legislate on the matters in the new exclusive list, only in the circumstances and to the extent permitted by section 44(2). It means that the power of the provinces to legislate on these matters free of competition from national government, has been considerably enhanced. National government could under the interim constitution legislate on all these matters and its legislation prevailed over competing provincial legislation in any of the circumstances described in section 126(3) of the interim constitution. Those circumstances are considerably wider than that described by section 44(2) of the new text. The freedom of the provinces to legislate on these matters free of competition from national government, has in other words been considerably extended.

117. Section 146 of the new text regulates conflicts between national and provincial legislation.

The objectors' suggestion that the balance has shifted in favour of national legislation, is unfounded:

(a) The DP contends that "a provincial government (or someone seeking to rely on the provincial legislation) bears the onus of proving that the matters do not fall within the terms of the overrides in section 146(2) and (3)" because "the new text proclaims a different point of departure in that "section 146(2) and (3) presumes that the national legislation will prevail".[64]

But that is not so. Section 146(2) provides that national legislation prevails over provincial legislation only "if any of the following conditions are met". Section 146(3) similarly provides that national legislation prevails over provincial legislation only "if the national legislation is aimed at preventing unreasonable action by a province". These provisions should be read with section 146(5) which provides in turn that provincial legislation prevails over national legislation only "if sub-section (2) does not apply".[65] We submit that these provisions do not create any presumption in favour of national legislation. The burden of proving that national legislation prevails over provincial legislation, would be on the person contending that it does so. The burden of proving that provincial legislation prevails over national legislation would conversely be on the person who contends that it does so. There is no presumption either way.

The precise meaning of section 148 of the new text is obscure but it might create a bias in favour of national legislation. Insofar as it does so, however, it is simply a re-enactment of CP XXIII.

We submit in any event, even if there is an evidential presumption in favour of national legislation, that it does not affect the powers and functions of the provinces. It merely determines the outcome of a dispute if the court is unable to find the facts. It might consequently make it easier to prove that national legislation prevails over provincial legislation, but it does not add to or detract from the powers and functions of the provinces.

(b) The DP complains secondly that section 146(2)(b) of the new text has replaced the "effective performance" criterion in section 126(3)(b) of the interim constitution with the more nebulous "and hence, more easily met" criterion of "the interests of the country as a whole".[66] We submit that this contention is unfounded:

(i) Section 147(2)(b) is not only the successor to section 126(3)(b) of the interim constitution. It also replaces section 126(3)(c) of the interim constitution. The

[64]DP submissions, p. 23, para. 31

[65]There is an obvious omission in this section. It should refer, not only to sub-section (2) but also to sub-section (3). It should, in other words, read: "Provincial legislation prevails over the national legislation if sub-sections (2) and (3) do not apply".

[66]DP submissions, p. 24, para. 33.

latter provision permits an act of parliament to prevail insofar as it is "necessary to set minimum standards across the nation for the rendering of public services".

(ii) Section 146(2)(b) of the new text also does not allow national legislation to prevail whenever "the interests of the country as a whole" demand that it should do so. The requirement is narrower and more focused. It permits national legislation to prevail only if "the interests of the country as a whole require that the matter be dealt with uniformly across the nation, and the national legislation provides that uniformity by establishing norms and standards; framework; or national policies." It is no wider or more nebulous than sections 126(3)(b) and (c) read together.

(iii) The assumption that a more nebulous criterion is more easily met, is in any event at least doubtful. It might be more difficult to apply but need not for that reason be any wider than the "effective performance" and "minimum standards" criteria of sections 126(3)(b) and (c) of the interim constitution.

(c) The DP thirdly contends that section 146(4) introduces an irrebutable presumption which dispenses with the need for national legislation passed by the National Council of Provinces, to be necessary for the purposes described in section 146(2)(c).[67] We submit however that the presumption is rebuttable. That is not only a possible interpretation of section 146(4) but it is also the one which conforms precisely to the prescription of CP XXI(2).

118. We accordingly submit that the legislative power of the province has on balance been considerably enhanced.

Provincial Constitutions

119. A provincial legislature has the power to pass a provincial constitution under section 160 of the interim constitution and section 104(1)(a) read with sections 142 and 145 of the new text. We submit that there has been no diminution of the power to do so.

120. Section 143(2)(b) of the new text provides that a provincial constitution may not confer on the province, any power or function that falls outside its area of provincial competence in terms of schedules 4 and 5 to the new text or outside the powers and functions conferred on the province by the other sections of the new text. The interim constitution does not expressly include the same restriction but we submit that it is implied. The DP concedes that -

> "At present, a provincial legislature may not use a provincial constitution to extend the scope of its powers beyond the limits imposed by the interim constitution, whether directly (by e.g. conferring upon itself exclusive legislative powers in respect of matters other than those listed in section 156(1B) or concurrent legislative powers in respect of functional areas not listed in schedule 6) or indirectly (by e.g. including in a provincial constitution provisions which, if embodied in ordinary legislation, would amount to an excess of the power conferred upon provincial legislatures by the interim constitution) and that, for that reason "we accept that the conditions imposed by section

[67] DP submissions p. 24, para. 34

> 143(2) of the text do not render the competence of a provincial legislature to adopt a constitution for its province substantially less than or substantially inferior to that provided for in the interim constitution."[68]

We submit that the concession is correctly made. A legislature cannot by the exercise of its legislative powers confer upon itself greater powers than it had in the first place. In Minister of the Interior v. Harris[69] Van den Heever JA expressed this principle as follows:

> "No legislative organ can perform an act of levitation and lift itself above its own powers by the bootstraps of method."

121. The DP however complains that there has been a diminution of the power of the provinces to make their own constitutions insofar as the interim constitution required such a constitution to be consistent with the interim constitution itself[70] while the new text requires it to be consistent with the new text and not the interim constitution.[71] They say that, insofar as the new text now imposes a new requirement of consistency with the new text itself, it renders the competence of a provincial legislature to adopt its own constitution, substantially less than or substantially inferior to that provided for in the interim constitution.[72]

122. But at best for this argument, the new text imposes a new set of rules governing the power of the provinces to adopt their own constitutions. The replacement of the old set of rules for a new set, obviously does not in itself imply a diminution. One has to compare the two sets of rules to determine whether there has been any diminution. When that is done, the DP itself concedes that there is no greater restriction upon provinces under the new set of rules than there had been under the old.

123. We accordingly submit that there has been no diminution of the power of provinces to pass their own constitutions.

Provincial Executive Authority

124. Schedule E which commences at page 287 of our main submissions, compares the provincial executive powers and functions under the interim constitution and the new text respectively. We submit that the new text affords the provinces considerably greater executive authority than the interim constitution did.

125. The DP contends that section 125 of the new text "does not define the executive authority of

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[68] DP submissions p. 34, para. 54.

[69] 1952(4) SA 769 (A) 790

[70] Section 160(c)

[71] Section 143(1)

[72] DP submissions, p. 35, para. 55.

a province, but lists and regulates the exercise of several incidents of that authority".[73] We submit, however, that, although this contention is compatible with the language of section 125(2), it is an unduly literal reading of that section. Although the section describes the way in which the premier of a province "exercises the executive power" conferred on the province in terms of section 125(1), it is clearly intended to enumerate and define specific incidents of that power. Section 125(3) for instance says that a province "has executive authority in terms of sub-section (2)(d)". Those words make it apparent that sub-section 125(2)(d) must be understood to confer executive power on the provinces and not merely to regulate the exercise of its executive power.

126. Various objectors suggest that section 100 of the new text constitutes a significant restriction upon the executive power of the provinces. The DP calls it a "wide ranging override" which leaves "no doubt that upon the commencement of the new constitution the province's executive powers and functions will be (potentially) substantially less than or substantially inferior to those provided for in the interim constitution".[74]

127. We submit that these contentions are unfounded and indeed extravagant. They ignore the jurisdictional facts which have to be present before the national executive may intervene. It may do so only "when a province cannot or does not fulfil an executive obligation in terms of legislation or the constitution". It may, in other words, do so only when the province cannot or does not exercise its executive powers and indeed only when it is in unlawful default. The intervention may clearly continue only for so long as the province remains in unlawful default. The intervention of the national executive also does not in any way prevent the province from exercising its executive powers and functions or restrict it in doing so. The offending province in other words remains at liberty to cure its default by fulfilling its executive obligations and to exercise its executive powers and functions to the fullest extent. The power of intervention in terms of section 100 accordingly does not constitute a constraint upon provincial executive powers and functions at all.

128. The DP also contends that section 125(3) and (4) of the new text "introduces another important restriction on the provinces' executive power"[75] but the practical effect of the constraint must be insignificant. It says no more in effect than that a province has the power to develop and implement provincial policy only to the extent that it has the administrative capacity to assume effective responsibility for it. It is in other words a constraint which prevents a province from doing something for which it in any event does not have the administrative capacity. The constraint is moreover followed immediately in the very next sentence, with an injunction on national government to "assist provinces to develop the administrative capacity required for the effect of exercise of their powers and the performance of their functions". The latter provision endows the provinces with a corresponding right to demand such assistance from national government, a right they did not have before. Section 125(3) accordingly does not constitute a net loss at all.

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[73]DP submission, p. 26, para. 38

[74]DP submission, p. 26, para. 38

[75]DP submissions, p. 27, para. 39

Provincial Fiscal Powers

129. Under the interim constitution provinces are financially dependent on the national government because they do not have an independent tax base of any consequence. Their principle source of revenue is an "equitable share of revenue collected nationally" in terms of section 155(1). This share has to be fixed by an act of parliament. That has never been done so that most provincial revenue has had to come from national allocations.

130. The only independent taxing power of the provinces under the interim constitution, is their power in terms of section 156(1B) to impose taxes, levies and duties (excluding income tax or value added or other sales tax) on casinos, gambling, wagering, lotteries and betting (collectively referred to as "gambling"). The section leaves it open to national government to impose VAT on gambling. It in fact does so and the Katz Commission has recommended that it should continue to do so.[76] The imposition of VAT on gambling very considerably undermines the power to impose other forms of tax on the same activity. The Katz Commission noted[77] that the Lotteries and Gambling Board had made the following findings in this regard:

> "Unless gambling is exempt from VAT, the provinces will not be able to optimise the benefits which they can derive from casinos. It will totally inhibit the flexibility of provinces to set realistic tax structures if operators also have to pay 14% VAT on gross casino wins.
>
> It does not help provinces to have an exclusive right to levy taxes on gambling if gambling is subject to VAT as this, to a large extent, negates the ability of provinces to generate income from this source. North West Province, for example, levies 15% tax on the gross wins of their casinos and, assuming this to be a justifiable rate, will be able to levy very little if their casinos become subject to 14% VAT."

131. Under the final text, provinces retain their right to an equitable share of national revenue in terms of sections 214 and 227(1) and acquire a new and substantial taxing power in terms of section 228(1). The latter section permits them to impose,

- taxes, levies or duties other than income tax, value-added tax, general sales tax, rates on property or customs duties, and

- flat rate surcharges on the tax bases of any tax, levy or duty that is imposed by national legislation, other than the tax bases of corporate income tax, value-added tax, rates on property, or customs duties.

This independent tax base transforms provincial financial powers entirely because it frees provinces from financial dependence on national government.

132. The importance of independent taxation powers for provincial or state governments has been

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[76] Third Interim Report of the Katz Commission, p. 156, para. 15.6.3

[77] in its Third Interim Report at p. 150, para. 15.1.6(b)

emphasized in the literature on fiscal federalism:

(a) Wallace E Oates, professor of Economics at the University of Maryland and an authority on fiscal federalism, has made this point in his writings. In "**An Economist's Perspective on Fiscal Federalism**"[78] he discusses the relative advantages and disadvantages of "local" (that is, state or provincial) and national taxation. He notes that the reality of a system of national taxation is that national government uses its power of distribution of revenue for political ends:

> "So long as the transfers of funds to local governments are truly of a lump-sum form, there is no reason in principle why the recipient should feel any constraints as to how he employs these resources. This, however, is no doubt rather naive; so long as the central government is a major supplier of local funds, political realities can be expected to induce the central government to use this leverage to achieve some of its own objectives. In the United Kingdom, for example, central government grants (primarily of a lump sum form) now account for approximately two-thirds of local authority revenues, and this has given rise to widespread concern over the erosion of local autonomy and has generated a renewed interest in additional sources of tax revenues at the local level."

(b) In a later article, "**Decentralisation of the Public Sector: An Overview"**[79] professor Oates again points to the advantages of independent taxing powers over central government grants:

> "While there is certainly an important role for systems of inter-governmental grants, an excessive reliance on such systems can undermine the autonomy and vitality of decentralised decision-making. It is crucial, if decentralised levels of government are to have real and effective fiscal discretion, that they raise a significant portion of their own funds. This is important for two reasons. First, in a political setting, central funds nearly always come with certain strings attached. If decentralised governments are too heavily dependent on central revenue sources, it is inevitable that central intrusion into expenditure decisions will be widespread. Decisions concerning the menu and level of local programmes will become the result of negotiations between central and local authorities, under-cutting the fiscal independence of the local public sector. Second, heavy reliance on grants destroys the incentive for responsible local fiscal decisions. It is essential that localities, in choosing to expand or contract various programmes, consider carefully the cost of these decisions. If, however, funding comes from "above", there may be little real cost to the locality associated with these decisions."

(c) The importance of independent taxation powers for the provinces has also been underlined by Gerard V. la Forest (now la Forest J of the Supreme Court of Canada) in "**The Allocation of Taxing Power under the Canadian Constitution**". He notes that broad provincial taxing powers go hand in hand with the federal nature of the Canadian Constitution:

> "In a federation where the local government have such broad powers as they do under the

[78] published in W E Oates, *The Political Economy of Fiscal Federalism,* pp. 3-20

[79] published in R. Bennett, "*Decentralisation, Local Governments, and Markets"* pp. 43-58

Canadian Constitution, it is imperative that they also have broad fiscal powers."[80]

The existence of broad provincial taxing power has been criticised because it "diminishes the ability of the central government to direct the course of the economy".[81] However, this is the "price that has to be paid to keep the country together".[82] The thrust of these remarks is that provincial taxation powers is a significant provincial power under Canadian federalism.

133. The DP complains[83] that the provinces' unconditional entitlement to any transfer duty collected nationally in terms of section 155(2)(d) of the interim constitution, has not been perpetuated in the final text. But the objection is misplaced. The provinces are entitled to transfer duties in terms of section 155(2)(d) of the interim constitution, only as part of their "equitable share of revenue". The omission of any reference to transfer duties in sections 214 and 227 of the new text, does not reduce the equitable share of revenue to which provinces are entitled.

134. The DP also complains that the provinces' equitable share of national revenue need no longer be "reasonable".[84] We submit that this complaint relates to form and not substance. Section 155(2) entitles every province to an "equitable share of revenue" comprising a percentage of national revenue and section 155(c) goes on to provide that the percentage "shall be fixed reasonably in respect of the different provinces after taking into account the national interest and recommendations of the Financial and Fiscal Commission". Under the new text[85] the provinces retain their right to "an equitable share of revenue raised nationally". In terms of section 214, an act of parliament must provide for the equitable division of revenue raised nationally and must do so "only after the provincial governments, organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered, and must take into account" a list of considerations. We submit that the latter provision is substantially the same as the requirement in terms of section 155(3) that the provincial shares be "fixed reasonably". What it now does is to prescribe a reasonable process by which the determination is to be made.

135. Under sections 215(1) and 216(1) of the new text, national legislation must prescribe the form, contents and time of tabling of provincial budgets and must prescribe measures to ensure transparency and expenditure control in each sphere of government, including provincial governments. The interim constitution does not contain similar provisions. The

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[80] p. 164

[81] p. 164

[82] p. 164

[83] DP submissions, p. 29, para. 44

[84] DP submissions p. 29, para. 44

[85] Sections 214(1) and 227(1)

DP[86] and IFP[87] argue that these provisions diminish provincial power. We submit, however, that they constitute purely matters of form and do not make any difference of substance.

136. The DP[88] and IFP[89] complain that the power of the national treasury in terms of section 216(2) of the new text, to stop the transfer of funds to provinces, constitutes a diminution of their powers and functions. The National Treasury may, however, only do so in terms of section 216(2) of the new text, "for serious or persistent material breach" of the measures prescribed by national legislation to ensure transparency and expenditure control in each sphere of government. We submit that this imposition is similarly a matter of form and procedure and not substance. National government had the power under the interim constitution, to enact legislation prescribing measures to ensure transparency and expenditure control. The only change brought about by the interim text, is that the flow of funds to a province may be stopped for its serious persistent material breach of those measures. It in other words merely inhibits the provinces' freedom to act unlawfully.

137. We submit that the remaining submissions made on behalf of the DP, NP and IFP in relation to provincial fiscal powers, do not concern matters of substance.

South African Police Service

138. There has been some diminution of provincial powers and functions in relation to the South African Police Service. These changes have been made primarily because the interim constitution created two lines of command which have proved unworkable. The two lines of command emanate from national government and provincial government respectively and cross at the level of provincial commissioner:

(a) The national line of command runs from the national minister to the national commissioner to the provincial commissioner. It is described in sections 214(1), 216(1) and (2), 218(1) and 219(1) of the interim constitution.

(b) The provincial line of command runs from the provincial MEC to the provincial commissioner. It is described in sections 217(1) and (2) and 219(1) of the interim constitution.

(c) As appears from the description of these lines of command, they cross at the level of provincial commissioner and accordingly subject the latter to two lines of command acting independently of each other.

139. This problem has been addressed in the new text by limiting the role of the provinces to that

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[86]DP submissions, p. 30, para. 45

[87]IFP submissions, p. 27, para. 2.8.1.

[88]DP submissions, p. 30, para. 46

[89]IFP submissions, p. 27, para. 2.8.2.

of monitoring and overseeing police conduct, effectiveness and efficiency in terms of section 206(2).

140. We submit, however, that the diminution has not been as substantial as might appear because the legislative and executive powers of the provinces under the interim constitution are, in any event, limited.

141. The legislative power of the provinces under the interim constitution, are not clear. In terms of section 126(1) read with schedule 6, they are entitled to legislative in respect of "police, subject to the provisions of chapter 14". The dominant legislative provision of chapter 14, is section 214(1) which provides for the police service to be established and regulated by an act of parliament. It is in other words clear that the legislative framework for policing is to be determined at national level. The only express legislative power conferred on the provinces in terms of chapter 14, is the power under section 217(3) to "pass laws not inconsistent with national legislation regarding the functions of the service set out in section 219(1)". This power is in its own terms always subordinate to any national legislation.

142. Sections 217(1) and 219(1) of the interim constitution allow a provincial MEC to give directions to the provincial commissioner of police in relation to the provincial police matters listed in section 219(1). This power has been more illusory than real for the following reasons:

(a) In terms of sections 235(6)(b)(ii) and (8)(c) all executive power in respect of existing police legislation vests in national government. The president may assign executive police power to the provinces only "upon the rationalisation of the police service as contemplated in section 237".[90] Rationalisation is primarily the responsibility of the national government.[91] It has not yet been completed.[92] The provinces have consequently not yet acquired any executive police powers.

(b) Any directions given by the provincial MEC to the provincial commissioner of police on provincial police matters, compete with the directions of the national minister and commissioner of police precisely because of the dual lines of command created by the interim constitution. There was accordingly never any clear provincial executive power which could not be countermanded or at least contradicted at national level.

143. We accordingly submit that such diminution of provincial legislative and executive power in relation to police matters as has occurred in the new text, has been insubstantial.

Provincial Public Protectors

144. Section 114 of the interim constitution expressly confers upon provinces the power to

[90] Section 235(8)(c)

[91] Section 237(2)(a)(i) and (b)

[92] Sections 9(4) and (5) of the Police Proclamation and Section 72 of the Police Act

establish provincial public protectors. The new text does not contain a comparable provision.

145. We submit however that the provinces still have the legislative power to do so in their provincial constitutions enacted in terms of sections 104(1)(a), 142 and 143 or by ordinary legislation under the incidental legislative power of the provinces in terms of section 104(4).

Provincial Service Commissions

146. Section 213 of the interim constitution expressly confers upon provinces the power to establish their own provincial service commissions. The new text does not contain a comparable provision.

147. We submit, however, that the provinces have the implied power to establish their own public service commissions under the same provisions as those which would permit them to establish their own public protectors.

Conclusion

148. We submit that provincial powers and functions under the new text are, if anything, more substantial than under the interim constitution or alternatively, if there has been a net diminution, that it has in any event, not been substantial.

CP XIX: EXCLUSIVE POWERS

Introduction

149. The purpose of CP XIX is difficult to fathom. It makes a demand in relation to the powers and functions at both national and provincial level of government. Its purpose is, however, presumably to ensure a meaningful allocation of power to the provinces rather than to protect national government. But that purpose is hardly served by a demand that the provinces be afforded some exclusive and some concurrent power without in any way defining their nature or extent. For what it is worth, however, the principle demands that provinces should enjoy some exclusive and some concurrent powers. We submit that they clearly enjoy both under the new text. Their concurrent powers are obvious. We will point merely to their exclusive powers. They are both of a legislative and executive nature.

Exclusive Legislative Powers

150. We submit that the power of the provinces in terms of section 104(1)(b)(ii) read with section 44(1)(a)(ii), to legislate on matters in schedule 5 to the exclusion of national government, is an exclusive legislative power within the meaning of CP XIX, despite the fact that national government may intervene in terms of section 44(2):

(a) In terms of section 104(1)(b)(ii), the provinces may always pass legislation on any of the matters listed in schedule 5.

(b) In terms of section 44(1)(a)(ii) national government may never enter that sphere except when it is permitted to do so in terms of section 44(2). The latter section permits national government to enter into that sphere only in certain circumstances and then only to a limited extent. It may do so only when it is "necessary" to enter the sphere for one or more of the purposes listed in section 42(2)(a) to (e). The section also clearly implies that, even if national government overcomes that first hurdle and is allowed to enter the sphere demarcated by schedule 5, then it is still not at liberty to legislate within that sphere without restriction. It may do so only to the extent that it is necessary to achieve one or more of the purposes described in sections 42(2)(a) to (e). In other words, national government is restricted both in the circumstances in which it may intrude and in the extent to which it may do so.

(c) It follows that there remains an exclusive domain where national government may not intrude and only the provinces may legislate. It does not comprise the whole sphere defined by schedule 5. The area of exclusivity is smaller than the whole of schedule 5 because limited national intervention is permitted under section 42(2). The net domain of exclusivity is defined by reading schedule 5 and section 42(2) together. They make it clear that only the provinces may legislate on schedule 5 matters,

- when the circumstances described in section 44(2)(a) to (e) are not present; and

- by legislation which is not necessary to achieve any of the purposes described in those sections.

(d) The exclusive provincial domain may in other words be described as the power to legislate on schedule 5 matters,

- when it is not necessary to legislate for any of the purposes described in section 42(2); and

- for purposes other than those described in section 42(2).

(e) The point is, however, that there does remain an area of provincial exclusivity defined by the subject matters of schedule 5 on the one hand, and the circumstances in which and purposes for which national government may intervene in terms of section 42(2) on the other.

151. The new text has to comply with both CP XIX which demands exclusive provincial powers and CP XXI which demands in unqualified terms that national government be allowed to intervene in the circumstances described in section 42(2). The new text satisfies both these demands without subordinating the one principle to the other. The demand of the objectors for exclusive provincial legislative power without any power of national intervention, would satisfy CP XIX but violate CP XXI(2).

152. Apart from the general legislative authority conferred upon the provinces, various provisions of the new text also confer specific legislative authority on them. It is not always clear whether this legislative authority specifically conferred on the provinces, is also intended to

be exclusive to them.[93] We submit, however, that the following are instances of exclusive provincial legislative power:

(a) The power of every province to pass its own constitution in terms of sections 104(1)(a), 142 to 145.

(b) Section 115(c) contemplates provincial legislation providing for the compulsion of witnesses to appear, to give evidence and to produce documents before a provincial legislature or any of its committees.

(c) Section 120(2) requires a provincial act which provides for a procedure by which the province's legislature may amend a money bill.

(d) Section 155(2) provides for provincial legislation for the establishment of municipalities, the provision for the monitoring and support of local government in the province and promotion of the development of local government capacity to perform its functions and its ability to manage its own affairs.

(e) Section 161 provides for provincial legislation within the framework of national legislation which provides for privileges and immunities of municipal councils and their members.

(f) Section 226(2) provides that money may be withdrawn from the provincial revenue fund only in terms of an appropriation by a provincial act. This is an important provision which allows provinces exclusive control over the provincial post.

153. The provinces also enjoy a variety of exclusive executive powers. Examples may be found in sections 108(2), 110(2), 125(5) and 127(2).

Conclusion

154. We submit that the new text clearly complies with CP XIX.

[93] particularly in the light of section 44(1)(a)(ii) which *prima facie* confers authority on the National Assembly to legislate on any matter other than one within schedule 5

TRADITIONAL AUTHORITIES

CP XIII SATISFIED

155. It is submitted that the objections by the IFP, Chief Mwelo Nonkonyana and others have no merit.

156. We have already submitted that CP XIII has been complied with in the new text (see paras. 216-219 at pp. 226 - 228 of the submissions by the Constitutional Assembly).

157. Section 211(1) gives constitutional recognition and standing to the institution, status and role of traditional leadership.

158. Section 211(3) enjoins the courts to apply customary law when that law is applicable.

159. It is submitted that customary law is not a static or monolithic system of law; it is responsive to changes and manifests itself in different forms and practices in different parts of South Africa. Its development is best promoted through legislation and the courts.

160. CP XIII read with CP XVII does not attempt to foist a "democratic" system of representation on traditional leadership, and the fact that section 182 of the interim constitution has not been duplicated in the new text does not mean that CP XIII has been violated. On the contrary, the interference by a "foreign" system in the institution of traditional leadership has been removed.

161. In terms of section 211(2) traditional authorities that observe a system of customary law are permitted to continue functioning subject to "applicable legislation and customs".

162. It is submitted that it is not necessary to deal with the remaining objections relating to an alleged violation of CP XIII(2) as they are without substance.

163. In the light of the aforegoing it is submitted that the objections hereanent are without substance.

CULTURE, COLLECTIVE RIGHTS AND SELF-DETERMINATION

CONTRAVENTION OF CP XI, XII AND XXXIV

164. It is submitted that all the objections to the abovementioned principles are without foundation, and we do not wish to add anything to what we have said in paragraphs 220 to 227 of our main submissions at pp. 230 to 232.

CONCLUSION

165. We submit that in the time available to us we have dealt with the main objections of the political parties and referred to a number of others. It may be necessary to make further submissions as a result of closer examination of some of the objections and leave may be sought to file short supplementary heads of argument. We submit that the Court should certify the new text as a whole in terms of section 71 of the interim constitution.

DATED AT JOHANNESBURG ON THIS THE 18TH DAY OF JUNE 1996.

G. BIZOS SC
W.H. TRENGOVE SC
M.T.K. MOERANE SC
N. GOSO
K.D. MOROKA