GENERAL INDEX

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 23/96

CERTIFICATION OF THE CONSTITUTION
OF THE REPUBLIC OF SOUTH AFRICA, 1996

Heard on: 1-5 and 8-11 July 1996

Decided on: 6 September 1996

JUDGMENT

THE COURT:[95]

CHAPTER I. INTRODUCTION

[1] The formal purpose of this judgment is to pronounce whether or not the Court certifies that all the provisions of South Africa's proposed new constitution comply with certain principles contained in the country's current constitution. But its underlying purpose and scope are much wider. Judicial "certification" of a constitution is unprecedented and the very nature of the undertaking has to be explained. To do that, one must place the undertaking in its proper historical, political and legal context; and, in doing so, the essence of the country's constitutional transition, the respective roles of the political entities involved and the applicable legal principles and terminology must be identified and described. It is also necessary to explain the scope of the Court's certification task and the effect of this judgment, not only the extent and significance of the Court's powers, but also their limitations. Only then can one really come to grips with the certification itself.

[2] That is in itself a complex and wide-ranging exercise, dealing with a large number and variety of issues, some interrelated but many not. Virtually all of those issues were raised in written submissions and oral representations received from political parties, special interest groups and members of the public at large. But, as will be shown shortly, the certification task extends beyond considering complaints specifically drawn to the Court's attention. We certainly derived great benefit from such contributions and wish to express our appreciation to counsel for the Constitutional Assembly and the political parties, to the representatives of other bodies and to the persons who submitted written submissions or oral argument. The thoroughness of their research and the cogency of their arguments greatly eased our task. Ultimately, however, it was our duty to measure each and every provision of the new constitution, viewed both singly and in conjunction

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95 This is the unanimous judgment of the available members of the Court. Ackermann J, who had initially participated in the Court's consideration of this matter, fell ill during the hearing of oral submissions. Having heard legal argument and other representations on behalf of those parties who had the right of audience, the remaining members of the Court concluded that the proceedings would have to continue without the benefit of Justice Ackermann's contribution. Regrettable though it was, the provisions of s 100(3)(c) of the Constitution of the Republic of South Africa, 1993 (inserted by s 2 of Act 44 of 1995) rendered such decision unavoidable in the circumstances.

with one another, against the stated Constitutional Principles, irrespective of the attitude of any interested party. In what follows we intend not only to record our conclusions regarding that exercise, but to make plain our reasons for each such conclusion.

[3] We may however be called upon in future and in the context of a concrete dispute to deal with constitutional provisions we have had to construe in the abstract for the purposes of the certification process. In order to avoid pre-empting decisions in such cases, we have endeavoured, where possible, to be brief and to provide reasons for our decisions without saying more than is necessary.

[4] In order to contain this judgment within manageable proportions, use has been made of annexures.[96] The multiplicity of issues involved has also necessitated dividing the judgment into separate Chapters, each dealing in the main with a specific topic. Questions dealt with in different Chapters are sometimes interrelated, however, and different aspects thereof may be touched on in more than one Chapter. As this may make it difficult to follow the thread of the discussion of a particular subject, we have also included an index. Extensive use has been made of abbreviations. These have been identified in the text, but a schedule of abbreviations has been provided to facilitate reading of only parts of the judgment.

A. HISTORICAL AND POLITICAL CONTEXT

[5] South Africa's past has been aptly described as that of "a deeply divided society characterised by strife, conflict, untold suffering and injustice" which "generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge".[97] From the outset the country maintained a colonial heritage of racial discrimination: in most of the country the franchise was reserved for white males[98] and a rigid system of economic and social segregation was enforced. The administration of African tribal territories through vassal "traditional authorities" passed smoothly from British colonial rule to the new government, which continued its predecessor's policy.

[6] At the same time the Montesquieuan principle of a threefold separation of state power - often but an aspirational ideal - did not flourish in a South Africa which, under the banner of adherence to the Westminster system of government, actively promoted parliamentary supremacy and domination by the executive. Multi-party democracy had always been the preserve of the white minority but even there it had languished since 1948. The rallying call of apartheid proved irresistible for a white electorate embattled by the spectre of decolonisation in Africa to the north.

[7] From time to time various forms of limited participation in government were devised by the minority for the majority, most notably the "homeland policy" which was central to the apartheid system. Fundamental to that system was a denial of socio-political and economic rights to the

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96 Annexure 1 is a list of appearances; Annexure 2 contains the text of the Constitutional Principles; Annexure 3 identifies each of the objectors (other than political parties) and the nature of their objections; and Annexure 4 is a list of abbreviations.

97 See the first and third paragraphs of the postscript, headed "*National Unity and Reconciliation*", to the Constitution of the Republic of South Africa Act 200 of 1993. That Act will hereafter be referred to as the "Interim Constitution" or the "IC" and the sections thereof as, for example, "IC 25".

98 In the Cape Province persons of certain other ethnic origins enjoyed a limited franchise and there was provision for representation in the national legislature of African interests by whites.

majority in the bulk of the country, which was identified as "white South Africa", coupled with a Balkanisation of tribal territories in which Africans would theoretically become entitled to enjoy all rights.[99] Race was the basic, all-pervading and inescapable criterion for participation by a person in all aspects of political, economic and social life.

[8] As the apartheid system gathered momentum during the 1950s and came to be enforced with increasing rigour, resistance from the disenfranchised - and increasingly disadvantaged - majority intensified. Many (and eventually most) of them demanded non-discriminatory and wholly representative government in a non-racial unitary state, tenets diametrically opposed to those of apartheid. Although there were reappraisals and adaptations on both sides as time passed, the ideological chasm remained apparently unbridgeable until relatively recently.

[9] The clash of ideologies not only resulted in strife and conflict but, as the confrontation intensified, the South African government of the day - and some of the self-governing and "independent" territories spawned by apartheid - became more and more repressive. More particularly from 1976[100] onwards increasingly harsh security measures gravely eroded civil liberties. The administration of urban black residential areas and most "homeland" administrations fell into disarray during the following decade. The South African government, backed by a powerful security apparatus operating with sweeping emergency powers, assumed strongly centralised and authoritarian control of the country.[101]

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99 For people who were not classified as either "European" or "Bantu", apartheid theory did not purport to offer a rationale for its discrimination.

100 When student unrest, which started in Soweto on 16 June, escalated and spread to many parts of the country.

101 In *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at para 7, a pen-picture of the government at that time is given:

> "The Constitution itself makes provision for the complex issues involved in bringing together again in one country, areas which had been separated under apartheid, and at the same time establishing a constitutional State based on respect for fundamental human rights, with a decentralised form of government in place of what had previously been authoritarian rule enforced by a strong central government. On the day the Constitution came into force 14 structures of government ceased to exist. They were the four provincial governments, which were non-elected bodies appointed by the central government, the six governments of what were known as self-governing territories, which had extensive legislative and executive competences but were part of the Republic of South Africa, and the legislative and executive structures of Transkei, Bophuthatswana, Venda and Ciskei, which, according to South African law, had been independent States. Two of these States were controlled by military regimes, and at the time of the coming into force of the new Constitution two were being administered by administrators appointed by the South African authorities. The legislative competences of these 14 areas were not the same. Laws differed from area to area, though there were similarities because at one time or another all had been part of South Africa. In addition the Constitution was required to make provision for certain functions which had previously been carried out by the national government to be transferred as part of the process of decentralisation to the nine new provinces which were established on the day the Constitution came into force, and simultaneously for functions that had previously been performed by the 14 executive structures which had ceased to exist to be transferred partly to the national government and partly to the new provincial

[10] Then, remarkably and in the course of but a few years, the country's political leaders managed to avoid a cataclysm by negotiating a largely peaceful transition from the rigidly controlled minority regime to a wholly democratic constitutional dispensation.
After a long history of "deep conflict between a minority which reserved for itself all control over the political instruments of the state and a majority who sought to resist that domination", the overwhelming majority of South Africans across the political divide realised that the country had to be urgently rescued from imminent disaster by a negotiated commitment to a fundamentally new constitutional order premised upon open and democratic government and the universal enjoyment of fundamental human rights.[102] That commitment is expressed in the preamble to the Interim Constitution by an acknowledgement of the

> "... need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms".

With this end in view the IC

> "... provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."[103]

[11] Following upon exploratory and confidential talks across the divide, the transitional process was formally inaugurated in February 1990, when the then government of the Republic of South Africa announced its willingness to engage in negotiations with the liberation movements. Negotiations duly ensued and persevered, despite many apparent deadlocks. Some of the "independent homeland" governments gave their support to the negotiation process. Others did not but were overtaken by the momentum of the ensuing political developments and became part of the overall transition, unwillingly or by default.

[12] One of the deadlocks, a crucial one on which the negotiations all but foundered, related to the formulation of a new constitution for the country. All were agreed that such an instrument was necessary and would have to contain certain basic provisions. Those who negotiated this commitment were confronted, however, with two problems. The first arose from the fact that they were not elected to their positions in consequence of any free and verifiable elections and that it was therefore necessary to have this commitment articulated in a final constitution adopted by a credible body properly mandated to do so in consequence of free and fair elections based on universal adult suffrage. The second problem was the fear in some quarters that the constitution eventually favoured by such a body of elected representatives might not sufficiently address the anxieties and the insecurities of such constituencies and might therefore subvert the objectives of a negotiated settlement. The government and other minority groups were prepared to relinquish

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> governments which were to be established. All this was done to ensure constitutional legislative, executive, administrative and judicial continuity."

102 See *The Azanian Peoples Organisation (AZAPO) and Others v The President of the Republic of South Africa and Others* (CC) Case No CCT 17/96, 25 July 1996, not yet reported at paras 1 and 2.

103 See the first paragraph of the postscript to the IC.

power to the majority but were determined to have a hand in drawing the framework for the future governance of the country. The liberation movements on the opposition side were equally adamant that only democratically elected representatives of the people could legitimately engage in forging a constitution: neither they, and certainly not the government of the day, had any claim to the requisite mandate from the electorate.

[13] The impasse was resolved by a compromise which enabled both sides to attain their basic goals without sacrificing principle. What was no less important in the political climate of the time was that it enabled them to keep faith with their respective constituencies: those who feared engulfment by a black majority and those who were determined to eradicate apartheid once and for all. In essence the settlement was quite simple. Instead of an outright transmission of power from the old order to the new, there would be a programmed two-stage transition. An interim government, established and functioning under an interim constitution agreed to by the negotiating parties, would govern the country on a coalition basis while a final constitution was being drafted. A national legislature, elected (directly and indirectly) by universal adult suffrage, would double as the constitution-making body and would draft the new constitution within a given time. But - and herein lies the key to the resolution of the deadlock - that text would have to comply with certain guidelines agreed upon in advance by the negotiating parties. What is more, an independent arbiter would have to ascertain and declare whether the new constitution indeed complied with the guidelines before it could come into force.[104]

B. LEGAL CONTEXT AND TERMINOLOGY

[14] The settlement was ultimately concluded by the negotiating parties in November 1993. Shortly thereafter and pursuant thereto the South African Parliament duly adopted the Interim Constitution. Although the formal date of commencement of the IC was 27 April 1994 (a date agreed upon in advance by the negotiating parties), its provisions relating to the election of the transitional national legislature came into operation earlier.[105]

[15] The importance of the deadlock-breaking agreement is highlighted by the preamble to the IC which, in its second paragraph, characterises the Constitutional Principles as "a solemn pact" in the following terms:

> "**AND WHEREAS** in order to secure the achievement of this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles".

It is also clear from the language that the Constitutional Principles constitute the formal record of the "solemn pact". They are contained in IC sch 4, which is incorporated by a reference under IC 71(1)(a). Although they are numbered from I to XXXIV[106] and are often referred to as the 34 Constitutional Principles, they list many more requirements than that. Henceforth they will be

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104 The detailed progression of the proposals can be traced in the reports of the Technical Committee on Constitutional Issues, May - November 1993. See in particular para 6 of the second report, dated 19 May 1993.

105 So did incidental interim legislation adopted by the South African Parliament relating to the transitional government of the country pending the elections and to the supervision and conduct of those elections. The interim national legislature consists of a 400-member National Assembly, elected on a pure proportional representation basis, and a 90-member Senate elected by the provincial legislatures, also on a proportional representation basis. See IC 40 and IC 48.

106 See Annexure 2 hereto for the full text of the Constitutional Principles.

referred to collectively as the "CPs" and individually as "CP I" and so on. The wording and interpretation of the CPs will be discussed later; what is of importance at this stage is to note that they are acknowledged by the preamble to be foundational to the new constitution. As will be shown shortly, they are also crucial to the certification task with which the Court has been entrusted.

[16] IC ch 5, headed "***The Adoption of the New Constitution***", fixes the basic framework and rules for the drafting exercise. First, in IC 68(1), it provides as follows:

> "The National Assembly and the Senate, sitting jointly for the purposes of this Chapter, shall be the Constitutional Assembly."

The body thus created, the Constitutional Assembly, will hereafter be referred to as the "CA". In terms of IC 68(2), read with IC 68(3) and IC 73(1), the CA had to commence its task within seven days from the first sitting of the Senate and draft and adopt a new constitutional text within two years of the first sitting of the National Assembly (the "NA"). For such adoption IC 73(2) required a majority of at least two-thirds of all the members of the CA. The succeeding subsections of IC 73 make detailed provision for what transpires if the requisite majority is not obtained. In the event, such majority was indeed obtained and no more need be said about the alternative mechanisms. The constitution which the CA adopted is formally titled the "Constitution of the Republic of South Africa, 1996" and will hereafter be referred to as the "New Text" or the "NT". Its individual provisions will be identified by the prefix "NT".

[17] IC ch 5 then addresses the issue of certification. It will be recalled that the "solemn pact" envisaged independent determination of the question whether the new constitutional text complies with the CPs.[107] Accordingly IC 71(2) reads as follows:

> "The new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles referred to in subsection (1)(a)."

It should be emphasised that the subsection requires that "all" the provisions be certified as complying with the CPs. Precisely what that entails will be dealt with later. Suffice it at this stage to make two points. First, that this Court's duty - and hence its power - is confined to such certification. Second, certification means a good deal more than merely checking off each individual provision of the NT against the several CPs.

[18] The provisions of IC 71(3), although not directly prescribed by the "solemn pact", form a logical additional safeguard, and warrant quotation:

> "A decision of the Constitutional Court in terms of subsection (2) certifying that the provisions of the new constitutional text comply with the Constitutional Principles, shall be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof."

Once this Court has certified a text in terms of IC 71(2) that is the end of the matter and compliance or non-compliance thereof with the CPs can never be raised again in any court of law, including this Court. That casts an increased burden on us in deciding on certification. Should we

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[107] See the last sentence of para 13 above.

subsequently decide that we erred in certifying we would be powerless to correct the mistake, however manifest.

[19] One then turns to IC ch 7 to complete the survey of the constitutional provisions which give effect to the "solemn pact". That chapter deals with the judicial authority in the Republic. Among other things, it established two new organs of state, namely this Court[108] and the Judicial Service Commission.[109] For present purposes it is sufficient to observe that the appointment and dismissal mechanisms and the composition and powers of those two bodies constitute an attempt to create a sufficient safeguard that the decision regarding compliance of the NT with the CPs would be impartial.

C. ADOPTION OF THE NEW TEXT BY THE CONSTITUTIONAL ASSEMBLY

[20] The CA duly commenced its deliberations and all but one of the political parties represented in Parliament participated throughout.[110] Numerous public and private sessions were held and a wide variety of experts on specific topics were consulted on an ongoing basis. In response to an intensive country-wide information campaign, including public meetings and open invitations to the general public, the CA also received numerous representations, both oral and written. Although the final text concerning some contentious issues was drafted only shortly before adoption of the NT, the CA had throughout its deliberations issued interim reports containing progressive drafts of the text and of alternative proposals on outstanding provisions. In the result political parties and other interested bodies or persons were kept up to date and had ample time to consider possible grounds for objecting to certification.

[21] On 8 May 1996 the CA adopted the NT by a majority of some 86 percent of its members.[111] Two days later the Chairperson of the CA, acting in accordance with rule 15 of the Rules of the Constitutional Court,[112] transmitted the draft to this Court, certifying (i) that it had

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108 An 11-member specialist constitutional tribunal, established by IC 98, composed of existing judges of the Supreme Court and constitutional law experts (IC 99) and obliged to sit en banc (IC 100(3)).

109 This 17-person body, established by IC 105, is composed of representatives of all three branches of government as well as the organised legal profession and academia and plays a vital screening role in judicial appointments and removals from office.

110 The exception was the Inkatha Freedom Party.

111 Some political parties, although voting in favour of adoption, intimated that they intended opposing certification of the NT.

112 Subrules (1) and (2) of rule 15 provide as follows:

> "(1) The Chairperson of the Constitutional Assembly which has passed a new constitutional text in terms of section 71(1) of the Constitution and which wishes such constitutional text to be certified by the Court shall certify in writing the content of the constitutional text passed by the Constitutional Assembly and submit such text to the registrar with a formal request to the Court to perform its functions in terms of section 71(2) of the Constitution.
> (2) The certificate contemplated in subrule (1) shall include a statement specifying that the provisions of the text were passed by the requisite majority."

been adopted by the requisite majority,[113] and (ii) that it complied with the CPs. At the same time he requested the Court to perform its certification functions in terms of IC 71(2).

D. PROCEDURE ADOPTED BY THE COURT

Directions

[22] The President of the Court, considering it to be in the national interest to deal with the matter as thoroughly yet expeditiously as possible, determined that both written and oral representations would be received and fixed 1 July 1996 as the date for the commencement of oral argument. On Monday 13 May 1996 he issued detailed directions, including a timetable, for its disposal. The directions included provision for written argument on behalf of the CA to be lodged with the Court and invited the political parties represented in the CA that wished to submit oral argument to notify the Court and to lodge their written grounds of objection. Although there was no legal provision for anyone else to make representations, because of the importance and unique nature of the matter, the directions also invited any other body or person wishing to object to the certification of the NT to submit a written objection.[114] The directions required objectors to specify their grounds of objection and to indicate the CP allegedly contravened by the NT. The Court, through the good offices of the CA, also published notices (in all official languages) inviting objections and explaining the procedure to be followed by prospective objectors. Each written objection was studied and, if it raised an issue germane to the certification exercise which had not yet been raised, detailed written argument was invited.

[23] Thereafter the President issued further directions from time to time for the orderly conduct of the proceedings. In particular a detailed timetable was issued, allocating specific times on particular days for oral submissions. Because of the relatively tight timetable and the importance of the issues at stake, the Court condoned non-compliance by members of the public with the dates fixed in the directions and considered all relevant representations, however belatedly lodged.

Objections

[24] In the event, notices of objection, written representations and oral argument were submitted on behalf of five political parties.[115] Objections were also lodged by or on behalf of a further 84 private parties. The political parties and the CA as well as 27 of the other bodies or persons were afforded a right of audience. In deciding whom to invite to present oral argument, we were guided by the nature, novelty, cogency and importance of the points raised in the written submissions. Interest groups and individuals propounding a particular contention were permitted to submit argument jointly notwithstanding the absence of a formal link between them. The underlying principle was to hear the widest possible spectrum of potentially relevant views. A schedule of objections lodged by non-political parties, indicating the name of the objector and the gist of the objection, is annexed.[116] In respect of all issues of substance the representatives of the CA and of the DP, the IFP and the NP timeously lodged and exchanged detailed written

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113 At least two-thirds of all the members of the CA.

114 Of no more than 1 000 words.

115 The African Christian Democratic Party ("ACDP"), the Democratic Party ("DP"), the Inkatha Freedom Party ("IFP") (which was joined by the KwaZulu-Natal Province), the National Party ("NP") and the Konserwatiewe Party ("KP"). The majority party, the African National Congress ("ANC"), was not represented but intimated that it supported the submissions on behalf of the CA.

116 See Annexure 3.

submissions. Most other public bodies and several individuals did likewise. The written objections and supporting submissions ultimately ran to some 2 500 pages, excluding the extracts from judgments, textbooks and other publications which were annexed. In the result the Court was enabled to identify the issues, conduct research and focus the oral argument.

Oral Argument

[25] Hearings commenced on Monday 1 July 1996 and continued until Thursday 11 July 1996. Individual objectors were heard in person; otherwise representation was permitted through persons ordinarily entitled to appear before the Court or through a duly authorised member of the organisation concerned.[117] The objections were divided into broadly associated topics and in respect of each, counsel for the CA were afforded the right to open the debate; each objection was then heard and the CA replied. On the last day, after all the objections had been traversed, the Court heard argument on behalf of the CA and of the DP, the IFP and the NP on issues which the Court itself required to be traversed. At the same time everyone who had submitted oral argument and wished to make further submissions was afforded an opportunity to do so. In the process all relevant issues were fully canvassed in argument.

E. THE NATURE OF THE COURT'S CERTIFICATION FUNCTION

[26] Notwithstanding publication of the directions by the President, in which the issues were identified, there remained considerable misunderstanding about the Court's functions and powers in relation to certification of the NT. As a result many objections - and even some of the oral arguments - were misdirected. Apparently, therefore, there is a risk that the tenor and import of this judgment may be misunderstood by some readers unless the more egregious misapprehensions are resolved.

[27] First and foremost it must be emphasised that the Court has a judicial and not a political mandate. Its function is clearly spelt out in IC 71(2): to certify whether all the provisions of the NT comply with the CPs. That is a judicial function, a legal exercise. Admittedly a constitution, by its very nature, deals with the extent, limitations and exercise of political power as also with the relationship between political entities and with the relationship between the state and persons. But this Court has no power, no mandate and no right to express any view on the political choices made by the CA in drafting the NT, save to the extent that such choices may be relevant either to compliance or non-compliance with the CPs. Subject to that qualification, the wisdom or otherwise of any provision of the NT is not this Court's business.

[28] Nor do we have any power to comment upon the methodology adopted by the CA, unless and to the extent that it may amount to a breach of IC ch 5. No such infringement has been alleged, the objections being confined to complaints that submissions to it were ignored by the CA, that its deliberations at times lacked transparency, and the like. Even if such complaints were to be well-founded, which we are manifestly neither legally empowered nor practically able to determine, they would remain irrelevant to our task.

[29] There was also considerable confusion about the comparison the Court had to conduct in the performance of its duty under IC 71(2). That subsection is in itself quite unequivocal; and read in the context discussed above, there can be no doubt at all that the comparison we have to make is between the NT and the CPs. In general, and subject to an important proviso relating to CP XVIII.2, which is discussed in detail later,[118] differences between the NT and the IC are not

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117 A schedule of all appearances is annexed, marked Annexure 1.

118 See Chapter VII below.

germane to the certification exercise the Court has to perform. It may be that reference to the IC is of assistance in trying to ascertain the meaning of a word or phrase in either the NT or the CPs, but it is generally of no consequence that some or other provision in the IC has been omitted from the NT, or has been reproduced in a different form. Provided it remained within the boundaries set by the CPs, the CA was fully entitled to do what it wished with any precedent in the IC. That is not only clear from the provisions of IC ch 5, but is inherent in the "solemn pact". The IC was expressly intended to provide "a historic bridge between the past of a deeply divided society ... and a future founded on the recognition of human rights ..."[119] and to facilitate the "continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution".[120] Compiled as it was by the un-mandated negotiating parties, it has no claim to lasting legitimacy or exemplary status. The CA, composed of the duly mandated representatives of the electorate, was entrusted with the onerous duty of devising a new constitution for the country, unfettered by the provisions of the IC other than those contained in the CPs.

[30] It should also be emphasised that, provided there is due compliance with the prescripts of the CPs, this Court is not called upon to express an opinion on any gaps in the NT, whether perceived by an objector or real. More specifically, there can be no valid objection if the NT contains a provision which in principle complies with the requirements of the CPs, or a particular CP, but does not spell out the details, leaving them to the legislature to flesh out appropriately later. Provided the criteria demanded by the CPs are expressed in the NT, it is quite in order to adopt such a course. The subsequent legislation will be justiciable and any of its provisions that do not come up to the constitutionally enshrined criteria will be liable to invalidation. Here it is important to note that the CPs are principles, not detailed prescripts.

F. OVERVIEW OF THE CERTIFICATION DECISION

[31] Before becoming involved in the detailed analysis of the objections to the certification of the NT, it is necessary to make a general observation. It is true we ultimately come to the conclusion that the NT cannot be certified as it stands because there are several respects in which there has been non-compliance with the CPs.[121] But one must focus on the wood, not the trees. The NT represents a monumental achievement. Constitution making is a difficult task. Drafting a constitution for South Africa, with its many unique features, is all the more difficult. Having in addition to measure up to a set of predetermined requirements greatly complicates the exercise. Yet, in general and in respect of the overwhelming majority of its provisions, the CA has attained that goal.[122]

CHAPTER II. INTERPRETATION OF THE CONSTITUTIONAL PRINCIPLES *A. GENERAL APPROACH*

[32] It is necessary to underscore again that the basic certification exercise involves measuring the NT against the CPs. The latter contain the fundamental guidelines, the prescribed boundaries, according to which and within which the CA was obliged to perform its drafting function. Because of that pivotal role of the CPs their interpretation forms the logical starting point for the

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119 See the opening paragraph of the postscript to the IC.

120 See the third paragraph of the preamble to the IC.

121 See Chapter VIII below.

122 See para 46 below.

certification exercise.

[33] In the light of the background described and in the context discussed above, the CPs have to be applied and interpreted along the following lines.

[34] The CPs must be applied purposively and teleologically to give expression to the commitment "to create a new order" based on "a sovereign and democratic constitutional state" in which "all citizens" are "able to enjoy and exercise their fundamental rights and freedoms".[123]

[35] The CPs must therefore be interpreted in a manner which is conducive to that objective. Any interpretation of any CP which might impede the realisation of this objective must be avoided.

[36] The CPs must not be interpreted with technical rigidity. They are broad constitutional strokes on the canvas of constitution making in the future.

[37] All 34 CPs must be read holistically with an integrated approach. No CP must be read in isolation from the other CPs which give it meaning and context.

[38] It accordingly follows that no CP should be interpreted in a manner which involves conflict with another. The lawmaker intended each of the CPs to live together with the others so as to give them life and form and nuance.

[39] There is a distinction to be made between what the NT may contain and what it may not. It may not transgress the fundamental discipline of the CPs; but within the space created by those CPs, interpreted purposively, the issue as to which of several permissible models should be adopted is not an issue for adjudication by this Court. That is a matter for the political judgment of the CA, and therefore properly falling within its discretion. The wisdom or correctness of that judgment is not a matter for decision by the Constitutional Court. The Court is concerned exclusively with whether the choices made by the CA comply with the CPs, and not with the merits of those choices.

[40] What follows logically from this is that it is quite unnecessary for the CA to repeat the same constitutional structures and protections which are contained in the IC. Variations and alternatives, additions and even omissions are legitimate as long as the discipline enjoined by the CPs is respected.

[41] The test to be applied is whether the provisions of the NT comply with the CPs. That means that the provisions of the NT may not be inconsistent with any CP and must give effect to each and all of them.

[42] When testing a particular provision or provisions of the NT against the provisions of the CPs it is necessary to give to the provision or provisions of the NT a meaning. More than one permissible meaning may sometimes reasonably be supported. On one construction the text concerned does not comply with the CPs, but on another it does. In such situations it is proper to adopt the interpretation that gives to the NT a construction that would make it consistent with the CPs.

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123 See the first paragraph of the preamble to the IC.

[43] Such an approach has one important consequence. Certification based on a particular interpretation carries with it the implication that if the alternative construction were correct the certification by the Court in terms of IC 71 might have been withheld. In the result, a future court should approach the meaning of the relevant provision of the NT on the basis that the meaning assigned to it by the Constitutional Court in the certification process is its correct interpretation and should not be departed from save in the most compelling circumstances. If it were otherwise, an anomalous and unintended consequence would follow. A court of competent jurisdiction might in the future give a meaning to the relevant part of the NT which would have made that part of the NT not certifiable in terms of IC 71 at the time of the certification process, but there would have been no further opportunity in the interim to refuse a certification of the NT on that ground. This kind of anomaly must be avoided - and will be - if courts accept the approach which we have suggested in this paragraph.

B. STRUCTURAL COMPLIANCE

[44] If the CPs are approached in the way we have indicated in the preceding paragraphs of this judgment, two questions arise. First, are the basic structures and premises of the NT in accordance with those contemplated by the CPs? If such basic structures and premises do not comply with what the CPs contemplate in respect of a new constitution, certification by this Court would have to be withheld. If the basic structures and premises of the NT do indeed comply with the CPs then, and then only, does the second question arise. Do the details of the NT comply with all the CPs? If the answer to the second question is in the negative, certification by the Constitutional Court must fail because the NT cannot properly be said to comply with the CPs.

[45] In order to answer the first question it is necessary to identify what are indeed the basic structures and premises of a new constitutional text contemplated by the CPs. It seems to us that fundamental to those structures and premises are the following:

(a) a constitutional democracy based on the supremacy of the Constitution protected by an independent judiciary;[124]

(b) a democratic system of government founded on openness, accountability and equality, with universal adult suffrage and regular elections;[125]

(c) a separation of powers between the legislature, executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness;[126]

(d) the need for other appropriate checks on governmental power;[127]

(e) enjoyment of all universally accepted fundamental rights, freedoms and civil

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124 CPs IV, VII and XV.

125 CPs I, V, VIII, IX and XVII.

126 CP VI.

127 CP XXIX.

liberties protected by justiciable provisions in the NT;[128]

(f) one sovereign state structured at national, provincial and local levels, each of such levels being allocated appropriate and adequate powers to function effectively;[129]

(g) the recognition and protection of the status, institution and role of traditional leadership;[130]

(h) a legal system which ensures equality of all persons before the law, which includes laws, programmes or activities that have as their objective the amelioration of the conditions of the disadvantaged, including those disadvantaged on grounds of race, colour or creed;[131]

(i) representative government embracing multi-party democracy, a common voters' roll and, in general, proportional representation;[132]

(j) the protection of the NT against amendment save through special processes;[133]

(k) adequate provision for fiscal and financial allocations to the provincial and local levels of government from revenue collected nationally;[134]

(l) the right of employers and employees to engage in collective bargaining and the right of every person to fair labour practices;[135]

(m) a non-partisan public service broadly representative of the South African community, serving all the members of the public in a fair, unbiased and impartial manner;[136] and

(n) security forces required to perform their functions in the national interest and prohibited from furthering or prejudicing party political interests.[137]

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128 CP II.

129 CPs I, XVIII, XIX, XX, XXI and XXIV.

130 CP XIII.

131 CPs I, III and V.

132 CP VIII.

133 CP XV.

134 CPs XXV, XXVI and XXVII.

135 CP XXVIII.

136 CP XXX.

137 CP XXXI.

[46] An examination of the NT establishes that it satisfies the basic structures and premises of the new constitution contemplated by the applicable CPs.[138] (The question whether any particular detail contained in the NT complies with the relevant CPs is a separate and different question which will be discussed in this judgment under different headings dealing with the application of one or more relevant CPs to the corresponding part of the NT.)

[47] Having found that the NT complies with the structural guidelines drawn by the CPs, we turn to consider the second question posed above. Do the details of the NT comply with the CPs? In that exercise we start with the Bill of Rights, a crucial element of the CPs and the NT.

CHAPTER III. BILL OF RIGHTS

[48] It is no coincidence that the drafters of the CPs, having in CP I established the principle that the state they contemplated would be a democracy, immediately proceeded to describe one of its key attributes in CP II. It reads as follows:

> **"Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution."**

For they were avowedly determined

> "... to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races *so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms"*.[139]

In CP II they therefore stipulated that the NT must provide for a bill of rights, constitutionally safeguarded and enforceable by the courts.

[49] The method the drafters of the CPs adopted to give content to the bill of rights was to refer to "all universally accepted fundamental rights, freedoms and civil liberties". There are two components to this: "fundamental rights, freedoms and civil liberties" and "universally accepted".

[50] The phrase "fundamental rights, freedoms and civil liberties" should not be broken down into separate words and examined in isolation. Each word does bear a meaning, but the phrase as a whole conveys a composite idea that is firmly established in human rights jurisprudence.[140] What

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138 The need referred to in sub-paragraph 45(a) above is satisfied by, inter alia, NT 1, 2, 74 and ch 8; in sub-paragraph 45(b) by, inter alia, NT 1, 9, 19(3), 32, 49, 108 and 159; in sub-paragraph 45(c) by, inter alia, NT chs 4, 5 and 8 and NT 47, 89, 92, 165 and 177; in sub-paragraph 45(d) by, inter alia, NT chs 9, 10 and NT 223-5; in sub-paragraph 45(e) by, inter alia, NT chs 2 and 8; in sub-paragraph 45(f) by, inter alia, NT 1 and chs 3, 4, 5, 6 and 7; in sub-paragraph 45(g) by, inter alia, NT ch 12; in sub-paragraph 45(h) by, inter alia, NT 9; sub-paragraph 45(i) by, inter alia, NT 1, 46(1), 105(1) and 157(2); sub-paragraph 45(j) by, inter alia, NT 74 (but see para 152-6 below); sub-paragraph 45(k) by, inter alia, NT 214 and 227; sub-paragraph 45(l) by, inter alia, NT 23; sub-paragraph 45(m) by, inter alia, NT ch 10; and sub-paragraph 45(n) by, inter alia, NT ch 11.

139 See the first paragraph of the preamble to the IC (emphasis added).

140 The movement to recognise and protect the fundamental rights of all human beings gained increased momentum in the international arena from the end of the Second World War. In 1945, the Charter of the

the drafters had in mind were those rights and freedoms recognised in open and democratic societies as being the inalienable entitlements of human beings. Viewed in that light one should not read "fundamental", "rights", "freedoms" and "civil liberties" disjunctively. There is of course no finite list of such rights and freedoms. Even among democratic societies what is recognised as fundamental rights and freedoms varies in both subject and formulation from country to country, from constitution to constitution, and from time to time. For that reason, the drafters qualified the phrase by the words "universally accepted".

[51] Although a strict literal interpretation should not be given to "universal", for that may result in giving little content to CP II, it nevertheless establishes a strict test. It is clear that the drafters intended that only those rights that have gained a wide measure of international acceptance as fundamental human rights must necessarily be included in the NT. Beyond that prescription, the CA enjoys a discretion. That this is the case is apparent too from the instruction given in the closing clause of CP II which requires the CA to give "due consideration to *inter alia* the fundamental rights contained in Chapter 3" of the IC. The CA was clearly not obliged to duplicate those rights, nor to match them. They merely had to be duly considered.[141]

[52] The "universally accepted fundamental rights, freedoms and civil liberties" required by the CP is a narrower group of rights than that entrenched by the IC. We emphasise this point because in several instances objectors argued that NT ch 2 should fail certification because the scope of a particular NT provision falls short of - or goes further than - the corresponding provision in the IC. That is not the test. Although it is true that the drafters of the CPs also drafted IC ch 3 and had its provisions in mind in plotting the guidelines for the CA, they expressly did not bind it to draft a bill of rights identical to that in the IC. To the extent that the IC afforded rights which went beyond the "universally accepted" norm, the CA was entitled to reduce them to that measure. By like token, the CA was entitled to formulate rights more generously than would be required by the "universally accepted" norm, or even to establish new rights. It should be emphasised that in general the Bill of Rights drafted by the CA is as extensive as any to be found in any national constitution. Specific objection has, however, been taken to particular provisions, with which we proceed to deal.

A. NT 8(2): HORIZONTAL APPLICATION

[53] NT 8(2) provides:

> "A provision of the Bill of Rights binds natural and juristic persons if, and to the extent that, it is applicable, taking into account the nature of the right and of any duty imposed by the right."

Objection was taken to this provision on the ground that it would impose obligations upon persons

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United Nations was signed. Among its aims were the achievement of "international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all" (art 1(3)). This ambition was given further voice by the 1948 Universal Declaration of Human Rights ("UDHR"). Then in 1966, in order to give these rights the binding force of international obligations, the General Assembly of the United Nations adopted the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights ("ICCPR" and" ICESCR"). The adoption of the UDHR led also to the drafting of regional instruments such as the European Convention on Human Rights and Fundamental Freedoms in 1951, the European Social Charter in 1961, the American Convention on Human Rights in 1969 and the Banjul Charter on Human and Peoples' Rights in 1981. These developments in the international sphere were mirrored in various national constitutions, many of which now contain bills of rights.

141 The Executive Director of the CA, Mr H Ebrahim, lodged an affidavit which asserted that the CA had indeed given due consideration to the provisions of IC ch 3. This statement was not disputed by any of the objectors.

other than organs of state, that is, it permitted what has been referred to in South African jurisprudence and academic writing as the "horizontal application" of bills of rights. The objection was grounded, first on the basis that the horizontal application of fundamental rights is not universally accepted. That is so, but as stated above, the requirement of universal acceptance in CP II does not preclude the CA from including provisions in the NT which are not universally accepted.

[54] The second ground for the objection was that in rendering the chapter on fundamental rights binding on private persons, the NT is inconsistent with CP VI which requires that there be a separation of powers between the legislature, the executive and the judiciary. The argument was that the effect of horizontality is to permit the courts to encroach upon the proper terrain of the legislature, in that it permits the courts to alter legislation and, in particular, the common law. However, that argument has two flaws. First, it fails to acknowledge that courts have always been the sole arm of government responsible for the development of the common law. There can be no separation of powers objection, therefore, to the courts retaining their power over the common law. Second, the objectors also fail to recognise that the courts have no power to "alter" legislation. The power of the judiciary in terms of the NT remains the power to determine whether provisions of legislation are inconsistent with the NT or not, not to alter them in ways which it may consider desirable. In any event, even where a bill of rights does not bind private persons, it will generally bind a legislature. In such circumstances all legislation is subject to review. The argument, then, that a "horizontal" application of the Bill of Rights will inevitably involve the courts in the business of the legislature to an extent that they would not be involved were the Bill of Rights to operate only "vertically", is misconceived.

[55] A further argument raised by the objectors was that NT 8(2) would bestow upon courts the task of balancing competing rights which, they argued, is not a proper judicial role. This argument once again fails to recognise that even where a bill of rights binds only organs of state, courts are often required to balance competing rights. For example, in a case concerning a challenge to legislation regulating the publication and distribution of sexually explicit material, the court may have to balance freedom of speech with the rights of dignity and equality. It cannot be gainsaid that this is a difficult task, but it is one fully within the competence of courts and within the contemplation of CP II. That the task may also have to be performed in circumstances where the bearer of the obligation is a private individual does not give rise to a conflict with the CPs.

[56] The objectors also argued that imposing obligations upon individuals in the Bill of Rights is in breach of CP II which contemplates that individuals would be beneficiaries only of universally accepted fundamental rights and freedoms. They argued that as bearers of obligations, individuals would necessarily suffer a diminution of their rights in a manner that is contrary to the contemplation of CP II. This argument, too, cannot be accepted. As long as a bill of rights binds a legislature, legislation which regulates the relationships between private individuals will be subject to constitutional scrutiny. In Germany and similar European countries where there is general codification of private law and constitutional review, the codes have to comply with constitutional standards. And even in the United States, the Bill of Rights affects private law. As stated in the previous paragraph, such scrutiny will often involve a court in balancing competing rights. It is also implicit in the indirect horizontal application of the rights required by IC ch 3, to which the CA had to pay "due regard".[142] CP II implicitly recognises that even if only the state is bound, rights

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142 See *Du Plessis and Others v De Klerk and Another* 1996(3) SA 850 (CC); 1996(5) BCLR 658 (CC) at paras 31-62.

conferred upon individuals will justifiably be limited in order to recognise the rights of others in certain circumstances. The fact that horizontal application may also lead to justifiable limits on the rights of individuals does not mean that CP II has been breached.

B. NT 8(4): JURISTIC PERSONS

[57] Objection was also taken to NT 8(4), which states that

> "[j]uristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of the juristic persons."

The comparable provision in the IC is 7(3), which provides that

> "[j]uristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, the nature of the rights permits."

The objection was based on the language of CP II, which provides that "everyone shall enjoy all universally accepted fundamental rights and freedoms". It was argued that "everyone" in CP II refers only to natural persons, and that, by extending the rights to juristic persons, the rights of natural persons are thereby diminished. We cannot accept the premise: many "universally accepted fundamental rights" will be fully recognised only if afforded to juristic persons as well as natural persons. For example, freedom of speech, to be given proper effect, must be afforded to the media, which are often owned or controlled by juristic persons. While it is true that some rights are not appropriate to enjoyment by juristic persons, the text of NT 8(4) specifically recognises this. The text also recognises that the nature of a juristic person may be taken into account by a court in determining whether a particular right is available to such person or not.

[1] The objectors were also concerned that affording rights to powerful and wealthy corporations would result in detriment to individual rights, given that powerful corporations have greater resources to enforce their rights through litigation. But the same could be said of powerful and wealthy individuals. Moreover, the objection wrongly equates juristic persons with powerful and wealthy corporations. In South Africa there are countless small companies and close corporations that need and deserve protection no less than do natural persons. The CA was entitled to retain the provision in IC ch 3 that provides that juristic persons are entitled to the benefits of the entrenched fundamental rights. The objection therefore has no basis in the CPs.

C. NT 12(2): RIGHT TO BODILY INTEGRITY

[1] NT 12(2) provides that:

> "Everyone has the right to bodily and psychological integrity, which includes the right -
>
> (a) to make decisions concerning reproduction;
> (b) to security in and control over their body; and
> (c) not to be subjected to medical or scientific experiments without their informed consent."

Objection was taken to this provision in the NT on the grounds that it opens the way to abortion. The objector argued that the proper interpretation of CP II permits the CA to increase the rights contained in the IC, but prohibits it from reformulating rights in a way that would detract from the protection conferred by the IC. The objector further argued that there are two provisions in the NT which effectively reduce the protection afforded the foetus by the IC. The first is NT 12(2) and the second is the omission of a provision equivalent to IC 33(1)(b). IC 33(1)(b) provides that any limitation of a right contained in the IC "may not negate the essential content of the right". The objector argued that the omission of this right may render it more probable that abortion will be

held to be constitutional.

[2] It should be emphasised that this Court's current task is not to determine whether the NT permits abortion or not but to decide whether or not the NT complies with the CPs. The relevant CP in this case is CP II which requires the CA to include within the NT all "universally accepted fundamental rights, freedoms and civil liberties". Beyond that the CPs give the CA a wide discretion to determine which rights should be included in the NT and how they should be formulated.

[3] In response to the objection made against NT 12(2), certain institutions filed argument in support of the NT. They argued that the right to bodily integrity contained in NT 12(2) is a universally accepted fundamental right and that therefore the CA was obliged to include it in the NT. They also argued that a woman's right to make informed decisions about reproduction needs to be recognised in order to achieve gender equality.

[4] In our view the objection to NT 12(2) cannot be sustained because it is based on an incorrect interpretation of CP II. As we have said above,[143] CP II does not require the CA to repeat the provisions contained in IC ch 3. It merely requires the CA to include in the NT all "universally accepted fundamental rights". The objector did not suggest that in not including a provision such as that contained in IC 33(1)(b), the CA had breached this requirement. In the light of our conclusion, it is not necessary to decide whether the objector's argument that the NT does detract from the protection provided in the IC is correct, nor is it necessary for us to consider further the arguments raised by those institutions defending the NT.

D. NT 23: LABOUR RELATIONS

[5] There were two objections to NT 23.[144] The first was that the omission of the right of employers to lock out workers is in breach of CPs II and XXVIII. The second ground of objection was that NT 23 fails to "recognise and protect" the right of individual employers to engage in collective bargaining as required by CP XXVIII.

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143 See para 40.

144 NT 23 provides as follows:

> "(1) Everyone has the right to fair labour practices.
> (2) Every worker has the right -
> (a) to form and join a trade union;
> (b) to participate in the activities and programmes of a trade union; and
> (c) to strike.
> (3) Every employer has the right -
> (a) to form and join an employers' organisation; and
> (b) to participate in the activities and programmes of an employers' organisation.
> (4) Every trade union and every employers' organisation has the right -
> (a) to determine its own administration, programmes and activities;
> (b) to organise;
> (c) to bargain collectively; and
> (d) to form and join a federation.
> (5) The provisions of the Bill of Rights do not prevent legislation recognising union security arrangements contained in collective agreements."

Lockout

[6] The first and major ground for this objection was based on CP XXVIII which provides that:

> **"Notwithstanding the provisions of Principle XII, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected. Provision shall be made that every person shall have the right to fair labour practices."**

The objectors argued that in order to engage effectively in collective bargaining, bargaining parties must have the right to exercise economic power against each other. Accordingly, went the argument, the right to lock out should be expressly recognised in the NT. It is correct that collective bargaining implies a right on the part of those who engage in collective bargaining to exercise economic power against their adversaries. However, CP XXVIII does not require that the NT expressly recognise any particular mechanism for the exercise of economic power on behalf of workers or employers: it suffices that the right to bargain collectively is specifically protected. Once a right to bargain collectively is recognised, implicit within it will be the right to exercise some economic power against partners in collective bargaining. The nature and extent of that right need not be determined now.

[7] The objectors also argued that, by including the right to strike but omitting the right to lock out, the employers' right to engage in collective bargaining is accorded less status than the right of workers to engage in collective bargaining. However, the effect of including the right to strike does not diminish the right of employers to engage in bargaining, nor does it weaken their right to exercise economic power against workers. Their right to bargain collectively is expressly recognised by the text.[145]

[8] A related argument was that the principle of equality requires that, if the right to strike is included in the NT, so should the right to lock out be included. This argument is based on the proposition that the right of employers to lock out is the necessary equivalent of the right of workers to strike and that therefore, in order to treat workers and employers equally, both should be recognised in the NT. That proposition cannot be accepted. Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace (the last of these being generally called a lockout).[146] The importance of the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lock out. The argument that it is necessary in order to maintain equality to entrench the right to lock out once the right to strike has

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145 This is subject to the issue we discuss below under the heading *The Right of Individual Employers to Bargain Collectively* in para 69.

146 In South Africa the lockout has been the subject of elastic statutory definition. Under the Labour Relations Act 28 of 1956, the lockout was given wide definition to include a range of employer conduct aimed at compelling workers' agreement, including changing the terms and conditions of employment of workers and even the dismissal of workers. The new Labour Relations Act 66 pf 1995 (the "LRA") gives a much more restricted definition to lockout.

been included, cannot be sustained, because the right to strike and the right to lock out are not always and necessarily equivalent.

[9] It was also argued that the inclusion of the right to strike necessarily implies that legislation protecting the right to lock out, such as the LRA, would be unconstitutional. The objectors argued that such a result would be in breach of CP XXVIII. The argument is based on a false premise. The fact that the NT expressly protects the right to strike does not mean that a legislative provision permitting a lockout is necessarily unconstitutional, or indeed that the provisions of the LRA permitting lockouts are unconstitutional. The effect of NT 23 will be that the right of employers to use economic sanctions against workers will be regulated by legislation within a constitutional framework. The primary development of this law will, in all probability, take place in labour courts in the light of labour legislation. That legislation will always be subject to constitutional scrutiny to ensure that the rights of workers and employers as entrenched in NT 23 are honoured.[147]

[10] The second ground for this objection was that, in failing expressly to protect an employer's right to lock out, the NT does not comply with CP II which requires that "all universally accepted fundamental rights, freedoms and civil liberties" shall be provided for and protected in the new Constitution, "due consideration [having been given] to, *inter alia*, the fundamental rights" contained in the IC. The objector argued that, in drafting the Bill of Rights in the NT, the CA was required to give due consideration to all the rights entrenched in the IC, which meant that rights contained in the IC should be omitted only if there were good reasons for so doing. Although it is true that the CA was required to give due consideration to the provisions in the IC, there is nothing in CP II which restrains it from departing from those provisions once it has done so, unless it is shown that the provisions fall within the class of "universally accepted fundamental rights and freedoms". The objectors did not suggest that the CA had not paid due consideration to the provisions of the IC. It also cannot be said that the right of employers to lock out workers is a universally accepted fundamental right as contemplated by CP II. The right to lock out is recognised in only a handful of national constitutions and is not entrenched in any of the major international conventions concerned with labour relations. It cannot be said, therefore, that the omission from NT 23 of a right to lock out is in conflict with CP II.

The Right of Individual Employers to Bargain Collectively

[11] The second objection levelled at NT 23 is based on the failure to entrench the right of individual employers to engage in collective bargaining. The objection was based on CP XXVIII which provides that "the right of employers ... to engage in collective bargaining shall be recognised and protected." The objectors pointed out that NT 23 specifically entrenches only the rights of employers' associations to engage in collective bargaining, and does not specifically entrench the right of individual employers to engage in collective bargaining. It is true that NT 23 does not protect the right of individual workers to bargain, but individual workers cannot bargain collectively except in concert. As stated above, collective bargaining is based on the need for individual workers to act in combination to provide them collectively with sufficient power to bargain effectively with employers. Individual employers, on the other hand, can engage in collective bargaining with their workers and often do so. The failure by the text to protect such a

147 This is not dissimilar to the situation in Germany, although in that country the development of the collective right to strike and lock out is undertaken by the courts with no legislative framework, other than the constitutional one. See, for a discussion, Carl Mischke "Industrial Action in German Law" (1992) 13 *Industrial Law Journal* 1-13, at 4.

right represents a failure to comply with the language of CP XXVIII which specifically states that the right of employers to bargain collectively shall be recognised and protected. This objection therefore succeeds.

E. NT 25: PROPERTY

[12] NT 25 provides as follows:

> "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
> (2) Property may be expropriated only in terms of law of general application -
> (a) for public purposes or in the public interest; and
> (b) subject to compensation, the amount, timing, and manner of payment of which, must be agreed or decided or approved by a court;
> (3) The amount, timing, and manner of payment of compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant factors, including -
> (a) the current use of the property;
> (b) the history of the acquisition and use of the property;
> (c) the market value of the property;
> (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
> (e) the purpose of the expropriation.
> (4) For the purposes of this section -
> (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
> (b) property is not limited to land.
> (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
> (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure, or to comparable redress.
> (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
> (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).
> (9) Parliament must enact the legislation referred to in subsection (6)."

Two major objections were levelled against this provision. The first was that the section does not expressly protect the right to acquire, hold and dispose of property as did IC 28(1). The second objection was that the provisions governing expropriation and the payment of compensation are inadequate.

[13] The first objection raises the question whether the formulation of the right to property adopted by the CA complies with the test of "universally accepted fundamental rights" set by CP II. If one looks to international conventions and foreign constitutions, one is immediately struck by the wide variety of formulations adopted to protect the right to property, as well as by the fact that significant conventions and constitutions contain no protection of property at all. Although article 17 of the UDHR provides that "[e]veryone has the right to own property" and that "[n]o-one shall be arbitrarily deprived" of property, neither the ICESCR nor the ICCPR contains any general protection for property.

[14] Several recognised democracies provide no express protection of property in their constitutions or bills of rights.[148] For the remainder, a wide variety of formulations of the right to property exists. Some constitutions formulate the right to property simply in a negative way, restraining state interference with property rights.[149] Other constitutions express the right in a positive way, entrenching the right to acquire and dispose of property.[150] A further formulation frequently used is to state that "private property is inviolable" subject to expropriation in certain circumstances.[151] This survey suggests that no universally recognised formulation of the right to property exists. The provision contained in the NT, which is a negative formulation, appears to be widely accepted as an appropriate formulation of the right to property. Protection for the holding of property is implicit in NT 25. We cannot uphold the argument that, because the formulation adopted is expressed in a negative and not a positive form and because it does not contain an express recognition of the right to acquire and dispose of property, it fails to meet the prescription of CP II.

[15] The second objection was that the provisions governing expropriation, and in particular for the payment of compensation, also fall short of what is universally accepted as contemplated by CP II. The argument was that the NT should stipulate that the compensation should be calculated on the basis of market value and that expropriation should take place only where the use to which the expropriated land would be put is in the interests of a broad section of the public. The objectors also argued that expropriation for purposes of land, water or related reform contemplated by NT 25(8) fell short of the "universally accepted" understanding of the right to property. Once again, and for the reasons given in the previous paragraph, we cannot accept these arguments. An examination of international conventions and foreign constitutions suggests that a wide range of criteria for expropriation and the payment of compensation exists. Often the criteria for determining the amount of compensation are not mentioned in the constitutions at all.[152] Where the nature of the compensation is mentioned, a variety of adjectives is used including "fair",[153] "adequate",[154] "full",[155] "equitable and appropriate"[156] and "just".[157] Another approach adopted is

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148 See, for example, the Canadian Charter of Rights and Freedoms; and the New Zealand Bill of Rights Act, 1990.

149 See, for example, the fifth and fourteenth amendments of the US Constitution; article 16 of the Belgian Constitution; and article 16 of the Zimbabwean Constitution.

150 See, for example, article 16(1) of the Namibian Constitution and article 105 of the Hong Kong Basic Law.

151 See, for example, article 29 of the Japanese Constitution.

152 See, for example, article 33 of the Spanish Constitution.

153 See, for example, article 62(2) of the Portuguese Constitution and article 16(1)(c) of the Zimbabwean Constitution.

154 See, for example, article 8(1)(b)(i) of the Botswana Constitution and article 16(1)(c) of the Zimbabwean Constitution.

155 See, for example, section 73(1) of the Danish Constitution and article 14(1) of the Netherlands Constitution.

to provide that the amount of compensation should seek to obtain an equitable balance between the public interest and the interests of those affected.[158] Some constitutions, too, prescribe that the compensation must be prompt or made prior to the expropriation.[159] Similarly there is no consistency with regard to the criteria for expropriation itself. The approach taken in NT 25 cannot be said to flout any universally accepted approach to the question.

[16] A further objection was that the NT contains no express recognition of mineral rights. Once again this objection finds no basis in CP II. Our examination of international conventions and foreign constitutions shows that it is extremely rare for there to be any mention of mineral rights within a property clause. It certainly could not be said to be a "universally accepted fundamental right".

Intellectual Property

[17] A further objection lodged was that the NT fails to recognise a right to intellectual property. Once again the objection was based on the proposition that the right advocated is a "universally accepted fundamental right, freedom and civil liberty". Although it is true that many international conventions recognise a right to intellectual property,[160] it is much more rarely recognised in regional conventions protecting human rights[161] and in the constitutions of acknowledged democracies.[162] It is also true that some of the more recent constitutions, particularly in Eastern Europe,[163] do contain express provisions protecting intellectual property, but this is probably due to the particular history of those countries and cannot be characterised as a trend which is universally accepted. In the circumstances, the objection cannot be sustained.

F. NT 26 to 29: SOCIO-ECONOMIC RIGHTS

[18] Sections 26, 27 and 29 in the NT provide rights of access to housing, health care, sufficient food and water, social security and basic education. NT 28, among other things, provides such rights specifically to children. These rights were loosely referred to by the objectors as socio-economic rights. The first objection to the inclusion of these provisions was that they are not

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156 See, for example, article 32 of the Estonian Constitution.

157 See, for example, article 29 of the Japanese Constitution and article 16 of the Namibian Constitution.

158 See, for example, article 14(3) of the German Basic Law.

159 See, for example, article 16 of the Luxembourg Constitution and article 14(1) of the Netherlands Constitution.

160 See, for example, article 27(2) of the UDHR and article 15(1)(c) of the ICESCR.

161 There is no provision protecting intellectual property in, for example, the American Convention on Human Rights, the Banjul Charter on Human and Peoples' Rights or the European Convention on Human Rights.

162 None of the following constitutions contain express protection for intellectual property: the Austrian Basic Law; the Belgian Constitution; the Botswana Constitution; the Canadian Charter of Rights and Freedoms; the German Basic Law; the Indian Constitution; the Japanese Constitution; the Constitution of the United States of America.

163 See, for example, article 51 of the Belarus Constitution; article 54(3) of the Bulgarian Constitution; article 39 of the Estonian Constitution and article 47 of the Macedonian Constitution.

universally accepted fundamental rights. As stated, such an objection cannot be sustained because CP II permits the CA to supplement the universally accepted fundamental rights with other rights not universally accepted.

[19] The second objection was that the inclusion of these rights in the NT is inconsistent with the separation of powers required by CP VI because the judiciary would have to encroach upon the proper terrain of the legislature and executive. In particular the objectors argued it would result in the courts dictating to the government how the budget should be allocated. It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.

[20] The objectors argued further that socio-economic rights are not justiciable, in particular because of the budgetary issues their enforcement may raise. They based this argument on CP II which provides that all universally accepted fundamental rights shall be protected by "entrenched and justiciable provisions in the Constitution". It is clear, as we have stated above, that the socio-economic rights entrenched in NT 26 to 29 are not universally accepted fundamental rights. For that reason, therefore, it cannot be said that their "justiciability" is required by CP II. Nevertheless, we are of the view that these rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the NT will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion. In the light of these considerations, it is our view that the inclusion of socio-economic rights in the NT does not result in a breach of the CPs.

G. NT 29: EDUCATION IN THE LANGUAGE OF CHOICE

[21] In this regard two identical objections were levelled against the certification of NT 29.[164]

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[164] NT 29 provides as follows:

> "(1) Everyone has the right -
> (a) to a basic education, including adult basic education; and
> (b) to further education, which the state must take reasonable measures to make progressively available and accessible.
> (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account -
> (a) equity;
> (b) practicability; and
> (c) the need to redress the results of past racially discriminatory law and practice.
> (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that -
> (a) do not discriminate on the basis of race;
> (b) are registered with the state; and
> (c) maintain standards that are not inferior to standards at comparable public

In both instances the objection furnishes no indication as to which CP has allegedly been violated. It appears that the objection is based on the contention that whereas IC 32(b) provides for a right to be educated in the language of choice, if it is reasonably practicable, under NT 29(2) that right is subject to a balancing, in which equity, practicability and the need to redress past racially discriminatory law and practice are taken into account.

[22] With regard to the right to establish private schools, the objection is that the right provided by IC 32(c) is impoverished in NT 29, in that such right is now subject to state registration and arbitrary administrative decisions.

[23] But, as we have noted before, this Court's task of certifying the NT mandates that NT 29 be measured against a relevant CP, not against the IC. The objectors were unable to point to any CP that is alleged to have been breached. In any event, the various factors set out in NT 29(2)(a) to (c) are the basis on which the state is directed to take positive action to implement the right to receive education in the official language or languages of choice; they impose a positive duty on the state which does not exist under the IC. And under the NT it would clearly never be open to the state, as the objectors fear, arbitrarily to refuse to register a private school. Such action would be challengeable at least under NT 29 itself. Moreover, an obligation to register is a reasonable and justifiable condition which would be permissible under IC 33.

H. NT 32 READ WITH NT SCH 6 S 23(2)(a): ACCESS TO INFORMATION

[24] CP IX requires the NT to make provision for "freedom of information so that there can be open and accountable administration at all levels of government". Read alone, NT 32(1) complies with this requirement by according to everyone "the right of access to (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights". The objection, however, is directed at the mechanism introduced by NT sch 6 s 23 which suspends the operation of NT 32(1) until Parliament has enacted legislation, which must happen "within three years of the date on which the new Constitution took effect". Such legislation, under NT 32(2), may include "reasonable measures to alleviate the administrative and financial burden on the state". Until then, under NT sch 6 s 23(2)(a), the right that is available to every person is that of "access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights".

[25] The transitional measure is obviously a means of affording Parliament time to provide the necessary legislative framework for the implementation of the right to information. Freedom of information legislation usually involves detailed and complex provisions defining the nature and limits of the right and the requisite conditions for its enforcement.[165] The effect of the provision, as we interpret it, is that if the contemplated legislation is not enacted timeously, the transitional arrangement in NT sch 6 as well as the provisions of NT 32(2) fall away and the suspended NT 32(1) automatically comes into operation. The interim right given in NT sch 6 s 23(2)(a) does not comply with the requirements of CP IX, however. What is envisaged by the CP is not access to information merely for the exercise or protection of a right, but for a wider purpose, namely, to ensure that there is open and accountable administration at all levels of government.

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educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions."

[165] Illustrations of the type of legislation which might be necessary can be found by referring to the laws enacted in those countries which have recognised this right, for example, the United States of America, Canada and Australia all have freedom of information legislation.

[26] What must therefore be determined is whether the suspension of the NT 32(1) formulation of the right for three years complies with CP IX.

[27] Details governing freedom of information are not ordinarily found in a constitution, and it is unlikely that the drafters of the CPs contemplated that such provisions would be contained in the NT itself. It is also significant that freedom of information is not a "universally accepted fundamental human right",[166] but is directed at promoting good government. That is why it is dealt with in CP IX, as one of a series of CPs dealing specifically with government.[167] Had freedom of information indeed been a fundamental human right or one of the basic structural requirements for the new dispensation, its suspension would have been inconsistent with the character of the state envisaged by the drafters of the CPs.

[28] But it is not such a right. CP IX requires that "provision" be made for freedom of information in the NT. That has been done in NT 32(1) read with NT sch 6 s 23(2)(a), which clearly delineates the right and puts the legislature on terms under the sanction of unqualified implementation. In the context of CP IX, and of what is reasonably required on the part of the legislature if such provision is to be made, that meets the requirements of the CP. If the legislation is not passed timeously the general but undefined right as formulated in NT 32(1) will come into operation. That is reasonable. The legislature is far better placed than the courts to lay down the practical requirements for the enforcement of the right and the definition of its limits. Although NT 32(1) is capable of being enforced by a court - and if the necessary legislation is not put in place within the prescribed time it will have to be - legislative regulation is obviously preferable.

[29] Although three years from the date of adoption of the NT seem a long time for the necessary legislation to be put in place, the decision as to the time reasonably required to draft the legislation was one to be made by the CA. We cannot say that it exceeded its authority in the decision that it took. In the result, we hold that the provisions of CP IX have been complied with.

I. NT 35(1)(f): BAIL

[30] NT 35(1)(f) provides that:

> "Everyone who is arrested for allegedly committing an offence has the right-
> ....
> (f) to be released from detention if the interests of justice permit, subject to reasonable conditions."

The objection to this section was that it places an onus on an applicant for bail to prove that his or her release would be in the interests of justice. The only basis, however, for such an objection would be that NT 35(1)(f) as formulated fails to recognise a "universally accepted fundamental right" and is therefore in conflict with CP II. But it cannot be said that there is a universally accepted formulation of a right to bail. There are various ways in which pending trial release is dealt with in constitutions and conventions. Sometimes bail is not mentioned at all. When it is mentioned, the right to release is often subject both to the exercise of judicial discretion to

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166 CP II requires the inclusion in the NT of all universally accepted fundamental rights.

167 See CPs VI to X.

determine whether bail should be granted and to the imposition of reasonable conditions.[168] In the circumstances, there is no merit in the objection, and it is not necessary for us to consider whether the objectors have rightly interpreted the clause.

J. NT 36(1): LIMITATIONS OF RIGHTS

[31] It was contended that limitations to fundamental rights protected in a bill of rights are acceptable only if such limitations are "necessary"; NT 36(1), on the other hand, makes provision for rights to be limited in circumstances where such limitations are "reasonable and justifiable". NT 36(1) does not repeat the requirement contained in the IC that in a number of specified cases the limitation must also be "necessary". The result, so it was argued, was that the NT fell short of meeting the standards of universally accepted norms which permit limitations only when they are "necessary".

[32] It is true that international human rights instruments indicate that limitations on fundamental rights are permissible only when they are "necessary" or "necessary in a democratic society".[169] But "necessity" is by no means universally accepted as the appropriate norm for limitation in national constitutions.[170] The term has, moreover, been given various interpretations, all of which give central place to the proportionate relationship between the right to be protected and the importance of the objective to be achieved by the limitation.[171] The content this Court gave to the limitations clause in IC 33(1) in *S v Makwanyane and Another* conformed to that interpretation.[172] Indeed, NT 36(1) is substantially a repetition of what was said in that judgment.[173] But what

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168 See, for example, section 11(e) of the Canadian Charter of Rights and Freedoms; section 24(b) of the New Zealand Bill of Rights Act 1990; section 71 of the Danish Constitution; article 9(3) of the ICCPR.

169 Sieghart *The International Law of Human Rights* (Oxford University Press Oxford 1983) 88-9.

170 See for example, article 1 of the Canadian Charter of Rights and Freedoms; article 19(1) of the German Basic Law.

171 See the discussion of the meaning of the word "necessary" in *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others* 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 55 et seq.

172 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 104:

> "The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based upon proportionality ... [P]roportionality ... calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."

See also *S v Williams and Others* 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC) at para 60 et seq.

173 It permits limitation that is

> "... reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including -

matters for present purposes is that the conceptual requirement established by international norms relative to proportionality or balancing be met. The choice of language lay with the CA. The criteria set out in NT 36(1) do in fact conform to internationally accepted standards, and comply with CP II.

K. NT 37: STATES OF EMERGENCY

[33] NT 37 envisages national legislation authorising the temporary and partial curtailment of the Bill of Rights in limited circumstances and subject to detailed conditions.[174] In principle there can be no objection to such authorisation. Partial curtailment of a bill of rights during a genuine national emergency is not inherently inconsistent with "universally accepted fundamental human rights, freedoms and civil liberties". Nor can it be said that the safeguards provided by NT 37 against possible legislative or executive abuse of emergency powers are inadequate. Two subsidiary points relating to the section have, however, been raised. The first was that NT 37(1) authorises national legislation governing the declaration of an emergency without specifying who may be empowered to issue such a declaration. Although it is correct that the subsection leaves it to Parliament to make the designation, that cannot found a valid objection to certification of NT 37. CP II does not require constitutional designation of the entity which is to be empowered to declare an emergency, nor does universally accepted human rights jurisprudence. None of the other CPs does so either. The envisaged legislation will be subject to constitutional control and, insofar as the executive branch of government may be vested with the power, it is significant that NT 37(2) and (3) involve the legislature and the judiciary as watchdogs. That amply complies with international norms.[175] In the result the objection must fail.

[34] The second point, which arose in the course of oral argument, relates to NT 37(4) and (5), which read as follows:

> "(4) Any legislation enacted in consequence of a declared state of emergency may derogate from the Bill of Rights only to the extent that -
> (a) the derogation is strictly required by the emergency; and
> (b) the legislation -

> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

[174] The subsection reads as follows:

> "A state of emergency may be declared only in terms of an Act of Parliament and only when-
> (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster, or other public emergency; and
> (b) the declaration is necessary to restore peace and order."

The succeeding four subsections are replete with safeguards against abuse of the extraordinary powers which the section empowers Parliament to sanction.

[175] See, for example Chowdhury *Rule of Law in a State of Emergency* (Pinter Publishers London 1989) 55, 58 et seq; Oraa *Human Rights in States of Emergency in International Law* (Oxford University Press Oxford 1992) 40-2.

(i) is consistent with the Republic's obligations under international law applicable to states of emergency;
(ii) conforms to subsection (5); and
(iii) is published in the national Government Gazette as soon as reasonably possible after being enacted.

(5) No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise -
(a) indemnifying the state, or any person, in respect of any unlawful act;
(b) any derogation from this section; or
(c) any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of that table."

[35] The problem lies in a provision in the table referred to in NT 37(5) rendering derogable inter alia the right of accused persons, guaranteed by NT 35(5), to have evidence obtained in circumstances violative of the Bill of Rights excluded if its admission "would render the trial unfair or otherwise be detrimental to the administration of justice".

[36] Had subsection 4 stood alone, paragraph (a) of it might well have sufficed for the protection of rights during states of emergency, to the extent commensurate with such situations of peril. The addition of subsection 5, however, has introduced a differentiation between the importance of various rights which seems invidious and, in some instances at least, so inexplicable as to be arbitrary. We can think of no reason why some of the rights that are said to be derogable in states of emergency should be treated as such. A clear example is the derogability of NT 35(5). Derogation from such a right cannot be justified even in an emergency. Any attempt at such justification would fail in terms of NT 37(4). No purpose is therefore served by this attempt to render derogable what can in practice never be justified.

[37] Although we accept that it is in accordance with universally accepted fundamental human rights to draw a distinction between those rights which are derogable in a national emergency and those which are not, this should be done more rationally and thoughtfully than it is done in NT 37(5).

L. MARRIAGE AND FAMILY RIGHTS

[38] The objectors stated that almost all international human rights instruments include provisions either recognising the family as the basic unit of society or else protecting the right freely to marry and to establish family life. The constitutions of many democratic countries also expressly contain such rights. Accordingly, they argued, the absence of such rights in the NT violated CP II.

[39] From a survey of international instruments it is clear that, in general, states have a duty, in terms of international human rights law, to protect the rights of persons freely to marry and to raise a family. The rights involved are expressed in a great variety of ways[176] with different emphases in the various instruments. Thus the African Charter on Human and Peoples' Rights expressly protects the right to family life (article 18), but says nothing about the right to marriage. Similarly the Convention on the Elimination of All Forms of Discrimination against Women departs from many other international documents by emphasising rights of free choice, equality and dignity in all

176 Sieghart supra n 75 at 201-2 enumerates six distinct rights: the right to marry; the right to found a family; the right not to marry without full and free consent; equal rights to, in, and after marriage; the family's right to protection; and the right of children to protection.

matters relating to marriage and family relations (article 16), without referring at all to the family as the basic unit of society.

[40] A survey of national constitutions in Asia,[177] Europe,[178] North America[179] and Africa[180] shows that the duty on the states to protect marriage and family rights has been interpreted in a multitude of different ways. There has by no means been universal acceptance of the need to recognise the rights to marriage and to family life as being fundamental in the sense that they require express constitutional protection.

[41] The absence of marriage and family rights in many African and Asian countries reflects the multi-cultural and multi-faith character of such societies. Families are constituted, function and are dissolved in such a variety of ways, and the possible outcomes of constitutionalising family rights are so uncertain, that constitution-makers appear frequently to prefer not to regard the right to marry or to pursue family life as a fundamental right that is appropriate for definition in constitutionalised terms. They thereby avoid disagreements over whether the family to be protected is a nuclear family or an extended family, or over which ceremonies, rites or practices would constitute a marriage deserving of constitutional protection. Thus, some cultures and faiths recognise only monogamous unions while others permit polygamy. These are seen as questions that relate to the history, culture and special circumstances of each society, permitting of no universal solutions.

[42] International experience accordingly suggests that a wide range of options on the subject would have been compatible with CP II. On the one hand, the provisions of the NT would clearly prohibit any arbitrary state interference with the right to marry or to establish and raise a family. NT 7(1) enshrines the values of human dignity, equality and freedom, while NT 10 states that everyone has the right to have their dignity respected and protected. However these words may come to be interpreted in future, it is evident that laws or executive action resulting in enforced marriages, or oppressive prohibitions on marriage or the choice of spouses, would not survive constitutional challenge. Furthermore, there can be no doubt that the NT prohibits the kinds of violations of family life produced by the pass laws or the institutionalised migrant labour system, just as it would not permit the prohibitions on free choice of marriage partners imposed by laws such as the Prohibition on Mixed Marriages Act 55 of 1949.[181]

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177 The Constitution of Pakistan (s 35) contains provisions expressly protecting marriage and family life, while the constitutions of India, Malaysia and Singapore do not.

178 In southern and eastern Europe the general rule is for constitutions to contain express provisions protecting marriage and family life, while in northern Europe the tendency is the opposite. Germany (art 6 of the Basic Law) has an express provision, while Austria has none; the Belgian Constitution (art 22) simply protects family privacy while the constitution of the Netherlands has no such provision at all.

179 Neither the centuries-old Constitution of the United States of America, nor the very recent Canadian Charter of Rights and Freedoms, contains express provisions dealing with rights relating to family or marriage.

180 The constitutions of Tunisia, Mauritius and Morocco do not include family and marriage rights, while those of Ethiopia (art 34(3)) and Namibia (art 14) do. In Botswana (art 15) and Zambia (art 23(4)(c)), the only reference to the family and marriage comes in an indirect way, namely, through a qualification to the non-discrimination principle, which permits recognition of personal law.

181 The pass laws would be struck by the right to freedom of movement (NT 21(1)) and the Prohibition of Mixed Marriages Act 55 of 1949 would fall foul of the equality clause (NT 9).

[43] On the other hand, various sections in the NT either directly or indirectly support the institution of marriage and family life. Thus, NT 35(2)(f)(i)and (ii) guarantee the right of a detained person to communicate with, and be visited by, his or her spouse or partner and next of kin.

[44] There are two further respects in which the NT deals directly with the issue, and both relate to family questions of special concern. The first deals with the rights of the child, wherein the right to family and parental care or appropriate alternative care is expressly guaranteed (NT 28(1)(b)). The second responds to the multi-cultural and multi-faith nature of our country. NT 15(3)(a) authorises legislation recognising "marriages concluded under any tradition or a system of religious, personal or family law", provided that such recognition is consistent with the general provisions of the NT.

[45] In sum, the CA was free to follow either those states that expressly enshrined protection of marriage and family rights in their constitutions, or else those that did not. It took a middle road and, in the circumstances, the objection cannot be sustained.

M. MISCELLANEOUS POINTS

[46] There were a variety of other objections to provisions in and omissions from the Bill of Rights. In respect of each objection, however, the basic flaw is that the CPs contain nothing which lends it support. We repeat that it is not for us but for the CA, the duly mandated agent of the electorate, to determine - within the boundaries of the CPs - which provisions to include in the Bill of Rights and which not. We can accordingly express no view on the merits, or otherwise, of the objections which advocated the following:

(a) the reinstatement of capital punishment;
(b) that abortion should be permitted;
(c) that abortion should be prohibited;
(d) amendments to the sections dealing with education and, in particular, the language medium of education;
(e) amendments to the sections dealing with equality, affirmative action, privacy, the environment, freedom of movement with reference to illegal immigrants, language and culture and the right to present petitions;
(f) the banning of pornography, obscenity and blasphemy;
(g) the constitutional protection of the right to self-defence and to possess firearms;
(h) discrimination against homosexuals; and
(i) the prohibition on restraints on trade.

CHAPTER IV. CENTRAL GOVERNMENT ISSUES

[47] Having dealt with the provisions of the NT relating to the relationship between the state and the individual - and between individuals - we turn to a consideration of the relationship between organs of state at the national level. The discussion relates to a wide variety of issues and commences with the fundamental relationship between the three pillars of the South African state.

A. SEPARATION OF POWERS BETWEEN THE LEGISLATURE AND THE EXECUTIVE

[48] An objection was taken to various provisions of the NT[182] that are said to violate CP VI.

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[182] NT 47(1)(a)(i), in terms of which only the President has to leave the NA whereas the Deputy President, Ministers and Deputy Ministers are entitled to remain members; NT 91(3)(a), in terms of which the President must select the Deputy President from among the members of the NA; NT 91(3)(b), which entitles the

This CP reads:

> "**There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.**"

The principal objection is directed at the provisions of the NT which provide for members of executive government also to be members of legislatures at all three levels of government. It was further submitted that this failure to effect full separation of powers enhances the power of executive government (particularly in the case of the President and provincial Premier), thereby undercutting the representative basis of the democratic order.

[49] The objector does not suggest that there has not been an adequate separation of the judicial power from the legislative and executive power, or that there has not been an adequate separation of the functions between the legislature, the executive and the judiciary. His complaint is that members of the Cabinet continue to be members of the legislature and, by virtue of their positions, are able to exercise a powerful influence over the decisions of the legislature. He contends that this is inconsistent with the separation of powers and cites as examples to be followed the United States of America, France, Germany and the Netherlands.

[50] There is, however, no universal model of separation of powers, and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute. This is apparent from the objector's own examples. While in the USA, France and the Netherlands members of the executive may not continue to be members of the legislature, this is not a requirement of the German system of separation of powers. Moreover, because of the different systems of checks and balances that exist in these countries, the relationship between the different branches of government and the power or influence that one branch of government has over the other, differs from one country to another.

[51] The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation. In Justice Frankfurter's words, "[t]he areas are partly interacting, not wholly disjointed".[183]

President to select any number of Ministers from the ranks of NA members; NT 91(3)(c), which restricts the President's power of appointment of Ministers from outside the NA; NT 91(4), which requires the President to appoint a member of the Cabinet to be the leader of government business in the NA; NT 132, which empowers the provincial Premier to appoint no fewer than five and no more than ten members of the provincial legislature to the Executive Council; NT 151(2), in terms of which a Municipal Council is both the legislative and executive authority of local government. It should be noted that although the President is to be elected from among the members of the NA, under NT 87 he ceases to be a member of the NA upon being elected.

183 *Youngstown Sheet & Tube Co v Sawyer* 343 US 579, 610 (1951). For the United States' approach to the doctrine, see generally Stone et al *Constitutional Law* (Little Brown & Co Boston 1986) 342; Tribe *American Constitutional Law* 2 ed (Foundation Press New York 1988) 18-22; *United States v Nixon* 418 US 683, 703-5 (1974).

[52] NT 43 vests the legislative authority of government in the national sphere in Parliament and in the provincial sphere in the provincial legislatures. NT 85 and 125 vest the executive power of the Republic in the President and the executive power of the provinces in the Premiers, respectively. NT 165 vests the judicial authority of the Republic in the courts. This constitutional separation of powers has important consequences for the way in which and the institutions by which power can be exercised.[184]

[53] As the separation of powers doctrine is not a fixed or rigid constitutional doctrine, it is given expression in many different forms and made subject to checks and balances of many kinds. It can thus not be said that a failure in the NT to separate completely the functionaries of the executive and legislature is destructive of the doctrine. Indeed, the overlap provides a singularly important check and balance on the exercise of executive power. It makes the executive more directly answerable to the elected legislature. This is emphasised by the provisions of NT 92(2), which indicate that members of the Cabinet are "accountable collectively and individually to Parliament for the performance of their functions". In terms of NT 92(3)(b), Cabinet members are compelled to provide Parliament with full and regular reports concerning matters under their control. And finally, the legislature has the power to remove the President and indirectly the Cabinet (which is presidentially appointed) under NT 89.

[54] Within the broad requirement of separation of powers and appropriate checks and balances, the CA was afforded a large degree of latitude in shaping the independence and interdependence of government branches. The model adopted reflects the historical circumstances of our constitutional development. We find in the NT checks and balances that evidence a concern for both the over-concentration of power and the requirement of an energetic and effective, yet answerable, executive. A strict separation of powers has not always been maintained;[185] but there is nothing to suggest that the CPs imposed upon the CA an obligation to adopt a particular form of strict separation, such as that found in the United States of America, France or the Netherlands.

[55] What CP VI requires is that there be a separation of powers between the legislature, executive and judiciary. It does not prescribe what form that separation should take. We have previously said that the CPs must not be interpreted with technical rigidity.[186] The language of CP VI is sufficiently wide to cover the type of separation required by the NT,[187] The Federal structure

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184 Supra n 7.

185 Separation of the executive from the legislature is required below the level of Cabinet members and Deputy Ministers. Thus, NT 47(1)(a) precludes a person appointed by or in the service of the state, other than the President, Deputy President, Ministers and Deputy Ministers, from being a member of the NA, and similar restrictions are imposed by NT 106 in respect of membership of provincial legislatures by such officers and employees, other than the Premier and members of the Executive Council of a province. Although NT 47(1)(a)(ii) and NT 106(1)(a)(ii) permit exceptions to be made by legislation to the general prohibition against members of the executive, other than members of the Cabinet and Deputy Ministers, being members of the legislature, this can be done only in respect of persons whose functions are compatible with those of the members of such a legislature.

186 See para 36 above.

187 In *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v Dignan* (1931) 46 CLR 73 at 89 Dixon J, dealing with the Australian Constitution which distinguishes between legislative, executive and judicial powers in much the same way as does the NT, said: "These provisions, both in substance and in arrangement, closely follow the American model [of separation of powers] upon which they were framed."

of the Australian Constitution isdiffers in material respects from the NT, but the formal division of power between the branches of the federal government is similar to that made in the NT. and the objection that CP VI has not been complied with must accordingly be rejected.

B. THE POWER OF THE PRESIDENT TO ISSUE PARDONS

[56] The powers and functions of the President are set out in NT 84(1) and (2). The objection argued on behalf of the objectors concerns the power given to the President in terms of NT 84(2)(j). NT 84 provides in part:

> "(1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.
>
> (2) The President is responsible for
>
> ....
>
> (j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures".

[57] It is alleged that this power offends CPs IV, VI and VII. The basis of the objection is, first, that the exercise of the power is not constrained by any constitutional or common law procedures, or any substantive constitutional criteria or rules, and that no reasons need be given for its exercise or for any refusal to exercise the power. It was contended that the power therefore detracts from the requirements of CP IV, which proclaims the supremacy of the Constitution. Second, it was argued that the responsibility entrusted to the President is an executive and not a judicial power, yet its exercise encroaches upon the judicial terrain and in fact overrules or negates judicial decisions in violation of both the separation of powers requirement of CP IV and the provisions pertaining to judicial functions in CP VII.

[58]

The power of the South African head of state to pardon was originally derived from royal prerogatives. It does not, however, follow that the power given in NT 84(2)(j) is identical in all respects to the ancient royal prerogatives. Regardless of the historical origins of the concept, the President derives this power not from antiquity but from the NT itself. It is that Constitution that proclaims its own supremacy.[188] Should the exercise of the power in any particular instance be such as to undermine any provision of the NT, that conduct would be reviewable.

[59] The objection based on CPs VI and VII really amounts to a complaint about a perceived overlap of powers and functions between the President, as a member of the executive, on the one hand and the judiciary on the other. It has never been part of the general functions of the court to pardon and reprieve offenders after justice has run its course. The function itself is one that is ordinarily entrusted to the head of state in many national constitutions, including in countries where the constitution is supreme[189] and where the doctrine of separation of powers is strictly observed.

Later in his judgment (at page 96) he says: "The arrangement of the Constitution and the emphatic words in which the three powers are vested by sections. 1, 61 and 71 combine with the careful and elaborate provisions constituting or defining the repositories of the respective powers to provide evidence of the intention with which the powers were apportioned and the organs of government separated and described."

188 NT 2.

189 See, for example, the Basic Law of the Federal Republic of Germany Art 60(2); Constitution of India Art 72; Constitution of the Republic of Namibia Art 32(3)(d); Constitution of the United States art II sec 2(1).

C. COURTS AND THE ADMINISTRATION OF JUSTICE

[60] We now consider the objections levelled against various provisions contained in NT ch 8 which deal with courts and the administration of justice. The CPs which are relevant to this Chapter are CP V, CP VI, and CP VII.

[61] The main objections[190] with regard to this Chapter are centred on:

(a) the composition and independence of the Judicial Service Commission (the "JSC");
(b) the independence of the judiciary, with particular reference to the appointment of acting judges;
(c) the position and independence of the magistracy;
(d) the prosecuting authority; and
(e) the participation of lay people in court decisions.

We now proceed to deal with each of these matters.

Judicial Service Commission

[62] The JSC has a pivotal role in the appointment and removal of judges.[191] It consists of the Chief Justice, the President of the Constitutional Court, one Judge President, two practising attorneys, two practising advocates, one teacher of law, six members of the NA, four permanent delegates to the National Council of Provinces ("NCOP"), four members designated by the President as head of the national executive, and the Minister of Justice.[192] The practising attorneys and advocates and the teacher of law are to be designated by their respective professions; the Judge President is to be designated by all the Judges President; at least three members of the NA must come from opposition parties; the four delegates of the NCOP must be supported by the vote of at least six of the nine provinces; and the four presidential appointments are to be made after consultation with the leaders of all the parties in the NA.

[63] It was contended that Parliament and the executive are over-represented on the JSC and that the President, who appoints the Minister of Justice, the Chief Justice, the President of the Constitutional Court and four members of the JSC, and who selects the Constitutional Court judges from the JSC list or lists, has been given too dominant a role in the appointment of judges. The President also has the power in terms of NT 178(2) to select a profession's nominees if there is disagreement within a profession as to who its nominees should be. The President is required to

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190 Objection was also taken to the power of the national legislature in terms of the NT to pass legislation concerned with court procedures. This objection has no substance. Any such legislation would be subject to constitutional control.

191 In terms of NT 174(4) and (6) appointments of Constitutional Court judges are to be made from a list or lists compiled by the JSC, and the appointment of judges to all other courts must be made on the advice of the JSC. In terms of NT 174(3) the President of the Constitutional Court and the Chief Justice are to be appointed by the President after consultation with the JSC. The President must also consult the leaders of all political parties represented in the NA before appointing the President of the Constitutional Court. In terms of NT 177 a judge may be removed from office only if the JSC finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct, and the NA calls for that judge to be removed by a resolution adopted by at least two-thirds of its members.

192 NT 178(1).

do this after consulting the profession concerned and is also required to consult the JSC before appointing the Chief Justice,[193] and the JSC and the leaders of parties represented in the NA before appointing the President of the Constitutional Court.[194]

[64] CP VI makes provision for a separation of powers between the legislature, executive and judiciary and CP VII requires the judiciary to be "appropriately qualified, independent and impartial". NT 174(1) requires that a person appointed to judicial office be "appropriately qualified" and a "fit and proper person" for such office. These are objective criteria subject to constitutional control by the courts, and meet the requirements of CP VII in that regard. The CPs do not, however, require a JSC to be established and contain no provision dealing specifically with the appointment of judges.

[65] The requirement of CP VI that there be a separation of powers between the legislature, executive and judiciary is dealt with elsewhere in this judgment.[195] An essential part of the separation of powers is that there be an independent judiciary. The mere fact, however, that the executive makes or participates in the appointment of judges is not inconsistent with the doctrine of separation of powers or with the judicial independence required by CP VII. In many countries in which there is an independent judiciary and a separation of powers, judicial appointments are made either by the executive or by Parliament or by both.[196] What is crucial to the separation of powers and the independence of the judiciary is that the judiciary should enforce the law impartially and that it should function independently of the legislature and the executive. NT 165 is directed to this end. It vests the judicial authority in the courts and protects the courts against any interference with that authority. Constitutionally, therefore, all judges are independent.

[66] Appointment of judges by the executive or a combination of the executive and Parliament would not be inconsistent with the CPs. The JSC contains significant representation from the judiciary, the legal professions and political parties of the opposition. It participates in the appointment of the Chief Justice, the President of the Constitutional Court and the Constitutional Court judges, and it selects the judges of all other courts. As an institution it provides a broadly based selection panel for appointments to the judiciary and provides a check and balance to the power of the executive to make such appointments. In the absence of any obligation to establish such a body, the fact that it could have been constituted differently, with greater representation being given to the legal profession and the judiciary, is irrelevant. Its composition was a political choice which has been made by the CA within the framework of the CPs. We cannot interfere with that decision, and in the circumstances the objection to NT 178 must be rejected.

Acting Judges

[67] Objections were raised in respect of the provisions of the NT dealing with the appointment of acting judges. They were to the effect that

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193 NT 174(3).

194 NT 174(3).

195 See Chapter IV.A above.

196 This is the case, for example, in the United Kingdom, Canada, Australia, New Zealand, India, the United States of America and Germany, as well as in many other countries.

(a) the Minister of Justice effectively has a sole discretion to make the appointments of all acting judges, save for the appointment of acting judges to the Constitutional Court;
(b) the principle of separation of powers is compromised since political control over these appointments becomes possible; and
(c) safeguards such as tenure, an open process and involvement of the JSC have been omitted.

[68] The fact that the Minister has a significant role in the appointment of acting judges is not in itself a contravention of CP VI. We have dealt in paragraphs 122-4 of this judgment with the reasons for this conclusion.

[69] The appointment of acting judges is a well established feature of the judicial system in South Africa. Such appointments are made to fill temporary vacancies which occur between meetings of the JSC, or when judges go on long leave, are ill or are appointed to preside over a commission. These appointments are necessary to ensure that the work of the courts is not disrupted by temporary vacancies or the temporary absence or disability of particular judges.

[70] That acting judges have no security of tenure, and may therefore be perceived to lack an important guarantee of the independence that is a prerequisite for judicial office, is relevant to the requirements of CP VII. If the appointment of acting and permanent judges were to be at the discretion of the Minister there would be concern on this score. But this is not the case. Acting appointments are essentially temporary appointments for temporary purposes. Although judges are appointed by the President in terms of NT 174(6), the President has to act on the advice of the JSC. The JSC is an independent body. If there is a vacancy in a court the JSC is under a duty to fill it. It may no doubt delay or defer an appointment until a suitable candidate is identified, but it should not be assumed that it will abdicate its responsibility by allowing permanent vacancies to be filled indefinitely by acting judges. Acting appointments provide it with a valuable opportunity for assessing the qualities of potential judges. The use of part-time judges has become a feature of the court system in England, which is a country always associated with an independent judiciary. Such appointments are made there for the same reasons as they are made in South Africa: "to assist the work of the courts" and to "give to possible candidates for full-time appointments the experience of sitting judicially and an opportunity to establish their suitability".[197]

[71] Acting appointments often have to be made urgently and unexpectedly. The JSC is a large body and there are practical reasons why a meeting of the JSC cannot be convened whenever the need arises for such an appointment to be made. It was contended, however, that NT 175 confers too much power on the Minister and that the necessary checks and balances on the exercise of such power are lacking.

[72] Appointment of an acting judge to the Constitutional Court, which is the court of last instance on all constitutional matters,[198] is in a special category. NT 175(1) requires such appointments to be made by the President on the recommendation of the Minister acting with the

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197 *Judicial Appointments: the Lord Chancellor's Policies and Procedures* (1990) at 8, cited by Friedland *A Place Apart: Judicial Independence and Accountability in Canada* (Canadian Judicial Council Ottawa 1995) 249.

198 NT 167(3)(a).

concurrence of the President of the Constitutional Court and the Chief Justice. All three are members of the JSC and the requirement that there be agreement between them as to the person to be appointed meets any reasonable concern that the power of appointing an acting Constitutional Court judge might be abused.

[73] In terms of NT 175(2), acting appointments to other courts can be made by the Minister of Justice after consultation with the senior judge of the court on which the acting judge will serve. The constitutional requirement that such consultation take place is a formalisation of a constitutional convention followed in many Commonwealth countries in which the judiciary is regarded as independent. It leaves the final decision to the Minister but requires the decision to be taken in good faith with due regard to the advice given. An acting judge is obliged by NT sch 2 s 6 to take an oath or to make a solemn affirmation to uphold the Constitution and "administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law". An acting judge is protected by the provisions of NT 165 and sits only in cases assigned by the senior judge of the court. The Minister therefore has no control over the cases that such person will hear, and is precluded by NT 165 from interfering in any way with the discharge by the acting judge of his or her duties.

[74] In our view there are adequate safeguards in the NT to meet the requirements of CP VII and the objection taken to NT 175 must be rejected.

Independence of the Magistracy

[75] NT 165 states that judicial authority is vested in the courts (which according to NT 166(d) includes the magistrates' courts) and that the courts are independent and subject only to the Constitution and the law, which they must apply impartially without fear, favour or prejudice.

[76] The appointment of magistrates is governed by NT 174(7), which provides that

> "[o]ther judicial officers 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."

There is no equivalent in the NT to IC 109 which provides for the establishment of a Magistrates Commission, as follows:

> "There shall be a Magistrates Commission established by law to ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against magistrates, take place without favour or prejudice, and that the applicable laws and administrative directives in this regard are applied uniformly and properly, and to ensure that no victimization or improper influencing of magistrates occurs."

[77] Objection was made to the NT on the grounds that the independence of the magistracy, as required by CP VII, was not satisfactorily secured in the NT. In particular, the objectors stated that (a) there were no express provisions governing the appointment, term of office, remuneration and removal from office of magistrates; and (b) there was no magistrates' commission such as that established by the IC.

[78] The CPs do not require such matters to be dealt with in the NT. The independence of all courts is guaranteed by NT 165. NT 174(7) provides that the appointment of "other judicial officers" will be provided for in terms of an Act of Parliament. Such legislation will be subject to constitutional control, and if it undermines the independence and impartiality of the courts, which

are specifically protected in terms of NT 165, it will not be valid. In the circumstances it is our view that the requirements of CP VII have therefore been met.

[79] A further objection was taken to NT 170 which excludes from the jurisdiction of the magistrates' courts the power to enquire into or to pronounce on the constitutionality of any legislation or any conduct of the President. This, it was argued, contravenes CP VII, read with CP II and CP V. CP VII requires that the judiciary should "have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights", while the requirements of CP II are that the fundamental rights, freedoms and civil liberties be entrenched and justiciable. CP V requires that the legal system ensures the equality of all before the law and an equitable legal process. By preventing the magistrates from enquiring into or ruling on the constitutionality of any legislation, however subordinate, in the course of criminal or civil proceedings otherwise within their jurisdiction, it was argued, the NT precludes the majority of South African courts from safeguarding and enforcing the NT where legislation or the conduct of the President is under scrutiny. The NT, therefore, makes it unnecessarily difficult for litigants and accused persons in the magistrates' courts to invoke and rely upon the Constitution.

[80] Neither do we accept this objection. The mere fact that some, but not all, courts have jurisdiction to decide constitutional issues does not mean that CP VII has not been complied with. Differences between the jurisdictions of "lower" and "higher" courts are not an unusual feature of court systems elsewhere in the world. The CA was entitled to confine jurisdiction over particular matters, including constitutional jurisdiction, to the "higher" courts, as has been done in the IC. The fact that such a decision was taken does not mean that the judiciary lacks the jurisdiction to safeguard and enforce the Constitution and all fundamental rights. It means no more than that litigants who wish to turn to the courts for enforcement of such rights must look to the "higher" and not the "lower" courts.

[81] The independence and impartiality of the judiciary are adequately protected by the involvement of the JSC in appointments of judges to the "higher" courts, and by the constitutional requirement guaranteeing the independence and impartiality of judicial officers in the "lower" courts.

The Prosecuting Authority

[82] Objection was taken to NT 179 which makes provision for a single national prosecuting authority consisting of a National Director of Public Prosecutions, Directors of Public Prosecutions and prosecutors. In terms of NT 179(2), the prosecuting authority has the power to institute criminal proceedings on behalf of the state. NT 179(5) provides that the National Director of Public Prosecutions is vested with powers which include the determination of prosecution policy, the issuing of policy directives which have to be observed in the prosecution process, the power to intervene in the prosecution process when policy directives are not complied with and the ability to review a decision to prosecute or not to prosecute.

[83] It was contended that the provisions of NT 179 do not comply with CP VI, which requires a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness. The objection was based primarily on the fact that, in terms of NT 179(1), the National Director of Public Prosecutions is appointed by the President as head of the national executive. There is no substance in this contention. The prosecuting authority is not part of the judiciary and CP VI has no application to it. In any event, even if it were part of the judiciary, the mere fact that the appointment of the head of the national prosecuting authority is made by the President does not in itself contravene the

doctrine of separation of powers.

[84] The decision in *Ex parte Attorney-General, Namibia: In Re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General*[199] was relied upon in support of the objection. This case stressed the importance of the prosecuting authority in a constitutional state being independent and pointed to the potential danger of empowering political appointees to decide whether or not prosecutions should be instituted.

[85] The dispute in *Ex parte Attorney-General* arose out of the terms of the Namibian Constitution which provide that there should be an Attorney-General and a Prosecutor-General. The Attorney-General is a political appointment and holds office at the discretion of the President without any security of tenure. The Prosecutor-General is appointed by the President on the recommendation of the Judicial Service Commission and under the Constitution is vested with the power to prosecute in the name of the Republic of Namibia. The Court had to construe the Constitution and determine whether the Prosecutor-General was subject to the instructions of the Attorney-General. It concluded that he was not.

[86] In the course of the judgment reference was made to the lack of uniformity in Commonwealth countries in regard to the status of the prosecuting authority. It was said that

> "... there is no single policy to be discerned in these countries as their constitutions have adopted different models and, in some cases, a hybrid mixture. Moreover in none of them has the same language been used as in the Constitution of Namibia."[200]

[87] *Ex parte Attorney-General* was concerned with the application of the particular prosecuting model selected by the Namibian Constitution. The decision as to the model to be adopted for the prosecuting authority in the NT is not prescribed by the CPs and was a decision to be taken by the CA. If that decision complies with the requirements of the CPs we have no power to set it aside. The choice that was made is not inconsistent with CP VII nor with any other of the CPs.

[88] NT 179(4) provides that the national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. There is accordingly a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts. In the circumstances, the objection to NT 179 must be rejected.

Participation of Lay Persons in Court Decisions

[89] Objections were also made to NT 180(c), which provides for "the participation of people other than judicial officers in court decisions".

The objectors contended that the participation in court decisions by people other than judicial officers was a violation of CP VII, which required the judiciary to be "appropriately qualified". The objections are, in our view, ill-conceived and overlook the fact that the provisions of NT 180(c) merely permit the participation of lay people in the decisions of the courts, but do not provide for the appointment of such people as, or in place of, judicial officers. The use of lay people as jurors

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199 1995 (8) BCLR 1070 (NmS).

200 Id at 1085G.

and assessors is a well-established practice in many parts of the world. The implementation of NT 180(c), and the method of appointment, role and functions of assessors and such lay people, would be determined by legislation. If it were to interfere with the integrity of judicial authority that would be subject to constitutional control.

[90] We accordingly find that CP VII is not violated by this section.

D. IMMUNISING LEGISLATION FROM CONSTITUTIONAL SCRUTINY

NT 241(1)

[91] NT 241(1) provides that the provisions of the LRA shall, despite the provisions of the Constitution, remain valid until they are amended or repealed. This provision of the NT is objected to on the grounds that it is in conflict with CP IV, which provides that the Constitution shall be supreme, and CPs II and VII, which provide that the fundamental rights contained in the Constitution shall be justiciable. The purpose of NT 241(1) seems clear. The provisions of the LRA are to remain valid and not to be subject to constitutional review until they are amended or repealed. This section is in conflict with the CPs. If CPs II, IV and VII are read together, it is plain that statutory provisions must be subject to the supremacy of the Constitution unless they are made part of the Constitution itself. If that route is followed, the provisions must comply with the CPs and must be subject to amendment by special procedures as contemplated by CP XV. This is not the route adopted in NT 241(1). Alternatively, if the provisions are not part of the Constitution, they must be subject to constitutional review as contemplated by CPs II and VII. If this were not the case, the CA would have been entitled to shield any number of statutes from constitutional review. This could not have been the intention of the drafters of the CPs. NT 241(1) clearly intends to protect the provisions of the LRA from constitutional review without making it part of the Constitution. The section is not in compliance with the CPs.

NT sch 6 s 22(1)

[92] NT sch 6 s 22(1)(b) provides that the provisions of the Promotion of National Unity and Reconciliation Act 34 of 1995, as amended,[201] are valid. Although this is a slightly different formulation from that adopted in NT 241(1), it nevertheless seeks to achieve the same goal, exempting the named statute from constitutional review. For the reasons given above, neither is this provision in compliance with the CPs. However, NT sch 6 s 22(1)(a) is not in breach of the CPs. This provision adds the text of the epilogue of the IC to the text of the NT. As such, that provision is rendered part of the NT and subject to constitutional amendment in the ordinary course. It was not argued and it could not have been argued that the text of the epilogue was in breach of the CPs on any other ground.

E. AMENDING THE CONSTITUTION

[93] Two related objections were lodged with regard to the entrenchment of the provisions of the NT. The first relates to procedures for the amendment of the NT as prescribed in NT 74 and the second concerns the entrenchment of the Bill of Rights in the NT.

Amendment of Constitutional Provisions: NT 74

[94] The issue is whether the provisions of NT 74 comply with the requirements of CP XV, which prescribes "special procedures involving special majorities" for amendments to the NT. The objection is that NT 74 provides for "special majorities" but not for "special procedures". It

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201 Which created the body known as the Truth and Reconciliation Commission.

therefore becomes necessary to determine what is meant by "special procedures involving special majorities".

[95] It is clear that CP XV makes a distinction between procedures and majorities involved in amendments to ordinary legislation, on the one hand, and to constitutional provisions on the other. Its purpose is obviously to secure the NT, the "supreme law of the land",[202] against political agendas of ordinary majorities in the national Parliament. It is appropriate that the provisions of the document which are foundational to the new constitutional state should be less vulnerable to amendment than ordinary legislation. The requirement of "special procedures involving special majorities" must therefore necessarily mean the provision of more stringent procedures as well as higher majorities when compared with those which are required for other legislation.[203]

[96] NT 74 must be contrasted with NT 53(1), which makes provision for amendments to ordinary legislation. The amendment of a constitutional provision requires the passing of a bill by a two-thirds majority of all the members of the NA.[204] NT 53(1) deals with amendments to ordinary legislation (other than money bills).[205] It requires that "a majority of the members of the National Assembly must be present before a vote may be taken on a bill or an amendment to a bill"[206] and that before a vote may be taken on any other question before the NA, at least one-third of the members must be present.[207] Finally, it provides that all questions before the NA are decided by a majority of the votes cast.[208]

[97] There is another form of entrenchment with regard to NT 1 and NT 74(2), where the amending provision must be supported by a majority of 75 percent of the members of the NA.[209] Special procedures are invoked where an amendment affects the NCOP, provincial boundaries, powers, functions or institutions or deals with a provincial matter. Then the amendment must, in addition to the two-thirds majority of the members of the NA, be approved by the NCOP, supported by a vote of at least six of the provinces.[210] Where the bill concerns only a specific province or provinces, the NCOP may not pass it unless it has been approved by the relevant provincial legislature or legislatures.[211]

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202 CP IV.

203 There are many examples of such special majorities and procedures, e.g., s 152 of the South Africa Act, 1909 and art 182 of the Namibian Constitution.

204 NT 74(1)(a).

205 NT 77 deals with amendments to money bills.

206 NT 53(1)(a).

207 NT 53(1)(b).

208 NT 53(1)(c).

209 NT 74(2).

210 NT 74(1)(b).

211 NT 74(3).

[98] The two-thirds majority of all members of the NA which is prescribed for the amendment of an ordinary constitutional provision is therefore a supermajority which involves a higher quorum.[212] No special formalities are prescribed. We are of the view that, in the context of the CPs, the higher quorum is an aspect of the "special majorities" requirement and cannot be regarded as part of "special procedures". It is of course not our function to decide what is an appropriate procedure, but it is to be noted that only the NA and no other House is involved in the amendment of the ordinary provisions of the NT; no special period of notice is required; constitutional amendments could be introduced as part of other draft legislation; and no extra time for reflection is required. We consider that the absence of some such procedure amounts to a failure to comply with CP XV.

Entrenchment of the Bill of Rights

[99] CP II requires that

> "**all universally accepted rights, freedoms and civil liberties ... shall be provided for and protected by entrenched and justiciable provisions in the Constitution.**"

The complaint is that the provisions of the Bill of Rights contained in NT ch 2 do not enjoy the protection and entrenchment required by CP II. In particular there is nothing in the NT which elevates the level of protection of the Bill of Rights above that afforded the general provisions of the NT.

[100] In defence of the NT it was argued that the relevant provisions enjoy the requisite protection and entrenchment and that CP II is satisfied once those rights, freedoms and civil liberties are placed beyond the reach of ordinary legislative procedures and majorities, as has been done in the NT.

[101] We do not agree that CP II requires no more than that the NT should ensure that the rights are included in a constitution the provisions of which enjoy more protection than ordinary legislation. We regard the notion of entrenchment "in the Constitution" as requiring a more stringent protection than that which is accorded to the ordinary provisions of the NT. The objection of non-compliance with CP II in this respect therefore succeeds. In using the word "entrenched", the drafters of CP II required that the provisions of the Bill of Rights, given their vital nature and purpose, be safeguarded by special amendment procedures against easy abridgement. A two-thirds majority of one House does not provide the bulwark envisaged by CP II. That CP does not require that the Bill of Rights should be immune from amendment or practically unamendable. What it requires is some "entrenching" mechanism, such as the involvement of both Houses of Parliament or a greater majority in the NA or other reinforcement, which gives the Bill of Rights greater protection than the ordinary provisions of the NT. What that mechanism should be is for the CA and not for us to decide.

F. INDEPENDENT INSTITUTIONS

[102] CP XXIX reads:

> "**The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and**

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212 NT 74(1)(a).

administration and a high standard of professional ethics in the public service."

Objection was taken to the NT on the ground that the independence and impartiality of these four institutions has not been "provided for and safeguarded" as required by the CP. A decision as to whether this direction has been met can be made only by considering each institution separately. The functions and powers of each institution need to be understood to determine whether the particular provisions governing its independence and impartiality meet the test in CP XXIX. Factors that may be relevant to independence and impartiality, depending on the nature of the institution concerned, include provisions governing appointment, tenure and removal as well as those concerning institutional independence. Against the background of the nature of the particular institution, these factors must, when considered together, ensure independence and impartiality.

Public Protector

[103] The purpose of the office of Public Protector is to ensure that there is an effective public service which maintains a high standard of professional ethics.[213] NT 182(1) provides that the Public Protector has the power "to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice". NT 182(4) provides that the Public Protector must be "accessible to all persons and communities". The Public Protector is an office modelled on the institution of the ombudsman,[214] whose function is to ensure that government officials carry out their tasks effectively, fairly and without corruption or prejudice. The NT clearly envisages that members of the public aggrieved by the conduct of government officials should be able to lodge their complaints with the Public Protector, who will investigate them and take appropriate remedial action.[215]

[104] NT 181(2) provides that the institution of Public Protector is independent and impartial and that the powers of the Public Protector must be exercised without fear, favour or prejudice. NT 193 and 194 provide for appointment and removal procedures. The Public Protector is appointed by the President, after nomination by a committee of the NA composed proportionally of members of all political parties represented in the NA and approved by the NA by a majority of all members of the NA. The Public Protector must be removed from office by the President once a committee of the NA has made a finding that grounds of misconduct, incapacity or incompetence exist and that finding has been adopted by a resolution of a majority of the members of the NA.[216] NT 183 provides for tenure of seven years.

[105] The question which then arises is whether the requirements of CP XXIX have been satisfied. The independence and impartiality of the Public Protector will be vital to ensuring effective, accountable and responsible government. The office inherently entails investigation of

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213 CP XXIX.

214 The historical roots of the office of ombudsman are considerable. The first such office was established in 1809 in Sweden. However, since the Second World War the institution has been adopted in a wide variety of democracies: in Denmark in 1953, in Norway and New Zealand in 1962 and in the United Kingdom in 1967 (where the institution is known as the Parliamentary Commissioner for Administration).

215 NT 182(1)(a) and (c).

216 NT 194(1) read with NT 194(2)(b).

sensitive and potentially embarrassing affairs of government. It is our view that the provisions governing the removal of the Public Protector from office do not meet the standard demanded by CP XXIX. NT 194 does require that a majority of the NA resolve to remove him or her, but a simple majority will suffice. We accept that the NA would not take such a resolution lightly, particularly because there may be considerable public outcry if it is perceived that the resolution has been wrongly taken. These considerations themselves suggest that NT 194 does provide some protection to ensure the independence of the office of the Public Protector. Nevertheless we do not think it is sufficient in the light of the emphatic wording of CP XXIX, which requires both provision for and safeguarding of independence and impartiality. We cannot certify that the terms of CP XXIX have been met in respect of the Public Protector.

Auditor-General

[106] Like the Public Protector, the Auditor-General is to be a watch-dog over the government. However, the focus of the office is not inefficient or improper bureaucratic conduct, but the proper management and use of public money. To that end, NT 188 provides that the Auditor-General must audit and report on the accounts, financial statements and financial management of all national and provincial state departments and administrations as well as municipalities. The reports of the Auditor-General must be made public and they must also be submitted to any legislature that has a direct interest in the audit. NT 181(2) provides that the office of Auditor-General should be independent and that the powers and functions of the office should be exercised without fear, favour or prejudice. NT 189 provides that the tenure of the Auditor-General must be for a fixed, non-renewable term of between five and ten years. Appointment and removal provisions are the same as those that apply to the Public Protector.

[107] Against the background of the purpose of the office, it is our view that the dismissal provisions, which are identical to those that apply to the office of Public Protector, are not sufficient to meet the requirements of CP XXIX. The function of the Auditor-General is central to ensuring that there is openness, accountability and propriety in the use of public funds. Such a role requires a high level of independence and impartiality, as is recognised by CP XXIX. In the circumstances, it is our view that for the reasons we have given concerning the Public Protector, the prescripts of CP XXIX have not been achieved in the NT.

Reserve Bank

[108] The Reserve Bank is institutionally and functionally very different from both the Public Protector and the Auditor-General. Unlike those two institutions, its primary purpose is not to monitor government. The NT states that its primary object is to protect the value of the currency in the interest of economic growth.[217] The independence and impartiality of the Bank therefore do not require the same type of protection provided to the other two institutions. NT 224 provides that in pursuit of its primary object, the Bank must perform its functions independently and without fear, favour or prejudice.

[109] The first objection to the provisions relating to the Bank is that, as the mandate for independence and impartiality is limited to the "primary object", the requirements of CP XXIX are not met. That reading of the NT offered by the objectors simply cannot be sustained. All of the powers and functions of the institution will flow from the "primary object" and will accordingly be protected by the provisions of NT 224(2).

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[217] NT 224(1).

[110] A second objection raised was that the NT contains no provisions relating to the appointment, tenure and removal of the Governor of the Reserve Bank or of its Board of Directors. These matters are currently dealt with in legislation.[218] It was argued that this was a failure to meet the terms of CP XXIX. Given the purpose and nature of the institution, however, it is in our view unnecessary to place such provisions in the Constitution. If the national legislation were to include provisions concerning appointment, tenure and removal which compromised the independence and impartiality of the institution, then such provisions could well be challenged in terms of the Constitution.

[111] The third objection is that NT 224(2), which provides that there shall be regular consultation between the Bank and the member of the executive responsible for financial matters, compromises its independence and impartiality. We cannot adopt the interpretation of the provision offered by the objectors. If the executive interferes with the independence and impartiality of the Bank, that conduct can be challenged. The requirement for consultation in no way undermines the independence of the Bank. Accordingly, the provisions relating to the Reserve Bank comply with the CPs.

Public Service Commission

[112] The last institution mentioned in CP XXIX is the Public Service Commission (the "PSC"). Two CPs are relevant to this institution, CP XXIX, which is quoted above, and CP XXX.1, which provides:

> "**There shall be an efficient, non-partisan, career-orientated public service broadly representative of the South African community, functioning on a basis of fairness and which shall serve all members or [sic] the public in an unbiased and impartial manner, and shall, in the exercise of its powers and in compliance with its duties, loyally execute the lawful policies of the government of the day in the performance of its administrative functions. The structures and functioning of the public service, as well as the terms and conditions of service of its members, shall be regulated by law.**"

The CPs require appointments to the public service to meet the criteria set out in CP XXX, but do not require any particular procedures to be followed in making such appointments. As far as CP XXX.1 is concerned, its requirements are met by NT 197 read with NT 195. It is implicit in CP XXIX that an independent PSC should have some role in the process of appointing, promoting, transferring and dismissing members of the public service, but what that role should be is not defined. The institution of an independent public service commission to check executive power in respect of employment in the civil service comes to us from England and is a feature of the constitutions of many Commonwealth countries. The role of a public service commission is to promote fairness and maintain efficiency and standards in the public service. To this end it is usually required to report on its activities to Parliament. The purpose is to ensure that prescribed procedures for making appointments, promotions, transfers and dismissals are adhered to, and that any deficiencies in the organisation and administration of the public service, or the application of fair employment practices, are made public. There is, however, no uniformity in regard to the powers vested in a public service commission for the purposes of carrying out its duties.

[113] In England and Ireland the position at present seems to be that the public service commission is required to supervise the recruitment of persons to the civil service and to ensure that this is done fairly and that recruits have the necessary competence for their jobs. In England

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[218] See South African Reserve Bank Act 90 of 1989, as amended.

the commission also advises the government in regard to the administration of the civil service.[219] In India, the Constitution requires the public service commission to be consulted by the government in regard to all matters relating to recruitment, appointments, transfers, discipline and various other matters concerned with the administration of the public service. It is also required to set public service examinations.[220] The Namibian Constitution requires the public service commission to advise the government in regard to the administration of the public service,[221] but does not contain any provision obliging the government to follow such advice.

[114] NT 197 makes provision for a public service for the Republic and NT 196 for a single PSC for the Republic to which each province is entitled to nominate a person to be appointed. NT 196(4) provides:

> "Members of the Commission nominated by provinces may exercise the powers and perform the functions of the Commission in their provinces, as prescribed by national legislation."

Save for a statement in NT 196(1) that it must "promote the values and principles of public administration in the public service", the powers and functions of the PSC are not dealt with in the NT. The values and principles of public administration that have to be promoted are set out in NT 195 and apply to administration in every sphere of government, organs of state and public enterprises. This would include the provincial administrations.

[115] NT 196 makes provision for a PSC. It states what its purpose will be, but it does not indicate what functions it will perform or what its powers will be. This can be contrasted with IC 210, which provides a framework for the powers and functions of the PSC, and IC 213, which does the same for provincial service commissions.

[116] IC 210 deals with the basic powers and functions of the PSC. It is given the competence to make recommendations, give directions and conduct enquiries with regard to matters such as the organisation and administration of departments, the conditions of service of members of the public service, appointments, promotions, transfers, and a code of conduct applicable to members of the public service. IC 209 provides that the PSC will also have the powers and functions entrusted to it "by a law of a competent authority". The recommendations or directions of the PSC have to be implemented unless they are rejected by the President or, if they involve the expenditure of funds and the approval of the treasury has not been obtained.[222] IC 213 empowers provincial legislatures to establish provincial service commissions which, if established, are to function in a similar manner in the provinces and exercise and perform similar powers and functions in respect of provincial public servants. For practical purposes the provincial service commissions have the same powers and functions within the provinces as the PSC has nationally, save that the provincial commissions have to adhere to national norms and standards.

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219 Halsbury *The Laws of England* vol 8, para 1300; Casey *Constitutional Law in Ireland* 2 ed (Sweet & Maxwell London 1992) 147.

220 Part XIV, Chapter II of the Constitution of India.

221 Chapter 13, Article 112(1).

222 IC 210(3)(a). Public service commissions similarly have a significant role in the appointments to and promotions in the civil service in Commonwealth countries. See, for example, article 110 of the Singapore Constitution, section 73 of the Zimbabwean Constitution and the Canadian Federal Public Service Employment Act R.S. 1985.

[117] IC 212 provides that the structure and functioning of the public service, including the terms and conditions of service, and appointments and related matters shall be regulated by law.[223] This has been done by the Public Service Act,[224] which requires appointments, promotions, transfers and related matters, as well as the organisation of departments and the creation of posts, to be carried out in accordance with the recommendations or directions of the PSC. This, however, has not always been the case in South Africa. In terms of the Public Service Act 54 of 1957, the Governor-General was entitled to vary or reject such recommendations in respect of any person, and if the Governor-General did vary or reject a recommendation, the appropriate Minister or Administrator had to act in accordance with that decision.[225]

[118] CP XXIX requires at least that there be an independent and impartial PSC. Implicit in the insistence upon independence and impartiality is that the PSC will constitute a check upon political executive power in the administration of the public service. Without knowing what the functions and powers of the PSC will be and what protection it will have in order to ensure that it is able to discharge its constitutional duties independently and impartially, we are unable to certify that this requirement has been complied with.

[119] While there is no requirement in the CPs that there be provincial public service commissions, the powers of the national sphere of government and of the PSC in respect of provincial administrations are relevant to an evaluation of the autonomy and powers of the provinces. We deal with these issues elsewhere in the judgment.[226] It is sufficient for present purposes to say that we also cannot certify that CP XVIII.2 and CP XX have been complied with without knowing what the powers and functions of the PSC will be and what control the provinces will have over appointments to and the staffing of provincial administrations.

Electoral Commission

[120] CP VIII provides that there shall be, among other things, regular elections, but there is no

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223 IC 212 provides:

> "(1) There shall be a public service for the Republic, structured in terms of a law to provide effective public administration.
> (2) Such public service shall-
> ....
> (d) be regulated by laws dealing specifically with such service, and in particular with its structure, functioning and terms and conditions of service;
> ....
> (4) In the making of any appointment or the filling of any post in the public service, the qualifications, level of training, merit, efficiency and suitability of the persons who qualify for the appointment, promotion or transfer concerned, and such conditions as may be determined or prescribed by or under any law, shall be taken into account."

224 Public Service Act of 1994 (Proclamation No 103 of 1994) ss 3(3) and (4).

225 S 7(1) of the Public Service Act 54 of 1957. The Governor-General acted on the advice of the Executive Council, which in essence called for a decision by the Cabinet. See *Stander v Administrator, Natal and Others* 1960(1) SA 327 (N).

226 See paras 273-8.

CP which requires the establishment of an independent institution to administer them. Therefore, objections which were raised regarding the lack of independence of the Electoral Commission are not relevant to our mandate, which is limited to issues of compliance with the CPs. In any event, NT 181(2) provides that the Electoral Commission shall be independent and that its powers and functions shall be performed impartially. Presumably Parliament will in its wisdom ensure that the legislation establishing the Electoral Commission guarantees its manifest independence and impartiality. Such legislation is, of course, justiciable.

Human Rights Commission, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and Commission for Gender Equality

[121] CP III states among other things that the Constitution shall promote racial and gender equality and CP XI that the conditions for promotion of the diversity of language and culture shall be encouraged. The CPs, however, do not require the constitutional establishment of the Human Rights Commission, the Commission on the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the Commission for Gender Equality. As the task of this Court is limited to determining whether the NT complies with the CPs, the nature and independence of these institutions is beyond our reach. We note, however, that NT 181(2) does specifically require these institutions to be independent and to carry out their functions impartially.

G. ELECTION MATTERS

[122] In terms of the IC, members of the NA and the provincial legislatures are elected by a system of proportional representation on candidate lists drawn by registered political parties.[227] The choice of electoral system is echoed in CP VIII which, among other requirements, demands "in general, proportional representation". The IC also contains what is known as an "anti-defection clause", which obliges legislators to vacate their seats if they cease to be members of the parties that nominated them.[228]

[123] The demand in CP VIII for "in general, proportional representation" is echoed in NT 46(1)(d) and NT 105(1)(d) for the NA and provincial legislatures respectively.[229] There is no suggestion that those provisions of the NT offend in any way. But the NT also substantially retains the IC's anti-defection clause,[230] and to that there has been objection.

[124] The objectors contend that the anti-defection clause creates an imperative form of representation which cannot be reconciled with the CPs. They place particular reliance on CPs I, II, IV, VI, VIII and XVII, submitting that legislators are subjected to the authority of their parties in a manner inimical to accountable, responsive, open, representative and democratic government;

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227 See IC 40(1) read with IC sch 2.

228 See IC 43(b) and IC 133(1)(b) in respect of the NA and provincial legislatures respectively.

229 NT 46(1)(d) and NT 105(1)(d) prescribe elections "in terms of an electoral system that ... results, in general, in proportional representation".

230 See NT sch 6 s 6(3) read with NT sch 6 annexure A s 13 which in part provides that

> "*[a] person loses membership of a legislature to which this Schedule applies if that person ceases to be a member of the party which nominated that person as a member of the legislature*."

that universally accepted rights and freedoms, such as freedom of expression, freedom of association, the freedom to make political choices and the right to stand for public office and, if elected, to hold office, are undermined; and that the anti-defection clause militates against the principles of "representative government", "appropriate checks and balances to ensure accountability, responsiveness and openness" and "democratic representation". The enactment of this anti-defection clause is justified by counsel for the CA on the grounds that it is desirable to secure a more stable government and to avoid corruption in legislatures. We shall consider the objections with reference to each of the CPs relied upon by the objectors.

[125] With regard to CP I, the requirement relates to a "democratic system of government" and by necessary implication representative government. The anti-defection provision, on the face of it, is wholly consistent with that requirement. It obliges members of a party, who are elected by virtue of the inclusion of their names on the party's list, to remain loyal to that party. That meets the expectations of voters who gave their support to the party. We cannot conclude that the anti-defection provision contravenes CP I.

[126] It was contended by the objectors that an anti-defection clause resulted in the breach of universally accepted fundamental rights, freedoms and civil liberties and that
such clauses were not accepted in the democratic world. This is not correct. Anti-defection clauses are indeed to be found in the constitutions of democracies, for example, Namibia and India. For that reason alone, the objection cannot be sustained. In any event the rights of legislators to free speech is strengthened by NT 58(1) and 71(1), which allow Cabinet members, members of the NA, delegates to the NCOP, members of the national executive and local government representatives to enjoy freedom of speech in their respective legislatures and in their committees, subject to their rules and orders. NT 117(1) extends corresponding protection to provincial legislators and NT 161 leaves room for similar provision to be made for municipal councillors. Furthermore, legislators, as citizens, enjoy freedom of association and free participation in politics under NT 18 and NT 19. To the extent that any of these rights are limited by the anti-defection clause, they are not aspects of rights which are universally accepted as fundamental and therefore the objection based on CP II is not sustainable.

[127] The objection alleging a breach of CP VI focuses on the requirement that there be appropriate checks and balances to ensure accountability, responsiveness and openness. Inasmuch as CP VI principally deals with a separation of powers between the legislature, executive and judiciary, its applicability to the anti-defection clause seems questionable. In any event CP VI leaves the choice of checks and balances to the CA and the fact that the NT contains an anti-defection clause cannot mean that the checks and balances required by CP VI are absent or insufficient. In a democracy the electoral system and the elections in accordance with that system provide the most important check on the legislature and its members. An anti-defection clause can act as an additional check on legislators who become accountable, not only to the electorate and the legislature, but also to their party. It is the party that faces the voters during the succeeding election and has to justify its acts in the previous legislative period. If members wish to be re-elected they need to bear in mind party discipline. This does not amount to a reduction in accountability to the electorate.

[128] It was also contended that the requirements of accountability and responsiveness in CP VI were breached. The argument was that legislators would have to obey the instructions of the party leadership even if the party concerned had unequivocally abandoned its electoral manifesto and directed its MPs to vote, speak and act against the policies expressed in that manifesto; or if the party imposed the whip in relation to a policy which legislators sincerely and reasonably believed to

be wrong. The end result, so it was further submitted, would amount to a subversion of the accountability and responsiveness of legislators to the electorate. We do not agree. Under a list system of proportional representation, it is parties that the electorate votes for, and parties which must be accountable to the electorate. A party which abandons its manifesto in a way not accepted by the electorate would probably lose at the next election. In such a system an anti-defection clause is not inappropriate to ensure that the will of the electorate is honoured. An individual member remains free to follow the dictates of personal conscience. This is not inconsistent with democracy.

[129] By parity of reasoning, the resort to CPs VIII and XVII (representative multi-party democracy and democratic representation) does not avail the objectors. An anti-defection clause enables a political party to prevent defections of its elected members, thus ensuring that they continue to support the party under whose aegis they were elected. It also prevents parties in power from enticing members of small parties to defect from the party upon whose list they were elected to join the governing party. If this were permitted it could enable the governing party to obtain a special majority which it might not otherwise be able to muster and which is not a reflection of the views of the electorate. This objection cannot be sustained.

[130] An objection was also raised to the fact that there is no provision such as that contained in IC sch 2 s 15 requiring separate ballot papers for the election of members of the NA and members of provincial legislatures. No CP was referred to as requiring such provision to be made in the NT. CP VIII requires "regular elections" and "universal adult suffrage". These requirements are part of the founding provisions of NT 1. The right to vote is also protected by NT 19. Legislation dealing with the franchise must comply with NT 1 and NT 19. This is all that the CPs require. If an NT sch 6 ballot is inconsistent with such provisions, legislation providing for such a ballot would be open to constitutional challenge.

H. TRADITIONAL LEADERSHIP

Institution of Traditional Leadership

[131] The objectors complained that NT 211[231] and 212[232] fail to protect the "institution, status

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231 NT 211 provides:

> "(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
>
> (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
>
> (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

232 NT 212 provides:

> "(1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
>
> (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law -
>
> (a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and
>
> (b) national legislation may establish a council of traditional leaders."

and role" of traditional leadership, as required by CP XIII. They argued that these words encompass the powers and functions that traditional authorities have long exercised; such powers and functions must not only be acknowledged, but "protected"; and their substance has to be determined not by national legislation but "according to indigenous law". They argued that the use of the word "role" in addition to the words "institution" and "status" suggests that a constitutionally entrenched function is called for. The objectors sought support for their argument in the non-derogation provision in CP XVII.[233] The implication is that the provisions of CP XIII must contemplate a role for traditional leadership in government, otherwise the proviso would be redundant. They argued that the purpose underlying a guaranteed and active role for traditional leaders in government is to ensure an appropriate place in the constitutional structure for elements of traditional forms of government that have deep historical roots in the country and that continue to have direct relevance for millions of people, particularly many living in rural areas, where the perceived reality of government is the traditional authority rather than the modern state.[234]

[132] We do not feel that the objectors' interpretation of either the CPs or the NT is correct. Had the framers intended to guarantee and require express institutionalisation of governmental powers and functions for traditional leaders, they could easily have included the words "powers and functions" in the first sentence of CP XIII. The non-derogation declaration in CP XVII would represent a surprisingly oblique way of achieving what the framers of the CP could have done directly. It is to be noted further that CP XIII.2 includes the word "authority" in relation to protected aspects of the monarchy, thus implying that authority is not included in those features of traditional leadership which have to be recognised and protected.

[133] Moreover, indigenous law has for over a century become closely interlinked with and influenced by statutory law.[235] The second sentence of CP XIII.1 expressly declares that the continuing application by the courts of indigenous law, as is the case with common law, will be subject to fundamental rights and legislation.

[134] To some extent the objectors' arguments concerning the failure of the NT to protect the institution of traditional leadership were coloured by what they considered to be the necessary consequence of interpreting NT 211(2) in the light of NT 212(1). They contended that reading the two sections together led to the conclusion that the continued existence and functioning of

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233 The second sentence of CP XVII provides that the representative government demanded in the first sentence "shall not derogate from the provisions of Principle XIII".

234 Although the various objectors were at one in contending that mere recognition of traditional leadership fell short of protecting it in the Constitution, they presented different views in relation to what powers and functions should be constitutionally provided for. One claimed that CP XIII implied direct involvement of traditional leaders at all three levels of government, while the other argued for an active role for traditional authorities in local government, where they should assume the functions of municipalities in appropriate areas. Yet another proposed a more limited set of functions, to be exercised alongside rather than instead of elected local authorities.

235 Indeed, the Black Administration Act 38 of 1927 effectively centralised the control of all traditional authority in the hands of the Governor-General. Today it is nowhere more evident than in KwaZulu-Natal, where legislation, first adopted at the instance of the KwaZulu legislature and currently being extended to the whole province, provides for the recognition, appointment and conditions of service, discipline, retirement, dismissal and deposition of Amakhosi and Iziphakanyiswa. The KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990; KwaZulu Amakhosi and Iziphakanyiswa Second Amendment Act 19 of 1993 and KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995.

traditional authorities were dependent upon national legislation in terms of NT 212(1) because this, and only this, they argued, could be the "applicable legislation" referred to in NT 211(2). They claimed that the upshot was that, far from protecting traditional authorities, the NT undermines the protection currently given by IC 181. We regard this interpretation as erroneous. In our view, NT 212(1) adds to rather than diminishes the scope of NT 211(2) by permitting a specific role for traditional leaders at local level which they would otherwise not have enjoyed.

[135] It is neither necessary nor desirable to make definitive statements at this stage about the precise scope of the words "institution, status and role" of traditional leadership, nor are we obliged to define the manner in which indigenous law is to be interpreted. Our role is limited to ensuring that the institution, status and role of traditional leadership are recognised and protected in the NT. NT 211(1) expressly declares:

> "The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution."[236]

[136] Whatever meaning a future court might, in a concrete dispute, give to the words "institution, status and role of traditional leadership", they are carried forward into the NT. The fact that they are declared to be subject to the NT merely underlines the point that in a constitutional state, no-one exercises power or authority outside of the constitution. Accordingly, traditional leadership is protected by and finds its place under the wide umbrella of the NT.

[137] In the framework of the CPs as a whole, CP XIII acknowledges the existence, as part of the South African community, of three elements of traditional African society with noteworthy and continuing cultural relevance. These are institutions of traditional leadership, customary law and, at the provincial level, traditional monarchy. In a purely republican democracy, in which no differentiation of status on grounds of birth is recognised, no constitutional space exists for the official recognition of any traditional leaders, let alone a monarch. Similarly, absent an express authorisation for the recognition of indigenous law, the principle of equality before the law in CP VI could be read as presupposing a single and undifferentiated legal regime for all South Africans, with no scope for the application of customary law - hence the need for expressly articulated CPs recognising a degree of cultural pluralism with legal and cultural, but not necessarily governmental, consequences.

[138] Without the non-derogation provision, it could have been argued that the principle of representative democracy (CP XVII) barred any such participation of traditional leaders at any level of government. The non-derogation section thus opens the way for traditional leadership to be involved in democratic government, without prescribing or necessitating any particular form which such involvement should take.[237]

[139] In our view, therefore, the NT complies with CP XIII by giving express guarantees of the continued existence of traditional leadership and the survival of an evolving customary law. The

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236 For the purposes of this analysis the terms "indigenous law" and "customary law" are interchangeable.

237 In IC 183 such involvement takes the form of a proposed Council of Traditional Leaders, cooperating with Parliament at the national level, and Houses of Traditional Leaders functioning together with provincial governments. At the local level, IC 182 provides that traditional leaders in certain areas would be ex officio members of local authorities of such areas. The non-derogation provision should accordingly be seen as authorising, though not requiring, identical or similar institutional arrangements in the NT.

institution, status and role of traditional leadership are thereby protected. They are protected by means of entrenchment in the NT and any attempt at interference would be subject to constitutional scrutiny. The CA cannot be constitutionally faulted for leaving the complicated, varied and ever-developing specifics of how such leadership should function in the wider democratic society, and how customary law should develop and be interpreted, to future social evolution, legislative deliberation and judicial interpretation.

Traditional Courts

[140] It was contended that the omission in the NT of any mention of traditional courts violates CP XIII, not only because it results in failure to entrench traditional courts, but because it prevents their recognition without a constitutional amendment.

[141] Traditional courts functioning according to indigenous law are not entrenched beyond the reach of legislation. NT 166 does indeed provide for their recognition. Subsection (e) refers to "any other court established or recognized by an Act of Parliament". This would cover approximately 1 500 traditional courts recognised in terms of the Black Administration Act 38 of 1927.[238] The qualification "which may include any court of a status similar to either the High Courts or the Magistrates' Courts" can best be read as permitting the establishment of courts at the same level as these two sets of courts. It does not, as the objectors contended, provide for a closed list. This interpretation is supported by NT 170, which says that "[m]agistrates' courts and all other courts may decide any matter determined by an Act of Parliament" - it does not say magistrates' courts or all other courts of a similar status. More directly, NT sch 6 s 16(1) says that "[e]very court, including courts of traditional leaders ... continues to function". In our view, therefore, NT 166 does not preclude the establishment or continuation of traditional courts.

Undermining Traditional Leadership by Horizontal Application of the Bill of Rights

[142] The objection was that the horizontal application of the Bill of Rights, as required by NT 8(2), has the effect of nullifying the protection afforded to indigenous law by NT ch 12. If that were so the NT would breach CP XIII. A further consequence, the objectors contended, is to frustrate the development of traditional law, which had long been downtrodden and prevented from developing securely alongside Roman Dutch law, thereby further frustrating attempts for it to be used by those who preferred to be governed by it rather than by Roman Dutch law. Indigenous law, they argued, was based both on custom and tradition; custom was the source of law while tradition was the basis of morality, the two fusing in the application and development of indigenous law. Thus, patriarchal principles which underlay much of indigenous law would be outlawed by the Bill of Rights, thereby undermining the core of indigenous law. This would put such hallowed institutions as lobola (bride wealth) in jeopardy, open the way to allowing women to succeed to the monarchy on the same basis as men and prevent a father from claiming damages for the seduction of his daughter.

[143] The most obvious difficulty facing proponents of this proposition is that CP XIII expressly states, in its second sentence, that indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the NT and to legislation dealing therewith. This provision is repeated almost verbatim in NT 211(3). The objection, in effect, appears to be directed at the CP itself, rather than at the NT. As such, it falls outside our present competence.

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238 Bennett *A Sourcebook of African Customary Law for Southern Africa* (Juta & Co Ltd Cape Town 1991) 63.

[144] In any event, it is clear that the feared destructive confrontation between the Bill of Rights and legislation on the one side and indigenous law on the other need not take place in the manner that the objectors contemplate. The so-called horizontal application of the Bill of Rights, to which they referred, is not unqualified, but conditioned by the phrase in NT 8(2) "if, and to the extent that, it is applicable, taking into account the nature of the right and of any duty imposed by the right". Second, NT 39(2) states that, when developing customary law, every court must promote the spirit, purport and objects of the Bill of Rights. This is not an appropriate moment to lay down exactly what the implications of these provisions are, and nothing we say here should be construed as expressing any opinion thereon. Suffice it to say that the issues raised by the objectors which fall outside our present mandate are not foreclosed by this decision. They can be raised and dealt with if and when they arise concretely.

I. MISCELLANEOUS MATTERS

Preamble

[145] A number of objections were raised against the preamble to the NT. Several objectors complained that the words "in humble submission to almighty God" which appear in the preamble to the IC are not repeated in the NT. That is said to violate CP II and IC ch 3. On the other hand, another objector objected to the inclusion of the invocation "[m]ay God protect our people" as discriminatory against non-theists, in violation of CP III.

[146] These objections are founded on a misunderstanding of the role of this Court in the certification process. As emphasised earlier,[239] it is not our function to test the NT against the IC, but against the CPs. The first set of objectors pointed to no CP which mandates the inclusion of any particular religious reference in the preamble.[240] Nor did the second demonstrate that the invocation of a deity constitutes any form of discrimination against non-theists which breaches a CP.[241] Professor Prozesky's objection relating to the oath of office prescribed under the NT is not well founded. Under NT sch 2, each office-bearer is afforded the option of making a solemn affirmation rather than swearing an oath of office, and it is only in the case where the inductee opts to swear an oath that she or he is required to use the words "So help me God."[242]

[147] We also cannot agree with the contention by an objector that the preamble to the NT emphasises the injustice of the past rather than equality, non-discrimination and reconciliation, and thereby fails to comply with CP III's mandate that the NT promote "national unity". While it is true that the preamble "[r]ecognise[s] the injustices of the past", and "[h]onour[s] those who suffered for justice and freedom", it also "[r]espects those who have worked to build and develop" South Africa, affirms that "South Africa belongs to all who live in it, united in our diversity", and specifically seeks to "[h]eal the divisions of the past" and "[b]uild a united and democratic South Africa". The tenor of the preamble cannot thus be said to be contrary to the ideal of national unity

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239 See paras 29-30 above.

240 NT 15(1) provides the fullest protection for freedom of conscience and religion.

241 The rights of atheists to be free from discrimination are adequately protected by NT 15 and NT 9.

An associated objection relating to the oath of office prescribed under the NT is not well-founded either. Under NT sch 2, each inductee is afforded the option of making a solemn affirmation rather than swearing an oath of office, and it is only in the case where the inductee opts to swear an oath that she or he is required to use the words "So help me God".

established in CP III.

Seal of the Republic

[148] It is the submission of the objector that the omission to make specific provision for the seal of the Republic in the NT compromises the integrity of the Constitution as the supreme law of the Republic.

[149] The relevant principle is CP IV, which requires:

> "**The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.**"

[150] The objector had not shown any basis for the contention that the absence from the NT of a reference to the seal of the Republic undermines the supremacy of the Constitution. Constitutional supremacy is unambiguously and adequately entrenched in the NT. There is therefore no violation of CP IV on that account.

Languages

[151] Language is a sensitive issue in South Africa. Prior to the IC coming into operation there were two official languages in what was the then Republic of South Africa, Afrikaans and English. That is reflected in IC 3, which deals with languages. The corresponding provision in the NT is NT 6 which, in subsection (1), lists eleven languages, nine African languages in addition to the two previously mentioned.[243] An objection levelled at NT 6 alleged that its failure to include in the

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[243] NT 6 reads as follows:

> "(1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.
>
> (2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.
>
> (3) National and provincial governments may use particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances, and the balance of the needs and preferences of the population as a whole or in respective provinces; provided that no national or provincial government may use only one official language. Municipalities must take into consideration the language usage and preferences of their residents.
>
> (4) National and provincial governments, by legislative and other measures, must regulate and monitor the use by those governments of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.
>
> (5) The Pan South African Language Board must -
>
> (a) promote and create conditions for the development and use of
>
> (i) all official languages;
>
> (ii) the Khoi, Nama and San Languages; and
>
> (iii) sign languages.
>
> (b) promote and ensure respect for languages, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu, Urdu, and others commonly used by communities in South Africa, and Arabic, Hebrew, Sanskrit and others used for religious purposes."

listing of official languages any of the languages spoken by South Africans of Indian descent constitutes a failure to comply with CPs I, II, III, IV, V, VII and especially XI. A related objection complains about the inclusion of these languages in NT 6(5)(b), rather than in NT 6(5)(a).

[152] No tenable argument was presented relating to the CPs. Indeed, CP XI is the only one of some relevance to the objections advanced. But even in the case of CP XI no cogent argument in support of the objections can be presented. The object of CP XI is to provide protection for the diversity of languages, not the status of any particular language or languages. The granting of official status to languages is a matter within the sole responsibility of the CA, and it is the CA's considered determination in that regard that is reflected in NT 6(1). The balance of NT 6 is directed at fostering linguistic diversity. We believe that NT 6 clearly satisfies CP XI in that regard.

[153] It is doubtless true that various languages spoken by communities of South Africans of Indian descent have been marginalised in the past. But those tongues have nevertheless enjoyed better protection in institutions such as community schools than have the indigenous languages referred to in NT 6(5)(a)(ii), the Khoi, Nama and San languages. Moreover, none of the Indian languages would be in danger of extinction, even if they were no longer to be used in South Africa. Although that would be a loss to the cultural heritage of the country, the languages would survive and flourish in their countries of origin. The South African indigenous languages, however, have suffered great historical neglect and are threatened with extinction. In that light it is neither unreasonable nor discriminatory for the NT to mandate the Pan South African Language Board to take special steps to protect these especially vulnerable indigenous tongues.[244]

[154] A separate objection goes to the status of Afrikaans in the NT. That objection did not allege the violation of any particular CP. Rather it was that NT 6 must be given content by reading it alongside IC 3(2), (5) and (9), which, inter alia, require that the status of Afrikaans as an official language should not be diminished. It appears to be the contention that the status of Afrikaans is diluted under the NT, relative to the IC. But NT 6, like the rest of that document, must be tested against the CPs, and not against the IC.[245] In any event, the NT does not reduce the status of Afrikaans relative to the IC: Afrikaans is accorded official status in terms of NT 6(1). Affording other languages the same status does not diminish that of Afrikaans.

[155] Finally, we have considered an argument which challenged NT 6(3) and 6(4) as inconsistent with CP II. We are unpersuaded by the argument that the NT fails to respect the entitlement of individuals to use the language of their choice in dealings with the government. NT 30 protects the right of all to use the language of their choice, and that right would extend to communications with the government, subject to reasonable limitations where they would be warranted.

[156] The objections based on the contention that NT 6 is inconsistent with CP XI and CP III must therefore fail.

Self-Determination

[157] It was contended that although CP XXXIV does not impose as clear an obligation on the

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244 We note that, whilst the Indian languages referred to above are not listed in NT 6(5)(a), in terms of the NT 6(5)(b) the Pan South African Language Board is mandated to promote and ensure respect for these tongues.

245 Except of course in those cases where the CP makes explicit reference to the IC.

CA as do other CPs, it establishes an expectation about the creation of a Volkstaat among a significant number of Afrikaners which the NT does not realise. The contention was that CP XXXIV has to be interpreted in the light of agreements and memoranda produced by the Freedom Front, the ANC and the then South African Government on the eve of the elections in April 1994. Yet, far from giving these expectations form, the NT has given nothing concrete in the form of self-determination, and has in fact made the achievement of such self-determination much harder in three respects. First, Parliament would have a discretion as to whether or not to permit a cultural community to exercise self-determination within a territorial entity. Second, in terms of IC 184B(3), special arrangements exist to permit changes to provincial boundaries by a simple majority so as to create such an entity, whereas under the NT a constitutional amendment would be required (in order to change NT 103). Third, such entity would under the NT be subject to the Bill of Rights because NT 235 speaks of self- determination within the framework of the NT, whereas no such framework qualification exists in CP XXXIV.

[158] The argument is also based on a misunderstanding of the provisions of IC 184A. These provisions do not empower the Volkstaat Council or Parliament to establish a Volkstaat without amending the IC. The idea of a Volkstaat has to be pursued "constitutionally" through representations to the CA and the Commission on Provincial Government. IC 184B(3) deals only with boundary changes consequent upon the establishment of a Volkstaat. The other requirements, namely the creation of the Volkstaat and the definition of its powers and functions, can be achieved only through amendments to the IC or through adoption in the NT, which will require a two-thirds majority in the NA and the Senate or in the CA. What IC 184B(3) allows is a reorganisation of boundaries consequent upon such a decision, without necessarily having the consent of the province or provinces affected thereby. The provision that national legislation should determine the matter simply provides the mechanism for giving legal form to any decision taken in accordance with the Constitution.

[159] A related contention was that the right to self-determination, including the right to secession, is internationally accepted as a right, and thus should not be subjected to the discretion of Parliament. Thus, if a dispute reached this Court, it should be decided according to objective criteria as determined by international law, and not by whether or not Parliament has passed the requisite legislation.

[160] In our view the terms of the NT do not sustain the argument that CP XXXIV has not been complied with. Our task is simply to test the terms of the NT against the CPs. Whatever subjective hopes any parties might have had as a result of the insertion of CP XXXIV, its language for present purposes is clear. Its basic thrust is that constitutional provision for the notion of the right to self-determination by any community sharing a common cultural and language heritage within a territorial entity shall not be precluded, notwithstanding the fact that South Africa shall be one sovereign state, as required by CP I. This is clearly a permissive rather than an obligatory provision. The only mandatory provision in the CP is that if a territorial entity has in fact been established in terms of the IC before the NT is adopted, then such entity must be entrenched in the NT. No such entity had in fact been established, so no obligatory entrenchment had to be made.

[161] It is not necessary for us to decide whether the NT is obliged to keep the idea of territorial self-determination alive. The fact is that the CA chose to do so in terms of NT 235, which ensures that the permissive door opened by the CP is kept ajar. It is obvious that any arrangements which could be made to establish a territorial entity and to define its boundaries will have to be negotiated with an existing government within the framework of the NT (including the permissive provision). This is contemplated by CP XXXIV.1 itself, which underlines the "recognition therein of the right

of the South African people as a whole to self-determination" and says that the more limited right to self-determination of a particular community shall not be precluded "within the framework of the said right". Moreover NT 74(1)(b)(ii) and (4) and 103(2), which deal with provincial boundaries and any changes that may be made to them, are specifically required by the provisions of CP XVIII.3 and CP XVIII.4. Finally, it is difficult to interpret CP XXXIV as permitting the denial of the fundamental human rights of any persons living in such an entity, let alone requiring the exclusion of the Bill of Rights. The provision that national legislation shall determine the matter simply provides the mechanism for giving legal form to any agreement that might be reached.

[162] The broader question has also been answered. This Court functions purely in terms of the IC. Proponents of a Volkstaat are free to campaign for political and constitutional changes which would result in the forms of self-determination which they consider appropriate being brought about and institutionalised. We are, however, bound in our present task by the limits of the 34 CPs, and by them alone. Apart from CP XXXIV, the only CP dealing with self-determination is CP XII, which requires certain collective rights of self-determination to be recognised and protected in the NT. This has been done in the Bill of Rights through NT 31, which protects cultural, religious and language communities. A submission by one of the objectors that the right is not protected because the provision is framed in negative and not positive terms is without substance.

[163] It was also contended that the language of CP XXXIV is wide enough to embrace not only forms of Afrikaner self-determination but self-determination of traditional authorities as well, thus avoiding any racial selectivity in the interpretation of the CP. We cannot accept that contention. In our view CP XXXIV is not intended to entrench the status of traditional authorities. Their role and status are expressly dealt with in CP XIII and CP XVII. Their continued existence under IC 181 and NT 212 is not entrenched but is subject to amendment and repeal. CP XXXIV cannot be relied upon to entrench the existence of traditional authorities.

CP XIV: Participation in the Political Process by Minority Parties

[164] Decisions in the NCOP are to be taken in terms of NT 65(1), which states:

> "Except where the Constitution provides otherwise -
>
> (a) each province has one vote which is cast on behalf of the province by the head of its delegation; and
>
> (b) all questions before the National Council of Provinces are agreed when at least five provinces vote in favour of the question."

Objection was taken to these provisions on the ground that they do not comply with CP XIV which requires that:

> "**Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.**"

It was contended that the procedures in the NCOP dealing with NT 76 legislation and constitutional amendments do not comply with the requirements of CP XIV because voting is by province, which means, so the contention went, that minority parties in provincial delegations do not have an effective vote.

[165] The method of voting in the NCOP depends upon the subject matter of the legislation. In respect of matters dealt with in terms of NT 75, each delegate has one vote and the question is

decided by a majority of votes.[246] The rules and orders of the NCOP must provide for the participation of minority parties in such matters in a manner consistent with democracy.[247] Other matters are decided on the basis that each province has one vote and at least five provinces must support the decision.[248] NT 70(2)(b) requires the rules and orders of the NCOP to provide for the participation of all provinces in its proceedings in a manner consistent with democracy.

[166] NT 61(2) requires the allocation of seats in the NCOP to be regulated by national legislation in a manner which ensures that minority parties participate in the NCOP in a manner consistent with democracy. This, and the requirements of NT 70(2)(b) and (c) relating to the participation of provinces and of minority political parties in the proceedings of the NCOP in a manner consistent with democracy, give rise to constitutional obligations which are subject to judicial control.[249] Provision is made for the full participation of minority political parties in the passing of legislation in the NA and in the passing of NT 75 bills in the NCOP. Although voting in the NCOP in respect of other matters is on the basis of one vote per province, the participation of the provinces in the proceedings has to take place in a manner consistent with democracy.

[167] NT 53(1)(a) provides that decisions in the NA are to be taken by a majority vote unless the Constitution provides otherwise. Larger majorities are required to overrule vetoes of the NCOP[250] and to amend the Constitution.[251] NT 57(2)(b) requires the rules and orders of the NA to provide for

> "the participation in the proceedings of the Assembly, and its committees, of all minority political parties represented in the Assembly, in a manner consistent with democracy".

[168] All legislation, including amendments to the Constitution, must be passed by the NA.[252] The NCOP also has to pass legislation referred to in NT 76 and certain constitutional amendments referred to in NT 74(1)(b) and to deal with bills referred to in NT 75. If the NCOP fails to pass a bill governed by NT 76, its decision can be overridden by a two-thirds majority of the NA;[253] other bills have to be referred to the NCOP and dealt with by it in terms of NT 75. If it fails to pass such a bill its decision can be overridden by a simple majority in the NA.[254]

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246 NT 75(2).

247 NT 70(2)(c).

248 NT 65(1)(a) and (b). In the case of constitutional amendments that affect the NCOP, alter provincial boundaries, powers, functions or institutions or amend a provision that deals specifically with a provincial matter, the votes of six provinces are required. NT 74(1)(b).

249 See NT 2 read with NT 167(4)(c) and 167(5).

250 NT 76(1)(e), (i) and (j) and 76(5)(b)(ii).

251 NT 74(1)(a) and 74(2).

252 NT 44(1)(a) (i) and (ii) read with NT 73, 74, 75, 76 and 77.

253 NT 76(1)(e),(i) and (j) and 76(5)(b)(ii).

254 NT 75(1)(c) and (d).

[169] Minority political parties participate fully in the legislative process through their role in the NA. In addition they are represented in the NCOP and are entitled to participate in its proceedings, which are required to be conducted in a manner consistent with democracy. The fact that voting on certain matters is to take place on the basis of one vote per province is not inconsistent with democracy. Given the purpose of the NCOP, which is to involve the provinces in the enactment of certain legislation and to provide a forum in which provincial interests can be advanced, the method of voting is not inappropriate. In the German Bundesrat, on which the NCOP appears to have been modelled, the votes of each Land may be cast only as a block vote,[255] and there is nothing to suggest that the German system has proved unsatisfactory or undemocratic.

[170] In our view the provisions of the NT dealing with the structure and functioning of Parliament are not inconsistent with democracy, and sufficient provision has been made for the participation of minority parties in the legislative process to meet the requirements of CP XIV.[256]

CHAPTER V. PROVINCIAL GOVERNMENT ISSUES (OTHER THAN CP XVIII.2)

[171] In this Chapter we consider the broad question whether the provisions of the NT relating to the provincial tier of government comply with the prescripts of the CPs. The Chapter initially deals (in Part A) with each of the individual CPs relevant to provincial government. It then (in Part B) addresses the first of two major issues concerning provincial powers, namely whether the NT establishes "legitimate provincial autonomy", a phrase used in CP XX. In the nature of things the discussion of specifics in the initial part of the Chapter overlaps to some extent with that in the second. A third issue of provincial powers arises from the requirement in CP XVIII.2 that "[t]he powers and functions of the provinces" in the NT "shall not be substantially less than or substantially inferior to those" in the IC. This requirement introduces a dimension to our certification task differing fundamentally from that required by the CPs in general. It is accordingly considered separately in Chapter VII.

A. ASSESSMENT OF THE CONSTITUTIONAL PRINCIPLES

CP XVIII.1

[172] This CP requires the powers and functions of provincial governments and the boundaries of the provinces to be defined in the NT. This is complied with in NT 103(2), 104 and 125 and in NT ch 6 generally and the contention is not that the NT does not define the powers and functions of provincial government sufficiently but rather that the powers are substantially less than those in the IC. That submission is dealt with in a separate part of this judgment.[257]

CP XVIII.3

[173] This CP requires that the boundaries of the provinces in the NT should be the same as those established in terms of the IC. This is complied with by NT 103(2) which provides that "[t]he

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255 Article 51(3) of the Basic Law for the Federal Republic of Germany.

256 It was also contended that CP XI and CP VIII are breached by the provisions of NT 47(3)(b), 62(4)(e) and 106(3)(b) providing that membership of a legislature is lost if a member is absent from the legislature in breach of its rules and in circumstances in which the rules provide that such membership shall be lost. This is a provision legislatures are entitled to make to ensure that elected representatives discharge their obligations to the legislature to which they have been elected. An abuse of this power could be challenged and the provisions are not inconsistent with CP VIII or CP XIV.

257 See Chapter VII below.

boundaries of the provinces are those existing when the Constitution took effect".

CP XVIII.4

[174] This CP deals with amendments to the NT which alter the powers, boundaries, functions or institutions of provinces. Such amendments require the approval of a special majority of the legislatures of each of the provinces, or alternatively, if it exists, a two-thirds majority of a chamber of Parliament composed of provincial representatives. If the amendment concerns specific provinces only, the CP requires that the NT should mandate that the approval of the legislatures of such provinces be obtained. CP XVIII.4 is satisfied by NT 74, which does in fact require bills amending the NT to be supported by a vote of two-thirds of the members of the NA and also two-thirds of the provinces in the NCOP if such a bill affects the NCOP or alters provincial boundaries, powers, functions or institutions, or if it amends a provision that deals specifically with a provincial matter. If a bill amending the NT concerns a specific province or provinces only, NT 74(3) also requires the approval of the relevant legislature or legislatures of the province or provinces concerned.

CP XVIII.5

[175] The requirement set by this CP that provision should be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions is fully met by NT 74(4), the wording of which closely follows that of the CP. NT 74(3) serves as a further bulwark of provincial integrity.

CP XIX

[176] This CP requires the NT to include exclusive and concurrent powers and functions for national and provincial levels of government. There is indeed a list of both exclusive and concurrent powers contained in NT 44(1)(a) and 104(1)(b) read with NT schs 4 and 5.[258] An invasion of the exclusive powers of a province is permissible in terms of NT 44(2) read with NT 147(2), but the requirements of CP XIX with regard to "exclusive powers" must be read subject to CP XXI.2. Clearly, the drafters did not intend "exclusive" to mean immune from encroachment under the conditions contemplated by CP XXI.2. We have dealt with the proper approach to these CPs in a separate part of this judgment.[259] They are to be read holistically and consistently with each other.

[177] CP XIX also requires that the national and provincial levels of government have the power to perform functions for other levels of government on an agency or delegation basis. NT 44(1)(a)(iii), 99, 104(1)(b)(iii), 104(1)(c) and 156(4) all provide machinery for the assignment of power between different levels of government, including the municipal, provincial and national levels. Moreover, NT 238 expressly empowers "[a]n executive organ of state in any sphere of government" to "delegate any function ... to any other executive organ of state". Manifestly there has been compliance with the relevant requirement of CP XIX.

CP XX

[178] CP XX raises the issue whether the legislative and executive powers given to the provinces are "appropriate" and "adequate" to enable them to function effectively. It also raises the issue

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258 The residual powers of Parliament, in terms of NT 44(1)(a)(ii), to pass legislation regarding matters not covered by NT schs 4 and 5 is also an exclusive power, vesting at the national level of government.

259 See Chapter II above. See also in regard to CP XIX para 254 below.

whether such powers promote "legitimate provincial autonomy". The argument advanced on behalf of the objectors was not really that the powers of the provinces are not appropriate or adequate but rather that their legitimate autonomy has not been promoted by the NT. That is a substantive topic considered on its own later, and subsumes the question whether the powers of provinces are adequate or appropriate for their effective functioning.[260]

CP XXI.1

[179] This CP requires that in the allocation of powers to the national and provincial governments the criterion should be the level "at which decisions can be taken most effectively in respect of the quality and rendering of services". The allocation of functions between the national government and provincial governments is regulated by NT 44(1) and NT 104(1) read with NT schs 4 and 5. No cogent argument has been advanced to us to support the proposition that the allocation of powers made to the national and provincial governments in terms of these sections in the NT offends the criteria prescribed by CP XXI.1.

CP XXI.2

[180] This CP, which contemplates the NT permitting the national government to intervene legislatively or otherwise in specific circumstances, relates to the larger issue of whether the NT makes adequate provision for "legitimate provincial autonomy" and is dealt with fully below.[261]

CP XXI.3

[181] This CP requires the allocation to the national government of such powers as are necessary "for South Africa to speak with one voice, or to act as a single entity". This CP is satisfied by the general residual power of the NA which is contained in NT 44(1)(a)(ii), by the specific powers contained in NT sch 4, by the grounds on which intervention by the national legislature is justified in terms of NT 44(2) and by the grounds on which an override is justified in terms of NT 146. We deal with the last two sections elsewhere.[262]

CP XXI.4

[182] This CP provides that legislative powers should be allocated predominantly to the national government where national uniformity is required. It is satisfied by NT 44, read with NT sch 4 and NT 146. No persuasive argument was addressed to us to show that where uniformity across the nation is required that function is not "allocated predominantly, if not wholly, to the national government". The machinery of the sections in the NT, to which we refer later,[263] is expansive and flexible enough to accommodate this requirement.

CP XXI.5

[183] This CP requires that the determination of national economic policies, the promotion of inter-provincial commerce and related matters should be allocated to the national government. Although there appears to be no specific section "allocating" these areas to the national government in the NT, the requisite allocation is the necessary result of the powers of intervention contained in NT 44(2)(b) and (e), of the overrides contained in NT 146(2)(a), (b), (c)(ii), (iii) and (iv) and of the

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260 See Chapter V.B below.

261 See Chapter V.B below.

262 See Chapter V.B below.

263 See Chapter V.B below.

residual powers of Parliament under NT 44(1)(a)(ii).

CP XXI.6

[184] This CP requires provincial governments, either exclusively or concurrently with the national government, to have powers relating to provincial planning and services and "aspects of government dealing with specific socio-economic and cultural needs and the general well-being of the inhabitants of the province". An examination of NT schs 4 and 5 shows that this CP has been satisfied. NT sch 5 refers expressly to provincial planning and provincial cultural matters and NT sch 4 includes such matters as health services, education (excluding tertiary education), population development, regional planning and development, tourism and welfare services.

CP XXI.7

[185] CP XXI.7 requires that concurrent powers be allocated to the national and provincial governments "[w]here mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service". It was not contended before us that there is indeed an area denied to the provinces where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity. It is true that NT 146(2)(c)(v) allows national legislation to prevail where this is necessary for the promotion of equal opportunity or equal access to governmental services, but this does not constitute a failure to give effect to CP XXI.7. First, CP XXI.7 must not be read in isolation, but with CP XXI.2; and second, the national legislation authorised by NT 146(2)(c)(v) does not per se preclude the provincial governments from also taking such measures as are required to guarantee equality of opportunity or access to a government service.

CP XXI.8

[186] This CP requires the NT to specify the allocation of "necessary ancillary powers" to those allocated to either the national or provincial governments. As far as NT sch 4 competences are concerned, this CP is clearly satisfied by NT 44(3) and NT 104(4). Such allocation is not expressly made in regard to the powers of the provinces listed in NT sch 5, but since NT sch 5 defines the exclusive powers of the provinces, the provinces would necessarily also be the repository of powers incidental to the powers vested in them in terms of NT sch 5. It is equally clear that the residual legislative power of Parliament under NT 44(1) includes all powers, save those referred to in NT 44(1)(a)(ii).

CP XXII

[187] This CP simply prevents the national government from exercising its powers "so as to encroach upon the geographical, functional or institutional integrity of the provinces". It is important to distinguish between having a power which does so encroach upon the integrity of the provinces and exercising a power which has that effect. The prohibition is against the exercise. The protection against the exercise of such power is contained in NT 41(1)(g), which expressly provides that all spheres of government must exercise their powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere. The form and object of CP XXII are therefore satisfied.

CP XXIII

[188] This CP requires precedence to be given to the legislative powers of the national government where a dispute between the national and provincial governments cannot be resolved by a court on a construction of the NT. We have some difficulty in understanding the meaning of this CP. Resolving such disputes is inherent in the judicial function and a court can hardly take the position that it is unable to do so. It must give to the disputed part of the NT a meaning. But

whatever be the proper meaning of CP XXIII, it was not contended before us that effect is not given to it by NT 148.

CP XXV

[189] The fiscal powers of the provinces, required to be defined in the NT by this CP, are found in NT ch 13 and are dealt with more fully in a separate part of this judgment.[264]

CP XXVI

[190] This CP gives to each level of government a constitutional right to an equitable share of revenue collected nationally to enable provinces and local government to provide basic services and to execute the functions entrusted to them. This CP appears to be satisfied by NT 214 and 227 and is fully dealt with in a separate part of this judgment.[265]

CP XXVII

[191] This CP requires a financial and fiscal commission to recommend equitable fiscal and financial allocations to each province. We deal with this issue at length below in analysing the fiscal and financial requirements of the NT.[266] NT 214 read with NT 220 in our view gives adequate expression to this CP.

B. LEGITIMATE PROVINCIAL AUTONOMY

[192] Having dealt with the individual CPs bearing on provincial competences, we now turn to a consideration of the broader question whether the NT makes adequate provision for "legitimate provincial autonomy". Although those words appear in CP XX, and make that CP more pertinently relevant to the question to be considered, the legitimacy (or genuineness) of the powers and functions allocated to the provinces by the NT has to be evaluated against the more general requirements of those CPs which relate to provincial government. For the sake of clarity some degree of repetition will be inevitable.

CP XXI

[193] CP XXI sets out the criteria according to which the allocation of powers to the national and provincial governments is to be made. There are to be exclusive and concurrent provincial powers in respect of provincial planning and development, the rendering of services, and dealing with "socio-economic and cultural needs and the general well-being of the inhabitants of the province".[267]

[194] Provincial planning, provincial cultural matters, provincial recreation and amenities and provincial sport are included in the NT sch 5 list of functional areas of exclusive provincial legislative competences. Agriculture, consumer protection, cultural matters, disaster management, education other than tertiary education, environment, health services, housing, regional planning and development and urban and rural development are included in the NT sch 4 list of concurrent national and provincial legislative competences. In terms of NT 125(5) the implementation of

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264 See Chapter VII.I below.

265 See Chapter VII.I below.

266 See Chapter VII.I below.

267 CP XXI.6.(b).

provincial legislation is generally an exclusive provincial executive power.[268] NT 125(2)(b) empowers the provinces to implement national legislation in respect of NT schs 4 and 5 matters unless an Act of Parliament provides otherwise. Such Act of Parliament would require the assent of the NCOP.[269] The provinces also have the legislative and executive power to establish municipalities, and to monitor and see to the effective performance of municipal functions within the province,[270] as well as the other legislative competences referred to in parts A of NT schs 4 and 5. This allocation of powers and functions makes provision for extensive legislative and executive provincial competences in a manner which complies with the overall requirements of CP XXI.

[195] The objection alleging lack of provincial autonomy is directed not so much at the allocation of functional competences as at the provisions of the NT which are said to allow the national government to intervene in provincial affairs. CPs XIX, XX and XXII are relevant to these objections.

CP XIX

[196] CP XIX requires the powers allocated to the national and provincial levels of government to include exclusive and concurrent powers. This must be read with CP XXI.2 which provides:

> "**Where it is necessary for the maintenance of essential national standards, for the establishment of minimum standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.**"

CP XXI.2 contemplates a situation in which the national level of government has no legislative competence and has to be specifically empowered to legislate. It applies pertinently in the areas of exclusive provincial legislative competence and qualifies the requirements of CP XIX.

[197] A contention raised in argument before us that CP XXI.2 should be construed as applying only to areas in which the national level and provincial levels have concurrent powers cannot be accepted. The CP deals with national priorities which are applicable to all functional areas. These priorities are national and not provincial competences, and on the plain language of the CP they are of general application. This is borne out not only by the subject matter of the particular competences but by the use of the word "intervene". In the field of concurrency the national level of government has the power to make laws and does not need to be specifically empowered to intervene. This is necessary only in situations in which the national level would not otherwise have the power to legislate or to act.

[198] It was not disputed that the national level of government has exclusive power in respect of all matters other than those specifically vested in provincial legislatures by the NT.[271] NT sch 5 lists

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268 This general power is subject to an exception in respect of the national government's powers under NT 100 which are discussed below in paras 263-6.

269 NT 76(1), (2) and (4).

270 Parts B of NT schs 4 and 5 read with NT 155(2) and (3).

271 NT 43(a) read with NT 44(1)(a)(ii) and NT 104(1)(b).

functional areas of exclusive provincial legislative competence, and these functional areas are excluded from the ordinary legislative authority of the national sphere of government.[272] The provinces also enjoy powers in respect of the following matters: the adoption of provincial constitutions making provision for provincial legislative and executive structures and procedures, and a traditional monarch;[273] the summonsing of persons to report to or give evidence before the provincial legislature;[274] the imposition of provincial taxes;[275] the establishment, monitoring and promotion of the development of local authorities;[276] and the spending power in respect of money in the provincial revenue fund.[277]

[199] The exclusive powers of the provinces in respect of NT sch 5 matters are subject to NT 44(2), which specifically empowers Parliament to "intervene by passing legislation ... with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary" to do so for any of the purposes set out in paragraphs (a) to (e) of the section. This power of intervention is defined and limited. Outside that limit the exclusive provincial power remains intact and beyond the legislative competence of Parliament. If regard is had to the nature of the NT sch 5 powers and the requirements of NT 44(2), the occasion for intervention by Parliament is likely to be limited. NT 44(2) follows precisely the language of CP XXI.2, and goes no further than CP XXI.2 requires it to do. We are of the opinion that the NT complies with CP XIX read with CP XXI.2, that provision is made for exclusive provincial powers within the contemplation of the CPs, and that the contentions to the contrary must be rejected.

CP XX

[200] CP XX requires:

> **"Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity."**

The phrase "legitimate provincial autonomy" lacks precision and certainty. The provinces derive their powers from the NT and are obliged to function within the framework of the NT. As long as that constitutional framework is within the limits set by the CPs, what is legitimate provincial autonomy must be determined with due regard to that framework.

[201] The CPs do not contemplate the creation of sovereign and independent provinces; on the contrary, they contemplate the creation of one sovereign state in which the provinces will have only

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272 NT 44(1)(a)(ii).

273 NT 143(1).

274 NT 115.

275 NT 228(1). In terms of NT 228(2)(b), this power is subject to regulation in terms of an Act of Parliament.

276 NT 155(2) and (3).

277 NT 226(2).

those powers and functions allocated to them by the NT. They also contemplate that the CA will define the constitutional framework within the limits set and that the national level of government will have powers which transcend provincial boundaries and competences. Legitimate provincial autonomy does not mean that the provinces can ignore that framework or demand to be insulated from the exercise of such power.

[202] What is important is that the provinces be vested with the powers contemplated by the CPs and be able to exercise such powers effectively. If this is done the requirement of CP XX relating to legitimate provincial autonomy will have been met.

[203] Various provisions of the NT are said by the objectors to encroach upon the legitimate autonomy of the provinces. In particular, objection was taken to NT 44(2), 100, 125(3), 146 and 147 and certain provisions of NT chs 10 and 13.

NT 44(2)

[204] NT 44(2)[278] empowers Parliament to pass legislation concerning NT sch 5 matters[279] when it is necessary to do so for any of the purposes set out in subsections (a) to (e) of that provision. It has already been pointed out that this is a specific requirement of CP XXI.2[280] and in so far as this could be said to infringe upon the autonomy of the provinces in relation to their exclusive powers, it is an infringement authorised and required by the CPs themselves. It is not part of the legitimate autonomy of provinces contemplated by the CPs to be immune from such intervention.

NT 100

[205] NT 100 creates an exception to the general principle that the implementation of provincial legislation in a province is an exclusive provincial executive power.[281] It provides that when a province cannot or does not fulfil an executive obligation the national executive may take appropriate steps to ensure fulfilment of that obligation.

[206] The right to intervene is subject to the provisions of NT 41(1)(e), (f) and (g), which require all levels of government to

> "(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
> (f) not assume any power or function except those conferred on them in terms of the Constitution; [and]
> (g) exercise their powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere".

It is also subject to the requirements of NT 100(2), which are that such intervention be approved by the NCOP.

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278 See para 257 above in which the impact of this section upon the exclusive powers of the provinces is discussed.

279 Functional areas of exclusive provincial legislative competence.

280 See paras 254-7 above.

281 NT 125(5).

[207] The action of the national executive contemplated by NT 100 is either to put the province on terms to carry out its obligations (and presumably to intervene if it then fails to do so) or to assume responsibility for such functions itself to the extent that it is necessary to do so for any of the purposes set out in NT 100(1)(b). These are the same purposes referred to in NT 44(2) and intervention for such purposes is also authorised and required by CP XXI.2.

[208] NT 100 serves the limited purpose of enabling the national government to take appropriate executive action in circumstances where this is required because a provincial government is unable or unwilling to do so itself. This is consistent not only with CP XXI.2 but also with CP XX, which requires the allocation of powers to be made on a basis that is conducive to effective public administration. Any attempt by the national government to intervene at an executive level for other purposes would be inconsistent with the NT and justiciable. NT 100 does not diminish the right of provinces to carry out the functions vested in them under the NT; it makes provision for a situation in which they are unable or unwilling to do so. This cannot be said to constitute an encroachment upon their legitimate autonomy.

NT 125(3)

[209] NT 125(3) provides:

> "A province has executive authority [to develop and implement policy] only to the extent that the province has the administrative capacity to assume effective responsibility. The national government, by legislative and other measures, must assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their functions ...".

The provision envisages a situation in which a province is unable to carry out the functions that are required for the development or implementation of policy and imposes an obligation on the national government to assist the province to develop the necessary capacity. The provisions are consistent with CP XX, which relates the allocation of executive powers to effective public administration. In a situation such as that which exists in South Africa, where newly established provinces may not yet have the administrative infrastructure to enable them to carry out the functions they have to perform in terms of the NT, the provision serves a necessary governmental purpose, and does not encroach upon the legitimate autonomy of the provinces.[282]

NT 146

[210] NT 146 is referred to in the section dealing with CP XVIII.2.[283] It deals with conflicts between national legislation and provincial legislation in the field of concurrent legislative competences. We have drawn attention to the fact that NT 41 requires all spheres of government to exercise their powers and functions in a way that respects the geographical, functional and institutional integrity of government in another sphere.[284] A provision regulating how conflict between the legislation of different levels of government is to be resolved is clearly necessary. NT 146 is within the broad framework of governmental preferences contemplated by CPs XXI.2 and

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[282] A submission that NT 125(4) deprives a province of the right to have a dispute in regard to its capacity to develop and implement policy resolved by the courts is incorrect. The provision fixes the time within which the dispute must be resolved as contemplated by NT 41(4) and does not detract from a province's rights under NT 167(4) to have the dispute resolved by the Constitutional Court.

[283] See Chapter VII.C below.

[284] Para 264 above.

XXI.4, and in the light of this and the provisions of NT 41 it cannot be said that the section encroaches upon the legitimate autonomy of the provinces

NT 147(1)

[211] NT 147(1) deals with conflicts between national legislation and provisions of a provincial constitution. Preference is given to national legislation which is specifically required or envisaged by the NT and to national legislative intervention made in terms of NT 44(2). Conflicts between national legislation and provisions of a provincial constitution in the field of the concurrent legislative competences set out in NT sch 4 are to be dealt with in the same manner as conflicts in respect of such matters between national legislation and provincial legislation.

[212] The continued existence of the provinces as well as their power to adopt provincial constitutions is recognised by CP XVIII. The provinces are not sovereign states. They were established by the IC and derive their powers from it. One of these powers is to enable a provincial legislature to adopt a constitution for its province subject to the proviso that such a constitution should not be inconsistent with the IC or the CPs.[285]

[213] Provincial legislatures are permitted by IC 160(3) to make provision in a provincial constitution for legislative and executive structures and procedures different from those provided for in the IC and to make provision for the institution, role, authority and status of a traditional monarch.[286] They cannot, however, by exercising their power to adopt a provincial constitution, increase the powers vested in them under the IC or amend provisions of the IC which regulate the relationship between the national and provincial levels of government.[287] NT 147 is to the same effect.

[214] NT 147 does not encroach upon the legitimate political autonomy of the provinces. It does no more than preserve the relationship between the NT and provincial constitutions. It makes clear that a provincial constitution cannot alter the power relationship established by the NT, that it cannot increase the powers vested in the provincial government under the NT and that it cannot reduce or otherwise seek to modify the powers vested in Parliament by the NT. In doing so it gives effect to CP IV which states:

> "**The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.**"

The provisions of NT 147 do not in our view encroach upon the legitimate autonomy of the provinces.

NT ch 10

[215] NT ch 10 deals with public administration. The CPs which deal specifically with these matters are CP XXIX and CP XXX, which have already been considered.[288] CP XXIX requires an

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285 IC 160.

286 IC 160(3)(b) requires provision to be made for the Zulu monarch in the case of the province of KwaZulu-Natal.

287 See *Certification of the KwaZulu-Natal Constitution, 1996* (CC) Case No CCT 15/96, judgment delivered on the same day as this judgment.

288 See Chapter IV.F above.

independent and impartial PSC "in the interests of the maintenance of effective ... administration and a high standard of professional ethics in the public service". CP XXX requires there to be "an efficient, non-partisan, career-orientated public service broadly representative of the South African community", the structures and functioning of which, "as well as the terms and conditions of service of its members, shall be regulated by law".

[216] NT 196(2) provides that there must be a single PSC, which is subject to regulation by national legislation, but is independent and impartial. It is clear that only one PSC is contemplated and that there has been a departure from the provisions of the IC which empowered provinces to establish their own provincial service commissions. It is also implicit in NT sch 6 s 24(2) that the new PSC to be established in terms of NT 196 will take the place of both the existing PSC and the provincial service commissions.

[217] Separate provincial service commissions are not specifically required by the CPs. The question whether the changes made by NT ch 10 will have a material bearing on the autonomy of the provinces or their powers depends upon the functions and powers of the new PSC, which, as we have previously noted, is a matter that has not been dealt with in the NT.

[218] Under the IC provincial service commissions are bound by norms and standards set by the national PSC. The setting of such norms and standards by an independent body does not detract from the legitimate autonomy of the provinces. What is important to such autonomy, however, is the ability of the provinces to employ their own public servants. We do not read the NT as denying the provinces this power. Although there is no specific provision dealing with this, it is a power implicit in the executive authority of the provinces which is vested in the Premiers by NT 125(1), and in the other provisions of NT 125 which presuppose that the provinces will have an administrative infrastructure necessary for the implementation and administration of laws. The IC does not specifically empower the provinces to set up their own administrations and to employ their own servants, but this has been done by all the provinces, and it has never been doubted that the power to do this is inherent in their executive authority to implement laws. NT sch 6 annexure D s 6 accepts that existing provincial administrations will remain in place and that the process of rationalisation will be continued with a view to establishing an effective administration for each province. The fact that NT 197 makes provision for "a public service for the Republic" and not for separate public services for the various levels of government does not detract from this. IC 212 also makes provision for "a public service for the Republic". What is important is who makes the appointments to the public service in respect of provincial administrations.

[219] The mere fact that the NT makes provision for a single PSC does not mean that the legitimate autonomy of the provinces will necessarily be impaired or that their powers will necessarily be reduced. Each of the provinces is vested with the power to nominate one of the Commissioners and will therefore have the opportunity of making a contribution to the work of the PSC. Everything really depends upon the powers to be vested in that body. The national legislation which will regulate the functioning of the PSC involves the NCOP and has to be passed in accordance with the requirements of NT 76.[289] If the functions and powers of the PSC are set out in the NT, the legislation will be subject to constitutional control.

[220] If the PSC has advisory, investigatory and reporting powers which apply equally to the national and provincial governments, and the provinces remain free to take decisions in regard to

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289 NT 76(3)(e).

the appointment of their own employees within the framework of uniform norms and standards, the changes will neither infringe upon their autonomy, nor reduce their powers. But if the provinces are deprived of the ability to take such decisions themselves, that would have a material bearing on these matters.

NT ch 13

[221] NT ch 13 deals with finance.[290] In the context of provincial autonomy the objection that is taken is as follows. NT 215 prescribes to the provinces how and when they must prepare their budgets and what must be contained in them, and NT 216 empowers Parliament to prescribe measures to ensure both transparency and expenditure control, by requiring all spheres of government to adhere to recognised accounting practices, uniform expenditure classifications and uniform treasury norms and standards. In terms of NT 216(2) the transfer of funds to a province may be stopped if there is a "serious or persistent material breach of" such measures. NT 217, which deals with procurements, requires all organs of state at all levels of government to contract for goods and services "in accordance with a system which is fair, equitable, transparent, competitive and cost-effective", and it authorises national legislation to prescribe a framework within which "affirmative action" policies may be implemented. NT 218 provides that loan guarantees by any level of government must comply with conditions set out in national legislation, and NT 219 requires national legislation to prescribe a framework for determining the salaries of traditional leaders and members of councils of traditional leaders, and the upper limit of salaries, allowances or benefits of members of provincial legislatures and members of Executive Councils of provinces. It is contended that these provisions, taken together, encroach upon the legitimate autonomy of the provinces.

[222] These provisions must be seen in the context of the requirements of the CPs dealing with the allocation to different levels of government of revenue raised nationally. That is dealt with in the CPs as follows:

> "**XXVI**
> **Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that the provinces and local governments are able to provide basic services and execute the functions allocated to them.**
> **XXVII**
> **A Financial and Fiscal Commission, in which each province shall be represented, shall recommend equitable fiscal and financial allocations to the provincial and local governments from revenue collected nationally, after taking into account the national interest, economic disparities between the provinces as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the provinces.**"

[223] NT 214(1) requires an Act of Parliament to make provision for the equitable division of revenue, the determination of each province's share of such revenue, and other allocations out of the national government's share of revenue that may be made to provinces or local governments. The Act has to take account of various factors specified in NT 214(2). For the purpose of addressing the issue of legitimate provincial autonomy, what is important is that the scheme of governmental financing contemplated by the CPs is one which involves a distribution of revenue collected nationally between the various levels of government. The provisions of NT 215 and 216 are rationally connected to such a scheme and serve a legitimate purpose. Uniformity in accounting

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290 The question whether NT ch 13 complies with the CPs XXV, XXVI and XXVII is dealt with in Chapter VII.I below.

practices and preparation of budgets will facilitate the equitable allocation of revenue between the various levels of government; indeed, without such uniformity the allocation of revenue on an equitable basis might not be possible. In the circumstances the requirements of NT 215 and 216(1) do not encroach upon the legitimate autonomy of the provinces.

[224] A province cannot carry out its governmental functions without the equitable share of revenue to which it is entitled. If the transfer of funds to the provinces is to be made, or is liable to be stopped, at the discretion of the national government, that would materially impair the legitimate autonomy of the provinces.

[225] This, however, is not the effect of NT 214 and 215. Each province has a constitutional right to an equitable share of revenue collected nationally, a right that is recognised in NT 214(1). NT 216(2), which empowers the Minister of Finance in the national government to stop the transfer of funds to an organ of state which is guilty of a serious or persistent material breach of the requirements of the measures established to secure uniformity, does not detract from this right. It is an enforcement mechanism designed to secure compliance with the corresponding obligation to adhere to uniform norms in the budgeting and accounting processes. It can be invoked only if there has been a serious or persistent material breach of these obligations, and it is subject to the external controls of NT 216(3), (4) and (5). These include approval by Parliament within 30 days of such action having been taken.[291] For this purpose Parliament includes the NCOP, and the approval that is required may be given by Parliament only after the Auditor-General has reported to it on the issue and the province concerned has been given the opportunity of answering the allegations against it.[292] The question whether there has been a serious or persistent material breach of the provisions would also be justiciable.

[226] The enforcement mechanism is rationally connected to the obligation to adhere to the prescribed norms and is not disproportionate to the breach that it is intended to remedy. In the circumstances it cannot be said to infringe upon the legitimate autonomy of the provinces.

[227] The obligation to effect procurements in accordance with a system that is fair, equitable, transparent, competitive and cost-effective is consistent with open and accountable administration which is an implicit requirement of the CPs.[293] The obligation to act in this manner does not detract from the legitimate autonomy of the provinces; it is what they would have been expected to do. The provision that national legislation must determine a framework for affirmative action policies in respect of procurements is consistent with CP XXI, and is not an encroachment on the legitimate autonomy of the provinces.

[228] NT 218(1), which provides that the national government, provinces and municipalities may guarantee loans only if the guarantee complies with conditions established in national legislation, cannot be said to deprive the provinces of legitimate provincial autonomy. It is a provision aimed at ensuring that all levels of government observe uniform and sound financial practices to prevent the mismanagement and misuse of public funds. Nor can it be said that the provisions of NT 219(2), which provide that national legislation shall establish a framework for determining the

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291 NT 216(3)(b).

292 NT 216(5).

293 See CPs VI and IX.

upper limits of salaries to be paid to members of provincial legislatures, among others, deprives the provinces of legitimate autonomy. This provision does not prevent the provinces from determining the actual salaries to be paid to members of provincial legislatures; it merely provides for the establishment of a framework to establish upper limits. In our view, the provision achieves an acceptable balance between the need to establish national standards and the need to preserve provincial autonomy. In conclusion, we find no merit in the objections levelled against any of these provisions.

Cooperative Government

[229] The constitutional system chosen by the CA is one of cooperative government in which powers in a number of important functional areas are allocated concurrently to the national and the provincial levels of government. This choice, instead of one of "competitive federalism" which some political parties may have favoured, was a choice which the CA was entitled to make in terms of the CPs. Having made that choice, it was entitled to make provision in the NT for the way in which cooperative government is to function. It does this in NT 40 and 41.

[230] NT 40 defines the different levels of government as being "distinctive, interdependent and interrelated" and requires them to conduct their activities within the parameters of NT 40 and 41. According to NT 41(1), all spheres of government and all organs of state within each sphere must adhere to the principles of cooperative government and inter-governmental relations set out in that section.

[231] These principles, which are appropriate to cooperative government, include an express provision that all spheres of government must exercise their powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.[294]

[232] Inter-governmental cooperation is implicit in any system where powers have been allocated concurrently to different levels of government[295] and is consistent with the requirement of CP XX that national unity be recognised and promoted. The mere fact that the NT has made explicit what would otherwise have been implicit cannot in itself be said to constitute a failure to promote or recognise the need for legitimate provincial autonomy.

[233] Although it was argued that cooperation should be a matter for negotiation between each province and the national government, the only provision in NT 41(1) to which serious objection was taken was the requirement that the different spheres of government should avoid legal proceedings against each other. This has to be read with NT 41(4) which provides:

> "An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute."

This provision binds all departments of state and administrations in the national, provincial or local

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294 NT 41(1)(g).

295 *Ex Parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 (CC); 1996 (4) BCLR 518 (CC) at para 34.

spheres of government.[296] Its implications are that disputes should where possible be resolved at a political level rather than through adversarial litigation. It is consistent with the system of cooperative government which has been established and does not oust the jurisdiction of the courts or deprive any organ of government of the powers vested in it under the NT. The contention advanced on behalf of one of the objectors that litigation between organs of state is not competent under the NT is clearly wrong. Specific provision for such litigation is made in NT 167(4)(a). In our view it cannot be said that NT 41 is inconsistent with CP XX. In so holding we are not unmindful of the fact that NT 41(2) and 41(3) make provision for Acts of Parliament to establish the structures and institutions which will promote and facilitate inter-governmental relations, and prescribe the mechanisms and procedures to facilitate the settlement of inter-governmental disputes. The legislation that is required has national implications and it is appropriate that it should be the subject of national legislation. The legislation will have to respect the integrity of provincial governments and, although it does not have to be passed by the NCOP, it will be subject to constitutional control.

[234] The principles of cooperative government and inter-governmental relations set out in NT 41 are not invasive of the autonomy of a province in a system of cooperative government and the objection that they contravene CP XX must be rejected.

Framework

[235] Various objections were taken to provisions of the NT which either individually or collectively were said to constitute an invasion of provincial autonomy. In this category are provisions of the NT which deal with framework matters such as the size of provincial legislatures,[297] the calling of referenda,[298] the recognition of the post of leader of the opposition in the provincial legislature,[299] the number of terms that a premier can serve,[300] the electoral law and electoral procedures,[301] and the regulation of matters necessary for the proper functioning of constitutional structures such as intervention by the provinces in the affairs of municipalities,[302] the basis for determining the permanent and special delegates to the NCOP,[303] and the procedure in terms of which provinces confer authority on their delegates to cast votes on their behalf in the NCOP.[304]

[236] The CPs empower the CA to determine the constitutional framework within which the

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296 NT 239(1)(a)

297 NT 105(2).

298 NT 84(2)(g) and NT 127(2)(f).

299 NT 116(2)(d).

300 NT 130(2).

301 NT 46(1) and NT 105(1).

302 NT 139.

303 NT 61(2)(a).

304 NT 65(2).

various levels of government will function. Provincial governments, like other levels of government, have to conduct their affairs within the prescribed framework.[305] As long as the framework does not constrain the exercise of provincial powers in ways which would prevent the provinces from effectively exercising the powers vested in them by the NT, the framework is not relevant to provincial autonomy. The provisions of the framework to which reference is made in this section do not prevent or unduly constrain the provinces from exercising their powers and the objections to such provisions must be rejected.

"Oversight"

[237] NT 55(2)(b)(ii) requires the NA to provide "mechanisms" to maintain "oversight" of any organ of state, which will include a department of a provincial government.[306] This must be seen in the context of the scheme of cooperative government under which provinces will implement national legislation unless an Act of Parliament otherwise provides,[307] and where Parliament is under a constitutional duty to intervene and implement such legislation itself if it is necessary to do so.[308] It is also relevant to decisions which may have to be taken by the NA in regard to the enactment of NT sch 4 legislation or the exercise by Parliament of its powers under NT 44(2).[309]

[238] The mechanism established and the exercise of the powers under such mechanism will be subject to constitutional control and the provisions of NT ch 3. In the circumstances the "oversight" provision is a legitimate power to vest in the national government in the context of the system of cooperative government which has been established, and does not contravene the provisions of CP XX.

Other Objections

[239] Other issues raised in relation to provincial autonomy are that there is no provision for a province to adopt an official language,[310] that there are restrictions on a province's ability to change its name,[311] and that there is no power enabling a province to establish armed forces. None of these powers is required by the CPs and it was open to the CA to decide how to deal with such matters. The decisions taken do not prevent or unduly constrain the ability of the provincial legislatures to exercise their legislative and executive powers and there has accordingly been no breach of CP XX.

[240] In the result the question whether CP XX has been complied with depends upon the provisions which in the light of this judgment will have to be made in the NT in respect of the powers and functions of the PSC. If those provisions are made in a way which does not

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305 NT 143 enables each provincial legislature to adopt a provincial constitution in which provision can be made, inter alia, for legislative or executive structures and procedures that differ from those provided for in the NT and for the institution, role, authority and status of a traditional monarch. To the extent authorised by this provision, provincial legislatures can change aspects of the framework prescribed by the NT.

306 NT 239(1).

307 NT 125(2)(c).

308 NT 100(1).

309 See para 257.

310 NT 6(3).

311 NT 104(2).

compromise the legitimate autonomy of the provinces, the requirements of CP XX will have been met. But unless and until the powers and functions of the PSC have been clarified we are unable to certify that CP XX has been complied with.

CHAPTER VI. LOCAL GOVERNMENT ISSUES

[241] Most of the objections in respect of local government ("LG") provisions of the NT were levelled at the alleged diminution of provincial powers and functions.[312] While this was the primary quarrel, it was not the only one. Further objections were directed at the NT for its alleged failure to set out a framework for LG powers, functions and structures as required by CP XXIV. Moreover, it was maintained that the NT failed more generally to heed the injunction of CP XXV, which is to say that the framework for LG does not make provision for fiscal powers and functions for different categories of LG. In addition, it was argued that the power granted to municipalities to impose excise taxes contravened CP XXV for the reason that this was not an "appropriate fiscal power".

[242] CP XXIV requires that a framework for LG powers, functions and structures shall be set out in the NT. The comprehensive powers, functions and other features of LG are to be set out in parliamentary statutes or provincial legislation, or both. CP XXV requires, inter alia, that the CP XXIV framework shall make provision for appropriate fiscal powers and functions for different categories of LG.

[243] At the very least, the requirement of a framework for LG structures necessitates the setting out in the NT of the different categories of LG that can be established by the provinces and a framework for their structures. In the NT, the only type of LG and LG structure referred to is the municipality.[313] In our view this is insufficient to comply with the requirements of the CP XXIV. A structural framework should convey an overall structural design or scheme for LG within which LG structures are to function and provinces are entitled to exercise their establishment powers. It should indicate how LG executives are to be appointed, how LGs are to take decisions, and the formal legislative procedures demanded by CP X that have to be followed. We conclude, therefore, that the NT does not comply with CP XXIV and CP X.

[244] Moreover, there is no compliance with CP XXV. No provision has been made in the NT for appropriate fiscal powers and functions in respect of different categories of LG. Indeed, as indicated, in terms of NT 155(1)(a), the various categories of LG are to be determined by national legislation. This merely reinforces our conclusion that a structural framework for LG must encompass a broad design of the municipal typology.

[245] This conclusion, strictly speaking, makes it unnecessary to consider an objection to the provisions of NT 229(1), which authorise municipalities to impose, inter alia, "excise taxes". The submission made on behalf of this objector is that it is not an "appropriate" fiscal power and therefore falls foul of CP XXV. It was also contended that such taxes are not subject to any national or provincial control and are for that reason also "inappropriate" to confer on LG. Our view with regard to this objection may be helpful to the CA.

[246] Stated simply, the first objection is based upon the submission that an excise tax is usually a

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312 See Chapter VII.E below.

313 See NT 151.

tax imposed upon the manufacture or sale of goods. This is the sense, for example, in which the term is used in the Customs and Excise Act 91 of 1964. Counsel for the objector acknowledged that the word could also bear the meaning of a tax levied on licences or a lower-tier tax on defined items such as alcohol and tobacco. The submission on behalf of the CA (in its final incarnation) was that on a proper reading of NT 229, the word "municipal" was to be inserted by implication before the word "excise". On that basis, so it was contended, "excise taxes" would refer to excess charges on utilities such as water and electricity provided by municipalities. The material furnished by the CA in support of that submission was, however, destructive of the contention. It shows that the word "excise" ordinarily carries the meaning of a retail tax targeted at specific commodities such as alcohol, tobacco and fuel. At best the taxing power in respect of "excise taxes" would lead to a tyranny of uncertainty and litigation.

[247] In our opinion the word is ambiguous. It is unnecessary to refer to the dictionary meanings which illustrate that. To limit the expression to "municipal excise taxes" would not remove the ambiguity. Suffice it to say that the expression includes taxes that are inappropriate for municipalities to impose.

CHAPTER VII. PROVINCIAL POWERS (CP XVIII.2)

A. THE INTERPRETATION AND APPLICATION OF CP XVIII.2

[248] CP XVIII.2 reads as follows:

> "**The powers and functions of the provinces defined in the Constitution, including the competence a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution.**"

CP XVIII.2 was introduced into the CPs through an amendment to the IC promulgated on 3 March 1994.[314] It was not disputed that it was one of a series of amendments passed at that time, and that one of the objects of these amendments was to encourage political formations which had refused to participate in the transition process to change their minds and to support the transition to a new political order.[315] It was contended that the legislative history required particular importance to be given to the CPs amended in this way, that the purpose of the amendments was, among others, to provide assurances that the NT would make provision for provincial autonomy, and that CP XVIII.2 should be interpreted so as to give effect to this purpose.

[249] None of the CPs can be characterised as being more important than the others, and the fact that CP XVIII.2 was introduced at a late stage does not mean that its provisions should be given greater weight than the other provisions of IC sch 4. Together they constitute the solemn pact to which we have referred previously. Some of their provisions will have been of particular importance to certain political formations; but other provisions will have been of equal importance to others. They have to be construed holistically in the manner set out in Chapter II of this

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314 S 13 of the Constitution of the Republic of South Africa Amendment Act 2 of 1994.

315 Other amendments made by Act 2 of 1994 included a reformulation of the IC 126 overrides, the vesting of additional powers of taxation in the provinces through the provisions of IC 156(1A), the reformulation of certain of the fiscal and financial provisions of IC 156, 157, 158 and 159, the reformulation of IC 160, which empowers provinces to adopt provincial constitutions, the introduction of IC ch 11A dealing with the Volkstaat Council, the amendment of IC sch 2 to make provision for separate ballots for national and provincial legislatures, and the introduction of CP XXXIV dealing with self-determination.

judgment, and CP XVIII.2 is not entitled to special treatment simply because it was a late addition to the pact.

[250] CP XVIII.2 does not deal with provincial autonomy. That has been addressed in CP XX, which was part of the original pact and was not the subject of any amendment in 1994. The purpose of CP XVIII.2 is apparent from its own terms. It is a guarantee that provincial powers and functions will not be substantially reduced by the provisions of the NT, and it is on that basis that it has to be construed.

[251] CP XVIII.2 clearly requires a comparison between the powers of the provinces in the IC and those provided for in the NT. Before making that comparison it is necessary to understand the scheme according to which power is distributed between the national and provincial levels of government under the IC. At the national level Parliament has the power to make laws for the Republic.[316] This is a general plenary legislative competence and is not confined to specific functional areas.[317] At the provincial level, a provincial legislature has a limited competence to make laws for its province with regard to those matters which fall within the functional areas of IC sch 6.[318] Provincial legislatures also have the power to adopt a constitution for the province[319] and enjoy certain financial and fiscal powers specified in the IC.[320] None of the IC sch 6 powers is exclusive to the provinces. Parliament is also competent to make laws in regard to IC sch 6 matters, and the IC regulates the manner in which conflicts between IC sch 6 laws enacted by Parliament and IC sch 6 laws enacted by a provincial legislature are to be resolved.[321]

[252] The distribution of power between the national and provincial levels of government under the NT is substantially similar. At the national level Parliament has the power to pass legislation with regard to any matter other than a matter within the functional areas of exclusive provincial legislative competence set out in NT sch 5.[322] In respect of such matters Parliament has only a limited power to intervene by passing legislation when it is necessary to do so for the purposes set out in NT 44(2)(a)-(e).[323] Provincial legislatures have the exclusive powers referred to in NT sch

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316 IC 37.

317 Supra n 200 at para 13.

318 IC 126(1).

319 IC 160.

320 IC 155-9.

321 IC 126(3), (4) and (5).

322 NT 44(1)(a)(ii).

323 NT 44(2)(a)-(e) provides:

> "(a) to maintain national security;
> (b) to maintain economic unity;
> (c) to maintain essential national standards;
> (d) to establish minimum standards required for the rendering of services; or
> (e) to prevent unreasonable action taken by a province which is prejudicial to the interest of another province, or to the country as a whole."

5, which are subject to intervention by Parliament in the special circumstances set out in NT 44(2), and powers set out in NT sch 4 which are exercisable concurrently with Parliament. The resolution of conflict between national legislation and provincial legislation in respect of NT sch 4 matters is regulated by the provisions of NT 146 to 150. A provincial legislature also has the power to adopt a constitution for the province[324] and enjoys the fiscal and financial powers set out in NT ch 13.

[253] NT schs 4 and 5 cover similar ground to that covered by IC sch 6. There are differences, however, and these differences, as well as differences in other aspects of the individual and collective powers of the provinces, have to be evaluated in order to determine whether or not CP XVIII.2 has been complied with.

[254] Against the backdrop of the schemes followed in the IC and the NT in allocating legislative and executive powers to the provinces and the national state, the following issues must be borne in mind in approaching the interpretation and application of CP XVIII.2.

[255] What must be distinguished in the first place are the powers, functions and status of the institution of the Senate, through which the provinces express their input in the national and political institutions of the country in terms of the IC, from the corresponding powers, functions and status of the NCOP through which that input must be made in terms of the NT. (This analysis appears separately in this judgment.)[325]

[256] If the NCOP is superior or inferior in status and power to the Senate as an institution, this is a factor which must be taken into account in determining the balance between the factors which determine the provinces' current powers and functions and the factors which determine such powers and functions under the NT.

[257] A second distinction which must be made is between the power and the capacity of provinces collectively[326] to resist the will of the national government and the power of an individual province to do so.[327] Each of the two categories must be subject to the same weighing process. In each case the enquiry must be whether the NT gives more or less power to the province or provinces.

[258] A particular provision of the NT that fails to comply with a relevant CP must be left out of account in the weighing process for the purposes of the exercise in terms of CP XVIII.2. But if the NT is not certified because of its failure to comply with the CPs, and the CA changes the relevant part of the text which fails so to comply, we would be obliged to weigh the text as changed (insofar as it impacts upon the functions, powers and status of the provinces) in the competing factors which have to be balanced in deciding whether the ultimate package of provincial powers under the NT is substantially inferior to, or less than, that which is accorded to the provinces in the IC. This means that although the Court must not at this stage enter into the exercise of weighing the particular factor represented by the text which otherwise fails to comply with a relevant CP, such

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324 NT 142-5.

325 See Chapter VII.B below.

326 The collective power of the provinces is also dealt with below in Chapter VII.B.

327 The difference between the IC and the NT in regard to the power of individual provinces is dealt with in paras 467-8 of this judgment.

an exercise may still be relevant to enable the CA to assess what weight would be attached to the particular part of the text once the respect in which it had been found defective were to be rectified. The assessment of that weight would be relevant for the purposes of deciding whether the powers of the provinces were substantially less or inferior in the NT relative to the corresponding powers of the provinces in terms of the IC.

[259] In the application of CP XVIII.2 to the NT there are necessarily two enquiries. If the powers, functions and status of the provinces in terms of the NT are not inferior or less, that is the end of the enquiry in that respect. If, however, they are indeed inferior or less, the second question that arises is whether they can properly be said to be substantially inferior or substantially less. The answer to this question might involve some element of subjective judgment, but it is ultimately an objective exercise which must be performed by our having regard to all relevant factors.

B. THE NATIONAL COUNCIL OF PROVINCES

[260] Under the IC the provinces have what can be said to be a "collective" power which is exercised largely through the Senate. Under the NT the Senate has been replaced by the NCOP. In their argument counsel for the CA placed weight on the establishment of this new institution and contended that it will result in a material enhancement of the collective power of the provinces. This was disputed by counsel for a number of the objectors, who contended to the contrary that the collective power of the provinces has been reduced by the NT. In evaluating the changes made by the NT it is therefore necessary for us to have regard not only to the changes that have been made in respect of the individual powers of the provinces, but also to the structural and other changes in the NT which bear upon their collective power.

[261] Under the IC, where Parliament consists of the NA and the Senate,[328] each province is represented in the Senate by ten nominated senators. The power to nominate these senators does not vest in the provincial legislature or its members but in the parties represented in the provincial legislature. They nominate senators according to a system of proportional representation which depends upon the number of members that each party has in the provincial legislature.[329] Senators' positions in Parliament depend upon the support for their parties in the province, they are nominated by and owe their seats directly to the parties to which they belong. Their position is to a substantial extent similar to that of those members of the NA (200 of the 400 members) who are elected to the NA on provincial party lists. The representation of the provinces in the Senate is therefore indirect and weak, in that senators owe their appointment to the parties and not directly to the provincial legislatures or the provincial electorates.

[262] The Senate was described in argument by counsel for the CA as a mirror image of the NA. That may be the picture at present as a result of the elections for the NA and the provincial legislatures having taken place on the same day in terms of the same system - namely proportional representation according to party lists.[330] This is, however, not necessarily an accurate description of the Senate as an institution. The equal representation of the provinces in the Senate can lead to different proportions in the representation of the parties in the Senate, as compared with their representation in the NA. So too can the fact that the ballot for the provincial legislature is

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328 IC 36.

329 IC 48.

330 See IC sch 2.

conducted separately from the ballot for the NA, a difference that could be particularly significant if provincial elections are conducted in the future at different times from national elections, which might well be the case. The Senate may therefore develop into a House in which the party political representation will be materially different from that which exists in the NA, and become an effective wielder of party political power. The method of nomination of senators does, however, detract from the weight to be given to the Senate as a source of collective provincial power. As an institution it is more a House in which party political interests are represented than a House in which provincial interests are represented, and this has to be taken into account in evaluating the effect of the changes introduced by the NT in so far as they are relevant to the issue of collective provincial power. Against this background, we turn now to a consideration of the changes.

[263] All parliamentary bills have presently to be considered and debated by the Senate before they are passed. The power of the Senate in respect of the passing of bills depends upon the subject matter of the bill. Certain bills are subject to a Senate veto. They are, first, bills amending IC 126 or 144, which are the source of the legislative and executive powers of the provinces. Such bills require a majority of at least two-thirds of all the members in each House sitting separately.[331] There are other bills which can only be passed by an ordinary majority in both Houses sitting separately. These are bills "affecting the boundaries or the exercise or performance of the powers and functions of the provinces",[332] bills determining the percentages of income tax, value-added tax, and fuel levy to be allocated to the provinces by Parliament,[333] bills conferring authority on provinces to raise taxes, levies or duties[334] and bills prescribing the framework within which loans for capital expenditure can be raised by provinces.[335]

[264] There is a different category of bills that are ultimately dependent upon decisions taken at a joint sitting of both Houses. Bills amending provisions of the IC, other than IC 126 and 144, require a two-thirds majority of the total number of members at a joint sitting.[336] Ordinary bills, which are bills other than money bills or bills amending the IC, or affecting provincial powers, functions or boundaries,[337] have to be passed by both the Senate and the NA.[338] If they are passed by one House and rejected by the other, the deadlock can be broken by a majority of all the members at a joint sitting of both Houses.[339] The election and impeachment of the President are matters for decision by joint sittings of both Houses.[340]

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331 IC 62(2).

332 IC 61.

333 IC 155(2A).

334 IC 156(1A).

335 IC 157(1A).

336 IC 62(1).

337 IC 59(3).

338 IC 59(1).

339 IC 59(2).

340 IC 77(1)(b) and IC 87.

[265] Finally, there are money bills in which a dissent by the Senate can be overridden by an ordinary majority in the NA.[341] To avoid undue delay the Senate must take its decision within 30 days, or be deemed to approve of the bills.[342]

[266] In summary, therefore, the Senate has substantial power in relation to amendments to IC 126 or NT 144, has a veto in respect of some legislation, participates in joint sittings at which the IC is amended or deadlocks between the two Houses are resolved, and has the power to delay the passing of money bills.

[267] The NCOP is constituted differently to the Senate and has a different role in the legislative process. According to NT 42(4), the NCOP

> "... represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces."

It consists of delegations of ten persons appointed by each of the provincial legislatures. Six of the ten are "permanent" delegates and four are "special" delegates.[343] The special delegates, but not the permanent delegates, are to be members of the provincial legislature.[344] Each delegation will be led by the Premier of the province or a member of the provincial legislature designated by the Premier.[345] A provincial delegation is to be composed in a manner which enables parties in the provincial legislature to be represented in the delegation proportionately to their support in the provincial legislature.[346] Voting is by province, each province having one vote, which must be cast in accordance with the authority conferred on the delegation by the province.[347] However, when the legislation concerns a matter falling outside the functional areas of concurrent national and provincial legislative competence,[348] each delegate has an individual vote.[349] Organised LG may participate in the proceedings of the NCOP through non-voting representatives.[350] National legislation determines how the permanent and special delegates of the provinces are to be

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341 IC 60(8).

342 IC 60(7) and (8).

343 NT 60(1) and (2).

344 NT 61(3).

345 NT 60(3).

346 NT 61(1).

347 NT 65(1).

348 Listed in NT sch 4.

349 NT 75(2).

350 NT 67.

selected[351] and how the non-voting delegates of local authorities are to be chosen[352] and prescribes a uniform procedure to be followed by the provinces in conferring authority on their delegations to cast votes on their behalf.[353]

[268] The NCOP is part of Parliament[354] and participates in the passing of legislation. Where there is disagreement between the two Houses on certain bills the disagreement has to be referred to a Mediation Committee consisting of an equal number of members of the NA and the NCOP.[355] If mediation fails to secure the agreement of both Houses, the bill will lapse unless the NA subsequently passes the bill by a majority of at least two-thirds of its members.[356] Bills in this category include bills dealing with NT sch 4 matters,[357] bills dealing with the Public Protector[358] and bills dealing with the structure and functioning of the public service, the regulation of the terms and conditions of employment in the public service,[359] the promotion of certain aspects of public administration,[360] and the powers and functions of members of the PSC nominated by the provinces.[361] In the same category are bills in which Parliament seeks to intervene in NT sch 5 matters,[362] bills dealing with the Financial and Fiscal Commission,[363] and bills which affect the financial interests of the provincial sphere of government.[364] Bills which do not fall into these categories can be passed by a majority in the NA over the dissent of the NCOP if the NA elects to do this.[365]

[269] The NCOP also participates in constitutional amendments which affect the NCOP itself,

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351 NT 61(2)(a).

352 NT 163.

353 NT 65(2).

354 NT 42(1).

355 NT 78.

356 NT 76(1)(i) and (j).

357 NT 76(1) and (2) (the functional areas of concurrent national and provincial legislative competence).

358 NT 76(3)(c).

359 NT 76(3)(f).

360 NT 76(3)(d).

361 NT 76(3)(e).

362 NT 76(4)(a) (the functional areas of exclusive provincial legislative competence).

363 NT 76(4)(a).

364 NT 76(4)(b).

365 NT 75(1).

alter provincial boundaries, powers, functions or institutions, or amend a provision of the NT dealing specifically with a provincial matter.[366] The votes of at least six provinces are required for such amendments.[367] Other constitutional amendments can be passed without the participation of the NCOP by a two-thirds majority of the members of the NA.[368]

[270] In summary, therefore, amendments to the powers and functions of the provinces under the NT require, in addition to a two-thirds majority of the NA, the votes of six of the nine provinces; this is in place of the present requirement, which is a two-thirds majority of the NA and of the Senate. Where the Senate now has a veto in respect of certain bills, the NT provides that a dissent in the NCOP can be overridden by a two-thirds majority of the NA. In certain matters where joint sittings of the Senate and the NA would presently be required, the NT empowers the NA to take decisions on its own. In other matters in which a deadlock could now be broken by a majority at a joint sitting, the NT requires a two-thirds majority in the NA in order to override dissent by the NCOP. In addition the NCOP, unlike the Senate, does not participate in the election or impeachment of the President,[369] nor does it have the power to refer bills to the Constitutional Court.[370] It follows that in some respects the Senate has greater power than the NCOP; in other respects it has less.

[271] Counsel for the CA argued that the structure and functioning of the NCOP will enhance the collective power of the provinces. The NCOP, so the argument went, is a forum in which the interests of the provinces will be directly represented and will be pursued at a high level by provincial Premiers or their delegates from the provincial legislatures. This is likely to lead to provincial interests being advanced more effectively than is the case in the Senate, where the provincial representation is weak and indirect, and party interests are likely to prevail.

[272] We agree that the Senate as an institution has not been constituted in a manner that is calculated to promote provincial interests. It is essentially a national institution in which party political interests are represented.

[273] Although we are satisfied that the structure and functioning of the NCOP as provided for in the NT are better suited to the representation of provincial interests than the structure and functioning of the Senate, we are unable to say that the collective interest of the provinces will necessarily be enhanced by the changes that have been made.

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366 NT 74(1)(b).

367 NT 74(1)(b). Such amendments require in addition the support of two-thirds of the members of the NA.

368 NT 74(1)(a). IC 61 empowers a majority of Senators from a particular province or provinces to veto bills which affect the boundaries or the exercise or performance of the powers or functions of such province or provinces only. This allows the Senators of a particular province to protect that province against legislation which is directed against such province and is not of general application. The veto is, however, one which bears on the individual rather than the collective powers of the provinces and is dealt with in that section of the judgment. See paras 167-8.

369 IC 77(1)(b), IC 87 and NT 86(1).

370 IC 98(9) and NT 80.

[274] We have found it extremely difficult to evaluate the overall impact of these changes. A number of variable and uncertain factors have to be taken into account. These include not only the differences in the powers of the two Houses which have been referred to, but also the method of appointing the members of the Houses, the contrast between direct and indirect representation, the different methods of voting, the different procedures to be followed, the influence of the parties on voting patterns, and the possible impact of the anti-defection provisions on voting.[371] Account must also be taken of the disparity in numbers between the NA (400 members) and the Senate (90 members), which means that the NA is able to bring significantly greater weight to joint sittings, a feature of the IC not repeated in the NT.

[275] It may prove to be the case that the collective powers of the provinces have been substantially enhanced by the changes that have been made. That is, however, too speculative a proposition for us to accept as a basis for the certification of the NT. In the result, although we are satisfied that there has been no reduction in the collective powers of the provinces, we are unable to conclude that there has been a measurable enhancement of such powers either.

C. LEGISLATIVE POWERS: NT SCHS 4 AND 5 COMPARED WITH IC SCH 6

[276] The powers of the provinces, in terms of NT 104(1), 44(1)(a) and 44(2) read with NT schs 4 and 5, must be compared with IC 126 read with IC sch 6. That comparison yields the following.

[277] More powers are given to the provinces in the sense that a category of exclusive powers is introduced that does not exist under the IC. What this means is that with regard to the list set out in NT sch 5, the national government cannot legislate at all except in the special circumstances identified in NT 44(2). This appears to be some increase in the legislative powers and functions of provinces. Under the IC the national government can legislate in these areas as of right, but its laws will not prevail over provincial laws unless IC 126(3) can successfully be invoked. In terms of the NT, the national government can ordinarily not legislate in these areas but if it does, on the grounds authorised in terms of NT 44(2), its laws will prevail if the relevant justification under NT 44(2) is established. This is clear from NT 147(2).

[278] In the case of concurrent legislative powers, however, there is some difference. In terms of IC 126(3), for national legislation to prevail over provincial legislation, one or other of the requirements of IC 126(3) has to be established. National legislation is not assisted by any presumption. Under the NT, however, there is a presumption of necessity in terms of NT 146(4) with regard to those functions of the provinces in respect of which they enjoy concurrent authority with the national government in terms of NT 44(1)(a)(ii) read with NT 104 and NT sch 4. That presumption appears to be rebuttable but it still gives to the NA an advantage in regard to an area which it did not previously enjoy. The advantage is contained in NT 146(4). Even if it is a rebuttable presumption, it would be a presumption sometimes difficult to displace, especially when the enquiry is whether or not the national legislation was necessary for the maintenance of national security or economic unity.

[279] National legislation also enjoys an advantage in respect of the otherwise concurrent powers of the provinces: an override is made competent in terms of NT 146(2)(b), where the national legislation provides for uniformity, inter alia, by establishing "frameworks" or "national policies". By allowing for national legislation to prevail over provincial legislation where "the interests of the

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371 See Chapter IV.G above.

country as a whole require" uniformity, and where such uniformity is provided by national legislation which establishes "norms and standards; frameworks; or national policies", the NT has expanded to some extent the grounds on which provincial legislation can be overridden.[372]

[280] Against these considerations must be weighed the actual contents of the lists in NT schs 4 and 5 relative to the list contained in IC sch 6. The following areas have been added to provincial competences which are not found under the IC.

NT sch 4 compared with IC sch 6

- Administration of indigenous forests
- Disaster management
- Pollution control
- Population development
- Property transfer fees
- Provincial public enterprises
- Public works in respect of the needs of provincial government
- Vehicle licensing

NT sch 5 compared with IC sch 6

- Ambulance services
- Archives other than national archives
- Libraries other than national libraries
- Liquor licences
- Museums other than national museums
- Provincial planning
- Provincial cultural matters
- Veterinary services, excluding regulation of the profession
- Monitoring and overseeing powers over local authorities in terms of NT 155(3) read with part B of NT sch 5

[281] On the other hand the following areas which fall within a provincial competence under the IC have now been excluded or reduced:

- Casinos, racing, gambling and wagering
- Determining the framework of remuneration of traditional leaders
- Some reduction in the provinces' power to declare any official language as an official language within the whole or part of a particular province (compare IC 3(5) with NT 6(3))
- The power of approving or vetoing the appointment of a provincial commissioner

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372 The courts would have jurisdiction to determine whether "the interests of the country as a whole require that a matter be dealt with uniformly" for the purposes referred to in NT 146(2)(b), or that it is necessary for the objectives set out in NT 146(2)(c), or that the matter concerned cannot, within the meaning of NT 146(2)(a), be regulated effectively by individual provincial legislation. Such an exercise involves both an objective and a subjective element. The test in each case is ultimately objective because it is not the subjective belief of the national authority which is the jurisdictional fact allowing the national legislation to prevail over the provincial legislation, but there is inherently some subjective element involved in the assessment of what the interests of the country require or what is necessary. Some deference to the judgment of the national authority in these areas is inevitable and the presumption created by NT 146(4) may prove to be a formidable obstacle.

of police in terms of IC 217(2)(a) and the power to institute appropriate proceedings against a provincial commissioner who has lost the confidence of the provincial executive council, in terms of IC 217(2)(b); and a measure of operational control by the provincial executives under IC 219(1) is reduced to a monitoring power in terms of NT 206(2)

- The restructuring of LG after the interim period contemplated by IC 245
- All higher education, excluding university and technikon education, falls within the concurrent legislative competence of provinces in terms of IC sch 6. NT sch 4 excludes all tertiary education from the legislative competence of the provinces. The effect is that whereas institutions for the training of teachers, for example, would previously have fallen within the competence of provinces, this is no longer the case
- Whereas all roads fall within the concurrent legislative competence of provinces in terms of IC sch 6, this is no longer the case in terms of the NT. But provincial roads and traffic are made the subject matter of exclusive provincial competence in NT sch 5
- Whereas all "provincial public media" fall within the concurrent legislative competence of the provinces in terms of IC sch 6, this is now marginally reduced by NT sch 4 to "[m]edia service directly controlled or provided by the provincial government subject to section 192"

[282] An examination of these lists, together with the argument of the political parties, shows an increase in the power of the provinces only to a marginal degree. Against this must be weighed the areas in which there is some reduction.

[283] Balancing the two, there can be little argument that the powers of the provinces are now less than they are in the IC, but can they be said to be substantially less or inferior? There must in that exercise inevitably be some degree of subjective judgment which can only be made by weighing this factor together with all other relevant factors, including the larger issues such as the power of the NCOP under the NT compared with that of the Senate under the IC,[373] the power of an individual province to resist the power of the centre in regard to its own areas of legislative or executive discretion, and a comparison between the IC and the NT relating to the constitution-making power of the provinces.[374] We deal with this issue later in the judgment.[375]

D. CONSTITUTION-MAKING POWERS

[284] The only CP which refers to provincial constitutions is CP XVIII.2. It was contended by the objectors that on a proper construction of this CP the competence of a provincial legislature to adopt a constitution for its province must not be substantially less than or substantially inferior to its ability to do so in terms of the IC.

[285] This contention was disputed by counsel for the CA who argued that the words "including the competence of a provincial legislature to adopt a constitution for its province" mean that the power to adopt a constitution is to be taken into account for the purposes of the CP XVIII.2

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373 See Chapter VII.B.

374 See paras 467-8 and Chapter VII.D.

375 See Chapter VII.J.

evaluation, but that there is no requirement that such power should itself be not substantially less than or inferior to that which provinces enjoy under the IC.

[286] In the view that we take of this matter it is not necessary to decide this dispute, for we are satisfied that the power of a provincial legislature to adopt a constitution for its province is substantially the same as the existing power under the IC.

[287] In determining whether the powers of the provinces under the NT to adopt provincial constitutions are substantially less than or substantially inferior to the powers they have under the IC, the comparison that has to be made is between IC 160 and NT 142 and 143.[376] The other legislative and executive powers and functions of the provinces do not have a direct bearing on the power of a province to adopt a constitution, and are accordingly not relevant to this particular enquiry.

[288] NT 143 provides that a provincial constitution may not be inconsistent with the NT save for two areas in which the provisions of a provincial constitution can be different from the corresponding provisions in the NT. It also provides for areas in respect of which the constitution-making powers of the provinces are limited.

[289] The two areas in which provincial constitutions are permitted to be different are, first, in respect of legislative and executive structures and procedures of a province and, second, in respect of the institution, role, authority and status of a traditional monarch, where applicable. The areas of limitation are essentially that a provincial constitution must comply with NT ch 3 and the values in NT 1, and may not confer upon a province powers or functions beyond those conferred on it by the NT.

[290] IC 160(3) provides:

> "A provincial constitution shall not be inconsistent with a provision of this Constitution,

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376 NT 142 provides:

> "A provincial legislature may pass a constitution for the province or, where applicable, amend its constitution, if at least two thirds of its members vote in favour of the Bill."

NT 143 provides:

> "(1) A provincial constitution, or constitutional amendment, must not be inconsistent with this Constitution, but may provide for -
>
> (a) provincial legislative or executive structures and procedures that differ from those provided for in this Chapter; or
>
> (b) the institution, role, authority and status of a traditional monarch, where applicable.
>
> (2) Provisions included in a provincial constitution or constitutional amendment in terms of paragraphs (a) or (b) of subsection (1) -
>
> (a) must comply with Chapter 3 and the values in section 1; and
>
> (b) may not confer on the province any power or function that falls -
>
> (i) outside the area of provincial competence in terms of Schedules 4 and 5; or
>
> (ii) outside the powers and functions conferred on the province by the other sections of the Constitution."

including the Constitutional Principles set out in Schedule 4: Provided that a provincial constitution may-

a) provide for legislative and executive structures and procedures different from those provided for in this Constitution in respect of a province; and

b) where applicable, provide for the institution, role, authority and status of a traditional monarch in the province, and shall make such provision for the Zulu Monarch in the case of the province of KwaZulu/Natal."

[291] In the judgment given by us in the proceedings for the certification of the KwaZulu-Natal Constitution[377] we have said:

> "... whatever meaning is ascribed to 'structures and procedures' they do not relate to the fundamental nature and substance of the democratic state created by the interim Constitution nor to the substance of the legislative or executive powers of the national Parliament or Government or those of the provinces."

We also make clear in that judgment that a provincial legislature manifestly does not have the power, through adopting a constitution, to alter the power relationship between itself and the national level of government, or to usurp powers which are not vested in it under the IC. It follows that NT 143(2) is no different in substance from IC 160(3). It is true that in NT 143(2)(a) there is a directive that provincial constitutions must comply with NT ch 3 and the values in NT 1, but in the context of NT 142 and 143 this does not mean that what is contemplated is a constitution in which these values must be separately identified. What it does mean is simply that nothing in a provincial constitution may conflict with NT ch 3 or the values in NT 1. It makes clear that the inconsistency referred to in NT 143(1) extends to such matters and that they do not fall within the exemption made in NT 143(1)(a).

[292] In the result, what is contemplated by NT 142 and 143 is not a provincial constitution suitable to an independent or confederal state but one dealing with the governance of a province whose powers are derived from the NT. On that analysis there is no real departure from the power of constitution making which a provincial government enjoys in terms of IC 160. That power, properly analysed, is a power subject to the same limitations and the same potential which we have identified in NT 142 and 143.

[293] NT sch 6 s 13 provides that "[a] provincial constitution passed before the new Constitution took effect must comply with section 143 of the new Constitution." It was contended that the effect of this section is to impair the power of a province to retain a legally and constitutionally valid provincial constitution. But there is no provision of the CPs which requires existing provincial laws (or a provincial constitution) to be protected against the supremacy provision of the NT. On the contrary, CP IV specifically provides that the NT shall be the supreme law of the land, binding on all organs of state at all levels of government.

[294] A related argument, that NT sch 6 s 13 is a provision having retrospective effect, is equally without substance. The NT does not have retrospective effect. It applies prospectively from the date it comes into effect in terms of NT 244 and, by reason of the supremacy provision,[378] nullifies from that date all existing laws (including provincial laws) inconsistent with its provisions.

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377 *Certification of the KwaZulu-Natal Constitution, 1996*, as yet unreported, (CC) Case No CCT 15/96, delivered on the same day as this judgment, at para 5.

378 NT 2.

[295] The fallacy in the arguments directed against NT sch 6 s 13 is that they assume that the CPs require provincial constitutions to be given precedence over or to be protected in the NT, whereas the CPs in fact contain no such provision.

E. POWERS WITH RESPECT TO LOCAL GOVERNMENT

CP XVIII.2: Diminution of Powers

[296] Under this heading we consider the extent, if any, to which the powers and functions of the provinces in relation to LG which are contained in the NT are less than or inferior to those provided for in the IC.

Local Government Transition Act 209 of 1993

[297] Comparison of the powers and functions of the provinces in the IC and the NT respectively requires some elucidation of the effect of the Local Government Transition Act 209 of 1993 (the "LGTA").

[298] In terms of the provisions of IC 245(1), the LGTA was to govern the entire process of restructuring LG until the initial LG electoral process had been completed. Under IC 126(1), a provincial legislature has legislative powers with regard to all matters falling within the functional areas specified within IC sch 6; and under IC 144(1) the province enjoys concurrent executive powers. One of the functional areas so listed is "Local government, subject to the provisions of Chapter 10". The combined effect of these provisions was to render the powers and functions of the provinces in relation to LG subject to the imperatives of the LGTA until what is termed the "interim phase" was completed. Until LG was established by elections, the LGTA, "and it alone, would govern the reconstruction of local government".[379] Currently, therefore, all the LG elections having been held, provincial powers and functions in relation to LG are governed by IC ch 10. We would stress that this does not mean that the IC incorporated the LGTA or any portion thereof. However, IC 245 effectively removed LG from the IC during the defined transitional period.

[299] It was urged upon us by counsel for the CA that we could not ignore the provisions of IC 245(1) and the LGTA. This submission is premised on the fact that for the better part of the life of the IC, the transitional arrangements in respect of LG are controlled by the LGTA.

[300] We cannot agree with the submission on behalf of the CA. The exercise demanded by CP XVIII.2 is one of comparing text with text. The CP speaks of "[t]he powers and functions of the provinces defined in the Constitution" and those "provided for in this Constitution". The complications wrought by the LGTA are therefore more apparent than real. In effect, the LGTA must be ignored for the purpose of the CP XVIII.2 exercise. This is the necessary consequence of the provisions of IC 71 from which this Court derives its power to certify the NT. Under subsection (2) the NT shall be of no force and effect unless this Court has certified that all the provisions of the text comply with the CPs. This Court can therefore do no more than look to the CPs for the purpose of measuring the NT. In this respect CP XVIII.2 is quite clear in its requirement that the powers and functions which must be considered are those in the respective constitutional texts. The transitional provisions of the IC are clearly not relevant to this exercise.

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379 Per Kriegler J in *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* supra n 7 at para 162. See Cloete "Local Government Transformation in South Africa" in De Villiers (ed) *Birth of a Constitution* (Juta & Co Ltd Kenwyn 1994) 298-300 and more generally Basson *South Africa's Interim Constitution* (Juta & Co Ltd Kenwyn 1994) ch 7.

Relevant Provisions of the Interim Constitution and the New Text

[301] IC 174 provides for the establishment of LG for residents of areas demarcated by a law of a competent authority. Such a law may make provision for categories of metropolitan, urban and rural LGs with differentiated powers, functions and structures. IC 175 further empowers a competent authority to determine the powers, functions and structures of LG. As IC sch 6 confers legislative competence for LG upon provinces, it is clear that the references to "competent authority" in IC 174 and 175 are to both Parliament and the provincial legislatures. IC 174(3) thus stipulates that LG shall be autonomous and, within the limits prescribed by or under law, shall be entitled to regulate its affairs. IC 174(4) provides that there shall be no encroachment upon powers, functions and structures of an LG by Parliament or a provincial legislature to the extent that the fundamental status, purpose and character of LG is compromised. And IC 174(5) makes provision for publication for comment of proposed parliamentary or provincial legislation which materially affects the status, powers or functions of LG. It follows that national and provincial legislative and executive powers in respect of LG are potentially concurrent under the IC.

[302] The provisions of IC 126 are relevant in an assessment of the value to be given to the concurrent powers of the provinces in respect of LG. It is not possible or apposite to attempt to evaluate the circumstances in which national legislation would be likely to be promulgated in this area; and, even less so, the circumstances in which the provisions of IC 126 would be likely to result in national legislation prevailing over that of a province. For present purposes, we can have regard to no more than that under the IC, the powers in question are potentially concurrent and subject to the national override in the whole field of LG.

[303] Turning now to the LG provisions in the NT, one finds a very different regime. The central provisions are to be found in NT 155, which provides as follows:

> "(1) National legislation must determine -
>
> (a) the different categories of municipality that may be established;
>
> (b) appropriate fiscal powers and functions for each category; and
>
> (c) procedures and criteria for the demarcation of municipal boundaries by an independent authority.
>
> (2) Provincial government, by legislative or other measures, must -
>
> (a) establish municipalities;
>
> (b) provide for the monitoring and support of local government in the province; and
>
> (c) promote the development of local government capacity to perform its functions and its ability to manage its own affairs.
>
> (3) Subject to the provisions of sections 44, 151 and 154, -
>
> (a) a provincial government has the legislative and executive power to monitor the local government matters listed in Schedules 4 and 5; and
>
> (b) national and provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of those matters, by regulating the exercise of municipalities' executive authority referred to in section 156(1)."

[304] NT sch 4 matters are termed functional areas of concurrent national and provincial legislative competence. NT sch 5 matters are functional areas of exclusive provincial legislative competence. Both contain a part B, which sets out a substantial list of LG matters. The effective competence of the provinces in respect of the matters listed in both NT schs 4 and 5 is a matter of degree and depends upon the limitations applicable to each: NT sch 4 matters are subject to the provisions of NT 146 and 76(1) or (2) and NT sch 5 matters to NT 44(2), 76(1) and (4) and

147(2). The effect of these provisions is discussed elsewhere in this judgment.[380] Suffice it to say here that NT sch 4 matters can be legislated by both Parliament and the provincial legislatures, with the former enjoying an override dependent upon the degree to which the legislation corresponds to the criteria contained in NT 146. Under NT 44(2), Parliament may legislate, in accordance with NT 76, only with regard to matters falling within NT sch 5, subject to the criteria contained in NT 44(2). The implications of the NT 146 overrides and Parliament's competence to intervene in NT sch 5 matters are discussed elsewhere in this judgment.[381]

[305] There are other provisions of the NT which also confer powers on Parliament with regard to LG which would have been concurrent in terms of the provisions of the IC. In terms of NT 139, headed "Provincial supervision of local government", a provincial executive is granted a power of intervention where a municipality cannot or does not fulfil an executive obligation in terms of legislation. The provincial executive is empowered to take appropriate steps to ensure fulfilment of the obligation, including issuing a directive to the Municipal Council or assuming responsibility for the relevant obligation to the extent necessary to maintain essential national standards, to establish minimum standards for the rendering of a service, to prevent the Municipal Council from taking unreasonable and prejudicial action and to maintain economic unity. This power of intervention is procedurally circumscribed under NT 139(2), in terms of which the relevant provincial executive member responsible for LG and the NCOP are to play a decisive role. In terms of NT 139(3), this process of provincial supervision of, and intervention in, LG affairs may be regulated by national legislation. NT 159 provides that the term of a Municipal Council may be no more than four years, "as determined by national legislation". NT 160(3) provides that national legislation determines the manner in which members of Municipal Councils participate in their proceedings. NT 161 requires national framework legislation in terms of which the provincial legislatures may provide for the privileges and immunities of members of Municipal Councils. NT 163 then reads as follows:

> " An Act of Parliament enacted in accordance with the procedure established by section 76 must -
> . . . .
> (b) determine procedures by which local government may -
> (i) consult with national or provincial government;
> (ii) designate representatives to participate in the National Council of Provinces; and
> (iii) nominate persons to the Financial and Fiscal Commission."

And, finally, in terms of NT 164, all matters concerning LG not dealt with in the NT may be prescribed by national or provincial legislation within the framework of national legislation.

[306] It was correctly pointed out by counsel for the CA that LG structures are given more autonomy in the NT than they are in the IC. But it needs to be borne in mind that the IC contemplates that LG will be autonomous, though it does not delineate the boundaries of the autonomy as clearly as the NT does.[382] Whereas in the IC the potential concurrency of powers in

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380 See paras 234, 257, 310, 326 and 335-6.

381 At para 262.

382 IC 174(3) provides that LG "shall be autonomous and, within the limits prescribed by or under law, shall be entitled to regulate its affairs" and IC 175(2) provides that it "shall be assigned such powers and functions as may be necessary ...".

Parliament and the provincial legislatures is in respect of the whole field of LG,[383] power will now be allocated to specific areas of competence. It is in this process that the local authorities are afforded greater autonomy at the expense of both Parliament and the provincial legislatures. There is a corresponding diminution of the powers in respect of LG in respect of both the national and provincial legislatures. However, the exercise we are enjoined to perform by CP XVIII.2 relates only to the diminution of provincial powers and functions. A corresponding diminution of the powers and functions of Parliament is not relevant.

The Comparison under CP XVIII.2

[307] In relation to LG, there are four broad areas of comparison under CP XVIII.2 which should be considered. These are

- the source and ambit of provincial legislative powers and functions;
- direct provincial legislative competence in respect of LG matters;
- the executive powers of the provinces; and
- exclusive or regulatory powers of the national legislature and executive.

We shall consider these in turn.

The Source and Ambit of Provincial Legislative Powers and Functions

[308] The source of national and provincial legislative powers in relation to LG is to be found in NT 155. That section places a substantial constraint upon the general provisions of NT 43(b), which vests legislative authority in the provincial legislatures in respect of "the provincial sphere of government", and in NT 104(1)(b), which vests in provincial legislatures the power

> "to pass legislation in and for its province with regard to -
> (i) any matter within a functional area listed in Schedule 4;
> (ii) any matter within a functional area listed in Schedule 5; and
> (iii) any matter outside those functional areas, and that is expressly assigned to the province by national legislation ...".

The constraint to which we refer is to be found in parts B of NT schs 4 and 5, respectively. In terms thereof, provinces are entitled to legislate only "to the extent set out in section 155(3)". Furthermore, as we have seen, NT 155(3)(a) grants a provincial government legislative and executive power "to monitor the local government matters listed in Schedules 4 and 5". Moreover, NT 155(3)(b) grants provincial and national governments the legislative and executive authority "to see to the effective performance by municipalities of their functions in respect of those matters, by regulating the exercise of municipalities' executive authority ... ". This in turn ties in with the requirement in NT 155(2)(b) that provincial legislation provide for the monitoring and support of LG in the province. Under NT 139, which has already received mention, provinces are given powers of supervision of LG.

[309] As we understand these provisions, they have the consequence that the ambit of provincial powers and functions in respect of LG is largely confined to the supervision, monitoring and support of municipalities.

[310] We do recognise that this is not the sole power and function of provincial governments in regard to LG. In NT 155(2)(a) they are afforded the legislative competence to "establish municipalities" and are indeed compelled to exercise such competence. What precisely is entailed

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383 In terms of IC 174(4), these powers cannot be exercised so as to compromise the status of LG.

by the power to establish is not here discussed. It is sufficient to say that this may prove to be an important legislative power which permits a provincial government to create specific LG structures for the province from the different categories of municipality that may be established.

[311] On the other hand, as we have seen, the source of provincial powers and functions located in IC 174 and 175 is undifferentiated and unspecified. The new role pronounced in the NT is clearly a redefined one. The effect of and weight to be given to this role will depend substantially on what precisely is contemplated by supervision, monitoring and support powers and functions. The difference can be measured only by reference to the substance of the powers and functions themselves.

[312] It would not be helpful to consider dictionary definitions of the terms "supervision", "monitoring" and "support". It is more apposite to extract contextual meanings of these terms as evidenced by the NT itself. The provincial supervisory function is fully captured by NT 139. In this context, "supervision" means a process of provincial review of the actions of LG, so as to measure the fulfilment by LG of executive obligations conferred by statute, and a process of implementation of corrective measures should LG fall short of its obligations. A similar meaning is attributed to the word "supervision" in NT 100, to describe the national executive's role in relation to the failure of a province to fulfil a statutorily borne executive obligation. "Supervision" is utilised alongside "intervene" to designate the power of one level of government to intrude on the functional terrain of another. The general power of supervision appears to be on-going. The active exercise of such power (its legislative and executive expression) is made conditional on specific circumstances and is constrained by specific procedures. Nevertheless this power to intervene, where these conditions are met, is considerable and may be particularly important in the field of LG, where administrative and executive structures are likely to be in need of greater support than are comparable structures in higher spheres of government.

[313] The term "support" derives much of its significance from NT 154(1), which compels national and provincial governments to "support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions". The meaning of the word "support" in NT 155(2)(b), although it appears without the word "strengthen", is clearly no less extensive. Its general meaning is entirely consistent with the use of the word "supporting" in its reciprocal sense in NT 41(1)(h)(ii). The legislative and executive powers to support LG are, again, not insubstantial. Such powers can be employed by provincial governments to strengthen existing LG structures, powers and functions and to prevent a decline or degeneration of such structures, powers and functions. This support power is to be read in conjunction with the more dynamic legislative and executive role granted provincial government in NT 155(2)(c) and (3)(b). In terms hereof, the provinces must assert legislative and executive power to promote the development of LG capacity to perform its functions and manage its affairs and may assert such powers, by regulating municipal executive authority, to see to the effective performance by municipalities of their functions in respect of listed LG matters. Taken together these competences are considerable and facilitate a measure of provincial government control over the manner in which municipalities administer those matters in parts B of NT schs 4 and 5. This control is not purely administrative. It could encompass control over municipal legislation to the extent that such legislation impacts on the manner of administration of LG matters.

[314] The word "monitor" is the least textually delineated of the terms used in NT ch 7 to describe the ambit of provincial powers in relation to LG. The monitoring power is more properly described as the antecedent or underlying power from which the provincial power to support, promote and supervise LG emerges. Textually, the word "monitor" either appears alongside

"support"[384] or is made subject to provisions in which the support, promotional and supervisory roles are adumbrated.[385] In its various textual forms "monitor" corresponds to "observe", "keep under review" and the like. In this sense it does not represent a substantial power in itself, certainly not a power to control LG affairs, but has reference to other, broader powers of supervision and control. It is unlikely therefore that provincial governments could seek to underpin a legislative intervention to promote the performance and management capacity of LG or recast the manner in which LG matters are administered by relying on a broad monitoring power. The mechanisms of provincial intrusion in these areas are set out in the NT provisions already traversed.

[315] We do not interpret the monitoring power as bestowing additional or residual powers of provincial intrusion on the domain of LG, beyond perhaps the power to measure or test at intervals LG compliance with national and provincial legislative directives or with the NT itself. What the NT seeks hereby to realise is a structure for LG that, on the one hand, reveals a concern for the autonomy and integrity of LG and prescribes a hands-off relationship between LG and other levels of government and, on the other, acknowledges the requirement that higher levels of government monitor LG functioning and intervene where such functioning is deficient or defective in a manner that compromises this autonomy. This is the necessary hands-on component of the relationship.

[316] It is evident that any attempt to measure comparatively provincial powers under the IC and NT in regard to LG is exceedingly difficult. The comparison is not one of like with like. Under the IC the provincial government can have assumed powers and functions beyond the areas of supervision, support, promotion and monitoring. We have already noted that the extent of powers afforded provinces in these areas by the NT is substantial. The powers probably include everything that a province, while respecting the autonomy of LG, can do in practice in the exercise of its powers under the IC. However, under the NT provinces cannot assume powers outside of these areas, or certainly not to the same extent permissible under the IC. The only conclusion we can reach is that in some of the areas in question there has been a diminution of provincial powers and functions. The weight to be ascribed to this is dealt with later.[386]

Direct Provincial Legislative Competence in Respect of Local Government Matters

[317] There is another respect in which provincial powers and functions in respect of LG have been altered. In IC sch 6 there is listed a broad functional area of legislative competence termed "Local Government, subject to the provisions of Chapter 10". Within this broad sphere, and subject to national legislative overrides, provincial governments are free to legislate directly in relation to all LG matters. In the NT, however, specific functional areas of legislative competence in relation to LG are detailed in NT schs 4 and 5. Other legislative competences not dealt with in the NT may be assigned to the provinces by national legislation in terms of NT 104(1)(b)(iii). This restricted list-based provincial competence contained in the NT stands to be compared with the unenumerated potentially concurrent legislative powers afforded provinces under the IC. It is a difficult comparison to make. Notwithstanding that the lists of LG matters in parts B of NT schs 4 and 5, respectively, are extensive, it must be recognised that the enumerated list approach must, to some extent, be more restrictive than a loosely defined area of competence. This must mean that the NT attenuates the manner in which the legislative power is exercised. We conclude that to this

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384 NT 155(2)(b).

385 NT 155(3).

386 See Chapter VII.J.

extent provincial powers have been diminished in the NT.
[318] In respect of NT sch 5 matters, however, this diminution falls to be further gauged in the context of the measures safeguarding provincial power that are found in NT 76 read with NT 44(2). Under the latter, Parliament can intervene in NT sch 5 matters only when it is necessary to achieve the objectives set out in NT 44(2)(a) to (e). Such legislation is subject to the mechanism of NT 76(1), in terms of which the will of the NCOP, the institutional locus of provincial interests at national level, can be overborne only by a two-thirds majority of all the members of the NA. The greater constraint placed upon the national legislature by the NT in respect of NT sch 5 matters has to be weighed against the attenuation of competences brought about by the listing of functions.

[319] A further relevant factor in the weighing process is to be found in NT 164. Pursuant to this provision all matters not dealt with under the NT may be prescribed by national or provincial legislation, the latter within the framework of national legislation. This power to prescribe residual LG matters may well be significant. Not only are provincial legislatures competent to so prescribe but the function of national legislation is restricted to regulation. It is adequate for present purposes to state that the term "regulate" connotes a broad managing or controlling rather than a direct authorisation function. Thus Parliament is entitled, in relation to provincial legislative power under NT 164, to establish the general framework within which such power is to be exercised. This leaves room for provinces to determine details of LG matters within that framework and to legislate for them.

[320] A degree of obscurity arises from the somewhat circuitous drafting of the NT. We refer here to the competence to legislate with regard to the status, powers and functions of municipalities. In the IC this is a concurrent area of legislative competence. In terms of the NT the express competence of the provincial legislatures is to establish municipalities. It is not clear whether this includes legislative competence with regard to status, powers and functions. NT 154(2) would suggest that it is such a competence. Echoing the provisions of IC 174(5), one finds there a provision requiring publication for comment of national or provincial legislation that "affects the status, institutions, powers or functions of local government". Again, the question arises whether this competence is not substantially attenuated by the provisions of NT 155, read with the provisions of parts B of NT schs 4 and 5, respectively.

Executive Powers of the Provinces
[321] To the extent that provincial legislative powers may have been diminished or at least circumscribed in the manner described above, it follows that there would be a concomitant diminution or circumscription of provincial executive powers in relation to LG. In terms of IC 144(2), a province has executive authority over all matters in respect of which such province has exercised its legislative competence. Thus, to the extent that provinces currently enjoy broad and undefined legislative powers under IC ch 10, they are vested with broad and undefined executive powers. In the NT, the legislative and executive frameworks also coincide. NT 154(1) and 155 indicate that where national or provincial legislative powers can be exercised in relation to LG, executive powers follow. Thus, to the extent that provincial legislative powers have been diminished or increased in respect of LG, there would be a corresponding diminution or increase in respect of executive powers.

Exclusive or Regulatory Powers of the National Legislature and Executive
[322] We refer here to the areas of legislative (and hence executive) powers which have been allocated exclusively to Parliament and instances where Parliament is designated as being required to regulate or control the exercise of provincial government powers regarding LG, in NT 139, 155(1), 159, 160(3), 161, 163 and 164. To the extent that these provisions preclude or

circumscribe the provincial legislative competence, there has been a further diminution of both provincial legislative and executive powers and functions. In the context of comparing direct provincial legislative competences in respect of LG matters, we have expressed the view that NT 164 represents a tempering of the diminution of direct provincial powers in relation to LG matters by virtue of the requirement that national legislation provide the framework for provincial legislation. This feature of NT 164 reflects a broader distinction between those NT provisions in terms of which the national legislature is endowed with sole law-making power in respect of one or other LG matter[387] and those provisions permitting provincial governments to legislate within a national legislative framework or subject to national legislative regulation.[388] The latter provisions entitle provincial governments to legislate directly within the scope of a broad national directive and hence do not represent instances of diminution of the magnitude of the former.

F. PROVINCIAL SERVICE COMMISSIONS

[323] It was argued on behalf of some of the objectors that provincial powers have been substantially diminished by the NT provisions dealing with the PSC. This, they said, breaches CP XVIII.2. The argument was that, whereas IC 213 empowers a provincial legislature to establish a provincial service commission under the control of provincial government, NT 196 makes no provision whatsoever for provincial service commissions.

[324] In reply the CA submitted that provinces retain implied legislative power to establish provincial service commissions, either in provincial constitutions, in terms of NT 104 (1)(a), 142 and 143, or by ordinary legislation under the incidental legislative power of the provinces, in terms of NT 104(4).

Relevant Provisions of the Interim Constitution

[325] Express provision is made in IC 213 for a province to create its own provincial service commission, and the IC also lays down, albeit in broad terms, the powers and functions not only of the provincial commissions but also of the PSC. Subject to norms and standards set at national level, the provincial service commission enjoys competence in respect of provincial public servants, inter alia, to make recommendations, give directions and conduct enquiries with regard to the establishment and organisation of departments of the province, the appointment, promotion, transfer, and discharge of public servants, and the promotion of efficiency and effectiveness in departments of the provinces; to advise the provincial executive on matters relating to the public service; and to exercise other PSC powers and functions assigned by the President with the approval of the provincial Premier.[389]

[326] A provincial service commission's advisory competence includes the power to advise the provincial executive on matters relating to the public service or the employment, remuneration or other conditions of service of functionaries employed by any institution or body which receives funds wholly or partly appropriated by a provincial legislature.[390] A provincial service commission has the further competence to delegate its powers to a commissioner or an official in the public

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387 NT 155(1), 159, 160(3) and 163.

388 NT 139, 161 and 164.

389 IC 213(1).

390 IC 213(1)(b).

service to perform any of its functions.[391]

[327] IC 213(2) further provides:

> "The provisions of sections 210(2), (3), (4), (5) and (7) and 211 pertaining to the Public Service Commission, shall *mutatis mutandis* apply to a provincial service commission, except that any reference to an Act of Parliament, Parliament or the President shall be deemed to be a reference to a provincial law, a provincial legislature or the Premier of a province, respectively."

Especially important in this regard is IC 210(3), which, read with IC 213(2), renders the implementation of the recommendations or directions of a provincial service commission peremptory within six months if such recommendations have not specifically been rejected by the Premier before implementation, or the recommendations involve expenditure of public funds and approval from treasury has not been obtained.

[328] Finally, the provincial service commission, being a creature of provincial legislation, is accountable to the provincial legislature, reporting annually to it on its activities.[392]

Relevant Provisions of the New Text

[329] As already noted, the NT makes no express provision for provincial service commissions. NT 196 provides:

> "(1) There is a single Public Service Commission for the Republic to promote the values and principles of public administration in the public service.
> (2) The Commission is independent and must be impartial and regulated by national legislation.
> (3) Each of the provinces may nominate a person to be appointed to the Commission.
> (4) Members of the Commission nominated by provinces may exercise the powers and perform the functions of the Commission in their provinces, as prescribed by national legislation.
> (5) The Commission is accountable to the National Assembly."

Although NT 143(1)(a) authorises a province to create structures in its constitution differing from those provided for in NT ch 6, such structures "must not be inconsistent" with the NT. Given the language of NT 196(1), providing for a single PSC for the Republic, a provincial service commission having the same functions would be inconsistent with the NT. The argument on behalf of the CA that the power to create such a commission may be implied must therefore be rejected.

[330] Each province will nominate one representative to the PSC, and the PSC's powers and functions in the provinces may be delegated to that nominee by national legislation. The NT is silent on the powers and functions of the PSC; these remain to be spelled out in national legislation. Thus, the extent to which those powers and functions will be delegated to provincial nominees may be prescribed by that legislation in terms of NT 196(4). But whatever these powers and functions may be, and whatever the extent of the delegation of powers and functions, the scheme clearly does not contemplate separate provincial service commissions.

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391 IC 213(1)(c).

392 IC 210(7).

[331] As to the argument on behalf of the CA that the provinces are free to create provincial service commissions by ordinary legislation under the incidental legislative power of the province, the CA did not point to any provincial competence enumerated in NT sch 4 to which such an act might be deemed "incidental". We are unable to identify any listed provincial competence that might serve as a basis for an incidental power. We can only conclude, therefore, that the legislative creation of a provincial service commission would be beyond the powers of a province.

Comparison for Purposes of CP XVIII.2

[332] We have previously indicated that we cannot evaluate changes made in the NT in regard to PSCs without knowing what the powers and functions of the "single Public Service Commission" will be.[393] If such powers interfere with the provinces' powers to appoint provincial public servants, subject to national norms and standards, there will have been a reduction of provincial powers in this regard.

G. POLICING POWERS

[333] It is alleged that provincial policing powers and functions are "substantially less than or substantially inferior to" those provided for in the IC. In this regard the argument was advanced on behalf of the CA that the appropriate comparison was with the transitional provisions of the IC contained in IC 235(6) read with IC 235(8). It is in substance the same argument as was advanced regarding the comparison of provincial powers relating to LG.[394] The argument is unsound for the reasons we have already given in that context.

[334] Both the IC and the NT allocate powers, functions and the responsibility for policing in the province to both national and provincial governments. IC sch 6 lists "Police, subject to the provisions of Chapter 14" as one of the legislative competences of provinces. IC 214 provides for the establishment and regulation, by an Act of Parliament, of "a South African Police Service, which shall be structured at both national and provincial levels and shall function under the direction of the national government as well as the various provincial governments."[395] The Act of Parliament has to provide for the appointment of the National Commissioner[396] as well as for the "establishment and maintenance of uniform standards of policing at all levels."[397] The "powers and

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393 See paras 170-7 and 275-8.

394 See para 358 above.

395 IC 214(1).

396 IC 214(2)(a).

397 IC 214(2)(b). These are matters pertaining to

> "(i) the exercise of police powers;
> (ii) the recruitment, appointment, promotion and transfer of members of the Service;
> (iii) suspension, dismissal, disciplinary and grievance procedures;
> (iv) the training, conduct and conditions of service of members of the Service;
> (v) the general management, control, maintenance and provisioning of the Service;
> (vi) returns, registers, records, documents, forms and correspondence; and
> (vii) generally, all matters which are necessary or expedient for the achievement of the purposes of this Constitution."

functions of the Service" are set out in IC 215, and IC 216(1) provides that the President shall charge a Minister with responsibility for the Service and appoint a National Commissioner, whose function it is to "exercise executive command of the Service, subject to IC 219(1)"[398] and the directions of the Minister concerned. IC 219, in turn, empowers a Provincial Commissioner, subject to the provincial Executive Council, to exercise control over the day-to-day operations of the police force in the province.

[335] The approach of the NT differs from that of the IC. NT ch 11 deals with "Security Services" which consists of "a single defence force, a single police service and any intelligence services established in terms of the Constitution". The security services are to be "structured and regulated by national legislation"[399] and the police service, whose powers and functions must also be established by national legislation, is designed to function in the "national, provincial and, where appropriate, local spheres".[400] The national legislation must be such that it enables the "police service to discharge its responsibilities effectively, taking into account the requirements of the provinces".[401] It is within this framework that a comparison must be made between the legislative and executive powers accorded to provinces with regard to policing in the IC, on the one hand, and the NT, on the other.

[336] The NT omits the reference in IC 214(1) to "direction of the national government as well as the various provincial governments". Indeed, whereas IC 217 requires the Premier of a province to allocate to a member of the Executive Council of the province the responsibility for the performance by the Service of certain specified functions,[402] the NT contains no such express provision. It is necessary, however, to determine the content of this power in order to make a proper evaluation of what, if anything, has been lost by the provinces. The provision in the IC gives the member of the Executive Council powers and responsibilities to issue directions to the Provincial Commissioner in his or her performance of the substantive functions set out in IC 219(1);[403] to approve or veto the appointment of the Provincial Commissioner;[404] and to institute

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398 IC 219 deals with the functions of Provincial Commissioners.

399 NT 199(4).

400 NT 205(1).

401 NT 205(2).

402 IC 217(1).

403 The functions in respect of which the member of the Executive Council may issue directions to the Provincial Commissioner are

> "(a) the investigation and prevention of crime;
> (b) the development of community-policing services;
> (c) the maintenance of public order;
> (d) the provision in general of all other visible policing services, including -
> (i) the establishment and maintenance of police stations;
> (ii) crime reaction units; and
> (iii) patrolling services;
> (e) protection services in regard to provincial institutions and personnel;
> (f) transfers within the province of members of the Service ... ; and
> (g) the promotion, up to the rank of lieutenant-colonel, of members of the Service ...".

appropriate proceedings against the Provincial Commissioner if he or she has lost the confidence of the Executive Council.[405]

[337] In terms of the NT the member of the Executive Council does not have veto power with regard to the appointment of the Provincial Commissioner; the provincial executive is entitled to be consulted by the National Commissioner before he or she makes such appointment. Also lost is the power of the member of the Executive Council to issue directions to the Provincial Commissioner for the performance of part of his or her duties[406] and to institute appropriate proceedings against the Provincial Commissioner if he or she has lost the confidence of the Executive Council. The Provincial Commissioner is in terms of the NT directly accountable to the National Commissioner in all respects.[407]

[338] In terms of the NT the national Minister is vested with the responsibility for policing and for the determination of national policy with regard to all policing. An obligation is, however, placed on the Minister to consult with provincial governments before the determination of national policing policy; he or she is also obliged to take the needs of the provinces into account.[408] What each province is entitled and empowered to do is listed in NT 206(2).[409]

[339] The burden of the criticism was that the monitoring, oversight and liaising powers and functions provided for in the NT hardly make up for the loss of the powers referred to in IC 219. The new structure indeed requires that the Provincial Commissioner be directly accountable only to the National Commissioner. This flows from the abandonment of the division in functions between the national and provincial spheres of government as prescribed in IC 218 and 219.[410] The specific functions of the Provincial Commissioners are not enumerated in the NT; they are a matter for national legislation.[411] We agree that the loss by the provinces of direct control over the Provincial Commissioners is a significant diminution. What has been substituted is a provincial power, among

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404 IC 217(2)(a).

405 IC 217(2)(b).

406 IC 219(1).

407 NT 207(4)(b).

408 NT 206(1).

409 NT 206(2)(a)-(e) provides:

> "(a) to monitor police conduct;
> (b) to have oversight of the effectiveness and efficiency of the police service, including receiving reports on the police service;
> (c) to promote good relations between the police and the community;
> (d) to assess the effectiveness of visible policing; and
> (e) to liaise with the Cabinet member responsible for policing with respect to crime and policing in the province."

410 The distinction is between the functions of the National Commissioner on the one hand and those of the Provincial Commissioner on the other.

411 NT 207(4).

other things, to monitor all police conduct in the province, to exercise an oversight role in policing, including receiving reports on police service, and to liaise with the National Minister with regard to crime and policing in the province.[412] Although these are important functions and their effective exercise by the province could have a profound influence on the performance of the Provincial Commissioner's functions, the measure of control is less and is indirect.

[340] Unlike the IC, the NT does not prescribe any powers or functions to be exercised by the province independent of the national Minister and National Commissioner. Political accountability in relation to the provinces has been reduced by removing what was a more direct relationship between the Provincial Commissioner and the provincial Executive to an indirect one.

[341] In terms of the IC, provincial legislative powers are restricted[413] and subject to national legislation and national direction.[414] The only express legislative power granted to provinces is to pass legislation which is "not inconsistent with" such national legislation and confined to the areas set out in IC 219(1), which areas remain subject to national legislation as well.[415] NT sch 4 part A grants legislative power over policing to provinces "to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislature legislative competence". This pertains to legislation which might be found necessary to carry out the monitoring, oversight and liaising functions set out in NT 206(2).[416] Apart from this, there is no express provision for provincial legislative power in the NT.

[342] Another change which adversely affects the powers and functions of the provinces is in relation to local policing. The IC requires provision to be made for the establishment by a LG of a municipal or metropolitan police service whose functions will be restricted to crime prevention and the enforcement of municipal and metropolitan by-laws.[417] Such police service can, however, only be established with the consent of the designated member of the Executive Council, who is also the person responsible for the determination of the powers and functions of such police service. There is no comparable provision in the NT; local policing is a matter to be dealt with by an Act of Parliament.

[343] A global assessment as to whether CP XVIII.2 has been violated cannot be made on an item-by-item basis. The overall picture has to be taken into account, regard being had to the weight to be attached to the individual components that form part of the evaluation. However, as far as

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412 NT 206(2).

413 IC 217(4) provides:

> "No provincial law may -
> (a) permit lower standards of performance of the functions of the Service than those provided for by an Act of Parliament; or
> (b) detract from the rights which citizens have under an Act of Parliament."

414 IC 214(1) and 216.

415 IC 217(3).

416 See para 396 above.

417 IC 221(3).

this particular item is concerned, it is our view that there has been a significant reduction in the powers and functions of the provinces.

H. POWERS WITH REGARD TO TRADITIONAL LEADERSHIP

Traditional Leadership[418]

[344] The first and preliminary enquiry relates to the role of traditional leaders in LG, and whether the capacity of the provinces to control that role has been diminished. The concurrent power that the provinces enjoy over traditional authorities must be seen in association with their concurrent power in respect of LG, which, in terms of IC sch 6 is expressly made subject to IC ch 10. This chapter provides in IC 179(1) that "[a] local government shall be elected democratically". IC ch 10 makes no provision for the involvement of traditional leaders. There has thus been no diminution of provincial powers on this score, since there is no scope for the exercise of such powers in the IC.

[345] At the same time the IC recognises a continuing role for traditional authorities, albeit not as part of democratically elected LG. The IC does, however, make provision for three categories of governmental roles for traditional leaders. First, IC 183(1)(a) gives the provinces the exclusive power and sole obligation to establish provincial Houses of Traditional Leaders. The objectors contended that this exclusive provincial power has been reduced to a concurrent one under NT 212(2)(a). This means that the provinces do not lose their power in this respect, but rather that the power has become subject to possible national overrides. On its own, this would not qualify as a major reduction of provincial powers, but could contribute in some measure to a cumulative reduction in the capacity of provinces to influence the role to be played by traditional leadership in their part of the country.

[346] Second, IC 182 provides for the entrenchment of the ex officio participation of traditional leaders in existing LG structures. It would appear that under the IC neither the provinces nor the national government has the power either to include traditional leaders in LG structures or to exclude them from such structures, as their participation is constitutionally entrenched by IC 182. The provinces can, accordingly, not claim to have been deprived of a power which they do not possess. NT 212(1) does not take an existing provincial power away, but gives the national government a power that never existed before. In other words, it authorises the national government to qualify the democratic principle at LG level by infusing an element of traditional leadership into the democratic local structures.

[347] In the third place, IC 181(1) acknowledges the continued functioning of existing traditional authorities, and provides for the concurrent power of national and provincial legislatures to amend or repeal legislation dealing with the "power and functions" of such authorities. The objectors argued that the "competent authority" referred to in IC 181(1) must include both the provincial and the national legislatures, seeing that "traditional authorities" is an area of concurrent legislative competence according to IC 126 read with IC sch 6. They went on to contend that in terms of NT 211(2), on the other hand, traditional authorities are in future to be subject to "applicable legislation", which, they said, must refer to national legislation as provided for in NT 212(1). The effect of this would be that the regulation of the "powers and functions" of existing traditional authorities would under the NT be an exclusive national competence, no longer a concurrent national and provincial competence.

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418 This topic has been examined in Chapter IV.H above from a slightly different angle.

[348] We have already pointed out that NT 211(2) read with NT 212(1) does not compel or even invite such an interpretation. On the contrary, NT 211(2), by referring to "any applicable legislation", seems to imply a continuation of existing concurrent powers, in terms of which both national and provincial laws would operate. There is nothing in this provision to suggest any invasion of the concurrent powers allocated to the provinces in IC sch 6 and repeated in NT sch 4 part A. Traditional authorities would continue to exist and carry out such functions as were entrusted to them by such legislation. At the same time provincial legislatures would carry on exercising their concurrent powers to deal with such authorities.

[349] Far from reading NT 212(1) as undermining the manifest intention of NT 211(2), it should be construed as a provision which permits augmenting of the role of traditional leadership in keeping with the non-derogation proviso in CP XVII. This it does by authorising the national legislature to allow traditional leaders to have a role as part of or in association with democratic municipal government. The additional powers given to the national legislature accordingly do not involve any reduction in the powers of the provinces.

Customary Law

[350] A further and associated allegation of reduction of powers was made in relation to indigenous or customary law. IC sch 6 includes "indigenous law and customary law" as one of the concurrent provincial powers. This provincial competence is retained in NT sch 4, but it is made subject to the provisions of NT ch 12. NT 211(2) of this chapter states that a "traditional authority that observes a system of customary law may function subject to any applicable legislation and customs ". The same argument was advanced to the effect that the term "applicable legislation" must be understood in the light of NT 212(1); for the same reason, it must be rejected.

[351] In conclusion, there has been a small reduction in provincial powers inasmuch as what was formerly an exclusive provincial power to establish a provincial House of Traditional Leaders has now become a concurrent power. Somewhat more significant is the fact that determining the framework for the remuneration of traditional leaders is transferred from provincial to national legislation.[419] Essentially, however, the provinces retain their concurrent powers to deal with traditional authorities.

I. FISCAL POWERS

[352] It was argued that in one or other respect the individual powers and functions of the provinces would be diminished by operation of the provisions of NT ch 13. Some objections made mention of additional CPs. It is therefore convenient to follow the contours of the NT and consider the objections on a section-by-section basis.

General Legislative Provisions

[353] There was objection to a cluster of fiscal legislative powers allocated to Parliament. It was said that such competences render provincial powers and functions less and inferior. This is by reason of the absence of any blocking mechanism afforded the second House of Parliament, in which provincial interests are given expression. Under IC 156(1A) and 157(1A), parliamentary legislation authorising provincial taxing powers and providing a framework for the raising of loans by the provinces, respectively, is required to be passed both by the NA and the Senate, sitting separately. Thus the Senate has a veto.

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419 See para 433.

[354] Under the NT, comparable legislation is covered by NT 76(4)(b), which provides that non-money bills envisaged in NT ch 13 and affecting the financial interests of the provincial sphere of government are to be dealt with under the mechanism provided for in NT 76(1). In essence, and as more fully described elsewhere in this judgment,[420] this mechanism prescribes that the NA must initially pass the bill, and in the event of disagreement with the NCOP, the bill is placed before a Mediation Committee. If the dispute cannot be resolved, the NA can override the NCOP by a two-thirds vote of all its members. NT ch 13 legislation which is subject to this procedure includes that envisaged in NT 215(2) (prescribing the form of provincial budgets and other budgetary requirements); NT 216(1) (establishing a national treasury and prescribing measures to ensure transparency and expenditure control); NT 217(3) (prescribing a framework for procurement policy); NT 218(1) (setting out conditions for provincial guaranteeing of loans); NT 219 (establishing a framework for determining salaries, allowances and benefits of government officials and a commission to make recommendations on them) and NT 228(2)(b) (regulating provincial taxing powers).

[355] In essence, what we are being asked to conclude is that the replacement of a Senate veto by a two-thirds majority NA override constitutes a diminution of individual provincial powers. We are unable to say that this is so. The Senate effectively gives expression to party political decisions at national level, and its veto has little political value to a province with minority representation. Second, and even if this was not so, it cannot be gainsaid that the two-thirds majority requirement of NT 76(1)(e) constitutes a substantial obstacle to overcome. Such a supermajority is normally reserved for alterations to the constitution itself.[421] It can by no measure be disregarded or discounted in the manner the objectors proposed.

Allocations of Revenue

[356] We have deliberately omitted from the above discussion reference to legislation envisaged under NT 214 (although counsel for the objectors did not initially draw this distinction in their written arguments).

[357] NT 214(1) stipulates that an Act of Parliament must provide for the equitable division of revenue raised nationally among all spheres of government, for the determination of each province's equitable share and for any other allocation to provinces and LG from the national government's share of revenue. In terms of NT 214(2), the passage of such an Act must be preceded by consultation with provincial governments, organised LG and the Financial and Fiscal Commission; the recommendations of the latter having to be considered. Additionally, certain policy objectives have to be taken into account before legislating in terms of this section. We need not review the entire list of such objectives here, but merely point out that numerous provincial interests are included in this list.

[358] Counsel for the objectors who were concerned with this point appeared to regard NT 214 legislation as falling within the broad category of legislation envisaged by NT ch 13, and encompassed by NT 76(4)(b). However, during oral argument it was submitted that such legislation fell to be described as a money bill and thus fell outside of the purview of NT 76(4). The significance of this description is that money bills are to be passed in accordance with the provisions of NT 77(3) read with NT 75. Under the latter provision, money bills are effectively designated as

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420 See para 326.

421 See, for example, IC 62 and NT 74(1)(a) and (2).

bills falling outside of NT sch 4; which is to say they can only be introduced by the NA and any dissent by the NCOP can be overridden by a simple majority in the NA. The corresponding provision currently operative, IC 155(2A), provides that national legislation in terms of which a province's equitable share of revenue is determined is required to be passed by the NA and Senate sitting separately. Therefore, a conclusion that NT 214 legislation is a money bill would represent a diminution of provincial capacity to hinder the passage of such legislation in the second House of Parliament, without the counter-balance of an in-built special majority for the bill's enactment by the NA.

[359] A money bill is defined in NT 77(1)(a) as a bill that "appropriates money or imposes taxes, levies or duties". We have noted that NT 76(4)(b) excludes money bills, but includes a bill "envisaged elsewhere in Chapter 13, and which affects the financial interests of the provincial sphere of government". The various enactments which are envisaged by NT ch 13 are incapable of bearing the meaning of appropriations, and even less impositions of taxes and the like. But NT 214 legislation is different in this regard. In broad terms it can be described as a means of transferring money from state coffers to the provinces or LG.

[360] It is clear, however, on a proper construction of NT 214 that legislation enacted thereunder is not a money bill as defined in NT 77(1)(a). The NT draws a sharp distinction in NT 213(2) between moneys drawn from the National Revenue Fund as "appropriations by an Act of Parliament" and "direct charges against the National Revenue Fund, when it is provided for in the Constitution or an Act of Parliament". In NT 213(3), a province's equitable share of revenue is said to be a direct charge against the Fund. Thus, on a plain reading of the text, an NT 214 bill should fall outside the definition of a money bill in NT 77(1)(a). It would not otherwise have been necessary for NT 213(2) to have distinguished between appropriations and direct charges. And it would not have been necessary in NT 213(3) to delineate a province's equitable share of revenue raised nationally as a direct charge. On such a reading, it is the NT itself (in NT 213(3)) that decrees that an NT 214 bill determining a province's equitable share be a direct charge, and capable therefore of effecting a withdrawal of moneys from the National Revenue Fund under NT 213(2)(b). This would give meaning to the phrase in the latter provision "when it is provided for in the Constitution". Our attention has not been drawn to any other constitutional provision capable of giving a different meaning to this portion of NT 213(2)(b).

[361] This interpretation is buttressed by the absence of any mention of "appropriation" in NT 214. In addition, such a characterisation would seem consistent with the legislative scheme of the NT. We have already indicated that NT 214(2) provides that the provinces must be consulted before an NT 214 bill may be enacted. In addition, as we have shown, a range of policy objectives must be considered. Within the provincial sphere of interest these include the need to ensure that provinces are able to provide basic services, provincial fiscal capacity, developmental needs and economic disparities. These concerns are compatible with the more guarded legislative route followed under NT 76. It appears far more consistent with the overall scheme of NT ch 13 and the general principles laid down in NT ch 3 on inter-governmental cooperation that the passage of NT 214 legislation necessitates additional and direct consultation with provincial interests rather than a mere indirect engagement through the second House.[422]

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[422] See, for example, NT 216(2) to (5) which provides detailed procedure for stopping the transfer of funds to an errant province. In addition, note the various provisions of the chapter requiring antecedent consultation with the Financial and Fiscal Commission before legislating, such as NT 218(2), 228(2)(b), 229(2) and 230(2). The Commission under NT 221 is substantially representative of provincial interests. See also the detailed principles spelled out in NT ch 3 which inter alia require that spheres of government must cooperate with each other by informing each other and consulting on matters of common interest (NT 41(1)(h)(iii)).

[362] It must further be asked on what basis the other legislation affecting the provincial sphere of government, such as legislation setting out the conditions for the guaranteeing of a loan in NT 218 and referred to in NT 76(4)(b), can be so distinguished from an NT 214 bill that they are required to be dealt with under NT 76 rather than NT 75.[423]

[363] It is therefore our considered view that bills determining a province's equitable share are not money bills and are subject to the procedure set out in NT 76(1).

[364] On a reading of NT 76(4)(b) as encompassing NT 214 bills, legislation determining and allocating a province's equitable share is thus not only subject to the requirements of NT 214(2) - that provincial governments, organised LG and the Financial and Fiscal Commission be consulted, and certain provincial interests be taken into account - but also to the safeguards inherent in NT 76. There is no diminution here in the powers or functions of the provinces.

NT 214: The Provinces' Equitable Shares of Revenue

[365] Counsel for an objector submitted that the provinces' entitlement to equitable shares of revenue would be materially undermined by the provisions of the NT. As we understand it, the argument has four struts. First, and in contradistinction to IC 155(2)(d), NT 214 omits to include as a portion of a province's equitable share of revenue, an entitlement to any transfer duty collected nationally on the transfer of property situated within the province concerned. Second, there is no guarantee that the province's equitable share of revenue is reasonable. Third, NT 214(2) introduces national government concerns which are required to be taken into account in determining a province's equitable division of revenue. The silent premise of this leg of the argument is that by including more specified national concerns, such factors will automatically prevail. Fourth, NT 214(2)(d) is further said to limit a province's equitable share by the requirement that the need to ensure provincial ability to provide "basic services" be considered, as opposed to mere "services".

[366] In the alternative, counsel for one of the objectors alleges a non-compliance with CP XXVI, which requires:

> "**Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them.**"

More particularly it is argued that the mechanism under NT 214 will facilitate the determination of a province's equitable share in a manner which will not guarantee that provinces are able to provide basic services and execute the functions allocated to them.

[367] We disagree with the contention that NT 214 undermines a province's entitlement to an equitable share of revenue and thereby diminishes provincial powers. The argument that NT 214 omits a province's unconditional entitlement to any transfer duty on the transfer of property situated within the province concerned, fails to take account of the different manner in which the NT provides that the equitable share be determined. Under IC 155(2) various sources of revenue are stipulated to comprise a province's equitable share. The first three of such sources are to be fixed as a percentage by Parliament on income tax, value-added tax and the fuel levy. The percentages of these are unspecified in the IC. The fourth source is that portion of transfer duty

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423 The use in South African financial legislation of the word "appropriation" is not consistent and an analysis of the provisions thereof would not assist in the interpretation of NT 214.

collected nationally on transactions involving property situated within the province concerned. The fifth consists of those additional allocations made by central government out of national revenue. The sum total of the amounts of revenue so sourced are said to comprise the province's equitable share of revenue under IC 155(2).

[368] NT 214, on the other hand, does not specify the sources of funding but rather a process for determining an equitable share for each province. All of the fixed categories, save the one contained in IC 155(2)(e), have been dropped from the NT.[424] In their place are to be found additional substantive and procedural safeguards in determining the actual amount of the equitable share. The designation of categories of source does not touch on the actual determination of the amount of a province's equitable share. It merely specifies the categories from which that amount is determined. The overall provincial entitlement in the IC and NT is unchanged; it is to an equitable share of revenue raised nationally. In both the IC and NT it is Parliament that must determine this share. The objections levelled at the failure to "guarantee" transfer duty allocation to provinces, therefore, carry no weight at all.

[369] The second argument falls to be rejected without much elaboration. In IC 155(3) it is stated merely that the various components of the equitable share are to be "fixed reasonably in respect of the different provinces after taking into account the national interest and recommendations of the Financial and Fiscal Commission". It is our view that the more detailed requirements for evaluating a province's equitable share, provided for in NT 214(2), flesh out the requirement of reasonableness. The consultations and considerations that are to precede an NT 214 enactment are designed precisely to achieve a reasonable outcome. There is no constitutionally entrenched disadvantage, nor loss of a substantive safeguard for provinces in this provision, as submitted by counsel for the objector.

[370] The third argument has no substance. The considerations that are to be taken into account under IC 155(3) are widely stated.[425] The consideration of national interest alone in the IC allows for virtually unlimited national government interests to be taken into account. NT 214(2) establishes more precise guidelines within which the national legislature is to legislate and against which its legislative output may be tested. There has here been no diminution of provincial powers and the provisions of NT 214(2) in no way contravene CP XXVI.

[371] The fourth argument turns on the shift from the words "to provide services", used to describe the object of provincial entitlement to an equitable share in IC 155(1), to the words "to provide basic services", used to describe this objective in NT 227(1)(a). We are of the view that nothing prejudicial to the provinces turns on this change of wording. Indeed, as counsel for the objector acknowledged, the change in wording was, in all probability, intended to accommodate the requirements of CP XXVI.

[372] We turn now to the contention by counsel for another objector that the absence in the NT of a provision equivalent to IC 158(b) represents a material diminution in the powers of provincial government. We do not agree. IC 158(b) provides that financial allocations by the national

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424 The sole remaining source, namely "any other allocations" referred to in NT 214(1)(c), is now treated as additional to a province's equitable share.

425 Under IC 155(4), it is only in respect of conditional or unconditional allocations out of national revenue to a province that detailed considerations are to apply.

government to LG "shall ordinarily be made through the provincial government of the province in which the local government is situated". This provision establishes the possibility, not the certainty, that provincial governments can be utilised as a conduit through which funds raised nationally can be allocated to LG. The provision does not purport to create provincial powers in respect of such revenue. In addition, under NT 226(3), read with NT 214(1), it seems to be envisaged that allocations from national revenue to LG will be made through a province and will constitute direct charges against the provincial revenue fund concerned.

Budgetary Controls

[373] Counsel for the objectors made much of the parliamentary budgetary controls present in NT 215. NT 215(2) provides that national legislation must prescribe the form of national, provincial and municipal budgets, when national and provincial budgets must be tabled; and that budgets in each government sphere must indicate the sources of revenue and the way in which proposed expenditure will comply with national legislation. In addition, NT 215(3) contains a list of further budgetary requirements. It is apparent that NT 215 does impose additional constraints on provincial budgetary procedures. These constraints are all matters of structure and form, going to the overarching requirement that government at all levels be transparent and accountable. We hold the view that these requirements cannot be said to result in diminished provincial powers and functions. The budgetary requirements set out in NT 215(3) are of the most rudimentary and essential nature, and are clearly imposed to ensure the attainment of the objectives of NT 215(1). It must be emphasised that NT 215 does not seek to prescribe the manner in which provinces spend their revenue.

Treasury Controls and Procurement

[374] The objections to the power of the Minister of Finance to halt funds to a province which has persistently and materially breached its financial obligations have been considered earlier in this judgment[426] in relation to provincial autonomy. So, too, have the objections to provincial procurement of goods and services.[427] It follows from the reasons there set out that there is no diminution of provincial powers or functions in these areas.

Remuneration

[375] In terms of the IC, the determination and payment of salaries and allowances to traditional leaders falls within the IC sch 6 provincial competence "traditional authorities".[428] Under NT 219(1)(a), it is left to an Act of Parliament to establish the framework for the determination of salaries, allowances and benefits, to among others, traditional leaders and members of any councils of traditional leaders. Further under NT 219(2), national legislation is to establish an independent commission to make recommendations regarding such payments. In our view this does constitute a diminution of provincial powers.

[376] Objection was raised to the intrusion of the national legislature on to the terrain of provincial salaries in terms of NT 219(1)(b). In this instance the alleged diminution can only be in

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426 See paras 279-84 above.

427 See paras 279-85 above.

428 *In re: KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; In re: Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995* 1996(7) BCLR 903 (CC) at paras 21-2.

respect of the fixing of the upper limit of such salaries. While the setting of upper limits for provincial officials by Parliament is justifiable on the basis of achieving national uniformity, it does seem that this constitutes a diminution of a provincial power under the NT.

Financial and Fiscal Commission

[377] An objector challenged the proposed composition of the Commission under NT 221. It was pointed out that under the IC half of the Commission's members are representative of provincial interests. Under NT 221(1)(b), only nine of the twenty-two represent such interests. The Commission is constitutionally enjoined to independence and impartiality and it is clearly intended that it will address broad economic rather than narrow provincial concerns. In this respect the Commission is hardly a vehicle for the exercise of power by individual provinces. There may well be a diminution of the collective powers of provinces but their individual powers are not affected.

Residual Funding

[378] Counsel for two objectors took issue with NT 227(4) which reads as follows:

> "A province must provide for itself any resources that it requires, in terms of a provision of its provincial constitution, that are additional to its requirements envisaged in the Constitution."

The provision is characterised as a new burden not previously provided for or implied and is contrasted with IC 155(2) which details the composition of an equitable share of revenue, the amount of which is to be determined by national government. It is not necessary to speculate on the degree to which the provision renders provincial governments less or more dependent on national government. It can simply be stated that this provision does not effect any diminution of provincial powers or functions.

Taxing Powers

[379] Counsel for the objectors objected to various aspects of NT 228, generally submitting that its provisions represent a diminution or narrowing of provincial taxing powers. It is said that under the NT provinces are more constrained in their competence to raise taxes, levies and duties than under the IC. In terms of IC 156 a provincial legislature is presently competent to raise taxes, levies and duties other than income tax, or value-added or other sales tax, and to impose surcharges on taxes, provided it is authorised by an Act of Parliament and there is no discrimination against non-residents of the province who are South African citizens. By contrast NT 228(1) provides:

> "A provincial legislature may impose -
>
> (a) taxes, levies, or duties other than income tax, value-added tax, general sales tax, rates on property, or customs duties; and
>
> (b) 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."

Thus, it is pointed out that under the NT provincial legislatures are barred from imposing rates on property or customs duties or surcharges on both. In addition it is contended that provincial legislatures have lost their competence to enact legislation authorising the imposition of user charges as contemplated by IC 156(3).

[380] Although the NT does not specifically authorise provinces to enact legislation authorising the imposition of user charges, such a power would be within the express or implied power to legislate with regard to matters reasonably necessary for or incidental to the effective exercise of an

NT sch 4 or 5 competence. It cannot seriously be suggested that provinces cannot pass legislation making provision for a user charge for abattoirs, health services, public transport etc. In so far as charges might be raised which are unrelated to the actual use of services provided, they would be within the general power to impose rates and levies. NT 228 does, however, remove a province's capacity to impose a small range of taxes and duties. The IC requires specific authorisation by national legislation for any taxing power sought to be exercised other than those contemplated under IC 156(1B) and (3). This legislative authorisation may be granted only after taking account of recommendations of the Financial and Fiscal Commission. And, further, provincial taxing powers are subject to the anti-discrimination constraint in IC 156(1)(b). The use of the word "authorised" in IC 156(1)(a) is not insignificant. Under NT 228(2), the power of provincial legislatures to impose taxes, levies, duties and surcharges is required only to be regulated by national legislation enacted after consideration of recommendations of the Financial and Fiscal Commission. The distinction between "authorised" and "regulated" is drawn from the wording of CP XXV itself. Under this CP, the NT is required to define the fiscal powers and functions of national and provincial government.

[381] It is apparent that the national legislation envisaged under NT 228(2) is to ensure the coherence of the taxing system and is not directed at providing the underpinning of the taxing power itself. This is provided by the NT. The term "authorised" is used to signal the empowerment by law or the courts.[429] "Regulation" however, is habitually used in statutes in conjunction with the word "control" to signify the object of legislative authorisation, the directing and commanding of that which has been authorised to be regulated.[430] Thus seen, NT 228 affords provincial legislatures specific and guaranteed taxing powers. The IC offers provinces merely the expectation of such powers. It is by reason of the greater specification and detail in the NT that certain types of taxes, levies and duties have been omitted from provincial legislative competence, but this omission is more than offset by the assurance of specific taxing powers. In this respect we conclude that there is no diminution of the powers and functions of the provinces.

[382] Counsel for an objector suggested that the requirement that taxing powers be regulated by national legislation under the NT deprives provinces of, what are termed, "autonomous fiscal powers", allegedly present in IC 156(1) and (3). This, it was said, violates CP XX which provides that each level of government is to have appropriate and adequate legislative and executive powers and functions to enable it to function effectively, and further violates CP XXV. For reasons given above, however, we find no autonomous fiscal powers recognised in IC 156(1) and (3). The objection thus has no substance.

[383] More weighty, however, is the contention advanced that the NT withdraws exclusive provincial competence to impose gambling taxes. Under IC 156(1B) provinces are afforded exclusive competence to impose taxes, levies and duties on casinos, gambling, wagering, lotteries and betting (for simplicity's sake we refer to these as gambling taxes). This provision does not make a reappearance in the NT. But IC 156(1B) cannot be read in isolation. It has to be seen against the backdrop of IC 156(2). This latter provision prohibits the levying of any tax (including gambling taxes) by provinces, in a manner which detrimentally affects national economic policy, inter-provincial commerce or the national mobility of goods, services, capital and labour. This

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429 *Ex parte Trustees Estate Loewenthal* 1939 TPD 250 at 254.

430 *Amoils v Johannesburg Municipality* 1916 TPD 634 at 637; *R v Mafutsani & Another* 1936 TPD 18 at 19.

provision clearly makes it possible in certain circumstances for the national legislature to regulate the imposition of gambling taxes, although such taxes could initially be imposed independently of any national legislative authority. The concerns of IC 156(2) are precisely those replicated in NT 228(2)(b), which provides a policy framework for national legislation to regulate all provincial taxing powers.

[384] It is recognised, however, that the failure of the NT to designate provincial competence in respect of gambling taxes as "exclusive" does entail a diminution of such power. We are of the view that this loss of exclusive gambling taxing powers is compensated by the more specific and less conditional powers given provinces under NT 228(1). But it is not clear that the exclusion of the provisions of IC 156(1B) in the NT represents a material loss at all. Under the NT gambling taxes are included in the provinces' general taxing powers under NT 228(1)(a). The NT goes no further than allowing Parliament to regulate such taxing powers under NT 228(2)(b).

J. THE WEIGHING OF THE BASKETS

[385] Both the IC and the NT assign, define and qualify various functions and powers of the provinces. In some respects the powers given to the provinces in terms of the NT are less than or inferior to the corresponding powers given to the provinces in terms of the IC; in other respects they are more substantial and in many other respects they are substantially the same. These items have previously been analysed in separate parts of this judgment. The purpose of this section is to take stock of all of them. What CP XVIII.2 requires is a judgment as to whether or not, on a weighing of all these factors, the powers and functions of the provinces in the NT can be said to be "substantially less than or substantially inferior to" the powers and functions which the provinces enjoy in the IC.

[386] In our view the best way of approaching this difficult question is to analyse the provisions of the NT and the IC dealing with provincial powers, comparing like with like, with a view to determining on the basis of such comparison whether the NT has led to an enhancement or diminution of the particular powers that are being compared. Where there has been a material enhancement or diminution the difference must be weighed, having regard to the relative importance of the particular power, and that weight must be placed on the scales that balance the NT against the IC.

[387] This exercise must be done for each category of comparable powers, and on completion of the process an assessment must be made whether the powers of the provinces have been enhanced or diminished by the NT. If they have been diminished that is not the end of the matter. It will be necessary also to have regard to the functions of the provinces which have remained substantially the same, and to bring them to account in order to determine whether, in relation to the totality of the powers vested in the provinces, the diminution is substantial.

[388] To perform this exercise it is therefore necessary to identify and assess the relevant factors which affect the powers and functions of the provinces in the two constitutions being compared. We analyse each factor in turn.

The Institutional Instrument Through Which Provincial Powers and Functions are Expressed at the National Level

[389] This involves a comparison between the institution of the Senate under the IC and the institution of the NCOP under the NT. This comparison has been made in a separate part of this

judgment.[431] It is undoubtedly an important area of comparison but a proper analysis does not yield any currently measurable enhancement or diminution of powers and functions for the provinces.

South African Police Service

[390] The conclusion arrived at was that the powers and functions accorded to the provinces in this area in the NT are significantly less than the corresponding powers which the provinces enjoy in the IC.[432]

The Power to Make Provincial Constitutions

[391] Both the IC (in IC 160) and the NT (in NT 142 and 143) contain the power for a province to adopt a provincial constitution. The conclusion to which we have come is that the powers of the provinces in this respect have been neither enhanced nor diminished.[433]

Financial and Fiscal Powers and Functions

[392] Our conclusion was that the financial and fiscal powers and functions of the provinces in the NT are not materially different from the powers and functions which the provinces enjoy in the IC.[434] With regard to gambling taxes specifically, in terms of the NT provinces do not have any exclusive competence to levy gambling taxes but the loss of that right (contained in IC 156(1)(b)) does not constitute any real diminution of provincial power in the NT, for the reasons we have given.[435]

[393] However, NT 219(1)(b) provides that an Act of Parliament must establish a framework for determining the upper limit of salaries, allowances or benefits of members of the provincial legislatures, members of executive councils and municipal councils. There is no such limitation in the IC. To that extent there has been a diminution of provincial power in the NT.[436]

Provincial Public Protectors

[394] In terms of IC 114 a provincial legislature has the power to provide for the establishment, appointment, powers and functions of a provincial public protector. No such power exists in terms of NT 182, which deals with the appointment of the national Public Protector. To that extent there is a diminution in provincial powers but this must be balanced against the fact that a provincial public protector under the IC in any event can only exercise his or her functions "in consultation with the Public Protector", who has concurrent jurisdiction in the provinces, and that a provincial law providing for a provincial public protector cannot derogate from the powers and functions of the national Public Protector. The result is that there has been a diminution of a power which is of limited ambit and effect.

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431 See Chapter VII.B.

432 See Chapter VII.G.

433 See Chapter VII.D.

434 See Chapter VII.I.

435 See paras 441-2.

436 See paras 482-3.

Public Service Commissions

[395] In terms of IC 213 a provincial legislature has authority to provide a law for the establishment of a provincial service commission. As we have pointed out above,[437] no such power appears in NT ch 10, as the NT establishes a single PSC for the whole country on which each province has a representative. We cannot assess whether the powers and functions of the provinces in this area have been diminished because NT ch 10 does not define the powers of the PSC.

[396] CP XXIX requires the independence and impartiality of a PSC to be provided for and safeguarded by the Constitution, and CP XXX requires an efficient, non-partisan, career-orientated public service which functions on the basis of fairness, to serve all members of the public in an unbiased and impartial manner. NT ch 10 does not comply with these CPs because it does not set out the powers of the PSC with sufficient clarity to enable us to assess whether its independence and impartiality have been safeguarded and whether the powers of the provinces have been diminished or enhanced. NT ch 10 therefore has to be ignored at this stage for the purposes of weighing the baskets because it itself is not in compliance with the CPs.

Abstract Powers of Review

[397] The power IC 98(9) confers on the Speaker of a provincial legislature to request the Constitutional Court to determine the constitutionality of a bill before a provincial legislature, is not repeated in the NT. Under NT 122 twenty percent of the members of a provincial legislature may apply to the Constitutional Court for an order declaring that all or part of an Act passed by the provincial legislature is unconstitutional. The only practical difference seems to be that the constitutionality of a provincial bill cannot be attacked in the Constitutional Court until that bill has been passed and becomes an Act; and that the majority required to invoke this Court's jurisdiction is reduced from a minimum of one-third to a minimum of one-fifth of the members of the provincial legislature. There is no real diminution of provincial powers in this regard. If the bill is indeed unconstitutional it will so be held by the Court after it purports to become an Act and all that is necessary to trigger that mechanism is a minimum of 20 percent of the members of the provincial legislature instead of the previous 33 and one-third percent.

Traditional Leadership

[398] This issue is dealt with in a separate part of this judgment and the conclusion was that on a proper analysis of the two constitutions the NT does not markedly diminish the powers enjoyed by the provinces in this area under the IC.[438]

The Powers of Provincial Competence (Excluding Those Specifically Discussed)

[399] In the application of CP XVIII.2 it is clearly necessary to compare the list of provincial legislative functions in IC sch 6 with NT schs 4 and 5 in order to examine whether the powers and functions of the provinces in the NT can be said to be less than or inferior to the corresponding powers of the provinces in the IC. Our analysis has led us to conclude that the powers of the provinces in terms of NT schs 4 and 5 are marginally less than or inferior to the powers enjoyed by the provinces in terms of IC sch 6.[439]

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437 In Chapter VII. F.

438 See Chapter VII.H.

439 See Chapter VII.C.

Provincial Executive Powers

[400] IC 144(2) provides that a province shall have executive authority over all matters in respect of which it has exercised its legislative competence, matters which are assigned to it by the President in terms of IC 235 or any law; and also all matters delegated to it by or under any law. The corresponding section in the NT is NT 125. NT 125(2) provides for the exercise of provincial executive power for the purposes of implementing provincial legislation in the province and national legislation within the functional areas listed in NT schs 4 and 5, administering national legislation assigned to it in terms of an Act of Parliament, developing and implementing provincial policy, coordinating the functions of provincial departments and administration, preparing and initiating provincial legislation and performing any other function which is assigned to it by the Constitution or an Act of Parliament. These are wide executive powers which are not really different from the corresponding executive powers which provinces enjoy in terms of IC 144.

[401] That conclusion is, however, subject to two qualifications. First, NT 125(3) provides that the executive power of a province to develop and implement provincial policy only vests in it to the extent that that province has the administrative capacity to assume effective responsibility. This qualification, in our view, does not in any meaningful sense detract from the executive powers of the provinces. If a province lacks the administrative capacity to assume effective responsibility it would not properly be able to exercise any function in that area. It could, in terms of NT 125(3), require the national government to assist it in developing the necessary administrative capacity.

[402] The second qualification arises from the provisions of NT 100 which allow the national executive to intervene, and even to assume responsibility itself, where the province concerned cannot or does not fulfil its executive obligations. In our view, this cannot properly be said to constitute any meaningful limitation of legitimate provincial executive functions because as long as a province wishes, and is able to, fulfil its executive obligations, no intervention in terms of NT 100 would be competent. If there were to be any unlawful interference by the national executive with the autonomy of a province in terms of NT 100, the province concerned would be entitled to the protection of judicial review.

[403] In the result, none of the qualifications to which our attention was drawn during the course of argument diminishes the proper and legitimate exercise of the executive functions of the provinces. Those powers and functions are effectively neither less than nor inferior to the corresponding powers of the provinces extended in IC 144. Nor can it be said that there has been any real enhancement in the powers and functions of the provinces. It was contended on behalf of the CA that NT 125(2)(b), which gives to a province the executive power to implement all national legislation listed within NT schs 4 or 5, constitutes such an enhancement. That power, however, is subject to an Act of Parliament which may provide otherwise and in any event might carry both powers and obligations. Whether there is an enhancement is therefore largely speculative.

Local Government

[404] In the Chapter of this judgment dealing with LG we have referred to the comparison between the IC and the NT in respect of the powers of provincial government in relation to the institution, function and role of LG.[440] LG structures are given more autonomy in the NT than they have in the IC and this autonomy is sourced in the NT and not derived from anything given to LG structures by the provinces. To this extent, therefore, there is, in the NT, a diminution in provincial

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[440] See Chapter VII.E.

powers and functions insofar as they pertain to the role of LG.[441] It is true that LG powers, independently sourced in the NT, also reduce the corresponding powers which the national government enjoys in this area in terms of the IC, but for the purposes of applying CP XVIII.2 this is irrelevant. What has to be compared is the text of the two constitutions insofar as they pertain to provincial competencies in the area of LG.

[405] We have also concluded that whereas IC sch 6 lists a broad functional area of provincial legislative competence which is termed "Local government, subject to the provisions of Chapter 10", the NT specifically lists the particular areas of LG which in terms of NT schs 4 and 5 fall within the legislative competences of provinces. To this extent there is some diminution in provincial legislative power. There is also a corresponding diminution in the executive power of the provinces that flows from their diminished legislative powers.

Miscellaneous Matters

[406] In the course of argument it was contended on behalf of some of the objectors that, properly analysed, the NT provides for lesser provincial power than the IC does in its comparable provisions. That objection involves a number of sub-issues, such as the impact of the chapter on cooperative government in the NT and, more particularly, NT 41(1)(h) and 41(2)-(5); the holding of provincial elections in terms of national legislation permitted by NT 105(1); the qualification for members of provincial legislatures provided for in NT 106; the code of ethics referred to in NT 136(1); the regulation of referenda in terms of NT 127(1)(f); the requirements of NT 218 and 219 pertaining to government loan guarantees and the remuneration of persons holding public office; the regulation of taxation in terms of NT 228(2); and related issues. None of these issues is of real significance in assessing provincial autonomy generally. It follows that such changes as the NT brings about in respect of such matters do not materially diminish the autonomy which the provinces enjoy in terms of the IC.

The Power of the National Government to Intervene in or to Override the Exercise of Provincial Powers

[407] In dealing with provincial legislative powers we have dealt with the fact that in terms of NT 146 national legislation prevails over provincial legislation in certain circumstances and that in terms of NT 44(2) Parliament has the right of intervention by passing legislation in certain circumstances which would ordinarily fall within the functional area of the provinces.[442] There is undoubtedly a difference between the legislative powers of a province authorised in the IC and those authorised in the NT. In terms of IC 126 read with IC sch 6, Parliament enjoys, with a provincial legislature, a concurrent right to legislate in the areas listed in IC sch 6. It does not have to justify such legislation, although in the event of a conflict with a provincial legislature in the same area an Act of Parliament would only prevail over the provincial legislation if the special circumstances defined in IC 126(3) are satisfied. In the case of the NT, there is no such automatic right by Parliament. It is expressly precluded by NT 44(1)(a)(ii) from passing legislation within the functional areas listed in NT sch 5 and in order to overcome that disability, it must invoke the special power of intervention set out in NT 44(2).

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441 It must be remembered, however, that IC 174 does not give to the provinces unlimited power in respect of LG. LG must be established and its powers, functions and structures are to be determined by the law of a competent authority. Under the IC the provincial government is not the only competent authority and a national override under IC 126(3) might be warranted.

442 See Chapter VII.C.

[408] Notwithstanding the difference, however, our conclusion is that in the comparison between IC 126(3) and NT 44 there is no significant enhancement of provincial powers.[443]

The Power of a Province to Resist National Legislation which Specifically Affects a Particular Province or Provinces

[409] What is relevant in this regard is a comparison of IC 61 with NT 74. IC 61 effectively provides for a provincial veto where a bill before Parliament affects the boundaries or the exercise or performance of the powers or functions of a particular province or provinces only. Such a bill cannot be made law unless it is approved by a majority of the senators of the province or provinces in question. This concept is echoed by NT 74(3) which provides that a bill which concerns only a specific province or provinces may not be passed by the NCOP unless that bill has been approved by the relevant provincial legislature or legislatures.

[410] There is, however, one difference: the veto provided for in NT 74(3) only refers to bills in terms of NT 74(1)(b) which amend the Constitution. Where there is a bill which affects the exercise or the performance of the powers or functions of a particular province or provinces but is not a constitutional amendment, the veto in NT 74(3) would not operate, and to that extent there is a diminution in the power which is enjoyed by an individual province or provinces in terms of IC 61. IC 61 is essentially an "anti-discrimination" provision. The omission of a similar provision in the NT must, however, be weighed in the context of NT 41(1) which affords constitutional protection against national legislation or executive conduct which discriminates against a particular province or provinces.

Cooperative Government

[411] NT ch 3 introduces a new philosophy which obliges all organs of government to cooperate with each other and to discharge various functions.[444] It was contended on behalf of some of the objectors that these obligations put restrictions on the provinces which are not present under the IC and that the powers of the provinces have to that extent been diminished. We find this argument to be unpersuasive for two reasons. In the first place, to the extent to which NT ch 3 does impose any obligations, those obligations are imposed on the national government as well and any suggested diminution in the powers of the provinces is therefore balanced by a corresponding reduction in the reciprocal powers of the national government.

[412] Second, the obligations referred to are largely of a general kind which are sensible and might in any event be inferred without these provisions, such as the duty to preserve the peace, national unity and the indivisibility of the Republic; the duty to secure the well-being of the people of the Republic; and the duty to cooperate in mutual trust and good faith by fostering friendly relations and avoiding legal proceedings against each other.

Conclusion Regarding CP XVIII.2

[413] Giving a weight to each of the factors which we have enumerated in the preceding paragraphs and applying the approach which we have set out as carefully and as diligently as we can, we have come to the conclusion that the powers and functions of the provinces in terms of the NT are less than and inferior to the powers and functions which the provinces enjoy under the IC.

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443 We deal separately with NT 146 and more particularly with the significance of NT 146(4) at para 480.

444 NT 41.

[414] The question then is whether they can be said to be substantially less than or substantially inferior to such powers. This has been the most difficult of all the questions that we have been required to address in these proceedings. We are acutely conscious of the fact that in some respects the evaluation must necessarily be subjective, and that the CA may be better placed than we are to make such a judgment, particularly in evaluating the NCOP and the enhancement of provincial powers in respect of the implementation of NT schs 4 and 5 laws. We are, however, required to make this judgment ourselves, and to be satisfied that there has been compliance with CP XVIII.2.

[415] We cannot give a firm answer to this question until the issues relating to the powers of the provinces in regard to the appointment of their own employees, as well as the powers and functions of the PSC, have been clarified. It is, however, important that we should indicate now what our views are in regard to the other issues that have been raised in regard to CP XVIII.2. We have accordingly considered what the answer would be if the powers of the provinces in regard to these two matters were to prove to be not less than or inferior to their powers under the IC.

[416] We have already indicated that we see no measurable difference in the collective powers of the provinces resulting from the replacement of the Senate by the NCOP. We also consider that there has been no material change made in respect of the fiscal and financial powers of the provinces or their powers in respect of provincial constitutions.

[417] The NT schs 4 and 5 powers of the provinces, excluding the LG powers mentioned in part B of each of the two schedules, are administration of indigenous forests, abattoirs, agriculture, airports (other than international and national airports), ambulance services, animal control and diseases, archives (other than national archives), casinos, racing, gambling and wagering (other than lotteries and sports pools), consumer protection, cultural matters, disaster management, education at all levels (excluding tertiary education), environment, health services, housing, indigenous law and customary law, industrial promotion, language policy and the regulation of official languages, libraries (other than national libraries), liquor licences, museums (other than national museums), nature conservation (other than national parks, national botanical gardens and marine resources), media services directly controlled or provided by the provincial government (subject to regulation by the Independent Broadcasting Authority), police, pollution control, population development, property transfer fees, provincial public enterprises in respect of NT schs 4 and 5 matters, provincial planning, provincial cultural matters, provincial recreation and amenities, provincial sport, provincial roads and traffic, public transport, public works in respect of provincial government departments, regional planning and development, road traffic regulation, soil conservation, tourism, trade, traditional leadership, urban and rural development, vehicle licensing, veterinary services (excluding regulation of the profession) and welfare services.

[418] There is also an extensive list of LG matters which are subject to monitoring by the provinces. In addition there are the fiscal and financial powers which include an entitlement to an equitable share of revenue, and the constitution making powers. We have set out this list to indicate how extensive it is and how significant some of the powers are. It includes powers in important functional areas which affect the day to day lives of people, such as agriculture, consumer protection, primary and secondary education, the environment, health, housing, regional planning and development, urban planning and development, trade, and welfare, and other important powers such as tourism and public transport.

[419] None of the functional areas set out in IC sch 6 has been excluded but in some instances the

extent of the powers has been curtailed. In particular, this has been the case in respect of police powers, and to a lesser extent in respect of education, LG and traditional leadership. There has also been the loss of powers in respect of lotteries and sports pools, and the matters referred to in Chapter V.B (dealing with provincial autonomy).

[420] In the case of provincial police powers there has been a loss of operational control. The curtailment in education is in respect of tertiary education (other than at technikons and universities, which were excluded under the IC). The curtailment with respect to LG lies largely in the consolidation of the autonomy of LG authorities, which results in a limitation of some of the concurrent powers of the national and provincial governments. The curtailment of provincial powers over traditional leadership is in respect of the setting of salaries which has been made subject to framework legislation to be passed by Parliament after considering the recommendations of an independent commission on remuneration.

[421] Seen in the context of the totality of provincial power, the curtailment of these four aspects of the IC sch 6 powers would not in our view be sufficient in themselves to lead to the conclusion that the powers of the provinces taken as a whole are substantially less than or substantially inferior to the powers vested in them under the IC.

[422] But these are not the only relevant considerations. There is in addition the presumption in NT 146(4) which favours national legislation which is sought to be justified on the grounds that it is necessary for one of the purposes referred to in NT 146(2)(c). There is also the alteration in the scope of the override contained in NT 146(2)(b). It introduces the criterion for the setting of norms and standards for a matter that it be required "in the interests of the country as a whole", in place of the criterion in IC 126(3)(b) that the norms and standards be required for the "effective performance" of the matter. These changes apply to legislation in the entire field of concurrent powers, giving added strength to national legislation in respect of such matters, and weakening the position of the provinces should there be a conflict with competing provincial legislation.

[423] If the curtailment of powers and the override provisions referred to in the preceding two paragraphs are taken together, their combined weight in the context of the NT as a whole is sufficient to be considered substantial. It therefore follows that the NT does not satisfy CP XVIII.2.

CHAPTER VIII. CONCLUSION AND ORDER

A. CONCLUSION

[424] It is therefore our conclusion that the following provisions of the NT do not comply with the CPs:

- NT 23, which fails to comply with the provisions of CP XXVIII in that the right of individual employers to engage in collective bargaining is not recognised and protected.

- NT 241(1), which fails to comply with the provisions of CP IV and CP VII in that it impermissibly shields an ordinary statute from constitutional review.

- NT sch 6 s 22(1)(b), which fails to comply with the provisions of CP IV and CP VII in that it impermissibly shields an ordinary statute from constitutional review.

- NT 74, which fails to comply with -

CP XV in that amendments of the NT do not require "special procedures involving special majorities"; and

CP II in that the fundamental rights, freedoms and civil liberties protected in the NT are not "entrenched".

- NT 194, which fails in respect of the Public Protector and the Auditor-General to comply with CP XXIX in that it does not adequately provide for and safeguard the independence and impartiality of these institutions.

- NT 196, which fails to comply with -

  CP XXIX in that the independence and impartiality of the PSC is not adequately provided for and safeguarded; and

  CP XX in that the failure to specify the powers and functions of the Public Service Commission renders it impossible to certify that legitimate provincial autonomy has been recognised and promoted.

- NT ch 7, which fails to comply with -

  CP XXIV in that it does not provide a "framework for the structures" of local government;

  CP XXV in that it does not provide for appropriate fiscal powers and functions for LG;

  and CP X in that it does not provide for formal legislative procedures to be adhered to by legislatures at LG level.

- NT 229, which fails to comply with CP XXV in that it does not provide for "appropriate fiscal powers and functions for different categories of local government".

- To the extent set out in this judgment the provisions relating to the powers and functions of the provinces fail to comply with CP XVIII.2 in that such powers and functions are substantially less than and inferior to the powers and functions of the provinces in the IC.

[425] We wish to conclude this judgment with two observations. The first is to reiterate that the CA has drafted a constitutional text which complies with the overwhelming majority of the requirements of the CPs.[445] The second is that the instances of non-compliance which we have listed in the preceding paragraph, although singly and collectively important, should present no significant obstacle to the formulation of a text which complies fully with those requirements.

B. ORDER

[426] We are unable to and therefore do not certify that all of the provisions of the Constitution

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445 See para 31.

of the Republic of South Africa, 1996 comply with the Constitutional Principles contained in schedule 4 to the Constitution of the Republic of South Africa Act 200 of 1993.

Chaskalson P	Langa J
Mahomed DP	Madala J
Didcott J	Mokgoro J
Goldstone J	O'Regan J
Kriegler J	Sachs J

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Prince Madlakadlaka on behalf of Queen Modjadji of the Balobedu community

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Dr C Albertyn and Ms M O'Sullivan

I

The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

II

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution.

III

The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.

IV

The Constitution shall be the supreme law of the land. It shall be binding on all organs of state at all levels of government.

V

The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

VI

There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

VII

The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.

VIII

There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation.

IX

Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.

X

Formal legislative procedures shall be adhered to by legislative organs at all levels of government.

XI

The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.

XII

Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.

XIII

1. The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

2. Provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch shall be recognised and protected in the Constitution.

XIV

Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.

XV

Amendments to the Constitution shall require special procedures involving special majorities.

XVI

Government shall be structured at national, provincial and local levels.

XVII

At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII.

XVIII

1. The powers and functions of the national government and provincial governments and the boundaries of the provinces shall be defined in the Constitution.

2. The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution.

3. The boundaries of the provinces shall be the same as those established in terms of this Constitution.

4. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed.

5. Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.

XIX

The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

XX

Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity.

The following criteria shall be applied in the allocation of powers to the national government and the provincial governments:

1. The level at which decisions can be taken most effectively in respect of the quality and rendering of services, shall be the level responsible and accountable for the quality and the rendering of the services, and such level shall accordingly be empowered by the Constitution to do so.

2. Where it is necessary for the maintenance of essential national standards, for the establishment of minimum standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole, the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.

3. Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government.

4. Where uniformity across the nation is required for a particular function, the legislative power over that function should be allocated predominantly, if not wholly, to the national government.

5. The determination of national economic policies, and the power to promote interprovincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.

6. Provincial governments shall have powers, either exclusively or concurrently with the national government, *inter alia* -

(a) for the purposes of provincial planning and development and the rendering of services; and

(b) in respect of aspects of government dealing with specific socio-economic and cultural needs and the general well-being of the inhabitants of the province.

7. Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the provincial governments.

8. The Constitution shall specify how powers which are not specifically allocated in the Constitution to the national government or to a provincial government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national government or provincial governments.

XXII

The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces.

XXIII

In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national government and provincial governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.

XXIV

A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both.

XXV

The national government and provincial governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in Principle XXIV shall make provision for appropriate fiscal powers and functions for different categories of local government.

XXVI

Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them.

XXVII

A Financial and Fiscal Commission, in which each province shall be represented, shall recommend equitable fiscal and financial allocations to the provincial and local governments from revenue collected nationally, after taking into account the national interest, economic disparities between the provinces as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the provinces.

XXVIII

Notwithstanding the provisions of Principle XII, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected. Provision shall be made that every person shall have the right to fair labour practices.

XXIX

The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution

in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

XXX

1. There shall be an efficient, non-partisan, career-orientated public service broadly representative of the South African community, functioning on a basis of fairness and which shall serve all members of the public in an unbiased and impartial manner, and shall, in the exercise of its powers and in compliance with its duties, loyally execute the lawful policies of the government of the day in the performance of its administrative functions. The structures and functioning of the public service, as well as the terms and conditions of service of its members, shall be regulated by law.

2. Every member of the public service shall be entitled to a fair pension.

XXXI

Every member of the security forces (police, military and intelligence), and the security forces as a whole, shall be required to perform their functions and exercise their powers in the national interest and shall be prohibited from furthering or prejudicing party political interest.

XXXII

The Constitution shall provide that until 30 April 1999 the national executive shall be composed and shall function substantially in the manner provided for in Chapter 6 of this Constitution.

XXXIII

The Constitution shall provide that, unless Parliament is dissolved on account of its passing a vote of no-confidence in the Cabinet, no national election shall be held before 30 April 1999.

XXXIV

1. This Schedule and the recognition therein of the right of the South African people as a whole to self-determination, shall not be construed as precluding, within the framework of the said right, constitutional provision for a notion of the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way.

2. The Constitution may give expression to any particular form of self-determination provided there is substantial proven support within the community concerned for such a form of self-determination.

3. If a territorial entity referred to in paragraph 1 is established in terms of this Constitution before the new constitutional text is adopted, the new Constitution shall entrench the continuation of such territorial entity, including its structures, powers and functions.

Objections by Private Parties

Text	Objector	Subject of objection
Preamble	A C Cilliers	Stress on "injustices of our past" instead of non-discrimination and reconciliation
Preamble	M H Prozesky	"May God protect our people" discriminates against non-theists
6(3) read with 6(4)	A C Cilliers	Use of particular official languages for the purposes of government
6 and 9	Concerned South African Indian Citizens	Non-recognition of Telegu, Gujarati, Urdu, Tamil and Hindi as official languages
6	Prince Madlakadlaka on behalf of Queen Modjadji	Non-recognition of Khilobedu as an official language
6	G Moralee	English should be the only official language
Ch 2	J Anderson	Limitation of rights
Ch 2	J Anderson	Sexual orientation as a ground for non-discrimination
Ch 2	J Munnikhuis	Failure to make legal system more accessible and protective of the lay person and to promote position of women in law
Ch 2	H W Theron	The defined rights are not adequately clarified
8(2)	Gauteng Association of Chambers of Commerce and Industry	Horizontal application of the Bill of Rights
8(2)	Free Market Foundation	Horizontal application of the Bill of Rights
8(2)	Congress of Traditional Leaders of South Africa	Horizontal application of the equality clause will impact on indigenous law
8(2) and (3)	SA Institute of Race Relations	Horizontal application of the Bill of Rights
8(2) and (3)	Transvaalse Landbou-Unie	Horizontal application of the Bill of Rights
8(3)	Free Market Foundation	Anomalous and creates a law-making function for the courts by making no provision for customary law
8(4)	P Bond , L Zita and D Miller	Protection of rights of juristic persons
9(2)	A C Cilliers	Affirmative action
9(2)	P Dennely	Affirmative action

9(2) and (5)	H W Theron	Affirmative action
9(3)	J Hammarström	Sexual orientation as a ground for non-discrimination
9(5)	United Christian Action	Unfair discrimination
9(5)	Africa Christian Action	Unfair discrimination
9, 11, 12(2)(a) and 36	Pro Life	Abortion
9(2), 12(2)(a) and (b) and 27(1)(a)	Christians for Life	Abortion
11 and 12	M de Barros	Abortion
11 and 12	Doctors for Life	Abortion
11 and 12	Human Life International	Abortion
11 and 12	R W Nixon	Self-defence
11 and 12	People for Life	Abortion
11 and 12	World Federation of Doctors Who Respect Human Life	Abortion
11 and 12(1)(c)	J D Mann	Self-defence
11(2), 12(2)(a) and 27(1)(a)	Africa Christian Action	Abortion
11(2)	United Christian Action	Abortion
12	United Christian Action	Firearms
12	Victims of Choice	Abortion
12(2)(a) and 27(1)(a)	E Ngwenye-Seobi	Abortion
14,16 and 19	P Bond, L Zita and D Miller	Juristic persons
15, 27, 28 and 33	R E Chalom	Chapter 2
15(3), 30, 31, 211 and 212	Traditional Authorities Research Group	Traditional leadership
16(2)	Africa Christian Action	Pornography
16(2)	United Christian Action	Pornography
17	A C Cilliers	Mass action
21(1)	A C Cilliers	Freedom of movement

22 and 23	H Mahomed	Restraint of trade
23	Business South Africa	Lock out
23	Business South Africa	Employers rights to collective bargaining
23	Gauteng Association of Chambers of Industry and Commerce	Lock out
23	Free Market Foundation	Lock out
23	P Macnab	Lock out
24	The Environmental Law Association	Environment
24	DM Kisch Inc	Environment
24	The Environmental Law Association	Environment
25	Transvaalse Landbou- Unie	Property
25	Free Market Foundation	Property
25	Gauteng Association of Chambers of Commerce and Industry	Property
25	South African Agricultural Union and Agricultural Employers' Organisation	Property
25(4)(b)	P Meakin	Natural resources
26	Africa Christian Action	Property and housing
26	United Christian Action	Property and housing
26, 27 and 28(1)(c)	SA Institute of Race Relations	Socio-economic rights
26, 27 and 28(1)(c)	Free Market Foundation	Socio-economic rights
26, 27 and 28(1)(c)	Gauteng Association of Chambers of Commerce and	Socio-economic rights

	Industry	
27(1)(a)	Dr ES Clark	Abortion
29(2)	Ouerbelange-groep Hoërskool Brandfort	Language and education
29(3) read with 29(4)	A C Cilliers	Language and culture
30	A C Cilliers	Language and culture
31	A C Cilliers	Language and culture
32	Ouerbelange-groep Hoërskool Brandfort	Privacy
32 read with Sch 6 s 23(2)(a)	Legal Resources Centre, Cape Town	Access to information
35(1)(e) and (f)	Human Rights Committee of South Africa	Bail and detention
36	Ouerbelange-groep Hoërskool Brandfort	Limitations on rights
36	Transvaalse Landbou-Unie	Limitations on rights
36	A C Cilliers	Limitations on rights
36(1)	Human Rights Committee of South Africa	Limitations on rights
37	Human Rights Committee of South Africa	State of emergency
44(2)	Volkstaatraad	Provincial powers
47(1)(a)(i), 91(3)(a),(b) and (c) and 91(4)	A E Nothnagel	Separation of powers
74	Human Rights Committee of South Africa	Amendment of the constitution
74	Association of Law Societies	Entrenchment of the Bill of Rights
83	A C Cilliers	President
146, 147 and 155-159	PROLOGOV Consultancy	Powers of provinces re LG
146(1)-(5) read with 148	C O du Preez	Powers of provinces re LG
Ch 7	Congress of Traditional	Traditional leaders at LG level

	Leaders of South Africa	
Ch 7	A Hoffenberg	Local autonomy, separation of powers and election matters
152-3	J Munnikhuis	Municipal powers
155(1)	C O du Preez	National and provincial powers re LG
Ch 8	ARMSA, MASA and LESTASA	Independence of magistrates
Ch 8	Congress of Traditional Leaders of South Africa	Customary courts
Ch 8	R E Laue	Independence of magistrates
170	Association of Law Societies	Magistrates' courts, constitutional jurisdiction
174(7)	ARMSA, MASA and LESTASA	Independence of magistrates
175	Human Rights Committee of South Africa	Acting judges
178	Association of Law Societies	Composition of the Judicial Service Commission
178(1)	Human Rights Committee of South Africa	Composition of the Judicial Service Commission
178(6)	Human Rights Committee of South Africa	Judicial Service Commission process
179	A C Cilliers	Prosecuting authority
179	Attorney-General, Transvaal	Prosecuting authority
180(c)	A C Cilliers	Lay participation in courts
180(c)	Free Market Foundation	Lay participation in courts
180(c)	Gauteng Association of Chambers of Commerce and Industry	Lay participation in courts
181(2)-(4), 193(4) and (5) and 194	Association of Law Societies	Safeguards for the Public Protector, the Public Service Commission and the Auditor-General
187	J Munnikhuis	Gender equality
193	Human Rights Committee of South Africa	State institutions supporting democracy
193 and 194	Co-operative for Research and	Electoral Commission

	Education	
Ch 10	J Munnikhuis	Corruption
199(4), 205-208, Sch 4 and Sch 6 Annexure D Items 1 and 2	MEC for the Police Service, Western Cape	Powers of provinces re police
Ch 12	Congress of Traditional Leaders of South Africa	Traditional leadership
Ch 12	P Mohlalisi	Traditional leadership
211	A J Kerr	Customary law
213	P Meakin	Fiscal powers
223-225	Free Market Foundation	Reserve Bank
223-225	Gauteng Association of Chambers of Commerce and Industry	Reserve Bank
224	Association of Law Societies	Safeguards for the independence of the Reserve Bank
229(1)	Afrikaanse Handelsinstituut	Municipal excise taxes
235	A C Cilliers	Self-determination
235	Ouerbelange-groep Hoërskool Brandfort	Self-determination
235	Volkstaatraad	Self-determination
241	Business South Africa	Labour Relations Act of 1995
Sch 2	M H Prozesky	Oath of office, discrimination against non-theists
Schs 4 and 5 Parts B	C O du Preez	Provincial powers re LG
Sch 5	South African Society of Archivists	Provincial archives
Sch 6 Annexure A item 13 (23A. (1))	P A Matthee, MP	Anti-defection provision

Alleged Omissions by Private Parties

Text	Objector	Alleged Omissions

Preamble	Africa Christian Action	The words “In humble submission to Almighty God”
Preamble	Ouerbelange-groep Hoërskool Brandfort	The words “In humble submission to Almighty God”
Preamble	United Christian Action	The words “In humble submission to Almighty God”
Preamble	E Suliman	The words “In humble submission to the Almighty God”
Preamble	J Anderson	The words “democratically approved Christian value system”
Ch 2	Action Moral Standards	Family and marriage
Ch 2	Africa Christian Action	Family and marriage
Ch 2	Africa Christian Action	Right to own firearms and right to self defence
Ch 1	Bureau of Heraldry, Department of Arts, Culture, Science and Technology	Seal of the Republic
Ch 2	Christians for Truth	Family and marriage
Ch 2	Die Nederduitse Gereformeerde Kerk	Family and marriage
Ch 2	Human Life International	Family and marriage
Ch 2	J Anderson	Right to change religious or political philosophy
Ch 2	K Buchman on behalf of 34 organisations	Intellectual property rights
25	Association of Marketers	Intellectual property rights
25	Loerie Awards Committee	Intellectual property rights
Ch 2	Private citizen from Nigel	Family and marriage
Ch 2	South African Gunowners Association	Right to own firearms and right to self defence
Ch 2	The South African Institute of Intellectual Property Law	Intellectual property rights
Ch 2	United Christian Action	Family and marriage

Ch 2	Victims of Choice	Family and marriage
Ch 2	Women for Responsible Rights	Family and marriage
Ch 2	J I Welch	Right to own licensed firearms
Chs 4 and 5	R E Chalom	Separation of powers

Miscellaneous Comments from Private Parties

Objector	Miscellaneous Objections
C D Addington	Constitutional Court Rule 17(6) IC
DF Spangenberg	Philosophical objection
King Astronomy Yokulunga	News should be more accessible
M G Nqoutja	Privileges and immunities clause
P Meakin	IC 24(c) rights infringed when the CA ignored SACPRIT submissions
Pan South African Language Board (PANSALB)	Relationship between PANSALB and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities

Objections of Private Parties relating to the Certification Process

Objector	Objection
H Esterhuyse	Manner and time constraints on the public
Organization of Livestock Producers	Manner and time constraints on the public
SG Abrahams	Manner and time constraints on the public

Submissions of Private Parties Supporting the New Text

Text	Supporter	Subject of Submission
Entire Text	CA	General defence of the NT
23	Congress of South African Trade Unions	Lock-out and collective bargaining
241	Congress of South	Labour Relations Act 1995

	African Trade Unions	
8(2)	Legal Resources Centre, Centre for Applied Legal Studies and the Community Law Centre, UWC	Horizontal application of the Bill of Rights
12(2)(a) and (b) and 27(1)(a)	Legal Resources Centre, Centre for Applied Legal Studies and the Community Law Centre, UWC	Reproductive rights
26, 27 and 28	Legal Resources Centre, Centre for Applied Legal Studies and the Community Law Centre, UWC	Socio-economic rights
Ch 12	Legal Resources Centre, Centre for Applied Legal Studies and the Community Law Centre, UWC	Traditional leadership
12(2)(a) and (b) and 27(1)(a)	Reproductive Rights Alliance	Reproductive rights
25	Print Media Association	Property clause re: intellectual property

Submission of Political Parties

The following five political parties submitted extensive written and oral objections to a wide variety of provisions. These are dealt with in the course of the judgment.

- African Christian Democratic Party
- Democratic Party
- Inkatha Freedom Party (with KwaZulu-Natal Province)
- Konserwatiewe Party
- National Party

ACDP	African Christian Democratic Party
ANC	African National Congress
art	article
CA	Constitutional Assembly
ch	chapter
CP	Constitutional Principle
DP	Democratic Party
IC	Interim Constitution
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFP	Inkatha Freedom Party
JSC	Judicial Services Commission
KP	Konserwatiewe Party
LG	Local Government
LGTA	Local Government Transition Act 209 of 1993
LRA	Labour Relations Act 66 of 1995
NA	National Assembly
NCOP	National Council of Provinces
NP	National Party
NT	New Text
para	paragraph
PSC	Public Service Commission
s	section
sch	schedule
UDHR	Universal Declaration of Human Rights