DEMOCRATIC PARTY (DP)

THE APPLICATION TO CERTIFY A NEW CONSTITUTIONAL TEXT IN TERMS OF SECTION 71 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1993

NOTICE BY THE DEMOCRATIC PARTY IN TERMS OF RULE 15 (4) AND DIRECTION 2 OF THE DIRECTIONS ISSUED BY THE PRESIDENT OF THE CONSTITUTIONAL COURT ON 13 MAY 1996

TAKE NOTICE that the DEMOCRATIC PARTY intends to present oral argument to the Constitutional Court in terms of Rule 15(4).

TAKE NOTICE FURTHER that the DEMOCRATIC PARTY objects to the certification of the constitutional text adopted by the Constitutional Assembly on 8 May 1996 ("the text"), on the following grounds:

Provincial Powers

1 . The omission of exclusive provincial legislative powers from the text, alternatively the nullification of the provinces' ostensibly "exclusive" legislative powers by *inter aria* sections 44(2), 76(4)(a), 147(1)(b) 147(2) and 228(2), contravenes Constitutional Principle XIX. The powers at the provincial level of government must include exclusive, legislative powers.

2. The omission of exclusive provincial executive powers from the text, alternatively the nullification of the provinces' ostensibly "exclusive" executive powers by *inter alia* sections 100, 125 and 127(2)(@ contravenes Constitutional Principle XIX. The powers at the provincial level of government must include exclusive executive powers.

3. Despite Constitutional Principle XVIII.2 the powers and functions of the provinces defined in the text are substantially less than or substantiality inferior to those provided for in the Constitution of the Republic of South Africa, 1993 ("the interim Constitution"). More specifically:

3.1 The "exclusive" legislative powers and functions conferred upon the provinces by, or contemplated in or regulated by, *inter alia* sections 44(1)(a)(ii), 44(1)(b)(iii), 44(2), 76(4), 104(1)(b)(ii), 147(1)(b), 147(2), 148, 149 and 155(3)(a) and Schedule 5 of the text, are substantially less than or substantially inferior to those provided for in *inter alia* sections 126, 156, 157, 213 and Schedule 6 of the interim Constitution.

3.2 The "concurrent" legislative powers and functions conferred upon the provinces by, or contemplated in or regulated by, *into,*. alia sections 44(1)(a)(ii), 44(1)(b)(ii), 44(3), 104(1)(b)(i), 104(4) 104(5), 146, 148, 149 and 155(3)(b) and Schedule 4 of

the text are substantially less than or substantially inferior to those provided for in *inter alia* sections 126, 156 and 157 an Schedule 6 of the interim Constitution.

3.3 In the alternative to paragraphs 3.1 and 3.2, the "exclusive" and "concurrent" powers and functions conferred upon the province by, or contemplated in or regulated by, *inter alia* section 44(1)(a)(ii), 44(1)(b)(ii), 44(1)(b)(iii), 44(2), 44(3), 76(4), 104(1)(b)(i), 104(1)(b)(ii), 104(4), 104(5), 146, 147(1)(b), 147(2), 148, 149, 155(3)(a), 155(3)(b) and Schedules 4 and 5 of the text, are substantially less than or substantially inferior to those provided for in *inter alia* sections 126, 156, 157, 213 and Schedule 6 of the interim Constitution.

3.4 The executive powers and functions conferred upon the provinces by, or contemplated in or regulated by, *inter alia* sections 100, 125, 127, 136(1) and 139 and Schedule 6 items 14 and 15 of the text, are substantially less than or substantially inferior to those provided for in *inter alia* sections 144 and 147 of the interim Constitution.

3.5 The financial and fiscal powers, functions and competences conferred upon the provinces by, or contemplated in or regulated by, *inter alia* sections 76(4), 214, 215(2), 215(3), 216 217, 218, 219(1)(b), 220(3), 221(1), 227, 228 and 230 of the text and by Schedule 4, are substantially less than or substantially inferior to those provided for in *inter alia* sections 135(4), 155 156, 157, 158 and 200(1) of the interim Constitution.

3.6 The competence to adopt a constitution and to give effect to its provisions conferred upon the provincial legislatures by, or contemplated in or regulated by, *inter alia* sections 104(1)(a), 104(3), 109, 142, 143, 144, 145, 147(1), 148 and 149 and Schedule 6 item 13 of the text, are substantially less than or substantially inferior to those provided for in *inter alia* sections 160 and 162 of the interim Constitution.

3.7 The powers and functions in relation to the South African Police Service conferred upon the provinces by, or contemplated in or regulated by, *inter alia* sections 199(1), 199(3), 205(1), 206(2), 207(3) and 207(4) of the text and Schedule 6 item 24(1) reed with Schedule 6 Annexure D item l(b) and sections 217(2)(,3) and 218(1)(b) of the interim Constitution and read with Schedule 6 Annexure D item l(d) and section 218(1)(k) of the interim Constitution, are substantially less than or substantially inferior to those provided for in *inter alia* sections 214, 217, 218(1)(b , 218(1)(k), 219, 220 and 221 of the interim Constitution.

3.8 The powers and functions in relation to the public protectors and the public service commission conferred upon the provinces by, or contemplated in or regulated by, sections 182, 183 and 193 of the text, are substantially less than or substantially inferior to those provided for in *inter alia* sections 114 and 213 of the interim Constitution.

3.9 The powers and functions in relation to Bills appropriating or allocating money or shares of national revenue to the provinces or determining the conditions for provincial loans for current or capital expenditure, Bills affecting provincial matters, and Bills amending the Constitution, which are conferred upon the provinces (via the National Council of Provinces) by, or contemplated in or regulated by, sections 74(1)(b), 74(3), 74(4 , 75, 76, 77, 78 and 230 of the text, are substantially less than or substantially inferior to the powers or functions provided for in sections 61, 62, 155(2A), 156(1A) and 157(1A) of the interim Constitution.

3.10 The powers and functions of the members of provincial legislatures in relation to the referral to the Constitutional Court of disputes about the constitutionality of Bills before Parliament are substantially less than or substantially inferior to those provided for in sections 98(2)(d) and 98(9) of the interim Constitution. Section 80 of the text allows only members of the National Assembly to apply to the Constitutional Court for a order declaring that all or part of a Act passed by the National Assembly is unconstitutional. By contrast, sections 98(2)(d) and 98(9) empower the members of a provincial legislature to petition the Speaker to refer to the Constitutional Court dispute between the members of that legislature about the constitutionality of a Bill before the National Assembly.

4. In the alternative to paragraph 3:

4.1 The provisions of the text described in paragraph 3 above contravene Constitutional Principle XX. Those provisions do no confer upon the provincial level of government appropriate an adequate legislative and executive powers and functions that will enable that level of government to function effectively. The text's concentration of powers at the national level government at the expense of the provincial level of government is not conducive to effective public administration and does not recognise the need for and promote legitimate provincial autonomy.

4.2 The provisions of the text described in paragraph 3 above contravene Constitutional Principle XXI. In particular, section 100(1)(b)(i) contravenes Constitutional Principle XXI item 2 because it authorises the national executive to assume responsibility for a provincial executive obligation to the extent necessary to meet established minimum standards for the rendering of a service rather than to the extent necessary to *establish* minimum standards *required* for the rendering of a service; section 146(3)(ii) contravenes Constitutional Principle XXI because it provides that national legislation will prevail over provincial legislation in circumstances which are neither specified in that Principle nor contemplated by it.

4.3 The provisions of the text described in paragraph 3 above contravene Constitutional Principle XXII. Sections 44(2), 100(1)(b), 146 and 147, in particular, together empower the national government to exercise its powers so as to encroach upon the functional and institutional integrity of the provinces.

4.4 The provisions of the text described in paragraph 3.4 above contravene Constitutional Principle XXVI. Section 214(2), in particular, allows Parliament to determine as the provinces' "equitable share" of revenue collected nationally, a share which will not ensure that provinces are able to provide basic services and execute the functions allocated to them.

Labour Relations

5. The omission of a right to lock out (as was provisionally provided in all the working drafts of the new Constitution), alternatively "recourse to the lock out" (which is the formulation preferred by section 27(5) of the interim Constitution), from section 23(3) of the text, alternatively from section 23 of the text, contravenes Constitutional Principles 1, V and XXVIII. As a result of that omission, section 23(3), alternatively section 23, weakens the Constitution's endeavour to establish a democratic system of government committed to achieving equality between men and women and people of all races, does not ensure equality of all before the law, does not make provision, alternatively ensure, that every person shall have the right to fair labour practices, and does not recognise and protect the right of employers to engage in collective bargaining.

6. The omission of a right to bargain collectively from sections 23(2) and (3) contravenes Constitutional Principle XXVIII. As a result of that omission sections 23(2) and (3) do not recognise and protect the right of employees and employers to engage in collective bargaining. The requirements imposed by Constitutional Principle XXVIII are not met by conferring the right to bargain collectively upon trade unions and employers' organisations - as section 23(4) does.

The Supremacy of the Constitution

7. Section 241(1), alternatively section 241, contravenes Constitutional Principle IV as it renders the Constitution subordinate to the Labour Relations Act, 1995.

The Separation of Powers and the Judiciary

8. Section 146(4) contravenes Constitutional Principles VI and VII. The section creates an irrebuttable presumption and, in so doing, violates the separation of powers between the legislature and the judiciary, alternatively deprives South Africans of appropriate checks and balances to ensure accountability, responsiveness and openness. The section deprives the judiciary of the power and jurisdiction to safeguard and enforce the Constitution.

"Accountable, Responsive, Open, Representative and Democratic Government"

9. Schedule 6 items 6(3)(a) and 11(1)(a), alternatively Schedule 6 items 6(3) and 11(1), contravene Constitutional Principles VI, VII, VIII and XVII. These provisions create a list system of proportional representation for the first elections of the National Assembly and

the provincial legislatures under the Constitution. Such an exclusively proportional system is not accountable, responsive, representative, open or democratic, not least because it vests in the leadership of the political parties and not the electorate the power to determine the. names and order of preference of the candidates for the elections to the National Assembly and the provincial legislatures.

10. Schedule 6 Annexure A item 13 contravenes Constitutional Principle.", II, VI, VII and XVII. This item enables political parties to issue,. authoritative instructions to "their" members of the National Assembly and the provincial legislatures which the latter, on pain of loss of membership of the legislature concerned, are obliged to implement unquestioningly. This is inimical to accountable, responsive, open representative and democratic government, and undermines such universally accepted fundamental rights and freedoms as the right to freedom of expression, the freedom to make political choices and the right to stand for public office and, if elected, to hold office.

Multi-party Democracy

11. Section 61(3) contravenes Constitutional Principles VIII and XIV. The section allows the provincial legislatures, the Premier of a province and in some instances the leaders of other political parties to designate the minority parties' special delegates to the Council of Provinces. In so doing the section allows the majority party to break the cohesion of minority parties' caucuses by nominating and voting for members of those caucuses who may not be the first choice of their parties. This is subversive of multi-party democracy and undemocratically undermines minority parties' capacity to participate in the legislative process.

Abstract Review: Costs Orders

12. Sections 80(4) and 122(4) contravene Constitutional Principles IV, V, VIII and XIV. These sections discourage minority parties from seeking abstract review of legislation which they sincerely consider to be unconstitutional, while making no equivalent provision to ensure that majority parties do not unreasonably oppose applications for abstract review. In particular, the sections do not empower the Court to order the respondents to pay costs if their opposition did not have a reasonable prospect of success. This state of affairs is subversive of the supremacy of the Constitution, equality before the law, an equitable legal process, multi-party democracy and the capacity of minority parties to participate in the legislative process.

Presidential Pardons, Reprieves and Remissions

13. Section 84(2)(j) contravenes Constitutional Principles V, VI and VII. A Constitution which allows the President to pardon and reprieve offenders and to remit any fines, penalties or forfeitures could subvert the equality of all before the law, result in an inequitable legal process, undermine the separation of powers between the executive and the judiciary and attenuate the powers and jurisdiction of the judiciary.

The Appointment of the Public Protector, the Auditor-General and the Members of the Human Rights Commission, the Commission for Gender Equality and the Electoral Commission

14. Section 193(5) Contravenes Constitutional Principles VI, XIV and XXIX. The sections allow the majority party in the National Assembly to appoint the Public Protector, the Auditor-General, the members of Human Rights Commission, the Commission for Gender Equality and the Electoral Commission. In so doing, the section undermines the independence and impartiality of these institutions, alternatively the ostensible independence and impartiality of these institutions, in a manner which cannot be reconciled with, firstly, the need for appropriate checks and balances to ensure accountability, responsiveness and openness, secondly, with the participation of minority parties in the legislative process in a manner consistent with democracy and, thirdly, with the specific requirement that the independence and impartiality of the Public Protector and the AuditorGeneral 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.

The Financial and Fiscal Commission

15. Section 214(2) contravenes Constitutional Principle XXVII. The section allows the Financial and Fiscal Commission to choose whether or not it will make recommendations regarding the Act of Parliament described in section 214(1). By contrast, Constitutional Principle XXVII obliges the Commission to make those recommendations.

TAKE NOTICE FURTHER that the DEMOCRATIC PARTY has appointed the offices of WEBBER WENTZEL BOWENS, 60 Main Street, JOHANNESBURG, at which it will accept notice and service of all documents in these proceedings.

Peter Leon
WEBBER WENTZEL BOWENS
Attorneys for the Democratic Party

THE CONSTITUTIONAL COURT

Reference: CCT 23/9 5
22 May 1996

Messrs Webber Wentzel Bowens
P 0 Box 61771
MARSHALLTOWN
2107

Dear Mr Leon

I have been asked by the President of the Court to advise you as follows:

There appears to have been a misunderstanding about an extension of the period within which parties represented in Parliament could submit objections to the Constitutional text. No such extension was granted. It was indicated to Mr Gauntlet that a formal application should be made for a short extension, which would be treated with understanding, Your letter of today's date will, however, be treated as such an application, and on the understanding that the objections a lodged with us by 5 pm today, it will be granted.

Sincerely

M NIENABER

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21 May 1996

The Registrar
Constitutional Court
2nd Floor, Forum 2
Braampark
33 Hoofd Street
corner Loveday Street
Johannesburg

Attention: Mrs M Nienaber

Dear Madame

CERTIFICATION OF THE NEW CONSTITUTIONAL TEXT: OBJECTION BY THE DEMOCRATIC PARTY

I refer to my discussion with you earlier today.

As I have explained, I had, understood from the senior counsel briefed by the Democratic Party to represent it in this manner, Advocate Jeremy Gauntlett SC, that the Constitutional Court had extended the period by which political parties had to lodge objections to the certification of the Constitution ("The Submission Date") from 20 May 1996 to 22 May 1996.

As I previously advised the Registrar on 10 May 1996, the Democratic Party intends objecting to certain provisions of the Constitutional Text in terms of section 71 of the 1993 Constitution. The

Democratic Party's objections, which are currently being finalised, will not be ready until 22 May 1996.

In the circumstances, I would appreciate it if you would advise me, as soon as possible:

1 whether the Constitutional Court has extended the submission date to 22 May 1996;

2 if not, whether the Constitutional Court will accept the submission of the Democratic Party's objection on 22 May 1996.

Yours Faithfully

WEBBER WENTZEL BOWENS

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10 May 1996

The Registrar
Constitutional Court
2nd Floor, Forum 2
Braampark
33 Hoofd Street
Johannesburg

Attention Mrs M Nienaber

Dear Madam

CERTIFICATION OF THE NEW CONSTITUTIONAL TEXT

We act on behalf of the Democratic Party of South Africa.

Our client has instructed us to challenge certain provisions of the new constitutional text passed by the Constitution Assembly on 6 May 1996, on the basis that these provisions do not comply with schedule 4 of the Constitution of the Republic of South Africa, 1993.

We understand that the Constitutional Court intends scrutinising the constitutional text for the purpose of certification during June. If this is correct, you will appreciate that this will leave us very little time within which to prepare and file our papers in this matter. In the circumstances, we would appreciate it if you would advise us, as soon as possible:

1 When the Constitutional Court will in fact be reviewing the new Constitution;

2 Whether the political parties will be permitted to make submissions to the Constitutional Court and, if so, what form the submissions should take;

3 By what date the submissions should be received by the Constitutional Court;

4 Whether the Constitutional Court will permit political parties to present oral argument to it and, if so, what form such oral argument should take.

Yours faithfully

WEBBER WENTZEL BOWENS

THE APPLICATION TO CERTIFY A NEW CONSTITUTIONAL TEXT IN TERMS OF SECTION 71 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1993

WRITTEN ARGUMENT FOR THE DEMOCRATIC PARTY

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INTRODUCTION

1. The Democratic Party ("DP") wishes at the outset to make plain its general stance in relation to the certification of the text of the new Constitution ("the text"). It was a co-author of the text and voted in favour of the adoption of the text on 8 May 1996. It believes, in the words of DP leader Mr Leon, that:

   "This Constitution represents in a real way a triumph for the fundamental ideas of the Democratic Party."

   "We want all South Africans to walk the road ahead with a common purpose, a common road map, and under a common flag. Despite our misgivings on individual clauses, We support this Constitution and all that it represents."

2. The DP has stated repeatedly that it supports a new democratic constitution for our country and, believing profoundly in the rule of law, that it also supports a constitution that complies with the 34 Constitutional Principles in Schedule 4 to the Constitution of the Republic of South Africa, Act 200 of 1993 ("the interim Constitution").

3. The DP has studied the text adopted by the Constitutional Assembly and has a serious concern that certain provisions of that text do not comply with the Constitutional Principles. As Chaskalson P explained in the *Western Cape* case the 34 Constitutional Principles

contained in Schedule 4 of the interim Constitution were agreed upon and adopted by the Negotiating Council of the Multi-Party Negotiating Process to provide definitive guidelines for the drafting of the final Constitution.

Chapter 5 of the interim Constitution locates their role in the context of a new constitutional text. Section 71 provides that the new constitutional text "shall comply with the Constitutional Principles" and that text, even though it would have been passed by the Constitutional Assembly, "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". The Constitutional Principles, like the other provisions of chapter 5, are intended to be of substantive application in the drafting and adoption of the new Constitution. Moreover, section 74 provides that the Constitutional Principles cannot be repealed or amended. Neither can section 74 itself, or any other provision in chapter 5 insofar as it relates to them, or to "the requirement that the new constitutional text shall comply with the Constitutional Principles, or that such text shall be certified by the Constitutional Court as being in compliance therewith". As a result, the Constitutional Principles have a higher status than the rest of the interim Constitution. They cannot be amended at all. This particular status stems from their special function in the matrix of the two-stage constitution-making process agreed to during the Multi-Party Negotiation Process and reflected in the text of the interim Constitution.

***Executive Council, Western Cape Legislature v President of the Republic of South Africa 1995* (4) SA 877 (CC) at paras 29, 31, 32, 35 and 41**

4. In the Preamble to the interim Constitution the Constitutional Principles are described as a "solemn pact" in accordance with which the elected representatives of all the people of South Africa, the Constitutional Assembly, should be mandated to adopt a new Constitution. The DP approaches the certification process in the spirit of the Preamble. Its main concern in these proceedings is to ensure and protect the integrity of the new Constitution.

5. The sequence of these submissions is set out in the contents page. Most of the lengthier aspects are dealt with first. The first of these substantially entail a grouping together of various provisions in the text which. it is submitted, are hit by one or more of a number of elements in the Constitutional Principles applicable to provincial powers. We deal with each of these elements in turn.

PROVINCIAL POWERS

No Exclusive Powers

6. Constitutional Principle XIX provides that the powers at the provincial level of government must include exclusive powers. It is submitted that exclusive "powers" means (or at least includes - see the qualification relating to judicial powers in paragraph 10 below) exclusive legislative and executive powers. It is submitted further that the omission of exclusive

provincial legislative powers from the text, alternatively the nullification of the provinces' ostensibly "exclusive" legislative powers by *inter alia* sections 44(2), 76(4)(a) and 147, contravenes constitutional Principle XIX. It is submitted finally that the omission of exclusive provincial executive powers from the text, alternatively the nullification of the provinces' ostensibly "exclusive" executive powers *by inter alia* sections 100, 125 and 127(2)(f), contravenes Constitutional Principle XIX. In saying. so, we accept that the Constitutional Principles constitute a standard against which the Constitutional Text as a whole must be measured. Nevertheless, as indicated above, the Constitutional Principles represent a "solemn pact" in accordance with which the elected representatives of all the people of South Africa, the Constitutional Assembly, should be mandated to adopt a new Constitution. Consequently, it would be wholly inappropriate not to give effect to words in the Constitutional Principles the meaning of which is clear. It is submitted that "exclusive" is just such a word. In its ordinary sense "exclusive" means "sole; shutting out; debarring from interference or participation; vested in one person alone" *(Black's Law Dictionary* 6 ed. (1990)).

***Black's Law Dictionary* 6 ed. (1 990) s.v. "exclusive"**

7. It is submitted that the word "powers" in Constitutional Principle XIX encompasses legislative powers. Not only is it difficult to construe the Principle as referring to any other species of "powers", but the adjective "concurrent" recalls the wording of section 126(1) of the interim Constitution prior to its amendment by section 2 of Act 2 of 1994 - the wording of Constitutional Principle XIX was not amended at the same time. It also recalls the Constitutional Court's characterisation of the powers conferred upon the provincial legislatures by section 126 of the interim Constitution as "concurrent".

Cf.:
Executive Council, *Western Cape Legislature' v President of the Republic of South Africa,* supra, at para 74
***In re: The National Education Policy Bill No 83 of 1995* 1996 (4) BCLR 518 (CC) at para 13**

8. The expression "national and provincial levels of government" in Constitutional Principle XIX cannot fairly be construed as referring only to the executive branch, even though the second part of the Principle seems to envisage the executive when it refers to the "power to perform functions": the expression "perform functions" is one that seems more appropriate for the executive than the legislature. That notwithstanding, the term "government" is often used in a broader sense to refer to both the legislative and executive branches of the state - especially where (as the text allows) the majority party in the legislature will effectively control the legislature. (Indeed Montesquieu *in L'Esprit de Lois (1* 748), following Aristotle XXX vol IV (tr. Jowett) and Locke *Second Treatise of Civil Government* (1690) chapter 12 uses "government" as encompassing the legislative, executive and judicial functions. See further Hood Phillips *Constitutional and Administrative Law* 7 ed (1987) ll.) Moreover, there are many indications that the term "government" is used in this broader sense in the Constitutional Principles. For instance, Constitutional Principle X states that "formal

legislative procedures shall be adhered to by legislative organs at all levels of government"; Constitutional Principle XVII states that "at each level of government there shall be democratic representation"; Constitutional Principle XX states that "each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively"; Constitutional Principle XXI specifies the criteria which are to apply to the "allocation of powers to the national government and the provincial government", and it is explicit in Constitutional Principle XXI.2 that in the circumstances described there the national government may intervene through legislation; Constitutional Principle XXIII refers to "legislative powers" which have been allocated "concurrently to the national government and the provincial government". None of these Constitutional Principles would make any sense if the term "government" were to be read as referring specifically and exclusively to the executive.

Cf.:
Baxter *Administrative Law* (1 984) 97
***Fourie v Minister van Lande* 1970 (4) SA 165 (0) at 173E**
Hood Phillips *Constitutional and Administrative Law* 7 ed (1987) 11
Locke *Second Treatise of Civil Government* (1 690) Chapter 12
Montesquieu *L'Esprit des Lois* (1748)

9. For the reasons given above, there can be no doubt that the word "powers" in Constitutional Principle XIX encompasses executive powers. It is to be noted also that a province is given executive powers by section 144(2) of the interim Constitution over *inter alia* "all matters in respect of which such province has exercised its executive competence".

10. It is possible - but it is submitted improbable - that Constitutional Principle XIX also encompasses judicial powers. It is to be noted in this regard that the interim Constitution equips the provinces with legislative and executive powers only. And the wording of many of the Constitutional Principles governing provincial issues is consistent with legislative and executive powers and functions, not judicial powers.

11. It is therefore submitted that Constitutional Principle XIX, in stipulating that national and provincial levels of government shall include "exclusive and concurrent powers", uses the word "government" in a broad sense so as to require that such powers must be allocated to the legislative and executive branches of the state at both national and provincial levels. It is submitted that this is the most natural reading of Constitutional Principle XIX and that this reading is supported by the use of the term "government" in the surrounding Constitutional Principles.

12. There are no exclusive provincial legislative powers in the text, alternatively the ostensibly "exclusive" legislative powers conferred on the provinces are rendered concurrent or subordinate powers by *inter* alia sections 44(2), 76(4)(a) and 147 of the text. Section 104(1) provides that a provincial legislature may *inter alia* pass a constitution for its province and pass legislation in and for its province with regard to any matter within a

functional area listed in Schedule 4 ("Functional Areas of Concurrent National and Provincial Legislative Competence") and Schedule 5 ("Functional Areas of Exclusive Provincial Legislative Competence"). Neither section 228 nor any other provision of the text confers exclusive financial and fiscal powers on the provincial legislatures (compare section 157(1B) of the interim Constitution).

13. Section 44(2) provides that Parliament may intervene by passing legislation, in accordance with section 76(1) (which allows two thirds or more of the members of the National Assembly to override the National Council of Provinces), with regard to a matter failing within a functional area listed in Schedule 5, when that intervention is necessary for one or more of the purposes listed in section 42(2)(a) to (e). And section 147(2) provides that national legislation referred to in section 44(2) prevails over provincial legislation (section 147(2)).

14. If there is a conflict between national legislation of the sort described in section 44(2) and a provision of a provincial constitution, the former prevails over the latter (section 147(1)(b)). And if there is a conflict between national legislation and a provision of a provincial constitution with regard to a matter within the functional areas listed in Schedule 4, the former prevails over the latter in the circumstance described in section 146(2) to (4) (section 147(1)(c)). In the light of these provisions, it is submitted that a provincial legislature's power to pass a constitution for its province cannot fairly be described as "exclusive"
(see further the discussion below of the term "exclusive").

15. As to executive power, it is submitted that there are no exclusive provincial executive powers in the text, alternatively that the ostensibly "exclusive" executive powers conferred on the. provinces are rendered concurrent or subordinate powers by *inter alia* sections 100, 125 and 127(2)(f) of the text.

16. Section 125 does not define the executive authority of a province, but lists and regulates the exercise of several incidents of that authority. These include "implementing provincial legislation in the province" (section 125(2)(a)), "developing and implementing provincial policy" (section 125 (2)(d)), "co-ordinating the functions of provincial departments and administration" (section 125(2)(e)) and "preparing and initiating provincial legislation" (section 125(2)(f).

17. Section 125(5) explicitly renders the provincial executive's power to implement provincial legislation "subject to section 100" (it is now settled that the purpose of the phrase "subject to" in such a context is to establish what is dominant and what is subordinate or subservient see the authorities cited below). Section 100(1), in particular, is a wide-ranging "override" provision. The section permits the national executive to "intervene by taking any appropriate steps to ensure fulfilment" of an executive obligation imposed on a province in terms of the Constitution or legislation (encompassing, presumably, legislation of the sort in section 44(1)(a)(ii) and (2)). This power of intervention includes, but is not limited to, issuing directions of the kind described in section 100(1)(a) and assuming responsibility for

the relevant obligation in that province to the extent that is necessary for one or more of the purposes listed in section 100(1)(b)(i) to (iv). I

Cf.:
***C and J Clark Ltd v Inland Revenue Commissioners* [1973] 2 All ER 513 (ChD) at 52Oe-f**
***S v Marwane* 1982 (3) SA 717 (A) at 747H-748A**
***Zantsi v Council of State, Ciskei* 1995 (4) SA 616 (CC) at para 27**
***Ynuico Ltd v Minister of Trade and Industry,* unreported, Constitutional Court, 21 May 1996, Case No. CCT 47195, at para 8**

(it is submitted in passing that, quite apart from its implications for Constitutional Principle XIX, section 100 (1 *) (b)* (i) of the text impermissibly extends the national government's "override" in relation to established standards for the rendering of a service to standards which are merely "established", rather than "established" and "required" for the rendering of a service.)

18. Clearly, section 100(1)(a) permits the national executive to issue directives constraining or suspending a provincial executive's exercise of its powers to develop and implement provincial policy (section 125(2)(d)), co-ordinate the functions of provincial departments and administration (section 125(2)(e)) and prepare and initiate provincial legislation (section 125(2)(f)). In this way, these ostensibly "exclusive" powers, too, are rendered subordinate to the executive authority of the national authority.

19. It is to be noted, however, that Constitutional Principle XXI.2 states that the new Constitution shall empower "the national government to intervene through legislation or ... other steps" in the circumstances listed there, Those circumstances are, in all material respects, identical to those listed in section 44(2)(a) to (e) of the text (but see the difficulty described above in relation to section 100(1)(b)(i) of the text). In view of our alternative submissions that the ostensibly "exclusive" legislative powers conferred on the provinces are rendered concurrent or subordinate powers by *inter alia* sections 44(2), 76(4)(a) and 147 of the text and that the ostensibly "exclusive" executive powers conferred on the provinces are rendered concurrent or subordinate powers by *inter* alia sections 100, 125 and 127(2)(f) of the text, the question which now arises is whether this Constitutional Principle "trumps" the requirement in Constitutional Principle XIX that the provinces be afforded exclusive legislative and executive powers. It is submitted that the answer to this question is in the negative.

20. Any "intervention" in the areas of provincial exclusive legislative and executive competence which Constitutional Principle XIX postulates will destroy the integrity of that Constitutional Principle. The requirement that exclusive legislative and executive competence be conferred on the provincial levels of government has the inevitable corollary that the national level of government has no power to legislate on matters falling within that

competence - in other words, that the national level of government is disempowered with regard to those matters.

21. The submission in the preceding paragraph depends for its correctness on reading the term "exclusive" in its ordinary sense (as to which see paragraph 6 above). A possible counter-argument might be that the term "exclusive" should be construed in a looser sense, corresponding (roughly) with the term "primary". It is submitted, however, that there is nothing to recommend this looser interpretation, and that there are no indications in the text that the term "exclusive" bears any sense other than its ordinary meaning. True, some oblique support for this submission may be derived from Constitutional Principle XXII, which stipulates that "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". Clearly, the underlined phrase presumes that there are only two situations in which the national government might potentially infringe provincial integrity: (a) when the national government exercises powers which are exclusive to it (i.e. powers falling outside the functional areas listed in Schedules 4 and 5 of the text); and (b) when the national government exercises a power which it "possesses" concurrently with the provincial governments. Equally clearly, Constitutional Principle XXII does not state that the national government shall not encroach upon the integrity of the provinces by trenching upon the provinces' exclusive legislative and executive powers. It is submitted, however, that this "omission" is attributable to the fact that the framers of Constitutional Principle XXII presumed (correctly) that any such encroachment is impossible in circumstances where the national government has *(ex hypothesi)* no powers at all. In the result, it is submitted that, properly construed, Constitutional Principle XXI.2 is confined to powers which are shared concurrently by the national and provincial levels of government. This interpretation not only preserves the integrity of Constitutional Principle XIX, but accords with the meaning which the term "concurrent competence" has acquired in South African constitutional jurisprudence (as to which see paragraph 8 above; see further Leonardy "South Africa's Constitutional Provisions on Devolution and Federalism" in De Villiers (ed) *Birth of a Constitution* (1994) 156-7), namely the powers which the national level of government shares with the provincial level of government and where, in cases where one or more specified criteria are met, action (including legislation) by the former will prevail over action by the latter.

See:
Leonardy "South Africa's Constitutional Provisions on Devolution and Federalism" in De Villiers (ed) *Birth of a Constitution (1994)* 156-7

Substantial Diminution

22. The powers and functions of the provinces defined in the text are substantially less than or substantially inferior to those provided for in the interim Constitution. This violates the injunction in Constitutional Principle XVIII.2 that the "powers and functions of the provinces defined in the [new] 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 provide for in" the interim Constitution. There are at least eight reasons why this is so.

Constitutional Principle XVIII.2

23. Constitutional Principle XVIII.2 invites a comparison between the powers and functions of the provinces, as they are defined in the interim Constitution, and the powers and functions of the provinces, as they are defined in the text. The latter must not be "substantially less than or substantially inferior to" the former (of course, the latter may be "substantially superior" to the former).

Cf.:
G Erasmus "Provincial Government under the 1993 Constitution. What Direction will it Take?" (1994) 9 *SAPL* 407 at 418

24. "Substantially" has been defined to mean *inter alia* "in all essential characters or features; in regard to everything material; in essentials: to all intents and purposes; in the main" *(Oxford English Dictionary* 2 ed s.v. "substantially"). It is submitted that given the context in which it is used in Constitutional Principle XVIII.2, the word "substantially" bears this qualitative meaning. There is some judicial support for reading "substantially" in this way (albeit in an entirely different context). In *Lawson & Kirk v South African Discount & Acceptance Corporation (Pty) Ltd* the court was concerned with the interpretation of section 14(1) of the Usury Act, 37 of 1926, which provided that "the provisions of this Act shall apply to every transaction which, whatever its form may be, is substantially one of money lending". The court stated that, in that context, "the word 'substantially' means 'in the main', 'in its principal essentials'." A similar approach was adopted in *Western Bank Ltd v Registrar of Financial Institutions* where the court observed:

"The word 'substantially' in the definition means 'in substance', 'in all essential characteristics or features'. According to the Larger Oxford English Dictionary 'substantially' means (1) essentially, intrinsically, (2) actually, really, and (3) in all essential characteristics or features; in regard to everything material in essentials; to all intents; in the main."

***Lawson & Kirk v South African Discount & Acceptance Corporation (Pty) Ltd* 1938 CPD 273 at 279**
***Western Bank Ltd v Registrar of Financial Institutions* 1975 (4) SA 37 (T) at 44C-D**

Cf.:
***Dreyer v Tuckers Land and Development Corporation 1981* (1) SA 1219 (T) at 1224F-1225B**

25. According to the *Shorter Oxford English Dictionary* the word "less" means "of not so great size, extent or degree", "of lower station, condition, or rank", "inferior" and is used particularly "to characterise the smaller, inferior ... of two person or things of the same

name". And as the definitions of the word "inferior" in dictionaries such as the *Shorter Oxford English Dictionary* show, the word can bear one or both of two different meanings, namely (a) to denote that something is subordinate to or lower than something else with which it is being compared (i.e. in a "comparative sense") or (b) to denote that something is "substandard" or "second rate" (i.e. in an "absolute sense"). As was explained by both counsel and the Court in *Stellenbosch Wine Trust Ltd v Oude Meester Group Ltd*, the first meaning contains no element of disparagement - it merely means that one of the two subjects being compared is subordinate to or of lesser quality than the other. The second meaning does contain an element of disparagement in that it conveys that the subject in question fails short of a general norm or standard and is thus "sub-standard", "second rate" or of "poor quality". It is submitted that when the word "inferior" is viewed in its linguistic and contextual setting and in the light of the surrounding circumstances - the prohibition of "substantial inferiority" was introduced as part of the first of two important pre-election amendments (section 13(a) of Act 2 of 1994) - it is clear that the word "inferior" in Constitutional Principle XVIII.2 bears the first meaning described above.

Cf.:
***Stellenbosch Wine Trust Ltd v Oude Meester Group Ltd* 1974 (1) SA 729 (A) at 73OA-E and 735B-E.**

26. It is submitted, therefore, that the use, of the expression "substantially less than or substantially inferior to" in Constitutional Principle XVIII.2 means that in all essential or material characters or features the powers and functions of the provinces defined in the text may not be subordinate to or of lesser <u>quality</u> than the powers and functions of the provinces defined in the interim Constitution. The question, therefore, is whether, from a qualitative perspective, the text has "taken away" any of the powers conferred upon provinces by the interim Constitution.

Legislative Powers and Functions

27. The first reason why the powers and functions of the provinces defined in the text do not meet the requirements imposed by Constitutional Principle XVIII.2 is because the "exclusive" and "concurrent" legislative powers and functions conferred upon the provinces by, or contemplated in, or regulated by the text, are substantially less than or substantially inferior to those provided for in the interim Constitution.

28. The interim Constitution allocates legislative power to Parliament and to the provincial legislatures. In terms of section 37 Parliament is given legislative competence over the whole of the national territory and in respect of all matters save those expressly reserved to the provincial legislatures by sections 156(1B) and 160. The legislative competence of the provincial legislatures, dealt with in sections 126, 156 and 160 of the Constitution, is restricted. They have concurrent legislative competence with Parliament in respect of the matters referred to in Schedule 6 to the interim Constitution or reasonably necessary for or incidental to the effective exercise of that competence and their territorial competence is limited to the provincial territory. Section 126(3) makes provision for the way in which any

conflict that might arise between Acts of Parliament and provincial laws in this field of concurrent powers is to be resolved. If there should be such conflict, the Acts of Parliament shall prevail only if they apply uniformly in all parts of the country and then only insofar as they meet the criteria specified in section 126(3)(a) to (e). The provincial laws are given precedence in all other cases. If a conflict is resolved in favour of either a provision in an Act of Parliament or a provision in a provincial law the other is not invalidated; it is subordinated and to the extent of the conflict rendered inoperative. The subordinated provision remains in force and, if the inconsistency fails away (because of the amendment or repeal of the predominant provision) it will then have to be implemented in all respects. At present, the provincial legislatures have two exclusive legislative competencies within their respective provincial territories, viz. to impose taxes, levies and duties (excluding income tax or value-added or other sales tax) on casinos, gambling, wagering, lotteries and betting (section 156(1B)) and to pass provincial constitutions (section 160).

Cf.:
***Executive Council, Western Cape Legislature v President of the Republic of South Africa, supra,* at para 74**
***Premier, KwaZulu-Natal v President of the Republic of South Africa 1996* (1) SA 769 (CC) at para 25**
***In re: The National Education Policy Bill No 83 of 1995* 1996, *supra,* at paras 13-20**

29. The "exclusive" legislative powers conferred on the provincial legislatures by the text, and the powers of the national Parliament to override provincial legislation resulting from the exercise of those powers, are discussed in paragraphs 12 to 14 above. As pointed out in paragraph 12, section 104(1) of the text also provides that a provincial legislature may pass legislation in and for its province with regard to any matter within a functional area listed in Schedule 4 ("Functional Areas of Concurrent National and Provincial Legislative Competence") or with regard to any matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning a Schedule 4 matter. In keeping with the concurrent status of the matters listed in Schedule 4, section 44(1)(a)(ii), (b)(ii) and (3) confers on the National Assembly and the National Council of Provinces the power to pass legislation (in accordance with section 76) with regard to any matter listed in Schedule 4 or with regard to any matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any Schedule 4 matter.

30. Conflicts between national and provincial legislation failing within a functional area listed in Schedule . 4 are regulated by section 146 of the text. Aside from the fact that in addition to conflicts between Acts of Parliament and laws passed by provincial legislatures, section 146 also governs conflicts between national and provincial delegated legislation approved or deemed to have been approved by the National Council of Provinces (section 146(6) and (7)), when measured against section 126(3) and (4) of the interim Constitution section 146 of the text imposes three important additional limitations on the provinces' legislative powers.

31. First, unlike section 126(3) of the interim Constitution - after its amendment by section 2 of Act 2 of 1994 - a provincial government (or someone seeking to rely on the provincial legislation) bears the *onus* of proving that the matters do not fall within the terms of the overrides in section 146(2) and (3) (read with section 146(5)), alternatively the override in section 146(3). Moreover, in the ordinary course of events a provincial government (or someone seeking to rely on the provincial legislation) will bear the duty to begin. That is because section 126(3) of the interim Constitution and section 146(2) and (3) of the text, alternatively section 146(3) of the text, proclaim different points of departure: while section 126(3) presumes that a provincial law will prevail over a generally applicable Act of Parliament (unless one of the conditions posited in section 126(3)(a) to (e) is met), section 146(2) and (3) presumes that the national legislation will prevail (as long as one of the conditions posited in section 146(2)(a) to (c) or 146(3)(i) or (ii) is met).

Cf.:
G Erasmus "Provincial Government under the 193 Constitution.
What Direction will it Take?" (1 994) 9 *SAPL* 407 at 417

33. Secondly, the "overrides" in sections 146(2) and (3) are weighted further in favour of national legislation. Section 146(1)(b) of the text has "replaced" the objective "effective performance" criterion in section 126(3)(b) of the interim Constitution with the more nebulous (and, hence, more easily met) "the interests of the country as a whole". Section 146(1)(b) of the text also introduces as a possible override legislation establishing "frameworks" and "national policies", while section 146(2)(c)(v) extends the override to legislation necessary for "the promotion of equal opportunity".

34. Thirdly, section 146(4) introduces an irrebuttable presumption, the effect of which is to render non-justiciable the requirement of necessity in section 146(2)(c) whenever national legislation dealing with one of the matters referred to there has been passed by the National Council of Provinces. The words "must be presumed" leave no room for rebuttal. Once it has been established that legislation has been passed by the National Council of Provinces and that it deals with one of the matters referred to in section 146(2)(c), the presumption that the legislation is "necessary" cannot be rebutted by evidence to the contrary even if it is patently clear that the legislation is wholly unnecessary. Yet that would be reminiscent of *S v A* - a case dealing with Justinian's irrebuttable presumption that a boy under 14 years of age is incapable of sexual intercourse - in which a mother who admitted committing incest with her 9 year old son was acquitted because, by reason of Justinian's irrebuttable presumption, such intercourse could not in law have taken place.

See:
***S v A* 1962 (4) SA 679 (E) at 681A-B**

(it is to be noted, however, that the scope of the irrebuttable presumption in section 146(4) is limited by the fact that section 76 does not invariably require the assent of the National Council of Provinces as a prerequisite for the passage of Acts of Parliament dealing with

matters listed in Schedule 4. Moreover, the presumption does not apply to the laws described in section 146(6), i.e. laws made in terms of an Act of Parliament and "approved", not "passed", by the National Council of Provinces. On the other hand, as explained in paragraph 89 below, quite apart from the implications of the irrebuttable presumption in section 146(4) for Constitutional Principle XVIII.2, the section violates Constitutional Principles VI and VII.)

35. Moreover, in spite of the fact that the provincial legislatures have "gained" as functional areas in Schedules 4 and 5 of the text the "administration of indigenous forests", "pollution control", "liquor licences" and "archives and museums", they have "lost" the competence to legislate on "lotteries and sports pools" and "teacher training colleges" currently in Schedule 6 of the interim Constitution.

36. It is submitted that the (potential) reductions in provincial legislative powers described in paragraphs 32 to 35 above are not offset by section 104(5) of the text, which provides that "a provincial legislature may recommend to the National Assembly legislation concerning any matter outside the authority of that legislature, or in respect of which an Act of Parliament prevails over a provincial law.." In short, it is clear that the "exclusive" and "concurrent" legislative powers and functions conferred upon the provinces by the text are substantially less than or substantially inferior to those provided for in the interim Constitution.

Executive Powers and Functions

37. It is submitted further that the executive powers and functions conferred upon the provinces by, or contemplated in, or regulated by the text, are substantially less than or substantially inferior to those provided for in the interim Constitution. There are at least four reasons why this is so.

38. First, as explained in paragraphs 16 to 18 above, section 125 does not define the executive authority of a province, but lists and regulates the exercise of several incidents of that authority. As explained there, however, a province's exercise of its executive authority is subject to the wide-ranging "override" in section 100(1). There is no equivalent override in the interim Constitution. Consequently, there can be no doubt that upon the commencement of the new Constitution the province's executive powers and functions will be (potentially) substantially less than or substantially inferior to those provided for in the interim Constitution. The requirements in section 100(2) of the text that notice of an intervention in terms of section 100(1)(b) be tabled in the National Council of Provinces within 14 days of its first sitting after the intervention began, that the intervention. must end unless it is approved by the Council within 30 days, of that sitting and that the Council must review the intervention regularly and make recommendations to the national executive, provide cold comfort for provinces governed by minority parties in the Council. What is more, the power of "reservation and disallowance" conferred upon the National Council of Provinces by section 100(2) does not apply to directives issued in terms of section 100(1)(a).

39. Secondly, section 125(3) and (4) of the text, read with section 125(2)(d), introduces another important restriction on the provinces' executive power. In future, provinces will be allowed to develop and implement provincial policy only to the extent that they have the administrative capacity to assume effective responsibility. The National Council of Provinces is designated as the arbiter. Section 125(4) provides that it must resolve disputes concerning the administrative capacity of a province. (For reasons similar to those given in paragraph 89 below, this section may also violate Constitutional Principles VI and VII.)

40. Thirdly, whereas section 147(1)(f) of the interim Constitution empowers the provincial Premiers to proclaim provincial referenda and plebiscites in terms of a provincial law, section 127(2)(f) of the text renders that power subject to national legislation.

41. Fourthly, section 136(1) of the text provides that members of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation. There is no equivalent section in the interim Constitution. (Of course, this provision may also be viewed as a limitation on the provinces' legislative competence.)

Financial and Fiscal Powers, Functions and Competencies

42. It is submitted that the financial and fiscal powers, functions and competencies conferred upon the provinces by, or contemplated in, or regulated by the text, are substantially less than or substantially inferior to those provided for in the interim Constitution. There are at least eight reasons why this is so.

43. First, section 76(1) of the text, read with section 76(4), which governs Bills and resolutions dealing with provincial financial affairs - i.e. the Bills and resolutions which are contemplated by, or which would be sanctioned by, sections 214, 215(2), 216(1), (3) and (4), 217(3), 218(1), 219(1)(b), 228(2)(b) and 230(1) - allows two-thirds or more of the members of the National Assembly to override the National Council of Provinces. By contrast, the Bills contemplated by sections 155(2A), 156(1A) and 157(1A) of the interim Constitution (after their amendment by sections 3 to 5 of Act 2 of 1994) cannot be passed without the consent of the Senate. There is no equivalent override or dead-lockbreaking mechanism in the interim Constitution, because these sections require such Bills to be passed by the National Assembly and the Senate sitting separately, without more. In short, the text eliminates the veto presently "possessed" by the Senators - the provinces' nominees in Parliament.

44. Secondly, section 214 of the text drops a province's unconditional entitlement to any transfer duty, collected nationally, on the acquisition, sale or transfer of any property situated within the province (cf. section 155(2)(d) of the interim Constitution). Moreover, section 214(2) does not require the "equitable division" of revenue raised nationally among the national, provincial and local spheres of government and the determination of each province's "equitable share" of the provincial share of that revenue to be "reasonable" (cf. section 155(3) of the interim Constitution). Section 214(2) also introduces as factors

relevant to that "equitable division" and that "equitable share" (and not just to the conditional or unconditional "allocations" of revenue to the provinces (cf. section 155(4) of the interim Constitution)), in addition to "the national interest" (cf. section 155(3) of the interim Constitution), *inter alia* "any provision that must be made in respect of the national debt" and "the needs and interests of the national government, determined by objective criteria". Finally, presumably on account of the wording of Constitutional Principle XXVI of the interim Constitution, section 214(2) of the text limits the provinces' "equitable share" to the percentage or amount required for the provision of "basic" services (cf. section 155(1) of the interim Constitution). Viewed as a whole, therefore, these provisions give the provinces' far fewer objective financial guarantees (particularly in relation to the "equitable division" and the "equitable share") and, consequently, expose them to manipulation by the national sphere of government to a far greater degree than is the case at present.

45. Thirdly, sections 215(2) and 216(1) of the text provide that national legislation must prescribe the form, contents and time of tabling of provincial budgets and must prescribe measures to ensure transparency and expenditure control in the provincial level of government. There are no such provisions in the interim Constitution. (Cf. section 186 of the interim Constitution.)

46. Fourthly, section 216(2) to (5) allows the national treasury to stop the transfer of funds to a province e.g. because of that province's "persistent material breach" of the "uniform expenditure classifications" prescribed by national legislation. A decision to stop the transfer of funds may be enforced immediately. The decision must be confirmed by Parliament following a process substantially the same as that established by section 76(1) of the text - i.e. a process that allows the two-thirds or more of the members of the National Assembly to override the National Council of Provinces - and may be reconfirmed in the same way at intervals of up to 120 days at a time, provided that before Parliament does so the province must be given an opportunity to answer the allegations against it and to state its case before a committee (not Parliament). Again, there are no such provisions in the interim Constitution.

47. Fifthly, section 217(3) of the text provides that national legislation must prescribe the framework within which a procurement policy providing for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination, may be implemented by organs of state in the provincial sphere of government. By contrast, all that section 187(1) of the interim Constitution provides in this regard is that the procurement of goods and services for the provincial (and local) level of government must be regulated by an Act of Parliament and provincial laws which must make provision for the appointment of independent and impartial tender boards. As a result, the text introduces a potentially far-reaching new constraint on the provinces' procurement powers (and their power to pass legislation governing procurements).

48. Sixthly, section 219(1)(b) of the text provides that an Act of Parliament must establish a framework for determining the upper limit of salaries, allowances or benefits of *inter alia*

members of provincial legislatures. By contrast, section 135(4) of the interim Constitution (as amended by section 10 of Act 13 of 1994) provides that the remuneration and allowances of the members of the provincial legislatures must be prescribed by or determined under laws of "their" provincial legislatures.

49. Seventhly, whereas section 200(1) of the interim Constitution ensured that half of the members of the Financial and Fiscal Commission would be provincial nominees, only nine of the twenty two members of the Commission described in section 221(1) of the text will be provincial nominees. As a result, the text diminishes the influence of the provincial sphere of government in this important body.

50. Eighthly, section 228(1) of the text bars provincial legislatures from imposing rates on property or customs duties or from imposing surcharges on rates or customs duties (something which they are entitled to do in terms of section 156(1) of the interim Constitution, as amended by section 4(1) of Act 2 of 1994). Moreover, the text fails to confer on the provinces the exclusive legislative competence within their respective provincial territories to impose taxes, levies and duties (excluding income tax or value-added or other sales tax) on casinos, gambling, wagering, lotteries and betting (cf. section 156(1B) of the interim Constitution).

Provincial Constitutions

51. It is submitted that the competence to adopt a constitution and to give effect to its provisions conferred upon the provincial legislatures by, or contemplated in, or regulated by the text, is substantially less than or substantially inferior to that provided for in the interim Constitution.

52. Sections 104(1)(a) and 142 of the text provide that a provincial legislature may pass a constitution for its province or, where applicable, amend its constitution, if at least two thirds of its members vote in favour of the Bill. Section 143, read with Schedule 6 item 13, states that a provincial constitution (including a provincial constitution passed before the new Constitution took effect) or an amendment to a provincial constitution must not be inconsistent with the new Constitution, but may provide for provincial legislative and executive structures and procedures that differ from those provided for in Chapter 6 of the text, or for the institution, role, authority and status of a traditional monarch, where applicable. Section 143(2) of the text states, however, that those inconsistent provisions may not confer on a province any power or function that fails outside the concurrent and "exclusive" areas of competence in Schedules 4 and 5 or outside the powers and functions conferred on the province by any other sections of the text. Moreover, as explained in paragraph 14 above, section 147(1)(b) of the text provides that if there is a conflict between national legislation of the sort described in section 44(2) and a provision of a provincial constitution, the former prevails over the latter. And section 147(1)(c) provides that if there is a conflict between national legislation and a provision of a provincial constitution with regard to a matter within the functional areas listed in Schedule 4, the former prevails over the latter in the circumstance described in section 146(2) to (4). Finally, section 148

provides that if a dispute Concerning a conflict cannot be resolved by a court, the national legislation prevails over the provincial constitution.

53. Section 160(1) of the interim Constitution also provides that a provincial legislature shall be entitled to pass a provincial constitution for its provision by a resolution of at least two-thirds of all its members. Section 160(3) and (4), as amended by section 8 of Act 2 of 1994 and section 1 of Act 3 of 1994, stipulate that, except to the extent stated in the provisos to section 160(3), a provincial constitution may not be inconsistent with a provision of the interim Constitution, and shall be of no force and effect unless the Constitutional Court has certified that none of its provisions is so inconsistent. According to the provisos to section 160(3), only a province's legislative and executive structures and procedures, or those of its elements providing for the institution, role, authority and status of a traditional monarch, may differ from the interim Constitution.

54. We accept that, at present, a provincial legislature may not use a provincial constitution to extend the scope of its powers beyond the limits imposed by the interim Constitution, whether directly (by e.g. conferring upon itself exclusive legislative powers in respect of matters other than those listed in section 156(1B) or concurrent legislative powers in respect of functional areas not listed in Schedule 6) or indirectly (by e.g. including in a provincial constitution provisions which, if embodied in ordinary legislation, would amount to an excess of the power conferred upon provincial legislatures by the interim Constitution). For that reason, we accept that the conditions imposed by section 143(2) of the text do not render the competence of a provincial legislature to adopt a constitution for its province substantially less than or substantially inferior to that provided for in the interim Constitution.

55. The same cannot be said of section 143(1) and Schedule 6 item 13 of the text. It is to be noted that section 160(3) of the interim Constitution provides that provincial constitutions which are passed during the currency of the interim Constitution need comply only with the provisions of the interim Constitution (including the Constitutional Principles in Schedule 4). They need not comply with the text of the new Constitution passed by the Constitutional Assembly prior to its coming into force as the Constitution of the Republic. In this regard it is significant that section 160(4) was amended by section 8(b) of Act 2 of 1994 to omit as a requirement for the certification of a provincial constitution, if at the stage of certification the new constitutional text is then already passed, that none of the provisions of that provincial constitution is inconsistent with a provision of the new constitutional text. For that reason, it is submitted, the text cannot now stipulate that a provincial constitution must not be inconsistent with the new Constitution (as section 143(1) does) without rendering the competence of a provincial legislature to adopt a constitution for its province substantially less than or substantially inferior to that provided for in the interim Constitution. In effect, in circumstances where provisions of the new Constitution pertaining to elements of a provincial constitution differ from the corresponding provisions in the interim Constitution (if any), section 143(1) will result in the *ex post* facto invalidation of those elements even though they were not only valid when passed but were certified by the Constitutional Court.

56. There is no equivalent in the interim Constitution of sections 147(1)(b) and (c) and 148 of the text. Clearly, these provisions, too, render the competence of a provincial legislature to adopt a constitution for its province substantially less than or substantially inferior to that provided for in the interim Constitution.

South African Police Service

57. It is submitted that the powers and functions in relation to the South African Police Service conferred upon the provinces by, or contemplated in, or regulated by *inter alia* sections 199(1), 199(3), 205(1), 206(2), 207(3) and 207(4) of the text and Schedule 6 item 24(1) read with Schedule 6 Annexure D item l(b) and sections 217(2)(a) and 218(1)(b) of the interim Constitution, are substantially less than or substantially inferior to those provided for in *inter alia* sections 214, 217, 218(1)(b), 218(1)(k), 219, 220 and 221 of the interim Constitution.

58. The reductions in the provinces' powers and functions in this area include the following. First, whereas at present the member of a province's Executive Council responsible for the South African Police Service in that province ("the MEC for Safety and Security") must approve or veto the appointment by the National Commissioner of the province's Provincial Commissioner (section 217(2)(a) of the interim Constitution), section 207(1) of the text and Schedule 6 item 24(1) of the text, read with Schedule 6 Annexure D item l(b), provide that, henceforth, such appointments shall be made by the National Commissioner "after consulting the provincial executive". Secondly, whereas at present the MEC for Safety and Security may issue directions to a Provincial Commission regarding the matters listed in section 21 9(1) of the interim Constitution, no such power is conferred upon that MEC by section 207(2) and (4) of the text. Thirdly, the provincial legislatures' competence in relation to policing has been substantially reduced. For instance, Part A of Schedule 4, read with sections 199(3)(b), disables provincial legislatures from passing laws regulating the establishment and powers of municipal law enforcement agencies (cf. section 217(3) of the interim Constitution).

Provincial Public Protectors; Provincial Service Commissions

59. It is submitted that the powers and functions in relation to the public protectors and the public service commission conferred upon the provinces by, or contemplated in or regulated by, sections 182, 183 and 196 of the text, are substantially less than or substantially inferior to those provided for in *inter alia* sections 1 14 and 213 of the interim Constitution.

60. Whereas section 114 of the interim Constitution *inter alia* empowers a provincial legislature to pass legislation providing for the establishment, appointment, powers and functions of a provincial public protector (with concurrent jurisdiction in the province with the national Public Protector) and to confirm the appointment of someone as the provincial public protector, sections 182 and 183 of the text make no provision at all for provincial public protectors. Similarly, whereas section 213 of the interim Constitution empowers a

provincial legislature to provide by law for a provincial service commission and places any such commissions under the control of provincial organs of state, section 196 of the text make no provision at all for a provincial service commission.

Bills Affecting Provincial Matters

61. It is submitted that the powers and functions in relation to Bills appropriating or allocating money or shares of national revenue to the provinces or determining the conditions for provincial loans for current or capital expenditure, Bills affecting provincial matters, and Bills amending the Constitution, which are conferred upon the provinces (via the National Council of Provinces) by, or contemplated in, or regulated by, sections 74(1)(b), 74(4) and 76 of the text, are substantially less than or substantially inferior to the powers or functions conferred upon the provinces (via the Senate) by sections 61, 62, 155(2A), 156(1A) and 157(1A) of the interim Constitution.

62. In effect, sections 61, 62, 155(2A), 156(1A) and 157(1A) of the interim Constitution confer upon the Senate the power to veto the Bills to which the sections apply - section 62(2) goes even further, by requiring a two-thirds majority of all the members of the Senate for Bills amending sections 126 and 144 of the interim Constitution. The Senate's veto stems from the fact that those Bills must be passed by the National Assembly and the Senate sitting separately and from the fact that there is no deadlock-breaking mechanism. For that reason, these sections differ markedly from sections 59(2) or 60(8) of the interim Constitution: section 60(8) confers on the National Assembly an unqualified override, while the deadlock-breaking mechanism described section 59(2) (a joint sitting of both Houses of Parliament) is weighted in favour of the National Assembly (which is far larger than the Senate).

63. Sections 74(1)(b), 74(4) and 76 of the text do not afford the provinces anything like the same measure of protection as do the sections in the interim Constitution discussed in the preceding paragraph.

64. Section 74(1)(b), read with section 65(1)(a), requires the support of six or more provinces (voting *en bloc*) for Bills amending the Constitution in the manner there described, as opposed to the interim Constitution's requirement that at least two thirds of all the members of the Senate support Bills of that sort.

65. Section 74(4) of the text requires Parliament to refer Bills amending the Constitution which concern the powers, boundaries or functions of provinces to the provincial legislatures "for their views". This provision stands in stark contrast with the proviso to section 62(2) of the interim Constitution which states that the boundaries and legislative and executive competences of a province shall not be amended without the <u>consent</u> of a relevant provincial legislature.

66. Section 76(1)(e), (i) and (j) of the text confers on two thirds or more of the members the National Assembly the power to override decisions by the National Council of Provinces in relation to Bills failing within the functional areas listed in Schedule 4 (and which were not

tabled first in the National Council of Provinces), Bills envisaged by section 44(2) (as to which see paragraph 13 above), Bills envisaged by section 220(3) (the Act of Parliament governing the Financial and Fiscal Commission) and Bills envisaged elsewhere in Chapter 13 which affect the financial interests of the provincial sphere of government. By contrast, as explained in paragraph 62 above, the Bills contemplated by sections 155(2A), 156(1A) and 157(1A) of the interim Constitution (after their amendment by sections 3 to 5 of Act 2 of 1994) - i.e. Bills dealing with the provinces' equitable share of revenue collected nationally, provincial taxes and provincial loans - cannot be passed without the consent of the Senate.

67. And section 76(2) of the text confers on the National Assembly a veto in respect of Bills failing within the functional areas listed in Schedule 4 (and which were tabled first in the National Council of Provinces). Neither section 59 of the interim Constitution nor any other provision there confers on the present National Assembly anything resembling this drastic override.

Abstract Review: Powers of Referral

68. It is submitted that the powers of members of provincial legislatures to refer to the Constitutional Court Bills before Parliament (even if they become Acts of Parliament) and Bills before other provincial legislatures (even if they become Acts of such legislatures) where there is a dispute over their constitutional validity, are substantially less than or substantially inferior to the equivalent powers in the interim Constitution. Moreover, unlike the present Senate, the National Council of Provinces has no power to refer to the Constitutional Court for "abstract review" Bills before Parliament.

69. Section 98(2)(d) of the interim Constitution, read with section 98(9), provides for the referral to the Constitutional Court of any dispute over the constitutionality of any Bill before Parliament or any provincial legislature upon request of the Speaker of the National Assembly, the President of the Senate or the Speaker of a provincial legislature, who shall make such a request to the Court upon receipt of a petition by at least one third of all the members of the National Assembly, the Senate or the provincial legislature concerned, as the case may be. Parliament or a provincial legislature may pass a Bill despite its referral to the Constitutional Court. The members of a legislature may not misuse the procedure for abstract review to delay the passage of legislation. Conversely, a referral is competent even after a Bill has been passed. In appropriate cases costs orders will be made.

Cf.:
In re: The National Education Policy Bill No 83 of 1995 **1996 (4) BCLR 518 (CC) para 44**
In re: The School Education Bill of 1995 (Gauteng) **1996 (4) BCLR 537 (CC) paras 2 and 36**

70. Properly interpreted, section 98(2)(d) read with section 98(9), allows one-third of the members of a provincial legislature not only to request the referral to the Constitutional

Court of a Bill before "their" provincial legislature, but also to request the referral of a Bill before Parliament or another provincial legislature. They may do so even when the dispute about that Bill is not a dispute between the members of "their" provincial legislature.

71. There are two reasons why this is so. First, the words "any dispute" in section 98(9) refer back to the words "any dispute over the constitutionality of any Bill before Parliament or a provincial legislature" in section 98(2)(d). Secondly, the words "as the case may be" in section 98(9) render a request to the Constitutional Court by the Speaker of the provincial legislature contingent on his or her receiving a petition by at least one-third of the members of the provincial legislature. As a matter of language, however, those words do not render such a request contingent on the Bill serving before the provincial legislature requesting the referral or, perhaps, on the presence of a dispute about the constitutionality of the Bill between the members of that provincial legislature.

72. It is submitted, therefore, that whereas one-third or more of the members of a provincial legislature may not request the Speaker of the National Assembly, the President of the Senate or the Speaker of another provincial legislature to refer to the Constitutional Court a dispute between members of "their" provincial legislature about the constitutionality of any Bill before the National Assembly, the Senate or the latter provincial legislature, they may address that request to the Speaker of "their" provincial legislature and may do so even if there is no dispute about the constitutionality of the Bill between the members of that provincial legislature. Alternatively, it is submitted that whereas one-third or more of the members of a provincial legislature may not request the Speaker of the National Assembly, the President of the Senate or the Speaker of another provincial legislature to refer to the Constitutional Court a dispute between members of "their" provincial legislature about the constitutionality of any Bill before the National Assembly, the Senate or the latter provincial legislature, they may address that request to the Speaker of "their" provincial legislature.

73. The purpose of sections 98(2)(d) and 98(9) is to enable members of the national and provincial legislatures to prevent the passage of unconstitutional legislation, not least because as organs of state those legislatures have a duty to defend and uphold the Constitution as the supreme law of the land. In the normal course of events the impugned legislation will be tabled in the legislature from which a referral emanates. But, as demonstrated above, the interim Constitution clearly contemplates that in certain circumstances - including cases where one party enjoys a majority of more than 70 per cent in the legislature before which a Bill has been tabled - the members of another legislature may request a referral.

74. This mechanism is reminiscent of section 93(1)(2) of the Basic Law of Federal Republic of Germany, which provides:

"The Federal Constitutional Court shall rule in case of disagreement or doubt as to the formal and material compatibility of federal or Land legislation with this Basic Law or as to the compatibility of Land legislation with other ' federal legislation at

the request of the Federal Government, a Land government or one third of the Members of the Bundestag."

(Basic Law, Official Translation, Press and Information Office, German Federal Government, Bonn (1994))

75. Lander governments may - and often do - request the Federal Constitutional Court to review legislation passed by the Bundestag. Some of the most important decisions by the Federal Constitutional Court have been handed down in cases referred to it in terms of this section. These include decisions on matters such as the constitutionality of abortion and state funding for political parties, conscientious objection and the status of universities. Lander governments may also use this section to request the Federal Constitutional Court to review of the legislation of other Lander. The use of this section is uncontroversial.

Cf.:
Schlaich *Das Bundesverfassungsgericht* (1 991) 77-78 Umbach & *Clemens Bundesverfassungsgerichtsgesetz* (1992) 977 and 983
Leibhoiz, Rinck & Hesselberger *Grundgesetz Kommentar an Hand der Rechtsprechung des Bundesverfassungsgerichts* (1993), commentary on section 93, para 113

76. Section 80 of the text provides that one third of the members of the National Assembly (but not the National Council of Provinces) may apply to the Constitutional Court for an order declaring that all or part of an Act passed by the Assembly is unconstitutional. The application must be made within thirty days of the date on which the President has assented to and signed the Bill. Section 122 of the text provides that 20 per cent 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 that legislature is unconstitutional. Again, the application must be made within 30 days of the date on which the Premier has assented to and signed the Bill.

77. In addition, section 79(4)(b) of the text, read with section 84(2)(c), provides that if the President has reservations about the constitutionality of a Bill which has been passed and reconsidered by Parliament, he or she may refer the Bill to the Constitutional Court for a decision on its constitutionality before signing the Bill. Similarly, section 121(2)(b) of the text, read with section 127(2)(c), confers on the provincial Premiers a power of referral in respect of Bills passed and reconsidered by "their" provincial legislatures. Section 167(4)(b) provides, by necessary implication, that the Constitutional Court has jurisdiction to decide on the constitutionality of Bills before Parliament or the provincial legislatures only in these circumstances.

78. The text does not allow the members of a provincial legislature to request abstract review by the Constitutional Court of the constitutionality of legislation before Parliament or another provincial legislature. Moreover, the text does not allow applications for abstract review of Bills. An application of this sort may only be made once the Bill has been passed by the provincial legislature concerned and assented to and signed by the Premier. Finally,

and perhaps tellingly, the text does not allow the National Council of Provinces - which is required by section 42(4) to represent the provinces in order to ensure that provincial interests are taken into account in the national sphere of government - to request abstract review at all.

Disputes between National and Provincial Organs of State

79. It is submitted that the competence of provincial organs of state to approach the Constitutional Court to resolve disputes between them and national organs of state, which is presently conferred by *inter alia* sections 98(2)(e) and 102(13) - (16) of the interim Constitution, is now constrained by the mechanisms (and potentialities for control by the centre) in Chapter 3 of the text. These mechanisms (and potentialities) render the power of provincial organs of state to approach the Constitutional Court to resolve constitutional disputes between them and national organs of state substantially less than or substantially inferior to that provided for in the interim Constitution.

80. Sections 102(13) to (16) of the interim Constitution establish a procedure for the referral to the Constitutional Court of disputes between provincial and national organs of state about the constitutionality of any executive or administrative act or conduct or any threatened executive or administrative act or conduct of one of those organs of state. In terms of these sub-sections a provincial organ of state may apply to a division of the Supreme Court for an order referring to the Constitutional Court a dispute of this sort and, if the Supreme Court refuses to do so, the provincial organ of state may appeal to the Constitutional Court.

81. By contrast, section 41 (1)(h)(vi) of the text provides that all spheres of government and all organs of state within each sphere of government "must avoid legal proceedings against each other", and section 41(4) provides that "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." Moreover - and, it is submitted, crucially - section 41(3) provides that "an Act of Parliament must provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes." The upshot of this is that Parliament, acting in accordance with section 75 of the text (which confers on the National Assembly the ultimate say on all Bills falling outside the functional areas listed in Schedule 4) will enact "mechanisms and procedures to facilitate settlement of intergovernmental disputes". There is a real risk that these mechanisms and procedures will make it substantially more difficult for the provinces to refer to the Constitutional Court disputes between provincial and national organs of state, not least because of the National Assembly's inevitable centralist proclivity.

Inappropriate and Inadequate Provincial Legislative and Executive Powers

82. In the alternative to the submissions in paragraphs 19 to 81 above, it is submitted that the provisions of the text described in those paragraphs contravene Constitutional Principle XX. Those provisions do not confer upon the provincial level of government appropriate and

adequate legislative and executive powers and functions that will enable that level of government to function effectively. The text's concentration of powers at the national level of government at the expense of the provincial level of government is not conducive to effective public administration and does not recognise the need for and promote legitimate provincial autonomy.

Minimum Standards for the Rendering of Public Services

83. In the further alternative to the submissions in paragraphs 19 to 81 above, it is submitted that the provisions of the text described in those so paragraphs contravene Constitutional Principle XXI. In particular, section 100(1)(b)(i) contravenes Constitutional Principle XXI.2 because it authorises the national executive to assume responsibility for a provincial executive obligation to the extent necessary to meet established minimum standards for the rendering of a service rather than to the extent necessary to *establish* minimum standards *required* for the rendering of a service; section 146(3)(ii) contravenes Constitutional Principle XXI because it provides that national legislation will prevail over provincial legislation in circumstances which are neither specified in that Principle nor contemplated by it.

Functional and Institutional Integrity of the Provinces

84. In the further alternative to the submissions in paragraphs 19 to 81 above, it is submitted that the provisions of the text described in those paragraphs contravene Constitutional Principle XXII. Sections 44(2), 100(1)(b), 146 and 147, in particular, together empower the national government to exercise its powers so as to encroach upon the functional and institutional integrity of the provinces.

The Provinces' Equitable Share of Revenue Collected Nationally

85. In the final alternative to the submissions in paragraphs 19 to 81 above, it is submitted that the provisions of the text described in paragraph 44 above governing the provinces' financial and fiscal powers, competences and entitlements contravene Constitutional Principle XXVI. As explained in paragraph 44, section 214(2) of the text introduces as factors relevant to the "equitable division" of revenue raised nationally among the national, provincial and local spheres of government and the determination of each province's "equitable share" of the provincial share of that revenue, *inter alia* "any provision that must be made in respect of the national debt", and "the needs and interests of the national government, determined by objective criteria". These factors, it is submitted, will allow Parliament to determine as the provinces' "equitable share", a share which will not ensure that provinces "are able to provide basic services and execute the functions allocated to them" (Constitutional Principle XXVI).

LABOUR RELATIONS

The Absence of Provision for the Lock-out

86. It is submitted that the omission of a right to lock out (as was provisionally provided in all the working drafts of the new Constitution), alternatively "recourse to the lock out" (which is the formulation preferred by section 27(5) of the interim Constitution), from section 23(3) of the text, alternatively from section 23 of the text, contravenes Constitutional Principles I, V and XXVIII. As a result of that omission and in view of the conferral on workers' of a right to strike by section 23(2)(c) - section 23(3), alternatively section 23, weakens the Constitution's endeavour to establish a democratic system of government committed to achieving equality between men and women and people of all races, does not ensure equality of all before the law, does not make provision, alternatively ensure, that every person shall have the right to fair labour practices. and does not recognise and protect the right of employers to engage in collective bargaining, alternatively does not recognise and protect the right of employers to engage in collective bargaining on a basis of parity with their employees.

The Level of Collective Bargaining

87. It is submitted that the omission of a right to bargain collectively from sections 23(2) and (3) contravenes Constitutional Principles XII and XXVIII. As a result of that omission sections 23(2) and (3) do not recognise and protect the right of employees and employers to engage in collective bargaining, alternatively to do so at plant or enterprise level. The requirements imposed by Constitutional Principles XII and XXVIII are not met by conferring the right to bargain collectively upon trade unions and employers' organisations - as section 23(4) does.

THE SUPREMACY OF THE CONSTITUTION

88. It is submitted that section 241(1), alternatively section 241, contravenes Constitutional Principle IV. This section renders the new Constitution subordinate to the Labour Relations Act, 1995, alternatively insulates the Labour Relations Act from constitutional scrutiny. It is a contradiction in terms for the Constitution to be at once the supreme law of the Republic and subordinate to an Act of Parliament. Moreover, section 241(1) - a provision which was introduced as part of an eleventh-hour compromise between the two largest parties in the Constitutional Assembly - flies in the face of not only the Preamble but also at least two of the weighty Founding Provisions (sections 1 and 2 of the text).

THE SEPARATION OF POWERS BETWEEN THE LEGISLATURE AND THE JUDICIARY

89. Section 146(4) contravenes Constitutional Principles VI and VII. As explained in paragraph 34 above, the section creates an irrebuttable presumption and, in so doing, violates the separation of powers between the legislature and the judiciary, alternatively deprives South Africans of appropriate checks and balances to ensure accountability, responsiveness and openness. The section deprives the judiciary of the power and jurisdiction to safeguard and enforce a vital part of the Constitution.

"ACCOUNTABLE, RESPONSIVE, OPEN, REPRESENTATIVE AND DEMOCRATIC GOVERNMENT"

90. It is submitted that Schedule 6 items 6(3)(a) and 11(1)(a) of the text, alternatively Schedule 6 items 6(3) and 11(1), contravene Constitutional Principles VI, VII, VIII and XVII. These provisions create a list system of proportional representation for the first elections of the National Assembly and the provincial legislatures under the Constitution. Such an exclusively proportional system is not accountable, responsive, representative, open or democratic, not least because it vests in the leadership of the political parties and not the electorate the power to determine the names and order of preference of the candidates for the elections to the National Assembly and the provincial legislatures.

91. Schedule 6 Annexure A item 13 contravenes Constitutional Principles II, VI, VII and XVII. This item enables political parties to issue authoritative instructions to "their" members of the National Assembly and the provincial legislatures which the latter, on pain of loss of membership of the legislature concerned, are obliged to implement, unquestioningly. This is inimical to accountable, responsive, open, representative and democratic government, and undermines such universally accepted fundamental rights and freedoms as the right to freedom of expression, the freedom to make political choices and the right to stand for public office and, if elected, to hold office.

92. Seen together, the electoral system and the provisions in the text requiring that members of Parliament and the provincial legislatures must be members of the political parties which nominated them militate against, alternatively do not amount to, "representative democracy" (as required by Constitutional Principles 1, VIII and XVII) or "appropriate checks and balance to ensure accountability, responsiveness and openness" (as required by Constitutional Principle VI). They also undermine several of the universally accepted fundamental rights, freedoms and civil liberties postulated by Constitutional Principle 11.

The Electoral System

93. Sections 46(1) and 105(1) of the text provide that the system for the election of the members of the National Assembly and the provincial legislatures must be prescribed by national legislation and based on the national common voters roll (or the provinces' segments of that roll), must provide for a minimum voting age of 18 years and must result, in general, in proportional representation.

94. Item 6 of Schedule 6 of the text, however, provides that Schedule 2 of the interim Constitution, as amended by Annexure A to Schedule 6 of the text, applies to the first election of the National Assembly and the provincial legislatures under the new Constitution. In essence, Schedule 2, as amended, provides for a "pure" closed list system of proportional representation, i.e. a system which permits the political parties to determine the names on the parties' lists and the sequence of the names and which, without natural or artificial hurdles (the size of constituencies or thresholds), aims at attaining the highest

possible degree of proportionality between votes cast and party-political representation in those legislatures.

(it is to be noted also that item 23(1) of Schedule 2 of the interim Constitution, as amended, applies to the filling of vacancies in the National Assembly and a provincial legislature until the second election under the new Constitution of the National Assembly or the second such election of that provincial legislature, as the case may be. In terms of item 23 of the interim Constitution, read with items 6(4) and 11(2) of Schedule 6 of the text, until the second election under the new Constitution the party which nominated the vacating member must fill the vacancy by nominating the next qualified and available person on that party's list.)

The Requirement of Party Membership

95. Section 47(3) of the text provides that a person loses membership of the National Assembly if that person ceases to be eligible in terms of section 47(1) or is absent from the Assembly without permission in the circumstances there described. According to section 47(4) vacancies in the National Assembly must be filled in terms of national legislation. Similar provisions regulate loss of membership and the filling of vacancies in the provincial legislatures. See sections 106(3) and (4).

96. But Schedule 6 item 6, read with Schedule 2 of the interim Constitution, as amended by Annexure A to Schedule 6 of the new Constitution, introduces (as item 23A of Schedule 2 of the interim Constitution) another ground for the loss of membership of the National Assembly or a provincial legislature: a person loses membership if he or she ceases to be a member of the party which nominated him or her as a member of the National Assembly or the provincial legislature concerned. An Act of Parliament, which must be passed within a "reasonable time" after the new Constitution "took effect", may "provide for the manner in which it will be possible for a member of a legislature who ceases to be a member of the party which nominated that member, to retain membership of such legislature", and may also provide for "any existing party to merge with another party" or "any party to subdivide into more than one party".

97. It is submitted that the conferral upon Parliament, by item 23A of Schedule 2 of the interim Constitution, of a power to ameliorate or to repeal the parts of that item which may be found to be repugnant to the Constitutional Principles in Schedule 4 - the question of repugnance is discussed below - cannot be regarded as sufficient "compliance" with those Principles. The question posed by section 71 of the interim Constitution is whether the provisions of the text comply - present tense - with the Constitutional Principles. Chapter 5 of the interim Constitution does not contemplate another transitional period. The requirements imposed by the Principles must be met before the Constitutional Court may certify that a provision complies with them.

Conflict with the Constitutional Principles

98. Constitutional Principle VIII states that there shall be representative government embracing multi-party democracy, regular elections, universal suffrage, a common voters roll, and, in general, proportional representation.

99. It is submitted that the requirement that there be, in general proportional representation, is not met by the system of "pure" proportional representation in Schedule 2 of the interim Constitution, as amended by Annexure A to Schedule 6 of the text. Constitutional Principle VIII points to a system which produces an appropriate degree of proportionality between votes cast and seats allocated to political parties but which also avoids the pitfalls commonly associated with systems which aim solely at attaining the highest possible degree of proportionality. The most acute such problem is the fact that there is no candidate-voter identification and, consequently, no individual accountability of members of Parliament (and the provincial legislatures) to the electorate (cf. single-member or multi-member constituencies or even "open" lists). This can lead to voter alienation from the political system, and to lack-lustre, slothful and unconcerned membew of Parliament, who look to please the party leadership rather than also representing the interests of their constituencies.

100. Constitutional Principle VI requires a separation of powers with appropriate checks and balances to ensure accountability, responsiveness and openness. Clearly, in a democracy, the electoral system and the elections in accordance with that system provide the most important check on a legislature and its members. The electoral system provides the vital link between the members of the voting public and their representatives. For that reason, the electoral system must be designed in a way which ensures openness, accountability and responsiveness. The value of openness, accountability and responsiveness emerges clearly from several other provisions in the text. For instance, section 41(1)(c) provides that all spheres of government and all organs of state must "implement effective, transparent, accountable and coherent government for the Republic as a whole." Section 57(1)(b) provides that the National Assembly "may make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement." (See also section 116(1)(b) in relation to the rules and orders of the provincial legislatures.) And, most significantly in this regard, section 1 provides that the Republic of South Africa is one sovereign democratic state founded, *inter alia*, on "universal adult suffrage, a national common voters roll, regular elections, and a multi-party system of democratic government, to ensure accountability, responsiveness and openness". (Emphasis supplied.)

101. As explained above, in terms of the system in Schedule 2 of the interim Constitution, as amended, both the names on the parties' lists and the sequence of the names is decided by the. parties, not the voters. The electorate has no choice between candidates, only a choice between parties (a fact which is accentuated by the linking of continued membership of a legislature to membership of a political party). And no provision is made in the text for an "internal" democratic procedure for the selection and sequencing of candidates by the political parties.

(From all accounts, some of the lists of the parties which took part in South Africa's first election were compiled in a decidedly undemocratic manner.

See:
De Vos "South Africa's Experience with Proportional Representation" in De Ville & Steytier *Voting in 1999: Choosing an Electoral System (1* 996) at 29-43)

102. As a result of the system in the text, the members of the National Assembly and the provincial legislatures are not genuinely accountable to the electorate, and are also unlikely to be responsive to it. That is because, in an immediate sense, they are dependent for their election and continued political "life" on the support, not of the electorate, but of the party congress and party leadership, In the case of the majority party, this could lead to the attenuation, perhaps even the collapse, of not only the accountability and responsiveness to the voters of the National Assembly and the provincial legislatures but also the accountability and responsiveness to the National Assembly and the provincial legislatures of the national and provincial executives. And that would reduce to a caricature provisions in the text such as sections 42(3), 55(2), 56(d), 92(2), 102, 114(2), 115(d), 133(2) and 141.

(it is to be noted further that, in terms of item 8 of Schedule 6 to the text, former senators who are not appointed as permanent delegates to the National Council of Provinces, are entitled to full voting membership of the provincial legislature by which they were initially nominated as senators. This further disturbs the democratic representativity of the provincial legislatures, not least because in the Eastern Cape, Free State, Mpumalanga, Northern Province and North West Province, one party, the African National Congress, will suddenly have four additional voting members in the provincial legislature. None of the other parties in these provinces will derive any "benefit" from this provision.)

103. It is submitted that there is a real risk that a "pure" closed-list system of proportional representation, such as that in Schedule 2, as amended, will advance the interests of political parties and their bosses at the expense of the interests of the voters. The system is not representative, accountable, responsive or open. On the contrary, it may well lead to the establishment of self-perpetuating party-political oligarchies. That would be inimical, not only to Constitutional Principles VI and VIII, but to Constitutional Principle XVII, which provides that, at each level of government, there shall be democratic representation.

104. Moreover, Constitutional Principle II provides that everyone shall enjoy universally accepted fundamental rights, freedoms and civil liberties, provided for and protected by entrenched and justiciable provisions. Not surprisingly, therefore, section 19(3) of the text entrenches in the Bill of Rights the fundamental right of every adult citizen to stand for public office and, if elected, to hold office. This is an universally accepted human right. Yet the right is seriously undermined by the present system of proportional representation. In particular, it undermines the right of every adult citizen to hold office when elected. As explained, the expulsion from his or her party of a member of the National Assembly or a provincial legislature means loss of membership of the legislature concerned. This result is

inexorable, even in cases where the party concerned has abandoned its electoral mandate and resorted to expulsions in an effort to rid itself of members who refuse to abandon the newly defunct (though mandated) policy. Clearly, item 23A of the Schedule 2 of the interim Constitution also violates the rights to freedom of conscience, freedom of speech, freedom of association and freedom to make political choices. Again, these are all universally accepted human rights.

MULTI-PARTY DEMOCRACY

105. It is submitted that section 61(3) of the text contravenes Constitutional Principles VIII and XIV. The section allows the provincial legislatures, the Premier of a province and in some instances the leaders of other political parties to designate the minority parties' special delegates to the National Council of Provinces. In so doing the section allows the majority party to break the cohesion of minority parties' caucuses by nominating and voting for members of those caucuses who may not be the first choice of their parties. This is subversive of multi-party democracy and undemocratically undermines minority parties' capacity to participate in the legislative process.

ABSTRACT REVIEW: COSTS ORDERS

106. It is submitted that sections 80(4) and 122(4) of the text contravene Constitutional Principles IV, V, VIII and XIV. These sections discourage minority parties in the National Assembly and the provincial legislatures from seeking abstract review of legislation which they sincerely consider to be unconstitutional, while making no equivalent provision to ensure that majority parties do not unreasonably oppose applications for abstract review. In particular, these sections do not empower the Court to order the respondents to pay costs in cases where their opposition did not have a reasonable prospect of success. This state of affairs is subversive of the supremacy of the Constitution, equality before the law, an equitable legal process, multi-party democracy and the capacity of minority parties to participate in the legislative process.

107. At present, in terms of rule 13(5) of its Rules, the Constitutional Court may order the objectors to a Bill before Parliament or a provincial legislature to pay the costs occasioned by their objection if their petition in terms of section 98(2)(d) and (9) of the interim Constitution "has no merit or is shown to have been taken precipitately". Section 98(8) of the interim Constitution provides that the Constitutional Court may in respect of proceedings before it make such order as to costs as it may deem just and equitable in the circumstances.

See:
In re: The National Education Policy Bill No 83 of 1995 **1996 (4) BCLR 518 (CC) para 41**

Cf.:
In re: The School Education Bill of 1995 (Gauteng) **1996 (4) BCLR 537 (CC) para 36**

***Ferreira v Levin NO; Vryenhoek v Powell NO (No 2)* 1996 (4) BCLR441 (CC) para 10**
Umbach & Clements (eds) *Bundesverfassunasaerichtsgesetz* (1992) 636-63
MacDonald, Matscher & Petzoid (eds) *The European System for the Protection of Human Rights* (1993) 755-73

108. Subject to what is said below, we accept that in some cases where the petitioners did not have a reasonable prospect of success it might be appropriate for the Constitutional Court to make a costs order against them. We submit, however, that sections 80(4) and 122(4) of the text tilt the scales unfairly against them and, in so doing, violate Constitutional Principles V, VIII and XIV. We fail to appreciate why those sections do not confer on the Court a similar power to "punish" a respondent - i.e. the majority party in the legislature or the majority on the issue, as the case may be - whose opposition did not have a reasonable prospect of success. As stated earlier, this state of affairs is subversive of equality before the law, an equitable legal process, multi-party democracy and the capacity of minority parties to participate in the legislative process. The spectre of applications for abstract review provides not only an important bulwark against unconstitutional legislation, but compels majority parties to consider seriously minority parties' constitutional objections to incipient legislation.

109. Quite apart from the specific deficiency of sections 80(4) and 122(4) discussed in the preceding paragraph, it is submitted that these sections are subversive of Constitutional Principle IV. That is because they will discourage members of the National Assembly and the provincial legislatures from applying for abstract review for fear of an adverse costs order. In effect, the members of these legislatures will be prevented from asserting that the Constitution is the supreme law of the land. For this reason, the courts in France, e.g., are loath to make costs orders against applicants for abstract review.

See:
Favoreu & Philip (eds) *Les Grands Decisions du Conseil Constitutionnel* 8 ed (1995), Case No 23

PRESIDENTIAL PARDONS, REPRIEVES AND REMISSIONS

110. It is submitted that section 84(2)(j) contravenes Constitutional Principles V, VI and VII.

It is submitted that the power conferred upon the President by section 84(2)(j), namely the power to pardon and reprieve offenders and to remit fines, penalties or forfeitures, conflicts with the supremacy of the Constitution, subverts equality of all before the law, results in an inequitable legal process, undermines the separation of powers between the judiciary and the executive and attenuates the powers and jurisdiction of the judiciary to safeguard and enforce the Constitution and all fundamental rights. in its essence it constitutes a perpetuation of the devolved royal prerogative which existed under the preceding constitutional dispensation.

See:

Section 7(3)(f) of the Republic of South Africa Constitution Act, 33 of 1961
Section 6(3)(f) of the Republic of South Africa Constitution Act, 110 of 1983
Fouche *Die Bevoegdhede van die President van die Republiek van Suid-Afrika* (1964 LLD *diss.)* 351-2

112. Constitutional Principle IV provides that the Constitution shall be the supreme law of the land, It shall be binding on all organs of state at all levels of government.

113. Constitutional supremacy essentially implies that constitutional provisions enjoy a higher status than ordinary legislation; that constitutional provisions cannot be amended by ordinary parliamentary majorities; and that constitutional provisions are, as a rule, self-executing and justiciable. But the concept of constitutional supremacy means more far more than this. it encompasses the notion of constitutionalism. As explained by the Supreme Court of Namibia:

"in a constitutional state the government is constrained by the Constitution and shall govern only according to its terms, subject to its limitations and only for agreed powers and agreed purposes. But it means much more. It is a wonderfully complex and rich theory of political organisation. It is a composite of different historical practices and philosophical traditions. There are structural limitations and procedural guarantees that limit the exercise of State power. 'It means in a single phrase immortalised in 1656 by James Harrington in *The Commonwealth of Oceana a* government of laws and not of men'; Olivier *Constitutionalism in the New South Africa (1* 994)".

***Ex Parte Attorney-General, Namibia: In re: The Constitutional Relationship between the Attomey-General and the Prosecutor-General* 1995 (8) BCLR 1070 (NmS) at 1078G-1**

114. One of the incidents of constitutional supremacy is that the Head of State may not exercise extra-constitutional powers, such as prerogatives, not least because the scope of any such powers is neither determined by the Constitution nor, perhaps, adequately constrained by it.

115. The difficulties presented by constitutional "prerogatives" are illustrated by the decision in *Kruger v Minister of Correctional Services,* where the court dismissed a gender-discrimination challenge to a "Presidential Act". The Court held that the power to pardon offenders conferred upon the President by section 82(1)(k) of the interim Constitution is a power which derives from the prerogative. Its exercise cannot be reviewed by a court, even a court with constitutional jurisdiction, unless the decision was motivated by bad faith or was so irrational that no reasonable executive authority could have come to the same conclusion (something which the court viewed as tantamount to bad faith).

***Kruger v Minister of Correctional Services* 1995 (1) SACR 375 (T)**

Cf.:
R v Secretary of State for the Home Department, Ex parte Bentley **[1993] 4 All ER 442 452h-453b**
Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel en Nywerheid **1992 (4) SA 1 (A) at 24F25B**
Patriotic Front-ZAPU v Minister of Justice **1986 (1) SA 532 (ZSC) at 541 D-E, 55OF-G**

116. A different conclusion was reached in *Hugo v President of the Republic of South Africa*. There, the court held that the President is bound by the provisions of the Constitution in the exercise of the power to pardon or reprieve offenders conferred on him by section 82(1)(k) of the interim Constitution. In reaching this conclusion, Magid J relied on section 75 of the interim Constitution, in particular the requirement that the President "exercise and perform his or her powers subject to and in accordance with the Constitution".

Hugo v President of the Republic of South Africa **[19961 1 All SA 457 (D)**

117. It is significant, perhaps, that the text does not require the President to "exercise and perform his or her powers subject to and in accordance with the Constitution" but stipulates that members of the Cabinet must "act in accordance with the Constitution (section 92(3)). On the other hand, the President himself of herself *(dehors* the Cabinet) is still required to "uphold, defend and respect the Constitution as the supreme law of the Republic" (section 83(a) of the text; section 81 (1) of the interim Constitution) and must swear or affirm faithfulness to the Republic and obedience to the Constitution (section 90(3) and Schedule 2 of the text; section 78 and Schedule 3 of the interim Constitution).

118. It is submitted that if the President's exercise of the power conferred by section 84(2)(j) of the text is not subject to the Bill of Rights, or, perhaps, even if it is so reviewable, there is a real risk that the equity of the legal process, the equality of all before the law and the separation of powers and functions between the executive and the judiciary will be subverted. That much is clear from as the facts of the *Kruger* and *Hugo* cases. Moreover, the exercise of judicial authority by the executive attenuates the power and jurisdiction of the judiciary to safeguard and enforce the Constitution and all fundamental rights.

THE APPOINTMENT OF THE PUBLIC PROTECTOR, THE AUDITOR-GENERAL AND THE MEMBERS OF THE HUMAN RIGHTS COMMISSION, THE COMMISSION FOR GENDER EQUALITY AND THE ELECTORAL COMMISSION

119. It is submitted that sections 193(5) and 194 contravene Constitutional Principles VI, XIV and XXIX. The sections allow the majority party in the National Assembly to appoint and (in effect) to dismiss the Public Protector, the Auditor-General, the members of Human Rights Commission, the Commission for Gender Equality and the Electoral Commission. In so doing, the section undermines the independence and impartiality of these institutions, alternatively the ostensible independence and impartiality of these institutions, in a manner which cannot be reconciled with, firstly, the need for appropriate checks and balances to

ensure accountability, responsiveness and openness, secondly, with the participation of minority parties in the legislative process in a manner consistent with democracy and, thirdly, with the specific requirement that the independence and impartiality of the Public Protector and the Auditor-General be provided for and safeguarded by the new Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

THE FINANCIAL AND FISCAL COMMISSION

120. Section 214(2) contravenes Constitutional Principle XXVII. The section allows the Financial and Fiscal Commission to choose whether or not it will make recommendations regarding the Act of Parliament described in section 214(1). By contrast, Constitutional Principle XXVII obliges the Commission to make those recommendations.

J.J. GAUNTLETT S.C.

A.M. BREITENBACH

4 June 1996

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7 June 1996

URGENT

The Registrar
Constitutional Court

Dear Mrs Nienaber

D.P. SUBMISSIONS: ERRATA

Unfortunately, in attempting to meet the 4 June deadline applying to the Democratic Party, a number of minor errors crept into the written submissions filed on its behalf. I would accordingly be grateful if you would request the Justices' clerks to effect the following changes to those submissions.

1 . The second last word in the third last line of paragraph 22 should read "**provided**", and the following sentence must be deleted from the end of that paragraph: "**There are eight reasons why this is so**".

2. The term "**1996**" must be deleted from the reference to "**In re: The National Education Policy Bill**" at the end of paragraph 28.

3. The first part of the first sentence in paragraph 49 should be in the present tense.

4. The term "**Provincial Commission**" in the twelfth line of paragraph 58 should read "**Provincial Commissioner**".

5. The expression **"stark contrast with"** in the fourth line of paragraph 65 should read **"stark contrast to".**

6. The word "of" must be inserted between the words **"Members"** and "**the**" in the second line of paragraph 66.

7. The word "**of**" between the words "**review**" and "**the**" in the ninth line of paragraph 75 must be deleted.

8. The reference to "**the centre**" in lines 6-6 of paragraph 79 is perhaps confusing: the intention is to refer to the national government,

9. The first sentence on page 57 should read: "**Similar provisions require the loss of membership of provincial legislatures and the filling vacancies therein**".

We regret any inconvenience

Thank you for your assistance

Yours sincerely
J.J. GAUNTLETT SC