INKATHA FREEDOM PARTY

THE APPLICATION TO CERTIFY A CONSTITUTIONAL TEXT IN TERMS OF SECTION 71 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 200 OF 1993

POWER OF ATTORNEY

I, **MANGOSUTHU GATSHA BUTHELEZI**, the President of the Inkatha Freedom Party, and in my capacity as the duly authorised representative of the Inkatha Freedom Party, nominate, constitute and appoint hereby with the authority of substitution and assumption**, PATRICK ROY FALCONER** and/or any partner in the firm of attorneys **FRIEDMAN & FALCONER** of **DURBAN** and/or **JENNY FRIEDMAN** or **ROBIN BAYHACK** and/or any attorneys in the firm **BAYHACK ATTORNEYS** of **JOHANNESBURG** to be my true and lawful attorneys and agents in my name, place and stead, to appear before the abovenamed Honourable Court or wherever may be necessary and then and there as my act and deed to institute or participate in proceedings in the abovenamed matter in which the Inkatha Freedom Party opposes the certification of a new constitutional text in terms of section 71 of the Constitution of the Republic.

And to attend to all necessary legal steps in order to finalise the matter.

DATED AT CAPE TOWN this 4th DAY OF JUNE 1996.

THE APPLICATION TO CERTIFY A CONSTITUTIONAL TEXT IN TERMS OF SECTION 71 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 200 OF 1993

KINDLY TAKE NOTICE that the written argument on behalf of the Inkatha Freedom Party and the Province of KwaZulu Natal, is filed evenly herewith.

DATED AT CAPE TOWN this 6 DAY OF JUNE 1996.

THE APPLICATION TO CERTIFY A CONSTITUTIONAL TEXT IN TERMS OF SECTION 71 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 200 OF 1993

KINDLY TAKE NOTICE that the Inkatha Freedom Party and the Province of KwaZulu Natal have appointed attorneys **FRIEDMAN & FALCONER, c/o BAYHACK ATTORNEYS**, whose address appears below, as its attorney of record in this matter.

KINDLY TAKE NOTICE FURTHER THAT the address for service of all document and processes in this matter is as below.

KINDLY TAKE NOTICE FURTHER that the Power of Attorney granting authority act on behalf of the Inkatha Freedom Party is filed evenly herewith.

DATED AT CAPE TOWN this 6th DAY OF JUNE 1996.

THE APPLICATION TO CERTIFY A NEW CONSTITUTIONAL TEXT IN TERMS OF SECTION 71 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, ACT 200 OF 1993

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THE APPLICATION TO CERTIFY A NEW CONSTITUTIONAL TEXT IN TERMS OF

SECTION 71 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, ACT 200 OF 1993

WRITTEN ARGUMENT ON BEHALF OF THE INKATHA FREEDOM PARTY AND THE PROVINCE OF KWAZULU NATAL

A. INTRODUCTION

1 . On 8 May 1996 the Constitutional Assembly adopted a new constitutional text which has been submitted to this Court for certification in terms of section 71 (2) of the interim Constitution (hereinafter referred to as "the IC").

2. Pursuant to directions issued by the President of the Court the Inkatha Freedom Party ("the IFP") lodged a written objection with the Registrar of the Court on 20 May 1996 and the Province of KwaZulu Natal ("the Province") lodged an objection on 31 May.

3. The President of the Court has granted the IFP an extension until noon on 7 June 1996 to file its written argument in support of its contentions, and has acceded to the Province's request to file written argument in support of its objection, directing that such argument be filed by 11 June. It is considered appropriate to file these submissions on behalf of both the IFP and the Province inasmuch as their position is identical on all issues relevant to the Province. It is accepted that the ambit of these submissions is indeed wider than those expressly detailed in the objections of 20 May and 31 May respectively.

4. Chapter 5 of the IC locates the role of the Constitutional Principles ("the Principles") set forth in Schedule 4 to the IC in the context of a new constitutional context. Section 71 of the IC requires that the text complies with the Principles. The place and status of the Principles were considered by this Court in **EXECUTIVE COUNCIL, WESTERN CAPE LEGISLATURE AND OTHERS V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 1995 (4) SA 877 (CC).** There it was said that the Principles are of substantive application (para 41), they enjoy a higher status than the rest of the Constitution (para 35), and that they are intended to give a detailed constitutional texture to the new constitutional text (para 41). See also **PREMIER OF KWAZULU NATAL AND OTHERS v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA 1996 (1) SA 769 (CC) at para 12.**

5. Section 71 lays down a strict test of compliance. All of the text must comply with the Principles. Accordingly, if any provision in the text fails to comply with the Principles, the text cannot be certified. Section 71 does not permit certification by way of substantial compliance. The Principles are the foundational guarantees and criteria against which the text is to be judged. It is submitted that any non-compliance with the Principles precludes certification.

6. There are two preliminary issues of general relevance that must be determined. The first concerns the meaning of "compliance". "Compliance" means submission or obedience to.

(**Black's Law Dictionary, 6th edition, 1990**) This meaning accords with a recognition of the predominance of the Principles. We submit that compliance requires the satisfaction of two tests. First, the text must fit the Principles in the sense that the text is consistent with the principles. As to consistency see **In re: THE NATIONAL EDUCATION POLICY BILL NO. 83 OF 1995, 1996 (4) BCLR 518 (CC) paras 17-20.** Secondly, the text must give proper expression to the values embraced by the principles.

7. The second preliminary issue concerns the interpretation of the Principles and the new constitutional text. We submit that, in accordance with the norms of interpretation now well recognised by this Court, the interpretation of the Principles will be generous, purposive, and in accordance with the historical purpose of the Principles in guaranteeing a new constitutional order. **STATE v MHLUNGU 1995 (3) SA 867 (CC) paras 8-9; 874, WESTERN CAPE LEGISLATURE case (supra), para 61.**

8. The question as to how the new constitutional text is to be interpreted is more problematic. We submit that the interpretive approach of the Court should be one of caution. That is to say that the Court should consider the new constitutional text from a variety of interpretative vantage points which might be adopted in the future in relation to the text and consider from those vantage points whether the text nevertheless complies with the Principles. We make this submission because it is apparent that at different times courts have approached constitutional interpretation from different perspectives. Accordingly the constitutional text should not be approached from this court's preferred construction, but from the plausible available interpretations of this text. In this regard sight should not be lost of the provisions of section 71 (3) of the IC, which renders the constitutional text, once certified, immune from subsequent judicial intervention.

9. In terms of section 74 of the IC the Principles cannot be repealed or amended, and neither can section 74 itself nor any other provision in chapter 5 insofar as it relates to them or "*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* ".

10. For the reason's set forth below, the IFP and the Province submit that the new constitutional text (hereinafter referred to as "the NT") violates the Principles. Where reference is made to a particular Principle it will be referred to as "CP".

B. CONTRAVENTION OF CP XVIII(2)

1. BACKGROUND:

1.1 CP XVIII reads as follows:

"l. The powers and functions of the national government and provincial governments and the boundaries of the provinces shall be defined in the Constitution.

2. *The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution.*
3. *The boundaries of the provinces shall be the same as those established in terms of this Constitution.*
4. *Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed.*
5. *Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions."*

1.2 Reference in the Constitutional Principles to 'this Constitution" is to the IC and to "the Constitution' to the NT, as discussed in the **WESTERN CAPE LEGISLATURE**-case, **supra**, paras [241 to [411 at 892F-896H.

1.3 **Legislative history**:

1.3.1 The IC was adopted on 22 December 1993. Section 126(3) of the IC then read:

"*An Act of Parliament which deals with a matter referred to in subsections (1) or (2) shall prevail over a provincial law inconsistent therewith, only to the extent that...* "

Consequent upon intense negotiations the Constitution of the Republic of South Africa Amendment Act No. 2 of 1994 ("the Amendment Act") was promulgated on 3 March 1994. The Amendment Act resulted, inter alia, in section 1 26(3) of the IC and CP XVIII being amended substantially.

1.3.2 The present text of section 126(3) of the IC, which saw the light of day in the Amendment Act, reads:

"*A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter referred to in subsections (1) and (2) except in so far as ...* "

Subsections (a) to (e) of section 126 were also reformulated accordingly, and one of the overrides contained therein was watered down, viz the necessity for the determination of national economic policies was substituted with the impediment to the implementation of national economic policies.

1.3.3 On the same occasion CP XVIII(2) and (3) in their present formulation were introduced, leaving the remainder of CP XVIII essentially the same. Furthermore, eight functional areas were added to Schedule 6 to the IC.

1.3.4 The nature and purpose of these constitutional amendments were that of strengthening provincial autonomy, while at the same time guaranteeing that the degree and extent of provincial autonomy granted in the IC could not be diminished substantially in the next stage of constitutional development, viz the adoption - and ultimate certification - of the NT.

1.4 In terms of the IC provinces exercise the following powers and functions:

1.4.1 legislative and executive; and

1.4.2 participation in the legislative and executive decision-making of the national government.

1.5 While CP XVIII(1) refers to "powers and functions of ... provincial governments", CP XVIII(2) refers to "powers and functions of the provinces", thereby referring to the position of provinces in the constitutional system rather than merely considering the legislative and executive powers and functions of their governments. It is accordingly necessary, where applicable, to distinguish a province from a provincial government. The organs within a province may, for example, include a House of Traditional Leaders established in terms of section 183 of the IC. A concomitant power of a province is that of participating in the election and composition of the Council of Traditional Leaders referred to in section 184 of the IC. This Council in turn exercises powers with respect to the national legislative process. This, however, is not a power of a provincial government.

This is dealt with more fully below.

It is submitted that the phrase "the powers and functions of the provinces" as contained in CP XVIII(2) relates to both the aforementioned aspects of provincial competence.

1.6 CP XVIII(4) implies that the NT does not need to provide for a second chamber comprised of provincial representatives, but this does not detract necessarily from CP XVIII(2) as it is theoretically possible that provinces may participate in national legislative decision making even if a second chamber is not established by, for example, having representatives in a monocameral national legislature. Moreover CP XVIII(2) was inserted by virtue of an amendment of the IC on 3 March 1994 pursuant to a compromise of significance to the provinces, as provincial autonomy, provided for in the IC, could not be substantially reduced in the NT. Therefore, this particular legislative history suggests that any possible conflict between CP XVIII(2) and CP XVIII(4) has to be resolved on the basis of the pre-eminence and broad interpretation of CP XVIII(2).

1.7 What fails to be considered is whether provincial powers and functions in the NT are substantially less than or substantially inferior to those set out in the IC. The word "less" clearly entails a quantitative assessment and the word "inferior" must, in the context, entail a qualitative assessment. It is submitted that the qualitative assessment includes the status of provinces in the constitutional system with respect to their power:

1.7.1 to make autonomous decisions vis-a-vis the national government;

1.7.2 to make autonomous decisions vis-a-vis other provinces; and

1.7.3 to participate in national decision-making.

1.8 As appears below, it is submitted that CP XVIII(2) has not been complied with in the NT in that the powers and/or and functions of provinces provided for in the NT are both substantially less than and substantially inferior to those afforded the provinces in the IC.

2. PROVINCIAL LEGISLATIVE AND EXECUTIVE POWERS AND FUNCTIONS

2. OVERRIDES

2.1 EXECUTIVE OVERRIDES

2.1.1 When a province cannot or does not fulfil an executive obligation in terms of legislation or the (new) Constitution, clause 100 of the NT empowers the national executive to supervise the fulfilment of that obligation and to take any appropriate steps to ensure fulfilment of that obligation. It may issue directives and, under specified circumstances - the ambit of which, in certain instances, is extremely broad - it may thereby assume responsibility for the relevant obligation.

2.1.2 Clause 100(2)(b) provides that such intervention need only be approved by the COP within 30 days of its first sitting after the intervention began and, although clause 100(2)(c) provides that the COP must review the intervention regularly, it can only make recommendations to the national executive and probably cannot terminate the intervention once authorised. The COP is not a substitute for the discharge by a province of its powers.

2.1.3 These provisions may seriously diminish a province's accountability to its own electorate; reduce the possibility of a province performing an executive obligation in a manner that is different to that performed elsewhere; and thereby empower the national executive to intervene for reasons of political expediency. Moreover, there is no provision limiting the duration of such intervention by the national executive.

2.1.4 Clause 100(3) provides that national legislation may regulate the process established in clause 100. The provinces' diminished powers are thereby limited even more.

2.1.5 The executive authority reserved for provinces in section 143 of the IC includes, for example, the power to allocate scarce resources in accordance with a scale of priorities in the fulfilment of various executive obligations. Limited resources may leave some of these obligations incompletely fulfilled with the result that the national executive is empowered constitutionally to decide to re-allocate provincial resources, and thereby usurp powers under the guise of intervening to ensure compliance with obligations.

2.1.6 The two overrides set forth in clause 100(1)(b)(i) are particularly restrictive and have no precedent in the IC.

2.2 LEGISLATIVE OVERRIDES

2.2.1 In the IC, overrides are restricted to section 1 26(3). The NT, however, has extended the application and the quantity of overrides significantly. This will be amplified below.

2.2.2 A comparison of the overrides enumerated in clauses 146 and 147 of the NT, on the one hand and those in section 126(3) of the IC on the other, reveals a significant increase in the number and ambit of overrides contained in the NT. These include the following:

(a) Clause 146(2)(b):
This introduces the phrase 'the interests of the country as a whole", which has no equivalent in the IC. The notion of the national interest requiring uniformity determined by Parliament goes beyond the more limited 'technical" or objective tests contained in section 126(3) of the IC, and in particular the requirement of effectiveness which is not coextensive with "the interests of the country as a whole".

(b) Clause 146(2)(b)(ii):
This introduces the concept of "frameworks", which is not found in the IC, and, if "necessary", could result in all provincial legislation having to follow a national framework.

(c) Clause 146(2)(b)(iii):
The term "national policies" goes way beyond the]C notion of prevalence of national legislation being required for effective performance. National policies suggest a test of political desirability rather than the objective test of effectiveness.

(d) Clause 146(c)(v):
The necessity of national legislation for the promotion of equal opportunity or equal access to government services, comprises two overrides not found in the IC.

(e) Clause 146(2)(a) :
The distinction between "provinces individually" in this clause and "provincial" in section 1 26(3)(a) of the IC, is a material diminution of provincial powers in that

the NT precludes the primacy over national legislation, of legislation that is collectively agreed upon by the provinces, but enacted individually, so long as the matter cannot be regulated effectively by provinces individually.

(f) Clause 146(2)(b):
The IC envisages in section 126(3)(b) the use of norms and standards with respect to matters requiring effective performance. The NT substitutes this with the notion of the interest of the country as a whole.

(g) Clause 146(c)(iv):
To the extent that the IC's "promotion of inter-provincial commerce" in section 126(3)(d) has been replaced with "the promotion of economic activities across provincial boundaries", which is a broader and thus more powerful override, provinces have been weakened materially.

2.2.3 The IC provides that provincial law prevails over national law with respect to Schedule 6 competences unless section 1 26(3) applies. The NT reverses this schema, including the relevant onus.

2.2.4 Clause 146(2)(c) of the NT provides for six circumstances under which national legislation prevails over provincial legislation. Clause 146(4) however, strengthens these overrides, increasing the diminution of provincial powers with respect to the provisions of the IC. The COP passing the national legislation determines that such legislation "must be presumed to be necessary", in which case it prevails over provincial legislation. The onus of proving that a legislative measure is not necessary is very burdensome, if at times well-nigh impossible. In this case, as a matter of substance, necessity is not determined on its merits, but merely procedurally.

2.2.5 Clause 146 of the NT, as a whole deals, with conflicts between national and provincial laws on Schedule 4 matters. Subsection (6) states that:

"*National and provincial legislation referred to in subsections (1) to (5) includes a law made in terms of an Act of Parliament or a provincial Act only if that law has been approved by the National Council of Provinces* "

The effect of subsection (6) is to provide that a conflict is not deemed to exist unless each of the two laws in question has been approved by the COP. This provision requiring the COP to approve an individual province's law in order for there to be a conflict to be resolved results in the COP having the political power to allow a national law to override a provincial law on any occasion it sees fit.

So, if the COP fails to approve a provincial law, clause 148 will apply, decreeing the prevalence of national legislation. The province in question would not be able to seek legal redress, since clauses 41(2), (3), (4) and (5), to be implemented by national legislation, determine the resolution of intergovernmental disputes, not the resolution of

conflicts in legislation. Therefore, without the COP's assistance, no provincial legislation may prevail over national legislation merely by virtue of a justiciable constitutional entitlement. This type of override has no parallel in the IC.

2.2.6 The overriding legislation, adopted for the reasons set out in clause 146(2) of the NT, must apply uniformly throughout the country, as is the case for the overriding legislation envisaged in section 126 of the IC. This is particularly damaging because of the omission of the provision such as section 61 of the IC. Moreover, clause 146(3) allows the prevalence of national legislation applying to one or more provinces only for broadly defined reasons, including the need to prevent (rather than remedy) unreasonable actions of provinces which may impede the implementation of national economic policies. The reasons justifying this type of legislation are speculative in nature, and broad in parameter, for a vast segment of government policies may fall under "national economic policies". This diminution of provincial autonomy is exacerbated by the fact that the NT does not contain the protection against laws which apply to one or more provinces only, which is set forth in section 61 of the IC. It can be noted, that while the language of this override is traceable to CP XXI(2), the possibility of non-uniform application is not set forth therein.

2.2.7 Clause 147(2) of the NT provides that in the event of a conflict between national legislation and a provision of a provincial constitution with regard to national legislative intervention resulting from the application of clause 44 (2), national legislation prevails. The effect of this is to reduce the status of a constitutional provision adopted by a two thirds majority, to that of ordinary provincial legislation. This limitation has no parallel in the IC.

2.2.8 Clause 147(3) of the NT provides that in the event of a conflict between national legislation and a provision of a provincial constitution with regard to a matter listed in Schedule 4, then clause 146 applies as if the affected provision of the provincial constitution were provincial legislation. This limitation has no parallel in the IC.

2.3 **LOCAL GOVERNMENT - LEGISLATIVE COMPETENCE**

2.3.1 Schedule 6 of the IC provides for "post-interim" local government as a provincial legislative competence, subject to the provisions contained in chapter 10, which provides, inter alia, for the establishment and status, as well as powers and functions of local government. Provision for these specific aspects is to be made by way of legislation by "a competent authority" in terms of sections 174(1) and 175(1) which provide that the establishment and status of local government in the "post-interim"period as well as its powers and functions is a concurrent competence, with the primacy of national and provincial legislation thus being determined by section 126.

2.3.2 The NT, however, diminishes a province's competence over local government matters. Not only is it removed from the scheduled list of provincial competences, but chapter 7, in

providing for local government, ascribes a substantially inferior legislative and executive role to provinces with regard to local governments than does chapter 10 of the IC.

2.3.3 Section 174(2) of the IC empowers a province, by means of legislation, to "make provision for categories of metropolitan, urban and rural local government with differentiated powers, functions and structures..." In addition, section 175 enables the province to determine "powers, functions and structures of local government".

2.3.4 Clause 155(1) of the NT, however, provides that:

"*National legislation must determine -*
(a) the different categories of municipality that may be established;
(b) appropriate fiscal powers and functions for each category; and
(c) procedures and criteria for the demarcation of municipal boundaries by an independent authority. "

Clause 155(2) merely provides that provincial government 'by legislative or other measures" must establish municipalities, provide for the monitoring and support of local government in the province, promote the development of local government capacity to perform its functions and its ability to manage its own affairs.

Clause 155(3) merely affords a provincial government the legislative and executive power to monitor the local government matters listed in Schedules 4 and 5 and to see to the effective performance by municipalities of those matters. Further reference is made to 2.6.7 below.

2.4 **LOCAL GOVERNMENT - EXECUTIVE COMPETENCE**

2.4.1 Section 144(2) of the IC reads as follows:

"*A province shall have executive authority over all matters in respect of which such province has exercised its legislative competence ...*".

This includes the competence of local government.

2.4.2 The NT restricts a province's executive authority in regard to local government to the five matters contained in clauses 155(2) and 155(3), as referred to in 2.3.4 above.

2.4.3 The province's existing executive competence over chapter 10 matters has thus been diminished significantly,

2.5 **POLICE**

2.5.1 In terms of sections 126 and 144 and Schedule 6 to the IC, a province has legislative and executive powers and functions in respect of police, subject to chapter 14. In terms of

section 217 of the IC, a province has the "responsibility for the performance by the Service in or in regard to that province of the functions set out in section 219 (1)." This includes the investigation and prevention of crime [section 219(1)(a)]; the development of community-policing services [section 219(1)(b)]; the maintenance of public order [section 219 (1)(c)]; the provision in general of all other visible policing services [section 219(1)(d)]; protection services in regard to provincial institutions and personnel [section 219(1)(e)]; staff transfers [section 219(1)(f)]; and promotions up to the rank of lieutenant-colonel[section 219(1)(g)]. These competences are both legislative and administrative.

2.5.2 Clause 206 of the NT provides for vastly reduced provincial competence and merely authorises the provinces administratively to monitor police conduct [clause 206(2)(a)]; have oversight of the effectiveness and efficiency of the police [clause 206(2)(b)]; promote good relations between police and the community [clause 206(2)(c); assess the effectiveness of visible policing [clause 206(2)(d)]; and liaise with the national Cabinet member responsible for policing [clause 206(2)(c)].

2.5.3 Section 217(2) of the IC provides that a provincial government, through its relevant member of the Executive Council, shall approve or veto the appointment of the Provincial Commissioner and may institute appropriate proceedings against the Provincial Commissioner if he has lost the confidence of the provincial government. The effect of clause 207(3) of the NT, read with clause 41 (1)(f) means the removal of a province's veto over the appointment of its commissioner, and no provision is made for proceedings against a Provincial Commissioner.

2.5.4 Section 219(1) of the IC provides, inter alia, that, subject to "the directions of the relevant member of the Executive Council", a Provincial Commissioner shall be responsible for the functions listed in section 219(1)(a) to (g) of the IC. Clause 207(4) of the NT, however, provides that Provincial Commissioners are responsible for policing "as prescribed by national legislation" and subject to the power of the National Commissioner to exercise control over and manage the police services in terms of subsection (2).

2.2.5 Section 217(3) of the IC provides that a province "may pass laws not inconsistent with national legislation regarding the functions of the Service set out in section 219(1)." Clauses 205 and 206 of the NT provide for no legislative role for provinces.

2.5.6 The NT thus provides for substantially reduced provincial legislative and executive powers over policing in comparison with the IC.

2.6 **SCHEDULES 4 AND 5**

2.6.1 A comparison between Schedule 6 to the IC, and Schedules 4 and 5 to the NT, reveal that certain provincial competences under the IC are omitted from the NT, certain competences have been modified, and some competences have been added, though they are incidental to existing competences.

2.6.2 Important omissions from Schedule 6 to the IC, from a provincial perspective, are the following:

(a) local government, subject to the provisions of chapter 10 of the IC; and
(b) police, subject to the provisions of chapter 14 of the IC.

2.6.3 Important modifications which result in a reduction of provincial competences are the following:

(a) exclusion of lotteries and sports pools;
(b) exclusion of non-university and non-technikon tertiary education, (such as teachers' training colleges);
(c) indigenous law and customary law, subject to chapter 1 2;
(d) change from "provincial public media" to media services directly controlled or provided by the provincial government, (thereby excluding matters such as community radios, provincial private publications, et cetera);
(e) language policy subject to chapter 6; and
(f) change from 'traditional authorities" to "traditional leadership, subject to Chapter 12 of the Constitution", (thereby excluding the offices and structures which exercise powers of government in traditional communities or in terms of traditional law and customary law).

2.6.4 The following competences, which are in any event incidental to existing Schedule 6 competences under the IC, as set out in the brackets, have been added to the list:

(a) administration of indigenous forests [nature conservation];
(b) disaster management [environment, section 126 (2), as well as reflected in the fact that the relevant laws have already been assigned to provinces];
(c) pollution control [environment];
(d) population development [health services];
(e) provincial public enterprises [section 1 26 (2)1;
(f) public works [section 126 (2)1;
(g) part B of Schedules 4 and 5 [local government];
(h) archives [cultural affairs, section 126 (2)];
(i) libraries [local government];
(j) veterinary services [agriculture, health services] and
(k) liquor licences [trade and industry].

2.6.5 Of particular significance is the excluded competences, and those modified with the effect of reducing the scope of existing provincial competences. Most of the new inclusions are of little consequence and effect as they are already existing competences by virtue of section 126(2) of the IC which allows a provincial legislature to "make laws which are reasonably necessary for or incidental to the effective exercise of such legislative competence", or because they are sub-categories or intertwined within the ambit of existing competences.

2.6.6 Despite the fact that the NT provides a longer list of competences than those contained in the IC, it is submitted that they do not represent an expansion of the competences, but in reality result in a significant reduction of provinces' legislative competences.

2.6.7 The powers set out in Part B of Schedules 4 and 5 are not all the powers of local government. The IC provides, in sections 174 and 175 that provinces are entitled to exercise all the powers of local government. Accordingly, Schedules 4 and 5 to the NT have removed the power of the provinces to deal with all local government matters not listed therein and, more importantly, the power to establish, organise and administer local government, including, inter alia, the determination of the fundamental issue of the "local government model".

2.7 **PROVINCIAL CONSTITUTION**

2.7.1 Section l60(3) provides that "a provincial constitution shall not be inconsistent with the provisions of this Constitution,... ".

2.7.2 The NT replicates the requirements contained in the IC with regard to provincial constitutions, but extends further requirements which have the effect of restricting the ambit of the scope and extent of the provincial constitution. Clause 143(2) of the NT adds a further four conditions which must be complied with by a province wishing to adopt a constitution. These conditions constitute restrictions on the type of constitution a province may adopt and, as such, impede the province's powers and functions with regard to the adoption of a provincial constitution.

2.7.3 Clause 13 of Schedule 6 of the NT reads as follows:

"*A provincial constitution passed before the new Constitution took effect must comply with section 143 of the new Constitution*."

This constitutes a constitutional provision with retrospective effect, and as such, impairs the power of a province to retain a legally and constitutionally valid provincial constitution adopted in terms of the provisions of section 160 of the IC, before the coming into effect of the new Constitution.

2.7.4 Clause 143 further serves to nullify sections in a provincial constitution which may be in conflict with equivalent clauses contained in the NT, for example, the process required for the adoption of a name, the declaration of an official language, etc. The effect of this section extends beyond the requirement that a provincial constitution must be in compliance with the NT.

2.8 **FINANCIAL CONTROLS**

2.8.1 Clauses 215 and 216 of the NT provide for the creation of national legislation over a considerable number of procedural matters including, inter alia, the form of provincial and municipal budgets [see clause 215(2)(a)], when such budgets must be tabled [see clause 215(2)(b)], and the obligation resting on each sphere of government to show the sources of revenue and the way in which proposed expenditure will comply with national legislation [see clause 215(2)(c)].

2.8.2 Clause 216(1) and (2) provides for the establishment of a national treasury and expenditure control in each sphere of government and a means whereby the national treasury, with the concurrence of the Cabinet member responsible for national financial matters, may stop the transfer of funds to an organ of state (albeit only for serious and persistent material breach of the measures).

2.8.3 The provinces are not subject to such controls in terms of the provisions of the IC.

2.9 **TRADITIONAL LEADERS**

2.9.1 Schedule 6 of the IC includes "traditional authorities", which accordingly provides this legislative competence to the provinces as a concurrent competence subject to the provisions contained in section 126.

2.9.2 Schedule 4 of the NT refers to the term "traditional leadership, subject to chapter 12 of the Constitution", and thereby provides the provinces with a more limited functional area of concurrent national and provincial legislative competence, subject to the provisions contained in chapter 12 of the NT.

2.9.3 Clause 211(2) of chapter 12 of the NT reads as follows:

"*A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs*."

It is apparent from what is contained in chapter 1 2 that provincial law is not included in the term "applicable legislation", both because clause 21 2(1) provides that:

"*National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities*",

and because the reference in section 181 of the IC to a "competent authority" (ie. national or provincial legislature) legislating on traditional authorities is not replicated in the NT.

2.9.4 Clauses 21 1 and 21 2 therefore appear to be exclusively national competences, and therefore substantially diminish the existing provincial competence.

2.10 **INDIGENOUS LAW AND CUSTOMARY LAW**

Schedule 6 of the IC provides for indigenous law and customary law to be a provincial and concurrent competence, subject to the provisions of section 126. The NT recognises this competence, subject to the restrictions contained in chapter 12, which do not contemplate or provide for significant power under this competence.

2.11 HOUSES OF TRADITIONAL LEADERS

2.11.1 Section 183(1)(a) requires provinces in which there are traditional authorities and their communities, to establish Houses of Traditional Leaders to exercise their powers and functions in terms of provincial legislation, subject to chapter 11 of the IC.

2.11.2 Parliament is not empowered to legislate on the establishment, the composition, the election or nomination of representatives, and the powers and functions of a House of Traditional Leaders in terms of the provisions of the IC.

2.11.3 Clause 212(2)(a) of the NT enables national legislation to establish houses of traditional leaders, and as such, constitutes an encroachment upon the exclusive provincial competence to legislate in this regard under the IC.

2.11.4 Section 183(1)(b) of the IC provides that provincial legislation relating to the province's House of Traditional Leaders must comply with chapter 11. The provisions contained in chapter 1 2 of the NT render it constitutionally impossible for a province to establish a House of Traditional Leaders with powers and functions analogous to those currently enjoyed by such houses and this represents a significant diminution of provincial powers.

2.12 UNFINISHED SENATE BUSINESS

2.12.1 Clause 5(2) of Schedule 6 of the NT stipulates that any unfinished business before the Senate when the new Constitution takes effect must be referred to the COP, and the COP must proceed with that business in terms of the new Constitution.

2.12.2 The practical import of this provision is that legislation pending which may be defeated in the Senate in terms of section 61 of the]C, can now be passed in the COP by virtue of the new legislative process and the lack of similar protection of individual provinces.

2.13 FORCED CO-OPERATION

2.13.1 Chapter 9 of the IC allows unfettered intergovernmental relations, and provinces may operate as they see fit within the restraints of the IC only. The lack of constitutional restraints have been replaced by the various obligations provided for in clause 41 of the NT. Clause 237 requires that these obligations been performed diligently and without delay". In addition to these constitutional restraints, the NT affords national

legislation the effect of restraining what provinces are free to do. (For instance, in terms of clause 41 (1)(iv) it could require that before a bill is introduced by a provincial minister such bill be sent for review and comments to the corresponding national minister). It replaces a province's present voluntary co-operation with "forced" co-operation, which significantly reduces the power the IC presently accords a province to engage in constructive non-engagement or non-cooperation, or to seek co-operation through alternate means, thereby weakening the potentially competitive element between first and second tier government and diminishing the capacity of the second tier to pursue policies that are out of step with national policies.

Clause 41(2) to (5) reads as follows:

"*(2) An Act of Parliament must establish or provide for structures and institutions to promote and facilitate intergovernmental relations.*

(3) An Act of Parliament must provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

(4) 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.

(5) If a court is not satisfied that the requirements of subsection (4) have been met, it may refer a dispute back to the organs of State involved.. "

2.13.3 In essence the autonomy of the provinces will be materially reduced by the structures and institutions provided for in clause 41(2) insofar as the competence to promote and facilitate intergovernmental relations is transferred to those structures and institutions instead of leaving such competence in the hands of the provinces.

2.13.4 The provisions of clause 41(4) compel the provinces to resort to the mechanisms and procedures referred to when involved in an intergovernmental dispute. This, together with clause 41 (5), restricts the direct access to a court that provinces at present enjoy in terms of the IC, including the access to this Court as provided for in section 98(2)(e) of the IC.

2.13.5 The powers and functions of the structures and institutions to be established in terms of clause 42(2) of the NT affect provincial powers and functions which in terms of the IC provinces may exercise by themselves and outside such structures and institutions. The degree of this diminution of provincial autonomy will depend upon the actual legislation passed by Parliament at any given time. However, the constitutional empowerment of Parliament to adopt such open-ended legislation is a significant diminution of powers, as well and an encroachment of provincial institutional integrity

2.14 **DETERMINATION OF PROVINCIAL COP VOTE**

Clause 65(2) of the NT provides that an Act of Parliament must provide for a uniform procedure in terms of which provinces confer authority upon their delegations in the COP to cast votes on their behalf. Since the only occasion on which delegates vote en bloc on behalf of a province (as opposed to non-Schedule 4 bills when delegates vote as individuals, presumably on behalf of the parties they represent) is when the delegation has a single vote, it is axiomatic that the majority in the provincial legislature, or majority coalition on any matter if there is no simple majority, should determine the vote. The legislation regarding how a province instructs its representatives would, in terms of the IC, as well as the NT in clause 104(4), be a competence reasonably necessary for or incidental to the effective exercise of provincial powers and, as such, in terms of the IC and the NT, it would be a provincial, rather than a national competence. Therefore the exclusive national legislation provided for in clause 65 (2) materially diminishes a province's powers and functions.

2.15 **DEVELOPMENT OF PROVINCIAL POLICY**

2.15.1 The relevant part of clause 125(3) of the NT reads as follows:

"*A province has executive authority in terms of subsection (2)(d) only to the extent that the province has the administrative capacity to assume effective responsibility.* "

2.15.2 The effect of this clause is that such provincial policy cannot be implemented (and cannot even be developed) until a province has the required administrative capacity.

2.15.3 A province has the executive authority to administer provincial legislation or to initiate legislation, even if it has no administrative capacity in the matter concerned. However, such province could not develop its legislation on the basis of its own policies, because it cannot develop "provincial policy" without having administrative capacity. It follows that such province can only legislate if it does so following national policies.

2.15.4 This clause, for which there is no equivalent in the IC, seriously diminishes existing provincial powers with respect to the development and implementation of provincial policy. Section 1 26 of the IC provides that provinces are competent to make laws with regard to all matters which fall within the functional areas specified in Schedule 6 on the basis of the policies of their own choice, with no test of, or limit in respect of administrative capacity.

2.16 **ADMINISTRATIVE CAPACITY DISPUTES BETWEEN NATIONAL GOVERNMENT AND THE PROVINCES**

2.16.1 Clause 125(4) of the NT provides as follows:

"*Any dispute concerning the administrative capacity of a province in regard to any function must be referred to the National Council of Provinces for resolution within 30 days of the date of the reference to the Council.* "

2.1 6.2 In terms of the IC the concept of administrative capacity relates to the assignment of laws to provinces in terms of section 235 (8), for which administrative capacity is a prerequisite. The determination of administrative capacity is a factual and technical matter, the subject of an analysis of objective criteria. In the event of a dispute, a province has the right to challenge the President in court to prove that it has the requisite administrative capacity, The NT, however, provides in clause 125(4) that with respect to a different set of circumstances as important as the development of policy rather than the assignment of laws, a political chamber of the national government unilaterally resolves a technical and factual dispute between the two levels of government, which may have the effect of preventing a province developing or implementing provincial policy. This represents a substantial reduction of provincial power.

2.17 PUBLIC PROTECTOR

In section 114, the IC enables a provincial legislature, by law, to provide for the establishment, appointment, powers and functions of a provincial public protector and for matters connected therewith. This power has been removed in the NT.

2.18 CIVIL SERVICE COMMISSION

Though section 209 of the IC makes provision for a national Public Service Commission, section 213 of the IC enables a provincial legislature to provide for a provincial service commission with specified powers and functions. The various provinces have indeed established such provincial service commissions. Clause 196 of the NT replaces this constitutional framework for provincial legislative competence with a single Public Service Commission for the Republic, with one nominated representative per province appointed to it. The provincial representations are constrained to exercise such powers as they may have and to performing such functions as are ascribed to them, as prescribed by national legislation. The IC enables the provincial service commissions to make recommendations, give directions or conduct inquiries with regard to the establishment and organization of departments in the province as well as the appointments, promotions, transfers, discharge and other career incidents of such public servants. Clause 197(1) of the NT provides that there is to be a public service for the Republic as a whole "which must function, and be structured, in terms of national legislation". Moreover, clause 196(4) of the NT requires the nominated representatives to exercise their powers and functions in their provinces as prescribed by national legislation. Clauses 196 and 197 of the NT result in a substantial diminution of existing provincial powers and functions.

2.19 OVERSIGHT

Clause 55 (2) (b) (ii) of the NT requires the National Assembly to maintain 'oversight" of "any organ of state', which in terms of clause 239 includes all provincial departments, administrations, functionaries, statutory bodies or institution. This clause negates the most essential notions of provincial autonomy which should require the provincial

administration to be under the exclusive oversight of the elected provincial, rather than national, representatives. There is no similar provision in the IC.

2.20 NATIONAL ALLOCATIONS TO LOCAL GOVERNMENT

2.20.1 Section 1 58(b) of the IC reads as follows:

"*Financial allocations by national government - ...*
(b) to a local government, shall ordinarily be made through the provincial government of the province in which the local government is situated".

2.20.2 The NT does not contain a provision to this effect, thereby creating the situation whereby the national government is free to by-pass provincial governments in making financial allocations to local government. This constitutes a material diminution in the powers of provincial government.

2.21 USER CHARGES

2.21.1 Section 156(3) of the IC entitles a province to enact legislation authorising the imposition of user charges provided certain requirements are met.

2.21.2 This competence is omitted in the NT. User charges constitute a potentially important source of additional revenue to the provinces and such omission results in a substantial diminution of an existing provincial power.

2.22 GAMBLING TAXES

2.22.1 Section 1 56 (1 B) of the IC reads as follows:

"*A provincial legislature shall notwithstanding subsection (1) have exclusive competence within its province to impose taxes, levies and duties (excluding income tax or value-added or other sales tax) on:*
(a) casinos;
(b) gambling, wagering and lotteries; and
(c) betting. " (our underlining)

2.22.2 This competence is not provided for in the NT.

2.22.3 The significance of this omission is compounded by virtue of clause 227(4) of the NT which provides as follows:

"*a province must provide for itself any resources that it requires, in terms of a provision of its provincial constitution, that are additional to its requirements envisaged in the Constitution.* "

2.22.4 This constitutes a significant reduction of a provincial power because:

(a) this competence is described in the IC as "exclusive' to the province; and
(b) it represents a potentially crucial source of provincial revenue.

2.23 ASSIGNMENT OF LEGISLATION TO PROVINCES

2.23.1 Section 235(8)(a) of the IC reads as follows:

"*The President may, and shall if so requested by the Premier of a province, and provided the province has the administrative capacity to exercise and perform the powers and functions in question, by proclamation in the Gazette, assign, within the framework of section 126, the administration of a law referred to in subsection (6)(b) to a competent authority within the jurisdiction of the government of a province, either generally or to the extent specified in the proclamation.* " (our underlining)

It is submitted that this constitutes a constitutional obligation on the President.

2.23.1 Clause 14(1) of Schedule 6 of the NT reads as follows:

"*Legislation with regard to a matter within a functional area listed in Schedule 4 or 5 to the new Constitution... may be assigned by the President, by proclamation, to an authority within a provincial executive designated by the Executive Council of the province.* " (our underlining)

It is submitted that this merely entitles the President to assign laws to the provinces, but does not constitute an obligation upon him or her to assign the laws to the province and, consequently, does not provide the provinces with a right to such assignment.

2.23.3 The process of the assignment of laws to provinces in terms of section 235(8) of the IC is not complete, due to certain provinces not having the appropriate administrative capacity or because the national government has not completed the required process of amending such laws preparatory to their assignment.

2.24 DOUBLE BALLOT

Schedule 2 to the IC makes provision for the constitutional requirement of a double ballot for national and provincial elections. This has been abolished in regard to elections which will take place after 1999.

2.25 EARLY PROVINCIAL ELECTION

2.25.1 Section 128(2) of the IC makes provision for a province, through its Premier, to call a provincial election at any time.

2.25.2 This power has been restricted by clause 109(1)(b) of the NT which provides that provincial elections cannot take place unless three years have passed since the legislature was elected.

2.26 OFFICIAL LANGUAGE(S)

2.26.1 Section 3 of the IC provides that a provincial legislature may, by two-thirds resolution, declare any of the country's official languages to be an official language for the whole or for any part of the province and for any over all powers and functions within the competence of that legislature.

2.26.2 The NT, however, does not empower a provincial legislature to declare one or more official languages. By reason of clauses 41 (1)(f) and 104(1) it accordingly may not do so. Clause 6(3) obliges a provincial government to use at least two official languages.

2.26.3 There is a significant distinction between a province declaring one or more languages the official languages of that province, and the declaration that one or more official languages are to be used for purposes of the government of that province.

There is accordingly a diminution in the provinces' power in this regard.

2.27 NAME OF PROVINCE

2.27.1 Section 1 24 (1) of the IC provides that Parliament "shall', at the request of a simple majority of a provincial legislature, alter the name of the province in accordance with such request.

2.27.2 Clause 104(2) of the NT, however:

(a) provides that a request to Parliament to change the name of a province must be preceded by a resolution supported by two-thirds of the members of the legislature of such a province; but

(b) does not provide for a mandatory obligation to accede to such a request.

2.27.3 The provisions of clause 104(2) of the NT clearly seriously diminish a province's present power to determine its name.

2.28 ARMED ORGANISATIONS

Section 224(3)(c) of the IC enables a province to establish an "armed force or military force or armed organization" for "a service established by or under law for the

protection of persons or property", a similar provincial competence to that provided for in section 219(1)(e). No similar provision is contained in the NT, such competence being reserved for the national government only in clause 199(3) of the NT, thereby materially diminishing the provinces' powers in this regard.

2.29 **REFERENDA**

Clause 1 27(2)(f) of the NT requires that the Premier of a province can only call for a referendum in terms of national legislation. In terms of section 147 (1) (f) of the IC the Premier is competent to "proclaim referenda and plebiscites in terms of this Constitution or provincial law". This latter competence no longer exists.

2.30 **LEADER OF THE OPPOSITION**

While section 137 of the IC leaves to the provincial legislature the discretion on how to deal with its internal arrangements by means of its rules, clause 116 (2) (d) of the NT forces it to recognize the role of the Leader of the Opposition.

2.31 **SIZE OF LEGISLATURES**

In terms of section 126 (6) of the IC a province may request Parliament to increase the number of members of its legislature up to 100, since after the disbandment of the Independent Electoral Commission, this competence provided for in Schedule 2 to the IC has reverted back to Parliament. However, in terms of clause 105 (2) of the NT, Parliament may not accede to a province's request to increase such number above 80 members.

3. PARTICIPATION OF PROVINCES IN THE EXERCISE OF LEGISLATIVE AND EXECUTIVE POWERS AND FUNCTIONS OF THE NATIONAL GOVERNMENT

Both the IC and the NT provide for a bicameral Parliament, with a house/chamber, representing the provinces, comprised of ten representatives per province. Section 48 of the IC provides for a Senate, and clause 60 of the NT provides for a National Council of Provinces (hereinafter "the COP"). A comparison of the provisions of the IC and the NT reveals the collective competence of provinces to participate in the exercise of legislative and executive powers and functions of the national government to be diminished substantially in the NT for the following reasons:

3.1 **LEGISLATIVE PROCESS OF ORDINARY BILLS**

The provisions of section 59 of the IC vests the legislative authority of Parliament in both the National Assembly and the Senate which have the power to make laws for the Republic of South Africa, including, but not limited to those listed in Schedule 6. In terms of clause 76 of the NT the consent of the COP for the passage of bills is restricted to the functional areas listed in Schedule 4. The provisions of clause 75 of the NT effectively

reduce the powers of the COP to the competence to make recommendations. This is a substantial reduction of the powers and functions with respect to non-Schedule 6 matters reserved for the Senate in the IC. Subject to the provisions of section 59(2) of the IC, section 61 requires the concurrence of the Senate for the passage of bills.

In terms of the NT, however, the concurrence of the COP is not required for non-Schedule 4 matters.

The COP does not have the powers with regard to money bills which the Senate currently exercises subject to the provisions of section 60(6) of the IC.

3.2 INTRODUCTION OF BILLS

3.2.1 In terms of section 59(1), read with section 60(1) of the IC, any bill, excepting money bills, may be introduced in the Senate. in terms of clause 73 of the NT, only bills falling within the Schedule 4 functional areas and all those listed in clause 76(3), may be introduced in the COP. This further diminishes the provincial representatives' powers and functions within the legislative process.

3.2.2 One of the elements of the political compromise resulting in the March 3, 1994 amendments to the IC, was the reformulation of section 155 thereof to give the Senate a veto power with respect to the financial transfers to provinces provided for therein. The present formulation of section 155 (2A) requires the Senate to separately pass the Acts referred in that section. This power of the Senate has no correlation in the powers of the COP.

3.3 AMENDMENT TO THE CONSTITUTION

In terms of section 62 of the IC an amendment to the Constitution requires approval by at least two-thirds of the total number of members of both houses. In terms of clause 74 of the NT the COP participates only if the amendment affects the COP, or alters provincial boundaries, powers, functions or institutions, or amends a provision that deals specifically with a provincial matter, in which case at least six of the nine provinces must support the amendment. Though this provision is analogous to section 62(2) of the IC, the total exclusion of the COP with respect to any other amendments of the Constitution is a material diminution of the provincial representatives' powers and functions.

3.4 BILLS AFFECTING PROVINCES

In terms of section 61 of the IC, a bill affecting the boundaries or the exercise or performance of the powers and functions of the provinces requires separate approval of the National Assembly and the Senate. In terms of the NT, there is no equivalent competence afforded the COP.

3.5 REFERRING LEGISLATION TO THE CONSTITUTIONAL COURT

The IC provides that in the event of a dispute over the constitutionality of a bill before Parliament, one-third of the members of the National Assembly or the Senate may refer such a bill to the Constitutional Court. This procedure is retained in the NT, in clause 80, for the National Assembly in regard to bills before the National Assembly, but does not extend to bills before the COP. This procedure is not available for "national" bills, including those relating to Schedule 4 or 5 matters, thereby rendering the members of the COP in a disadvantaged position' when compared to the present Senators' powers.

3.6 RECONSIDERATION OF BILLS REFERRED BACK TO PARLIAMENT

3.6.1 Clause 84(2)(b), read with clause 79(3), of the NT provides for the President's responsibility for referring bills back to Parliament for reconsideration of such bills' constitutionality.

3.6.2 The NT provides for the COP's participation in the reconsideration of bills referred back to Parliament by the President only if the President's reservations about the constitutionality of the bill relates to a procedural matter which involves the COP, or in the event of clause 74 (relating to constitutional amendments) being applicable. The IC provides the Senate with equal power to reconsider such bills.

3.7 NATIONAL ASSEMBLY OVERRIDE OF COP

In terms clause 44(2) of the NT, Parliament may under certain circumstances intervene in an 'exclusive' provincial competence by passing legislation with respect to a Schedule 5 functional area in accordance with the procedures set out in clause 76, including referral to a Mediation Committee if necessary. In the event of there being no concurrence, two thirds of the National Assembly can still pass the bill. In other words, with respect to the integrity of provinces' "exclusive" legislative powers, the National Assembly can overrule the COP.

3.8 EXECUTIVE OVERSIGHT

The IC provides the Senate with equal competence to the National Assembly in its oversight of the national executive. In terms of clause 55(2) of the NT, the National Assembly must provide mechanisms: (a) "*to ensure that all executive organs of State in the national sphere of government are accountable to it*"; and (b) "*to maintain oversight of - (i) the exercise of national executive authority, including the implementation of legislation; and (ii) any organ of state. " These powers and functions are denied the COP*."

3.9 ELECTION OF PRESIDENT

Section 77(1)(b) of the IC provides that members of the National Assembly and the Senate shall, when necessary, elect, at a joint sitting, one of the members of the National Assembly as the President.

Clause 86(1) of the NT provides that the National Assembly. shall, whenever necessary, elect from among its members the -President. Members of the COP are excluded from the participation in the election of the President, which in terms of the NT is reserved to members of the National Assembly alone.

3.10 IMPEACHMENT

3.10.1 Section 87 of the IC provides that two-thirds of the members of the National Assembly and the Senate may jointly impeach the President or an Executive Deputy-President.

3.10.2 Clause 89 (1) of the NT provides for the removal of the President to be carried out by the National Assembly, and thereby clearly the members of the COP are excluded from doing so.

3.11 CABINET ACCOUNTABILITY

3.11.1 Section 92(1) of the IC provides that a Minister is accountable individually both to the President and to Parliament, which includes the National Assembly and the Senate. The Senate has oversight institutions to ensure that this accountability is maintained [see sections 58(1)(a) and 58(2) of the]C].

3.11.2 Clause 92(2) of the NT also provides that members of Cabinet are accountable to Parliament for the performance of their functions. The COP's institutional powers are, however, limited to requiring the presence of a Cabinet member at a meeting of the Council, or one of its committees, and then, presumably, only in regard to a Schedule 4 or Schedule 5 matter. In regard to any other functional area, Cabinet Ministers are not accountable to Parliament, but only to the National Assembly.

3.12 OVERRIDE ON PROVINCIAL LEGISLATION

In section 126 (3) (a) of the IC, a national law prevails over a provincial law only if the national Act "deals with a matter that cannot be regulated effectively by provincial legislation." Had this requirement been incorporated in the NT, then a provincial law dealing with a Schedule 4 matter which cannot be regulated effectively by an individual province could still be regulated effectively by combined provincial legislation agreed upon among the provinces - and enacted by the provinces individually - which legislation would then prevail over national law. This is no longer possible in the NT which specifically refers, in clause 146(2)(a), to legislation enacted by provinces individually. For instance, it is understood that the German Lander, each of which has competence in respect of its police, have legislated collectively on police uniforms to

ensure their uniformity. So, even though uniformity of uniforms may not be effectively regulated by the legislation of a province, it can effectively be achieved through "provincial legislation".

3.13 INTERGOVERNMENTAL RELATIONS

3.13.1 Chapter 3 of the NT provides inter alia that Parliament must pass an act to establish or provide structures and institutions to promote and facilitate intergovernmental relations, and must provide appropriate mechanisms and procedures to facilitate settlement of inter-governmental disputes [see clause 41(2) and (3)].

3.13.2 This legislation is a non-Schedule 4 matter, and accordingly, the COP can only make recommendations on these structures, which are to be determined exclusively by the National Assembly. This constitutes a significant reduction of the powers enjoyed by the Senate, without whose consent such legislation ordinarily could not be passed through the legislative process. Moreover, since it is effectively the National Assembly that determines the rules by which conflict is resolved and with which other spheres of government are obliged to comply, the position of the National Assembly is considerably strengthened at the expense of the COP by comparison to the Senate.

3.14 SPHERES OF GOVERNMENT

3.14.1 The IC makes a clear distinction between Parliament, provincial government and local government. In the NT, however, under the heading "Government of the Republic", is the proposition that in the Republic, government is constituted as national, provincial and local spheres of government", which, are "distinctive, interdependent and interrelated'. Moreover, these spheres of government are also "organs of state".

3.14.2 CP XVI requires that government be structured at various "levels", in line with the IC schema, which is confirmed by CP's XVIII(1), XIX, XX, XXI and XXII. From a provincial perspective, the notion expressed in the NT is that of a provincial government being a subordinate part of one government, instead of constituting a separate system of government. This definitional diminution is emphasized by the NT notion of provincial governments being organs of state, a position not expressed in the IC. This could have significant constitutional implications on the power of provinces to engage in litigation with other organs of the State.

3.15 OVERSIGHT

Clause 55 (2) (b) (ii) of the NT requires the National Assembly to maintain "oversight", inter alia, of "any organ of state", which in terms of clause 239 includes all national and provincial departments, administrations, functionaries, statutory bodies or institutions. Unlike the position in section 58(1)(a) and 58(2) of the IC, the COP has no such power, which has been excluded both with respect to the national oversights as well as the provincial oversights.

C. CONTRAVENTION OF CONSTITUTIONAL PRINCIPLES XIX, XX, XXI, XXII AND XXV

A cluster of Principles deal with the powers and functions of provinces, namely Principles XIX, XX, XXI, XXII and XXV.

It is submitted that the following provisions of the NT violate these Principles:

2. CONSTITUTIONAL PRINCIPLE XIX - DELEGATION

2.1 CP XIX reads as follows:

"*The powers and functions at the national and provincial levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.* "

2.2 As the principle provides for enumerated exclusive provincial powers, which are not envisaged in the IC, it also provides for a mechanism to solve problems arising out of the fact that national government can no longer rely on concurrence, namely the possibility that a province may delegate its powers which it cannot perform at any given time. Delegation and agency enable the provinces to retain control over the function concerned.

2,3 Clauses 99 and 125(1)(c) and (g) of the NT provide for the assignment of a national power or function to provinces or municipalities, and clause 126 enables a province to assign a legislative power to a municipality. The NT, however, contains no provision which permits the national government to perform functions for other levels of government on an agency or delegation basis.

2.4 Clause 100 of the NT does not fulfil this purpose, as this clause provides for a type of executive intervention, and not action based upon agency or delegation.

2.5 Clause 104(5) of the NT similarly does not satisfy this requirement, as it deals with a matter which fails outside the authority of the province's legislature or outside the province's competence.

3. CONSTITUTIONAL PRINCIPLE XX - LEGITIMATE PROVINCIAL AUTONOMY

3.1 CP XX reads as follows:

"*Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public*

administration, and which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity. "

3.2 Clause 1 25(3) of the NT, under the heading "Executive Authority of Provinces"' stipulates that a province has executive authority in regard to development and implementation of provincial policy only to the extent that the province has the administrative capacity to assume effective responsibility.

3.3 It is submitted that the effect of this clause is a prevention of the provinces from exercising their executive function not only of implementing policy, but even of developing policy, unless the provinces first satisfy the requirements of administrative capacity.

3.4 It is contended further that such a limitation on the executive power of a province should be construed as inapposite, and that the requirements that each level of government should have appropriate and adequate legislative and executive powers and functions that will enable each level of government to function effectively, has thus not been complied with.

3.5 Clause 125(2), also under the heading "Executive Authority of Provinces", provides that although a province has the executive power to implement provincial legislation [125(2)(a)], which is a separate function to that of developing provincial policy [l25(2)(d)], the provincial authority to implement provincial legislation inclusive of provincial policy, it must first satisfy the requirement of administrative capacity [125(3)]. The notion of a province being prevented from implementing provincial legislation, including provincial policy, unless it has first satisfied a requirement of administrative capacity, is, as inapt, as because each level of government should have appropriate and adequate legislative and executive powers and functions to enable it to function effectively.

3.6 Clause 6 of the NT does not empower provinces to declare one or more official languages in the provinces, despite this power being afforded to the provinces in terms of section 3(5) of the IC, without any deleterious effects on national unity. It is submitted that the requirement that the allocation of powers between different levels of government shall be made on a basis which recognises the need for and promotes national unity and legitimate provincial autonomy, has thus not been complied with.

3.7 In its reference to the allocation of powers recognizing the need for and promotion of national unity and legitimate provincial autonomy, there is nothing in the principle to suggest that these are not of equal normative value. Indeed, the use of the term "legitimate" to balance the term "provincial autonomy" strongly suggests an equal weighing. It is submitted that to the extent that CP XVIII(2) has not been complied with, so too has CP XX not been complied with, since the allocation of powers and functions to the provinces in a manner that is substantially less than or substantially inferior to those provided for in the IC, must be construed as not recognizing the need for or the promotion of legitimate provincial autonomy.

4. **CONSTITUTIONAL PRINCIPLES XX, XXII AND XXV - APPROPRIATE PROVINCIAL FISCAL POWERS**

4.1 CP XXII reads as follows:

"*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*."

4.2 CP XXV reads as follows:

"*The national government and provincial governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local governments referred to in Principle XXIV shall make provision for appropriate fiscal powers and functions for different categories of local government*. "

4.3 Clause 214 of the NT provides for the provinces to be entitled to an equitable share of revenue raised nationally.

4.4 In the light of the requirements of clause 227(4) of the NT, that "a province must provide for itself any resources that it requires, in terms of a provision of its provincial constitution, that are additional to its requirements envisaged in the Constitution" the requirement in clause 228(2)(b) must be regulated in terms of an Act of Parliament depriving the provinces of autonomous fiscal powers, infringing upon CP XX and CP XXV. Certain autonomous fiscal powers of the provinces were recognised in sections 1 56(3) and 1 56(1) of the IC. That these powers in the IC have been removed in the NT is an infringement of CP XXV, as it contains no provision for fiscal powers or an entitlement thereto.

5. **CONSTITUTIONAL PRINCIPLES XX, XXI AND XXII**

CHANGE OF NAME

5.1 Despite the fact that there might not be a commonly accepted definition of the "legitimate" provincial autonomy referred to in CP XX, it is submitted that clause 104(2) of the NT, which enables the national government to refuse to accept the change of the name of a province adopted by two thirds of the provincial legislature, is not in compliance with the principle that the allocation of powers between different levels of government shall be made on a basis which recognizes the need for and promotes national unity and legitimate provincial autonomy.

5.2 The fact that a province is denied the power of choosing its own name - despite overwhelming support - is furthermore not in compliance with CP XXI, for clearly this should be an exclusive competence of a province, while clause 104(2) of the NT accords

to Parliament the exclusive and final discretion on whether to accept the request to change a province's name.

5.3 CP XXII is also contravened, for not regarding the determination of the provincial name as an exclusive provincial power also comprises an encroachment by the national government.

PROVINCIAL CIVIL SERVICE

5.4 For the reasons set out in A.2.18 above, it is submitted that it is axiomatic that control of the civil service is a crucial provincial competence, and that despite clause 125(2)(e) of the NT providing the Premier of a province with the executive power to co-ordinate the functions of provincial departments and administrations, the provisions of chapter 10 nonetheless empower the national government to encroach upon the functional and institutional integrity of a province. These provisions are thus not in compliance with CP XXII.

5.5 The principle that the allocation of powers recognises the need for, and promotes national unity, and legitimate provincial autonomy has not been allowed in that the minimal level of legislative and executive power exercised by a province on its civil service has been eliminated, with the result being inordinate stress upon national unity at the expense of legitimate provincial autonomy as the basis of allocating these powers.

5.6 Moreover, it is submitted that there is non-compliance with the criteria listed in CP XXI. The allocation of exclusive legislative and executive power to the national government over these matters is not necessarily required by CP XXX (1) which envisages "a" public service. In fact, "a" public service does not necessarily mean "One" or "a single" public service, for when the CPs intend to express such unitary intent the word "one" is used (see CP 1). In any case, the "structuring and functioning" of a single public service could be regulated by both the national and the provincial levels of government, as it is the case in the IC, which solution is strongly suggested by the word "law" used at the end of CP XXX, usually referring to either national or provincial law. This reading is also suggested by the fact that provincial service commissions have already been established in various provinces.

6. CONSTITUTIONAL PRINCIPLES XX AND XXII - PROTECTING THE POWERS AND FUNCTIONS OF THE PROVINCES

6.1 Section 61 of the IC requires that bills affecting the boundaries or the exercise or performance of the powers and functions of a particular province or provinces only are deemed not to be passed by Parliament unless passed separately by the National Assembly and the Senate, and further requires that a bill affecting the boundaries or the exercise or performance of the powers or functions of a particular province or provinces only is deemed not to be passed, unless also approved by a majority of the senators of the

province or provinces in question in the Senate, shall also be deemed not to be passed by Parliament.

6.2 There is no provision in the NT requiring that a national bill affecting various matters germane to a particular province or provinces only should require their consent. This, it is submitted, provides the national government with undue power to legislate, in an unchecked manner, over matters germane to such provinces. This is an infringement of CP XX in that legitimate provincial autonomy is compromised.

6.3 It is contended that, in the absence of the protection afforded the provinces in terms of section 61 of the IC, the legitimate provincial autonomy and the protection thereof vis-a-vis national legislation are in jeopardy in light of clause 146(3) which enables national legislation to prevail even though it does not apply uniformly throughout the country, and to override provincial legislation to "prevent" unreasonable provincial actions, rather than to redress them. This provision enables pre-emptive legislation to curtail the autonomy of a specific province on the mere concern that such province may misuse its autonomy. It is submitted that the requirement that the allocation of powers between different levels of government is to be made on a basis which recognises the need for and promotes national unity and legitimate provincial autonomy has thus not been complied with. It is further contended that the absence of the protection afforded in section 61 of the IC also constitutes an encroachment.

6.4 CP XXII and XX are contravened by clause 55(2)(b)(ii) of the NT which requires the National Assembly to maintain "oversight" of "any organ of state", which, in terms of clause 239, includes all provincial departments, administrations, functionaries, statutory bodies or institutions. This clause negates the most essential notions of provincial autonomy which require the provincial administration to be under the oversight of the elected provincial, rather than national, representatives. This is a major encroachment, which allows the National Assembly to call provincial officials to account for their actions before its parliamentary hearings, constituting a significant encroachment on provincial institutional integrity. It also does not recognise "legitimate' provincial autonomy as required by CP XX..

6.5 One of the elements of the political compromise resulting in the 3 March, 1994 amendments to the IC, was the reformulation of section 155 thereof, giving the Senate a veto power with respect to the financial transfers to provinces provided for therein. The present formulation of section 155 (2A) requires the Senate separately to pass the Acts referred in that section. This power of the Senate, which has no equivalent in the powers of the COP, should be regarded as essential to the notion of promotion of legitimate provincial autonomy and protection against national institutional encroachments which always exist when the national government has the exclusive 'power of the purse".

7. CONSTITUTIONAL PRINCIPLES XX AND XXI

7.1 A crucial function dealing with legitimate provincial autonomy and cultural diversity is centered around indigenous and customary law and traditional authorities, which vary from province to province and within provinces.

7.2 The provinces' competence to legislate on traditional authorities, as provided for in chapter 11 of the IC, has been substituted with the term "traditional leadership".

7.3 The provinces' competence in regard to indigenous law and customary law is subject to clause 212(1) of the NT which reads as follows:

"*National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.* "

Provinces may not legislate on these matters, hence CP XX and CP XXI are contravened.

7.4 The constitutional principle requirement that the allocation of powers between different levels of government shall be made on a basis which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity has thus not been complied with.

7.5 Aspects relating to cultural diversity often relate to residual powers such as property, family and succession law, and some aspects of commercial law, which are also reflected in indigenous and customary law. CP XXI(8) requires the NT to "specify how powers which are not specifically allocated in the Constitution to the national government or to a provincial government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national government or provincial governments." Because of the requirement to acknowledge cultural diversity some of such residual powers should have been allocated to provinces.

8. CONSTITUTIONAL PRINCIPLES XXI AND XIX

8.1 EXCLUSIVE POWERS

8.1.1 Schedule 5 of the NT is headed "Functional areas of exclusive provincial legislative competence". Though styled "exclusive", the powers set out in Schedule 5 are subject to the powers of override by Parliament contained in clause 44(2) of the NT.

8.1.2 CP XIX requires that the powers and functions at the provincial level of government shall include exclusive and concurrent powers.

8.1.3 It is submitted that government as referred to in CP XIX embraces both the legislative and executive branches of government. This submission is strengthened by the contents of CP XX which refers to each level of government having appropriate and adequate legislative and executive powers.

8.1.4 A power is exclusive in one of two senses. First, the power is not shared as a concurrent power, in that the two levels of government do not legislate on the same subject matter. Second, the power is not subject to usurpation or interference.

8.1.5 These two senses of exclusivity are borne out both as a matter of meaning and as a matter of comparative constitutional law.

8.1.6 "Exclusive" means:

8.1.6.1 Debarring from interference or participation (Black's law Dictionary, 6th edition, and the Shorter Oxford Dictionary).

8.1.6.2 Exclusively of any other legislature (Stroud's Judicial Dictionary).

8.1.6.3 Apart from all others, without the admission of others to participation (Webster's New International Dictionary).

8.1.7 A consideration of comparative constitutional systems distinguishes exclusive powers from concurrent powers, including powers that are subordinate by way of overrides or framework legislation:

8.1.8 An exclusive power is a power exercised immediately in terms of the Constitution and not subject to overrides or framework legislation. In the German, Spanish and Italian constitutional systems, overrides and framework legislation constitute a form of concurrency. In the instance where the national legislation does not displace that of the regions, but merely creates a framework in which the regions may legislate, the powers of the regions are characterised as concurrent rather than exclusive.

8.1.9 Instances of exclusive powers are powers that are enjoyed in the absence of national legislative overrides.

8.1.10 For example, in Sicily and Trentino-Alto-Adige, these two Italian regions enjoy special autonomy in terms of the Italian constitution in the sense that they enjoy exclusive power in the absence of national overrides. The same applies to the Basque and Catalonia Autonomous Communities in Spain.

8.1.11 So too in Germany, India and Canada there is a provision for exclusivity in the sense contended for herein. See in this regard:

SEERVAI, <u>CONSTITUTIONAL LAW OF INDIA</u>, 4th ed, VOLUME ONE, 1993, 287, 288, 289.

HOGG, <u>CONSTITUTIONAL LAW OF CANADA</u>, (3rd ed), 1992, 404, 405, 409.

RIEDEL, <u>THE CONSTITUTION AND SCIENTIFIC AND TECHNICAL PROGRESS</u>, in STARCK, (ed), <u>NEW CHALLENGES TO THE GERMAN BASIC LAW</u>, (1991), section 3.

8.1.12 It is submitted that the treatment of exclusivity in comparative constitutional systems is consistent with the interpretation offered here as to the proper characterisation of Schedule 5.

8.1.13 The IC itself recognises an example of exclusive powers. Section 156(1B) of the IC gives to the provinces a fiscal legislative power which is not subject to overrides. Since in terms of section 232(4) of the IC the CP form part of the IC, there is a consistency of usage as to the meaning of exclusivity.

8.1.14 It is plain that the Schedule 5 powers are not exclusively enjoyed by the provinces. The effect of the override is to render the Schedule 5 powers subject to interference, and accordingly subordinate and non-exclusive. Even on the most benign view of the overrides, the exercise of the override powers renders the provinces' powers no better than concurrent, even though they are less pervasive than those to be found in clause 146 with respect to Schedule 4.

8.1.15 Accordingly the powers in Schedule 5 are not enjoyed exclusively by the provinces in either of the two senses of exclusivity identified above, and accordingly the NT does not comply with CP XIX.

8.1.16 The only question that then arises is whether CP XXI(2) sanctions the interference of provincial powers that would otherwise fall foul of CP XIX..

8.1.17 It is submitted that CP XXI(2) should be read in a fashion consistent with CP XIX. A consistent reading of these principles requires that CP XXI(2) is of application only in respect of concurrent powers.

8.1.18 It is no answer to the submissions made herein that the overrides nevertheless leave a residual set of exclusive powers in Schedule 5. As we have indicated above in relation to comparative constitutional systems, in which a residual set of exclusive powers could be identified as well, once an override trespasses upon a power otherwise enjoyed by a province, the proper characterisation of the position is that the powers of the province are concurrent rather than exclusive powers. In our submission CP XIX requires exclusivity and that exclusivity is not secured in the face of the overrides.

8.1.19 Just as clause 44(2) of the NT excludes the provinces from enjoying exclusive legislative powers, so too clause 1 00 of the NT precludes the provinces from enjoying exclusive executive powers. The intervention by the national executive provided for by clause 100 of the NT in respect of Schedule 5 matters compromises the exclusivity of the province's executive powers and thus is also a violation of CP XIX.

For example, under the German constitution article 37 of the Basic Law provides that 'Where a Land fails to comply with its obligations of a federal character imposed by This Basic Law or another federal statute the Federal Government may with the consent of the Bundesrat, take the necessary measures to enforce such compliance by the Land by way of federal coercion" (our underlining of the official Federal Government translation). In other words, article 37 applies, inter alia, to matters falling under the ambit of concurrency, but cannot apply with respect to matters failing within the exclusive legislative competence of a Land.

8.2 THE ALLOCATION OF POWERS - CP XX AND CP XXI

8.2.1 CP XXI and CP XX set out the criteria for the allocation of powers to the national government and the provincial governments. The introductory portion of CP XXI uses mandatory language. So does CP XX. These principles are not precatory procedural pathways to the allocation of powers. They are key substantive and mandatory criteria against which the NT is to be measured.

8.2.2 While CP XXI lists the detailed criteria of application in the allocation of powers, it is submitted that CP XX sets out the result that the application of the criteria in CP XXI must achieve.

8.2.3 An analysis of CP XXI yields the following:

8.2.3.1 A criterion of effectiveness in respect of the quality and rendering of services [XXI(1)].

8.2.3.2 Criteria of override [XXI(2), (4); (7)].

8.2.4 The criteria for the allocation of national powers CP XXI(3), (5).

8.2.5 The criteria for the allocation of provincial powers CP XXI(6).

8.2.6 We point out that the force of each criterion is not expressed in the same language. Thus in CP XXI(3) and (4) the force of the criterion is expressed on the basis of what should apply. This language suggests the criterion has presumptive force, whereas the other criteria use "shall", suggesting mandatory force.

8.2.7 Neither the language of CP XXI nor its criteria suggest any clear organising principle or scheme of priority.

8.2.8 However, the application of the criteria must, it is submitted, yield an allocation of powers which meets the overall requirements of CP XX, and in particular the recognition of the need for and promotion of national unity and legitimate provincial autonomy.

8.2.9 When the functional areas of exclusive provincial legislative competence set out in Schedule 5 of the NT are compared with the functional areas of concurrence set out in Schedule 4, it is submitted that the NT has failed to strike a balance between the need for national unity and the legitimate claims of provincial autonomy as required by CP XX.

8.2.10 CP XXI(6) gives an indication of what shall fall within the powers of provincial governments. The list is not expressed to be exhaustive. But it contains provincial planning and development and the rendering of services, as also specific socio-economic and cultural needs of the province.

8.2.11 It is submitted that the following functional areas, applying the enumerated matters in CP XXI(6), read with the criterion of effectiveness in terms of CP XXI(1), should have yielded in the NT an allocation of exclusive powers to the provinces that is consistent with the balance that is required to be struck in terms of CP XX. These functional areas are set forth below.

8.2.12 Administration of indigenous forests, casinos, racing, gambling and wagering, disaster management, indigenous and customary law, local government, media services directly controlled or provided by the provincial government, provincial public enterprises, provincial economic affairs, provincial public works in respect of provincial government departments, and traditional leadership and authorities. To this list of powers and functions allocated by the NT to the central government should be added those powers which relate to essential provincial institutional and functional integrity, such as provincial and local elections, provincial name and rules governing the conduct of provincial representatives in the COP, et cetera.

8.2.1 3 These functional areas have a provincial focus which may be managed effectively at the provincial level and which would have affected the balance required in CP XX in a manner that the present allocation fails to achieve. This submission is confirmed by comparative experience in that constitutions, such as that of India, which reflect the criteria of effectiveness as the basis for the allocation of powers, allocate a greater number of exclusive powers to states, provinces or regions.

8.2.14 Schedule 5 makes parsimonious provision for exclusive provincial competences. The areas identified in 8.2.12 above, though included in Schedule 4, do not belong there. These are matters expressing the value of provincial autonomy. Their exclusion from Schedule 5 and allocation to Schedule 4, does not comply with CP XX and CP XXI.

8.3 **RESIDUAL POWERS**

8.3.1 CP XXI(8) has two parts. The first requirement of CP XXI(8) is that the Constitution shall specify how powers not specifically allocated in the Constitution are to be allocated. Secondly, CP XXI(8) answers how such specification will take place by indicating that these powers shall be dealt with as necessary ancillary powers pertaining to the powers and functions already allocated.

8.3.2 Powers that are not specifically allocated in the Constitution are residual powers. They include legislative powers of Parliament which often do not require administrative execution, such as marriage law. CP XXI(8) requires that residual powers be dealt with on the basis that they are allocated as ancillary powers necessary to the powers and functions allocated to the national government or provincial governments. Thus the principle requires that residual powers are parasitic upon powers specifically allocated.

8.3.3 In the NT the power and functions specifically allocated are those set out in Schedules 4 and 5, as well as provisions with respect to matters set out elsewhere in the NT. These schedules and the other clauses specifically allocate powers to the national government and the provincial governments.

8.3.4 The NT does not specifically allocate the balance of the powers, rather the NT allocates these powers as residual powers to the National Assembly, conferring power on the National Assembly to pass legislation "with regard to any matter" in terms of clause 44(1)(a)(ii).

8.3.5 Clause 104(4) of the NT provides that provincial legislation which is reasonably necessary or incidental to the effective exercise of a power listed in Schedule 4 is for all purposes to be regarded as legislation with regard to a matter listed in Schedule 4. Thus clause 104(4) provides for ancillary powers in respect of the legislative competence of the provinces in respect of Schedule 4 matters.

8.3.6 Clause 44(1)(a)(ii) does not comply with CP XXI(8). While clause 44(1)(a)(ii) does specify how residual powers are to be dealt with, it does not deal with such residual powers on the basis that they are necessary ancillary powers pertaining to powers already allocated to national government or provincial governments.

8.3.7 Accordingly, the residual powers of the Constitution are allocated in terms of the NT as a primary allocation of powers, whereas the requirements of CP XXI(8) require that the residual powers be parasitic upon powers already allocated.

8.3.8 It follows that clause 44(21)(a)(ii) is not a proper allocation of powers. The NT requires that the primary powers to be allocated to Parliament should be specifically allocated by way of a schedule akin to that of Schedules 4 and 5 so that the necessary ancillary residual powers may be properly specified in accordance with CP XXI(B). This tripartite allocation of powers would follow the basis of allocation to be found eg. in the Indian Constitution.

8.3.9 Had the NT followed this tripartite allocation of powers, it would have conformed with the other aspects of CP XXI, and allocated powers according to the requirements of effectiveness and the other criteria listed under CP XXI. That the NT allocated significant powers as residual powers, had the result that the division of powers in the NT has been insufficiently responsive to the criteria laid down in CP XXI, as set out above.

8.3.10 It is accordingly submitted that CP XXI(8) has an important structural role to play to ensure that the allocation of powers takes place according to a considered application of the criteria in CP XXI and does not occur by way of an allocation of residual powers en mass. The proper allocation of powers specifically to the national legislative, apart from allowing for a more rigorous application of the criteria in CP XXI, would also have permitted residual powers to be allocated as parasitic ancillary powers in accordance with CP XXI(8).

8.3.11 As discussed under 7.5 above, owing to the requirement to acknowledge cultural diversity, some of the residual powers should have been allocated to provinces.

8.4 **OVERRIDES**

8.4.1 The language of CP XXI differentiates between criteria for the allocation of powers and specified overrides, as it does between peremptory and presumptive requirements for both.

8.4.2 CP XXI(1) is mandatory ("shall") and sets forth a general rule of subsidiarity based on effectiveness rather than efficiency, using language suggesting that the exclusive allocation of powers should enjoy priority ("the level", and "such level", rather than "levels") [See CP XXI (7)]

8.4.3 CP XXI(2) lists five mandatory national overrides ("shall"), while CP XXI (3) refers to powers which are presumptively to be treated ("should") as national exclusive powers. CP XXI(4) refers to national exclusive powers, implicitly stating that they, however, may also be concurrent or used as overrides ("should"), while CP XXI(5) refers to national overrides which presumptively apply ("should"). CP XXI(6) mandatorily lists some provincial powers ("shall"), while CP XXI(7) sets forth criteria dictating when concurrency is to be preferred over exclusivity, conversely implicitly providing that exclusivity is to be preferred in all other instances as a matter of presumption ("should"). This latter aspect of CP XXI(7) ties in with the preference for exclusive allocation of powers also expressed in CP XXI (1). Finally, CP XXI(8) requires ("shall") the allocation of residual powers as "ancillary"' powers, thereby prescribing that almost all powers be enumerated and allocated explicitly in the Constitution.

8.4.4 Other relevant criteria may be found in CP XX, CP XXII, CP XXIII, and CP XXV.

8.4.5 It is submitted that under the aforegoing schema only the following overrides are required when exclusive powers are not concerned: in that national law shall prevail when necessary for (1) maintenance of essential national standards, (2) the establishment of standards required for the rendering of services, (3) maintenance of economic unity, (4) maintenance of national security, and (5) prevention of unreasonable actions taken by one province which are prejudicial to the interest of another province or the country as a whole.

8.4.6 It is contended that only the following additional overrides are permissible, in that the national law shall prevail where (1) uniformity across the nation is required for a particular function, (2) the determination of national economic policies or (3) the promotion of interprovincial commerce or (4) the protection of the common market with respect to labour, goods, services and capital are concerned.

8.4.7 It is submitted that clause 146 of the NT contravenes this schema as it creates additional and different overrides. Moreover, it impermissibly allows for the requirement of necessity to be presumed as having been waived. Overrides which should be disallowed, therefore, include all the overrides utilised in respect of a matter designated as exclusive, as well as the overrrides provided for in clauses 146(2)(a), 146(2)(b)(i), (ii), (ii) and 146(2)(c)(iv) and (vi).

9. CONSTITUTIONAL PRINCIPLE XXII

It is submitted that a potential encroachment by the national government into provincial competences constitutes, constitutionally, a violation of the provincial competence, notwithstanding the fact that the central government may choose not to invoke such powers with which it has been entrusted.

9.1 LEADER OF OPPOSITION

While section 137 of the IC leaves to the provincial legislature the discretion on how to deal with its internal arrangements by means of its rules, clause 116 (2) (d) of the NT forces it to recognise the role of the Leader of the Opposition, which in an encroachment of its institutional integrity.

9.2 PROVINCIAL ADMINISTRATION OF NATIONAL LAW

Clause 125 (2) (b) of the NT requires provinces to administer national legislation. This is an encroachment of provincial institutional integrity.

9.3 CODE OF ETHICS

Clause 136 (1) of the NT requires that national legislation adopts a code of ethics governing the conduct of members of the Executive Councils of provinces. This undermines the fiduciary relationship between the provincial legislature and its executive, and the political accountability of elected members to their electorate, and prevents a province from determining its own code of ethics and rules to govern executive behaviour. This is an encroachment on provincial institutional integrity.

9.4 PREMIER'S TERM OF OFFICE

CP XXII is contravened by clause 130 (2) which prevents a Premier from serving more than two terms of office, which matter should be decided by each province as part of its institutional integrity.

9.5 ADMINISTRATIVE CAPACITY

Clause 125(4) provides that any dispute concerning the administrative capacity of a province must be referred to the COP for resolution. Any determination of administrative capacity is essentially a technical, and not a political exercise. However, the resolution of a dispute by the COP could be political decisions and is to be regarded as a policy decision taken by national level of government, bearing in mind the composition of the COP. Clause 125(3) is thus not in compliance with the principle that the national government shall not exercise its powers so as to encroach upon the functional integrity of the provinces.

9.6 OMISSION OF SPECIAL PROTECTION

Further to 6.2 and 6.3 above, it is submitted that the omission of an equivalent provision to that contained in section 61 of the IC constitutes a further violation of CP XXII, which provides that the national government should not exercise its powers so as to encroach upon the functional or institutional integrity of the provinces, especially in light of clause 146(4) allowing national legislation to prevail even if directed at one or more provinces only and adopted merely as preemptive measure.

9.7 OVERRIDES

9.7.1 Clause 146(2)(c) of the NT provides for six circumstances under which national legislation prevails over provincial legislation. Clause 146(4) creates a presumption that any national legislation which deals with any matter referred to in clause 146(2)(c), and has been passed by the COP, is presumed necessary for the purposes of clause 146(2)(c). In this case and with respect to the requirement of necessity such legislation prevails over provincial legislation not because of a substantive reason of content, but merely procedurally. It must be stressed that the requirement of necessity is a mandatory one, in terms of CP XXI(2), which is also contravened. This also constitutes non-compliance with CP XX, as it relates to the promotion of legitimate provincial autonomy.

9.7.2 Clause 146 of the NT, as a whole, deals with conflicts between national and provincial legislation. Sub-clause (6)(a) provides that national and provincial legislation referred to in sub-clauses (1) to (5) includes a law made in terms of an Act of Parliament, or a provincial act, only if that law has been approved by the COP. It is possible that the COP, for policy reasons, may not approve a provincial law in order to delay the resolution of a conflict, or to ensure the primacy of national legislation despite its merits (see, supra, A2.2.5.).

This contravenes CP XXII as it permits the national government to encroach upon the functional or institutional integrity of a province, even when the contents of its legislation would not grant the extension of powers over the provincial sphere.

9.8 NATIONAL PRIMACY OVER PROVINCIAL CONSTITUTION

9.8.1 Clause 147(2) of the NT provides that in the event of a conflict between national legislation and a provision of a provincial constitution with regard to Schedule 5 matters the national legislation prevails over the provision of the provincial constitution in terms of clause 44(2). The effect of this is to reduce the status of a constitutional provision adopted by a two thirds majority, to that of ordinary provincial legislation, and thus enable the national government to encroachment upon a province's functional or institutional integrity.

9.8.2 Clause 147 (1) (c) of the NT provides that, in the event of a conflict between national legislation and a provision of a provincial constitution with regard to a matter listed in Schedule 4, clause 146 applies, including clauses 146(4) and (6), as if the affected provision of the provincial constitution were provincial legislation referred to in that clause. As discussed above, clause 146(4) and (6) enable to COP to determine national primacy for policy or political reasons, to which the provisions of a provincial constitution be exposed in peril. This does not comply with CP XXII. Clause 147(1)(c), facilitates an encroachment upon a province's functional or institutional integrity as the clause reduce the status of a constitutional provision dealing with a provincial competence adopted by a two-thirds majority, to that of ordinary provincial legislation.

9.9 FORCED CO-OPERATION

9.9.1 Despite the provisions of chapter 3 of the NT, setting out principles of co-operative government and intergovernmental relations, and associated provisions such as clause 237, which requires all constitutional obligations to be performed diligently and without delay, and notwithstanding the re-statement of CP XXII in clause 41(1)(g), the schema of co-operative government in the NT is not, it is submitted, in compliance with CP XXII. Although certain of the various provisions governing the application of the concept of co-operative government are not problematic, the NT nevertheless provides, in essence, for a form of forced co-operation which is not only an oxymoron, but a form of encroachment by the national government into a province's functional and institutional integrity. **In re: THE NATIONAL EDUCATION POLICY BILL. NO. 83A 1995, 1996 (4) BCLR 518 (CC) para 31**. The use of the concept of spheres of government constituted nationally, provincially and locally is suggestive of the qualitative difference expressed in the principles with regard to levels of government, a notion which clearly expresses a classic vertical separation of powers of governments which may well co-operate with each other, but which are not obliged to. The encroachment by national government is derived from the fact that it is the national government alone which is empowered by the NT to regulate co-operation and conflict resolution between the spheres of government.

9.10 INSTITUTIONALISED INTERGOVERNMENTAL RELATIONS

9.10.1 Clause 41(2) of the NT provides that the national government must establish or provide for structures and institutions to promote and facilitate inter-governmental relations, which must thus, of necessity, be statutory bodies with specific powers and functions, as it again is pointless to create structures and institutions devoid of powers and functions. Such structures or institutions must therefore claim powers that are at present in the domain of either the national or provincial governments. For instance, the IC does not provide for structures and institutions to facilitate intergovernmental relations, but the provinces together and the provinces together with the national government, have created voluntary mechanisms to facilitate co-operation. These bodies have no powers and participation is not mandatory. The provisions in the NT, providing for national government intervention, in this manner, constitute an encroachment on a province's institutional integrity. It is worth noting how in the countries where the notion of intergovernmental cooperation developed, namely the United States of America and Canada such institutionalised statutory fora have never been established.

9.11 INTERGOVERNMENTAL DISPUTES

9.11.1 Clause 41(3) provides that the national government must provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes. Clause 41(1)(h)(vi) of the NT requires governments to avoid legal proceedings against each other. Clause 41(4) of the NT provides that any 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. Clause 41 (5) of the NT further provides that if a court is not satisfied that the requirements of subsection (4) have been met, it may refer a dispute back to the organs of state involved.

9.11.2 It is submitted that these four provisions afford the national government control over dispute resolution mechanisms and procedures. As clause 237 of the NT stipulates that all constitutional obligations must be performed diligently and without delay, provinces are thus obliged to comply. Again, there is no equivalent provision in the IC, but this has not prevented a negotiated settlement of disputes. By co-ercing a province into following procedures and mechanisms determined solely by the national government, including the removal of immediate access to the courts, a province is thus prevented from settling disputes through alternate means. This comprises an encroachment on a province's functional and institutional integrity at the hands of the national government. These provisions thus violate CP XXII.

9.12 OVERRIDES ON LOCAL GOVERNMENT

Clause 139 (1) defines the circumstances under which a province may intervene in a municipality. Sub-clause (2) provides a crucial executive role for the national government, through the COP. Subclause (3) further specifies that national legislation may regulate the process of intervention. If the submission that local government should be a provincial competence is upheld, this clause represents an encroachment by the national government on the functional and institutional integrity of a province and is thus not in compliance with CP XXII.

9.13 ASSIGNMENT

Clause 15 of Schedule 6 to the NT provides that an authority within the national executive which administers legislation failing beyond Parliament's legislative power when the NT takes effect, remains competent to administer such legislation until assigned to a province. This provision lapses after two years. As there is no obligation on the President in terms of clause 14 to assign powers sooner rather than later, this could result in the national government encroaching upon a province's functional or institutional integrity.

9.14 LEADER OF OPPOSITION

While section 137 of the IC leaves to the provincial legislature the discretion on how to deal with its internal arrangements by means of its rules, clause 116(2)(d) of the NT forces it to recognise the role of the Leader of the Opposition, which is an encroachment of its institutional integrity.

10. CONSTITUTIONAL PRINCIPLES XXI AND XXII

10.1 ELECTORAL MATTERS

10.1.1 Clause 105 (1) of the NT provides that the electoral system to be applied in the election of members of a provincial legislature must be prescribed by national legislation Clause 106(4) provides that vacancies in a provincial legislature must be filled in terms of national legislation.

10.1.2 Clause 157 of the NT provides that the election of members of municipalities must be provided by national legislation. Clause 190 provides for the establishment of a single Electoral Commission for the country, with the sole responsibility of managing provincial and local (as well as national) elections.

10.1.3 It is submitted that essential provisions relating to, for example, the electoral system for provincial or local government elections having to comply with requirements such as proportionality, voting age, and that elections be fair and free, are acceptable. However, an encroachment on a provincial government's functional or institutional integrity is permitted by the aforementioned clauses which provide for such matters to be exclusive legislative and executive competences of the national government. Likewise clauses 105, 157 and 190, with respect to provincial and local elections, are

not in compliance with any of the criteria of CP XXI, which suggest, rather, that this should comprise an exclusive or concurrent provincial competence.

10.2 REFERENDUM

Clause 127(2)(f) of the NT provides that a Premier of a Province may only call a referendum in the province in accordance with national legislation. This represents encroachment by the national government of a province's functional or institutional integrity, and is moreover not in compliance with CP XXI which does not require that this be a concurrent legislative or legislative competence.

10.3 PROVINCIAL REPRESENTATIVES IN THE COP

10.3.1 Clause 65 (2) provides that national legislation must provide for a uniform procedure in terms of which provinces confer authority on their respective delegations to cast votes on their behalf in the COP. Clause 65(2) also facilitates an encroachment of a province's functional or institutional integrity and is therefore not in compliance with CP XXII.

10.3.2 Clause 104(4) provides that provincial legislation regarding a matter that is reasonably necessary for, or incidental to the effective exercise of any Schedule 4 matter is, for all purposes, regarded as legislation on a matter listed in Schedule 4. The casting of a provincial vote in the COP with regard to a Schedule 4 matter is reasonably necessary for or incidental to a province's exercise of a Schedule 4 competence. It is accordingly submitted that clause 65(2) constitutes an encroachment of a province's functional or institutional integrity. It is moreover, not in compliance with CP XXI whose principles do not justify as an exclusive national legislative competence, the modalities by which a province confers authority upon its delegates to vote in the COP.

10.4 ORGANISED LOCAL GOVERNMENT

In terms of clause 163 an Act of Parliament must provide for the recognition of national and provincial organisations representing municipalities. It furthermore provides that such an Act of Parliament must determine the procedures by which local government may consult with national or provincial government. This is an encroachment by the national government of a province's functional and institutional integrity in non-compliance with CP XXII. It is also in non-compliance with CP XXI which suggests that this be a provincial competence.

10.5 LOCAL GOVERNMENT

10.5.1 Clause 1 64 of the NT provides that all matters concerning local government not dealt with in the NT may be prescribed by national legislation or by provincial legislation within the framework of national legislation.

10.5.2 Legislative and executive competences of provinces with respect to local government are substantially reduced when compared to the provisions of the IC, and accordingly, is not in compliance with the criteria for the allocation of powers required by CP XXI.

10.5.3 Insofar as this clause compels the provinces to exercise their legislative or executive competence within the framework of national legislation, it facilitates an encroachment by the national government of a province's functional or institutional integrity in non-compliance with CP XXII.

10.6 **DOUBLE BALLOT**

CP XVIII(2) and CP XX have been contravened by the fact that the constitutional requirement of double ballot for national and provincial elections set out in Schedule 2 of the IC has been abolished with respect to any elections after 1999, thereby contravening the requirement of the promotion of legitimate provincial autonomy.

D. CONTRAVENTION OF ADDITIONAL PRINCIPLES

1. CONSTITUTIONAL PRINCIPLE XII

1.1 CP XII reads as follows:

"*Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected,* "

1.2 This Principle contains a peremptory mandate which is not complied with. Clause 31 of the NT does not 'recognise and protect" any rights, but merely indicates that the rights mentioned therein "may not be denied". This language is anomalous when compared with all other sections of the Bill of Rights of the NT, and should be intended as not prohibiting the recognition of the right rather than positively bringing it about as required by CP XII. It is not even a peremptory mandate to Parliament, as it does not use language such as "the State must take reasonable legislative measures to..." often used in other clauses of the NT.

1.3 Furthermore, to the extent that clause 31 creates a right, it does so only for "persons belonging to a cultural, religious or linguistic community" and not for all members of society. Therefore, people, regarded as individuals, or as members of formations other than cultural, religious, or linguistic communities, have neither the individual nor the collective right of maintaining organs of civil society, such as chambers of commerce, charitable entities, professional associations, environmental action groups, etc. This clause, for instance, will not prevent government from assuming control of all non-governmental associations, or to nationalise, for example, the Red Cross of the World Wild Life Fund.

2. LABOUR RELATIONS

2.1 The exclusion of the right to lock-out

2.1.1 CP XXVIII provides that:

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

2.1.2 Clause 23(1) of the NT affords everyone the right to fair labour practices, and clause 23(2) provides, inter alia, that every worker has the right to strike. Clause 23(3), which sets forth every employer's rights, however, omits the right to lock-out.

2.1.3 In this regard it is contended that, as stated by McMillan J in **AMALGAMATED SOCIETY OF ENGINEERS v MILLAR'S KARRI AND JARRAH CO 9 WALR 207**, "... a lock-out is the converse of a strike...", as approved by Neser J in **DE BEER v WALKER N.0. 1948 (1) SA 340 (A) at 342.**

2.1.4 **TROLLIP** in **BENJAMIN JACOBUS AND ALBERTYN (eds), STRIKES. LOCKOUTS AND ARBITRATION IN SOUTH AFRICAN LABOUR LAW 83**, describes the lock-out as:

> "*... the employer's side of the economic pressure when the parties are unable to resolve their problems in negotiations or agree on the terms and conditions of employment.* "

2.1.5 Furthermore, as stated by **BRASSEY CAMERON CHEADLE AND OLIVIER, THE NEW LABOUR LAW**, at **133**, the lock-out:

> "*... is intended as a counterweight to the right to strike, and is a weapon of considerable practical importance to employers.* "

2.1.6 And as stated by **MACFARLANE, THE RIGHT TO STRIKE,** at **180 (**as quoted in **Brassey Cameron Cheadle and Olivier op cit at 129**):

> "*... while the right to strike as the legal right to secure the greatest good for sectional interests without regard to others, may be fully compatible with the ethics of the market economy, it lacks any claim to be put on a higher moral plane than the employer's right to lock-out, with which it is intimately associated in English law.* "
>
> (For a different viewpoint see, however, **CAMERON CHEADLE AND THOMPSON, THE NEW LABOUR RELATIONS ACT, THE LAW AFTER THE 1988 AMENDMENTS** at **31**)

2.1.7 In chapter 14 of the NT, which contains general provisions, clause 241 deals with the Labour Relations Act, No. 66 of 1995 (hereinafter "the LRA") - which has yet to come into operation - and states that it remains valid, despite the provisions of the NT, until the provision is amended or repealed. Chapter IV (sections 64-77) of the LRA deals with strikes and lock-out, and makes provision in certain cases for Lockouts.

2.1.8 Clause 241(2) of the NT provides that a bill to amend or repeal a provision of the LRA may be introduced in Parliament only after consultation with national federations of trade unions and employer organisations.

2.1.9 As stated by **CHASKALSON ET AL, <u>CONSTITUTIONAL LAW OF SOUTH AFRICA</u>, 3-12 para 3.3**:

"*The Principles thus place substantive and justiciable limits on the constitution-making authority of the Constitutional Assembly*. "

2.1.10 It is submitted that it is clear that:

(a) clause 241 of the NT places the LRA above the Constitution, running counter to CP IV, which provides that the Constitution shall be the supreme law of the land; and

(b) it would be a matter of comparative ease to remove the right to lock-out currently appearing in the LRA by a simple majority in Parliament, thereby taking away this while maintaining the right to strike.

2.1.11 Furthermore, it is contended that the provisions of clause 241 contravene CP XXVIII and that the NT has not recognised and protected the employer's right to engage in collective bargaining. As stated by **CAMERON CHEADLE AND THOMPSON** op cit at **4**:

"*The guarantor of the institution of collective bargaining is the threat of industrial action. No threat is effective unless there is a real possibility of its eventuality. Strikes and Lockouts are integral features of collective bargaining and unless they are afforded protection from criminal prosecution, civil interdicts, damages actions, and (in the case of strikes) the employer's power to dismiss, the threat becomes non-existent. Without the potential for pain, there would be no serious endeavour to negotiate and conclude a collective settlement.* "

2.1.12 Moreover, it is contended that the omission of the right to lockout means a contravention of employers' rights to fair labour practices in accordance with CP XXVIII.

2.2 **<u>Exclusion of the LRA from constitutional compliance</u>**

CP II, CP IV and CP VII have been contravened by clause 241 of the NT which excludes the LRA from justiciability under the Constitution, accordingly limiting constitutional supremacy (CP IV) and several fundamental rights (CP II). For instance, the LRA enables agency shop agreements and closed shop agreements which infringe upon the right of association and disassociation, and limit the right of judicial protection, requiring that labour disputes be conciliated, mediated and arbitrated, preventing direct access to court for the protection of contractual rights (CP II and CP VII).

3. **PRESIDENTIAL PREROGATIVE - CONSTITUTIONAL PRINCIPLES III, IV, V AND VII**

3.1. Clause 84(2)(j) of the NT confers on the President responsibility for pardoning or reprieving offenders and remitting any fines, penalties or forfeitures.

3.2. The power contained in clause 84(2)(j) of the NT derives from the royal prerogative which existed prior to 27 April 1994 and was discussed in cases such as: **SACHS v DONGES N.0. 1950 (2) SA 265 (A); BOESAK v MINISTER OF HOME AFFAIRS AND ANOTHER 1987 (3) SA 665 (C); and DILOKONG CHROME. MINES (EDMS) BPK v DIREKTEUR-GENERAAL, DEPARTEMENT VAN HANDEL EN NYWERHEID 1992 (4) SA 1 (A).**

3.3. It is submitted that the clause in question is an impermissible attempt to preserve the prerogative from extinction, in the face of the provisions of CP IV which states that the Constitution shall be the supreme law of the land.

3.4. It is contended that the true effect of the supremacy of the Constitution is that the President may not act pursuant to the so-called Presidential prerogative, for it is derived from powers outside the ambit of the Constitution.

3.5. For the reasons cogently developed by **BREITENBACH** in **THE SOURCES OF ADMINISTRATIVE POWER: THE IMPACT OF THE 1993 CONSTITUTION ON THE ISSUES RAISED BY DILOKONG CHROME MINES (EDMS) BPK DIE DIREKTEUR-GENERAAL, DEPARTEMENT VAN HANDEL EN NYWERHEID 1992 (4) SA 1 (A)** in **1994 (2) STELL LR 187 at 209-213**, it is submitted that it is clear that the previously existing Presidential prerogative was abrogated by the IC. As contended by Breitenbach, **op cit** at **212-213**, unlike in the 1983 Constitution, there is no general provision in the IC conferring on the President the prerogative powers possessed by his predecessors and:

"*the President ... will possess those powers granted by the 1993 Constitution and no other*. "

3.6. It is submitted that the right of presidential pardon envisaged by clause 84(2)(j) will be subversive of the separation of powers between the legislature, executive and the judiciary enshrined in CP VI. It also constitutes a limitation of the powers of the judiciary

embodied in CP VII and results in certain persons being treated differently in law from others, contrary to CP V, which provides for the equality of all before the law and an equitable legal process.

4. POLITICAL REPRESENTATION - CONSTITUTIONAL PRINCIPLES I, II, VII AND VIII

4.1. CP VIII reads as follows:

"*There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' role and, in general, proportional representation.* "

4.2. The provisions of items 6(3) and 11 (1) of Schedule 6 to the NT mean a perpetuation of the current system of proportional representation for the first elections of the National Assembly as well as of the provincial legislature's under the NT. This proportional system is exclusive, and in contravention of CP VIII.

4.3. Clauses 46 and 105 of the NT deal with the composition and election of members of the National Assembly and the provincial legislatures respectively. This requirement could be met, for example, by a provision similar to that to be found in clause 157(2)(b) of the NT in respect of local government.

4.4. However, item 6 of Schedule 6 to the NT provides that Schedule 2 to the IC, as amended by annexure "A" to Schedule 6 to the NT, will apply to the first election of the National Assembly and the provincial legislatures under the NT, with the result that the next elections to these bodies will be in accordance with an exclusive list system of proportional representation, contrary to the provisions of CP VIII.

4.5 Clause 47 of the NT deals with membership of the National Assembly, while clause 106 deals with membership of provincial legislatures. Clause 47(3) of the NT states that a person loses membership of the National Assembly, **inter alia**, if she or he ceases to be eligible in terms of clause 47(1). Clause 1063 is the provincial equivalent of clause 47(3).

4.6. A ground for loss of eligibility as a member introduced by item 6 of Schedule 6 to the NT, as read with Schedule 2 to the IC, as amended by annexure "A" to Schedule 6 to the NT - as item 23A of Schedule 2 to the IC - is the loss of membership of the National Assembly or provincial legislature in consequence of she or he ceasing to be a member of the party which nominated her or him as a member of the National Assembly or the provincial legislature concerned.

4.7. CP 11 states that everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions. Clearly a universally accepted fundamental right is that of every citizen of voting age to seek office and, once elected, to hold same. The result of the

expulsion of a member from her or his party is the loss of membership of the legislature in question. This could happen despite the party in question having deviated from its own originally propounded programme or principles, while the member remains steadfastly committed to the original programme or principles. This, it is submitted, fails foul of CP I and also of CP VII which requires democratic representation at each level of government.

4.8. It should be mentioned that in terms of clause 62(d) a person who is a permanent delegate to the COP would lose his membership of that body if she or he ceases to be a member of the party that nominated her or him and is recalled by that party.

4.9. The fact that item 23A(3) of Schedule 2 to the IC - amended as set forth above - permits Parliament, by an Act passed in accordance with clause 76(1) of the NT, within a reasonable period after the NT has taken effect, to amend the item in question in order to provide for the manner in which it would 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, cannot help the proponents of certification of the NT. The simple reason for so submitting is that at this time - which is the relevant time - the NT does not comply with the Principles. In fact, item 23A(3) contains an implied admission of this fact; that is why it provides for a possible future mechanism to permit the retention of membership despite the loss of party membership.

4.10. It is of particular importance to emphasise that clause 1(d) of the NT states as founding values of the Republic: universal adult suffrage, a national common voters role, regular elections, and a multi-party system of democratic government, with the aim of ensuring accountability, responsiveness and openness. It is submitted that an exclusive list system of proportional representation runs counter to the need for accountability, responsiveness or openness, and that the same holds true for the "anti-defection provisions" which result in members losing their seats in a legislature in the event of their leaving the party which nominated them. In this regard it is also contended that these also constitute contraventions of CP XVII, which requires that at each level of government there shall be democratic representation.

5. **CONSTITUTIONAL PRINCIPLE XIV**

CP XIV is contravened by the fact that the NT does not contain (sufficient) provision for the participation of minorities in the legislative process. Clauses 57(2)(b) and 116(2)(b) merely provide that this requirement be fulfilled by subsequent provisions and in the rules of the legislative concerned.

6. **CONSTITUTIONAL PRINCIPLE VII**

6.1 CP IV and CP VI have been contravened by the fact that the NT does not sufficiently guarantee the independence of the Constitutional Court from other branches of government which through their action may impair the Court's effectiveness. In this

respect the NT does not ensure that the Constitution is the supreme law, which supremacy is a function of the Constitution's justiciability.

6.2 The NT has failed to entrench essential notions of constitutional adjudication which will need to be filled in by Parliament. Namely the criteria and modalities governing the access to Court are not spelt out in the Constitution and are deferred to ordinary rather than constitutional adjudication. This is quite animalist, when compared to the constitutional arrangements supporting the jurisdiction of the Constitutional Courts of Austria, Germany, Italy and Spain. These countries have followed the rule that Parliament cannot legislate about the Constitutional Court, and that such Court exists immediately under the Constitution and constitutional legislation. This theoretical approached was adopted under the IC, and it was significant that the Constitutional Court Complementary Act fist adopted as ordinary legislation was then re-adopted as a constitutional amendment.

6.3 The NT gives to Parliament the power to determine who can have access the Constitutional Court, when and how, and in doing so the NT has given Parliament the power to restrict that access in general, or with respect to specific classes of legislation.

6.4 The NT also fails to determine the criteria for proper qualification of Justices, thereby enabling the ordinary legislature to make such a sensitive decision which may affect the Court's independence.

6.5 Furthermore, the extensive presidential powers in the appointment of Justices of the Constitutional Court and members of the Judicial Service Commission, which in turn participates in the appointment of the Justices, potentially undermines both the impartiality of the Court as well as the notion of separation of powers.

7. CONSTITUTIONAL PRINCIPLE XIII

7.1 CP XIII is contravened by clauses 211 and 212 of the NT which do not guarantee the historical and current powers and functions of traditional leadership in respect to the administration of their communities

7.2 *Inter alia* the NT no longer enables traditional leaders to be ex officio members of elected local government structures as provided for by section 182 of the IC, and does not entrench traditional authorities, which are the institutions through which the powers of government of traditional leadership (as opposed to ceremonial and cultural powers) are expressed.

7.3 CP XVII (democratic representation in government) acknowledges that it clashes with CP XIII (powers of traditional government), but it clarifies that CP XIII is paramount in respect to CP XVII, indicating that their relationship is such that it is CP XVII that derogates from CP XIII, rather than the converse. CP XVII clearly links local government to traditional leadership and states that with respect to traditional leadership the principle of representative democracy in local government does not apply. This confirms that the

"institution, status and role of traditional leadership" also contains essential local government functions which are to be protected.

7.4 However, clause 211(2) of the NT does not recognise traditional authorities (as opposed to traditional leadership), but merely states that they can continue to "function" until they are done away with. Clauses 151 to 164 of the NT require the establishment of elected municipalities for the "whole of the territory of the Republic" [clause 151 (1)1. In doing so the NT fails to comply with the prescription of protecting the institution, status and role of traditional leadership, which include important local government powers (i.e. local planning and zoning as it relates to the administration of the community's land)

7.5 The notion that local government consists of municipalities excludes the establishment of Regional Councils as an elected over-arching local government structure comprising elect ed municipalities and unelected traditional authorities. In terms of the NT, this type of Regional Council could exist as only a "co-ordinating" body, and not as a local government structure, or a "municipality" in its on right. In the absence of over-arching elected Regional Councils, the establishment of elected municipalities for the whole of the Republic and the preservation un-elected traditional authorities is irreconcilable. Therefore, in terms of the NT, traditional leadership may not be regarded as a local government structure, and the local government powers and functions of traditional leaders are transferred to elected municipalities. It can be noted that the notion of Regional Councils is expressed in the Local Government Transition Act referred to in section 245 of the IC.

7.6 CP XIII(2) is contravened by clause 143 of the NT in so far that it leaves to the discretion of the province whether to recognise and protect a monarch, while CP XIII(2) requires it to do so.

7.7 CP XIII(2) is contravened by item 13 of Schedule 6 of the NT read together clause 143 in so far as it fails to recognise the full import of the provisions relating to the monarch contained in the KwaZulu Natal Constitution, which could be overridden by clause 143.

8. CONSTITUTIONAL PRINCIPLES VI, VII, II AND V - THE PROSECUTING AUTHORITY

8.1 Separation of powers

8.1.1 CP VI and CP VII envisage a separation of powers between the legislature, executive and judiciary.

8.1.2 The effect of section 241(4) of the IC is that CP VI and CP VII are deemed to form part of the substance of the IC.

8.1.3 It is clear that the appointment and authority of the Attorneys-General are considered to be part of the judiciary in the IC. This is borne out by the following:

(a) While the legislature and the executive are provided for elsewhere in the IC, chapter 7 of the]C provides for the judiciary under the heading "**THE JUDICIAL AUTHORITY AND THE ADMINISTRATION OF JUSTICE**" and includes section 108 which provides for the appointment and the authority of the Attorneys-General.

(b) The effect of section 108 of the IC is that the national executive is not vested with the power to interfere with the authority reserved for the Attorneys-General in section 3(5) of the Attorney-General Act, 92 of 1992 ("Act 92 of 1992') which reads as follows:

" *(1) An Attorney-General shall, in respect of the area for which he has been appointed, have the authority to prosecute on behalf of the State in criminal proceedings in any court in the said area any person in the name of the Republic in respect of any offence in regard to which any court in the said area has jurisdiction.*

(2) Any Attorney-General may-

(a) perform all functions relating to the exercise of the authority conferred upon him under subsection (1); and

(b) perform all duties and exercise all powers imposed or conferred upon him under the Criminal Procedure Act, 1977 (Act 51 of 1977), and any other law which is in accordance with the provisions of this Act.

(3) The authority conferred upon an Attorney-General under subsection (1) shall include the authority to prosecute in any court any appeal arising from any criminal proceedings within the area of jurisdiction of the attorney-general concerned.

(4) ...

(5) The Minister shall co-ordinate the functions of the attorneys-general and may request an attorney-general to -

(a) furnish him with information or a report with regard to any case, matter or subject dealt with or handled by an attorney-general in the performance of his duties or the exercise of his powers; and

(b) provide him with the reasons for any decision taken by the attorney-general concerned in the performance of his duties or in the exercise of his functions.

(6) (a) An attorney-general shall annually not later than the first day of March submit to the Minister a report on all his activities during the previous year.

(b) A report referred to in paragraph (a) shall be laid upon the Table in Parliament within 14 days after it is submitted to the Minister, if Parliament is then in session, or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session."

Act 92 of 1992, therefore:

"*... has restored the independence of the South African Attorney-General which is similar to the position he enjoyed prior to 1926.* "

EX PARTE: ATTORNEY-GENERAL, NAMIBIA:
IN RE: THE CONSTITUTIONAL RELATIONSHIP BETWEEN THE ATTORNEY-GENERAL AND THE PROSECUTOR- GENERAL, 1995 (8) BCLR 1070 (NmS), 1088D as well as **1083E.**

8.1.4 The importance of the notion to consider the prosecuting authority to be part of the judiciary was succinctly emphasised in **EX PARTE: ATTORNEY-GENERAL. NAMIBIA: IN RE: THE CONSTITUTIONAL RELATIONSHIP BETWEEN THE ATTORNEY- GENERAL AND THE PROSECUTOR-GENERAL, supra, 1079 C-F, 1084 D-E, 1085H - 1086C, 1089 C-G.**

Prosecutions are instituted in the name of the State and on behalf of the Republic, not the government. Where it is possible for politicians to influence the decision to prosecute it means that the full force of the resources of the State, which ought to be deployed only in the public interest and for the public benefit, can be used at the instance of politicians and may therefore be mis-used in order to harass opponents of the government of the day.

8.1.5 At present, therefore, the offices of the Attorneys-General:

(a) are structurally judicial in nature;

(b) form part of the independent judicial branch of government.

8.1.6 Clause 179 constitutes a serious violation of the fundamental underlying concept of a Rechtsstaat as contemplated by CP VI and CP VII by entrusting the national executive with the:

(a) appointment of the National Director of Public Prosecutions [clause 179(1)(a)];

(b) authority not only to determine prosecution policy but also to intervene in the prosecution process [clause 179(5)].

8.2 **Protection of fundamental rights**

8.2.1 CP 11 provides that all universally accepted fundamental rights, freedoms and civil liberties, shall be provided for and protected in the Constitution. The said rights and freedoms cannot be protected by "*allowing a political appointee to dictate what prosecutions may be initiated, which should be terminated or how they should be conducted*."

EX PARTE: ATTORNEY-GENERAL, NAMIBIA:
IN RE: THE CONSTITUTIONAL RELATIONSHIP BETWEEN THE ATTORNEY-GENERAL AND THE PROSECUTOR-GENERAL, supra, 1079 D-E.

In this regard particular reference is made to the rights to equality (clause 9), freedom and security of the person (clause 12) and access to courts (clause 34).

8.2.2 An "equitable legal process" as envisaged by CP V leaves no room for a political appointee who can interfere with the prosecution process as aforesaid.

9. **CONSTITUTIONAL PRINCIPLE XXXIV**

CP XXXIV (3) requires the NT to entrench the continuation of any territorial entity of a community sharing a common cultural and language heritage established in terms of the IC. Traditional communities (tribes) in provinces such as KwaZulu Natal share a common cultural and language heritage. They have expressed institutions through which they have administered themselves autonomously and on the basis of their laws, namely indigenous and customary law. These institutions are the Traditional Authorities and the Regional Authorities. Even though these institutions preceded the IC, they were established by section 181 and 182 of the IC. These institutions are territorial, for their jurisdiction is determined territorially (see section and 181 and 182 of the IC). The NT has not *entrenched* the right of these institutions to continue to exist, with the same *powers and functions*, as required by CP XXXIV (3). On the contrary, clause 212 of the NT allows "applicable legislation" to eliminate or alter these institutions or their powers and functions, while clause 151 (1) and the whole of Chapter 7 of the NT are incompatible with the preservation and entrenchment of these institutions, and their present powers and functions. (cfr. the comments made under CP XIII above).

10. **CONSTITUTIONAL PRINCIPLES CP VIII AND CP XIV**

CP VIII is violated by clauses 47 (3) (b), 106 (3) (b) and 62 (4) (e) of the NT, which enable the majority of the legislature concerned to dismiss a political representative on account of non-attendance as determined by such legislature. This violates the notion of representative government making representatives accountable only to their electorate for

their performance, or the manner of the execution of their mandates. This clause also prevent democratic methods of political action of minority parties, such as that of boycotting parliamentary meetings for a period of time, and for this reason also contravenes CP XIV.

E. CONCLUSION

In all the circumstances it is submitted that this Court should decline to certify the NT in terms of section 71(2) of the IC.

PETER HODES S.C.
DAVID UNTERHALTER
R F VAN ROOYEN
6 June 1996

THE APPLICATION TO CERTIFY A CONSTITUTIONAL TEXT IN TERMS OF SECTION 71 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 200 OF 1993

LIST OF AUTHORITIES

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19. EX PARTE: ATTORNEY-GENERAL. NAMIBIA: IN RE: THE CONSTITUTIONAL RELATIONSHIP BETWEEN THE ATTORNEY-GENERAL AND THE PROSECUTOR-GENERAL 1995 (8) BCLR 1070 (NmS).