PROLOGOV CONSULTANCY

SUBMISSION TO THE

CONSTITUTIONAL COURT

regarding

Local Government in the

New Constitution

Dr DL Craythorne
PROLOGOV Consultancy
502 Buitenkioof Centre
8 Kioof Street
CAPE TOWN
8000

Certification of the Constitutional Text

Pursuant to the advertisement published in Rapport on 19 May 1996, 1 make the submissions hereunder to the Constitutional Court (hereafter the Court).

The Specific Provisions Concerned

Clauses 146 and 147 of the constitutional text, together with Chapter 7 of the constitutional text and in particular clauses 155, 156, 157, 158 and 159.

The Constitutional Principles Concerned

The Constitutional Principles (hereafter the Principles) concerned are: Vill (electoral system); XVI (three levels of government); XVIII (powers and functions); XIX (exclusive and concurrent powers); XX (legislative powers); XXI (allocation of powers); and XXIV (legislation on local government).

The Grounds of Obiection

Chapter 10 of the interim Constitution refers, in sections 174, 175 and 178 to legislation on local government being enacted by a competent authority. If these sections are connected to section 126 of the interim Constitution, it will be seen that provincial legislatures may legislate on all aspects of local government. It is submitted that the approach of the interim Constitution accords with the Principles referred to above.

Clauses 155(1) and 157 of the new text require the National Assembly to legislate on: t categories of municipalities; their fiscal powers and functions; the demarcation of boundaries; the composition of councils; the electoral system; and the qualifications of councillor.

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These exclusive legislative powers for national legislation are, I submit, substantially inferior to or substantially less than those provided for in the interim Constitution. The Court's attention is directed to Principle XVI, in terms of which there must be a provincia. level of government. A deliberative body which is a government must be endowed with a legislative competence, and this competence was negotiated in 1993 and enshrined in th interim Constitution. At the same time, the negotiators adopted inalienable Principles, which in the instant case are so strong that they (the negotiators) could only have contemplated a continuation of provincial legislative competence as it was then agreed. Therefore, in terms of Principle **XVIII.** 2. the provisions of Chapter 7 in the new text, referred to above, are substantially less or substantially inferior to concomitant provision,,, in the interim Constitution. This argument is strengthened by Principle XX which requires provinces to have adequate legislative powers to function effectively. It is clear that local government remains a provincial function in Chapter 7, but clearly in an inferior sense.

Principle XIX requires the powers and functions of the national and provincial levels of government to include exclusive and concurrent powers and this principle is expressed i I section 126(3) of the interim Constitution in a specific manner, viz that provincial legislation prevails over national

legislation unless the latter can pass certain tests. Clause 146(2) of the new text deals with the matter exactly in a reverse form, viz that national legislation prevails over provincial legislation if it applies uniformly over the country as a whole, subject to tests akin to those presently prevailing. Clause 146(3) introduces a new factor, viz that of unreasonable action by a province. What is reasonat le or not is largely a matter of subjective judgement and therefore is a cause for legal uncertainty. If taken with the approach of the clauses referred to in Chapter 7, the whole line of approach leads to the conclusion that in respect of local government, the new tex offers that which is substantially inferior or substantially less than what is offered.

Furthermore, the second sentence of Principle **XXIV** clearly implies that the extent **of**

comprehensiveness of legislation on local government must vest equally in both the national and provincial levels of government and cannot be divided between them.

Clause 157(1) also departs from the interim Constitution in two respects. First, it provide; for wards as a alternative to proportional representation for the election of councillors. Principle Vill only refers to proportional representation "in general" and not as a sole system. Second, electoral legislation is reserved to national legislation and that is not in accordance with the already-stated legislative competences of provinces.

Clause 158(1) contains one departure from the provisions of section 179(5) of the interirn Constitution but a very significant departure nevertheless. Section 179(5)(e) refers to a person not

being eligible to be a councillor if he or she is disqualified in terms of any oth law. Paragraph 6(d) of Schedule 4 to the Local Government Transition Act, 1993 (Act 2C of 1993) prohibits a person becoming a councillor if he or she at 15:00 on the day preceding nomination day, is indebted to the local government concerned in respect of any assessment rates, rent, service charges or any other monies for a period longer tha i three months. This prohibition does not appear in clause 158(1).

What is at stake here, the principle based on the fact that a person elected to govern a community, and who will decide on the local taxes to be paid **by** that community, should set an example and be above reproach.

Finally, clause 158(2), it is submitted, is amibiguous.

The Court is respectfully requested, on this issue, to consider a balance between rights society and obligations towards society by elected representatives.

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