EXPANDED OBJECTIONS TO CERTIFICATION OF THE NEW CONSTITUTION

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(Expansion of original objections, authorised by President of the Court, as mentioned in Registrar's letter dated 28 May 1996. Expansions are in bold type, for the convenience of the Court.)

GENERAL

I respectfully submit that the following provisions of the draft Constitution do not comply with provisions of the 34 Constitutional Principles, on the grounds as set out below.

The **International Covenant on Civil and Political Rights 1966** (the "**ICCPR**") is the closest approximation to all "universally accepted fundamental rights" referred to in Constitutional Principle II and is therefore used as criterion for determining whether or not the provisions of the Bill of Rights comply with **Constitutional Principle II**.

1) Preamble

The preamble places predominant stress on the "injustices of our past", thereby setting the scene for the interpretation of the entire Constitution in the light of the struggle against apartheid, instead of furthering the main aim of the new constitutional order, namely equality, non-discrimination and reconciliation in a democratic context.

The above-mentioned tenor of the preamble, which can be an aid to the interpretation of the new Constitution, is contrary to Principle III (the promotion, inter alia, of "national unity"), which implies (inter alia) reconciliation).

A preamble can be invoked when the provisions of the Constitution are ambiguous or otherwise not clear. The wording of the preamble can therefore be relevant in determining whether the text of the draft Constitution infringes any of the Constitutional. Principles. The submission above that "national unity" in Principle III embraces also reconciliation is supported by the provisions of the so-called "post-amble" of the transitional Constitution, entitled "National Unity and Reconciliation" (see also clause 22 of Schedule 6 of the draft new Constitution).

2) Founding provisions

Clause 6(3) (read with clause 6(4)) regulates the use of particular official languages for the purposes of government.

This clause, properly interpreted, is contrary to the provisions of Principle 11, which requires that the diversity of language and culture shall be acknowledged and protected, and

conditions for their promotion encouraged. The concept "official languages" implies, in the context of Principle 11, that subjects are entitled to use any of such languages in their dealings with the government, and not that the government can use any official language in its dealings with subjects. This is so despite the fact that clause 6 is not contained in the Bill of Rights: **language rights were regarded as so important by the framers of the Constitutional Principles that they were contained in a separate Constitutional Principle.**

The meaning ascribed to "official languages" in the paragraph above is based on the premise that language rights are primarily rights enuring for the benefit of the people, not for the benefit of the state administration or "for the purposes of government" (clause 6(3)). It is to this end that clause 6(5), providing for a Pan South African Language Board, has been enacted. It is conceivable that the factors of "practicality" and "expense" in clause 6(3) can be invoked by a national or provincial government, overriding the "needs and preferences of the population . . . . " (Clause 6 (3) itself attaches stronger weight to "the language uses and preferences" of their residents than is the case as far as national and provincial governments are concerned - an acknowledgement that language rights are primarily for the benefit of the people.)

3) Bill of Rights

Clause 9(2) is aimed at the promotion of "the achievement of equality" before the law, as opposed to the provisions of Principle V, which is aimed merely at the "amelioration" of the conditions of the disadvantaged. Clause 9(2) (or any other constitutional provision) cannot, for instance, bring about the achievement of economic equality. Clause 9(2) goes beyond Principle V.

It is submitted that, in order to comply with Principle V clause 9(2) should be redrafted to include the word "amelioration" (Afrikaans "verbetering""), as the words II(T)O promote the achievement of equality" in clause 9(2) contemplate the ultimate "achievement of equality". The word "promote" does not detract from this argument: promotion aimed at "achievement" amounts to more than "amelioration".

Clause 9 envisages "affirmative action". Affirmative action which brings about the "amelioration of the conditions of the disadvantaged" within the meaning of Principle V is in order. On the other hand, affirmative action including, f or instance, quota provisions) going beyond this and in effect authorising reverse discrimination contravenes Principle V in that it negates the very essence of equality.

Clause 17 provides for freedom of assembly and demonstration, including the right to present petitions. The latter provision is contrary to article 21 of the **ICCPR 1966** (see above), which reflects public international law in this regard. It places the recipient of the petition in an unfair bargaining position, in so far as some positive response to the petition is necessarily implied. I do not deny the existence of a right to petition, exercised by small

groups of representatives on behalf of a large body of their principals, but to couple petitions with mass action such as demonstrations goes beyond universally accepted fundamental rights in public international law, as incorporated by reference in Constitutional Principle II.

The essence of my objection is that there is an intimidators element inherent in the delivery of petitions during mass action, such as demonstrations. (This links up with the generally accepted view that demonstrators should be unarmed.)

Clause 21(1), providing for freedom of movement of "everyone" (as opposed to clause 21(3) and (4) - "citizens") is contrary to article 12(1) of the ICCPR, which applies only to "Everyone lawfully within the territory of a State", and accordingly contrary to Principle I (see GENERAL above) . Clause 21 (1) should not apply to unlawful immigrants. (The same argument applies to a number of other provisions of the Bill of Rights, affording unlawful immigrants rights in contravention of Principle II, incorporating by reference, provisions of the ICCPR.)

No further motivation is necessary at this stage.

Clause 29(3) (read with clause 29(4)) enables the state to determine that the establishment and maintenance of (particular) independent educational institutions could take place without state subsidies.

This clause contravenes Principle XI, which guarantees acknowledgement and protection of the diversity of language and culture. Clause 9(3) may possibly acknowledge the diversity of language and culture, but it certainly does not provide for the projection of such diversity, as the cost ("at their own expense") may be prohibitive for such institutions to make provision for "equitable" treatment of official languages, as is contemplated by clause 6(4). **(Clause 6(4) is more acceptable, as it purports to be in accordance with Principle XI, which contains broad and general guarantees relating to language.)**

My argument relating to clause 29(3) is not affected by the judgment of the Constitutional Court in Ex Parte Gauteng Provincial Legislature: in re dispute concerning the constitutionality of certain Provisions of the Gauteng School Education Bill of 1995, delivered on 4 April 1996. If it is, it is respectfully submitted that the Constitutional Court should distinguish the said judgment in this regard.

Clause 30, it is submitted, is contrary to Principle XI, in so far as language and cultural rights are made subservient to specific other provisions of the Bill of Rights, instead of being overriding, **which I submit is the tenor of Principle XI.**

There is an inherent danger in a provision that the exercise of rights relating to language and culture may not be inconsistent with any provision of the Bill of Rights. In the present context particular provisions of the Bill of Rights ought not to detract from broad general provisions, such as those relating to language and culture. If they

do, a guarantee of language and cultural rights would be nugatory. (All the provisions of the Bill of Rights should in any event be reconciled with one another, and to make express provision for the case of inconsistency, as clause 30 does, amounts to watering down the otherwise broad scope of clause 30.)

In respect of clause 31 (providing for the rights of cultural, religious and linguistic communities, but subject to clause 31(2)), the same ' criticism can be raised as in respect of clause 30 above. Clause 31, it is submitted, is also an infringement of Principle XI.

The same argument raised in respect of clause 30 above also applies in respect of clause 31.

Clause 36, providing for limitation of rights in terms of ordinary laws in circumstances where there is no necessity to do so, in effect emasculates the essence of entrenchment and accordingly contravenes Principle II.

The limitation clause is the most important clause in the Bill of Rights. As presently framed clause 36 enables the national legislature to detract from the entrenchment's guaranteed by the Bill of Rights on, inter alia, five grounds. A limitation which is "reasonable and justifiable in an open and democratic society ... 99 an the basis of "all relevant factors", including five specified factors, is a formula so wide and vague that it affords no guarantee whatsoever of entrenchment. It opens the door for the national parliament to erode the carefully formulated other rights enumerated in the Bill of Rights. The deletion of the requirement of necessity fatally flaws the bill of rights as an entrenchment of fundamental rights.

4) <u>The President and National Executive</u>

Clause 83 requires the President to uphold, defend and respect the Constitution, but not "all other law of the Republic" (see Schedule 2, paragraph 1 - oath of the President) as well. Clause 83 is in conflict with the concept of a constitutional state, which appears from the Constitutional Principles as a whole.

No further motivation is necessary at this stage.

5) <u>Courts and administration of justice</u>

Clause 179 provides inter alia for a national Attorney General, who will in effect be under control of the executive. These provisions do not ensure "equality of all before the law and an equitable legal process", as is required by Principle V. The provisions of clause 179 as a whole, providing for a national prosecution policy and intervention by the National Director of Public Prosecutions, enables selective prosecutions in contravention of the spirit of Principle V and, possibly, that of Principle VI (separation of powers).

Some time in the past an Attorney-General was in terms of the Criminal Procedure Act legally subject to the control of the Minister of Justice. During the so-called "Information Scandal," this defect in the Criminal Procedure Act became obvious. As a result of the enactment of the Attorney-General Act 1992 Attorneys-General became far more independent of the government than had been the case in the past. (See sections 4 and 5(5), in particular, of Act 92 of 1992.)

The above-mentioned salutary development of 1992 stands to be reversed by clause 179. A decision to prosecute should be based on legal considerations, not legal considerations coupled (possibly) with political considerations. Clause 179 opens the door for political interference in criminal justice, contrary to the spirit of Principle V. Clause 179(6) is particularly obnoxious, conferring the "final responsibility over the prosecuting authority" on a Cabinet member. Contrast section 5(5) of Act 92 of 1992, which gave the Minister of Justice power merely "to co-ordinate the functions of the attorneys-general".

Clause 180(c), authorising national legislation providing for the participation of "people other than judicial officers" in court decisions opens the door for adulteration of the requirement that the judiciary should be appropriately qualified (Principle VII) .

In the absence of constitutional guarantees in connection with the qualifications of, for instance, assessors, the requirement of Principle VII that the judiciary should be "appropriately qualified" has not been met.

6) General provisions

Clause 235 provides for self-determination of certain minorities within a territorial entity in the Republic "or in any other way, determined by national legislation".

It is submitted that clause 235 infringes Principle XXXIV, which uses the words "or in any other recognised way" (stress supplied). The latter words require recognition either by international law or by a number of individual world states, not necessarily being the majority. National legislation in this context was not contemplated by Principle XXXIV.

The concept of self-determination of a community "in a territorial entity within the Republic" is a reference to the concept of a so-called "Volkstaat". The words "or in any other recognised way", however, contemplate a right to self-determination along other avenues than that of a Volkstaat, or along avenues that might eventually lead to the establishment of a Volkstaat. "Collective rights of self-determination" in terms of Principle XII fall into a different category.

The negotiators at Kempton Park could in the prevailing circumstances naturally not agree on a formula reflecting modern international law concepts of self-determination. They therefore entrenched merely the broad concept of (political) self-determination in Principle XXXIV.

International law in this regard is still in a state of flux, but there is support for the view that self-determination of communities inside a sovereign state (compare Principle I - 'lone sovereign state") is being crystallised in international law. A typical example (in the context of language communities), is afforded by Belgium. Recent constitutional developments in Belgium, which has moved from a unitary state to a federal state, are in accordance with the self-determination of communities in another "recognised way", as contemplated by Principle XXXIV.

Clause 235, as presently phrased, provides no guarantee for self determination of communities "sharing a common cultural and language heritage", as it subjects such communities to national legislation. This will be the case despite possible compliance with the sole prerequisite of "substantial proven support within the community concerned for such a form of self-determination", laid down by Principle XXXIV. The party having the majority in Parliament can therefore determine the affairs of the communities mentioned in Principle XXXIV. This, it is submitted, is contrary to both the letter and the spirit of Principle XXXIV. (The word "may" in Principle XXXIV paragraph 2 should not, in the context, in itself be an obstacle to the realisation of a right of self-determination.)