PRELIMINARY CRITIQUE OF THE NEW CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA BILL OF 1996 (as amended on May 6, 1996) BY THE INKATHA FREEDOM PARTY

The Constitution of the Republic of South Africa Bill, 1996 [the Bill] is extremely detrimental for the cause of federalism and pluralism in our country, and in its comparison the interim Constitution of the Republic of South Africa, Act 200 of 1993, [the present Constitution] may acquire the appearance of a good constitution, even though it has historically proven to be incapable of resisting the autocratic, centralistic and totalitarian tendencies that are operating in our country.

The Bill has been designed to establish a unitary state under the guise of devolution of powers to provinces, proving wrong all those, like the NP, who promised that the present Constitution would lead to greater devolution of powers according to the so-called "incremental federalism".

The Bill enables a majority party to establish a totalitarian form of government and to directly or indirectly control all significant aspects of economic, social and cultural life, undermining any autonomy within civil society. This form of government would also be capable of imposing uniform policies across the country with respect to any relevant field of government's endeavor. By doing so, the present ruling aristocracy could prevent the existence of any autonomous power within civil society, or of any autonomous center of formulation of diversified policies within government, thereby ensuring that its centrally controlled power may go unchallenged. The Bill destroys all checks and balances through which political, economic, social and cultural pluralism can be maintained and enhanced.

On its introduction this Bill was described by Constitutional Assembly Chairman Cyril Ramaphosa as the birth certificate of a new nation, while on more attentive analysis it looks as the advanced death certificate of pluralism, federalism and freedom of a country which, constitutionally speaking, is committing suicide by installments.

Chapter 1 FOUNDING PRINCIPLES

Clause 6 diminishes the powers which provinces currently have to declare any of the official languages of South Africa to be an official language for the whole or any part of such province, as well as the right to bring about regional differentiation of language policy and practice. The Bill also abolishes the present notion of "equal use" of all official languages and enables government to use a particular official language for its

purposes.

Neither the Founding Principles nor the Preamble are consistent any notion of federalism, making no mention of provinces as founding political entities, and preventing the development of provincial citizenship.

Chapter 2 BILL OF RIGHTS

The application clause of the Bill of Rights reflects the ANC's original intent that the Bill of Rights should not apply to protect juristic persons, which now are bound by the Bill of Rights but not entitled to its full protection . Section 8 (4) differs from the present language of the Constitution, in so far as a juristic persons may invoke human right protection not in all circumstances in which the nature of the rights concerned so permits, but rather only in those circumstances in which the nature of the right requires to be applied also with respect to juristic persons in order to protect the rights of natural persons.

Given the broad formulation of second generation human rights, their horizontal application is quite problematic. As the Bill of rights bind all persons [clause 8 (2)] and the duties imposed by it must be performed (clause 2), private clinics and medical practitioners will have to comply with everyone's right to access heath care, and specifically may not refuse emergency medical treatment [clause 27 (1) and (2)]. Similarly, the right to have sufficient food and water (clause 27), the right to have access to adequate housing (clause 26), and some aspects of environmental right could be so construed as to applied in interpersonal relations, rather than being exclusive government's obligations, as it is the case in the KwaZulu Natal provincial Constitution of March 15, 1996. The fact that horizontality is not limited --as it is the case in the KwaZulu Natal Constitution which limits to significant legal relations under the control of government-- will also create problems in the application of the non discrimination clause which applies to all persons: as the Bill of rights may only be limited by a law this provision may lead to absurd situations.

The economic and labour provisions in the present Constitution are already strongly inclined toward socialism, and provide very weak protection for the system of free market enterprise. The Bill goes one step further in the same direction, eliminating any protection for the system of free market enterprise, while removing constitutional guarantees that could impair a socialistic take over. The right of free economic initiative, set out section 26 of the present Constitution, has been transformed into the "freedom of trade, occupation and profession" which does not encompass the right to set up enterprises.

The property clause has become so weak that it would constitute no impairment for very extensive programs of nationalization. Deprivations of

rights which are not expropriation are not disallowed, unless they are "arbitrary". Compensation for expropriation will be limited in case of nationalization which are motivated by an ostensible meritorious "purpose"

The Bill provides no protection for economic rights, such as the right of contractual autonomy and that of full economic competition. The right to strike is not qualified to prevent political and secondary strikes, and even a right to picket has been added, in spite of the fact that picketing is prohibited in many countries. Clause 23 (5) enables the rights of unions, such as close shop agreements and rights for union's members and leaders to override other individual rights set out in the Bill, like the right to seek occupation or to demonstrate.

The Bill entrenches the incipient corporative system established by the Labour Relation Act, providing, in clause 39 (4), that any of its provisions escapes the supremacy of the Constitution, and limiting the powers of any future Parliament to change it unless consultation has taken place with the trade unions. In doing so the Bill recognizes the legitimacy of, and entrenches the pillars of corporativism set out in such Act, namely government controlled labor dispute resolution, centralized national bargaining conducted by statutory bodies, mandatory or compulsory workers' membership in trade unions, trade unions organization on the basis of national federations, and coerced participation of labor, business and government in Nedlac.

A comparison between this Bill of Right, and that set out in the KwaZulu Natal Constitution, exactly identifies all the flaws and deviancies and what is required to promote free market enterprise, small and limited government, privatization and deregulation.

In the Bill there is no effective protection for pluralism and for the autonomy of civil society. Rights are only regarded in their individual characterization, and no effective and explicit recognition is given to the collective dimension of human rights exercise, as it is the case in the KwaZulu Natal Constitution. Even clause 31 falls short of protecting pluralism, for while it recognize the rights to form and join organs of civil society, including cultural, religious and linguistic organizations, it recognizes no autonomy for them and puts forward no guarantees to impair government from taking them over, as the ANC is currently attempting to do with respect to NGOs. The carefully crafted language of clause 31 does not create or recognize rights, but merely indicates that such rights "may not be denied", if and to the extent that they exist. Therefore the Bill does not recognize the socialized dimension of the human rights exercise, which may result in different models of societal organization. For instance, section 15 (3) merely enables legislation to recognize traditional and religious marriages and systems of personal and family laws, but provides no recognition for them or constitutional duty to bring about such

recognition. Providing that such recognition is not a part of the Constitution, it might take place by legislation at a later time, but subject to the Bill of Rights, it is possible that polygamous unions might not be recognizable.

There is no element in this Bill that protects cultural diversity, as collective phenomena. Significantly, there is no recognition of traditional and customary law, or specifically of the communal property system, while section 25 (6) strongly suggests the constitutional mandate of transforming communally owned property into private ownership. There is no recognition of any area of entrenched constitutional autonomy for social, economic and cultural formations, thereby creating no constitutional obstacle to government's control of NGOs, universities, trade unions, chambers of commerce, traditional communities, professional associations, family life, arts and culture, sportive and recreative institutions and any other relevant social, cultural or economic phenomenon. Also in this respect a comparison between this Bill of Rights of the KwaZulu Natal Constitution will give the measure of what is required to recognize and protect economic, social and cultural pluralism, showing, by comparison, how the Bill creates no obstacles to the establishment of a totalitarian form of government directly or indirectly controlling all significant aspects of life.

The Bill carries the same flaw that afflicted the present Constitution with respect to its limitation clause, for any right set out in the Bill may be limited by law on any occasion in which it is deemed reasonable and justifiable, even though it might not be necessary. The fact that section 35 (1) details five criteria, or tests, to be applied to determine justiciability and reasonableness may be seen as diminishing rather than strengthening the Bill of Rights.

In the Bill of Rights and throughout the rest of the text of the Bill, there is no recognition or implementation of any notion of minority rights or special minority protection.

In many respects several human rights have been diluted in the new formulation, as it the case for the freedom of expression where section 16 (2) creates what could become a loophole toward censorship, or for linguistic or cultural rights, the exercise of which is conditioned, in terms of clause 30, by a most unclear rider.

The guarantees related to the state of emergency have also been weakened, for while the present Constitution requires a two-thirds majority of the National Assembly, section 36 of the Bill requires only a simple majority for its ratification.

Chapter 3 PRINCIPLES OF COOPERATIVE GOVERNMENT

This Chapter is extremely pernicious to the future of provincial autonomy and devolution of powers in South Africa. Clearly it establishes one system of governance, structured around one government in which the decisions of the center are implemented downward on the basis of a "conveyer belt" system. Within such single government three "spheres" are identified, namely the national, provincial and local, thereby providing no qualitative differences between the provincial and local levels of government. This scheme carries the constitutional implication that provinces and local government are organs of the State, which is confirmed by section 239, rather than being autonomous separate bodies established by and under the Constitution.

This Chapter creates strong obligation for cooperation, and its provision clearly resolves the notion of cooperation as that of abiding by national government's policies. This conclusion derives from the reading of section 41 (2), (3) and (4), which impair the power of provinces to seek constitutional protection through constitutional adjudication for a conflict between organs of the State, or powers of the State, as set out in the present Constitution. In fact, national legislation will decide the steps to be taken by the lower levels of government to protect their position within the overall system of government, and only when such means of mechanism and procedures have been exhausted, can a province or a local government resort to a court of law to seek redress for their grievances' against the central government. Provinces do not have the right of immediate access to a court of law. This is an iniquitous system that characterizes cooperation as harmony among central government, provinces and local government from music written and conducted exclusively by the national level.

This Chapter expresses an hegemonic and Jacobin perspective in which provincial government and national government are not distinct governments but rather spheres of the same centrally dominated government. In this system there is no space for voluntary cooperation along the lines of the US or German federal cooperativism, but only for forced cooperation, which is an oxymoron. Accordingly, clause 41 (2) institutionalize the Intergovernmental Forum creating an additional venue where provinces will take majority decisions, thereby silencing any dissenting province.

Chapter 4 PARLIAMENT

The second chamber, the National Council of provinces, no longer has the power to significantly participate on an equal standing in all the parliamentary functions of the Republic. For all intents and purposes, the Bill establishes a mono-cameral system as it relates to the appointment and supervision of the executive (President and Cabinet), and a weak bicameral system with respect to the formulation of most of the legislation, for the

National Council has only the power to force the reconsideration of a bill outside Schedule 4. Consequentially, the position of provinces in the constitutional system remains weak, as they are not represented with effective powers, through an equally important Senate, in the formulation of the national legislative decision making.

Additional elements in the Bill confirm the fact that the position of the National Council of provinces is lower than that of the National Assembly, even with respect to Schedule 4 matters. In fact, the National Assembly may in the end have the final say, and override the National Council by virtue of a decision taken by a 2/3 majority of its members. The National Council does not have any similar power. Moreover, the National Council has no power to introduce money bills falling within Schedule 4 functional areas, which means that even matters such as duties or taxes for health and education will need to be initiated in the National Assembly. The National Council has also no competence with respect to constitutional amendments which do not affect provinces.

Constitutional amendments affecting provincial boundaries, powers and functions or institutions may be brought about with the support of six provinces in the National Council, but a province which is uniquely affected by an amendment is no longer offered the protection set out in section 62 (2) of the present Constitution. With respect to matters that do not fall within those listed in Schedule 4, the National Council of provinces has no power other than that forcing the National Assembly to reconsider what it has already decided.

Even with respect to the procedure that follows the failure by the President to assent to a Bill because of reservations about its constitutionality, the functions of the National Council are limited when compared to those of the National Assembly. Members of the National Council also do not have the rights given to members of the National Assembly to raise an issue of constitutionality of a bill by means of a petition signed by 1/3 of the members. As the provinces, through their senators, presently have such a power, these new provisions should also be regarded as a weakening of the position of provinces in the system and are part of a new system in which under ordinary circumstances provinces may not resort to constitutional adjudication.

It can also be noted that national legislation controls the procedure in terms of which a province confers authority on its delegation to casts votes on its behalf in the National Council. Moreover, the control of constitutionality by the President in assenting a bill is limited to procedural and not also to substantive issues of constitutionality. It is also anomalous that while one third of the members of the National Assembly is required for a referral of an Act to the Constitutional Court, the provincial petition requires only 20% of the members of a provincial

legislature.

Finally, the IFP has always objected to the traditional distinction between ordinary and money bills which undermines the rule of no taxation without representation and the centrality of parliament.

Chapter 5 THE PRESIDENT AND THE NATIONAL EXECUTIVE

The Bills preserves the presidential characteristics of the present Constitution, ascribing the executive function to the President, rather than to Cabinet (clause 85). The IFP has always objected to such presidential characteristics which may be conducive to possible future autocratic involution in the form of "presidentialism", and has preferred a pure parliamentary system, in which the position of the Head of State is differentiated from that of the Head of Government, and Cabinet as a whole entertains a constant fiduciary relationship with Parliament and is confirmed along with the selection of the head of government.

The provision of clause 50 (1) (b) which does not allow the dissolution of Parliament for the first three years of its term of office may create additional rigidity in the accountability of the executive to the legislate, especially. The Bill also preserves an anomalous provision of the present Constitution related to the impeachment of the President, which provision is not consistent with those regulating the vote of no-confidence in the President, which leads to his/her mandatory resignation.

The Bill also preserves the presidential characteristics of the present Constitution, as they relate to the fact that Cabinet is not empowered by a vote of confidence of Parliament. Rather, Ministers are chosen and serve at the pleasure of the President without a specific parliamentary mandate until a vote of no-confidence takes place. The accountability of the executive to Parliament is also weakened by an unusual provision that allows one organ of the state to assign to another organ any functions that an Act of Parliament specifically ascribes to its responsibility.

Chapter 6 PROVINCES

The IFP has always regarded the list of provincial powers set out in Schedule 6 of the present Constitution as totally insufficient, believing that provinces rather than the central Government ought to be the primary government of the people, and should be entitled to exercise all those powers and functions that can be adequately and properly exercised at provincial level, reserving to the national level only a limited number of powers and functions to be specifically listed in the national Constitution. The Bills defines a system in which provinces enjoy far less autonomy than they are entitled to in terms of the present Constitution.

The elimination of the contents of Schedule 2 of the present Constitution may carry the consequence that the double ballot system for national and provincial elections is no longer constitutionally guaranteed, opening the possibility for the national electoral law to require that a single election on a single ballot for national and provincial legislatures.

The IFP does not believe that the Bill complies with the Constitutional Principles set out in Schedule 4 of the present Constitution, as they relate to provincial powers and functions, especially Constitutional Principle XVIII (2), which requires that provincial powers and functions be not substantially diminished. The IFP also believe that there is also no compliance with the Principle requiring that provinces enjoy not only concurrent but also exclusive powers. Clause 44 (2) describes the functional areas set out in Schedule 5 as exclusive, and yet enables the national government to legislate with respect to them in six broadly phrased set of circumstances. Moreover, the characterization of "exclusive powers" attached to the adoption a provincial constitution --which in terms of clause 147 can be overridden by national legislation in almost any circumstances-- and to the execution provincial legislation --which can be overridden in terms of cause 100-- does not survive substantive legal scrutiny. These latter functions are effectively exclusive in the present Constitution.

The list of functional areas of provincial competence has been substantially diminished from that set out in the present Constitution. Namely, lotteries and sport pools, have been excluded from the competence on casinos, raising gambling and wagering. Tertiary education is no longer a provincial competence, while in terms of the present Constitution, only universities and technikons are excluded. The competence of indigenous laws and customary law has been made subject to provisions in Chapter 12, which recognizes specific powers of national legislation. Language policies and regulations of the official languages have been diminished, since what is expressly set out in clause 6 of the Bill is less then what is provided for in section 3 of the present Constitution. Provincial public media has been eliminated to be replaced with a more restrictive notion of media services directly controlled or provided by the provincial government, excluding services provided by the national broadcaster.

The competence on roads has been transformed from that on all types of roads, to a competence on provincial and municipal roads only. The competence on traditional authority has been replaced by the more restrictive competence on traditional leadership, while the competencies of police has been substantially eliminated, owing to the fact that Chapter 11 contains few matters of substance on which legislative powers can be exercised. Even though some provincial powers are still recognized with respect to local government, local government per se is no longer a provincial legislative function, as provinces can no longer establish and

organize local government.--including the shaping of the local government "model". The specific mention of provincial powers over local government matters should not be confused with the powers and function on local government.

Schedule 4 of the Bill, specifically characterizes all provincial functional areas as "concurrent" powers, while the word "concurrent" was removed from the present Constitution by virtue of the March 3, 1994 amendments which were concessions to the IFP to increase the area of provincial powers and autonomy.

The fact is, that the relation between the national and the provincial legislation is so structured in the Bill, that it makes provincial autonomy almost non-existent. The present Constitution already empowers national legislation to prevail over provincial legislation in at least 21 broadly phrased and described overrides, found in its section 126 (3). The Bill abolishes the presumptions that in case of a conflict provincial legislation prevails over national legislation, and reverses the burden of proof, stating that national legislation prevails unless it can be proven that none of the overrides could apply. Furthermore, the Bill extends the list of overrides adding at least six additional situations in which provincial legislation has no chances of surviving the impact of national legislation. One of them relates to the implementation of national economic policies, in the name of which most actions of government could be justified.

There are some provisions which may virtually and effectively kill any possible degree of provincial autonomy, and autonomous policy formulation at provincial level. Clause 146 (2) (b) enables the central government to override provincial legislation on every occasion on which the interest of the country as a whole requires, in the eyes of the beholder, uniformity by virtue of "national policies" Another of such norms is to be found in the subsequently subclause (4), which clearly states that provincial legislation can no longer be regarded as primary, but only as secondary legislation, thereby positioning the provinces in an even worse position than that occupied by the provincial Councils before their repeal in 1986. This provision indicates that any legislation approved by the National Council of provinces must be regarded as "necessary" and therefore automatically becomes one of the overrides in its entirety.

The only guarantee to provincial autonomy is the fact that central government legislation must be passed with the approval of the National Council of provinces, unless this body is overridden by 2/3 majority of the National Assembly. This means that for as long as five provinces agree to it, there is no snowball's chance in hell for any dissenting province to bring about any degree of differentiated policy formulation whatsoever.

Clause 146 (6) to (9) entrenches the notion that in any case the support of four additional provinces is necessary if any province intends to preserve any area of autotomy and any power and function. These subclauses provide that for any provincial law to qualify as a law which can give rise to a "conflict" with a national law, such provincial law must be explicitly or implicitly ratified by the National Council, which means that if it is not ratified it is always overridden by national law in terms of clause 148. Moreover, this scheme is likely to prevent a province from seeking judicial protection, as no conflict justiciable by a court exists unless the National Council so decide.

The import of subclause (4) to (7) of clause 146 makes a mockery of the rest of the provisions set out that clause which ostensibly purports to define cases and circumstances when the central government may override provinces. The truth of the matter is that for as long as five provinces so agree, central government may override provincial legislation whenever it deems fit. The same rule of resolution applies to provincial constitutions which are also subordinated to the full extent possible to any aspect of national legislation. Therefore, it can fairly be stated that within this system, the legislative competencies of provinces are that which the central government wishes them to be at any given time of political and institutional development, and that the Bill entrenches no degree of autonomy for provinces whatsoever.

To add insult to the constitutional injury of the preceding provisions, clause 148 of the Bill indicates that if there is any doubt about which level of legislation should prevail, that doubt must be solved so as to determine that the national legislation prevails over the provincial legislation and provincial constitution.

The subservient status of provincial legislation to national legislation is reflected in the relation between provincial executive functions and national executive functions. Clause 100 of the Bill enables the central executive to take over any provincial executive function when it deems that a province can not or does not fulfill its obligations in terms of an existing law requiring execution or administration. When such circumstances arise, the central government can intervene by taking whatever steps it deems appropriate. The steps or "measures" listed are only some of those which a central government may choose to take, and do not exclude more drastic ones.

This provision must be read against clause 41 (3) and (4) which prohibit an aggrieved provincial government from resorting to a court of law if its functions are encroached upon, before it has exhausted any conceivable procedure to settle the dispute which is provided for by the law of the central level of government. This effectively means that central government may at any time, and with total constitutional impunity take over the

administrative functions of a province. The threat of exercising this power will certainly have a devastating chilling effect on any province which intends to run its administration differently from the desiderata of the central government.

Clause 125 (4) also precludes provinces from resorting to a court to seek redress from the encroachment on their administrative powers. In fact, the administrative powers of a province are further limited by the qualification that provinces are entitled to exercise them only to the extent that they have the "administrative capacity" to assume effective responsibility for such powers, in terms of clause 125 (3). Once again the National Council of provinces has the final power to determine whether a province has the administrative capacity to handle a given function, thereby allowing five provinces to gang up on other provinces in which a different political majority may prevail, so as to deprive them of their executive functions and transfer them on to the central level of Government. Therefore, any determination on the administrative capacity of a province is not a factual or technical issue, but rather a political one to be decided by the other provinces in the National Council.

Moreover clause 125 (2) indicates that the Premier and the executive council of a province may administer matters related to the functional areas listed in Schedule 4 covered by national legislation only in so far as an Act of Parliament does not provide otherwise. Therefore an Act of Parliament could, for instance, extensively regulate health or education and decide that provinces should no longer "administer executive" powers in education or health, so as to establish "national" schools and hospitals.

Finally, a further reduction of provincial autonomy is caused by the requirement set out in section 143 (2) (b) that a provincial constitution may not confer on a province any powers that exceeds the powers conferred on the provinces by the Bill, which requirement does not exist in the present Constitution. For instance, in adopting its constitution, the province of KwaZulu Natal has legitimately claimed powers in addition to those listed in section 126 and Schedule 6, which additional powers derive from the exercise of its competence of adopting a provincial constitution, including the power to further legislate on executive and legislative structures and procedures for that province and matters which are covered by its provincial constitution such as the provincial bill of rights or the provincial civil service.

Incidentally, it can also be noted that the maximum number of members of provincial legislatures has been reduced from 100 to 80. Furthermore, there are no longer limits to the power to amend the Constitution reducing provincial autonomy, along the lines of the present CP XVIII (2) which was one of the March 3, 1994 concessions to the IFP.

Chapter 7 LOCAL GOVERNMENT

While in terms of the present Constitution, provinces may legislate on local government matters for as long as they do so consistently with the provision on local government of such Constitution, in terms of the Bill the national government has legislative competence to structure and organize local government, while provinces have the secondary responsibility to establish it and monitor it. . As the competence on local government is not listed amongst those of a province in terms of Schedule 4, the mentions in Chapter 7 of the legislative power of the province to adopt legislation must be construed so as to exclude any extension beyond what is explicitly provided for. Accordingly, a province has only the power of adopting secondary legislation in the matters referred to in clause 154 and 155 (2) and (3)..

The autonomy of local government entrenched in the Bill could be inferior to that which is presently entrenched in the present Constitution, for the Bill no longer contains the important broad statement that local government shall be autonomous.

The Bill creates a local government model which seems to exclude the notion of over-arching regional councils, and imposes municipal councils also in traditional communities to replace the local government administration in terms of indigenous and customary law. In doing do, the Bill fixes in stone matters which should be left to provincial legislation to determine so as to adjust them to regional and over time differentiations. It also decrees the end of traditional communities organised in terms of traditional and customary law and precludes any role for traditional leaders and their council in local government administration. Moreover, the preclusion against regional councils will weaken local government in rural areas, concentrating administrative and delivery capacity in more opulent areas to the depravation of the less affluent ones, thereby failing to redress the imbalances of the past.

National law will cause local government to organize horizontally both at national and at provincial level, thereby preventing provincial legislative action in this respect.

This Chapter is in direct conflict with the corresponding Chapter of the KwaZulu Natal Constitution.

Chapter 8 COURTS AND ADMINISTRATION OF JUSTICE

Reflecting the scheme used in the present Constitution judicial functions are an exclusive competence of the central government. The IFP has always held the position that provinces should be able to exercise judicial functions with respect to all subject matters on which they exercise

legislative and administrative powers and functions, as it is the case in most federal and regional systems.

The Bill does not clarify how the Constitutional Court can be seized with a constitutional matter, and who may commence an action. The ordinary legislature will need to define the "access rules" which are not set out in the Bill, while they are part of the present Constitution. In doing so an ordinary majority could make it more difficult to challenge the constitutionality of legislation. An ordinary majority could also derogate from the provisions regulating access to the Constitutional Court, and provide that with respect to specific legislation, or even to a given Act, access to Constitutional Court could be limited. It is quite anomalous that the "access rule" are not set out in a constitution.

There is also no indication on the effect of a decision of the Constitutional Court, which is a most peculiar deficiency. In fact, the statement that the Constitution is the supreme law of the land and legislative actions against it should be regarded as "invalid", which is set out in Section 2 of the Bill, could have little value without the concomitant provision that the Constitution Court may declare invalid laws to be null and void, or with no force and effect. An extreme interpretation, may, as a rule, regard a declaration of constitutional invalidity as merely requiring Parliament to correct the problem, rather than affecting the force and effect of the law.

As indicated supra, the Constitutional Court has in effect little power to gain jurisdiction on conflicts between the national and the provincial spheres of government, which are to resolved in terms of Chapter 3 and 4.

The President has very extensive powers in the appointment of the judges of the Constitutional Court, including presidential direct powers and the powers to reject nominations from the Judicial Commission, many members of which are appointed by the President or the majority party supporting the President. This may severely undermine the institutional impartiality and objectivity of the Constitutional Court.

The powers of the President and the ruling also extend very significantly with respect to the composition of the Judicial Service Commission which should ostensibly provide the check and balance to the Presidential discretion in the appointment of Constitutional Court judges.

The establishment of the office of the National Director of Public Prosecution falls short of providing true independence of prosecuting functions from the policies of the executive on the basis of a separate principle of accountability, requiring for instance that the Attorney General be directly accountable to Parliament or be elected. In this respect the provisions of Section 179 are not sufficient to provide

effective checks and balances.

Chapter 9 STATE INSTITUTIONS

The Bill eliminates provincial Public Protectors and provincial Civil Service Commissions thereby substantially reducing a provincial competence.

The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities could be extremely problematic. In fact, while the Bill of Rights does not recognize either the collective exercise of human rights nor collective rights, this Commission empowers the State to mingle and interfere with very sensitive matters which relate to the autonomy of civil society and the essential freedoms of the people regarded as individuals and members of cultural and social formations. It will be unavoidable that this Commission may become the instrument to foist governmental policies on matters in which the government ought not to be involved. In constitutional terms, it will have no impact on the present recognition of collective rights as there are no substantive provisions to support it. As it was the case for the present Volkstaat Council which operated without the benefit of a substantive provision on self determination, this Commission is a fig leaf covering the indecency of the NP's and FF's total collapse in the constitutional negotiation. A comparison with the KwaZulu Natal Constitution will reveal the provisions necessary to recognize collective rights and protect cultural and social pluralism.

The provisions on the Auditor General significantly affect essential autonomy at provincial level, as they also relate to the structuring of the provincial budget and to the accountability of the provincial executive to the provincial legislature for expenditure authorized by it. A unified system of auditing as structured in the Bill is not consistent with any recognition of fiscal and financial autonomy at provincial level.

The decision on the appointment of the public protectors and members of the commissions are not sufficiently explained in the Bill. Important checks and balances and minority protection that were set out in the present Constitution have been eliminated. Among them the requirement that the Public Protector be nominated by a parliamentary committee consisting of one member from each of the political parties represented in Parliament and selected by 75% majority. Majority rule seems to govern the exercise of discretion and the appointment of members of these commissions and auxiliary authorities under the Constitution.

Chapter 10 PUBLIC ADMINISTRATION

The Bill establishes a unified public service, and no longer provides for provincial civil service commissions nor considers the possibility that the

public service can be employed "by" the province with respect to the exercise of provincial functions, as is the case in the present Constitution. There is in this respect a substantial reduction of provincial autonomy, powers and functions.

The whole of the public service is required to loyally execute the lawful policies of the government of the day, which is intended to be the national level of government. These obligations will apply also to the provincial civil service who might happen to serve a provincial government that intends to develop different types of lawful policies than those decided centrally.

Chapter 11 SECURITY SERVICES

The Chapter on security services does not contain any of the guarantees and checks and balances that could prevent the undemocratic use of these services, or autocratic involutions or military adventures. The flowery propaganda type language of clause 198 is of little significance or guarantee in this respect.

Chapter 11 has completely eliminated any type of responsibility of provincial powers with respect to security services, specifically abolishing the provincial legislative competence over police and with respect to the establishment of services for the protection of people and property in terms Section 224 (3) (c) of the present Constitution.

The provision on defense falls short from providing an effective civilian check and balance to the military control of the Defense Forces, the operation and deployment of which remains too closely tied to political discretion. This flaw is compounded by the fact that the draft has rejected the proposals often advanced by the IFP that the Constitution shall prohibit the offensive use of military forces outside the country and shall reject the use of military force as the mate of the resolution of international dispute. Furthermore, the provision on the state of national defense is flawed in as far as it could allow, as it has happened in many other countries in the past, the deployment of troops in military operations abroad without the declaration of the state of national defense. It would be essential to define the state of national defense and extend the required parliamentary approval to any type of deployment of troops within or outside a country for military purposes.

The deployment of troops within the country for law enforcement purposes, is very poorly regulated. The IFP thought the constitution should have prohibited the defense force's from engaging in direct law enforcement activities. The present Constitution provides stronger guarantees, requiring that defense forces may be used in law enforcement only when the police service is unable to maintain law and order on its own. This

guarantee does not appear in the Bill.

The provisions on the police service, establish a unitary structure for police that is inconsistent with any effective devolution of police powers and functions to provinces or local governments. The division between the responsibility of the national and provincial commissioners set out in the present Constitution, have disappeared along with the provisions related to local policing and the independent complaint mechanism. Section 207 (4) of the Bill mentions the responsibilities of provincial governments, with respect to policing, which is nothing more than lip service of little legal significance. The type of police service that could emerge out of the constitutional provisions of the Bill, could be such as to resemble the French gendarmerie. The power of the province to veto the appoint of a provincial commissioner has also be removed.

The provisions on intelligence seem not to apply to military intelligence and police intelligence that are the branches of government most liable to create problems of a constitutional nature. The few provisions in the Bill on intelligence are totally inadequate to deal with the constitutional relevancies of the problems arising over the operation of intelligence. It is extremely concerning that the Bill has not accepted the often proposed IFP provision that ties intelligence only to activities which are regarded as crimes.

Chapter 12 TRADITIONAL LEADERS

The protection of traditional leaders, traditional authorities and indigenous and customary laws have been substantially diminished.

Traditional leaders are no longer entitled to be ex-officio members of elected local Government structures. There is no outright statement in the Bill on the recognition of traditional authorities or on the recognition of indigenous law, as they are set out in the present Constitution and are required by the applicable Constitutional Principle. The Bill merely recognizes traditional leadership.

The Bill does not establish Houses of Traditional Leaders or a Council of Traditional Leaders. The fact is that these institutions could not be established by either provincial or national legislation with the type of powers and functions set out in the present Constitution. In fact, for this institution to have the present power to delay the adoption of legislation and participate with consultative functions in the law making process, their powers and functions should have been spelled out at constitutional level.

It can also be noted that it is no longer required that the provincial constitution for KwaZulu Natal protects the status, role and functions of

the Zulu Monarch.

Traditional leaders will be remunerated by the central government and most likely will not qualify for membership in national and provincial legislatures [clause 47 (1)].

Chapter 13 FINANCES

The IFP has always argued in favor of provincial competence over fiscal and financial matters commensurate with its proposed division of powers between national and provincial governments - the extremely weak provision for provincial financial autonomy in interim constitution was thus totally unsatisfactory. The Bill, however, substantially weakens the provisions of the interim constitution.

First, it establishes national control over a host of procedural matters, such as the form of provincial and municipal budgets and their tabling [215(2)] as well as prescription over expenditure control by provinces and municipalities [216(1)] as if this can not be handled at a provincial level.

Second, while a province is still entitled to legislate on procurement, it is now mandatory that this competence be exercised within national framework legislation which is unlikely to leave provinces much scope for implementing their own policy.

Third, whereas current financial allocations by national government to local government shall "ordinarily be made through the provincial government of the province in which the local government is situated [158 (B) of interim constitution], there is no such guarantee in the Bill, leaving national government free to by-pass provincial governments completely. This is in compliance with the removal of local government from the list of concurrent national and provincial legislative competence.

Fourth, the Bill provides that the remuneration of traditional leaders be determined by an Act of Parliament. Apart from being politically confrontational, this neatly escapes the national government's present dilemma of having to seek the views of the as-yet not established and never-likely-to-be-established Council of Traditional leaders before the President can assent to the bill.

Fifth, whereas a province is currently entitled to enact legislation authorizing the imposition of user charges after consideration by the provincial legislature of any recommendations by the Financial and Fiscal Commission, this competence is not provided in the Bill. User charges are potentially an important source of additional revenue for provinces.

Sixth, whereas a provincial government currently has "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 [156 (1) (b) of interim constitution], this competence no longer exists in the Bill. This is particularly anomalous given the new requirement 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" [227(4)].

Chapter 14 GENERAL PROVISIONS

No comment

Schedule 1 to 4

No additional comment

Schedule 4 TRANSITIONAL ARRANGEMENTS

A bill-of-attender type of provision set out in section 13, which applies only to the KwaZulu Natal Constitution, requires that all provincial constitutions complies with the Bill This provision is retrospective and derogates from section 2 which indicates that all other laws adopted in terms of the present Constitution shall continue in force and effect.

The position of provinces during the interregnum between the two constitutions is weakened by section 5 (2) requiring that all unfinished business before the Senate shall be regarded as been approved once the Bill acquires force and effect. This will enable the "last moment" adoption of legislation without any of the guarantees set out in section 61 of the present Constitution.