THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CERTIFICATION OF THE AMENDED TEXT

OF THE NATIONAL CONSTITUTION

SUBMISSIONS ON BEHALF OF THE CONSTITUTIONAL ASSEMBLY

The State Attorney
Attorney for the Constitutional Assembly
11th Floor North State
Corner Market and Kruis Streets
Johannesburg

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INTRODUCTION

1. On 7 May 1996 the constitutional assembly passed a new constitutional text. On 6 September 1996 this court held that certain provisions of the new text did not comply with the constitutional principles. On 11 October 1996 the constitutional assembly passed an amended new text. It did so with overwhelming majority. The vote in the constitutional assembly was 370 in favour, 1 against, 8 abstentions and 48 absent. The vote in the senate was 71 in favour, none against, 2 abstentions and 5 absent.

2. We submit that the amended new text cures all the shortcomings in the original new text and now complies with the constitutional principles. We will first deal with the manner in which it has cured the shortcomings. We will then deal with the way in which the amended new text has addressed this court's criticism of the provisions relating to states of emergency. We conclude with our submissions on the new objections raised by some of the objectors. We do not deal with those of them which are palpably insupportable.

3. We will use the following abbreviations in these submissions:

IC :	the interim constitution
CP:	the constitutional principles
NT:	the original new text
AT:	the amended new text
CJ:	this court's judgment on the certification of the original new text reported at 1996 (10) BCLR 1253 (CC).

AMENDMENT OF THE CONSTITUTION

Introduction

4. CPXV provides that amendments of the constitution shall require "special procedures involving special majorities". This court interpreted the requirement to mean that both "special procedures" and "special majorities" are required. It held that, whilst NT74 prescribed "special majorities" for constitutional amendment, it did not require "special procedures" and accordingly fell short of the demand of CPXV.[1] In coming to this conclusion, it gave an indication of the kinds of special procedures it had in mind:

> "It is of course not our function to decide what is an appropriate procedure, but it is to be noted that only the NA and no other house is involved in the amendment of the ordinary provisions of the NT; no special period of notice is required; constitutional amendments could be introduced as part of other draft legislation; and no extra time for reflection is required. We consider that the absence of some such procedure amounts to a failure to comply with CPXV."[2]

The "special procedures" requirement

5. We submit that a "special procedure" is one which is out of the ordinary and more stringent than the procedure applicable to ordinary bills of a similar kind.

6. AT74(4) to (7) introduce the following new procedures for all bills amending the constitution:

   6.1. The bill may not include provisions other than constitutional amendments and matters connected with the amendments.[3]

   6.2. At least thirty days before such a bill is introduced, particulars of the proposed amendment must be:

   - published in the Government Gazette for public

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1 CJ1311:156

2 CJ1311:156

3 AT74(4)

comment;[4]

- submitted to the provincial legislatures for their views;[5] and

- submitted to the NCOP for public debate unless the amendment is one that is required to be passed by the NCOP.[6]

6.3. When such a bill is introduced, the written comments received from the public and the provincial legislatures must be submitted to,

- the speaker for tabling in the national assembly;[7] and

- the chairperson for tabling in the NCOP if the amendment is one that has to be passed by that house.[8]

6.4. The bill may not be put to the vote in the national assembly within thirty days of its introduction or tabling in that house.[9]

6.5. It follows that there will be a significant delay for reflection and debate from the conception to the birth of a constitutional amendment. It first has to go through the ordinary preparatory steps before publication. It has to be drafted, approved by cabinet and certified by the state law advisers. After publication, a minimum period of sixty days is allowed for comment, debate and reflection. If any change is made to the text of the amendment, the process has to be repeated. The special procedures accordingly constitute a significant brake on the process of constitutional amendment.

7. These new procedures apply to all constitutional amendments. AT74 distinguishes between five kinds of constitutional amendment and prescribes additional procedures for some of them:

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4 AT74(5)(a)

5 AT74(5)(b)

6 AT74(5)(c)

7 AT74(6)(a)

8 AT74(6)(b)

9 AT74(7)

7.1. Amendments of sections 1 and 74(1).[10] These amendments are subject to the new procedures and the additional requirement that they be passed by the NCOP.[11] This requirement is not applicable to ordinary bills.[12]

7.2. Amendments of the bill of rights.[13] These amendments are subject to the new procedures and the additional requirement that they be passed by the NCOP.[14] This requirement does not apply to ordinary bills.[15]

7.3. Amendments which affect the provinces generally.[16] They are amendments which relate to a matter that affects the NCOP;[17] alter provincial boundaries, powers, functions or institutions;[18] or amend a provision that deals specifically with a provincial matter.[19] They are subject to the new procedures and the additional requirement that they be passed by the NCOP. This requirement does not apply to ordinary bills affecting the provinces.[20]

7.4. Amendments which only affect a specific province or provinces.[21] These amendments are subject to the new procedures and the additional requirements that they be passed by the NCOP[22] and by the legislature or legislatures of the affected provinces.[23] These requirements do not apply to

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[10] AT74(1)

[11] AT74(1)(b)

[12] AT75 and 76

[13] AT74(2)

[14] AT74(2)(b)

[15] AT75 and 76

[16] AT74(3)

[17] AT74(3)(b)(i)

[18] AT74(3)(b)(ii)

[19] AT74(3)(b)(iii)

[20] AT76

[21] AT74(8)

[22] AT74(3)(b)

ordinary bills which affect a specific province or provinces.[24]

7.5. All other amendments which do not fall in any of the aforegoing specific categories. They are subject only to the new procedures which apply to all constitutional amendments. Those procedures are however special in the sense that they are out of the ordinary and more stringent than the procedures applicable to ordinary bills of a like nature, that is, those that do not affect the provinces in general or any province in particular.[25] They accord exactly and fully with the kinds of special procedures this court had in mind in the passage from its judgment quoted above.

8. We accordingly submit that AT74 complies with the "special procedures" requirement of CPXV.

The "special majorities" requirement

9. This court held that "(t)he two-thirds majority of all members of the NA which is prescribed for the amendment of an ordinary constitutional provision is ... a super-majority which involves a higher quorum"[26] and accordingly meets the "special majorities" requirement of CPXV.

10. The DP however now argues that a two-thirds majority in the NA is not a "special majority" because it is also required in terms of AT76(1)(e), (i) and (j) and AT76(5)(b)(ii) to pass bills which affect the provinces or change the seat of parliament but do not enjoy the support of the NCOP.[27] They contend for this reason that CP74(3) and (4) fail the "special majorities" requirement. We submit, however, for the reasons that follow that their contentions are unfounded.

11. A special majority is one which is out of the ordinary in the sense that it is higher than that required for comparable ordinary legislation. The mere fact that the same special majority might also be required for other special purposes, does not deprive it of its special character and make

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[23] AT74(8)

[24] AT76

[25] AT75

[26] CJ1310:156

[27] DP9:17.2-17.3 and 13:25-30

it ordinary.

12. A two-thirds majority in the NA is required to pass legislation only in very special circumstances. Apart from constitutional amendments in terms of AT74(2) and (3), it is required only in terms of AT76(1)(e), (i) and (j) and AT76(5)(b)(ii) when the national assembly pushes through legislation which affects the provinces or changes the seat of parliament, but does not enjoy the support of the NCOP. The requirement of the same majority for those special purposes, does not deprive it of its special character and render it ordinary.

13. In order to determine whether the requirement of a two-thirds majority in the NA in terms of AT74(2) and (3) is "special", one has to compare it with the majority required for comparable ordinary legislation. The DP does not compare like with like. Not all amendments in terms of AT74(2) and (3) can be compared with legislation affecting the provinces or changing the seat of parliament in terms of AT76(1)(e), (i) and (j) and AT76(5)(b)(ii). The true comparison is as follows:

    13.1. AT74(2) which governs amendments to the bill of rights in chapter 2, should be compared with AT75 which governs ordinary legislation which does not affect the provinces. The constitutional amendment requires a two-thirds majority in both houses and the ordinary legislation only a simple majority in the NA.

    13.2. AT74(3)(a) which governs other constitutional amendments which do not affect the provinces, should also be compared with AT75 which governs ordinary legislation which does not affect the provinces. The constitutional amendment requires a two-thirds majority and the ordinary legislation only a simple majority in the NA.

    13.3. AT74(3)(b) which governs constitutional amendments which affect the provinces, should be compared with AT76(1) and (2) which govern ordinary legislation which affects the provinces. The constitutional amendment can only be passed with a two-thirds majority in both houses. The ordinary legislation, on the other hand, can be passed either with an ordinary majority in both houses or with a two-thirds majority in the NA. In either event, the constitutional amendment requires a special majority not required for ordinary legislation.

14. All constitutional amendments other than those contemplated in AT74(3)(a), require a two-thirds majority in the NCOP. The DP characterises this requirement as a "special procedure" and not a

"special majority" and denigrates its value.[28] We submit that this is unfounded:

14.1. The requirement of a two-thirds majority in the NCOP is both a "special procedure" and a "special majority". This court recognised that it was a special procedure but did not suggest that it was not also a special majority.[29] It is a special procedure whenever constitutional amendments are required to be passed by the NCOP but comparable ordinary legislation not. It is always a special majority because ordinary legislation which does require the support of the NCOP, requires no more than a simple majority.[30]

14.2. The DP denigrates the value of the requirement of a two-thirds majority in the NCOP because it might conceivably be achieved with the support of only thirty-six members of the NCOP. But by parity of reasoning, a constitutional amendment which requires a two-thirds majority in the NCOP, could be defeated by as few as twenty-four of its members. The point is however that the vote is taken by province and two-thirds of the provinces clearly constitute a "special majority".

15. We accordingly submit that the AT also meets the "special majority" requirement of CPXV.

[28] DP15:30

[29] CJ1310:155

[30] AT65(1)(b)

ENTRENCHMENT OF THE BILL OF RIGHTS

16. CPII requires that the bill of rights be "protected by entrenched and justiciable provisions" in the constitution. This court interpreted the requirement to mean that more stringent protection of the bill of rights was required than that which was accorded to ordinary provisions of the constitution.[31] It held that "(i)n using the word 'entrenched', the drafters of CPII required that the provisions of the bill of rights, given their vital nature and purpose, be safeguarded by special amendment procedures against easy abridgement".[32] It went on to say that, what was required, was "some 'entrenching' mechanism, such as the involvement of both houses of parliament or a greater majority in the NA or other reinforcement, which gives the bill of rights greater protection than the ordinary provisions of the NT."[33]

17. AT74(2) now introduces one of the entrenching mechanisms identified by the court namely "the involvement of both houses of parliament". It requires a two-thirds majority in both houses. This requirement constitutes an entrenching mechanism insofar as ordinary amendments which do not affect the provinces, do not require the support of the NCOP.[34]

18. There are three other categories of constitutional amendment which also require a two-thirds majority in both houses of parliament. Two of the three are moreover subject to further stricter requirements:

    18.1. Amendments of sections 1 and 74(1) require a majority of 75% in the NA and a two-thirds majority in the NCOP.[35]

    18.2. Amendments which affect the provinces generally, require a two-thirds majority in both houses.[36]

    18.3. Amendments which affect one or more provinces in particular, require a two-thirds majority in both houses and approval by the

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[31] CJ1311:157-159

[32] CJ1311:159

[33] CJ1311:159

[34] AT74(3)(a)

[35] AT74(1)

[36] AT74(3)(b)

provincial legislature or legislatures concerned.[37]

19. CPII however requires merely that the bill of rights be entrenched. It does not require or suggest that the bill of rights should be the only part of the constitution entrenched or that it should be more securely entrenched than any other provision of the constitution. The fact that other provisions in the constitution are also entrenched and in two instances more securely entrenched than the bill of rights, accordingly does not detract from compliance with CPII.

20. The DP argues that because AT74(2) which entrenches the bill of rights, is not itself entrenched, the entrenchment demand of CPII is not met.[38] We submit that this contention is unfounded firstly because AT74(2) may not be capable of amendment at all, secondly because it is entrenched and thirdly because it need in any event not be entrenched:

20.1. AT74(2) may firstly not be capable of amendment at all, if to do so would radically and fundamentally restructure and re-organise one of the fundamental premises of the constitution.[39]

20.2. The entrenchment of the bill of rights in AT74(2), is itself entrenched for the following reasons. The entrenchment of the bill of rights lies in the requirement of AT74(2)(b) that any amendment of the bill of rights be approved by a two-thirds majority in the NCOP.[40] Any amendment of the latter provision, would be one contemplated by AT74(3)(b)(i) which "relates to a matter that affects" the NCOP. It will consequently also have to be passed by a two-thirds majority in both houses of parliament. The entrenching mechanism in AT74(2) accordingly enjoys the same entrenchment as the bill of rights itself.

20.3. But CPII thirdly in any event does not require the entrenching mechanism itself to be entrenched. This is consistent with the approach of the CP's in general, that they lay down requirements for the final constitution at its commencement, but do not demand that those requirements forever be satisfied.

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[37] AT74(8)

[38] DP10:18-24

[39] Premier, KwaZulu-Natal v President of the RSA 1996(1) SA 769 (CC) paras.47-48

[40] The requirement in AT4(2)(a) of a two-thirds majority in the NA, is common to all constitutional amendments and does not serve to "entrench"

They recognise on the contrary, that the final constitution would be subject to future amendment. CPXV demands merely that they be subject to "special procedures involving special majorities". The CP's in general and CPII in particular, in other words merely concern themselves with the final constitution at its commencement. They do not prescribe or in any way inhibit future amendment provided only that they are subject to special procedures involving special majorities. They do not require any provision of the final constitution to be immune from amendment.

The apparent anomaly upon which the DP relies, is in other words not peculiar to the entrenchment requirement of CPII. It is equally applicable to all the CP's including the special procedures and special majorities requirement of CPXV. All of them are subject to future amendment and those amendments may depart from the requirements laid down by the CP's themselves.

21. We submit that the deficiency has been cured and that AT74 now complies with the demand of CPII that the bill of rights be entrenched.

LABOUR RELATIONS

22. CPXXVIII requires that the right to engage in collective bargaining be conferred on "employers and employees". NT23(4)(c) conferred this right on trade unions and employers' organisations. This court held that it fell short of the requirement of CPVIII in that the right was not conferred on individual employers.[41]

23. AT23(5) now replaces NT23(4)(c) with the following provision:

> "Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this chapter, the limitation must comply with section 36(1)."

24. The implications of this amendment are:

24.1. The right conferred, is now a right "to engage in collective bargaining" and no longer a right "to bargain collectively". The new formulation coincides with the language of CPXXVIII.

24.2. The shortcoming in NT23(4)(c) is cured by conferring the right to engage in collective bargaining on every employer.

24.3. A new provision is introduced which allows national legislation "to regulate collective bargaining" subject to the general limitations provision in AT36(1). This provision merely makes explicit that which would in any event have been implied.

25. We accordingly submit that the deficiency has been cured and that AT23 now complies with CPXXVIII.

[41] CJ1285:69

IMMUNITY OF THE LABOUR RELATIONS ACT

26. NT241(1) immunised the Labour Relations Act against constitutional review. This court held that it was in conflict with CPIV which requires that the constitution be supreme and CPII and CPVII which provide that the fundamental rights contained in the constitution shall be justiciable.[42]

27. The offending provision has been deleted from the AT. It accordingly cures the defect.

[42] CJ1309:149

IMMUNITY OF THE TRUTH ACT

28. NT schedule 6, item 22(1)(b) immunised The Promotion of National Unity and Reconciliation Act 34 of 1995 against constitutional review. This court held that it was in conflict with CPIV which provides that the constitution shall be supreme and CPII and CPVII which provide that the fundamental rights contained in the constitution shall be justiciable.[43]

29. This deficiency has been cured by deleting the offending provision from AT schedule 6, item 22.

[43] CJ1309:150

THE PUBLIC PROTECTOR AND AUDITOR GENERAL

30. CPXXIX requires that the independence of the public protector and auditor general "be provided for and safeguarded by the constitution". In terms of NT193(4) and (5) they were appointed by the president on the recommendation of the NA and in terms of NT194(1) they could be removed from office by ordinary resolution of the NA on the grounds of misconduct, incapacity or incompetence after a finding to that effect by a committee of the NA.

31. This court held that the independence of these functionaries was not adequately protected. Its only concern was that they could, in effect, be removed from office by a simple majority of the NA.[44]

32. AT193(5)(b)(i) and AT194(2)(a) now require super-majorities in the NA for both their appointment and removal from office. A 60% majority is required for their appointment and a two-thirds majority for their removal from office.

33. We submit that these amendments have cured the deficiency.

[44] CJ1313:163 and 165

THE PUBLIC SERVICE COMMISSION

Introduction

34. This court held that the NT provisions relating to the PSC raised three issues of compliance with the CP's:

    34.1. The need to define the powers and functions of the PSC.

    34.2. The independence and impartiality of the PSC.

    34.3. The impact of the powers and functions of the PSC on provincial power.

The powers and functions of the PSC

35. This court held that NT196(1) did not sufficiently define the powers and functions of the PSC. It merely provided that the PSC shall "promote the values and principles of public administration in the public service". It contrasted this provision with IC210 which defined the powers and functions of the PSC in greater detail. It held that, although the CP's did not expressly require the powers and functions of the PSC to be defined, it was nonetheless necessary to enable the court to determine whether the NT complied with the requirement of CPXXIX that the independence and impartiality of the PSC be provided for and safeguarded; the requirement of CPXX that each level of government has appropriate and adequate legislative and executive powers and functions; and the requirement of CPXVIII(2) that the powers and functions of the provinces not be substantially less than or substantially inferior to those under the IC.[45]

36. AT196(4) now defines the powers and functions of the PSC in as much as detail as was done in terms of IC210. Its powers are to promote the values and principles described in AT195, to investigate, monitor, evaluate, propose, report and advise. Its only power of compulsion is the power in terms of AT196(4)(d) "to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195", that is, the democratic values and principles enshrined in the constitution including those specified in AT195. It is accountable to the NA[46] and must annually report to the NA[47] and to the provincial

[45] JC1317:177

[46] AT196(5)

[47] AT196(6)(a)

legislatures.[48] The role of the PSC is in other words to monitor, assist and check the exercise of executive power in the administration of the public service and to give account to the legislature for its performance of that function.

37. The definition of its role in AT196(4)(a), (d) and (e) refers to and incorporates the values and principles enumerated in AT195. The reference and incorporation adds further specificity to the definition of its role.

38. We accordingly submit that the deficiency of a lack of definition of the powers and functions of the PSC, has been cured.

The independence and impartiality of the PSC

39. CPXXIX requires the independence and impartiality of the PSC to be provided for and safeguarded by the constitution. This court left open the question whether the NT complied with this requirement. It held that it could not come to any conclusion in this regard "without knowing what the functions and powers of the PSC will be and what protection it will have in order to ensure that it is able to discharge its constitutional duties independently and impartially".[49]

40. AT196 incorporates the following provisions safeguarding the independence and impartiality of the PSC.

    40.1. The PSC comprises fourteen members.[50] There is safety in numbers. It would tend to make the PSC less vulnerable to political interference than the other watchdogs such as the auditor general and public protector who hold office on their own.

    40.2. In terms of AT196(7) and (8), the power of appointment of the members of the PSC, is widely dispersed. It vests in the NA which appoints five commissioners and the nine provincial legislatures which appoint one each. No single organ of state has the power to appoint a majority of the members of the PSC. Within each of them moreover, the appointment has to be recommended by a committee proportionally composed of members of all the parties within the legislature and approved

[48] AT196(6)(b)

[49] CJ1317:176

[50] AT196(7)

by the legislature itself by majority vote.

40.3. AT196(2) provides that the PSC "is independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice ...".

40.4. AT196(3) provides that all other organs of state must, through legislative and other measures, "assist and protect the commission to ensure the independence, impartiality, dignity and effectiveness of the commission".

40.5. In terms of AT196(3) no person or organ of state "may interfere with the functioning of the commission".

40.6. In terms of AT196(11) and (12) the circumstances in which a member of the PSC may be removed from office, are strictly circumscribed:

40.6.1. It may only be done "on the ground of misconduct, incapacity or incompetence".[51] These grounds are narrow and are an objective, justiciable jurisdictional requirement.

40.6.2. It may only be done after a finding of misconduct, incapacity or incompetence by a committee of the legislature concerned.[52] It is in other words not enough that the commissioner has in fact been guilty of misconduct or suffers from incapacity or is incompetent. A committee of the legislature must also be persuaded that that is so.

40.6.3. The legislature itself must adopt a resolution by majority vote, calling for the commissioner's removal from office.[53]

41. The DP argues that AT196 does not sufficiently safeguard the independence and impartiality of the PSC.[54] Its argument however ignores most of the safeguards built into AT196.

42. We submit that the independence and impartiality of the PSC is more than adequately provided for and safeguarded by the safeguards built

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[51] At196(11)(a)

[52] AT196(11)(b)

[53] AT196(11)(c)

[54] DP21:42

into AT196 which now conforms to the demand of CPXXIX.

The impact of the PSC on provincial powers

43. The powers and functions of the PSC may have an effect on the powers and functions of the provinces in relation to their own administration. The definition of the powers and functions of the PSC may accordingly impact on the requirements of CPXX that provincial governments have "appropriate and adequate legislative and executive powers and functions" and CPXVIII(2) that the powers and functions of the provinces not be substantially less than or substantially inferior to those under the IC. We address this implication later when we deal with provincial powers.

LOCAL GOVERNMENT POWERS

Introduction

44. This court upheld various objections to the provisions of the NT relating to local government.[55] We will deal with each of these objections in turn and then with a new objection raised by KZN.

A framework for local government

45. CP XXIV requires "a framework for local government powers, functions and structures". This court held that chapter 7 of the NT did not create such a framework.[56] It described the minimum requirements for such a framework as follows:

> "At the very least, the requirement of a framework for local government structures necessitates the setting out in the NT of the different categories of local government that can be established by the provinces and a framework for their structures. In the NT, the only type of local government and local government structure referred to, is the municipality. In our view this is insufficient to comply with the requirements of CP XXIV. A structural framework should convey an overall structural design or scheme for local government within which local government structures are to function and provinces are entitled to exercise their establishment powers. It should indicate how local government executives are to be appointed (and) how local government governments are to take decisions...".[57]

46. The significance of the second sentence of CPXXIV however has to be borne in mind. It demands that the "comprehensive powers, functions and other features of local government ... be set out in parliamentary statutes or in provincial legislation or both". Its implication is not merely that those comprehensive powers, functions and other features need not be specified in the constitution, but also that they may not be so specified because that function has to be left to parliament and the

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[55] CJ1349:299-305

[56] CJ1349:301

[57] CJ1349:301

provincial legislature. CPXXIV in other words requires that a thin line be tread between,

- the creation of a framework for local government powers, functions and structures on the one hand and

- the definition of the comprehensive powers, functions and other features of local government on the other.

47. The AT creates a framework for local government powers, functions and structures as follows:

47.1. AT152 and 153 describe the broad objects and duties of local government.

47.2. AT155 deals with the structure of local government. It creates three categories of municipality.[58] National legislation must define the different types of municipality within each category;[59] establish the criteria for the choice of category of municipality within each area;[60] the criteria and procedures for the determination of municipal boundaries;[61] and provide for an appropriate division of powers and functions between municipalities with overlapping areas of jurisdiction.[62] The legislation must take account of the need to provide municipal services in an equitable and sustainable manner.[63] Provincial legislation must choose the types of municipality to be established in each province.[64] Each provincial government must establish the municipalities in its province and monitor, support and promote the development of local government.[65]

47.3. In terms of AT151(2) the executive and legislative authority of a

[58] AT155(1)

[59] AT155(2)

[60] AT155(3)(a)

[61] AT155(3)(b)

[62] AT155(3)(c)

[63] AT155(4)

[64] AT155(5)

[65] AT155(6)

municipality is vested in its municipal council. AT157, 158 and 159 provide a framework for the composition, election, membership and terms of office of municipal councils.

47.4. In terms of AT151(3) a municipality has the right to govern the local government affairs of its community subject to national and provincial legislation. AT156(1) and (2) confer legislative and executive authority on municipalities in respect of the local government matters listed in parts B of schedules 4 and 5 and all other matters assigned to them by national and provincial legislation.

47.5. National and provincial government are required in terms of AT156(4) to assign or delegate to municipalities, the administration of all matters listed in parts A of schedules 4 and 5 which necessarily relate to local government and which would be more effectively administered locally, provided that the municipalities concerned have the necessary administrative capacity.

47.6. AT160 describes the internal legislative and executive procedures of municipal councils.

47.7. This court suggested that the requirement of a framework for local government powers, functions and structures, "should indicate how local government executives are to be appointed". It is not clear why a constitutional framework for local government, powers, functions and structures, should go to this level of detail. AT160(1) does, however, provide that a municipal council must elect its chairperson[66], may elect an executive committee and other committees in accordance with national legislation[67] and may employ the personnel necessary for the effective performance of its functions.[68] AT160(1) is however subject to AT160(5) which allows national legislation to provide criteria for determining the size of the municipal council, whether municipal councils may elect an executive committee or any other committee and the size of the executive committee or any other committee of the municipal council.

47.8. AT155 (7) provides for national and provincial government to

[66] AT160(1)(b)

[67] AT160(1)(c)

[68] AT160(1)(d)

regulate the effective performance of local government executive powers and functions.

48. We submit that these provisions do create a framework for local government powers, functions and structures as required in terms of CPXXIV. KZN argues that this requirement is not met[69] but its argument assumes that the required framework for local government powers, functions and structures is to be found only within the provisions of NT155(1).[70] It ignores all the other provisions which also contribute towards the framework.

49. We submit that the AT now complies with the requirement of CPXXIV.

The fiscal powers of local government

50. CPXXVIII demands that the framework for local government "shall make provision for appropriate fiscal powers and functions for different categories of local government". This court held that the NT did not comply with this requirement.[71] It also held that the local government power to levy "excise taxes" in terms of NT229(1), "includes taxes that are inappropriate for municipalities to impose".[72]

51. AT229 now deals explicitly and clearly with local government fiscal powers. Municipalities may impose,

- rates on property and surcharges on fees for services provided by or on behalf of the municipality;[73] and

- if authorised by national legislation, other taxes, levies and duties appropriate to local government or the category of local government into which that municipality falls, but excluding income tax, value added tax, general sales tax and customs duty.[74]

52. CPXXV requires that the constitutional text "make provision for

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[69] KZN11:27-31

[70] KZN12:30-31

[71] CJ1350:302

[72] CJ1350:303-305

[73] AT229(1)(a)

[74] AT229(1)(b)

appropriate fiscal powers and functions for different categories of local government". We submit that this requirement does not mean that different categories of local government must have different fiscal powers. But insofar as differentiation is demanded, it is adequately "provided for" within the meaning of CPXXV, by the power of national government to differentiate in terms of AT229(1)(b), (2)(b), (3) and (5).

53. We accordingly submit that AT229 now conforms to the requirements of CPXXV.

Continuation of the Local Government Transition Act

54. KZN argues[75] that AT schedule 6 clause 26.1 which perpetuates the life of the LGTA, violates the CP's on either of the following two grounds:

54.1. If its effect is to make the LGTA part of the AT, then it violates CP's II, III, V, VIII and XVII because the provisions of the LGTA are in conflict with those CP's.

54.2. If its effect is not to make the LGTA part of the AT, then it violates the requirement of CPIV that the constitution be the supreme law of the land because it immunises the LGTA against constitutional review in terms of AT151, 155, 156 and 157.

55. We submit for the following reasons that the KZN contentions are unfounded:

55.1. AT schedule 6 item 26(1) does not make the LGTA part of the AT. Its language does not suggest anything of the kind and it does not perpetuate the LGTA as it stands, but the LGTA "as may be amended from time to time by national legislation consistent with the new constitution".[76]

55.2. It perpetuates the LGTA only "until 30 April 1999 or until repealed, whichever is sooner".[77] It is in other words an ordinary transitional provision which provides for orderly transition from the IC to the AT. There is nothing in the CP's which preclude such interim measures for the transition from the old order to the new. It must on the contrary have contemplated

[75] KZN7:20-25

[76] TA schedule 6 item 26(1)(a)

[77] TA schedule 6 item 26(1)(a)

that the transition would be impossible without provisions of this kind.

55.3. These transitional provisions are not new. The fact is that local government in South Africa is in a process of transformation which will still take some time to complete. This reality was amply recognised in the local government transitional provisions in IC245[78]. It has in other words been apparent all along that the process of transformation of local government would be long and arduous. It reinforces the inference that the IC and therefore also the CP's, must have contemplated that the transition would be impossible without provisions of this kind.

[78] See particularly IC245(4) as amended by the Constitution of the RSA Amendment Act 7 of 1996 and NT schedule 6 item 26.

PROVINCIAL POWERS

Introduction

56. No other issue was as fully debated, as comprehensively considered and clearly determined, than the issue of provincial powers and more particularly the requirement of CPXVIII(2) that the powers and functions of the provinces "not be substantially less than or substantially inferior to those provided for in" the IC.[79] This court's conclusions may be summarised as follows:

    56.1. The NT does not comply with CPXVIII(2).[80]

    56.2. The NT would have complied with CPXVIII(2) if it had not been for two critical provisions which tipped the balance. They are NT146(2)(b) which creates a new ground of national legislature override "in the interests of the country as a whole" and NT146(4) which creates a presumption in favour of national legislation. The court thus clearly indicated that this deficiency could be cured by reversal of these two innovations.[81]

    56.3. These conclusions are subject to an important qualification. This court held that it could not give a firm or final answer to the question of compliance with CPXVIII(2) "until the issues relating to the powers of the provinces in regard to the appointment of their own employees, as well as the powers and functions of the PSC, have been clarified."[82]

57. We will deal with these issues as follows:

    57.1. The AT cures the deficiencies in the manner suggested by this court, by reversing the two critical innovations and clarifying the issue raised by this court's qualification. We will first deal with the way in which it does so.

    57.2. The AT introduces new enhancements of provincial police powers. We will secondly deal with the respects in which it does so.

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[79] CJ1350:306-481

[80] CJ1398:481

[81] CJ1398:479-481

[82] CJ1396:473

57.3. The DP and KZN argue that the AT introduces new diminutions of provincial power. We will thirdly deal with the respects in which they say it does so.

58. KZN seeks to re-argue the whole issue of compliance with CPXVIII(2) and does not confine itself to the innovations in the AT.[83] Whilst it may be permissible to do so, we submit that no useful purpose will be served by re-opening the whole debate which was so fully and comprehensively belaboured and decided. We will accordingly not reopen the broader debate but will confine ourselves to the innovations in the AT.

59. The debate tends to focus on the changes in provincial power from the IC to the NT and from the latter to the AT. It must, however, be borne in mind that those changes are often insignificant and inconsequential in their proper contexts, which is the vast body of provincial powers which have remained unchanged. This court described those powers[84] and then characterised them as follows:

> "We have set out this list to indicate how extensive it is and how significant some of the powers are. It includes powers in important functional areas which affect the day to day lives of people, such as agriculture, consumer protection, primary and secondary education, the environment, health, housing, regional planning and development, urban planning and development, trade, and welfare, and other important powers such as tourism and public transport."[85]

The override "in the interests of the country as a whole"

60. IC126(3)(b) and (c) provided for national legislation to override provincial legislation if it,

- "deals with a matter that, to be performed effectively, requires to be regulated or co-ordinated by uniform norms or standards that apply generally throughout the Republic" or

- "is necessary to set minimum standards across the nation for

[83] KZN18:51-62 and schedule 1

[84] CJ1396:475

[85] CJ1397:476

the rendering of public services".

61. Both those provisions were replaced by NT146(2)(b) which allowed for national legislation to override provincial legislation if "the interests of the country as a whole require that a matter be dealt with uniformly across the nation, and the national legislation provides that uniformity by establishing norms and standards; frameworks; or national policies". This was one of the two critical provisions which tipped the balance to non-compliance with CPXVIII(2).

62. NT146(2)(b) has now been replaced by AT146(2)(b) which provides for national legislation to override provincial legislation if it "deals with a matter that, to be dealt with effectively, requires uniformity across the nation and the legislation provides that uniformity by establishing norms and standards; frameworks; or national policies".

63. We submit for the following reasons that the objectionable feature of NT146(2)(b) has been removed and that AT146(2)(b) does not provide for any greater power of override than that provided for in terms of IC126(2)(b) and (c):

63.1. The aforegoing provisions of the IC, NT and AT have in common that they set two requirements for national override. The first is that the national legislation must deal with a certain kind of matter ("the subject-matter criterion") and the second that it provides for national uniformity in a certain way ("the method criterion").

63.2. This court identified the subject-matter criterion of NT146(2)(b) as its objectionable feature.[86] That feature has now been removed. AT 146(2)(b) reverts to the subject-matter criterion of IC126(3)(b) and (c) namely that the national legislation must deal with a matter which "to be dealt with effectively" requires national uniformity.

63.3. The method criterion in IC126(3)(b) and (c) is wide and open-ended. It permits national legislation to override provided only that it pursues national uniformity,

- by regulation or co-ordination "by uniform norms or standards that apply generally throughout the Republic"; or

- by "minimum standards across the nation for the

[86] CJ1359:337 and 1398:480

rendering of public services".

63.4. The method requirement of AT146(2)(b) is considerably narrower and more specific. It permits national legislation to override only if it pursues national uniformity "by establishing norms and standards; frameworks; or national policies". Insofar as this requirement for national override is more focused and specific and therefore narrower than that under IC126(3)(b) and (c), it serves to enhance rather than diminish provincial power.

64. The DP argues[87] that AT146(2)(b)(ii) and (iii) diminish provincial power in so far as they extend the method criterion for national override. But we submit that they do not do so. National legislation which provides for national uniformity by establishing frameworks or national policies, would also have qualified for override in terms of the broad method criterion of IC126(3)(b) and (c) as,

- "uniform norms or standards that apply generally throughout the Republic" or

- "minimum standards across the nation for the rendering of public services".

65. We accordingly submit that AT146(2)(b) cures the objectionable feature of NT146(2)(b).

The presumption in favour of national legislation

66. This court held that the offensive feature of NT146(4) was that it created a presumption in favour of national legislation passed by the NCOP.[88] AT146(4) now does away with the presumption and requires merely that the court "must have due regard to the approval or the rejection of the legislation by the NCOP". It accordingly removes the offensive feature identified by this court.

67. The DP argues that the latter requirement still diminishes provincial power.[89] The argument is however based on its interpretation of the requirement "to mean that courts must defer to the NCOP's assessment

[87] DP31:54.5

[88] CJ1398:480

[89] DP33:54.6

of what is necessary for the purposes set out in AT146(1)(c) more than the deference due to parliament would ordinarily require".[90] We submit that this interpretation is wrong for the following reasons:

67.1. AT146(4) merely requires "due regard" to the views of the NCOP. It demands no more than such regard as is proper or appropriate in the circumstances.

67.2. AT146(4) demands due regard to the views of the NCOP, not only if it approved the legislation but also if it rejected it. The requirement in other words works both ways and accordingly does not diminish provincial power.

67.3. It demands due regard to the views of the NCOP and not those of parliament as a whole. Insofar as the latter is under provincial control, the weight attached to its views would tend to enhance rather than detract from provincial power.

68. We accordingly submit that AT146(4) removes the objectionable feature of NT146(4).

Provincial power of appointment and the role of the PSC

69. We have already dealt with the provisions of the AT governing the PSC. We submit for the reasons that follow, that they do not diminish the powers of the provinces.

70. The provinces effectively appoint nine of the fourteen members of the PSC.[91]

71. The powers and functions of the PSC are largely that of a monitor and consultant.[92] Its only power of compulsion is the power in terms of AT196(4)(d) to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals, comply with the values and principles described in AT195. This power is, if anything, more limited than the power of direction under IC210(1)(a).

72. The provinces were entitled under IC213 to establish their own

[90] DP33:54.6.1

[91] AT196(7) and (8)

[92] AT196(4)

provincial service commissions. AT196(13) now provides instead that the provincial nominees to the PSC "may exercise the powers and perform the functions of the commission in their provinces as prescribed by national legislation".

73. AT197(4) vests the provinces with the power of "recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations within a framework of uniform norms and standards applying to the public service". This provision does not prescribe the manner in which the framework of uniform norms and standards is to be determined. We submit that it might be done in three different ways:

73.1. By national framework legislation in terms of AT197(1) and (2). The DP argues that these provisions diminish provincial power.[93] But we submit that they do not. The IC did not permit the provinces an unfettered power of recruitment, appointment, promotion, transfer and dismissal of the members of their own public service. IC213(1)(a)(ii) allowed provincial service commissions to make recommendations, give directions and conduct enquiries with regard to appointments, promotions, transfers, discharge and other career incidents of provincial public servants, but they could do so only "subject to norms and standards applying nationally".

Frameworks of this kind secondly do not constrain the exercise of provincial power in ways which would prevent the provinces from effectively exercising the powers vested in them. This court held that "the setting of such norms and standards by an independent body does not detract from the legitimate autonomy of the provinces" in that, "(w)hat is important to such autonomy, however, is the ability of the provinces to employ their own public servants".[94] It went on to say that: "if the PSC has advisory, investigatory and reporting powers which apply equally to the national and provincial governments, and the provinces remain free to take decisions in regard to the appointment of their own employees within the framework of uniform norms and standards, the changes will neither infringe upon their autonomy nor reduce their powers."[95] It later added the following in a somewhat different and broader context:

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[93] DP35:54.7

[94] CJ1343:276

[95] CJ1343:278

> "The CP's empower the CA to determine the constitutional framework within which the various levels of government will function. Provincial governments, like other levels of government, have to conduct their affairs within the prescribed framework. As long as the framework does not constrain the exercise of provincial powers in ways which would prevent the provinces from effectively exercising the powers vested in them by the NT, the framework is not relevant to provincial autonomy."[96]

73.2. The framework may also be created by the PSC under its power of direction in terms of AT196(4)(d). That power may however only be exercised to ensure compliance with the values and principles set out in section 195. Insofar as the provinces are in any event bound by those values and principles, frameworks of this kind will not constitute an additional constraint upon their powers.

73.3. It may also be done and is nowadays most commonly done by way of collective agreements struck at national level under the laws governing labour relations in the public service. Insofar as these agreements are based on the employers' consent, they would also not impinge upon provincial power.

74. We accordingly submit that the provisions of the AT relating to provincial powers of appointment of the members of their own public service and the role of the public service commission, do not diminish provincial power.

Provincial police powers

75. The provincial police powers under IC214 to 223 were significantly reduced in terms of NT205 to 208. This court assessed that reduction[97] and took it into account in its final weighing of the baskets for purposes of CPXVIII(2).[98]

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[96] CJ1348:294

[97] CJ1375:391-401

[98] CJ1389:443-481 at 478

76. AT205 to 208 now restore the following police powers to the provinces:

76.1. The provinces are given a more significant role in the determination of provincial police policy. In terms of AT206(1) national police policy may firstly only be determined after consultation with the provincial governments and must secondly take into account the policing needs and priorities of the provinces "as determined by the provincial executives". The policy may thirdly accommodate provincial differences taking into account the policing needs and priorities of the provinces as determined by their provincial executives. In terms of AT206(8) a joint committee is established comprising the national minister and provincial MEC's of police "to ensure effective co-ordination of the police service and effective co-operation among the spheres of government".

76.2. The provinces are given a significant role in the appointment and removal of provincial police commissioners. In terms of AT207(3) they can veto his or her appointment and in terms of AT207(6) they may institute proceedings for his or her removal or transfer if he or she has lost their confidence.

76.3. In terms of AT206(5) and (6) mechanisms are created to enhance the ability of the provinces to discharge their functions in terms of AT206(3) to monitor police conduct and oversee the effectiveness and efficiency of the police service in their provinces.

76.4. The provincial police commissioner is accountable to the provincial legislature. They may call him or her to account in terms of AT206(9) and he or she must annually report to them on policing in the province in terms of 207(5).

77. We accept that these additions do not fully restore provincial police power to the level contemplated by the IC. They do, nonetheless, constitute a meaningful and significant enhancement beyond that contemplated by the NT.

Regulation of collective bargaining and union security arrangements

78. The DP argues that the stipulations in AT23(5) and (6) that national legislation may regulate collective bargaining and union security arrangements, diminish provincial power to do so in relation to their own public administrations.[99]

[99] DP29:54.1

79. We submit that the argument is unsound. Under the IC, labour is an exclusive national legislative competence. The legislative competence of the provinces, is limited to their "reasonably necessary or incidental" competence under IC126(2). They are not deprived of this power by the express stipulations in AT23(5) and (6) permitting regulation by national legislation. Those provisions accordingly do not bring about any diminution of provincial power.

Conclusions

80. The comparison of provincial powers under the IC and NT for purposes of CPXVIII(2), was comprehensively debated, considered and decided. This court did the final weighing of the baskets[100] and concluded that the NT fell short of the requirement of the CP.[101] It gave a very clear indication however, of the manner in which this shortcoming could be overcome.[102] The CA adopted this suggestion and fully and properly cured the critical deficiencies. It went further and added to provincial police power in a meaningful and significant way.

81. We submit that the AT amply complies with the requirement of CPXVIII(2).

[100] CJ1389:443-481

[101] CJ1398:481

[102] CJ1396:473 and 1398:479-481

STATES OF EMERGENCY

82. This court held that NT37 which regulates states of emergency, complied with the demand of CPII for the provision and protection of all universally accepted fundamental rights, freedoms and civil liberties.[103] It was however critical of the table of non-derogable rights which it described as "so inexplicable as to be arbitrary" in certain respects.[104]

83. The table of non-derogable rights has been amended to meet this criticism:

83.1. AT89: Equality.

The list has been extended to include all the rights identified as non-derogable in article 4(1) of the International Covenant on Civil and Political Rights (1966). KZN[105] and the lobby led by the National Coalition for Gay and Lesbian Equality[106] point to the omission from this list of discrimination on the grounds of sexual orientation, pregnancy and disability. These rights are undoubtedly important. They do, however, not enjoy the level of universal recognition and protection as those included in the non-derogable list. They are perhaps also less vulnerable to derogation because it is barely conceivable that their derogation would meet the requirement of AT37(4)(a) that it be "strictly required by the emergency".

83.2. AT28: Children.

The list of non-derogable rights has been extended to include the right not to be used directly in armed conflict and to be protected in terms of armed conflict, in respect of children of fifteen years and younger. The extension makes sense because the protection of children in armed conflict is particularly meaningful in an emergency. The age limit of this protection in an emergency, corresponds with that imposed by article 38 of the Convention on the Rights of the Child (1989).

83.3. AT35: Arrested, detained and accused persons

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[103] CJ1294:91-95

[104] CJ1295:94

[105] KZN6:18.1-18.2

[106] National Coalition for Gay and Lesbian Equality and Others 9:3.4-3.8

The following rights have been added to the non-derogable list:

83.3.1. AT35(3)(n): The right to the benefit of the lesser punishment in the event of a change. This addition accords with the non-derogable rights recognised in major international human rights instruments such as article 4(2) read with article 15 of the International Covenant on Civil and Political Rights (1966).

83.3.2. AT35(5): The exclusionary rule. This right was included in response to this court's criticism of its omission from the non-derogable list in NT37.[107]

[107] CJ1295:94

STATE OF NATIONAL DEFENCE

84. AT203 authorises the president to declare a state of national defence but the declaration is subject to disclosure to and control by parliament and lapses if not endorsed by parliament within seven days.

85. The DP contends that this provision would violate various CP's if it "is construed by the court as a 'constitutional' martial law provision".[108] But we submit that it clearly is not to be so construed.

86. The power to create a state of national defence, is the modern-day equivalent of the power to declare a state of war. The purpose of AT203 is not only or even primarily to vest that power in the president, but to make it clear that it vests only in him and to subject it to the requirements of disclosure in terms of AT203(1) and parliamentary control in terms of AT203(2) and (3).

87. AT203 also does not permit any derogation from the constitution. This is quite clear particularly if it is read together with AT37:

    87.1. The language of AT403 does not suggest any power to derogate from the constitution beyond that contemplated by AT37.

    87.2. AT37(1)(a) makes it clear that AT37 is applicable even when "the life of the nation is threatened by war (or) invasion".

    87.3. AT37(8) relaxes certain of the controls of AT37 in times of "international armed conflict". The necessary inference is that AT37 applies even in those circumstances.

    87.4. In other words, if AT37 and AT203 are read together, their logic is clear. The president may declare a state of national defence. Such a declaration does not in itself entitle him to derogate from the constitution at all. Derogation is permissible only if the circumstances giving rise to the declaration of a state of national defence, also threaten the life of the nation and a state of emergency is declared in terms of AT37(1). But that need of course not follow. Armed conflict on foreign soil or even on our borders, need not threaten the life of the nation. In those circumstances it would be competent for the president to declare a state of national defence but not a state of emergency. He would then not be permitted to derogate from the constitution in any way.

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[108] DP24:48

88. KZN argues[109] that NT203 vests the power in the president to deploy the defence force in violation of the requirement of CPXXXI that the security forces "perform their functions and exercise their powers in a national interest". We submit that this argument is unfounded:

88.1. AT203 does not authorise the deployment of the defence force at all.

88.2. AT203 in any event does not vest the president with power to deploy the defence force. That power is vested in the military command subject to executive control of the minister of defence and the commander-in-chief in terms of AT198(d) and AT202 and legislative control by parliament in terms of AT198(d).

[109] KZN23:64

FREEDOM OF TRADE, OCCUPATION AND PROFESSION

89. AT22 affords "every citizen ... the right to choose their trade, occupation or profession freely". The Black Sash contends that it fails to meet the demand of CPII because the right is not afforded to "everyone".

90. The Black Sash argues that "the test is simply whether a right is universally accepted as fundamental" and, if it is, "then CPII commands that "everyone" shall enjoy it."[110] They add that CPII "does not allow universally accepted fundamental rights to be guaranteed to citizens only".[111]

91. But this argument is simplistic. Not only the existence of the right but also its ambit is determined by what is universally accepted. There are a range of universally accepted fundamental rights[112] which are universally conferred only on citizens and not on everyone. The right enshrined in AT21(3) "to enter, to remain in and to reside anywhere" in South Africa, is a good example. On the Black Sash logic however, all these rights would have to be extended to all-comers.

92. The right freely to choose one's trade, occupation or profession is in any event not a universally accepted fundamental right:

92.1. Whilst the right enjoys some recognition in international instruments, it is not by any means as universal as the Black Sash suggests:

92.1.1. The Universal Declaration of Human Rights (1948) is an aspirational statement and not a codification of internationa law or a reflection of the rights and freedoms recognised in open and democratic societies.

92.1.2. Whilst article 6(1) of the International Covenant on Economic, Social and Cultural Rights (1966) recognises "the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts", it is subject to the qualification in article 2(3) which allows developing countries "with due regard to human rights and their national economy" to "determine to what extent they would guarantee the

[110] Black Sash 8:4.5

[111] Black Sash 13:5.3.6

[112] Such as those protected in AT19, 20, 21(3) and (4)

economic rights recognised in the present covenant to non-nationals".

92.1.3. Article 15 of the African Charter on Human and Peoples' Rights (1981) recognises the right of every individual "to work under equitable and satisfactory conditions" and to "receive equal pay for equal work". It does not afford a right to aliens "to choose their trade, occupation or profession freely".

92.1.4. Article XIV of the American Declaration of the Rights and Duties of Man (1948) also affords the right to follow one's vocation freely only "insofar as existing conditions of employment permit".

92.1.5. Article 23 of the American Convention on Human Rights (1978) is expressly limited to citizens and article 26 does not protect a right freely to choose one's "trade, occupation or profession".

92.1.6. The Additional Protocol to the American Convention on Human Rights: Economic, Social and Cultural Rights (1988) is not yet in force. Article 6(1) moreover entrenches a right to work and not a right freely to choose one's trade, occupation or profession.

92.1.7. Article (1) of Part I and article 1(2) of Part II of the European Social Charter (1961) do recognise the right of every person freely to choose his or her occupation.

92.1.8. There are significant omissions from some leading international human rights instruments. The European Convention on Human Rights (1950) and the International Covenant on Civil and Political Rights (1966) for instance do not recognise such a right.

92.2. Drzewicki comes to the following conclusion in his chapter on the right to work in Eide, Krause and Rosas, "Economic, Social and Cultural Rights":[113]

> "On the international plane, a formulation of the right to work/employment has only remained in such general and ambiguous provisions that it is difficult to confirm its existence as an internationally recognised human right.

[113] published by Martinus Nijhoff Publishers (1995)

> Such unclear and over-optimistic positions have been visible in the non-binding UDHR, the ESC and in the African Charter of Human and Peoples' Rights, all having exerted no concrete interpretation towards recognition of the generally applicable right to employment. Keeping this in mind, this vagueness and generosity of some human rights instruments, certain states found it necessary to clearly reserve their positions. For example, the United Kingdom clearly opposed the over-interpretation of ESC (Article 1(1)) in a statement that the provision in question did not involve "an obligation to guarantee work", that is, a subjective right to work."

92.3. Some of the leading open and democratic societies also do not recognise such a right at all or confine it to citizens. Article 12(1) of the German Basic Law for instance only affords to Germans, "the right freely to choose their occupation or profession, their place of work, study or training". Artcle 4 of the Italian Constitution recognises a right to work but also confines it to "citizens". The United States Constitution and the Canadian Charter do not recognise a right freely to choose one's trade, occupation or profession at all. As the authority quoted by the Black Sash clearly indicates,[114] the rights of non-citizens in those societies, are derived entirely from the equality guarantees in their constitutions.

92.4. This court held that CPII "establishes a strict test" which requires recognition of "only those rights that have gained a wide measure of international acceptance as fundamental human rights".[115] We submit that the right of non-citizens freely to choose their trade, occupation or profession, falls far short of this requirement of universal acceptance.

93. The Black Sash submission also loses sight of the protection that non-citizens enjoy under the equality guarantee in AT9. We have already noted that it is the source in Canada and the United States, of the constitutional prohibition of discrimination against non-citizens in the freedom freely to choose their trade, occupation or profession. The equality guarantee would, for instance, defeat the discrimination postulated by the Black Sash in the examples they give at 17:6.1 and

[114] Black Sash 14:5.3.7(Canada) and 15:5.3.9

[115] CJ1279:51

6.2.

94. We submit that AT22 conforms to the demand of CPII.

TRANSITION: PUBLIC ADMINISTRATION AND SECURITY SERVICES

95. AT schedule 6 item 24(1) provides for certain provisions of the IC relating to public administration and security services, to continue in force subject to consistency with the AT and "any further amendment or any repeal of those sections by an act of parliament passed in terms of section 75 of the new constitution". It is similar to NT schedule 6 item 20(3) but narrower than the latter insofar as it perpetuates provisions of the IC but subject to "consistency with the new constitution".

96. KZN argues[116] that the effect of this section is that the provisions so perpetuated, "constitute a parameter of constitutionality" and "now form part of the new text" but that their amendment or repeal by ordinary procedures and majorities violates the requirement of CPXV that amendments to the constitution be permissible only by special procedures involving special majorities.

97. We submit that the premise of this argument is false. The sections perpetuated, are not made part of the AT. They are excluded from the general repeal of the IC. They continue to exist as remnants of the old IC and not as part of the AT. They moreover undergo a change of status in that they are subject to the new constitution and may be amended or repealed by ordinary act of parliament. It means that they in effect lose their constitutional status and are relegated to the status of ordinary legislation.

98. We accordingly submit that AT schedule 6, item 24(1) does not violate CPXV because any amendment of the provisions of the AT it perpetuates,

- would not constitute a constitutional amendment but an amendment of ordinary legislation, and

- would in any event not constitute an amendment of the AT but merely an amendment of the remnants of the IC.

Amendments of the AT remain permissible only subject to the special procedures and special majorities prescribed by AT74. This provision accordingly does not violate CPXV.

[116] KZN9:26

COLLECTIVE RIGHTS

99. CPXII requires that collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, be recognised and protected.

100. AT31 protects this right on the basis of a communality of language, culture or religion. KZN complains[117] that it does not fully meet the demand of CPXII because it "fails to recognise collective rights of self-determination going beyond culture, religion and language".

101. But the demand of CPXII is met not only by AT31 alone, but also by the right to freedom of association in terms of AT18, the right to form and join trade unions and employers' organisations in terms of AT23(2) and (3) and the right to participate in the cultural life of one's choice in terms of AT30.

102. We submit that AT18, 23, 30 and 31 taken together, fully meet the demand of CPXII.

[117] KZN3:7-14

TRADITIONAL MONARCHS

103. CPXIII(2) requires that provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch, be recognised and protected. AT143(1)(b) fully meets this demand.

104. But provisions of this kind in a provincial constitution, are subject to national override in terms of AT147(1)(c). KZN complains[118] that this possibility violates the demand of CPXIII(2) for recognition and protection of provisions of this kind.

105. We submit that the KZN complaint is unfounded for the following reasons:

105.1. CPXIII(2) require no more than that the right of the provinces to include provisions of this kind in their constitutions, be recognised and protected. It does not demand that those provisions should then be immune from national intervention and override.

105.2. On the contrary, CPXXI(2), (3), (4) and (5) and CPXXIII make it clear that it is permissible under the CP's, to provide for an unqualified right of national intervention and override in the circumstances contemplated by those CP's. They do not exclude any provincial legislation from their ambit. They do not demand that any particular provincial legislation be immune from intervention and override.

[118] KZN12:32-38

CONCLUSION

106. We submit that the AT complies with the CP's and qualifies for certification in terms of IC71(2).

DATED AT JOHANNESBURG ON THIS THE 12th DAY OF NOVEMBER 1996.

G. BIZOS SC
W.H. TRENGOVE SC
M.T.K. MOERANE SC
N. GOSO
K.D. MOROKA