CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 37/96

CERTIFICATION OF THE AMENDED TEXT OF THE
CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

Heard on: 18, 19 and 20 November 1996

Delivered on: 4 December 1996

JUDGMENT

THE COURT:

INTRODUCTION

[1] South Africa is currently functioning under an interim constitution (the "IC")[1] that, among other things, prescribes how the country's final constitution is to come into being.[2] Three of the essential steps of that constitution-making process are that (i) the Constitutional Assembly (the "CA")[3] has to adopt the

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1 The Constitution of the Republic of South Africa Act 200 of 1993. A list of the abbreviations used in this judgment is to be found in Annexure 3.

2 The mechanism for the drafting of the final constitution is contained in chapter 5 of the IC, running from sections 68 to 74.

3 Sections 68(1) and (2) of the IC read as follows:

> "(1) The National Assembly and the Senate, sitting jointly for the purposes of this Chapter, shall be the Constitutional Assembly.
> (2) The Constitutional Assembly shall draft and adopt a new constitutional text in accordance with this Chapter."

new constitutional text by a two-thirds majority,[4] (ii) such text must comply with a prescribed set of Constitutional Principles ("CPs"),[5] and (iii) it can come into force only once this Court has certified that it indeed so complies.[6]

[2] Pursuant to those provisions of the IC, the CA adopted a new constitutional text (the "NT") with the requisite majority in May 1996 and transmitted it to this Court for certification. After an extensive enquiry we delivered a judgment (the "*Certification Judgment*" or "*CJ*")[7] in which we traced the background to the creation of the IC, and analysed the role and meaning of the CPs. We also explained the nature, purpose and scope of our certification function, described how we had gone about performing that task and set out the reasons for our conclusions. In the event we withheld certification of the NT for reasons we ultimately expressed in the following terms:

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4 Section 73(2) of the IC provides as follows:

> "For the passing of the new constitutional text by the Constitutional Assembly, a majority of at least two-thirds of all the members of the Constitutional Assembly shall be required: Provided that provisions of such text relating to the boundaries, powers and functions of provinces shall not be considered passed by the Constitutional Assembly unless approved also by a majority of two-thirds of all the members of the Senate."

5 Section 71(1) of the IC provides:

> "A new constitutional text shall -
> (a) comply with the Constitutional Principles contained in Schedule 4; and
> (b) be passed by the Constitutional Assembly in accordance with this Chapter."

6 Section 71(2) of the IC reads:

> "The new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles referred to in subsection 1(a)."

7 Reported as *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

"A. CONCLUSION

It is therefore our conclusion that the following provisions of the NT do not comply with the CPs:

- NT 23, which fails to comply with the provisions of CP XXVIII in that the right of individual employers to engage in collective bargaining is not recognised and protected.

- NT 241(1), which fails to comply with the provisions of CP IV and CP VII in that it impermissibly shields an ordinary statute from constitutional review.

- NT sch 6 s 22(1)(b), which fails to comply with the provisions of CP IV and CP VII in that it impermissibly shields an ordinary statute from constitutional review.

- NT 74, which fails to comply with -

  CP XV in that amendments of the NT do not require 'special procedures involving special majorities'; and

  CP II in that the fundamental rights, freedoms and civil liberties protected in the NT are not 'entrenched'.

- NT 194, which fails in respect of the Public Protector and the Auditor-General to comply with CP XXIX in that it does not adequately provide for and safeguard the independence and impartiality of these institutions.

- NT 196, which fails to comply with -

  CP XXIX in that the independence and impartiality of the PSC is not adequately provided for and safeguarded; and

CP XX in that the failure to specify the powers and functions of the Public Service Commission renders it impossible to certify that legitimate provincial autonomy has been recognised and promoted.

- NT ch 7, which fails to comply with -

  CP XXIV in that it does not provide a 'framework for the structures' of local government;

  CP XXV in that it does not provide for appropriate fiscal powers and functions for LG;

  and CP X in that it does not provide for formal legislative procedures to be adhered to by legislatures at LG level.

- NT 229, which fails to comply with CP XXV in that it does not provide for 'appropriate fiscal powers and functions for different categories of local government'.

- To the extent set out in this judgment the provisions relating to the powers and functions of the provinces fail to comply with CP XVIII.2 in that such powers and functions are substantially less than and inferior to the powers and functions of the provinces in the IC.

We wish to conclude this judgment with two observations. The first is to reiterate that the CA has drafted a constitutional text which complies with the overwhelming majority of the requirements of the CPs. The second is that the instances of non-compliance which we have listed in the preceding paragraph, although singly and collectively important, should present no significant obstacle to the formulation of a text which complies fully with those requirements.

B. ORDER

> We are unable to and therefore do not certify that all of the provisions of the Constitution of the Republic of South Africa, 1996 comply with the Constitutional Principles contained in schedule 4 to the Constitution of the Republic of South Africa Act 200 of 1993."[8]

[3] The CA, acting in accordance with the provisions of section 73A(2) of the IC,[9] reconvened and in due course passed an amended text of the new constitution (the "AT") which not only addressed the grounds for non-certification set out in the *Certification Judgment*, but also effected many editorial and other minor changes to the NT. On 11 October 1996 the AT was passed by more than the requisite majority in the CA and its Chairperson duly transmitted the text to this Court for certification.

[4] This Court is now required to examine afresh whether the AT complies with the CPs. That is what section 73A(1), (2) and (3) read with section 71(2) of the IC dictate.[10] Nevertheless we could not ignore what had gone before.

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8 *CJ* at paras 482-4 (footnote omitted).

9 Section 73A(2) of the IC provides as follows:

> "The Constitutional Assembly shall within three months of the date of such referral pass an amended text in accordance with section 73(2) or approve an amended text in accordance with section 73(5), as the case may be, taking into account the reasons of the Constitutional Court."

10 The relevant parts of those subsections that have not yet been quoted read as follows:

> "73A. (1) If the Constitutional Court finds that a draft of the new constitutional text passed by the Constitutional Assembly ... does not comply with the Constitutional Principles, the Constitutional Court shall refer the draft text back to the Constitutional Assembly together with the reasons for its finding.

In particular we had to approach the present certification exercise in the context of the *CJ*. There we identified specific features of the NT that did not, in our view, comply with the CPs and gave detailed reasons for that view. The CA for its part was obliged to take those reasons into account in drafting the AT.[11]

[5] Upon receipt of the request for certification the Court issued directions, similar to those given for the previous certification proceedings,[12] relating to the receipt of written submissions from the public, the political parties entitled to be represented in the CA and the CA itself. The Court also directed the CA to publish the directions of the Court as widely as possible and to make copies of the AT freely available. The Court subsequently issued further directions indicating a hearing schedule, to commence on 18 November 1996.

[6] Although the two certification exercises are in principle the same, there is one significant difference that should be highlighted. It relates to the approach to be adopted to certain categories of objections. It is of course open to any objector to certification of the AT to raise an issue not considered

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> (2) The Constitutional Assembly shall ... pass an amended text in accordance with section 73(2)... taking into account the reasons of the Constitutional Court.
> (3) The amended text shall be referred to the Constitutional Court for certification in terms of section 71, whereupon the provisions of subsection (1) and (2) of this section again apply ....”

11 See IC 73A(2), quoted in n 9 above.

12 See *CJ* at paras 22-3.

before, or to contend that we erred in certifying some or other provision of the NT which is repeated in the AT. That is implicit in the mandate given to the Court to measure the AT, ie the text as a whole, against the CPs, read both singly and cumulatively.[13] Nevertheless the proponent of such a contention has a formidable task.

[7] This is so for a number of reasons. In the first instance the previous certification exercise was conducted in the light of very extensive written and oral submissions emanating not only from political parties represented in the CA and the CA itself, but also from the broad spectrum of South African society as a whole.[14] It is, of course, possible that some important feature was overlooked, notwithstanding the comprehensive nature of those submissions, the thoroughness with which they were argued and the Court's earnest endeavour to leave no stone unturned. But that, we believe, is unlikely.

[8] By like token it is possible that we erred in our analysis of an objection and wrongly concluded that the provision of the NT to which it was directed complied with the CPs. Many of the questions raised at the time were difficult and we have no claim to infallibility. Nevertheless we cannot vacillate. The

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13 Chapter II.A of the *CJ*, more particularly paras 34-8, 41 and 42 thereof, explains the general approach we adopted to such comparison.

14 The procedure adopted by the Court to ensure optimal consultation is described in paras 22-5 of the *CJ*; the multiplicity and scope of the objections and comments considered appear from Annexure 3 to the *CJ*.

sound jurisprudential basis for the policy that a court should adhere to its previous decisions unless they are shown to be clearly wrong is no less valid here than is generally the case. Indeed, having regard to the need for finality in the certification process[15] and in view of the virtually identical composition of the Court that considered the questions barely three months ago, that policy is all the more desirable here.

[9] Furthermore the procedure prescribed by s 73A of the IC clearly contemplates interaction between the CA and this Court in relation to the amendment of a constitutional text found not to comply with the CPs. Subsection 73A(1) obliges the Court to give the CA "the reasons for its finding" of non-compliance, while the succeeding subsection requires the CA to pass an amended text "taking into account the reasons of the Constitutional Court". We accordingly tried to make plain in the *CJ* precisely in what respects - and why - we found that the NT failed to measure up to the CPs. And it was probably also the reason why the AT bears every sign that the CA took the *CJ* as the blueprint for amending the NT.

[10] At the same time we were mindful, during both the previous deliberations and again now, that the finality of certification[16] demanded and

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15 There is a time frame built into chapter 5 of the IC, and section 71(3) thereof provides that certification of a text is the last word on the matter.

16 See IC 71(3).

demands that we make assurance doubly sure. We have therefore carefully examined each contention advanced in opposition to certification during these proceedings, irrespective of whether it corresponds with an objection dismissed in the *CJ*.

[11] Only two of the political parties entitled to be represented in the CA, the Democratic Party ("DP") and the Inkatha Freedom Party ("IFP"), lodged written submissions objecting to certification. The National Party, the largest opposition party in the CA and an objector during the previous certification proceedings, formally advised us that it did not intend objecting to certification of the AT. The province of KwaZulu-Natal ("KZN")and eighteen private individuals and interest groups also lodged written submissions regarding certification.[17] The CA in turn filed written submissions in support of certification. The DP, the IFP, KZN and the CA presented oral argument at the hearing, which continued for some two and one-half days. Although their respective written submissions were not co-extensive, the IFP made common cause with KZN at the hearing and was represented by the same advocate, who made one set of submissions on behalf of both his clients. In what follows such argument will therefore simply be ascribed to KZN.

[12] We have now had an opportunity to study all the written submissions and oral arguments advanced in opposition to certification of the AT and those presented on behalf of the CA. The nature of the renewed certification exercise, the extent and limits of this Court's functions and the manner in which we have performed that duty remain as before. Consequently we do not repeat all that has been said in that regard in the *CJ* (and use the same abbreviations and mode of citation as in the *CJ*).[18] We do consider it

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17 A schedule of all the objections and submissions, indicating the gist of each, is annexed as Annexure 1.

18 There are four basic documents to be considered, namely, the IC, the CPs, the NT and the AT. Henceforth their provisions will be referred to as, for example, IC 7(2), CP XII and so forth.

advisable though, to repeat and emphasize one paragraph of the *CJ*, which applies with equal force to the certification of the AT, paragraph 27:

> "First and foremost it must be emphasised that the Court has a judicial and not a political mandate. Its function is clearly spelt out in IC 71(2): to certify whether all the provisions of the NT comply with the CPs. That is a judicial function, a legal exercise. Admittedly a constitution, by its very nature, deals with the extent, limitations and exercise of political power as also with the relationship between political entities and with the relationship between the state and persons. But this Court has no power, no mandate and no right to express any view on the political choices made by the CA in drafting the NT, save to the extent that such choices may be relevant either to compliance or non-compliance with the CPs. Subject to that qualification, the wisdom or otherwise of any provision of the NT is not this Court's business."

[13] The scope of the current exercise is considerably narrower than before and permits of more focused discussion. We do so under the following main headings:

The Bill of Rights

Amendments to the Constitution

Local Government

Transitional Provisions

Traditional Monarch

Intervention Permitted by AT 100

Public Protector, Auditor-General and the Public Service Commission

Compliance with CP XVIII.2

[14] It will be observed that the list of topics we discuss does not include all of the objections and submissions listed in Annexure 1. As in the case of the previous certification exercise[19] we do not consider it necessary, or indeed desirable, to address in this judgment each and every contention advanced. We have studied all of them. Those that invoke substantive issues we have not previously treated, or that raise contentions covered by the oral or written submissions on behalf of the DP and KZN are dealt with in the course of this judgment. The balance raise issues that were considered and disposed of in the previous proceedings,[20] or that concern matters that have no bearing on compliance with the CPs,[21] or voice concerns that are properly within the province of the CA's political judgment.[22]

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19 See *CJ* at paras 104 and 203-14.

20 The points raised by Mr van Hees, Mrs Fogarty, and the Pro Life organization relating to abortion (see *CJ* at para 104); by Professor Prozesky relating to the rights of non-theists (see *CJ* at para 204); by the Volkstaatraad relating to AT 235, AT 74(1) and CP XXXIV (see *CJ* at para 215-21); by the Prologov Consultancy and the Volkstaatraad relating to exclusive provincial powers (see *CJ* at paras 254-7); and by Mr du Preez relating to local government (see *CJ* at para 377 and 380).

21 The points raised by Mr van Hees relating to alleged avarice in the legal and accounting professions; by Mr Ismail regarding the need for constituency meetings; by Mr Nkadimeng regarding Chiefs' Courts' jurisdiction, and by Fain College relating to the Preamble.

22 The points raised by Mrs Fogarty and Mr Hammarstrom relating to gay and lesbian rights; by Mr Faasen relating to the concept of "race"; by Mr King regarding environmental protection; by the Rhema Church and Mr Abrahams relating to pornography and consequent denigration of women; by Mr Abrahams relating to good government; and by Mr Sandison regarding affirmative action.

[15] Inasmuch as this judgment is concerned with certification of the AT, we do not deal with grounds for non-certification of the NT that have been rectified by the CA. It is evident from a comparison of the AT with the NT that the CA indeed conscientiously addressed the shortcomings we identified in the *CJ*[23] and made a concerted effort to rectify them. Whether it succeeded in that endeavour is, of course, the substantive question discussed in this judgment. But it should be noted that many of the original grounds for non-certification have so clearly been eliminated by the reformulation produced by the CA that no renewed objection could be raised. Thus major areas of contention have been removed. There is no longer any sustainable ground for objection to the constitutional provisions relating to labour relations (NT 23);[24] the shielding of ordinary legislation from constitutional scrutiny (NT 241, and NT sch 6 s 22(1)(b));[25] safeguarding the independence and impartiality of the Public Protector and the Auditor-General (NT 194);[26] and the taxing powers and legislative procedures of local government (NT 229 and NT Ch 7).[27]

[16] We now deal in turn with each of the topics mentioned in paragraph 13 above.

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23 *CJ* at para 482, quoted in para 2 above.

24 Compare AT 23.

25 These provisions have not been repeated in the AT.

26 Compare AT 194.

THE BILL OF RIGHTS

Freedom of Trade, Occupation and Profession

[17] An objection, made by the Black Sash Trust, that was not raised before relates to AT 22 (a verbatim repetition of NT 22), the relevant part of which provides:

> "Every citizen has the right to choose their trade, occupation or profession freely."

The contention is that the right of occupational choice extended to citizens by AT 22 is a "universally accepted fundamental right" which should be extended to everyone, ie irrespective of citizenship, in order to comply with CP II. The objection is foundationally flawed and it serves little purpose to cite, as the objector does, examples in international human rights instruments ostensibly extending the right of occupational choice to citizens and non-citizens alike. We say "ostensibly" because the instruments cited do not upon proper analysis bear such an unqualified meaning.

[18] The European Convention for the Protection of Human Rights and Fundamental Freedoms embodies no such right to occupational choice.[28] Nor does the International Covenant on Civil and Political Rights ("ICCPR"). Article

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27 Compare AT 229 and AT ch 7.

28 Article 3 of Protocol No 4 confers an unlimited right to be admitted to and to remain in only the state of which one is a national. See Van Dijk and Van Hoof *Theory and Practice of the European Convention on Human Rights* 2 ed (Kluwer Law and Taxation Publishers, The Netherlands 1990) 494-8.

12.4 of the ICCPR provides that "[n]o one shall be arbitrarily deprived of the right to enter his own country". The right, in terms of the ICCPR, to enter a particular country is accordingly reserved for nationals only. This would reserve to States Parties the right to regulate nationality, citizenship or naturalization. There does not appear to be anything in these instruments which would prohibit States Parties when regulating these matters from imposing suitable conditions, which would not otherwise conflict with the instruments, limiting the rights of non-nationals in respect of freedom of occupational choice.[29]

[19] Article 6.1 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") ostensibly recognises the right of "everyone" to "the opportunity to gain his living by work which he freely chooses or accepts". But this right would be subject to what has been said in the preceding paragraph. Even more important is the fact that Article 2.3 of ICESCR itself allows developing countries "with due regard to human rights and their national economy" to "determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals". It is subject to the even broader qualification in article 2.1 which makes it clear that the right

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29 The right of states to regulate their affairs in this regard is recognised, for example, by Article 1.3 of the International Convention on the Elimination of All Forms of Racial Discrimination which provides:

> "Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality."

in question is not fully enforceable immediately, each State Party only binding itself "to the maximum of its available resources" to "achieving progressively the full realization of the rights recognized in the present Covenant". In no way do we intend to denigrate the importance of advancing and securing such rights. We merely point out that their nature and enforceability differ materially from those of other rights.

[20] The European Social Charter part I(1) which states that "[e]veryone shall have the opportunity to earn his living in an occupation freely entered upon" must be evaluated in the same light. The introduction to part I makes clear that the obligation on Contracting Parties in respect of this right goes no further than "accept[ing] as the aim of their policy, to be pursued by all appropriate means, both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised".[30] The instruments discussed do not support the proposition that non-citizens are entitled to be treated on the same footing as citizens in regard to the freedom of occupational choice.

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30 Article 26 of the American Convention on Human Rights makes it clear that the economic, social and cultural rights are not absolute and immediately enforceable, but have to be achieved " progressively" by State Parties.

[21] This distinction is in fact recognised in the United States of America[31] and also in Canada.[32] There are other acknowledged and exemplary constitutional democracies where the right to occupational choice is extended to citizens only, or is not guaranteed at all. One need do no more than refer to India,[33] Ireland,[34] Italy[35] and Germany.[36] CP II, as we made plain in the *CJ*, requires inclusion in a bill of rights of "only those rights that have gained a wide

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31 Tribe *American Constitutional Law* 2 ed (Foundation Press Inc, New York 1988) 358 (footnotes omitted) says the following:

> "The Supreme Court has traditionally viewed the power of Congress to regulate the entry and stay of aliens, as well as the process through which aliens become naturalized citizens, as an inherent incident of national sovereignty, committed exclusively to national, as opposed to state or local control. 'It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.' As a result, the Court has consistently held that the substantive requirements that an alien must meet to enter this country, to stay, or to become a citizen, are virtually political questions, matters within the discretion of Congress and outside the scope of all but the most limited judicial review."

See also Tribe at 355-61. We express no view whether or in what circumstances an alien lawfully resident in the Republic, could invoke the provisions of NT 9. See Tribe at 1544-53. We are here concerned only with the claim to a universal right to occupational choice in every country.

32 Section 6(1) of the Canadian Charter expressly limits the right to "enter, remain in and leave Canada" to citizens and section 6(2) the right "to move to and take up residence in any province" and "to pursue the gaining of any livelihood in any province" to citizens and "every person who has the status of permanent resident of Canada". See also Hogg *Constitutional Law of Canada* 3 ed (Carswell, Ontario 1992) paras 43.1(a) - (d). Non-citizens can be admitted to Canada subject to conditions that do not apply to citizens. Hogg at paras 43.1(b) and 43.1(d).

33 See art 19(1)(g) of the Indian Constitution.

34 See art 45(2)(i) of the Irish Constitution.

35 See art 4 of the Italian Constitution.

36 See art 12(1) of the German Basic Law.

measure of international acceptance as fundamental human rights".[37] The fact that a right, in the terms contended for by the objector, is not recognised in the international and regional instruments referred to and in a significant number of acknowledged constitutional democracies is fatal to any claim that its inclusion in the new South African Bill of Rights is demanded by CP II. It follows that the objection must be rejected.

Civil Society

[22] CP XII requires that:

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

[23] Counsel for KZN contended that this CP has not been complied with.[38] He referred to AT 31,[39] which protects the right of persons belonging to

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37 See *CJ* at para 51.

38 This contention was also not raised before.

39 AT 31 provides:

> "(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community -
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> (a) to enjoy their culture, practise their religion and use their language; and
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> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
>
> (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

cultural, religious or linguistic communities to form, join and maintain cultural, religious and linguistic associations and other organs of civil society, but does not extend its protection to other communities. His argument was that the wording of this clause does not comply with the requirements of CP XII.

[24] CP XII does not indicate how the collective rights of self-determination are to be recognised and protected. That was a matter for the CA to decide. Having regard to the CPs as a whole, the "[c]ollective rights of self-determination" mentioned in CP XII are associational individual rights, namely, those rights which cannot be fully or properly exercised by individuals otherwise than in association with others of like disposition. The concept "self-determination" is circumscribed both by what is stated to be the object of self-determination, namely, "forming, joining and maintaining organs of civil society" as well as by CP I which requires the state for which the Constitution has to provide, to be "one sovereign state". In this context "self-determination" does not embody any notion of political independence or separateness. It clearly relates to what may be done by way of the autonomous exercise of these associational individual rights, in the civil society of one sovereign state. The objects of the AT 31 rights do not differ from the objects of the CP XII rights of self-determination; both sets of objects comprise various activities in relation to organs of civil society, "organs of civil society" being specifically mentioned in AT 31(1)(b). One ostensible difference is the fact that the subjects of the CP XII rights are unspecified and therefore unrestricted,

whereas AT 31 confers them on persons belonging to the three specified communities. It was this perceived difference that gave rise to the objection.

[25] The AT is based on founding values which include human dignity, the achievement of equality, the recognition and advancement of human rights and freedoms, the supremacy of the Constitution and the rule of law. It makes provision for a multi-party system of democratic government, with provision for three levels of government, to ensure accountability, responsiveness and openness.[40] This provides a protective framework for civil society, which is enhanced by institutional structures such as the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities, and the Commission for Gender Equality,[41] and ultimately by AT ch 2 which contains a justiciable Bill of Rights. The Bill of Rights is described as a "cornerstone of democracy",[42] and the state is required to respect, protect, promote and fulfil these rights,[43] which are enforceable by an independent judiciary.[44]

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40 AT 1 and AT 40.

41 AT ch 9.

42 AT 7(1).

43 AT 7(2).

44 AT ch 8.

[26] AT ch 2 protects a range of individual rights of association including freedom of association,[45] freedom to form and participate in the activities of political parties,[46] and freedom to form and join a trade union or employers' organisation and participate in its activities.[47] Freedom of association is conferred upon everyone. In addition AT 30 separately protects the right of all people to use the language and to participate in the cultural life of their choice. AT 8(4) extends the protection of the Bill of Rights to juristic persons, "to the extent required by the nature of the rights and the nature of that juristic person". AT 38 permits all these rights to be enforced by an association acting in the interest of its members, and a person acting in the interest of a group or class of persons. The clear protection of rights of association coupled with the generous standing provisions protect the rights of collective self-determination stipulated by the CP for those communities not expressly protected by AT 31.

[27] The requirements of CP XII are therefore met by the provisions of AT 31, the institutional structures provided by the AT and the express protection of rights of association in AT ch 2 together with the procedural provisions governing their enforcement.

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45 AT 18.

46 AT 19.

47 AT 23.

States of Emergency

[28] AT 37 deals with the circumstances in which legislation may derogate from the Bill of Rights during a declared state of emergency. It permits such derogation only if it "is strictly required by the emergency"[48] and the legislation "is consistent with the Republic's obligations under international law applicable to states of emergency".[49] It prohibits indemnification of the state or any person in respect of any unlawful act,[50] and also prohibits legislation or action that would derogate from particular rights.[51] These non-derogable rights are set out in a table which forms part of AT 37.

[29] In the *CJ* we drew attention to what appeared to us to be an irrational exclusion of certain rights from the list of non-derogable rights and we suggested that the list should have been compiled more rationally and thoughtfully than had been done.[52] We did not, however, decline to certify the NT on the grounds that this had not been done. This is clear from the way in which we dealt with this issue at paragraphs 92 to 95 of the *CJ*, and from paragraph 482 of the *CJ* in which we summarized our conclusions.

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48 AT 37(4)(a).

49 AT 37(4)(b)(i).

50 AT 37(5)(a).

51 AT 37(5)(c).

[30] Presumably as a result of these comments the table of non-derogable rights was revised in the AT. It now includes more of the AT 9(3) anti-discrimination provisions, the right of children under the age of fifteen years not to be used directly in armed conflict,[53] and the right to have evidence obtained in violation of the Bill of Rights excluded at a criminal trial if its admission would render the trial unfair.

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52 *CJ* at paras 94-5.

53 This corresponds to the age imposed by article 38.2 of the Convention on the Rights of the Child.

[31] KZN now objects to AT 37 on the grounds that the table of non-derogable rights does not comply with CP II. It relies in particular on paragraphs 94 to 95 of the *CJ* and argues that the table is still not drawn up on a rational basis. It contends that the table should have included more of the various types of discrimination prohibited by AT 9(3), the right to freedom of conscience, religion, thought, belief and opinion (AT 15(1)), the right not to be deprived of citizenship (AT 20) and the right to make decisions concerning reproduction (AT 12(2)(a)).

[32] Counsel for KZN argued that the table remained irrational notwithstanding the amendments. A similar submission was made by various non-governmental organizations in a written argument addressed to us dealing with AT 9, although they do not contend that this would constitute grounds for not certifying the AT.[54]

[33] Discrimination on the grounds of race, colour, ethnic or social origin, sex, religion or language has been made non-derogable, but not discrimination on the grounds of gender, pregnancy, marital status, sexual orientation, age, disability, conscience, belief, culture and birth which is also prohibited by AT 9(3). It was contended that there is no rational basis for these exclusions.

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[54] Submissions to this effect were made by the National Coalition for Gay and Lesbian Equality, the Black Sash, the Equality Foundation, Lawyers for Human Rights, National Association of Persons Living With HIV/AIDS, and Disabled People of South Africa. They asked us to comment on the anomalies in the provision and the allegedly invidious exclusion of certain rights from the category of non-derogable rights.

[34] Counsel for KZN accepted that there might be aspects of the right to freedom of conscience, religion, thought, belief and opinion which could legitimately be curtailed during an emergency. He contended, however, that there could be no derogation from the core of the right, which he described as the right to hold particular religious, moral, and other beliefs and opinions, and that this core ought to have been protected in the table of non-derogable rights.

[35] AT 20 provides that "[n]o citizen may be deprived of citizenship". It was contended that an emergency could in itself be no justification for depriving a citizen of his or her citizenship and that AT 20 should have been included in the table of non-derogable rights to prevent possible abuses of emergency powers.

[36] The criticisms directed against the choices made in compiling the table of non-derogable rights are not without substance. It should be acknowledged, however, that there are difficulties in defining in the abstract precisely what rights, or what "core" aspects of particular rights, should be made non-derogable in an emergency. The CA was called upon to draft the provision at a time when the parameters of the rights referred to were uncertain and had not yet been the subject of judicial determination. It chose to protect the rights in the first instance through the provision that any

derogation must be strictly required by the emergency and to include in the list as non-derogable certain core rights such as the rights to life and dignity and freedom from torture and cruel punishment.

[37] It is understandable that those who are protected by AT 9(3) but have not been included in the anti-discrimination provisions declared to be non-derogable, should express concern over the exclusion. CP II does not, however, require that any particular rights or category of rights be made non-derogable under an emergency. What it requires is that universally accepted protection be accorded to particular rights.

[38] The requirement of AT 37(4)(a) that any derogation be "strictly required by the emergency" imposes a stringent test. This, and the other provisions of AT 37, provide extensive protection to all AT ch 2 rights under an emergency. In the unhappy event of the declaration of a state of emergency, it will be the duty of the courts to ensure that the full measure of this protection is accorded to such rights. Moreover, the fact that a distinction is drawn in the AT 37 table between certain rights does not, of itself, mean that, outside of an emergency, any such hierarchical distinction should be drawn between the rights in question.

[39] Counsel for KZN contended that the filter provided by AT 37(4)(a) is inadequate because it refers only to legislation enacted in consequence of a

declaration of a state of emergency, whereas AT 37(2) contemplates that in addition to legislation enacted, “other action” may be taken in consequence of an emergency. There is no substance in this contention. Action that may be taken will be subject to the full protection of the Bill of Rights unless it is specifically authorised by legislation derogating from such provisions. Any such legislation will have to pass the test of AT 37(4)(a).

[40] Neither now, nor in the previous certification case, has any objector been able to point to any universally accepted principle concerning the protection of rights under states of emergency that has not been met by the provisions of NT 37 or AT 37. It was for this reason that in our previous judgment we declined to hold that NT 37(5) did not comply with the CPs. For the same reason we must reject the objection raised in the present proceedings to AT 37.

State of National Defence

[41] It was contended by counsel for the DP that AT 203 dealing with a state of national defence, which may be declared by the President as head of the national executive, is inconsistent with CPs I, II, IV and VII. NT 203, which was to the same effect, was not subject to any objection at the time of the previous hearing. The submission now made is premised on the assumption that the declaration of a state of national defence is in effect a declaration of martial law which would suspend the Constitution. Counsel for the DP

accepted, rightly in our view, that if this is not so, and if the declaration of a state of national defence does not detract from the supremacy of the Constitution, the objection would fall away.

[42] Article 2.4 of the United Nations Charter provides that:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

This prohibition is subject to article 51 of the Charter which provides in relevant part that:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security."

[43] These provisions outlaw war but permit the use of force in self-defence.[55] Although there have been frequent breaches of these provisions since the Charter was signed, international law still treats a war of aggression as unlawful.

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55 Article 2.3 of the Charter requires member states to settle disputes by peaceful means. If this, or action taken by the Security Council to achieve such purpose, should prove to be inadequate, article 42 provides that the Security Council itself may cause such action to be taken "by air, sea, or land forces as may be necessary to maintain or restore international peace and security".

[44] Consistent with international law the NT[56] and AT[57] confer a power on the state to defend itself through the use of force, but not to declare war. Hence the power that is vested in the President as head of the executive by AT 203 is to declare a state of national defence. Similar terminology is used in the German Basic Law,[58] the Namibian Constitution,[59] and the IC.[60]

[45] The declaration of a state of national defence does not constitute a declaration of martial law.[61] Nor does it, in itself, lead to the suspension of the Constitution or any of its provisions. It may provide grounds for the declaration of a state of emergency in terms of AT 37(1), but in that event all the provisions of AT 37 would be applicable.

[46] In its written argument counsel for KZN raised an objection to AT 203 contending that it is contrary to CP XXXI. This objection, which was not raised by it at the previous hearing, is based on two arguments. First, that the grounds on which a state of national defence may be declared are not

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56 NT 203.

57 AT 203.

58 Art 115a-e.

59 Art 26.

60 IC 225.

61 It is not necessary to express any view in this judgment as to whether the common law principles of martial law are consistent with the Constitution.

mentioned in the Constitution, and secondly that there is no provision that the power to declare a state of national defence should only be exercised in the national interest.

[47] Counsel for KZN correctly did not persist in these arguments. CP XXXI is concerned with the manner in which members of the security forces are required to carry out their functions.[62] It does not deal with the exercise of presidential powers, and has no bearing on the declaration of a state of national defence.

AMENDMENTS TO THE CONSTITUTION

[48] In the *CJ*, we held that the provisions of NT 74 failed to comply with both CP XV and CP II.[63] CP XV provides that:

> "**Amendments to the Constitution shall require special procedures involving special majorities.**"

We held, at *CJ* paragraph 156, that no special procedures were provided for amending the Constitution as required by this principle. CP II provides that:

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62 CP XXXI provides:

> "**Every member of the security forces (police, military and intelligence), and the security forces as a whole, shall be required to perform their functions and exercise their powers in the national interest and shall be prohibited from furthering or prejudicing party political interest.**"

63 *CJ* at paras 152-9.

> "**Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution.**"

We held, at *CJ* paragraph 159, that the provisions of NT ch 2 which contained the Bill of Rights were not satisfactorily entrenched in the Constitution as required by CP II. In response to our judgment, the CA amended the constitutional text. The DP argues, however, that AT 74 still does not meet the prescriptions of CP II and CP XV. It has raised two principal objections. First, counsel for the DP argued that AT 74(2) and (3) fail to comply with CP XV because they do not make provision for "special majorities" in either the National Assembly (the "NA") or the National Council of Provinces (the "NCOP"). The DP's second objection is that AT 74(2) is not in compliance with CP II in that it still fails adequately to "entrench" the rights contained in AT ch 2. We consider first, whether the AT meets the requirements of CP XV by providing "special procedures" for the amendment of the Constitution and then the two objections raised by the DP.

Special Procedures

[49] In paragraph 152 to 156 of the *CJ* we held that CP XV had not been complied with because of the absence of special procedures for the amendment of the Constitution. In the *CJ* at paragraph 153 we held "special

procedures" to mean the provision of "more stringent procedures" when "compared with those which are required for other legislation".

[50] AT 74(4) to (7) now prescribe procedures that have to be followed in passing amendments to the Constitution. A bill amending the Constitution may not contain any other matter.[64] At least thirty days notice of the proposed amendment must be published in the national Government Gazette to permit public comment,[65] and similar notice must be given formally to the provincial legislatures and to the NCOP for public debate if the proposed amendment is not one required to be passed by the NCOP.[66] Written comments received from the public or the provincial legislatures must be brought to the attention of the Speaker of the NA,[67] and the bill amending the Constitution may not be put to a vote until at least thirty days have elapsed since its introduction or tabling in the NA.[68] If the proposed amendment concerns only a specific province or provinces, the bill may not be passed unless it has been approved by the legislature or legislatures of the province or provinces concerned.[69]

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64 AT 74(4).

65 AT 74(5)(a).

66 AT 74(5)(b) and (c).

67 AT 74(6)(a).

68 AT 74(7).

69 AT 74(8).

[51] The procedures which are required by the AT for the passing of amendments to the Constitution ensure that the Constitution can only be amended by a bill that specifically purports to do so and that time is allowed for all interested persons to comment on a proposed amendment. These are indeed more stringent procedures than those required for other legislation.

[52] Although the DP objected that special procedures have not been provided for constitutional amendments, it's counsel correctly did not persist in this contention. We are satisfied that the procedures prescribed by the AT meet the requirements of CP XV and in the circumstances we hold that the AT complies with CP XV in so far as it requires special procedures to be followed for constitutional amendments.

Special Majorities

[53] CP XV also requires special majorities for amendments to the Constitution. The NT required any amendment to NT 1, which sets out the founding values of the Constitution, to be supported by at least seventy five per cent of the members of the NA.[70] Amendments affecting the NCOP, altering provincial boundaries, powers, functions or institutions, or amending a provision dealing specifically with a provincial matter, required the support of two-thirds of the members of the NA and six provinces in the NCOP. Other

[70] NT 74(2), which also required a similar majority for an amendment to NT 74(2).

amendments to the Constitution, including amendments to the Bill of Rights contained in NT ch 2, required the support of at least two-thirds of the NA, but did not have to be passed by the NCOP.[71]

[54] No change was made to the majorities prescribed by NT 74 for constitutional amendments other than amendments to the Bill of Rights. This had not been the subject of objection at the previous hearing and was not required by our judgment. It was nevertheless contended by counsel for the DP that the majorities required for such amendments do not constitute "special majorities" which are required by CP XV, because there are certain categories of legislation, other than constitutional amendments, which require similar majorities.[72]

[55] The objection is based on a passage in paragraph 153 of the *CJ* in which we said that:

> "It is appropriate that the provisions of the document which are foundational to the new constitutional state should be less vulnerable to amendment than ordinary legislation. The requirement of 'special procedures involving special majorities' must therefore necessarily mean the provision of more stringent

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71 NT 74(1).

72 Counsel for the DP referred to AT 76(1)(e), (i) and (j). These provisions permit the NA to pass legislation affecting the provinces even in the absence of NCOP approval if at least two-thirds of the members of the NA vote in favour of the legislation. This is a deadlock-breaking mechanism. It is not surprising that the CA imposed the requirement of a special majority for the operation of such a mechanism. Counsel for the DP also referred to AT 76(5)(b)(ii) which imposes a similar special majority where the NCOP fails to agree to legislation changing the seat of Parliament (AT 42(6) read with AT 76(5)).

> procedures as well as higher majorities when compared with those which are required for other legislation."

This passage was relied upon to support the untenable proposition that a special majority is one higher than that required for the passing of any other legislation.

[56] Immediately before the passage quoted above we had stated that the purpose of CP XV

> "... is obviously to secure the NT, the 'supreme law of the land', against political agendas of ordinary majorities in the national Parliament."[73]

What was being contrasted in paragraph 153 of the judgment was "ordinary legislation" requiring "ordinary majorities" and constitutional amendments which required "special procedures involving special majorities".

[57] IC 63 deals with the ordinary majorities required for ordinary legislation. It provides that:

> "Save where otherwise required in this Constitution, all questions before the National Assembly or the Senate or before the National Assembly and the Senate in a joint sitting, shall be determined by a majority of votes cast."

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73 *CJ* at para 153 (footnote omitted).

Conventionally, and in the absence of a special requirement calling for a higher majority, that is how decisions have ordinarily been taken by legislative bodies in South Africa at least since 1910.[74]

[58] AT 53(1) provides that

> "Except where the Constitution provides otherwise -
>
> (a) a majority of the members of the National Assembly must be present before a vote may be taken on a Bill or an amendment to a Bill;
>
> (b) at least one third of the members must be present before a vote may be taken on any other question before the Assembly; and
>
> (c) all questions before the Assembly are decided by a majority of the votes cast."

NT 53(1) was to the same effect. A higher quorum is required for the passing of legislation than is required for other decisions, but the conventional principle that legislation is ordinarily passed by a majority of votes cast has been retained.

[59] CP XV clearly requires a departure from this conventional principle for the enactment of constitutional amendments. When it requires special majorities, it means special majorities in contrast to an ordinary majority achieved by a simple majority of a quorum of a legislature. At the time CP XV

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[74] Ss 31 and 50 of the South Africa Act, 1909; s 51 of the Republic of South Africa Constitution Act 32 of 1961; s 62 of the Republic of South Africa Constitution Act 110 of 1983.

was drafted, the drafters could not have had any other ordinary majority in mind. The CA has provided that all constitutional amendments require a two-thirds majority in the NA. This is clearly a "special majority" when compared with the conventional simple majority rule.

[60] Counsel for the DP interpreted the words "special majorities" in CP XV to mean, in effect, majorities higher than the highest required for any legislation not amending the Constitution. Such an interpretation is artificial and appears to assume for no demonstrable reason that the drafters intended to contrast "special majorities" as referred to in CP XV with something other than a conventional ordinary majority. There is no textual or other basis for such an interpretation. Nor is there anything in the CPs which would preclude the CA from requiring special majorities for legislation other than constitutional amendments. The objection on this ground must therefore fail.

[61] The DP also contended that the method of voting in the NCOP on constitutional amendments permitted such amendments to be passed by the NCOP without the support of a "special majority". The NCOP consists of delegations of ten delegates from each province.[75] Delegates are not elected to this position; they are appointed by the provincial legislature, are

[75] AT 60(1).

answerable to it, and are subject to recall by it.[76] NCOP decisions, subject to certain exceptions,[77] are to be taken on the basis that each province has one vote, which will be cast on its behalf by the head of its delegation, in accordance with an authority conferred on him or her by the provincial legislature.[78] The support of six provinces that is required by AT 74(3) for constitutional amendments affecting provincial interests or the NCOP depends upon the votes of each of the provincial delegations in the NCOP, and not upon the votes of the individual delegates. It follows, so it was contended, that there may be circumstances in which the support of six provinces can be secured, notwithstanding the fact that the majority of the individual delegates are opposed to the measure.

[62] This argument is based on a misconception of the NCOP, which is a council of provinces and not a chamber composed of elected representatives. Voting by delegation reflects accurately the support of the different provincial legislatures for a measure under consideration. In effect, therefore, the support required for amending the Bill of Rights is two-thirds of the NA and the support of six provincial legislatures. That is a significant majority.

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76 AT 60, AT 61 and AT 62.

77 See AT 75(2).

78 AT 65.

[63] The last of the objections by the DP to the provisions of the AT dealing with amendments to the Constitution was that the approval of the NCOP is required only for those constitutional amendments that affect the provinces or involve the founding values, the Bill of Rights or the NCOP itself.[79] Other constitutional amendments do not have to be voted on by the NCOP and can be passed by the NA alone with the support of two-thirds of its members.[80] The DP contended that a two-thirds majority in the NA alone does not constitute a special majority within the meaning of CP XV. It sought to derive support for this contention from the fact that the AT requires all other legislation to be debated in and voted on by the NCOP.

[64] The NCOP is also required to consider legislation which does not affect the provinces. When it does so, voting is by delegates and not by delegation,[81] but if it fails to pass such legislation, its refusal can be overridden by an ordinary majority in the NA.[82] What is important is that such legislation does not have to be passed by the NCOP. In substance the NCOP has no more than a delaying power, and if its support is not secured, the legislation can be passed by a simple majority in the NA.

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79 AT 74(1), (2) and (3)(b).

80 AT 74(3)(a).

81 AT 75(2).

82 AT 75(1)(c).

[65] Although the NCOP does not vote on other amendments to the Constitution, it has to be consulted in regard to them. At least thirty days before it is introduced into the NA, particulars of any bill amending the Constitution must be published in the Government Gazette for public comment,[83] submitted to each of the provincial legislatures for their views,[84] and to the NCOP for public debate.[85] Any written comments received from provincial legislatures or the public must be tabled in the NA when the bill amending the Constitution is introduced.[86] The bill may only be put to a vote thirty days after it has been introduced or tabled in the NA.[87] The absence of a formal vote in the NCOP is balanced by the provision empowering the provincial legislatures to make their views known to the NA directly. In substance, therefore, the involvement of the NCOP in respect of other amendments to the Constitution, is little different from its involvement in ordinary legislation. In both instances there is a formal debate. Where ordinary legislation is involved there is a vote in the NCOP but the NCOP has no more than a delaying power.[88] Where other amendments to the Constitution are involved there is a debate in the NCOP but no vote; the

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83 AT 74(5)(a).

84 AT 74(5)(b).

85 AT 74(5)(c).

86 AT 74(6).

87 AT 74(7).

88 See para 64 above.

provincial legislatures make their views known directly to the NA instead of through a vote in the NCOP. The power of the NCOP to delay ordinary legislation is balanced by the requirements that at least thirty days notice be given before a bill amending the Constitution is introduced into the NA,[89] and that the bill may only be put to a vote in the NA thirty days after it has been introduced or tabled.[90]

[66] It was not suggested at either of the hearings that the CPs specifically require amendments to the Constitution to be passed by the NCOP. The CPs do not require a bicameral Parliament; nor, if there is more than one chamber of Parliament, do they require all legislation to be passed by each chamber. The CA was entitled to vest the power to effect other amendments to the Constitution in the NA alone, as long as it did so in a manner that complied with CP XV.

[67] Other amendments to the Constitution require the special procedures referred to above, and the support of at least two-thirds of the members of the NA. In substance this is a significantly higher majority than is required for the passing of ordinary legislation that does not involve the provinces. There is no

89 AT 74(5).

90 AT 74(7).

substance therefore in the DP's contention that the requirement of "special majorities" in CP XV has not been met in the AT.

Entrenchment of the Bill of Rights

[68] The NT permitted amendments to be made to the Bill of Rights by a majority of two-thirds of the members of the NA.[91] This was the special majority prescribed for constitutional amendments generally. We held that CP II required the Bill of Rights to be afforded more protection than this.[92] The CA responded in AT 74(2) by requiring amendments to the Bill of Rights to be supported not only by two-thirds of the members of the NA, but also by six provinces in the NCOP.

[69] The DP contended in its written argument that the amendment made does not afford sufficient protection to the Bill of Rights because AT 74(3) permits AT 74(2) to be amended by two-thirds of the NA without the support of the NCOP. It drew attention in this regard to the provisions of AT 74(1), which entrench the founding values contained in AT 1, by requiring a seventy-five per cent majority in the NA and the support of six provinces for any amendment of these provisions, or of AT 74(1) itself.

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91 NT 74(1).

92 CJ at para 159, which states:

> "What [CP II] requires is 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."

[70] AT 74(2) can only be amended by a bill passed in terms of AT 74(3). AT 74(2)(a) which requires a two-thirds majority in the NA for an amendment to the Bill of Rights can only be amended in terms of AT 74(3). We shall assume, but not decide, that such an amendment does not require the consent of the NCOP in terms of AT 74(3)(b), but only a two-thirds majority in the NA. The effect of this is that AT 74(2)(a) can be amended by a two-thirds majority of the NA without the participation of the NCOP. On the other hand, an amendment of AT 74(2)(b), which requires the consent of six of the nine provinces in the NCOP for an amendment to the Bill of Rights, requires the approval of both two-thirds of the NA and six of the nine provinces in the NCOP in terms of the provisions of AT 74(3)(a) and (b). It is not possible, in the light of AT 74(3)(b)(i), for the NA to dispense with this requirement without the approval of six of the nine provinces in the NCOP. In the result, there is no way, whether direct or indirect, in which a provision of the Bill of Rights can be amended without the approval of six provinces in the NCOP.

[71] Under the NT the NA could have amended the Bill of Rights with a two-thirds majority without the consent of the NCOP. We held that this was not sufficient to meet the requirement of "entrenchment" provided for in CP II.[93] The CA has now added as a requirement for the amendment of the Bill of Rights, the consent of a special majority of the NCOP. This consent may not

93 *CJ* at para 159.

be dispensed with by the NA acting on its own. If the CA had included an express requirement that the NA's voting majority in AT 74(2)(a) could not have been amended without the consent of six of the nine provinces in the NCOP, the rights entrenched in AT ch 2 would have been even more securely entrenched. This may well have been desirable. However we cannot say that it was necessary. In the circumstances, we are of the view that there has been compliance with CP II.

LOCAL GOVERNMENT

A Framework for the Structures of Local Government.

[72] In the *CJ* we held that NT ch 7, dealing with local government ("LG"), failed to comply with CP XXIV in that it did not provide a "framework for the structures" of LG; with CP XXV in that it did not provide for appropriate fiscal powers and functions in respect of different categories of LG; and with CP X in that it did not provide for formal legislative procedures to be adhered to by legislatures at LG level.[94]

[73] It was not disputed that as a result of the amendments that have been made the AT now complies with CP XXV and CP X. In AT 160(3), (4), (7) and (8) the CA responded to the finding by this Court that the NT failed to comply with CP X. Provision is there made for the formal legislative procedures to be

94 See *CJ* at paras 301-2.

adhered to by legislatures at LG level. And with regard to CP XXIV the CA has in AT 229 made provision for the differential allocation of fiscal powers and functions according to the municipal categories provided for in AT 155(1). We are satisfied that these CPs have in fact been complied with and, indeed, that was not disputed by the objectors. It was contended by counsel for KZN, however, that the AT still does not comply with CP XXIV.

[74] CP XXIV provides:

> "**A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in parliamentary statutes or in provincial legislation or in both.**"

[75] In the *CJ* we held:

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

> We conclude, therefore, that the NT does not comply with CP XXIV and CP X."[95]

[76] The CA amended NT 155, dealing with the establishment of municipalities, NT 160 dealing with the internal procedures of municipalities, and NT 229 dealing with municipal fiscal powers. It contended that these amendments adequately address the problem identified in the *CJ*.

95 *CJ* at para 301 (footnote omitted).

[77] The effect of these amendments is to specify three different categories of municipalities that can be established. In substance these are (a) self-standing municipalities, (b) municipalities that form part of a comprehensive coordinating structure, and (c) municipalities that perform coordinating functions. In the terminology of existing legislation the third category would include structures such as regional and metropolitan councils. It has been made clear that it is a national function to establish the criteria for determining which category of municipality should be established in a particular area and how powers and functions are to be divided between municipalities with shared powers.[96] National legislation must also define the types of municipality that may be established within each category but it is for the provincial legislature to determine which types should be established in its province.[97] The internal procedures for the functioning of municipalities have been defined more precisely than was the case in the NT, but national legislation must still provide the criteria for determining the size of a municipal council, the types of committees it may have and the size of committees that are established.

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96 AT 155(3)(a).

97 AT 155(5).

[78] The AT sets out the categories of LG that can be established,[98] and a scheme for LG within which LG structures are to function. The scheme is one which involves the establishment of municipalities for the whole of the territory of the Republic.[99] A municipality will have legislative and executive powers in respect of the local government matters listed in part B of AT sch 4 and part B of AT sch 5, and any other matter assigned to it by national or provincial legislation.[100] These powers will be vested in its Council.[101] The legislative power is to be exercised by the making of by-laws,[102] a power which must be exercised by the Council itself and may not be delegated by it to any person.[103] A framework for an electoral system according to which members of the Council are to be elected is set out in AT 157, and the manner in which decisions are to be taken and by-laws passed is prescribed by AT 160. A framework for the demarcation of municipal boundaries and wards is provided.[104] AT ch 13 establishes a framework for the fiscal powers and functions of municipalities, revenue allocation to municipalities, the preparation of budgets, treasury control, and the procurement of goods and services. The

98 AT 155(1).

99 AT 151(1).

100 AT 156(1).

101 AT 151(2).

102 AT 156(2).

103 AT 160(2).

104 AT 155(3)(b) and AT 157(4).

objects of LG are defined in AT 152, and municipalities are required to observe and adhere to the principles of cooperative government set out in AT ch 3.

[79] Counsel for KZN contended that the LG provisions of the AT are not materially different to those contained in the NT and that the flaws in the NT identified in our judgment have not been remedied. He argued that it is not possible to discern from the AT how LG will be organized, precisely what types of LG the provinces will be able to establish, or how the various types of LG will relate to each other and exercise their powers either individually or jointly. A minimum requirement for a framework, so it was contended, is that it should identify and set the parameters for an overall design of a coherent system of LG.

[80] In terms of CP XXIV the Constitution must provide a "framework for local government powers, functions and structures" whilst the "comprehensive powers, functions and other features of local government shall be set out" in national or provincial legislation, or in both. The CP contemplates, therefore, that the Constitution will provide no more than a framework and that the details of the LG system would be a matter for legislation. Counsel accepted that this was so and that the AT provides a framework for powers and functions, but contended that it does not provide a framework for "structures". He drew attention to the fact that the CP refers to "powers, functions and structures" when it deals with the framework, but to "powers, functions and other features" when it deals with comprehensive legislation, and suggested that this indicates that the CP contemplates that the structures of LG would be spelled out in greater detail in the Constitution than the other components of LG. He was,

however, unable to explain what the “other features” would be if they do not include structures.

[81] The word “framework” is used in relation to the three components of LG, and there is no reason to believe that it was intended to require “structures” to be dealt with in the Constitution in greater detail than “powers” and “functions”. Even if the words “other features” in CP XXIV were to be construed as excluding structures (and we doubt that this is how it should be construed), it would mean no more than that the CA was given the choice of dealing with LG structures in detail in the Constitution. It would not convert the obligation to provide a framework for LG structures into an obligation to do more than that. This would not only be inconsistent with the language of the CP, but it would also be an unusual requirement to impose on the drafters of a Constitution. Detail is clearly a matter for legislation, particularly in the fluid situation which existed at the time the CPs were drafted.

[82] The words “framework for local government structures” are vague and imprecise. Counsel acknowledged this, but relying on paragraph 301 of the *CJ*, he contended that there should at least have been a description of the types of municipalities that could be established in each of the three categories described in AT 155(1). That, in our view, is to deduce too great a specificity from a phrase of such general and imprecise import as a

"framework for local government ... structures".[105] In paragraph 301 of the *CJ* we drew attention to the fact that the only type of LG and LG structure referred to in the NT was a municipality. We said that a structural framework should convey an overall "design" or "scheme" and should indicate "how LG executives are to be appointed, how LGs are to take decisions and the formal legislative procedures demanded by CP X".[106] The AT now identifies three categories of LG,[107] how LG executives are to be appointed,[108] how LGs are to take decisions,[109] and the formal legislative procedures to be followed.[110] We hold that this, in the context of the overall scheme described above, is sufficient to meet the requirements of CP XXIV.

TRANSITIONAL PROVISIONS

Local Government Provisions

[83] Objection was also taken by KZN to the provisions of AT sch 6 s 26(1)(a) which states that:

> "(1) Notwithstanding the provisions of sections 151, 155, 156 and 157 of the new Constitution -

105 CP XXIV.

106 *CJ* at para 301.

107 AT 155(1).

108 AT 160(1)(b), (c) and (d).

109 AT 160(3).

110 AT 160(2),(3) and (4).

> (a) the provisions of the Local Government Transition Act, 1993 (Act 209 of 1993), as may be amended from time to time by national legislation consistent with the new Constitution, remain in force until 30 April 1999 or until repealed, whichever is sooner".

It was contended that these provisions do not comply with the requirements of CP IV. In support of this contention reliance was placed on paragraphs 149 and 150 of the *CJ* in which we held that NT 241(1) and NT sch 6 s 22(1)(b) did not comply with the CPs because they impermissibly shielded ordinary statutes from constitutional review.

[84] NT 241(1) provided that the provisions of the Labour Relations Act, 1995, remained valid despite the provisions of the Constitution. NT sch 6 s 22(1)(b) contained a similar provision in respect of the Promotion of National Unity and Reconciliation Amendment Act, 1995. The provisions of AT sch 6 s 26(1)(a) are different. They do not immunise the Local Government Transition Act 209 of 1993 from constitutional review. It remains subject to constitutional review, but is not subject to the framework provisions of AT 151, 155, 156 and 157 until 30 April 1999. All other provisions of the AT apply to it and any amendment of its provisions must be consistent with the AT.

[85] AT sch 6 s 26(1)(a) is a transitional provision designed to enable an orderly transition to be made from the existing system of LG to a system which conforms with the requirements of the AT. It is implicit in CP XXIV that this could be done. Otherwise existing LG laws and structures inconsistent with

any new scheme would be invalidated when the AT comes into force, which is likely to result in chaos. The old infrastructure would be invalid and in all probability there would be no new infrastructure to replace it. One should not impute such an intention to the framers of the CPs. There is nothing in the language of CP XXIV that requires the framework provisions to come into force immediately. On the contrary the CP contemplates that legislation will be needed to make provision for the comprehensive powers, functions and other features of LG that will be required, and in view of the known complexities of the transition to democratic LG, the drafting and implementation of such legislation are likely to present difficulties and to require time.

[86] The decision in the *CJ* on NT 32 read with NT sch 6 s 23(2)(a) seems to us to be more relevant to the present issue than the passages relied on by counsel for KZN. In paragraphs 82 to 87 of the *CJ* we considered the implications of a transitional provision which allowed the legislature a period of three years within which to implement freedom of information legislation. We held that "[t]he transitional measure is obviously a means of affording Parliament time to provide the necessary legislative framework for the implementation of the right to information".[111] In the context of CP IX, which requires provision to be made for freedom of information, and of what was reasonably required on the part of the legislature to give effect to this

111 *CJ* at para 83.

requirement, a period of grace within which to implement the provision was held to be reasonable, and consistent with the requirements of the CPs.

[87] The period of grace allowed for LG transition is less than the three years allowed for the implementation of freedom of information legislation. A decision as to the time needed was one to be made by the CA. In view of the complexities of a transition to a new order we cannot hold the period until April 1999 to be unreasonable or that the CA exceeded its authority in fixing this period. We accordingly hold that AT sch 6 s 26(1)(a) complies with the CPs.

Public Administration and Security

[88] A similar contention was advanced in regard to AT sch 6 s 24(1) which contains transitional provisions dealing with public administration and security services. This clause provides:

> "Sections 82(4)(b), 215, 218(1), 219(1), 224 to 228, 236(1), (2), (3), (6), (7)(b) and (8), 237(1) and (2)(a) and 239(4) and (5) of the previous Constitution continue in force as if the previous Constitution had not been repealed, subject to -
>
> (a) the amendments to those sections as set out in Annexure D;
>
> (b) any further amendment or any repeal of those sections by an Act of Parliament passed in terms of section 75 of the new Constitution; and
>
> (c) consistency with the new Constitution."

[89] The "previous Constitution" is the IC and the sections referred to deal with the President's powers as Commander in Chief of the South African National Defence Force, matters relating to the Police Service and Defence Force, and certain transitional provisions relating to public administration and the vesting of assets and liabilities which apparently still have relevance.

[90] Counsel did not contend that this provision does not serve a legitimate purpose relating to the transition from the old to the new constitutional order. He argues that the provision is objectionable on two alternate grounds depending on the character of the sections of the IC which the provision seeks to retain. If the retained provisions constitute a part of the new Constitution, then, argues counsel, they are in breach of CP XV in that they can be amended by an ordinary majority of the NA without special procedures. On the other hand, if the provisions do not constitute a part of the Constitution but have the status of ordinary legislation, counsel argues that they are invalid because the CA does not have the power to retain provisions of the IC as ordinary legislation.

[91] The first question for consideration, therefore, is whether the retained provisions form part of the AT or not. AT sch 6 s 24(1) provides that the listed provisions shall "continue in force". It does not provide that the provisions are deemed to be part of the AT (as does, for example, IC sch 6 s 22 in relation to the epilogue to the IC). In addition, subparagraphs (b) and (c) make it plain that the retained provisions are subject to amendment by the procedures applicable to ordinary legislation, and that they are subject to the supremacy of the Constitution. All these factors, in our view, indicate that the provisions retained do not form part of the text of the AT but are a form of ordinary legislation.

[92] The remaining question posed is whether the CA had the competence to retain provisions of the IC as ordinary legislation. It may be that it is not necessary to answer this question now. The present inquiry is whether the AT is in compliance with the CPs and no other question is relevant to the current proceedings. On this view, nobody would be precluded by IC 71(3) from raising the question of the validity of the retained provisions in subsequent proceedings, for if the retained provisions themselves do not form part of the text of the Constitution, they will not be subject to the ouster contained in IC 71(3).

[93] Be that as it may, it is our view that the CA did have the power to retain provisions of the IC as ordinary legislation under the new order. It is true that the CA is only granted a constitution-making power by the IC, but such a power is an extensive one. It involves not only the power to enact a constitution, but also to make provision for the transition from the old to the new constitutional order. To do so, it needs to make provision for the retention of some if not all existing legislation, as it does in AT sch 6 s 2. It also needs to regulate the continued existence of the legislature, executive and judiciary as it does in sch 6 ss 4-12 and 16-18. It is essential that the CA has such powers in order to ensure that the transition is carried out in an orderly fashion. Unless at least some parts of existing law and institutions were retained by the AT, the legal infrastructure would collapse. It was not only within the

competence of the CA to attend to this as part of the constitution-making process, but it was imperative that it did so.

[94] If it is accepted that the CA has the power to retain legislation and institutions from the old order, the only question that remains is whether that power included an authority to retain provisions of the IC as law, without making them an integral part of the new constitutional text. We fail to understand why the CA should not have this power. It has the power to repeal the old constitutional text, and if this is so, there seems to be no reason why it should not have the lesser power to retain some of its provisions needed for the transition without incorporating such provisions into the Constitution itself.

[95] On a proper construction of AT sch 6 s 24(1) the provisions of the IC referred to in that section have been retained to facilitate the transition, but are subordinated to the AT, and fall to be dealt with and to be amended in the same way as any other legislation that has been retained. It was within the competence of the CA to do this and in so doing, the CA did not breach any of the provisions of the CPs.

TRADITIONAL MONARCH

[96] CP XIII.2 requires that:

> "**Provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch shall be recognised and protected in the Constitution.**"

Counsel for KZN contends that this requirement has not been complied with.

[97] In order to deal with this contention it is necessary to have regard to AT 143 and 147(1). They provide:

> "143(1) A provincial constitution, or constitutional amendment, must not be inconsistent with this Constitution, but may provide for -
>
> (a) provincial legislative or executive structures and procedures that differ from those provided for in this Chapter; or
>
> (b) the institution, role, authority and status of a traditional monarch, where applicable.
>
> (2) Provisions included in a provincial constitution or constitutional amendment in terms of paragraphs (a) or (b) of subsection (1) -
>
> (a) must comply with the values in section 1 and with Chapter 3; and
>
> (b) may not confer on the province any power or function that falls -
>
> (i) outside the area of provincial competence in terms of Schedules 4 and 5; or
>
> (ii) outside the powers and functions conferred on the province by other sections of the Constitution.
>
> . . . .
>
> 147(1) If there is a conflict between national legislation and a provision of a provincial constitution with regard to -
>
> (a) a matter, concerning which this Constitution specifically requires or envisages the enactment of national legislation, the national legislation prevails over the affected provisions of the provincial constitution;
>
> (b) national legislative intervention in terms of section 44(2), the national legislation prevails over the provision of the provincial constitution; or
>
> (c) a matter within a functional area listed in Schedule 4, section 146 applies as if the affected provision of the provincial constitution were provincial legislation referred to in that section."

[98] The objection was as follows. AT 143(1)(b) gives effect to the recognition of the constitution-making power required by CP XIII.2, but it does not give effect to the requirement of protection. As a result, and because of the provisions of AT 147(1), provisions in a provincial constitution dealing with traditional monarchs are rendered vulnerable to being overridden by national legislation.

[99] CP XIII.2 does not require the relevant provisions of a provincial constitution to be given a position of supremacy in the national constitution, allowing them to prevail over all other protected interests. What is required is that the institution of the monarchy should be given the recognition and protection that it needs to enable it to carry out its traditional role and to maintain its status and authority, consistent with the constraints inherent in a republican and wholly democratic constitutional order.[112]

[100] AT 142 which vests a constitution-making power in a provincial legislature, and AT 143(1) which permits that power to be exercised so as to make provision for a traditional monarch, are both protected by AT 74(3) which requires a special majority of both the NA and the NCOP for any amendment to these clauses. That is the same as the protection given to the Bill of Rights.

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112 *CJ* at paras 194-7.

[101] The objection was not directed to the form of the constitution-making power; it was concerned with the substance of the power, ie whether it could be subordinated to national legislation.

[102] Counsel for KZN and counsel for CA both assumed that AT 147(1) is applicable to the provisions in a provincial constitution dealing with a traditional monarch. It is not entirely clear, however, exactly what impact, if any, AT 147(1) might have on a provision in a provincial constitution dealing with a traditional monarch. AT 147(1)(a) deals with national legislation "required" or "envisaged" by the AT. AT 219(1) requires national legislation to establish a framework for determining the remuneration of persons holding public office including traditional leaders. This would include a traditional monarch.[113] An independent commission has to make recommendations concerning such remuneration, and its recommendations have a role in the determination and implementation of the remuneration. The legislation required does not bear directly upon the institution, role, authority and status of a traditional monarch.

[103] AT 212(1) envisages the possibility of national legislation making provision for a special role for traditional leadership as an institution at local level in matters affecting local communities. This, too, could have no more than an indirect bearing on a traditional monarch whose concerns as monarch are not at local level.

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113 *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995* 1996 (4) SA 653 (CC); 1996 (7) BCLR 903 (CC) ("*KwaZulu-Natal Bills*").

[104] A provincial legislature would be protected by AT 41 against a possible abuse of the legislative power vested in Parliament by AT 219(1) and 212(1). AT 41(1) requires that:

> "[a]ll spheres of government and all organs of state within each sphere must -
>
> . . . .
>
> (e) respect the constitutional status, institutions, powers and functions of government in other spheres;
>
> . . . .
>
> (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere."

[105] We were referred to no other legislation required or envisaged by the Constitution that might be applicable to the institution, role, authority or status of a traditional monarch. If regard is had to the fact that legislation sanctioned by AT 147(1)(a) can have only an indirect bearing on such matters, AT 143(1) read with AT 74(3) and AT 41 provide sufficient protection for the provisions of a provincial constitution to meet the requirements of CP XIII.2.

[106] AT 147(1)(b) deals with national legislative intervention in terms of AT 44(2). AT 44(2) authorises Parliament to intervene by legislation with regard to a matter falling within an exclusive functional area listed in AT sch 5, when it is necessary to do so for the purposes referred to in that provision. For present purposes we will assume that AT 44(2) applies to the provisions of a provincial constitution enacted in terms of the authority contained in AT 143(1)(b). The only item in AT sch 5 that apparently may have any bearing on

a traditional monarch, is provincial cultural matters. The intervention sanctioned by AT 44(2) is unlikely to have any relevance to the institution, role, authority or status of a traditional monarch. But even if there should be circumstances where such intervention is justifiable as being necessary for a purpose defined in AT 44(2), and it affects in some way the institution, role, authority or status of a traditional monarch, it would be intervention that is specifically required by CP XXI.2. The CPs must be interpreted so as to be in harmony with one another. Because of the compelling importance of the matters referred to in NT 44(2), and the imperative language of CP XXI.2, the protection contemplated by CP XIII.2 should not be construed as including protection against intervention under NT 44(2).

[107] NT 147(1)(c) deals with conflicts between provisions of a provincial constitution and national legislation with regard to “a matter within a functional area listed in Schedule 4”. AT sch 4 lists the functional areas of concurrent national and provincial legislative competence. The functional area of “[t]raditional leadership subject to Chapter 12 of the Constitution” is included in the list.

[108] It is not necessary to decide in these proceedings whether or not a provision in a provincial constitution enacted pursuant to the power conferred on provincial legislatures by AT 142 and AT 143 should be characterised as being legislation to which AT 147(1)(c) applies. A traditional monarch is a

traditional leader and AT sch 4 would empower a provincial legislature to make laws dealing with the institution, role, authority and status of the monarch. The power to incorporate such legislation in a provincial constitution is, however, derived from AT 143(1)(b) and exists independently of AT sch 4. It would continue to exist, for instance, if AT sch 4 were to be amended so as to delete traditional leadership from the functional areas referred to. It may be, therefore, that this is a special power which is not subject to AT 147(1)(c).

[109] In the view that we take of this matter, however, it is not necessary to decide this issue. AT 146 gives preference to provincial legislation, and protects it against national legislation, unless circumstances exist in which a national override can be justified. The circumstances which would justify such an override can have only limited application to the institution, status, role and authority of a traditional monarch.

[110] We are satisfied that the recognition and protection required by CP XIII.2 have been afforded by the provisions of the AT to which we have referred, and we hold that the AT complies with CP XIII.2.

INTERVENTION PERMITTED BY AT 100

[111] AT 100 provides that:

"(1) When a province cannot or does not fulfil an executive obligation in terms of legislation or the Constitution, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including -

(a) issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and

(b) assuming responsibility for the relevant obligation in that province to the extent necessary to -

(i) maintain essential national standards or meet established minimum standards for the rendering of a service;

(ii) maintain economic unity;

(iii) maintain national security; or

(iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.

(2) If the national executive intervenes in a province in terms of subsection (1)(b) -

(a) notice of the intervention must be tabled in the National Council of Provinces within 14 days of its first sitting after the intervention began;

(b) the intervention must end unless it is approved by the Council within 30 days of its first sitting after the intervention began; and

(c) the Council must review the intervention regularly and make any appropriate recommendations to the national executive.

(3) National legislation may regulate the process established by this section."

[112] KZN previously objected to these provisions on the grounds that they interfere with provincial autonomy. We dealt with this objection at paragraphs 263 to 266 of the *CJ* and concluded that the objection should be dismissed.

[113] The objection has now been reformulated and advanced on the basis that AT 100 contravenes CP VI which requires that:

> "**There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.**"

The crux of the objection as it is now presented, is that in permitting the national executive to intervene under AT 100(1)(b) without first requiring that it take the steps referred to in AT 100(1)(a), the separation of powers required by CP VI has not been complied with.

[114] There is no substance in this contention. CP VI is concerned with the separation of powers between the legislature, the executive and the judiciary. It is not concerned with separation between national and provincial legislative and executive functions. In any event, on a proper construction of AT 100 the issue raised by KZN does not arise.[114]

[115] It was also contended that AT 100(1) is inconsistent with CP XXI.2 because it does not define all the steps that may be taken by the national government if it decides to intervene. This contention was based on the wording of AT 100(1) and particular importance was attached to the words "by taking any appropriate steps to ensure fulfilment of that obligation, including ...". Relying on these words counsel for KZN contended that there is a general empowerment of the national executive in AT 100(1) to intervene by taking "appropriate steps". The specific powers set out in AT 100(1)(a) and (b) are accordingly not the only steps that can be taken by the national executive; it

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114 See paras 124-5 below.

can also take any other "appropriate steps". Such a power, it was contended, lacks precision and is contrary to CP XXI.2 which provides that:

> **"The following criteria shall be applied in the allocation of powers to the national government and the provincial governments:**
>
> **. . . .**
>
> **2. Where it is necessary for the maintenance of essential national standards, for the establishment of minimum standards required for the rendering of services, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one province which is prejudicial to the interests of another province or the country as a whole, <u>the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution.</u>"** (emphasis added)

[116] CP XXI.2 provides one of the "criteria [which] shall be applied in the allocation of powers to the national government and the provincial governments". Central to its meaning is the phrase "the Constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the Constitution". Four points need to be made. First, the intervention provision which must be embodied in the Constitution is one providing for such intervention when "it is necessary for" the maintenance, establishment or prevention of the matters dealt with in the first part of CP XXI.2. Second, it is not obligatory for the Constitution to make provision both for legislation and "other steps"; at the same time nothing prohibits the Constitution from doing so. Third, making provision in the

Constitution for such intervention in circumstances other than those prescribed by CP XXI.2 is not prohibited if it complies with the other CPs. Fourth, should the Constitution make provision for intervention in respect of matters or situations not covered by CP XXI.2, in the sense that they do not relate to the necessity of maintaining, establishing or preventing the matters referred to, such provisions need not comply with the dictates of the concluding part of CP XXI.2, again subject to compliance with the other CPs.

[117] The CA has carried out its CP XXI.2 obligation by providing for legislative intervention through the provisions of AT 44(2). It was not obliged to do more. At the same time it was at liberty to provide in the Constitution for the national government to intervene through other defined steps in the circumstances prescribed by CP XXI.2. It was also at liberty, although not obliged, to make provision in the Constitution for national government intervention, consistent with the other CP's, falling outside the field of CP XXI.2.

[118] The construction of AT 100 should be approached against the above background. It deals with a failure by a province to fulfil an executive obligation. If this happens the national executive is empowered to take appropriate steps to ensure the fulfilment of the obligation. This is a legitimate power to confer on the national executive. As we said in the *CJ* at paragraph 266:

> "NT 100 serves the limited purpose of enabling the national government to take appropriate executive action in circumstances where this is required because a provincial government is unable or unwilling to do so itself. This is consistent not only with CP XXI.2 but also with CP XX, which requires the allocation of powers to be made on a basis that is conducive to effective public administration. Any attempt by the national government to intervene at an executive level for other purposes would be inconsistent with the NT and justiciable. NT 100 does not diminish the right of provinces to carry out the functions vested in them under the NT; it makes provision for a situation in which they are unable or unwilling to do so. This cannot be said to constitute an encroachment upon their legitimate autonomy."

In a constitutional scheme such as that embodied in the CPs the national executive is fully entitled, if not obliged, to do what is necessary to ensure that the Constitution and legislation consistent with the Constitution are adhered to.

[119] AT 100(1)(a) and (b) deal with a failure by a provincial executive to fulfil an executive obligation which results in prejudice to essential national standards, established minimum standards for the rendering of a service, economic unity, or national security, or that is prejudicial to the interests of another province or the country as a whole. They empower the national government to assume responsibility in such circumstances for the obligations that have not been carried out, but only to the extent necessary for the purposes referred to in AT 100(1)(b)(i)-(iv). AT 100 prescribes the procedure that has to be followed in order to do this. First, a directive must be issued in terms of AT 100(1)(a). After this has been done the national executive may

assume responsibility for the obligations to the extent that it is necessary to do so. That will presumably depend upon the response to the directive.

[120] AT 100(1)(a) and (b) deal with one process. This follows from the fact that they have not been formulated in the alternative, but are linked by the conjunction “and”. The issuing of a directive in terms AT 100(1)(a) has no consequences in itself; it only has relevance as part of a process which requires a directive to be issued before the intervention sanctioned by AT 100(1)(b) takes place. If intervention in terms of AT 100(1)(b) occurs, the requirements of AT 101(2) have to be complied with. These successive steps constitute the process referred to in AT 100(3) which may have to be regulated by legislation.

[121] This process meets the requirements of CP XXI.2. It is confined to the matters referred to in the CP and defines the steps to be taken - ie a directive, followed by the assumption of the obligation, and the procedures prescribed by AT 100(2).

[122] AT 100(1) also deals with the non-fulfilment of obligations by a province in circumstances to which CP XXI.2 does not apply. It is provided that in such circumstances the national executive may deal with the problem through taking “appropriate steps”.

[123] “Appropriate steps” within the meaning of AT 100(1) will not ordinarily include the assumption of a provincial obligation by the national executive. That is clear from the language of AT 100(1), which gives an extended meaning to “appropriate steps” to permit such action in the circumstances referred to in AT 100(1)(b).[115] The extended meaning is confined, however, to the intervention dealt with in AT 100(1)(b).

[124] The reference to “appropriate steps” in AT 100(1) must be construed in the context of the Constitution as a whole and the provision that it makes for the distribution of power between different levels of government. If regard is had to the CPs and the constitutional scheme embodied in the AT, it would not be appropriate for the national executive to attempt to intervene in provincial affairs in a manner other than that authorised by the Constitution or by legislation enacted in accordance with the Constitution. “Appropriate steps” would thus include action such as a resort to the procedures established under AT 41(2) for the promotion of intergovernmental relations and the settlement of intergovernmental disputes and the exercise of the treasury control powers

115 “Including” is generally used “to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include.” *Dilworth v Commissioner for Land and Income Tax* (1899) AC 99 at 105-6. See also *Rossmaur Mansions (Pty) Ltd v Briley Court (Pty) Ltd* 1945 AD 217 at 229-30; *R v Debele* 1956 (4) SA 570 (A) at 575; *Stauffer Chemical Co and Another v Safsan Marketing and Distribution Co (Pty) Ltd and Others* 1987 (2) SA 331 (A) at 350H-J.

under AT 216.[116] It would not, however, include resort to means that would be inconsistent with AT ch 3, and in particular, with the obligation under AT 41(1)(g) to exercise its powers in a manner that "does not encroach on the geographical, functional or institutional integrity" of provincial governments.

116 We express no opinion as to whether a court would issue a mandamus or make a declaration in regard to a province's failure to carry out its constitutional obligations. See in this regard *Ex Parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 (CC); 1996 (4) BCLR 518 (CC) at para 33. But if there were a dispute as to whether or not a province cannot or has not fulfilled a particular obligation, and that dispute cannot be resolved through other means, the national executive may wish to seek clarification from the courts on that issue, and resort to court proceedings as a means of resolving the dispute. Court proceedings could, therefore, constitute an appropriate step towards securing fulfilment of such obligations.

[125] On this construction of the clause, AT 100 means -

(a) when an obligation is not performed by a province the national executive can intervene through taking appropriate steps;

(b) “appropriate steps” must be construed to mean steps that are appropriate in the context of the Constitution; and

(c) where it is necessary to intervene for the purposes referred to in AT 100(1)(b) “appropriate steps” has an extended meaning, and permits the assumption of responsibility by the national executive for an obligation of the provincial executive, to the extent that it is necessary to do so for such purposes.

[126] The requirements of CP XXI.2 are met by AT 44(2), AT 100(1)(a) and (b) and AT 100(2). The other powers vested in the national executive by AT 100 fall outside the scope of CP XXI.2. They do not depend on the “intervention” being necessary for the purposes referred to in CP XXI.2 and do not involve the assumption by the national executive of responsibility for the obligations that have not been carried out. The parameters of these powers are sufficiently clear and constrained to meet the requirements of CP XX.

[127] We see no reason to depart from the finding made in the *CJ* that NT 100, to which AT 100 corresponds, complies with CPs XX and XXI.2. The objection to AT 100 must therefore be dismissed.

PUBLIC PROTECTOR, AUDITOR-GENERAL AND THE PUBLIC SERVICE COMMISSION

[128] CP XXIX requires:

> **"The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service."**

[129] In the *CJ* we said that it was necessary to consider the position of each institution separately, having regard to its powers and functions, in order to determine whether the provisions made in the NT for the protection of the independence and impartiality of that institution met the requirements of CP XXIX.[117]

[130] We held that in the light of the functions they had to perform, the independence and impartiality of the Public Protector and the Auditor-General

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117 *CJ* at para 160.

had not been adequately protected, but the provisions dealing with the Reserve Bank were adequate.[118]

[131] NT 196 dealt with the PSC as follows:

> "(1) There is a single Public Service Commission for the Republic to promote the values and principles of public administration in the public service.
> (2) The Commission is independent and must be impartial and regulated by national legislation.
> (3) Each of the provinces may nominate a person to be appointed to the Commission.
> (4) Members of the Commission nominated by provinces may exercise the powers and perform the functions of the Commission in their provinces, as prescribed by national legislation.
> (5) The Commission is accountable to the National Assembly."

[132] The number of commissioners to be appointed and the procedures according to which they would be appointed or could be removed from office were not dealt with in the NT. That was left to be regulated by national legislation.

[133] In dealing with the provisions of the NT relating to the PSC we held that the basic powers and functions of the PSC were not set out clearly in the NT, and

> "[w]ithout 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

118 *CJ* at paras 163, 165, and 166-9.

constitutional duties independently and impartially, we are unable to certify that [CP XXIX] has been complied with."[119]

[134] As a result of the *CJ* the provisions of the NT dealing with the PSC, including procedures for the appointment and removal of commissioners, and the provisions dealing with the appointment and removal from office of the Public Protector and the Auditor-General, have been amended. The AT substantially enhances the independence of both the Public Protector and the Auditor-General. AT 193(5)(b)(i) now provides that the resolution of the NA recommending their appointment be passed with a supporting vote of at least sixty per cent of the members of the NA and AT 194(2)(a) now provides that the resolution of the NA calling for their removal from office must be adopted with a supporting vote of at least two-thirds of the members of the NA. We are now satisfied that the terms of CP XXIX have been met in respect of both the Public Protector and the Auditor-General. The DP did not contend to the contrary, but objected to the provisions dealing with the PSC, submitting that they are insufficient to meet the requirements of CP XXIX.

[135] The functions of the PSC are now defined in the AT. Its main functions are to promote the basic values and principles governing public administration

119 *CJ* at para 176.

laid down by the AT;[120] to investigate, monitor and evaluate the organisation, administration and personnel practices of the public service;[121] to propose measures to ensure efficiency;[122] to give directions relating to recruitment and related matters;[123] and to advise national and provincial organs of state in regard thereto.[124] It is required to monitor adherence to applicable procedures[125] and to investigate and report on grievances of employees in the public service.[126]

[136] The size of the PSC and the procedures to be followed in appointing commissioners and removing them from office are also dealt with in the AT. The PSC is to consist of fourteen members, of whom five are to be appointed on approval by the NA, and nine on nomination by the Premiers of the nine provincial legislatures.[127] The appointment procedure involves a

120 AT 196(4)(a).

121 AT 196(4)(b).

122 AT 196(4)(c).

123 AT 196(4)(d).

124 AT 196(4)(f)(iv).

125 AT 196(4)(f)(iii).

126 AT 196(4)(f)(ii).

127 AT 196(7).

recommendation by a multiparty appointment committee of the relevant legislature, and the approval of the legislature itself.[128]

[137] AT 196(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". In terms of AT 196(3):

> "Other organs of state, through legislative and other measures, must assist and protect the Commission to ensure the independence, impartiality, dignity and effectiveness of the Commission. No person or organ of state may interfere with the functioning of the Commission."

[138] AT 196(11) deals with the removal of a commissioner from office. It provides that:

> "A commissioner may be removed from office only on -
> (a) the ground of misconduct, incapacity or incompetence;
> (b) a finding to that effect by a committee of the National Assembly or, in the case of a commissioner nominated by the Premier of a province, by a committee of the legislature of that province; and
> (c) the adoption by the Assembly or the provincial legislature concerned, of a resolution with a supporting vote of a majority of its members calling for the commissioner's removal from office."

[139] The DP contended that the role of the PSC is similar to the roles of the Public Protector and the Auditor-General, and that the procedures laid down for the protection of the independence of public service commissioners should

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128 AT 196(8).

be no less stringent than those for the removal from office of the Public Protector and the Auditor-General, which require a resolution of at least two-thirds of the members of the NA.

[140] AT 196(1) provides that there shall be a single PSC for the Republic. As a commission it will have joint responsibility for the work that it does. This, and the fact that it consists of fourteen members appointed by ten different legislatures, enhances its independence and makes any individual commissioner less vulnerable to unfair dismissal than the Public Protector and the Auditor-General might be. The dismissal of one of fourteen commissioners will not necessarily have a significant impact on the work of the PSC; the removal of the Public Protector or the Auditor-General could have a profound impact on the functioning of that office.

[141] Counsel for the DP drew attention to the fact that AT 196(13) provides that a commissioner appointed by a province may perform the functions of the commission in that province "as prescribed by national legislation". That is so, but it will not relieve the PSC of joint responsibility for the work that it does, nor prevent the thirteen remaining commissioners from coming to the support of an individual commissioner wrongly accused of misconduct, incompetence or incapacity.

[142] The functions of the PSC are materially different to those of the Public Protector and the Auditor-General. Inherent in the functions of the Public Protector is the "investigation of sensitive and potentially embarrassing affairs of government",[129] whilst the Auditor-General has a crucial role in "ensuring that there is openness, accountability and propriety in the use of public funds".[130] They perform sensitive functions which require their independence and impartiality to be beyond question, and to be protected by stringent provisions in the Constitution. The PSC's primary function is to promote "a high standard of professional ethics in the public service".[131] While it has important supervisory and watchdog functions, a good deal of its work will be of a routine or advisory nature. As an institution it cannot be equated with the Public Protector or the Auditor-General. A similar distinction is to be found in the IC which affords a lesser protection to the PSC than it does to the Public Protector and the Auditor-General. According to its provisions, commissioners of the national PSC are appointed[132] and can be removed by the President.[133] Grounds for removing a commissioner from office are:

> "misconduct, or unfitness for his or her duties, or incapacity to carry them out efficiently, or if, for reasons other than unfitness or incapacity, his or her removal from office will promote efficiency ...."[134]

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129 *CJ* at para 163.

130 *CJ* at para 165.

131 CP XXIX.

132 IC 211(1)(a).

133 IC 211(1)(e).

134 IC 211(1)(e).

Similar provision is made for the appointment and removal of provincial public service commissioners by the Premiers of the provinces.[135]

[143] "Misconduct, incapacity or incompetence," the only grounds on which a commissioner can be removed from office in terms of AT 196(11)(a), are legitimate grounds for dismissal. The removal of a commissioner from office depends upon the passing of a resolution by the relevant legislature that the commissioner has been guilty of such conduct. In the view that we take of this issue it is not necessary to decide whether a finding to that effect by the committee of the relevant legislature could be challenged in the courts. If it can, that is an added protection. If it cannot, and if there is any suspicion that the vote has been taken on other grounds, and that the removal is not justified, the decision could be made the subject of a complaint to the Public Protector. The political consequences attaching to an unfounded attempt to remove a commissioner, and an adverse finding by the Public Protector, are likely to be considerable.

[144] The protection afforded to the PSC has been substantially strengthened by the AT, and is of a much higher standard than that provided by the NT or the IC. If due regard is had to the functions of the PSC, and the ambit of the

135 IC 213(2).

protection given to commissioners by the provisions of the AT to which we have referred, the requirements of CP XXIX have clearly been complied with.

COMPLIANCE WITH CP XVIII.2

[145] CP XVIII.2 provides that:

> "**The powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, shall not be substantially less than or substantially inferior to those provided for in this Constitution.**"

[146] This CP therefore requires a comparison between the powers and functions of the provinces in the AT and those in the IC, and an assessment as to whether the powers of the provinces in the AT are indeed substantially less than or substantially inferior to those in the IC. That question involves two enquiries. The first enquiry is whether the powers and functions of the provinces in the AT are indeed less than or inferior to those accorded to the provinces in terms of the IC. If the answer to that enquiry is in the negative, no further enquiry in terms of CP XVIII.2 is required. If the answer to this question is positive, the second question which needs to be determined is whether the powers and functions of the provinces in terms of the AT are substantially less than or substantially inferior to those provided for in the IC.

[147] Both these questions were addressed by this Court in the relevant parts of the *CJ* dealing with the corresponding provisions of the NT. We held that:

(a) The powers and functions of the provinces defined in the NT were less than or inferior to the powers and functions of the provinces contained in the IC in respect of four main areas. These four areas were provincial police powers, tertiary education (other than technikons and universities), local government, and traditional leadership.[136]

(b) Although the powers and functions accorded to the provinces in these four areas in the NT were indeed less than or inferior to the corresponding powers and functions of the provinces set out in the IC, this would not in itself have justified the inference that the powers and functions of the provinces, taken as a whole, were substantially less than or substantially inferior to the powers and functions vested in the provinces under the IC.[137]

(c) These were, however, not the only relevant considerations.

> "There is in addition the presumption in NT 146(4) which favours national legislation which is sought to be justified on the grounds that

136 *CJ* at paras 477-8. Other differences between the two texts were not considered by us to be material in the context of provincial powers as a whole.

137 *CJ* at para 479.

> it is necessary for one of the purposes referred to in NT 146(2)(c). There is also the alteration in the scope of the override contained in NT 146(2)(b). It introduces the criterion for the setting of norms and standards for a matter that it be required 'in the interests of the country as a whole', in place of the criterion in IC 126(3)(b) that the norms and standards be required for the 'effective performance' of the matter. These changes apply to legislation in the entire field of concurrent powers, giving added strength to national legislation in respect of such matters, and weakening the position of the provinces should there be a conflict with competing provincial legislation."[138]

(d) Having regard to this additional consideration the "combined weight" of the four factors referred to previously and that additional factor justified the conclusion that "in the context of the NT as a whole" the powers and functions of the provinces in the NT were not only less than or inferior to the corresponding powers and functions of the provinces in the IC but also substantially so. For this reason the NT did not satisfy CP XVIII.2.[139]

[148] It is clear from this analysis that the differences between NT 146(4) (read with NT 146(2)(b) and (c)) on the one hand and IC 126(3)(b) on the other, was a crucial factor in this Court's conclusion that the powers and

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138 *CJ* at para 480.

139 *CJ* at para 481.

functions of the provinces in the NT were indeed substantially less than or substantially inferior to the corresponding powers of the provinces in IC 126(3). And indeed counsel for the DP and more especially for KZN launched a vigorous attack on the corresponding provisions of the AT, contending that the changes made to NT 146 by the CA pursuant to our previous finding still do not constitute compliance with CP XVIII.2.[140] It is therefore necessary to consider what the terms are of the changes made to AT 146 and to assess the importance of these changes. For this purpose the texts of IC 126(3)(b), NT 146(2) and (4) and AT 146(2) and (4) need to be analysed carefully.

[149] In terms of IC 126 a provincial legislature is given jurisdiction to make laws with regard to all matters which fall within the functional areas which are specified in IC sch 6[141] but the national Parliament itself also has legislative competence in those areas.[142] A conflict between a law passed by a provincial legislature and an Act of Parliament in these areas is regulated by the relevant parts of IC 126, which read as follows:

> "(3) A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter referred to in subsection (1) or (2) except in so far as -

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140 The Volkstaatraad, although not formally objecting to certification of the AT, expressed a similar concern about AT 146(4).

141 IC 126(1).

142 IC 126(2A).

(a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;

(b) the Act of Parliament 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;

(c) the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services;

(d) the Act of Parliament is necessary for the maintenance of economic unity, the protection of the environment, the promotion of interprovincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or

(e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies.

(4) An Act of Parliament shall prevail over a provincial law, as provided for in subsection (3), only if it applies uniformly in all parts of the Republic.

(5) An Act of Parliament and a provincial law shall be construed as being consistent with each other, unless, and only to the extent that, they are, expressly or by necessary implication, inconsistent with each other."

[150] What is clear from IC 126(3) is that unless it is established that any of the conditions referred to in IC 126(3)(a)-(e) are satisfied, a law passed by a provincial legislature in terms of the IC prevails over the relevant Act of Parliament dealing with the same matter.

[151] There was a material change to the whole scheme in terms of the NT, which gives provincial legislatures competence to pass laws in four areas.[143] First, they were given exclusive competence to pass laws in certain functional areas which were listed in NT sch 5.[144] Second, they were given concurrent powers, together with the national Parliament, to pass other laws in the functional areas listed in NT sch 4.[145] Third, they were accorded power to operate outside of these functional areas if it was expressly assigned by national legislation.[146] And finally, they were given the power to pass a constitution for the province.[147]

[152] This scheme still contained the potential for conflict between national legislation and provincial legislation falling within a functional area listed in NT sch 4. This conflict was regulated by NT 146, which reads as follows:

> "(1) This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4.
> (2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions are met:

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143 NT 104(1).

144 NT 104(1)(b)(ii).

145 NT 104(1)(b)(i).

146 NT 104(1)(b)(iii).

147 NT 104(1)(a) read with NT 142 and NT 143.

(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.

(b) 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 -

(i) norms and standards;

(ii) frameworks; or

(iii) national policies.

(c) The national legislation is necessary for -

(i) the maintenance of national security;

(ii) the maintenance of economic unity;

(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;

(iv) the promotion of economic activities across provincial boundaries;

(v) the promotion of equal opportunity or equal access to government services; or

(vi) the protection of the environment.

(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that -

(i) is prejudicial to the economic, health or security interest of another province or the country as a whole; or

(ii) impedes the implementation of national economic policy.

(4) National legislation that deals with any matter referred to in subsection (2)(c) and has been passed by the National Council of Provinces, must be presumed to be necessary for the purposes of that subsection.

(5) Provincial legislation prevails over the national legislation if subsection (2) does not apply.

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

(b) If the Council does not reach a decision within 30 days of its first sitting after the law was referred to it, the legislation must be considered for all purposes to have been approved by the Council.

(7) If the National Council of Provinces does not approve a law referred to in subsection (6)(a), it must, within 30 days of its decision, forward reasons for not approving the law to the authority that referred the law to it."[148]

[153] When NT 146 was compared with IC 126(3) it was clear that the grounds upon which national legislation could override provincial legislation had been expanded in important respects. NT 146(2)(b) introduced a new ground for an override based on the "interests of the country as a whole", to deal with uniformity "across the nation" instead of the previous criterion in terms of IC 126(3)(b) which provided merely that the norms and standards were required for the "effective performance" of the matter.[149] More crucially, NT 146(4) gave to national legislation a clear advantage by providing that when national legislation dealt with any matter referred to in NT 146(2)(c) and

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148 Conflicts between national legislation and a provincial constitution were regulated by NT 147 which reads as follows:

"(1) If there is a conflict between national legislation and a provision of a provincial constitution with regard to -

(a) a matter, concerning which this Constitution specifically requires or envisages the enactment of national legislation, the national legislation prevails over the affected provision of the provincial constitution;

(b) national legislative intervention in terms of section 44(2), national legislation prevails over the provision of the provincial constitution; or

(c) a matter within the functional areas listen in Schedule 4, section 146 applies as if the affected provision of the provincial constitution were provincial legislation referred to in that section.

(2) National legislation referred to in section 44(2) prevails over provincial legislation in respect of matters referred to in the functional areas contained in Schedule 5."

149 *CJ* at para 480.

it had been passed by the NCOP,[150] it had to be presumed to be necessary for the purposes of NT 146(2)(c). These features of NT 146 weighed heavily with this Court in the previous certification proceedings when we concluded that the powers and functions of the provinces in the NT as a whole were substantially less than or substantially inferior to their corresponding powers and functions in the IC.[151]

[154] The CA has addressed itself to this analysis and conclusion by introducing a new formulation of sections 146(2) and 146(4) in the AT. The preamble to NT 146(2)(b), which provided that for the purposes of prevailing over provincial legislation the relevant criterion to justify uniformity was "[t]he interests of the country as a whole", has been replaced by a more stringent criterion which provides that the national legislation must deal "with a matter that, to be dealt with effectively, requires uniformity across the nation." Secondly, and significantly, the whole of NT 146(4), which previously created a presumption in favour of national legislation, is deleted and is replaced by the following:

> "When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2)(c) and that dispute comes before a court for resolution, the court must have due regard

150 Created as a second house in the NT in place of the Senate in the IC.

151 *CJ* at paras 480-1.

to the approval or the rejection of the legislation by the National Council of Provinces."[152]

[155] The effect of AT 146(4) is to remove the presumption in favour of national legislation which was contained in NT 146(4). The issue as to whether or not the particular national legislation dealt with a matter which was necessary for the maintenance of national security or economic unity or the protection of the common market or any of the others factors listed in NT 146(2)(c) is now objectively justiciable in a court without any presumption in favour of such national legislation. If it is not established that the legislation is necessary for any of the purposes identified by AT 146(2)(c), the national government will not be entitled to rely on AT 146(2)(c) in order to ensure that such national legislation prevails over any conflicting provincial legislation dealing with the matter. The such national legislation has been approved by the NCOP will not create any presumption in favour of the national legislation. All that the court is enjoined to do is to have "due regard to the approval or rejection of the legislation" by the NCOP. The obligation to pay "due regard" means simply that the court has a duty to give to the approval or rejection of the legislation by the NCOP the consideration which it deserves in the circumstances. This is a consideration which the court might in any event

152 AT 146(4).

have been entitled to take into account without an express provision to that effect.

[156] It was contended on behalf of the objectors that the express inclusion of the duty to have regard to the approval or rejection of the legislation by the NCOP, must mean that the intention of the AT is that some special regard must be had to this factor beyond that which the court would ordinarily have given it. We are not persuaded by this contention, but even if it were correct, it would be of neutral value because the court must have "due regard" to the decision of the NCOP not only when it has approved the legislation but also when it has rejected it. This is to be contrasted with NT 146(4) which operated only in favour of the national Parliament where the legislation had actually been passed by the NCOP.

[157] In the result, AT 146(2) and AT 146(4) are materially different from the corresponding provisions of NT 146(2) and NT 146(4). More particularly, they are different in the very areas which weighed with this Court in coming to the conclusion that the powers and functions of the provinces in the NT were substantially inferior to or substantially less than their corresponding powers in the IC.

The reference to "norms", "standards", "frameworks" and "national policies" in AT 146(2)(b)

[158] It was contended on behalf of the objectors that the terms of AT 146(2)(b) diminished the powers and functions of the provinces in terms of the IC by permitting the need to express uniformity through mechanisms such as "norms and standards", "frameworks" or "national policies".[153] The comparable provisions in IC 126(3)(b) and (c) spoke of "norms or standards" and "minimum standards", but did not mention "frameworks" or "national policies". It was the addition of these two categories of which the objectors complained on the ground that it extended the likelihood of national legislation prevailing over provincial legislation.

[159] Although we accept that there may have been some increase in the range of national legislation which may now take precedence over provincial legislation, we are not of the view that this is a substantial increase. In terms of AT 146(2)(b), a framework or national policy can only take precedence over provincial legislation if it is a framework or national policy which "deals with a matter that, to be dealt with effectively, requires uniformity across the nation" and it provides that uniformity. This is effectively the same criterion as applies in terms of IC 126(3)(b). The criterion of uniformity is a significant limitation of the range of national policies and frameworks which may override provincial legislation. One of the definitions of "uniform" given in the Concise Oxford

153 AT 146(2)(b)(i), (ii) and (iii).

Dictionary is "conforming to the same standard, rules or pattern".[154] The achievement of uniformity in the context of AT 146(2)(b) therefore requires the establishment of standards, rules or patterns of conduct which can be applied nationally. As we have stated above, this is an objectively justiciable criterion. Under the IC, an override for the purpose of uniformity is permitted where legislation contained "norms or standards". Neither of these words is capable of precise definition. The Concise Oxford Dictionary defines "standard" as "an object or quality or measure serving as a basis or example or principle to which others conform or should conform or by which the accuracy or quality of others is judged".[155] "Norm" is defined as a "standard or pattern or type".[156] Given the ill-defined import of the words "norms and standards", and the governing criterion of uniformity, it is likely that even under the IC, framework legislation and national policies which sought to establish uniformity by establishing standards, rules or patterns of conduct would have been held to fall within the scope of "norms and standards".

[160] In the circumstances, it is our view that if there has been an increase in the possibility that national legislation will prevail over provincial legislation, it is not significant.

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154 *The Concise Oxford Dictionary of Current English* Allen (ed) 8 ed (Clarendon Press, Oxford 1990) 1337.

155 Id at 1188.

156 Id at 808.

[161] Notwithstanding important differences between the NT and the AT with reference to sections 146(2) and 146(4), it is nevertheless necessary to analyse the other relevant sections of the AT pertaining to provincial functions and powers in order to decide whether, in the context of the AT as a whole, the powers and functions of the provinces identified in the AT are substantially less than or substantially inferior to the powers vested in these bodies in terms of the IC.

Provincial Police Powers

[162] This was one of the four areas referred to by this Court in the previous certification proceedings as being one of the main areas in which the powers and functions of the provinces were indeed less in the NT than the corresponding powers and functions of the provinces in the IC.

[163] The relevant provisions of the NT pertaining to the police are NT 205 to 208 and the comparable provisions of the AT have the same numbers. Both NT 205 to 208 and AT 205 to 208 are reproduced in Annexure 2 for the purposes of convenience.

[164] A comparison between AT 205 to 208, NT 205 to 208 and the corresponding provisions of the IC shows, in our view, that the powers and functions of the provinces in the AT in respect of the police are still less than

those contained in the corresponding provisions of the IC but they are greater than the powers vested in the provinces in terms of the NT.

[165] In terms of the IC[157] it is the responsibility of a province to ensure that the Police Service performs its functions as set out in IC 219(1). IC 219(1) includes the investigation and prevention of crime;[158] the development of community-policing services;[159] the provision, in general, of all other visible policing services;[160] protection services in regard to provincial institutions and personnel;[161] staff transfers[162] and promotions up to the rank of lieutenant-colonel.[163]

157 IC 217(1).

158 IC 219(1)(a).

159 IC 219(1)(b).

160 IC 219(1)(d).

161 IC 219(1)(e).

162 IC 219(1)(f).

163 IC 219(1)(g).

[166] In both the NT and the AT there is a diminution of these powers. What is substituted is the power to monitor police conduct;[164] oversee or have oversight over the effectiveness and efficiency of the police service;[165] promote good relations between the police and the community;[166] assess the effectiveness of visible policing;[167] and liaise with the national Cabinet member responsible for policing.[168] The contrast in the powers of the provinces between the IC, on the one hand, and the NT and AT, on the other, shows that the powers of the provinces in the second category are indeed less than the powers accorded to the provinces in terms of the IC.

[167] There are, however, some important differences between the NT and the AT. In terms of the IC[169] the member of the Executive Council of a province entrusted with power by the Premier of the province in terms of IC 217(1), has the right to approve or veto the appointment of a provincial commissioner in terms of IC 218(1)(b). That power was removed in the NT.[170]

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164 AT 206(3)(a) and NT 206(2)(a).

165 AT 206(3)(b) (oversee); NT 206(2)(b) (have oversight of).

166 AT 206(3)(c) and NT 206(2)(c).

167 AT 206(3)(d) and NT 206(2)(d).

168 AT 206(3)(e) and NT 206(2)(e).

169 IC 217(2).

170 NT 207(3). Instead of a veto the National Commissioner appointed the provincial commissioner after consulting the provincial executive.

The AT, however, takes a position which gives to the provinces a greater say in the appointment of a provincial commissioner than was provided in the NT. The provincial commissioner is still appointed by the National Commissioner but now with the concurrence of the provincial executive and if there is disagreement the Cabinet member responsible for policing must mediate between the parties.[171] Moreover, the provincial executive is given the power to institute appropriate proceedings for the removal or transfer of, or disciplinary action against, the provincial commissioner, in accordance with national legislation, if the provincial commissioner has lost the confidence of the provincial executive.[172]

[168] The monitoring and overseeing functions of the provinces in the AT are also given more teeth by the power given to the provinces to investigate or to appoint a commission of enquiry into any complaints of police inefficiency or a breakdown in relations between the police and any community.[173] Moreover, a provincial legislature is given a potentially important power of control in the AT by the right to require the provincial commissioner to appear before it or any of its committees to answer questions.[174]

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171 AT 207(3).

172 AT 207(6).

173 AT 206(5)(a).

174 AT 206(9).

[169] From this analysis it is clear that although the more expansive powers of the provinces in the area of policing provided for in the IC have not been fully restored, there is nevertheless a significantly greater degree of power and control which vests in the provinces in this area in the AT compared with the corresponding powers of provinces contained in the NT.

Tertiary Education

[170] In the *CJ* we took into account that in terms of the IC the provinces have legislative and executive competence in respect of education at all levels, excluding university and technikon education,[175] and that this competence was curtailed in the NT by excluding all tertiary education from the legislative and executive competence of the provinces.[176] The difference is perpetuated in the AT.[177] However, the powers of the provinces in the AT in this area remain the same as the powers which they have in terms of the NT. It is therefore of no significance in assessing whether there has been any change in the weight of the factors which persuaded this Court in the previous proceedings to come to the conclusion that the powers and functions of the provinces provided for in

175 IC sch 6. *CJ* at paras 477- 8.

176 NT sch 4.

177 AT sch 4.

the NT were substantially less than or substantially inferior to the corresponding powers contained in the IC.

Local Government

[171] In the *CJ* this Court held that in the area of LG, the relevant provisions of the NT gave power to the provinces which to an extent diminished the corresponding powers enjoyed by the provinces in the IC.[178] In expressing that view we compared certain features of the IC with the NT. One of these features was that in terms of part B to NT sch 4 and part B to NT sch 5 the powers given to the provinces in respect of local government were limited by NT 155(3), which effectively confined the ambit of provincial powers and functions in this area to the supervision, monitoring and support of municipalities.[179] The Court contrasted this limitation with the powers of the provinces in IC sch 6, read together with IC 126(1) and IC 175, which did not incorporate the limitations of NT 155(3).[180] Part B of AT sch 4 and part B of AT sch 5, however, have the same effect as parts B of NT schs 4 and 5 by making the provincial competence in the area of LG subject to AT 155(6), which incorporates the same limitations as the limitations contained in NT 155(3). In this respect, therefore, the relevant parts of the AT neither diminish

178 *CJ* at paras 478.

179 *CJ* at para 367.

180 *CJ* at paras 359 and 374.

nor enhance the powers and functions of the provinces provided for in the NT and therefore have no added influence on the weighing exercise which this Court must do in the process of applying CP XVIII.2 to the AT. In this respect, the AT and the NT constitute the same degree of diminution of provincial power from that enjoyed in this area in the IC.

[172] Another feature we relied on was that in the NT there are specific areas of provincial legislative competence which are detailed in NT schs 4 and 5 and those not so detailed can only be exercised by the provinces if they are specially assigned to the provinces in terms of NT 104(1)(b)(iii). We contrasted this with IC sch 6 which does not create this limitation and simply accords legislative competence to provinces in the general area of local government (subject to the provisions of IC ch 10). For this reason this Court concluded that to that extent "provincial powers have been diminished".[181] This feature is, however, again neutral in weighing the ambit of provincial power in this area in terms of the AT because parts B of AT schs 4 and 5 again list the particular areas of LG in respect of which powers are given to the provinces. A province may only exercise any powers outside these lists if it is specially entrusted with such additional powers by an act of assignment in terms of national legislation.[182] The AT and the NT, in this respect, diminish

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181 *CJ* at para 375.

182 AT 104(1)(b)(iii).

the powers and functions of the provinces to the same extent. The AT does not add to or subtract from the degree of such diminution.

[173] In the *CJ* we held that the diminution in the powers and functions of the provinces in the NT referred to in the preceding paragraph was in some measure attenuated. In terms of NT 76, read with NT 44(2), the national Parliament could only intervene in respect of the exercise of jurisdiction in the area of NT sch 5 powers if it was necessary to achieve the objectives set out in NT 44(2)(a)-(e). Any such interference would have to be subject to the mechanism of NT 76(1) which requires that "the will of the NCOP, the institutional locus of provincial interests at national level, can be overborne only by a two-thirds majority of all the members of the NA".[183] This consideration is again neutral because the same degree of attenuation appears from AT 44(2).

[174] We also held that in terms of IC 144(2) and NT 154(1) and NT 155 any diminution in the legislative powers of the provinces also found expression in the corresponding executive powers of the provinces arising from the legislative powers.[184] The very same consequence arises from the provisions of AT 154(1) and AT 155(7).

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183 *CJ* at para 376.

184 *CJ* at para 379.

[175] In the result the powers and functions of the provinces in terms of local government in the AT are effectively the same as the powers they enjoyed in terms of the NT although they still remain less than the powers which the provinces enjoyed in terms of the IC.

Traditional Leadership

[176] The fourth area in respect of which we held in the *CJ* that the powers and functions of the provinces were less than the powers they enjoyed in terms of the IC is the area of traditional leadership.[185] There were two diminutions in this context. The first was in respect of the provincial power to establish houses of traditional leaders, which was formerly exclusive and is now a concurrent power which the provincial legislatures share with the national legislature.[186] The second related to the power of provincial legislatures to establish the salaries of provincial leaders which under the NT is subject to national legislation which may establish a framework for determining those salaries.[187] There has been no change to these provisions in terms of the AT.

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185 *CJ* at para 478.

186 See IC 183(1)(a) and NT 212(2)(a) read with NT sch 4.

187 See *KwaZulu-Natal Bills*, supra n 113 at paras 21-2; NT 219(1)(a); *CJ* at para 433.

[177] The preceding paragraphs of this judgment deal with the four areas which this Court in the *CJ* identified as the main areas in respect of which the powers and functions which the provinces enjoyed under the IC were diminished under the NT. These four areas are tertiary education, local government, traditional leadership and provincial police powers.[188] It is clear from our analysis that there has been no material change in the first three areas, but in respect of provincial police the powers previously accorded to the provinces in the NT have been enhanced in the AT.

[178] It is necessary, however, to examine some of the other sections of the AT which are relevant in determining whether, "in the context of the totality of provincial power",[189] the powers and functions of the provinces in terms of the AT can properly be said to be substantially less than or substantially inferior to the powers they enjoyed in terms of the IC. In doing so we have had full regard to the detailed arguments on behalf of the DP and KZN and the comparisons they have made between the relevant provisions of the IC, the NT and the AT.

The Powers of the NCOP

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188 *CJ* at para 478.

189 *CJ* at para 479.

[179] In the *CJ* a comparison was made between the powers of the NCOP in the NT and the corresponding powers of the Senate in the IC. Having regard to the large number of variable factors in such an equation we were "unable to conclude that there has been a measurable enhancement of such powers" in the NT but we were satisfied that "there has been no reduction in the collective powers of the provinces."[190]

[180] In terms of AT 74(2), however, a bill which purports to amend the Bill of Rights contained in AT ch 2 has to be passed by a two-thirds majority of the members of the NA and a supporting vote of at least six of the nine provinces represented at the NCOP. This gives to the NCOP an important power which was absent in NT 74 which required such a vote from the NCOP only in respect of bills which affected the NCOP or altered the provincial boundaries, powers, functions or institutions or which amended a provision that dealt specifically with a provincial matter. In the *CJ* we held that we could not properly assess whether the collective powers of the provinces had been increased by the creation of the NCOP and the granting of powers to it. [191] The power now accorded by AT 74(2) to the NCOP does appear greater than the corresponding power of the NCOP in the NT. However, for the reasons we

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190 *CJ* at para 333.

191 *CJ* at para 333.

gave in the *CJ*,[192] we are unable to discern whether this will result in a substantial increase in the collective powers of the provinces.

[181] In terms AT sch 6 s 21(5), until there is proper national legislation in terms of AT 65(2) (which provides for a uniform procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf in the NCOP) each province is given authority to determine its own procedure in this area. This is a marginal increase in the powers of the provinces because there was no such provision in the NT.

[182] Apart from these, there appear to be no differences relevant to the NCOP, between the NT and the AT which can have any influence on the enquiry required by CP XVIII.2.

Public Service Commission

[183] IC 213 gives the provinces the power to establish provincial service commissions. This power was not given to them in the NT, which provided only for a single Public Service Commission ("PSC") for the Republic.[193] The NT, however, did not specify the powers that the single PSC would enjoy. For this reason we found in the *CJ* that we could not determine whether the power of the provinces in respect of the PSC in the NT were indeed less than or inferior to those in the IC. We observed that:

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192 *CJ* at para 332.

193 NT 196.

> "we cannot evaluate changes made in the NT in regard to PSCs without knowing what the powers and functions of the 'single Public Service Commission' will be. If such powers interfere with the provinces' powers to appoint provincial public servants, subject to national norms and standards, there will have been a reduction of provincial powers in this regard."[194]

In the *CJ* we accordingly did not take the powers of the provinces in respect of PSCs into account in reaching our decision in respect of CP XVIII.2. The amendments brought about by the AT specify the powers of the PSC. Therefore we must now compare the PSC provisions of the IC with those of the AT.

[184] Under the IC the powers of the national PSC are governed by IC 210(1) which provides that:

> "The Commission shall be competent -
>
> (a) to make recommendations, give directions and conduct enquiries with regard to -
>
> (i) the organisation and administration of departments and the public service;
>
> (ii) the conditions of service of members of the public service and matters related thereto;
>
> (iii) personnel practices in the public service, appointments, promotions, transfers, discharge and other career incidents of members of the public service and matters in connection with the employment of personnel;
>
> (iv) the promotion of efficiency and effectiveness in departments and the public service; and

194 *CJ* at para 390 (footnote omitted).

(v) a code of conduct applicable to members of the public service;
...."

IC 210(3) makes it clear that directions or recommendations given by the PSC have to be implemented by those to whom they are directed unless treasury approval is not obtained for any resultant expenditure or the President rejects the direction or recommendation. The PSC therefore enjoys considerable powers over the public service. It can control the size of any establishment within the public service, determine conditions of service and job descriptions, and give directions concerning appointments, transfers and dismissals.

[185] The powers of the provincial service commissions are defined in IC 213(1) as follows:

"A provincial legislature may provide by law for a provincial service commission and, subject to norms and standards applying nationally, such commission shall, in respect of public servants employed by the province, be competent -

(a) to make recommendations, give directions and conduct inquiries with regard to -

(i) the establishment and organisation of departments of the province;

(ii) appointments, promotions, transfers, discharge and other career incidents of such public servants; and

(iii) the promotion of efficiency and effectiveness in departments of the province;"

The provisions of IC 210(3) are also applicable to provincial service commissions,[195] and therefore, like the national PSC, the directions and recommendations of a provincial service commission are, generally speaking, mandatory within the particular province.

[186] The arrangement under the AT is quite different. It establishes a single PSC for the whole Republic[196] but no provincial service commissions. The powers of the single PSC are set out in AT 196(4) which provides that:

> "The powers and functions of the Commission are:
>
> (a) To promote the values and principles set out in section 195, throughout the public service;
>
> (b) to investigate, monitor and evaluate the organisation and administration, and the personnel practices, of the public service;
>
> (c) to propose measures to ensure effective and efficient performance within the public service;
>
> (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;
>
> (e) to report in respect of its activities and the performance of its functions, including any finding it may make and directions and advice it may give, and to provide an evaluation of the extent to which the values and principles set out in section 195 are complied with; and
>
> (f) either of its own accord or on receipt of any complaint -
>
> (i) to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executive authority and legislature;
>
> (ii) to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies;

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195 IC 213(2).

196 AT 196(1).

(iii) to monitor and investigate adherence to applicable procedures in the public service; and

(iv) to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service."

[187] The "values and principles" referred to in AT 196(4)(a), (d) and (e) of are set out in AT 195(1), which reads as follows.

"Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be development-oriented.

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation."

[188] The role of the single PSC under the AT is therefore far less significant than it is under the IC. Under the IC the directions and recommendations of the PSC are effectively peremptory. Under the AT its powers, while important, are largely concerned with investigation and reporting. The hands-on control of the public service has been removed from the PSC and given, effectively, to the national and provincial executives. The exercise of those powers by each executive is now subject to monitoring by the single PSC. In relation to provincial government AT 197(4) makes it clear that it is the provincial governments that are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administration, all within a framework of uniform norms and standards applying to the public service.

[189] The question whether there has been any diminution or enhancement of provincial powers in respect of the PSC needs to be addressed in the light of the foregoing discussion. What has happened is that the national PSC and the provincial service commissions have been replaced by a single PSC which consists of representatives of national and provincial governments. Some of the powers of the national PSC have been transferred to national government, and some to the single PSC. Similarly, some of the powers of provincial service commissions have been transferred to provincial executives, and some have been transferred to the single PSC.

[190] Under the AT, provinces lose the power to establish provincial service commissions but gain powers and functions in respect of the single PSC. Under the IC the provinces are not represented on the national PSC. Its functions are therefore to be carried out independently of the provinces. Under the AT the provinces have greater powers in respect of the single PSC. AT 196(7) provides that the single PSC shall consist of fourteen commissioners, five approved by the NA and one from each of the nine provinces, nominated by each Premier. This gives the provinces a majority of the commissioners. The single PSC is therefore an important site of collective provincial power. Another factor is that in terms of AT 196(13) the commissioners appointed by the provinces "may exercise the powers and perform the functions of the Commission in their provinces as prescribed by national legislation". The meaning of this provision is not entirely clear. But even if it does confer a power on such commissioners, the nature of this power is dependent upon prescription in national legislation. The extent, if any, to which it may confer powers upon the provinces remains uncertain.

[191] The new PSC arrangements compensate provinces for the loss of the power to establish provincial service commissions by affording them collective power on the PSC. However, there remains a conceptual and residual difference between an autonomous power of a province to create its own commission, on the one hand, and on the other hand the power of such a

province to participate in the collective power of the provinces in that they appoint a majority of the members of the PSC.

[192] Under the IC provincial governments are entitled to appoint their own employees,[197] but their powers are constrained in two respects:

> (a) The provincial service commissions can issue mandatory directives in regard to the establishment and organisation of departments, appointments, transfers, promotions, discharge and other career incidents of provincial employees; and
>
> (b) The directions of the provincial service commissions have to conform with national norms and standards.

[193] Under the AT provincial governments will be able to deal with the matters referred to in subparagraph (a) in the previous paragraph without reference to the PSC but will have to do so in accordance with uniform norms and standards as required by AT 197(4). An objector contended that there is a diminution in the powers of provincial governments because AT 197(1) and (2) make it clear that the powers of a provincial government under AT 197(4) are subject to frameworks determined by national legislation. In our view, however, this requirement does not introduce any diminution of the powers of

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197 IC 213(1).

provinces. Under the IC these powers are exercised by the provincial service commissions "subject to norms and standards applying nationally".[198] There has been a shift of power from the provincial service commissions to the provincial government and from the national PSC to the national government, but under both the IC and the AT, appointments, transfers, promotions and discharge of employees are to be made by provincial institutions subject to national norms and standards. We, therefore, cannot accept that the provisions of the AT in this regard diminish the powers of the provinces.

[194] Other functions of the provincial service commissions in terms of IC 213(1), namely, the competence of the provincial service commissions to make recommendations and give directions to promote efficiency and effectiveness in departments of the provinces and to advise the Premier if requested to do so in regard to the provincial public service,[199] have fallen away as a result of the dismantling of provincial service commissions.[200] The power under the IC to give directions to promote efficiency and effectiveness will, under the AT, vest in the single PSC.[201] The PSC may give directions aimed at ensuring that personnel practices relating to recruitment, transfers,

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198 IC 213(1).

199 IC 213(1)(a)(iii) and IC 213(1)(b), respectively.

200 The powers of the provincial service commissions to delegate their powers or to perform powers for the national PSC (IC 213(1)(c) and (d)) are not relevant to this enquiry and have been ignored.

201 AT 196(4)(c).

promotions and dismissals comply with the values and principles set out in AT 195.[202] It follows that a provincial service commission's power to give directions in regard to "the promotion of efficiency and effectiveness in departments of the provinces"[203] has been replaced by a single PSC power to give directions in regard to personnel practices of a general nature, which would include efficiency and effectiveness.[204] It is not clear whether the directions will be binding on the administrations to which they are given. That may depend on the regulatory legislation referred to in AT 196(2). For the purposes of the certification proceedings we assume them to be binding.

202 AT 196(4)(d).

203 IC 213(1)(a)(iii).

204 AT 196(4)(c).

[195] The shift to the single PSC does represent some diminution of provincial power. Once again, however, the provincial service commissions' powers to give such directions under the IC were subject to "norms and standards applying nationally". Those norms and standards would, very likely, have included matters that may be the subject of directions under AT 196(4). It may be, however, that AT 196(4) affords a greater power to the single PSC to give directions in this regard than was contained in the notion of single norms and standards as contemplated by IC 213. To this extent there will have been some diminution of provincial power in this regard.

[196] The changed nature of the functions of the single PSC under the AT as compared with the functions of the national and provincial service commissions under the IC makes comparison difficult, and this complicates the weighing process that has to be undertaken.

[197] The relevant factors have been referred to above. In summary they are:

(a) The provinces have lost the autonomous power to appoint their own commissions.

(b) The collective powers of the provinces have been enhanced by the establishment of the single PSC. This enhancement in power has

not fully compensated the provinces for the loss of the power to create their own commissions.

(c) Part of the power which previously vested in a provincial service commission will now vest in the provincial executive.

(d) The residue of the power will be transferred to the single PSC. A significant part of the residual power concerns directions in regard to practices, which under the IC are in any event subject to national norms and standards.

[198] Weighing all these factors as best we can, we conclude that there has been a small diminution in the powers of the provinces arising out of the alteration in the functions of the PSC, the change in its composition, and the disestablishment of provincial service commissions.

Provincial Constitutions

[199] In the *CJ* this Court held that the power of a province to make and adopt a provincial constitution provided for in the NT did not enhance or diminish the corresponding powers which a province had in terms of the IC.[205] This conclusion must therefore also apply to the AT because AT 142 and AT 143,

[205] *CJ* at paras 342-53.

which deal with provincial constitutions, do not change the formula which was previously adopted in the NT.

Labour Relations

[200] AT 23(5) and (6) provide that "national legislation" may be enacted to regulate collective bargaining and to recognise union security arrangements contained in collective agreements. In NT 23(5) the corresponding provision was that the Bill of Rights did not prevent "legislation" recognising union security arrangements contained in collective agreements. Counsel appearing for the DP contended that AT 23(5) diminished the power of provinces because it gave to the national legislature only the right to recognise union security arrangements contained in collective agreements. In our view this submission is erroneous. The relevant comparison which must be made is between the IC and the AT. In terms of the IC "labour matters" fall within the legislative competence of the national legislature and that legislative competence includes the competence to make laws reasonably necessary for or incidental to the effective exercise of such legislative competence. The national legislature therefore always had the right to make legislation which recognises union security arrangements contained in collective agreements. The AT does not confer a new power. As far as the provinces are concerned, "labour" was not an area in respect of which they had legislative competence at all. By not providing for any right by a provincial legislature to recognise union security arrangements, AT 23(5) and (6) do not therefore diminish anything which the provinces enjoyed before in the IC.

Miscellaneous Objections

[201] The written submission on behalf of KZN contains a schedule which, so it was contended, lists numerous instances of diminished provincial powers and functions brought about by the AT. The schedule is virtually a repetition of points raised in relation to the NT. These were considered before and were either addressed in the *CJ* or were regarded as of insufficient cogency to warrant discussion. We were satisfied that these matters, viewed both individually and cumulatively, did not amount to a significant diminution in the powers and functions of provinces. A few of the objections are new. As in the case of the *CJ*, we have in this judgment dealt expressly with objections of substance only and omitted mention of those we found untenable. We have reconsidered all of these objections and remain of the view that they have resulted in no significant diminution in provincial powers or functions.

Other Provisions

[202] We have in this judgment made mention of three areas in which there is no relevant difference between the comparable provisions of the NT and AT because these three areas were specifically referred to in the *CJ* as areas in which the NT had diminished the powers and functions of the provinces.[206] There are, however, also a large number of other provisions where comparable provisions of the AT neither diminish nor enhance the powers of

[206] Tertiary education, local government and traditional leadership.

the provinces in the AT as compared with the NT in any significant sense. It is unnecessary to list such provisions in this judgment because they do not take the exercise of "weighing the baskets" further.

Conclusion

[203] In the *CJ* this Court held that "[s]een in the context of the totality of provincial power" the powers of the provinces in the NT taken as a whole were substantially less than or substantially inferior to the powers vested in them under the IC.[207] This would not have been the conclusion were it not for the provisions of NT 146(2) and (4) which tilted the balance against the provinces.[208]

[204] We are satisfied that:

(a) The amendments to the NT contained in AT 146(2) and (4) effectively restore the balance referred to in the preceding paragraph.

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207 *CJ* at para 479.

208 *CJ* at para 480.

(b) The amendments to provincial police powers contained in AT 205-8 increase the powers of the provinces in respect of police services compared with those accorded to the provinces in terms of the NT.[209]

(c) The provisions of the AT in regard to the PSC do not materially affect the balancing process.

(d) The combined effect of the changes made in the AT is such as to produce a conclusion different to that at which we arrived in respect of the NT. In particular those relating to provincial police powers and to the terms of the override contained in AT 146 have played a material role in this change of assessment.

(e) In the result, the powers and functions of the provinces in terms of the AT are still less than or inferior to those accorded to the provinces in terms of the IC, but not substantially so.

209 See para 169 of this judgment.

ORDER

[205] We certify that all the provisions of the amended constitutional text, the Constitution of the Republic of South Africa, 1996, passed by the Constitutional Assembly on 11 October 1996, comply with the Constitutional Principles contained in schedule 4 to the Constitution of the Republic of South Africa, 1993.

Chaskalson P

Langa J

Mahomed DP

Madala J

Ackermann J

Mokgoro J

Didcott J

O'Regan J

Goldstone J

Sachs J

Kriegler J

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ANNEXURE 1

SUMMARY OF OBJECTIONS AND SUBMISSIONS

Objections by Political Parties

CP	Text	Objector	Objection
I, II, IV and VII	203, alternatively 37	DP	Meaning of "state of national defence" is unclear. If it permits martial law it conflicts with the CPs.
II	37	KZN	The exclusion of rights, for example, the right not to be deprived of citizenship, from the table of non-derogable rights, is irrational.
II and XV	74(2) and 74(3)	DP	Section that entrenches the Bill of Rights may be amended by 74(3)(a) and therefore is not itself entrenched.
IV	sch 6 s 26(1)	KZN	Transitional provisions violate the supremacy of the AT.
VI and XXI.2	100	KZN	Intervention by the national executive in terms of 100 conflicts with the separation of powers.
XII	31	KZN	Failure to recognise collective rights of self-determination beyond culture, religion and language.
XIII.2	147	KZN	Future provisions in provincial constitutions dealing with the institution, role, authority and status of traditional monarchs subject to override of national legislation and therefore not protected.
XIII and XVII		IFP	The meaning given to the "role of traditional leadership" in the *CJ*.
XV	74(2) and 74(3)	DP	Procedures and majorities for amending the constitution not special because some categories of legislation more difficult to pass and amend.
XV	74(2) and 74(3)	DP	Inadequate provision for special majorities in the NCOP.
XV	sch 6 s 24(1)	KZN	Places provisions of the IC beyond constitutional review.
XVIII.2	Various	DP, KZN and IFP	Substantial diminution of provincial powers and functions.
XXII	163(b)(i)	IFP	Encroachment upon the functional and

			institutional integrity of provinces.
XXIV	155	KZN	Insufficient detail of framework for structures for LG.
XXIX	196(11) and (12)	DP	The independence and impartiality of the PSC is not adequately provided for.
XXXI	203	KZN	Lack of provision that the power to declare a state of national defence may only be exercised in the national interest.

*Objections lodged in the supplementary written arguments on behalf of the IFP have been omitted.

Objections/Submissions by Private Parties

CPs	Text	Objector	Objection
I, II, III and V	16 read with 36	Abrahams SG	Freedom of expression should be limited by prohibiting portrayal of women as sex objects and display of pornography to children.
I, II and III	Preamble	Prozesky MH	Inclusion of "May God protect our People" discriminates against non-theists.
II	11 and 12(2)	Pro Life	Abortion should be explicitly excluded from the Bill of Rights.
II	22	Black Sash Trust	The right to choose a trade, occupation or profession should extend to "everyone" (including non-citizens).
II	37(5)	National Coalition for Gay and Lesbian Equality; The Black Sash; The Equality Foundation; Lawyers for Human Rights; National Association of Persons Living with HIV/AIDS; Disabled People South Africa	Requests the Court to comment on the exclusion of sexual orientation, pregnancy, age, disability, conscience, opinion, belief, marital status, gender, culture and birth as non-derogable rights during a state of emergency.
II and III	16	Rhema Ministries of South Africa	Freedom of expression should be limited by prohibiting portrayal of women as sex objects and display of pornography to children.
XV	74(2) and (3)	Volkstaatraad	The amendment procedure for the Bill of Rights should be further entrenched.
XVIII.2	155(3)(a), (b) and (c), 164 and 229(3)	Du Preez CO	The powers of the provinces with regard to LG are diminished compared to the IC.
XVIII.2	104(1)(b)(iii), 139, 146(2), 146(4), 155, Sch 4 Part B, Sch 5 Part B and Sch 6 Item 26	PROLOGOV Consultancy	Diminution of provincial governmental powers in various aspects.
XVIII.2	146(2)(b)	Volkstaatraad	The formulation of "uniformity across the nation" too wide and therefore provincial powers are diminished.
XIX and XXI	146	Volkstaatraad	There are no exclusive powers given to

			the provinces.
XXII	146(4)	Volkstaatraad	The “due regard” provision is unclear and impedes the independence of the courts.
XXXII read with IC ch 6	Ch 5	Abrahams SG	“Good government” language in IC 88(4)(c) and (d) should be retained.
XXXIV	74 and 235	Volkstaatraad	In practice the creation of a Volkstaat is made impossible.
	Preamble	Fain College	Formulation of the preamble.
	9(2)	Sandison PC	Affirmative action.
	9(3)	Hammarstrom J	Sexual orientation as a ground for non-discrimination should not be included.
	9, 16 and 29(3)	Faasen K	The use of the term “race”.
	9(3), 11 and 12(2)	Fogarty IN	Abortion should be specifically excluded. Sexual orientation as a ground for non-discrimination should not be included.
	24	King WG	The right should include a concise formulation of how “pollution and ecological (environmental) degradation” is to be prevented and controlled.
	47 and 106	Ismail R	A public representative (MP) should be required to hold a minimum number of public meetings in his or her constituency.
		Nkadimeng M	Requests an explanation on the powers of adjudication by chiefs in their tribal courts and the protection of the chiefs’ status.
		Van Hees S	Various objections with regard to the justice system.

ANNEXURE 2

NT 205 to 208 read as follows:

Police Service

205.(1) The national police service must be structured to function in the national, provincial and, where appropriate, local spheres.

(2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.

(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

Political responsibility

206.(1) A member of the Cabinet must be responsible for policing and must determine national policing policy after consulting provincial governments and taking into account the needs of provinces.

(2) Each province is entitled -

(a) to monitor police conduct;

(b) to have oversight of the effectiveness and efficiency of the police service, including receiving reports on the police service;

(c) to promote good relations between the police and the community;

(d) to assess the effectiveness of visible policing; and

(e) to liaise with the Cabinet member responsible for policing with respect to crime and policing in the province.

Control of police service

207.(1) The President as head of the national executive must appoint a woman or a man as National Commissioner of the police service, to control and manage the police service.

(2) The National Commissioner must exercise control over and manage the police service in accordance with national policing policy and the directions of the Cabinet member responsible for policing.

(3) The National Commissioner must appoint a woman or a man as provincial commissioner for each province, after consulting the provincial executive.

(4) Provincial commissioners are responsible for policing-

(a) as prescribed by national legislation; and

(b) subject to the power of the National Commissioner to exercise control over and manage the police service in terms of subsection (2).

Police civilian secretariat

208. A civilian secretariat for the police service must be established by national legislation to function under the direction of the Cabinet member responsible for policing."

The aforementioned provisions are to be contrasted with AT 205 to 208, which read as follows:

"**Police service**

205.(1) The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.

(2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.

(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

Political responsibility

206.(1) A member of the Cabinet must be responsible for policing and must determine national policing policy after consulting the provincial governments

and taking into account the policing needs and priorities of the provinces as determined by the provincial executives.

(2) The national policing policy may make provision for different policies in respect of different provinces after taking into account the policing needs and priorities of these provinces.

(3) Each province is entitled -

(a) to monitor police conduct;

(b) to oversee the effectiveness and efficiency of the police service, including receiving reports on the police service;

(c) to promote good relations between the police and the community;

(d) to assess the effectiveness of visible policing; and

(e) to liaise with the Cabinet member responsible for policing with respect to crime and policing in the province.

(4) A provincial executive is responsible for policing functions -

(a) vested in it by this Chapter;

(b) assigned to it in terms of national legislation; and

(c) allocated to it in the national policing policy.

(5) In order to perform the functions set out in subsection (3), a province -

(a) may investigate, or appoint a commission of inquiry into, any complaints of police inefficiency or a breakdown in relations between the police and any community; and

(b) must make recommendations to the Cabinet member responsible for policing.

(6) On receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province.

(7) National legislation must provide a framework for the establishment, powers, functions and control of municipal police services.

(8) A committee composed of the Cabinet member and the members of the Executive Councils responsible for policing must be established to ensure effective co-ordination of the police service and effective co-operation among the spheres of government.

(9) A provincial legislature may require the provincial commissioner of the province to appear before it or any of its committees to answer questions.

Control of police service

207.(1) The President as head of the national executive must appoint a woman or a man as the National Commissioner of the police service, to control and manage the police service.

(2) The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.

(3) The National Commissioner, with the concurrence of the provincial executive, must appoint a woman or a man as the provincial commissioner for that province, but if the National Commissioner and the provincial executive are unable to agree on the appointment, the Cabinet member responsible for policing must mediate between the parties.

(4) The provincial commissioners are responsible for policing in their respective provinces-

(a) as prescribed by national legislation; and

(b) subject to the power of the National Commissioner to exercise control over and manage the police service in terms of subsection (2).

(5) The provincial commissioner must report to the provincial legislature annually on policing in the province, and must send a copy of the report to the National Commissioner.

(6) If the provincial commissioner has lost the confidence of the provincial executive, that executive may institute appropriate proceedings for the

removal or transfer of, or disciplinary action against, that Commissioner, in accordance with national legislation.

Police civilian secretariat

208. A civilian secretariat for the police service must be established by national legislation to function under the direction of the Cabinet member responsible for policing."

ANNEXURE 3

ABBREVIATIONS IN THE JUDGMENT

AT	Amended Text (as adopted on 11 October 1996)
CA	Constitutional Assembly
CJ	*Certification Judgment*
CP	Constitutional Principle
DP	Democratic Party
IC	Interim Constitution
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Convention on Economic, Social and Cultural Rights
IFP	Inkatha Freedom Party
KZN	KwaZulu-Natal Province
LG	Local Government
NA	National Assembly
NCOP	National Council of Provinces
NT	New Text (as adopted on 8 May 1996)
PSC	Public Service Commission