THE CERTIFICATION

OF

THE CONSTITUTION OF SOUTH AFRICA

by

Carmel Rickard

Submitted in partial fulfilment of the requirements for the degree of
Master of Laws

University of Natal
Durban
1997

"I felt glad I was there.
It was part of history."

- Beema Naidoo
Concerned South African Indians

ACKNOWLEDGMENTS

Special thanks to Karthy Govender, whose suggestion it was to retell the story of the certification process, for his patience, ideas and encouragement.

CONTENTS

INTRODUCTION

Yasmin Carrim stood before the packed public gallery in South Africa's Constitutional Court, all 11 green-robed justices ranged behind her in a raised semi-circle. "I call the case of the Certification of the Constitution of the Republic of South Africa," she said.

Johannesburg, Monday, July 1, 1996, and the first case she had yet called during her 18 month contract as researcher for Justice Kate O'Regan. By sheer chance she was chosen from her colleagues that morning to announce the case, a task which some clerks find a burden, even boring. But this was different; she knew she was helping make history.

Apart from Carrim's selection, however, nothing else about that day's case had been left to chance.

From the time of tough multi-party negotiations about South Africa's future held at the World Trade Centre on the other side of Johannesburg, the country's largest city, it had been clear that the ultimate decision over a new constitution would lie with the justices of the Constitutional Court.

During these talks, negotiations about a new political dispensation for the country almost came unstuck several times, particularly over how the new constitution should be drafted and adopted. The majority coalition insisted that a final constitution could only be drawn up by elected representatives of all the people, after free and fair elections. The minority parties by contrast feared that such a constitution might not give them the safeguards they and their constituencies required. They declared that without these safeguards they would not continue in the negotiating process. Their absence, in turn, would have created a problem for the other negotiating partners since it would have scuttled hopes for an all-party settlement.[1]

---

[1]For a brief history of this process in the words of the Constitutional Court, see *In Re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) (*First Certification* judgment).

For their compromise the parties turned to the Constitutional Court, a new body set up during the transition.

This court was to be different from any other South Africa had seen. Adjudication of the new constitution was too precious a task to be entrusted to the Appellate Division of the Supreme Court (the Appeal Court) in Bloemfontein, until then the highest court in the land. Its complete lack of representivity and its record over the past decades, particularly on issues involving human rights, had won it little credibility as a body which could be trusted to embrace the new constitutional spirit. So the negotiators decided to by-pass the Appeal Court, at least on constitutional questions; exclude it from any constitutional jurisdiction;[2] [3] establish a new court and give this new body the last word on constitutional questions.

Members of the new court would not be appointed in the haphazard, largely secret system of past judicial selection. Instead a more transparent process was devised which reflected the ideals of the new democracy and allowed the judges to be drawn from a much wider pool of lawyers than the overwhelmingly middle class, middle aged, white male advocates' Bar from which judges had traditionally been selected.

The president of the new court was to be chosen directly by South Africa's president[4] (a position filled by Nelson Mandela after the 1994 elections). Four of the remaining 10 judges would be drawn from the existing judiciary, while six would be chosen following interviews by the new Judicial Service Commission but subject to the final decision of Mandela.[5] These six could be Supreme Court judges, experienced attorneys, advocates or law lecturers or someone

---

[2]*Constitution of the Republic of South Africa Act 200 of 1993,* (the Interim Constitution or IC) s 101(5).

[3]In terms of the final constitution, Constitution of the Republic of South Africa 1996, the Appeal Court has been given limited constitutional jurisdiction. See s 168(3) and 172(2)(a).

[4]See IC s 97(2).

[5] See Chapter 7 of the IC, particularly s 97, 99 and 105.

with particular expertise in constitutional law. [6] [7]

---

[6]Mandela appointed the national director and co-founder of the Legal Resources Centre, Arthur Chaskalson SC, as President of the new Constitutional Court. (The LRC is a public interest law firm which acts on matters of public interest for people who cannot afford legal representation. It had challenged a number of important laws propping up the apartheid system as well as security legislation under which opponents of the government were detained without trial.) The composition - particularly the racial and to a lesser extent the gender composition - of the rest of the court then became a matter of intense speculation and behind-the-scenes lobbying, especially in view of the IC's instruction to the Judicial Service Commission in s 99(5)(d) that it should have regard to the need to constitute a court "representative in respect of race and gender".

The four members of the new court chosen from the existing bench in terms of IC s 99(3) included two who were white (Justices Richard Goldstone and Lawrence (Laurie) Ackermann) and two who were not (Justices Tholakele (Thole) Madala and Ismail Mahomed). This gave the Judicial Service Commission and the cabinet some latitude in appointing the remaining six. Had the four chosen from the existing bench all been white, it would have been difficult to justify including *any* white judges among the six chosen in the second stage of the selection process. The six whose appointments completed the bench were Justices John Didcott, Johann Kriegler, Pius Langa, Yvonne Mokgoro, Kate O'Regan and Albert (Albie) Sachs.

Both the process and the resulting court proved somewhat controversial at the time for a number of reasons. It was the first time members of a court had been chosen through formal interviews and this, together with the fact that the interviews were held in public with the media present, proved disconcerting for some candidates. Several political parties found the resulting composition of the bench just as disconcerting. Looking at the Government of National Unity example, with its broad cross-party representation, they had apparently come to expect that the Constitutional Court would have a similar "broad base", and that its judges would come from across the full political spectrum. However, from the start of the JSC hearings it was clear that the Government of National Unity model would not apply to the Constitutional Court. Candidates were asked about their party political membership if any, and whether they had played any role to promote or oppose apartheid or its practices. It quickly became clear that no one whose background was in any way touched by too close an association with apartheid or discredited views or institutions would be seriously considered. As a result the court is far more homogenous in its political views than, for example, the United States Supreme Court.

Initially, some concern was voiced by those disappointed in the make-up of the court that it might be a lackey of the ruling African National Congress, short on independence and credibility. However, even before the certification case was heard, the court had handed down judgments indicating that these criticisms and concerns were misplaced. Perhaps the clearest example can be found in *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (10) BCLR 1289 (CC). This was the first case in which the court had to consider enactments of the new democratically elected government, specifically, two presidential proclamations by Mandela. In his judgment, Chaskalson P described the case as involving "fundamental questions of constitutional law", adding that matters of "grave

To this body was given the task of ensuring that the draft final constitution, to be drawn up after democratic elections, embodied a number of principles on which all parties had agreed at the multi-party talks.[8] Some of these 34 Constitutional Principles (CPs) were like motherhood and apple pie, wholesome precepts with which all parties could easily agree; others contained the essence - sometimes controversial - of a party's political philosophy. For example, the recognition and protection of "collective rights of self-determination"[9] was a key part of the platform of the National Party and its allies, while the federalists (including many in the National Party) pinned their hopes on CP XVIII[10] among others, to satisfy their aspirations.

The compromise deal worked out between the parties was that a list of these agreed Constitutional Principles would become an integral part of the Interim Constitution drafted by the negotiators at the World Trade Centre talks. The Constitutional Court would then be given the task of ensuring that the proposed final constitution, drawn up after elections in 1994, embodied[11] these principles.

If the text satisfied the CPs, the judges would certify it, and no subsequent court could so much

---

public moment" were involved (as the issues at stake concerned imminent local government elections). Nevertheless, the justices found unanimously that the president had acted outside his powers in making these proclamations. The overall impact of the decision was to allay concern that the court would invariably find in favour of the government.

As to the composition of the court, at the time of the certification hearing, the bench included two women, three African justices and one of Indian descent. While still overwhelmingly male and white, it was the most "mixed" court then sitting in South Africa.

[7]IC s 99(2)(c)(i) and (ii).

[8]A list of the 34 Constitutional Principles is contained in Schedule 4 of the IC.

[9]CP XXII.

[10]This lengthy CP provides, among other subsections, that the powers and functions of the provinces, as defined in the final Constitution, shall not be "substantially less than or substantially inferior to those provided for in the (interim) Constitution". It proved a crucial hurdle in the first certification case.

[11]The precise requirement was that the text should "comply with" the CPs, a phrase which led to some debate during argument in the first certification case.

as raise the question whether any part of the Constitution was valid. If it did not meet the standard of the CPs, the text would have to be sent back to the Constitutional Assembly for more work. Section 71(2) explained this task: "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." And s 71(3) gave the court's decision infallibility: "A decision of the Constitutional Court in terms of ss (2) certifying that the provisions of the new constitutional text comply with the Constitutional Principles, shall be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof."

With South Africa's first genuinely democratic elections, held in April 1994, the process took its next step forward. The newly-elected representatives began regular meetings to fashion a final constitution. Sitting as a constitution-making assembly, they took two years before completing their task, and on May 8, 1996 passed the text with more than 80 percent support - comfortably over the two-thirds majority needed.

The draft was then sent to the Constitutional Court for approval and the certification process got under way.

THE PREPARATIONS

All political parties sitting in Parliament were automatically entitled to submit written argument on whether they believed the text satisfied the Constitutional Principles (the position of the Conservative Party which had stayed out of Parliament is discussed later). But the court was unanimous from the start that the process should also involve ordinary people as much as possible. Just as the Constitutional Assembly had invited - and received - public participation in the process of drafting the text, so too the court decided to give the public a chance to participate even in this final phase. Involvement was not to be limited to lawyers or political

parties; everyone, cranks and crackpots and obscure organisations included, was welcome to send in contributions.

As the court explained in its judgment on the case, "Although there was no legal provision for anyone else (apart from the political parties) to make representations, because of the importance and unique nature of the matter, the directions also invited any other body or person wishing to object to the certification of the (draft constitution) to submit a written objection."[12]

In all, 84 individuals or groups responded to the advertised invitation to participate. However, because of severe time constraints, and to avoid duplication and irrelevance, not everyone could be asked to present argument. After they had scrutinised the content of these submissions, the judges invited all the political parties as well as the Constitutional Assembly and 27 of the private individuals or organisations who had responded, to present oral argument at the hearing.

Pressed for time, the court was determined that the whole matter should be handled as quickly as possible while still allowing for proper participation. The country needed certainty, if not finality, on the whole constitutional issue: if the text were to be sent back, the Constitutional Assembly should be able to start its revision immediately; if, on the other hand, it were to be certified, there would be many legal consequences which the bureaucrats needed to attend to at once. After a struggle for freedom lasting many generations, the people of South Africa were entitled to their new constitution and the court should not delay the process.[13]

Originally the case was scheduled to run from Monday July 1 to Wednesday July 10, far longer than any matter so far heard by the Constitutional Court, but even this was not enough and an extra day was added to ensure that all involved felt they had had a full chance to put their views.

---

[12]*First Certification* judgment at 1272 B.

[13]Chapter 5 of the IC set strict time limits for each stage of the process and the court wanted to help ensure these deadlines were met.

The case generated an unprecedented work load. Judges were assigned to deal with particular aspects of the matter in the preparation stage. Extra staff were seconded from other departments to help manage the process, particularly the documentation involved, and a large room at the court was completely given over to the paperwork. Piles of submissions, annexures, daily programmes and other texts grew waist-high from the floor, and each day more documents were added as counsel and others presenting oral argument handed in additional written material. The court noted later that the written objections and supporting submissions ultimately ran to about 2 500 pages, not counting extracts from judgments, textbooks and other publications, including foreign material[14] which had been handed in as attachments.[15]

Far more was at stake than in any previous case of the court. When the parties had agreed to the multi-phase process of constitution-making they had made it clear that the Constitutional Principles with the Constitutional Court as their guarantor and guardian, provided the mechanism which had enabled the "solemn pact" to go ahead. Without it, parties would not have continued their participation in the negotiation process and the miracle of peaceful settlement could not have happened.

The centrality of this agreement is stressed even in the text of the IC, with a reference in the preamble. Right at the beginning of this momentous document, which served as a bridge from the old apartheid era to the new and final constitution, and as early as its second clause, the text notes, "In order to secure the achievement of this goal (a new democratic order), elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact[16] recorded as Constitutional Principles."

---

[14]This was a relatively new feature resulting from the IC which required the court to "have regard to public international law" under some circumstances, and permitted it to "have regard to comparable foreign case law" in others. See s 35(1) of the IC.

[15]*First Certification* judgment at 1273 A.

[16]This phrase - a "solemn pact" - was one used with particular resonance by many of the lawyers who appeared in the certification case. See references in Chapter Four of this work.

As July 1 drew near, the parties finalised their written and oral argument. The CA would enter the lists hoping to prove that its members had adhered to the CPs and that the text ought therefore to be certified; the majority African National Congress indicated that it supported the submissions of the CA and lobbied strongly for certification, but it was not officially represented by separated counsel at the hearings; the minority parties wanted to use the opportunity for a last effort to secure their particular concerns more fully than in the draft text. Their object was to persuade the court to send the draft back for additional work which might then give an opportunity for some of the old issues to be re-opened for further negotiations and, they hoped, further concessions.

In the case of the Inkatha Freedom Party the need to make a belated impact on the text was even more acute since it had walked out of the constitution-making process and had had little direct involvement in the final form.

Politicians and the judges of the court knew that it could be disastrous if the court were to certify a constitution and it were later to emerge that it lacked credibility among political parties and ordinary people. So they keenly watched Inkatha's response both to the text itself, and to the invitation to present argument during the hearing.

In KwaZulu-Natal, particularly, where the majority Inkatha Freedom Party felt disaffected from the constitution-making process, the status of the text was already in question. The province had finalised its own provincial constitution at about the same time as the Constitutional Assembly completed its work, and the provincial constitution was taken to the Constitutional Court for certification just the week before the national text was argued. The two documents revealed the great divide between the aspirations of the Inkatha Freedom Party and the majority supporters of the national text. If the court, as seemed likely given the response of the judges during argument,[17] refused to certify the provincial constitution, but passed the national equivalent, the tension between the province and supporters of the majority central government

---

[17]This impression was later confirmed when the court handed down its decision in the KwaZulu case: *In Re: Certification of the Constitution of the Province of Kwazulu-Natal, 1996* 1996 (11) BCLR 1419 (CC) (*KwaZulu-Natal Certification* judgment). See Chapter Seven below.

could once again reach breaking-point and renewed violence of the kind which had claimed many thousands of lives in the previous decade, might result.

For the Inkatha Freedom Party - absent, through its own choosing, from the negotiations surrounding the drafting of the text - the certification hearing provided a forum where it could make its views known. With the media's attention on its counsel, and in the presence of representatives of all the other parties, the Inkatha Freedom Party could put forward the negotiating position it might have adopted in the Constitutional Assembly, had it remained inside. During the run-up to the certification case an additional pressure surfaced, with speculation that if the court were to send the draft back, Inkatha might agree to return to the negotiating table.[18]

In a sense, however, some of Inkatha's agenda was not unique. Leadership of all the parties - both majority and minority - hoped for the court's decision to favour their particular view point. It would go down well with party rank and file to be able to say that the approach adopted by the leadership on drafting the constitution had been approved by the court.

Similarly, individuals and lobby groups contesting the draft who were invited to make oral submissions hoped they would be able to have the text sent back on the grounds that the draft did not adequately cater for their particular concerns.

A notable feature of the role of political parties in this case is that while the draft text submitted for ratification was passed unanimously, several parties among those which had ostensibly approved the text then opposed it during the hearings. Although this was mentioned in passing by both the court and counsel for the Constitutional Assembly, nothing much was made of it. Parties involved in drafting the KwaZulu-Natal constitutional text did exactly the same.[19] It

---

[18]This speculation was strengthened by remarks of counsel for the IFP made during the argument of the case. See below 62.

[19]This approach - perhaps it is now becoming a strategy - is not confined to one party. For example, in the certification case, the National Party and the Democratic Party had voted in favour of the text and later opposed it before court. In the KwaZulu-Natal case, the African National Congress was among those that voted for the text, but then strongly opposed it at the

appears that parties regard their vote in these circumstances as not necessarily indicating approval of the text, but rather support for the proposal that the text now be put to the Constitutional Court. In some cases, the parties reach a point at which they feel nothing more can be gained by negotiation on disputed issues and support referring the text to the Constitutional Court for its decision as much because it is a way of resolving a deadlock as for certification.

Interestingly, there was no public voicing of the question asked by some academics and commentators: was it justified for a group of unelected judges to preside over the validity of a constitution drawn up by the elected representatives of the people?[20] Quite the reverse, in fact. Not only was there no criticism of the court on this issue, but all the parties, minority and majority, fully accepted the role which the court was about to play, and made much of its importance in the whole constitution-making scheme. Individuals and interest groups set great store by making written and oral representations to the court, and were keen to become involved in the process, whether as supporters or opponents of the text. This is one of the most crucial factors in the whole drama of the certification process, and is an issue which will be discussed again.

Just as the parties and certain individuals entered the fray with conflicting hopes and expectations of what the court could deliver, and even misguided optimism about its function, so too, at the start of the case, not even the judges seemed certain about the exact nature of their task. This was to become obvious through the central debate on the first day and the resulting themes which ran through the whole two weeks of argument.

---

hearings. See Chapter Seven below.

[20]The countermajoritarian dilemma in the South African context has been discussed elsewhere, for example, D Davis, M Chaskalson and J de Waal "Democracy and Constitutionalism: the Role of Constitutional Interpretation" in D van Wyk, J Dugard, B de Villiers and D Davis *Rights and Constitutionalism: The New South African Legal Order* (1994). For a discussion of its application in the court's judgment on the first draft national constitutional text, see M Chaskalson and D Davis, "Constitutionalism, the Rule of Law, and the *First Certification judgment: Ex Parte Chairperson of the Constitutional Assembly in Re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC)", due to be published in the *South African Journal on Human Rights* later this year.

At first sight the court's mandate might have seemed clear. But, more closely analysed, it raised a number of difficult questions. Over the fortnight of the hearings, the judges were to take the opportunity to debate problems such as these with counsel representing many parties and interest groups.

THE CHRONOLOGY OF THE HEARINGS

The court issued advance daily schedules so participants and the public could keep track of the issues to be canvassed.

* From the opening session on Monday, July 1 until lunch on Wednesday July 3, the court wanted to hear the single biggest issue on the agenda: whether the provincial powers in the draft text satisfied the Constitutional Principles, particularly CP XVIII.2, and XIX - XXVII. The objectors during this three day session were the Democratic Party, the Inkatha Freedom Party and the National Party, with representatives of the Constitutional Assembly presenting their position before the submissions of the three objectors and given time to reply to the objections afterwards.

* Wednesday afternoon began with another parliamentary party, the African Christian Democratic Party, which had the opportunity to raise a cluster of objections. The ACDP was followed by three groups which objected to the language clauses in the draft text.

* Thursday July 4 would see three groups which had problems over whether the text complied with the Constitutional Principle on self-determination. That afternoon was to be spent examining the position of customary law and traditional leaders under the new text.

* The first week ended with an examination of provisions dealing with the courts and administration of justice. The objectors included the Democratic Party, the Inkatha Freedom Party, the Attorney-General of the Transvaal, the Magistrates' Association and the Association

of Law Societies. Hiring and firing provisions for key public watch-dog bodies, including the Public Protector and the Auditor General, were to come under the spotlight on Friday afternoon, along with problems relating to the separation of powers raised by several individual members of Parliament as well as the Democratic Party and the IFP.

* All of Monday July 8 would be dedicated to several disputes about the labour provisions in the draft text, with the Congress of South African Trade Unions (Cosatu) and the Constitutional Assembly on one side ranged against Business South Africa and the IFP, the Democratic Party and the National Party on the other. The labour provisions, together with the question of provincial powers, were the most contentious issues before the court.

* Property rights, compensation, intellectual property, municipal rates and taxes and the entrenchment of the Bill of Rights took up all of July 9 with a wide variety of individuals and parliamentary parties making their objections.

* Wednesday July 10, originally scheduled as the last day of the hearing, was to be spent on a number of issues related to the Bill of Rights including its horizontal application, the inclusion of socio-economic rights, bail provisions, the right to bodily integrity and the failure of the text to include a right protecting the family and marriage. Once again, a range of individuals, parties and lobby groups would voice their objection to or support for the text.

* When it became clear that another day was needed, the court agreed to allow Thursday July 11 for final argument on a variety of objections, most of which had already been raised earlier in the hearings.

THE ORAL ARGUMENT

The Constitutional Court does not record its hearings and the sound on the video tapes of the proceedings commissioned by the Constitutional Assembly proved unsuitable for transcription.

There is thus no official sound recording of oral argument during the case. All the extracts from debate in the hearings quoted in this article come from the extensive short-hand notes of the author, made in court at the time. Sometimes these notes merely paraphrased the argument. At other times they recorded the dialogue word for word or as close to this ideal as possible. Editing has sometimes been necessary, however, even of the word for word exchanges.

This is not the place for a detailed transcription of the entire two week hearing or a discussion of all the problems raised during oral argument. The account which follows is necessarily selective, and does not deal with a number of important and often controversial issues canvassed during the case. Instead of repeating the issues covered by counsel in written heads of argument - and therefore readily available in the court's archives - it tries to focus on the problems which emerged during the course of oral argument and which faced the judges as a result of the unique nature of the task they were asked to perform.

It seeks to record the process of judging in a case without precedent: the court's task was unparalleled in legal and political history, flying in the face of long-established principles about the line to be drawn between a court's role and that of the democratically elected representatives of the people. In addition, it was to be carried out by a newly constituted court still in the process of establishing its own legitimacy and credibility.[21] Perhaps most controversial of all, at least in the South African context, the court would be weighing and finally striking down a particularly momentous document - the first democratically formulated draft constitution in South Africa's history.

Sometimes the issues recorded here were the sub-text of debate, emerging occasionally and becoming clear only after close reading of notes made throughout the period of oral argument. Among many others, these issues include the court's debate with counsel over the relevance of the 'political question' and the scope of the court's power to investigate the decisions of the Constitutional Assembly, as well as the related countermajoritarian question of whether and to what extent the court was entitled to over-rule the decisions of the Constitutional Assembly. This account also looks at what the court had to say on the problems involved in undertaking

---

[21]See above n 6.

such an unprecedented process and the judges' developing sense of the nature, significance and difficulty of their role. During oral argument, the problems canvassed included the extent of compliance with the text which the court would have to require; what the court should do if sections of the draft appeared ambiguous; how - or whether - to ensure that the court's interpretation of these ambiguities bound a subsequent court; the role of the history of political negotiations and the legislative history of the drafting process as well as the extent to which the court could or should consider this in fulfilling its certification function; and the possible political results if the text were not certified and it had to be referred back for revision. Debate also highlighted the court's approach to problems such as whether the text contained sufficient protections for key sections of the draft (including the Bill of Rights) or for key players under the constitutional dispensation proposed by the draft (such as the Public Protector); its response to the question of what it should do when it strongly disapproved of a provision in the text but could find no Constitutional Principle to justify listing it among the grounds for refusing certification; and its attitude to parties raising issues considered by the judges to be irrelevant to the certification task.

In telling the story of the certification process this thesis also looks at broader issues such as the extent of public involvement; the contribution this made to the legitimacy of the outcome of the case and whether the final result contributed to the court's own credibility. In short, it tells the story of a unique legal and political experiment and evaluates whether the risk inherent in the undertaking, paid off.

The First Week

Monday July 1

Early on Monday, July 1, the courtroom was already full. It is a relatively small forum, housed in an office park in the inner city suburb of Braamfontein. Parking is at a premium and proved almost impossible to obtain over the next two weeks. Inside the courtroom, the benches had been specially re-arranged to accommodate as many members of the public as possible, in

addition to the teams of counsel representing all the parties. Not even the court's first case - in which it had to decide the constitutionality of the death penalty[22], one of the most controversial issues ever heard by a court in South Africa - had drawn such a large crowd. A special closed circuit television system was set up with large screens in the court lobby to cater for the overflow (and for smokers).

Promptly at 10 am the case was called and the judges processed into the court room. The president of the court, Justice Chaskalson, took his seat in the centre of the raised semi-circle; on his right sat the deputy president, Justice Mahomed,[23] with the other judges on either side in random order. (The court tries to project a modern, business-like approach, and at least in theory all are accorded equal seniority after the President and deputy.[24]) Every term they change seats, except for the president and deputy who remain in their central position.

The justices wear long green black-buttoned gowns with black waist sash and lace neck frill. These robes were specially designed for them and were first worn when the court was formally sworn in on February 14 1995. Despite the persistent newspaper cartoon image, however, neither they nor any other judge in South Africa wears the traditional white court wig. A name plate at each place on the bench now informs counsel and the public who is who, but at the time of the July 1996 certification case, these were not yet in use.

After the opening formalities in which counsel announced themselves and the clients for whom they appeared, the case began. First on his feet was the legendary civil rights lawyer George Bizos SC who opened proceedings for the Constitutional Assembly. Bizos, a leading

---

[22]Argued in February 1995 and reported four months later as *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC).

[23]Now Chief Justice of South Africa. As Chief Justice (appointed with effect from January 1 1997) he presides over the Supreme Court of Appeals in Bloemfontein and no longer sits on the Constitutional Court.

[24]See Practice Direction No 1, 1995 (2) BCLR 263. Section 4 reads, "Other than the President, the judges of the Constitutional Court enjoy equal seniority and, after the President, there is no order of precedence." The president of the court has confirmed to the writer that following the decision to appoint a deputy president, the section is to be altered accordingly.

Johannesburg silk with a reputation gained over the decades that he had blasted away at various pillars of apartheid, was obviously delighted with his role facilitating the final stages of constitution-making. Even more so because he appeared before many old friends, now on the bench, who were formerly colleagues in the ranks of human rights lawyers.

Political question/Countermajoritarian dilemma[25]*:* In his first sustained debate with the court, Bizos raised two related problems: the political question principle and the countermajoritarian dilemma. According to Bizos, these considerations meant that opponents of the constitutional text had very little space to object and the court had minimum leeway in considering their objections. The Constitutional Court had to respect the legitimate decisions of Parliament and the Constitutional Assembly, and much of the draft to which objectors took exception was "a matter of political judgment and not a matter for the court."

The judges immediately shot back their reply: was this case not unique precisely because the court was mandated to decide what would under normal circumstances be a "political question"? If Bizos was arguing that, whenever there was a conflict, the court should defer to the Constitutional Assembly, what was the point of the mandate given to the court by the Interim Constitution since this mandate could then not be exercised freely?

This led to a series of exchanges in which the court and counsel searched for an appropriate metaphor for the task at hand. For the Constitutional Assembly, any comparison would have to convey a sense that it, as the body of representatives elected by the people, had a wide range of choice open to it, while the court, unelected and unrepresentative in any strict sense, was comparatively confined in its capacity to intervene.

Bizos, commenting on the question of the breadth of choice allowed to the CA, said that the objectors saw the Assembly walking on a "narrow and very rickety bridge", running the risk of falling off at any time. As far as the CA itself was concerned, however, the bridge was very wide and allowed considerable leeway to the Assembly.

---

[25]See also below 19, 26, 31, 55, 57.

Typical of the debate at this point in the case was the following exchange:

Justice Chaskalson: "What troubles me is understanding how we are to approach inherently political questions."

Bizos: "Leave it to the politicians."

Justice Mahomed: "I am not sure. There may be one man opposed to it. But he may be right."

A little later Justice Mahomed was to suggest an image, which like that of the rickety bridge, was taken up and referred to by counsel and the judges throughout the case. "The CPs are the lights of the runway within which you operate the plane," he said. "You can choose the speed and the angle, but it must be between its lights."

Bizos then hit on an example to illustrate the value the court should put on the "judgment" of the CA in making political decisions, and by implication, to stress to the court the need to exercise caution about substituting its judgment for that of the CA on such matters. Given the court's response, however, it was not perhaps the best example he could have chosen.

He referred to s 174 of the draft text, which dealt with the appointment of judges and laid down the general criteria for selection. "Many of us," declared Bizos, "thought that the judiciary should only come from practising senior members of the bar. But the question of who is appropriately qualified is a matter for the judgment of the Constitutional Assembly."

"I would have thought," Justice Chaskalson retorted drily, "that this was one matter in which we would be as well placed as the CA to make a decision."

At this early stage in the argument, Bizos also gave notice that the CA believed many of the objectors were using the certification process for the wrong purpose. "This is not a forum for interest groups to lobby for their amendments," he said. "This is what many are doing here. It is to their credit that they are doing it, but it is misplaced." It was an argument the CA was to use

against several of the objectors, and one with which the court ultimately agreed in many cases.

Textual ambiguities/Binding a future court[26]*:* Another question canvassed soon after the start of argument, and which resurfaced repeatedly, was how the court should deal with ambiguities in the text. Justice Ackermann emphasised that the court was engaged in a task both unique and without precedent. But, he added, what was the court to do if a provision in the text was capable of three meanings. Suppose the court decided it meant A, which was in harmony with the Constitutional Principles, while if it had meant B or C it would have fallen foul of these principles. What could the court do to ensure that A was the meaning attributed to the provision thereafter?

Justice Chaskalson developed the problem: assume two possible interpretations were within the CPs and one meaning fell outside. "Would we in such circumstances say that because the constitution is open to a construction outside the CPs, it should not therefore be certified, or should we say - 'This is our interpretation' and add that this is foundational?"

Bizos replied that a statement by the court that the text complies, would be "the jurisprudence of this court". Justice Kriegler, still unsatisfied, continued the debate. In their next exchange he and Bizos raised two spectres repeatedly conjured up by other participants over the following fortnight.

Solemn pact invoked[27]*:*

"It could change next week," said Justice Kriegler of the court and its jurisprudence. "Then what happens to the solemn pact?" Bizos answered that it would be unhelpful to fail to certify a text which was capable of a meaning within the principles, merely because another meaning was also possible. "There is a country waiting for a constitution," he said.

Justice Kriegler and the rest of the court were well aware of the "solemn pact" and its

---

[26]On textual ambiguities see below 19, 40, 43, 48, 64; on binding a future court see below 19, 48, 63.

[27]See below 25, 30, 61.

implications for the gravity of the task they were undertaking. Parties had entered the pact only because of their faith in the Constitutional Court as the guarantor of the CPs. Justice Kriegler's reference to the "solemn pact" was intended to emphasise that this guarantee, and hence the very foundation of the pact, would amount to nothing if the interpretations on which the certification were based shifted with the membership of the court, or its mood, or its re-reading of the text a year later.

Political question/Countermajoritarian dilemma[28]: But while the members of the court agonised over this problem and its implications for their task, Bizos was reminding the court of another pressure - the country was waiting, impatient for its first democratically drawn constitution. By his phrase that "the country was waiting", he was however emphasising not just the urgency of the task in terms of the time taken, but also the by now well established sub-text running through his argument - that the text had been formulated by the people's representatives, and that the court should interfere as little as possible in their decisions.

Textual ambiguities/Binding a future court[29]*:* On the question of ambiguities, Justice Didcott was adamant. "We cannot bind future Constitutional Courts 30 years ahead," he said. "Even if we tried to do so it would not produce that effect. Can we really do anything more, in these circumstances when we have two equally tenable interpretations, one which conforms and one which does not, than make it clear what our reasons are, and that certification was made on this basis."

Linked with this question was the role which the CPs would play once the constitution was finalised.

Future role of the CPs[30]*:* Justice Ackermann picked up from Justice Didcott's remarks, saying he would follow a slightly different approach to the question. Suppose there were two

---

[28]See above 16 and below 26, 31, 55, 57.

[29]On textual ambiguities see above 18 and below 40, 43, 48, 64; on binding a future court see above 18 and below 48, 63.

[30]On the future role of the CPs see below 52, 63.

reasonably possible meanings and the court believed that if it meant B it could not certify. However it could also be given meaning A which would then allow the court to certify. In such a case, he said, "I do not see that a future court could ignore a provision in the Constitution, and just as little could it say - 'We give it a different meaning'."

Justice Langa: "Isn't the position that once we have given a particular interpretation to the CPs, then that is what the text means for all time?"

Justice Didcott wondered whether a Constitutional Court, if it adopted the approach of Justice Ackermann, could say that the text must be read in perpetuity to bear a particular meaning. "However," he added, "it does not lie within our power to give that instruction to a future Constitutional Court."

Justice Goldstone: "The corollary is that a future Constitutional Court, sitting in 10 to 300 years' time, would have to refer to the CPs. They do not disappear. They would be a primary source of interpretation."

Bizos: "Even in a deep freeze, they would be there for ever."

Justice Chaskalson: "It is more difficult when you have multiple choices. Could we say that as long as this constitution stands, all future matters must be construed in the light of the CPs?"

These debates continued throughout the two weeks, right until the last day. But after the tea adjournment on the first morning, another new issue emerged: how should the court decide whether the Constitutional Principles had been satisfied in relation to one of the most controversial of problems before it - provincial powers?

Provincial powers[31]: CP XVIII (2) said that the powers given to the provinces under the final constitution were not to be "substantially less than or substantially inferior to" their powers in the Interim Constitution. This CP had originally been inserted at the demand of the federalists

[31]See below 25, 26, 29, 30, 61.

and those with a preference for strongly decentralised government. None of the parties in this category, however, felt that the final text sufficiently embodied their hopes for strong provincial government, and they were to use their allotted time trying to persuade the court that this CP had not been satisfied.

As the court wrestled with how it should approach the balancing act required by this particular CP, Justice Kriegler remarked that, in making its decision, the court should "look not at the trimmings, but at the substance".

The difficult question of weighing provincial trimmings and substance, was handled for the CA by Johannesburg silk Wim Trengove, who had left a thriving private practice to head the constitutional litigation unit of the Legal Resources Centre. He suggested that the relevant CPs permitted the powers given the provinces to be "completely different" from those stipulated in the IC, provided only that they were not "substantially less". The court's task was to weigh up the final baskets, he said, rather than only looking individually at the powers changed or removed or added.

During his argument about what would happen should national and provincial legislation come into conflict, a side issue developed into the first round of real laughter heard during the long two weeks of the case.[32]

---

[32]Some counsel regard appearing in the Constitutional Court with trepidation because the bench has a reputation, not undeserved, of becoming more involved in the debate than is usual in South Africa's higher courts. While the level of engagement with counsel varies from one justice to another, the overall style of debate in the Constitutional Court has certainly tended to set this court apart. Counsel is rarely able to follow written heads of argument for more than a few minutes: the court quickly engages in extended, searching debate and in some cases, in prolonged sparring. Counsel used to the more restrained, formal approach in some of the other higher courts (although here too, practice is changing), can find maintaining prolonged, intense, off-the-cuff debate with 11 justices disconcerting. This is made even more difficult because some of the justices have, frankly, been rude to counsel on occasion. On the other hand, occasional banter and restrained joking is also a feature of most of the court's cases. The certification case was no exception, and, given the extensive duration and the atmosphere which inevitably builds up during such a long hearing, it may have been that there were even more moments of banter than usual.

Packed into the audience, and thus highlighting the sense of being present at an extraordinary moment in constitutional history, were several key drafters of the text. Political figures and their technical advisers, interviewed almost nightly in the media during the negotiating process, had come to hear how the result of their efforts would be viewed by the court. Sometimes the fact that they were in the gallery added an extra note to the legal debate. For example, during the technically complex debate on provincial and national powers, there was a discussion about the language of the text and the difficulty on occasion of interpreting it. (This was a problem to which the judges returned several times.) The judges became frustrated at how difficult it proved to construe the particular section they were considering. Justice Kriegler, reminded by counsel of phrases like "deemed an irrebutable presumption", wondered aloud whether it would be proper for the court to use that kind of old fashioned interpretation for a constitution written in "newspeak". Someone suggested a possible meaning of the phrase being analysed. Commenting on this particular example of the constitution- framers' work, Justice Mahomed, who sounded at the end of his tether, asked, "Why couldn't they have said that?" and Trengove replied, with feeling, "I wish they had said a lot of things which they didn't." The immediate general laughter was made richer by the realisation that many of the drafters were sitting in the audience, joining in the amusement at their own expense.

Possible misuse of constitutional powers[33]*:* The particular issue being discussed at the time of this exchange was s 146(4). Under this section, when national and provincial legislation clashed, national legislation "must be presumed to be necessary" in certain circumstances, one of which was that the law was needed "for the maintenance of national security".[34] Justice Mahomed found some of the implications of this section difficult to stomach. His criticism was a foretaste of several similar interventions, most notably on the last day[35] in which he recalled how particular legislation had been misused during the apartheid era, and warned of the dangers of permitting new laws to be passed which could also be misused, however honourable the drafters' intent.

---

[33]See below 43, 44, 67.

[34]Section 146(c)(i).

[35]See below 66 - 70.

Speaking of the presumption inherent in s 146(4), Justice Mahomed commented, "In the bad old days, all kinds of inroads on the liberty of people were made because it was necessary 'in the opinion of someone'. I am most anxious to avoid this."

He added, "I am very frightened of these powers of national security. We have seen what happened in the apartheid era and in Nazi times. One of the most impressive parts of this constitution is that it makes so many things objective. I am worried whether this presumption does not undermine that."

By the end of the first day, many of the key themes had been identified. The most important issues troubling the judges about the nature of their task had clearly emerged. The court had also made it clear that even though the constitution represented the work of "the people's democratically elected representatives", this did not mean the court would shirk its duty under the IC, of inquiring into whether the CPs were satisfied. Just how they were to do it, however, and the limits they should place on their inquiry, were issues still to be decided.

Tuesday, July 2

Meaning of "comply with"/Extent of compliance necessary[36]*:* Day two brought the first of the objectors - Cape Town silk Jeremy Gauntlett who appeared for the liberal Democratic Party. Gauntlett, prominent in a number of human rights cases in the years before the new political dispensation, raised several important issues on which the bench was keen to hear argument. In an extensive dialogue, initiated by Justice Mahomed, Gauntlett and the justices debated whether the requirement of the IC that the final text "comply with" the CPs was a more demanding standard than "be consistent with".

Gauntlett claimed the key lay with the requirement that "*all* the provisions"[37] should comply with the CPs. "The nub must be that all provisions do not clash with the CPs," he submitted.

---

[36]See below 62.

[37]The emphasis was his.

Justice Didcott asked whether the text should "accord with" the CPs; this would not be quite the same as "obeying" the CPs, but would, rather, demand conformity. Justice Madala wondered whether, even if it turned out there had not been full compliance, the court could accept and certify on the grounds of "substantial compliance".

Gauntlett's view was that if the court found some minor problems this would not necessarily have to result in a refusal to certify. But, he argued, throughout their task, as they examined each section, the judges had to ask, "Does this provision, and every other provision, comply?" If not, the court could not certify, Gauntlett said.

Then, for the first time, the question was raised of what would happen if the court should decline to give the text its *imprimatur*. "It would not be so heinous" for the court to refuse certification, Gauntlett said. "The text would just go back to the Constitutional Assembly for the modifications directed by the court."

Justice Mahomed was not so certain that, in terms of the political consequences, non-certification was quite the easy option suggested by Gauntlett. If the text were sent back to the Constitutional Assembly, he said, the members of the assembly might retract their earlier agreement. The unspoken question was obvious and potentially alarming - what would be the result if non-certification led to the parties backing out of their previous agreement? The difficulties involved in reaching the political compromise embodied in the text left no one in any doubt that, should parties renege, it could mean a disastrous, premature end to South Africa's miraculous peaceful settlement. Would the court be prepared to take this risk and refuse to certify even if the text warranted that decision? Or would it feel obliged to make stability the highest good, and certify the Constitution regardless of flaws? Did it feel that perhaps the risk of political disintegration was overstated and no such outcome would result? Throughout the rest of the two weeks, this difficult issue was a clear sub-text to the more obvious debate, never far from the surface even when more technical matters were being discussed, and also very much in the minds of the public present at the hearings.

While the court wrestled with this difficulty, Justice Kriegler raised another problem linked to

the vexed question of the political consequences of non-certification. Should the court "take cognisance of the fact that the draft was negotiated between parties of different views; in other words, its legislative history?"

Solemn pact invoked[38]: In Gauntlett's view, the "touchstone" was not the text itself, but rather the pact which had brought "deadly foes together".

When Gauntlett spoke of the "solemn pact" in his submission, he invoked the words to give his argument a particular resonance. Other counsel, and even some judges, used the phrase to similar effect. In fact, whenever the words were used during argument in this case, they acted much as a highlighter, indicating either that the speaker felt he or she was making a particularly important point, or was calling on the phrase to add weight to the argument.

For example, when Gauntlett wanted to underline the need for the justices to consider the legislative history of the CPs, he said on one occasion, "The solemn pact is imbued with a recollection of the past."

Legislative History/Provincial powers[39]*:* Gauntlett, who represented a party which felt that the draft gave the provinces inadequate powers, said that the legislative history of the text should be a key consideration for the court and would help explain some apparent inconsistencies between several of the CPs. He argued, by implication, that a consideration of the legislative history would allow the court to give a special kind of weight to some CPs over others. For example, if there were incongruities between CP XVIII (which spelt out the powers and functions of the provinces) and other CPs, this might be explained by the fact that CP XVIII was a late addition to the schedule of principles. He continued, "Not only must the Constitutional Court consider that CP XVIII came later, but it is also a matter of notoriety that it was a key element in bringing together the parties. Not that this court can disregard the other CPs in its favour, but it did have a pivotal role in cementing the pact." He also urged that the

---

[38]See above 18 and below 30, 61.

[39]On legislative history see below 47; on provincial powers see above 20 and below 26, 29, 30, 61.

court should be rigorous in its scrutiny of the draft text before agreeing to certification because of the "unpalatable ouster" contained in s 71(3) of the Interim Constitution, under which no subsequent court would have the jurisdiction to re-open the question whether the text or any of its provisions was valid.

Political question/Countermajoritarian dilemma/Provincial powers[40]: This discussion prefaced a moment which illustrated an important development in the thinking of the court about the nature of the task it had to fulfil. This problem - how the court should carry out its work, and to what extent it should allow the democratically elected CA to have its way - was, as we have seen, a theme of the first day's argument, and it was raised yet again in debate with Gauntlett on the second day. The context this time was the process which the court should adopt in deciding whether CP XVIII had been satisfied, and whether the powers given to the provinces in the text were adequate. In one intervention, rather longer than his usual style, Justice Chaskalson outlined how this investigation might be done, but then concluded that ultimately the court would have to make its own rules about how to carry out the job.

He said, "We must try to evaluate, in the context of a new constitutional order, whether the power which the provinces have under the new Constitution, looked at as a whole, is substantially less than the provinces had under the Interim Constitution. Then we must ask whether the functions are substantially less." After Gauntlett's interjection that it would be dangerous to refer only to the "powers" of the provinces,[41] Justice Chaskalson continued, with a clear acknowledgment of the difficulties before the court, and the lack of any helpful precedent, "In the end it is a value judgment. There is no legal yardstick or previous case." Then he re-opened the old question and asked, "To what extent is this judgment legal or political?"

Gauntlett's reply seemed, by that stage, the only possible solution to this continuing

---

[40]On the political question and the countermajoritarian dilemma see above 16, 19 and below 31, 55, 57; on provincial powers see above 20, 25 and below 29, 30, 61.

[41]Presumably Gauntlett wanted the court to consider the scope of the "functions" of the provinces under the new draft, as well as their powers, since CP XVIII deals with both.

conundrum. "The legal and political inquiries merge," he said. The court would have to bring to bear a judgment which was "part political and part legal".

In debate with Gauntlett, and during argument by the next two counsel, the judges showed their unease with the idea of increased provincial powers, particularly any increase which might lead to a sense of provincial "independence" of the central government. They made clear that their understanding of CP I, which stipulated that the Constitution should provide for "one sovereign state", meant that anything approaching provincial independence would be unacceptable. This reached a head during discussion with Dirk Brand, counsel for the Western Cape MEC for Police and legal adviser to the Western Cape premier.[42] When Brand complained that the new text significantly reduced provincial policing powers, Justice Didcott asked him, "Why are police functions so important for provincial government?" Brand said provincial government operated "on the ground", and could see the circumstances and needs in a province which were peculiar to the region. But his explanation met with little patience from Justice Didcott: "I find the whole idea of any provincial say in the running of a police force a most peculiar one. I have never heard it said in the past that this was necessary. I do not understand what sensible purpose a provincial say in the running of a police force would serve."

A few minutes later he added, "I would need to understand what purpose it would serve. Until then I cannot understand the need for these powers in the first place."

This judicial scepticism about the significance of certain contested provincial powers continued during debate with Cape Town advocate Peter Hodes SC for the Inkatha Freedom Party. Hodes, who became chairman of the General Council of the Bar in July 1997, complained that the proposed new text embodied "parsimonious provisions of powers" for the provinces, and by way of example mentioned that under the proposed constitution provinces had more restrictions on their ability to change their names. This provoked Justice Didcott into revisiting his earlier theme. "Why does the name of a province matter at all? I cannot understand the fuss

---

[42]The National Party holds the majority in the Western Cape. This province and KwaZulu-Natal, where the Inkatha Freedom Party took the lead, are the only two of the nine provinces not held by the ANC.

about the name of a sports team. It is one of the most trivial things imaginable."

Hodes suggested that perhaps a province like KwaZulu-Natal, might want to change its name to "KwaZulu" on the grounds that this would help "scour out the past".

"Why should a province not wish to change its name? It is not for anyone outside the province to make that decision," he declared. But Justice Didcott was unconvinced. "I cannot regard it as important either way," he said. "It is utterly trivial."

Here as at other moments in the debate, the tone of some of the discussion on provincial powers seemed to be influenced by the judges' memory of the KwaZulu-Natal provincial constitution. This had been brought to the Constitutional Court for certification a few weeks before the national certification case. Two months afterwards, the court handed down its decision on both constitutions. In their remarks on the provincial draft constitution, the judges were scathingly critical of the KwaZulu-Natal document, detecting in it a province too big for its own boots and that repeatedly attempted to usurp power to which it was not entitled.[43]

Against this background - the KwaZulu-Natal constitution case having been argued and work on the decision probably well under way - it might not be surprising that Justice Didcott in particular sounded so sceptical about the need to increase provincial powers. One of two members of the court[44] who come from KwaZulu-Natal, he has had lifelong experience of the threat of secession by the province from the rest of the country. In the last decade, these threats have apparently come from the IFP as part of a bitter civil war which has divided the people of the province. During that period, Justice Didcott presided in many murder cases in which he saw first hand the results of provincial political conflict fuelled by separatist tendencies.

Long before the national certification case was heard, the question of provincial autonomy and the powers of the provinces had been flagged as a key legal, political and emotional issue. This

---

[43] *KwaZulu-Natal Certification* judgment at 1426 E and 1430 G for example.

[44] The other is Justice Langa.

was borne out by the amount of time spent on the question, the detailed argument from both sides and the passion sometimes shown by key players. Repeatedly, in discussion with counsel on the issue of provincial powers, the judges sought for a balance: they were clearly unimpressed at attempts by any province to give itself powers which threatened the concept of "one sovereign state". On the other hand, they were repeatedly reminded that assurances of significant provincial powers lay at the heart of the "solemn pact" which brought all the parties to the negotiating table. They were also reminded that they had to ensure the minimal provincial powers promised by the Interim Constitution, were met. At one stage in debate over the relative positions of the provinces and the central government, Justice Mahomed offered a pragmatic interpretation. "We are talking about power," he said. "The question is to see what clout the provinces had in being able to resist the centre. What clout they had before and what clout they have now. If the clout they have now to resist the centre (for whatever reason) is less, then their powers are less."

Wednesday July 3

Provincial powers[45]*:* Typical of the submissions made to the court on the role of provincial power in the solemn pact were these remarks of counsel Jan Heunis for the National Party. He said there was a legitimate expectation that provinces should retain their functions and powers as stipulated in the IC, and that the CPs contemplated categories of power which would ensure they did so. That had to be the logical result of the political compromise made by the parties. Agreement about provincial powers was at least in part what induced acceptance of the IC. "The CPs were designed to enhance political autonomy and thus ensure the participation of interest groups which value political autonomy."

Heunis ended with a flourish, "The CPs were arduously formed to serve the rainbow nation. May you too, Justices, serve the rainbow nation well."

---

[45]See above 20, 25, 26 and below 30, 61.

Solemn pact invoked[46]: The counter argument was put forcefully a little later when Bizos entered the fray again after the mid-morning tea adjournment. "The Constitutional Court has heard for two days of the glories of provincial autonomy and its benefits to democracy," he said. "But the other parties to this solemn pact entered into it with a somewhat different perspective."

According to Bizos, it was significant that in the debate over provincial political powers, very little was said about the last words of CP XX which promotes national unity and legitimate provincial autonomy.[47]

"The parties that entered the solemn compact would have expected the CA and this court to give due weight to the place of national unity and 'legitimate' provincial powers. 'Legitimate' is the key word.

"We welcome the words of counsel for the IFP who said that we are one sovereign state. But that was not generally accepted (by his clients) at the time of negotiations."

Provincial powers[48]: Bizos quoted from Alan Buchanan's work, *Secession: The Morality of Political Divorce*[49], saying that according to the author, it is sometimes not clear whether a political movement is characterised by a drive for secession or merely greater autonomy.

"One of the parties (to this case) has produced a provincial constitution. It is not out of place to

---

[46]See above 18, 25 and below 61.

[47]CP XX reads, "Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which recognises the need for and promotes national unity and legitimate autonomy and acknowledges cultural diversity."

[48]See above 20, 25, 26, 29 and below 61.

[49]Allen Buchanan *Secession: the Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (1991).

remind the court that the pretensions in some of the provisions in the KwaZulu-Natal constitution fall into this category.[50]

"It should not be the tail that wags the dog. Hence we must be careful to limit power to 'legitimate' political power.

"The Constitutional Court cannot close its eyes to the violence occurring in parts of the country in which, with due respect, the perception existed that the local (police) commissioners were at the time neither able, nor, as it was suspected, willing to enforce the law.

"The question is not whether the police power is important. Of course it is. But in weighing up the baskets, must the court not ask whether it is for it, or for the CA, to decide whether the appointment of a provincial police commissioner is a legitimate power when the national safety and security may be jeopardised."

"A substantial part of the assembly at Codesa[51] insisted on a unitary state: it was part of the pact which they entered. The majority of the people of South Africa did not abdicate the right of sovereignty through their elected representatives. This is why, poignant as the call (of Heunis) is, for the minority to have their rights respected, we must remember that after all the majority also have rights.

Political question/Countermajoritarian dilemma[52]:
"There is within the principles an area which is a matter for political judgment by the majority. It is not the function of the court to decide fundamental questions such as how national unity should be brought about."

---

[50]Earlier, Bizos had called the KwaZulu-Natal certification case "net practice" for the national certification hearings.

[51]The Convention for a Democratic South Africa, the all party talks at the World Trade Centre where much of the foundation work was done on the Interim Constitution.

[52]See above 16, 19, 26 and below 55, 57.

After lunch came the turn of the African Christian Democratic Party whose criticism of the new text was based on their claims that it did not embody biblical principles.

The party's representative, Kurt Worrall-Clare, began with a complaint about the opening words of the draft text. He was one of several people who made history at the court when they presented oral argument at the hearing despite not being an admitted attorney or advocate.[53] This was a special concession made by the court for the duration of the case[54] and was an important move because it enabled the voices of groups and individuals to be heard who would otherwise have been silenced as they could not afford the cost of counsel.

Worrall-Clare pointed to the opening words of the previous (interim) constitution: "In humble submission to Almighty God". The proposed final constitution should have begun in the same way, he said. Instead it left out this key phrase and in doing so, the draft discriminated against Christians.

Justice Chaskalson was quick to remind him that the court's task was not to say whether it "liked" the draft text or not. "It is our job to certify if it complies and, even if we like it, not to certify if it does not. The only issue is whether it complies with the 34 CPs."

Justice Didcott broke into the debate a few minutes later. "Why should it discriminate against Christians just because it omits certain words? We are here concerned with temporal sovereignty. It is not purporting to be scripture. It governs secular sovereignty and nothing else."

---

[53]In Worrall-Clare's case he had a law degree, but had not been admitted to practice.

[54]In the KwaZulu-Natal certification case, by comparison, the court declined to allow IFP adviser Mario Ambrosini, to appear before it. While an attorney and admitted to practise in the United States, he is not admitted to appear in South Africa. Ambrosini complained bitterly about not being given appearance rights in the KZN case, and threatened to request the New York Bar, of which he is a member, to rescind its reciprocal arrangements with South African lawyers. Nothing appears to have come of this. See "Ambrosini gets upset ...." *Sunday Times* 30 June 1996.

Worrall-Clare replied that a constitution was not only the law of the land but was also the "spirit of the people it represents".

Most of the discussion during the time allotted to the ACDP took place between Worrall-Clare and Justice Didcott who particularly bridled when Worrall-Clare said his party wanted "biblical orthodox law" to be embodied in the constitution. He also claimed that "Christian law" should be given the same respect as African customary law. This was a reference, among others, to CP XIII which said that indigenous law would have a special place in the Constitution.

When debate between the two reached its hottest, Justice Sachs stepped in with what can only be called a lecture on the nature of secularism. It was not clear whether he did so with a didactic purpose - to explain the issues to Worrall-Clare - or whether he was using the opportunity to express his own views.

Even this distraction, however, did not quite interrupt the debate between Justice Didcott and Worrall-Clare.

As Justice Sachs paused for breath, Worrall-Clare began an impassioned declaration that if he had to choose between the "law of Abraham" and the constitution, in a case regarding the right to life of an unborn child ..., but before he could complete his sentence, Justice Didcott pointed out that the question of whether the guarantees of "life" in the Bill of Rights included the life of a foetus had been left open by the constitution. Worrall-Clare replied that abortion on demand and provisions that a wife in a Christian marriage would not have to ask her husband's permission (before having an abortion) were both contrary to the law of Abraham.

Eventually Justice Chaskalson interrupted: "These are issues that should have been raised by the ACDP at the Constitutional Assembly. At this stage whether we agree with you or not is irrelevant. If you lost the battle in the CA, we do not have the power to re-consider these issues here."

Language rights: Then came the turn of objectors whose complaints related to language rights.

A most interesting and significant objection came from Beema Naidoo, a retired former headmaster making submissions on behalf of his lobby group, Concerned South African Indians.

Naidoo complained about the status of the five Indian languages spoken in South Africa - Gujarati, Hindi, Tamil, Telugu and Urdu. His objection was that they were not given the same standing and protection as the languages spoken by other formerly oppressed groups in South Africa: they were not among the 11 official languages[55]; and while the Pan South African Language Board, set up under the proposed new constitution, had to "promote and create conditions for the development and use" of certain languages, the Indian languages were not listed among these either. Instead, they were lumped with a number of other languages which the new board had merely to "promote and ensure respect for". Promotion and respect were not enough, argued Naidoo.

"Indians were also victims of apartheid. There were never adequate funds to develop our languages properly. Now even though apartheid has gone, they will still not merit proper development."

Naidoo said that the language clauses in the draft constitution were an excellent example of the discrimination and unequal status suffered by the Indian languages. "Why should the five Indian groups, disadvantaged by apartheid, not be helped by giving their language equal status along with the other 11 languages?" he asked.

The South African Broadcasting Corporation had recommended that the multi-language Radio Lotus (which included the Indian languages) should be sold. There were no indications that any broadcasting privileges would be given to non-official languages. In addition, the education policy plainly favoured the official languages. In other words, Naidoo said, there were severe drawbacks for a language not on the official list. If these languages were not given equal protection, he asked, how could future generations exercise their right to speak a language of

---

[55]Section 6 (1): The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

their choice?

Several of the judges engaged with Naidoo: Justice Mahomed remarked that Tamil must be one of the oldest languages in the world; Justice Didcott said that during almost 20 years on the High Court bench in KwaZulu-Natal, he had observed that it was now rare for Indian witnesses to testify in their vernacular although they were "perfectly entitled to do so". Naidoo agreed, but said this was a problem caused by "English being foisted on us at the expense of our own languages".

Justice Sachs also took up the issue: "Can I just make a little observation? No one can fail to be moved by the points you are making. Not only Indian languages, but also the culture and other aspects of life have been heavily discriminated against in the past. Part of the problem, however, is that already there are 11 official languages. If you were to add another five to the list people might say it was getting completely out of hand."

But Naidoo stressed that he did not want to make unreasonable demands and further extend the list of official languages. To satisfy his complaint about the draft constitution, it was only necessary to delete the word "official" (in the phrase "official languages"). Instead, the 11 languages should be described as "recognised", and then others such as the Indian languages whose interests Naidoo represented could be added to this list. "We could follow the lead of the USA which has no official language, yet all official documents are written in English."

In an unpublished interview with the author after the court had given its decision (which did not uphold Naidoo's complaints), Naidoo said that despite the outcome, he felt the judges had listened carefully and sympathetically to his presentation. When he had heard that the court was about to consider whether to ratify the draft constitution he had decided to send a written memorandum to the court, together with more than 7 000 signatures he had collected on the subject of better rights for Indian languages.

He said his organisation would not have been able to afford legal representation to present their case, and he was delighted that the court had let him argue in person. "I felt glad I was there. It

was part of history," he said.

"In years to come people will look back on what we said. It may even be that the court's judges will be taken to task for overlooking the important issues we raised.

"However, the court took the correct decision in allowing everyone to write in and make their submissions. It was open to anyone to do so. If any individual had felt there was something wrong with the draft text, they had this important remedy."

Responding to Naidoo's argument in court, Bizos trod gently. He said the makers of the constitution had taken particular care not to leave anyone out, but it was understandable that some people would prefer to be higher up on the list.

Justice Mahomed did not let him off so lightly. "What about Mr Naidoo's complaints?" he insisted. "He says that the Indian languages also suffered under the apartheid regime."

"There is a logical basis for the differentiation," Bizos said. "Take German. To expect the South African fiscus to make money available for the promotion of German in the hope that another Goethe would spring from the soil of South Africa would be unrealistic."

Bizos added that he had great respect for Tamil which had been developed "probably before the English language".

"Long before," Justice Mahomed shot back.

"As was the Greek language," Justice Kriegler intervened, dangling irresistible bait to the Hellenic spirit of Bizos.[56]

"I wanted to keep Greek out of it so that I do not have an argument with the Deputy President

---

[56]Bizos fled Nazi-occupied Greece with his family in 1941. Although he left Greece as a teenager, well over 50 years later he still speaks English with a marked accent.

(Justice Mahomed) about who came first," Bizos replied. And with that, moved on to another subject, leaving the questions raised by Naidoo essentially unanswered.

Naidoo's submissions were particularly impressive because, despite being a lay person with no legal training at all, he had put together an excellent presentation. His cogent argument was delivered with clarity and passion. There was a logic about his complaints which could not be denied. In his view, a real injustice had been done to a community which deserved better: as far as the Indian language groups were concerned, the draft text did not right the wrongs of the past, but in a way perpetuated them. However, there was another sense in which Naidoo's contribution was important. Through his participation, he can be seen as an archetype: the ordinary South African participating in the historic moment of constitution-making through the certification process. Fired by his belief that the wrongs done to Indian languages over many decades should be made right, he took the decision to participate in the process and thus attempt to influence the court on the question. A pensioner with little money to spare, he collected thousands of signatures backing his stance, then wrote to the court outlining his position and requesting that his argument be considered. When the court invited him to make submissions, he and his friends had no money to pay counsel's fees. Instead they were just able to collect enough to send him to Johannesburg from Durban to appear in court in person. Undaunted at the prospect of presenting argument to the entire court, and watched by eminent counsel from around the country, he acquitted himself admirably.

Through Naidoo's representations, thousands of other ordinary people who identified with this issue and who had signed his petitions, felt themselves participating in the making of the constitution. The cumulative effect of the involvement in the process of individuals such as Naidoo, as well as of groups of people lobbying on a variety of other issues, helped give the court's decision legitimacy and later ensured that the final constitutional text won widespread public acceptance. The court ultimately held that many who objected to sections of the draft text misunderstood the nature of the certification process. However, if the unique certification experiment worked, it was at least partly because of the participation of private groups and individuals such as Naidoo, whether they misunderstood the exact nature of the certification process or not.

Later that afternoon the judges were briefly addressed by Johannesburg advocate Mathole Motshekga[57], on behalf of Archbishop Prince Madlakadlaka, a delegate from the court of Queen Madjadji of the Balobedu community. Motshekga explained that there had been a problem about proper recognition of the Khilobedu language[58]. Despite repeated attempts to have it recognised in the draft, along with the other official languages, this had not been done. However, Motshekga continued, the Queen had asked him to convey her belief that this should not stand in the way of the text being passed and she was therefore withdrawing her objections to the draft constitution. She believed there were other avenues which could be used to address the problem, including a possible amendment to the final constitution.[59]

While the representations on behalf of Queen Modjadji added little to the hearing, and in fact left the public feeling rather bemused, it allowed another moment of semi-levity when one of the judges gently upbraided Motshekga for the lack of gender sensitivity in his language. As he ended his submissions, Motshekga said that he wished to congratulate all the "fathers of this Constitution".

"There were mothers too, Mr Motshekga," chided Justice Mokgoro.

The presentation which followed the next day, however, raised far more serious gender-related questions.

Thursday July 4

Appearing for the Congress of Traditional Leaders of South Africa (Contralesa), *Inkosi* (Chief)

---

[57]On September 28 1997, Motskekga was elected to chair the ANC in Gauteng, the richest and most powerful of the nine provinces. With effect from the beginning of 1998, he will take over as premier of the province from Tokyo Sexwale, who has resigned.

[58]Khilobedu is a dialect of SePedi.

[59]Khilobedu is not among the official languages listed in the final constitution (*Constitution of the Republic of South Africa 1996)* nor is it specifically mentioned in s 6 among the languages which the Pan South African Language Board must promote.

Mwelo Nonkonyana[60] and *Inkosi* Sango Patekile Holomisa[61], made a dramatic entrance. They had been sitting in court next to Winnie Madikizela-Mandela[62] during the morning session, wearing conventional suits. Came the lunch break, however, they all drove off together in her car. After the adjournment, both *amakhosi* (chiefs)[63] swept back into court barefoot and wearing full traditional regalia.

In a subsequent interview with the author, Nonkonyana explained that when he and his colleague had introduced themselves to the president of the court, Justice Chaskalson,[64] they had "indicated" that they "would be happy to wear traditional attire". Nonkonyana said they were told this would be acceptable only if they were not appearing in court in their capacity as admitted members of the Bar. During their respective addresses, both therefore stressed that, although admitted advocates, they did not make their submissions to the court in this capacity, but rather as representatives of Contralesa[65] and their fellow chiefs.

---

[60]Nonkonyana is *inkosi* of the Bala tribe; head of the Bala tribal authority in Flagstaff; chairman of the Eastern Cape region of Contralesa and a member of Contralesa's national executive committee. He is also a member of the Umtata Bar.

[61]Holomisa is *inkosi* of the Hegebe in the Mqanduli district near Umtata. He is national president of Contralesa and was a member of the Umtata Bar until he was chosen as a member of Parliament for the ANC.

[62]The controversial divorced wife of President Mandela

[63]In Zulu the plural of *inkosi* (chief) is *amakhosi*. In Xhosa, the plural is *izinkosi.*

[64]Section 7 of the Constitutional Court's Practice Direction No 1 reads, "Legal practitioners appearing in the Court are only required to introduce themselves to the President, or, in the President's absence, to the presiding judge."

[65]Contralesa was established some years before the unbanning of the ANC and was a member of the United Democratic Front, a broad movement of organisations supportive of political liberation. At that stage it gave a platform to traditional leaders opposed to apartheid. Those who joined Contralesa were generally politically progressive in some senses, but wished to maintain their own traditional position and the patriarchal system which underpinned it. According to Nonkonyana, although Contralesa had been a member of the UDF, it had not "joined" the ANC when it was unbanned, because it did not wish to lose its independence and consequently its ability to represent the views of *amakhosi.* In an interview with the author, Nonkonyana said Contralesa had agreed to help the ANC reach the people "governed" by the local chiefs; had encouraged support for the ANC at the polling booths, and permitted individual members of Contralesa to hold national and provincial ANC seats as long as it was clear that they

When Holomisa, who spoke second, opened his address, he pulled no punches. "Since this is not my court," he declared, "I am not going to expect that I will be given the royal salute to which I am accustomed." Apart from some raised eyebrows from among the judges, however, his provocative remark met with no response.

Textual ambiguities[66]: Nonkonyana began Contralesa's submission with a statement which indicated that he had missed much of what had been argued during the hearings up to this point. Certainly he had not heard the court wrestling with the implications and meaning of the Constitutional Principles.

"The Constitutional Principles are very clear," Nonkonyana declared. "There is nothing ambiguous about them."

"I could have been fooled," Justice Mahomed retorted.

Horizontal application[67]*:* Undeterred, Nonkonyana outlined Contralesa's view of the draft constitution. It was negotiated in good faith, he said, and traditional leaders accepted the principle of moving towards a situation in which everyone felt accommodated. "Some of us cherish our deeply entrenched values and norms," he continued. "The objections of Contralesa relate only to the Bill of Rights. As it applies between the State and the people, we support and have preached it to our people. But if it is applied horizontally it will have negative effects."

Many traditional institutions were patriarchal and under the Bill of Rights it could be argued

---

did so in their private capacity, rather than in their capacity as Contralesa members or leaders. He added that despite the close relationship between the ANC and some members of Contralesa, tension existed between the two organisations over the future role of *amakhosi* and the ANC's attitude to this question. The difference between them, then, is not one of simple party politics, but rather the double issue raised by Nonkonyana in his submissions - the role of traditional leaders who occupy hereditary positions within a democratic political dispensation under which virtually all political leadership positions are elected; and the patriarchal system maintained by the traditional leaders which they believe is threatened by the Bill of Rights.

[66]See above 18, 19 and below 43, 48, 64.

[67]See below 57.

that they should be done away with to satisfy the principle of gender equality. Instead, he urged, indigenous law ought to be developed alongside Roman-Dutch law, and these traditional practices, many of which he claimed in fact protected women, should continue.

He was soon deep in debate with Justice Mokgoro over conflicting interpretations of the custom of paying *ilobolo*[68] or bride wealth and the role of white colonisers in ossifying traditional law.

Nonkonyana also had problems with the proposed constitution's lack of clarity about the function of the institution of the chiefs. "There is absolutely no role for traditional leaders at local level. The only way to resolve the problem is to expressly accommodate us. The strategy is clear. They want to render the institution (of traditional leaders) useless and irrelevant." He said there was no fundamental contradiction between the chiefly institution and democracy. But while he had repeatedly argued that they should be given a role, they were edged aside. Instead, "we must be happy with a billy can of beer and being hailed as a leader. This is not good enough."

Strategically, reply to Contralesa was given to Durban silk Marumo Moerane SC, one of three senior counsel on the legal team of the Constitutional Assembly and the only one of the three who is black. He acknowledged the "serious political problem" posed by the institution of the chiefs and submitted that the draft constitution attempted to deal with this difficulty. As for the chiefs' objections to the Bill of Rights and its implications for the way women were treated, Moerane commented, "You cannot have a situation where certain people are placed beyond the protection of the Bill of Rights. Everyone is entitled to enjoy them."

Friday July 5

When court reconvened next morning, Friday July 5, Justice Chaskalson announced that Justice Ackermann, had been taken ill with German measles and would be unable to participate in the proceedings for at least a week. Justice Chaskalson asked counsel their view on whether

---

[68]This is the widely used Nguni term; in Sesotho the term would be *bogadi.*

there was any reason why the court should not go ahead before a bench of the remaining 10 justices since this would still satisfy the quorum requirement of eight.

Bizos suggested an adjournment so that Justice Ackermann could participate in the rest of the hearing. Whatever inconvenience this might mean, it would at least avoid the possibility of the court splitting five:five on the outcome and the whole proceedings having to start from scratch. There is no reason to think that Bizos was seriously concerned about such a split. Perhaps he was simply pointing out *pro forma* the theoretical consequences of having an even number on the bench. Certainly he never raised it again and no other counsel expressed a similar anxiety. Neither at this stage, nor subsequently, was there any speculation about the possibility of a split vote and it was widely assumed that the court would come to a unanimous decision, even if separate concurring judgments were written as with the death penalty case.[69]

After Bizos also suggested to Justice Chaskalson that Justice Ackermann's ill health should not deprive him of an opportunity to participate in such an important matter, other counsel urged that the case should continue, and that the judge should be enabled to participate by watching a video from his sick bed.

Ultimately, the court ruled that the case would go ahead but that Justice Ackermann would play no further part in it. Then the depleted bench took up its work again, at the start of a day dominated by concern over whether watchdog bodies and individuals were given enough "teeth" by the draft constitution and whether their independence was sufficiently protected.

Independence of key institutions and role players[70]*:* Discussing provisions for the appointment of judges Trengove suggested that the court should not be alarmed by the proposal for the Judicial Service Commission, the body which interviews and selects judges, to include a high proportion of politicians: 15 out of 23 commission members.

---

[69]In the event, however, all four certification decisions (as of October 1997), have been unanimous and written, collectively, by "The Court".

[70]See below 44.

Possible misuse of constitutional powers[71]*:* Justice Mahomed was sceptical. The country wanted to get away from the past system where judges were appointed by the Minister of Justice and the executive. "That is why we have the Judicial Service Commission," he said. "The whole idea was to get away from political control."

"The dominant political party controlled the appointment of candidates and ultimately damaged perceptions of the judiciary," he continued. "We have suffered desperately because of that. And that is what the JSC was supposed to remedy. We come from a past that was indefensible."

Trengove threw back a ball which the judges themselves had pitched often enough - that the only question was compliance with the CPs, not with the court's particular predilections. "The only issue we are concerned with is the Constitutional Principles. The CPs demand judicial independence. We say it is not necessarily an ingredient for judicial independence that there be no political input."

Then, in the middle of this debate about how to ensure judicial independence, and whether the issue went beyond the scope of the CPs, the court returned to one of its core themes - how to approach ambiguity in the draft text.

Textual ambiguities[72]*:* Justice Goldstone moved the discussion in that direction when he asked whether the provisions should not be tested "in a worst case scenario". If the clauses providing the mechanism for judicial appointment could be interpreted as allowing for independence or not independence, then was the provision not "bad" when held to the standard demanded by the CPs?

The question was raised, but not resolved, and attention later moved back to debate on whether the independence of the Attorneys General, the magistracy and watch-dog bodies such as the Public Protector and the Auditor General, were adequately protected in the draft.

---

[71]See above 22 and below 44, 67.

[72]See above 18, 19, 40 and below 48, 64.

Possible misuse of constitutional powers/Independence of key institutions and role players[73]*:* CP XXIX stipulates that the independence and impartiality of positions such as the Auditor General and the Public Protector should be "provided for and safeguarded", but the court heard strong argument that the draft contained no such provisions.

Debate on this issue by a number of the judges was fulsome and passionate. Keenly remembering the past when the judiciary and others who should have watched over the rights of the public did not always act independently, the justices were determined to ensure this would not happen again.

Moerane, who defended these sections on behalf of the Constitutional Assembly, remarked dismissively that the only ones objecting to the provisions were members of the Democratic Party. But the judges did not let him off the hook so easily.

Justice Kriegler spelt out the problem again: "The nub of the objections is that a simple majority in Parliament can nominate the watch dogs. The critics want a bigger majority."

And Justice Chaskalson insisted that Moerane grapple with the issue. "You must address the removal by a simple majority. Because if officials can always be removed from office and do not have security of tenure, they are not independent of the majority party."

Justice Kriegler again: "The objection is that they can be appointed and dismissed by a simple majority. How independent can they then be?"

Justice Mahomed: "Wouldn't they be afraid that if they displease the majority, they will lose their jobs?"

Moerane tried another approach. The essential question was whether the provisions infringed any of the Constitutional Principles, he began, implying that the judges' concern went beyond

---

[73]On possible misuse of constitutional powers see above 22, 43 and below 67; on independence of key institutions and role-players see above 42.

permissible boundaries since no CPs were infringed by the proposed provisions. Justice Kriegler was having none of it. "If you want chapter and verse, is (infringement of) CP I[74] and CP VIII[75] not good enough?" Put on the spot, Moerane suggested that the watch-dog bodies were adequately protected "because of the in-built independence" provided in the draft.

Justice Mahomed: "That is not good enough. It has to *be* built in and that is not achieved by a mere catechism of independence. Why should the safeguards to secure the judiciary be any different from those to secure the Public Protector?"

Moerane: "For the same reason that the safeguards to protect the independence of the magistracy might not be the same as for judges."

Justice Chaskalson: "If there were an act allowing the Minister of Justice to dismiss a magistrate for incompetence, would it pass master?"

Moerane: "Probably not."

Justice Mahomed: "Just give a couple of judgments against the government, and they would say you are *all* incompetent."

In his summing up at the end of the first week, Bizos found himself, not for the last time in this case, having to defend the draft provisions against strong criticism from friends and colleagues on the bench with whose views on such issues he had previously always agreed. "The majority party in the legislature has the right to govern," he said. "But a majority party that requires an unfettered majority to appoint the Reserve Bank, the Public Service Commission and the Auditor General may be prevented from governing. How do you deal with an incompetent Auditor General or an incompetent Reserve Bank?"

---

[74]CP I provides for democratic government.

[75]CP VIII provides, among other things, for multi-party democracy.

Justice Chaskalson raised another problem. If the draft had merely said that the officials could be dismissed on the grounds of incompetence, then Parliament's decision could be tested by the court. However, the draft text said that the grounds would be incompetence as decided by the national assembly.

Justice O'Regan tried another tack with Bizos. "Surely the problem is the chilling effect when you think you might lose your job."

But in his closing remarks of the week, Bizos stuck to his guns, "I live in fear that I may be dropped from my next case. You have to be able to do your job."

Despite this rearguard action by Bizos, however, the week ended with a sense that the CA was dangerously close to losing its battle. The debate over the provisions dealing with the key watchdog bodies had been devastating and it seemed that some strong shoring-up operations would have to be carried out by the CA the following week.

The Second Week

The texture of debate in the second week was just as complex. A number of new constitutional issues emerged for discussion: did the labour provisions in the draft text satisfy the Constitutional Principles, for example; was the Bill of Rights sufficiently entrenched; what about family and reproductive rights and provisions for local government? But while such questions formed the weft of the argument, they were constantly woven through with other strands - the legal and philosophical problems of the first week which re-emerged for fresh consideration and development.

Monday July 8

First came the question of the labour provisions in the draft constitution which took all of Monday, July 8, to argue.

The question was potentially explosive. During the negotiating phase Cosatu's campaign on the issues involved had threatened to bring the country to a standstill. Cosatu's fight was characterised by many employers as an equality matter: management said both the right to strike and the right to a lockout should be included in the Constitution. Only by treating them equally would the principle of parity be satisfied. Cosatu on the other hand had insisted that the right to a lockout not be included in the final text. The judges would have to decide whether the draft was constitutional if it enshrined the right to strike, but contained no reference to a lockout.

On the day these matters were argued, three issues taxed the court and counsel. Could the draft pass muster if the employers' right to lockout (or their right to exercise economic power in pursuit of collective bargaining, as Business South Africa framed the dispute) were not given constitutional protection equivalent to the employees' right to strike? Was the failure to provide for individual employers to engage in collective bargaining a fatal flaw in the draft? And was the attempt to make the Labour Relations Act 66 of 1995 a quasi-part of the constitution permissible?

In debate over these issues, important interpretation problems were raised by Business South Africa which gave a fresh slant on similar difficulties[76] raised by the court in relation to different issues the previous week.

Legislative history[77]*:* Durban advocate Malcolm Wallis SC, at the time the chairman of the General Council of the Bar, represented Business South Africa. Wallis, who has particular expertise in labour cases (often, as here, from the perspective of management) told the judges that the context of the dispute between Cosatu and employers over their respective rights under the draft constitution was crucial. The Interim Constitution (then still in place) protected both labour's right to strike and management's right to lockout. Cosatu, however, had launched an extensive campaign against the lockout, and as a result, all reference to lockouts had been

---

[76]Namely, the problems of ambiguity and binding a future court to the interpretation of the court hearing this case.

[77]See above 25.

removed from the draft final constitution. During its campaign, Cosatu had not merely insisted on removing constitutional reference to the lockout, but had gone much further and argued that the lockout should not be allowed in South Africa, in other words, that a lockout was *unconstitutional.*

Textual ambiguities/Binding a future court[78]: According to Wallis, this led to an interpretation problem since the draft could be held to read in either of two ways.

If the draft were certified, and a subsequent court had to interpret the labour provisions, it could view the now-certified constitution against the backdrop of the dual campaign to remove the lockout from the text while entrenching the right to strike. The court could then hold that the proper interpretation of the text was that it not only omitted the right to lockout, but made it unconstitutional. This interpretation could well carry with it the implication that the exercise of economic power by employers, through collective bargaining, was also unconstitutional.

Or a court could say that the constitutional text referred to collective bargaining; that employers had the right to exercise their economic power, as was inherent in the Constitutional Principles, and that the lockout, while not a part of the constitution, was therefore not unconstitutional.

According to Business South Africa (BSA) the first of these two interpretations would be unconstitutional. But should the court certify the draft text as it stood, and even if it were to spell out its view of the meaning of the labour provisions and say this was foundational to its decision to certify, a later court could say that it disagreed and interpret the question of the constitutionality of the lockout in a different way.

Wallis said this was a real risk and urged the court either to refuse to certify because it was ambiguous, or to spell out that its certification decision had special status.

"It is really the same problem as was raised on the first day," Wallis said. "Unless this court can

---

[78]On textual ambiguities see above 18, 19, 40, 43 and below 64; on binding a future court see above 18, 19 and below 63.

devise a process where its adjudication is effectively part of the constitution for the future, you are left only with the option of saying that this text does not comply and sending it back to be remedied."

Again, it was Justice Didcott who took up this question as he had done the previous week. "How could one bring about the result of preventing a future court from ignoring *stare decisis,* when the whole basis for certification was that a particular clause carried a particular meaning?" he asked.

Wallis urged that if the text were to be passed on the basis of a particular interpretation, then the judges would have to say that s 71 of the Interim Constitution contemplated a very special process and spell out the interpretation on which certification was based.[79]

Like BSA, Cosatu had included an historical section in its written argument, but the gap between the two parties was clearly illustrated by the strikingly different treatment of this material. BSA dealt with the statutory history of industrial rights, starting its review with strikes in 1907 which led to the first national legislation on labour relations. However, according to Cosatu, the relevant history began far earlier, with the institution of slavery. Cosatu criticised BSA's historical section because it did not mention that for many years striking by black miners was illegal. It also contained no reference to the socio-political conditions of workers which ran parallel to and shored up labour legislation.

The strike, declared BSA, had developed over the years into a "most formidable weapon, capable of inflicting grievous harm on the employer".

Cosatu, on the other hand, justified its insistence that only the right to strike - and not the right to a lockout - should be included in the constitution, by referring to deep-seated inequalities in society, from slavery through to the migrant labour system, the indentured labour systems and other repressive apartheid laws and practices. Cosatu argued that the constitutional right to strike should be seen as a response to this history, which the drafters wanted to ensure would

---

[79]This is exactly what the court did in its *First Certification* judgment at 1285 A - D.

never be repeated.

During debate on this question, Justice Mahomed commented to Cosatu's counsel, Martin Brassey, professor of law at the University of the Witwatersrand and an expert in labour matters, that the problem involved a "special situation", going well beyond management and labour. "The black working class has been additionally disempowered by job reservation," he said.

Brassey agreed that the foundations of the problem had been laid "in 1652".[80] But in addition to these historical problems, "there is a question of balance between capital and labour". He said there were weapons apart from the lockout to underpin collective bargaining.

Justice Goldstone asked if the court did not have to consider whether the lockout could be totally prohibited. Brassey replied that this question would have to be decided by considering the implications to be drawn "from the constitution taken as a whole". "Today a statute prohibiting the lockout completely could be constitutional or it may not be. In 20 - 30 years' time a completely different conclusion could be reached. Hence the drafters decided to leave it open."

Legislation given a constitutional shield[81]*:* A second member of the legal team representing Business South Africa, Chris Loxton SC from the Johannesburg Bar, raised BSA's problem with the Labour Relations Act. This legislation, which had not yet come into operation, was given a special constitutional shield by the draft text.[82]

During debate on s 241 (which provided this "shield") the judges repeatedly expressed their

---

[80]This was the year in which Jan van Riebeeck landed in the Cape, and initiated what became a permanent white colony.

[81]See below 64.

[82]In terms of s 241(1) of the draft constitution, "A provision of the Labour Relations Act remains valid, despite the provisions of the Constitution, until the provision is amended or repealed."

concern that it put the legislation on a par with or even above the Constitution as the "supreme law". They were also concerned about the uncertainty to which it could lead. "Does it not mean that all law save the Labour Relations Act shall be subordinate to the Constitution?" asked Justice Chaskalson. A little later, he said that, given the particular wording of the section, the procedure for amending the Act would allow "a horse and cart to be driven right through the Constitution".

Loxton encouraged the judges to be critical. He said the draft contained a section which was really a statute given constitutional insulation. If the court certified the text and Parliament then amended the Labour Relations Act, the resulting constitutional text could be quite different from what the judges had originally passed. These changes could be made even before the draft constitution came into effect with the result that from the start, the constitution as implemented would bear little resemblance to that which the court had certified.

"It would change the balance of the Act and then you would have certified something entirely different from what people who live under the Act will experience. What governs such a person now is the Interim Constitution. But then there will be two suns in the heavens. One that shines on everyone not governed by the Labour Relations Act and one that shines on those who are governed by it."

Anyone who had listened to argument in the certification case on the KwaZulu-Natal draft constitution would have been left in little doubt about the way the court would view s 241. The judges' response to the proposed "sunset"[83] - or suspensive - clauses in the KwaZulu-Natal text was mirrored by their negative reaction to the uncertainty in which s 241 of the draft national text would result. Their dislike for legislation which purported to achieve "supreme law" status (something to which they had objected in the KwaZulu-Natal draft text[84]) also spelt bad news

---

[83]In terms of these "sunset" or suspensive clauses, certain provisions would only come into effect at a future date, not yet determined, when it was legally appropriate for them to do so.

[84]See for example, *Kwa-Zulu Natal Certification* judgment at 1430 G. This is not an isolated example, and on a number of occasions in the judgment the court expresses its disapproval of legislation (here the provincial constitutional text) which purports to achieve the same status as the national Constitution - the "supreme law".

for the apparent attempt in the draft national constitution to give an ordinary statute constitutional insulation.

Tuesday July 9

The next afternoon, Tuesday July 9, debate focussed on whether the Bill of Rights had been sufficiently entrenched in the draft text. The Constitutional Principles said that "all universally accepted rights, freedoms and civil liberties ... shall be provided for and protected by entrenched and justiciable provisions in the Constitution".[85] The draft text provided that, like other sections of the constitution, the Bill of Rights could be amended by a two-thirds majority. Some objectors felt this was an inadequate protection and that the requisite majority should be higher. During this debate, however, two related problems arose - whether the proposed constitution had a central core which was immune to amendment; and, associated with this question, what the role of the Constitutional Principles would be once the final text was certified. Although this second question had been raised before, it was debated more fully at this point than in previous discussion.

Future role of the CPs/Basic structure doctrine[86]*:* Johannesburg attorney Peter Leon, exercising the new right of attorneys to appear before the higher courts, appeared as counsel for the Association of Law Societies, the body which represents most of South Africa's attorneys. He said his organisation was seriously concerned about the fact that once a constitutional text had been certified by the court, the Constitutional Principles "simply go out of the window".

Justice Didcott asked, rather irritably, what the principles would do "inside the room" if they did not fall out of the window.

Leon: "The concern we have is that their values ...."

---

[85]CP II

[86]On the future role of the CPs see above 19 and below 63.

Justice Didcott: "If their purpose was to set guidelines for the new constitution, and they have met that purpose, what remaining purpose would they serve? Why do they have to be kept alive?"

Leon said his organisation foresaw problems once the constitution began to be amended. "What yardstick will the court have in dealing with these amendments? Is it right that the principles within the CPs should simply disappear?"

Justice Mokgoro asked whether the intention was not that once the constitutional text had been certified, "these values are in it"?

Leon: "That is correct, but there is nothing to stop the text - and those values - being changed by a two thirds majority."

Justice Mahomed, who was at the time also Chief Justice of Namibia, spelt out the differences between the two countries. "Namibia elected to say that you cannot amend the constitution. Here we say we can do so. Your ultimate defence against an abuse would be in the learning that says 'You cannot amend the constitution in a way which destroys its basic features.'"

Justice Sachs wanted to clarify whether this was what Leon meant. "Are you saying that there are certain fundamental features that cannot be changed even with special majorities, since that would not be amending the constitution?"

Justice Mahomed: "Yes, not amending, but tearing it up."

In this debate, the two justices were referring to the "basic structure" doctrine, which developed in the Indian courts through a line of cases starting with *Kesavananda v The State of Kerala*[87]. Briefly, this doctrine holds that there are essential features of a constitution which the

---

[87] *Kesavananda v The State of Kerala* (1973) SC 1461. Others in this line of cases included *Indira Nehru Gandhi v Raj Narain* (1975) SC 2299, *State of Rajasthan v Union of India* (1977) SC 1361, *Minerva Mills Ltd v Union of India* (1980) SC 1789, and *Gupta v Union of India* (1982) SC 149.

legislature has no power to destroy. 'Amendments' which in fact make changes that undermine "basic structures" of the constitution will not be allowed. Justice Mahomed, who first engaged in discussion on this issue with Leon, is keenly aware of this line of thinking and in a judgment written while still deputy president of the Constitutional Court, *Premier of KwaZulu-Natal and Others v President of the Republic of South Africa and Others*[88] he expressly raised the issue[89], albeit he decided that it was not an appropriate case in which to consider or apply the doctrine. Summarising the doctrine in that judgment he said, "It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and re-organising the fundamental premises of the Constitution, might not qualify as an 'amendment' at all."[90] [91]

Discussing this "basic structure doctrine" with the justices, Leon commented: "Our worry is that the CA does not accept the *Kesavananda* decision."[92]

He added, "By a two thirds majority the Bill of Rights could be cherry-picked: we could re-introduce the death penalty. We say that this section has not been fully entrenched (as it must be in terms of the Constitutional Principles) and that it is more than a flimsy protection which is needed."

---

[88] *Premier of KwaZulu-Natal and Others v President of the Republic of South Africa and Others* 1995 (12) BCLR 1561 (CC).

[89] At 1566 D - E and 1576 C - 1577 C.

[90] At 1576 F.

[91] Justice Mahomed also quoted (at 1576 H) Chandrachud J in the *Narain* case (at 2461), dealing with the effect of a previous Indian judgment: "(The Constitution) did not confer power to amend the Constitution so as to damage or destroy the essential elements or basic features of the Constitution .... The power to amend did not include the power to abrogate the Constitution .... The word 'amendment' postulates that the old Constitution must survive without loss of identity ... the old Constitution must accordingly be retained though in the amended form, and therefore the power of amendment does not include the power to destroy or abrogate the basic structure or framework of the Constitution."

[92] See n 87.

Asked by Justice Thole Madala what "fortification" he would have liked for the Bill of Rights, Leon opted for 75 percent.

Political question/Countermajoritarian dilemma[93]: Justice Didcott then returned to the vexed problem of the "political question".

"Isn't the depth of entrenchment a political decision?" he asked. "Any improper interference of that sort is a detraction from majority rule which is taken to be the touchstone of democracy. The executive was entitled to take account of this problem but decided not to make it so high that it would be impossible to amend the constitution when it was the wish of the majority of the people to do so. The fact of entrenchment is compulsory in terms of the CPs, but the depth - whether 66 or 75 percent - is a political choice."

Justice Mahomed agreed. "You must concede that the depth of entrenchment must be a political judgment. You say that in terms of CP XV and II it is more than (the two thirds majority provided for in s 74). But how much more is a matter for political judgment."

"It must be deep. Real - not nominal," Leon replied.

Wednesday July 10

Socio-economic rights/Court's power in relation to Parliament[94]: Next morning, previewing objections to the socio-economic rights contained in the draft text,[95] Trengove and the judges began to discuss in what way such rights could be made justiciable by the courts.

---

[93]See above 16, 19, 26, 31 and below 57.

[94]On socio-economic rights see below 58; on the court's power in relation to Parliament see below 58, 60.

[95]The draft text included several socio-economic rights not listed in the IC. For example, it introduces housing rights (s 26) for the first time and the right to health care, food, water and social security (s 27).

"What must the court do if the legislature does not take reasonable steps ....?" Justice Mahomed began.

Trengove: "If the State were to fail to discharge that positive duty, we are confronted by the question of what the court's powers are."

Justice Mahomed: "Can I put a *mandamus* on Parliament to pass a law?"

Trengove: "You could do so, although I concede it is a very complicated question. There is no reason why the executive should not be the subject of a *mandamus.*"

Justice Mahomed: "Must we always allow a wide margin of appreciation? I can perceive of a situation in which the state has become so involved in a military affair that it does not do anything about housing."

Trengove: "The court may then be dependent on political and public pressure to get Parliament to comply."

Justice Chaskalson: "If Parliament refuses to follow a court order, there would be a constitutional crisis - the court does not have an army."

Later, in debate with Gary Moore of the Free Market Foundation which is a strong protagonist of the separation of powers and opponent of justiciable socio-economic rights, the judges raised a similar question. If the government had the resources and wasted them, must it not be subject to constitutional discipline?

Moore, another lay person given permission to present oral argument in this case even though he was not admitted as an attorney or an advocate, was adamant. "It is not a question for judicial discretion. It invades the separation of powers."

Justice Didcott probed his reasoning. "I do not understand why striking down legislation is any

different. One of our major tasks is to supervise and strike down legislation which is unconstitutional. Yet you say this is an invasion of the separation of powers doctrine."

Justice Mahomed agreed. "This happens all the time. It is our function."

Justice Chaskalson summed up Moore's position. "It comes down to the proposition that if the court cannot interfere with the allocation of budgets it cannot enforce socio-economic rights and therefore socio-economic rights are inconsistent with the Constitutional Principles."

Socio-economic rights were also the basis of the submission by Johannesburg advocate Margie Victor for the Legal Resources Centre; this time the submission was in defence of socio-economic rights and it sparked a lively debate with the judges, chiefly with Justice Sachs.

Political question/Countermajoritarian dilemma[96]:
"My main concern," he told Victor, "is that the court could end up usurping the role of the legislature. There are all kinds of choices which belong to the legislature and not to the court. When should it be Parliament (that makes this choice) and when should it be the courts?"

Horizontal application[97]*:* He said he was particularly worried about horizontal rights, adding that the main danger was that government in South Africa could become a "dichostocracy - rule by judges".

Victor tried to reassure him. The state must take reasonable measures within its available resources, she said. When a matter was argued in court the relevant government agency would be present and full argument would be heard from their representatives. There was no danger of the court usurping the role of the legislature.

Justice Sachs pursued his point. "If the ordinary courts give a decision, Parliament can overturn

---

[96]See above 16, 19, 26, 31, 55.

[97]See above 40.

(it). But if the Constitutional Court gives a judgment, Parliament can do very little. We become the agency that determines all these issues, without the give and take of the legislative process. That is my concern."

Victor: "There are so many checks and balances in the draft constitution that the alarm bells should not start ringing. The Orwellian situation simply will not arise."

Justice Sachs again. "I am not concerned about socio-economic rights. My concern is about arguments made on a horizontal application of the Bill of Rights and the concern that this involves a failure to comply with the separation of powers."

Victor said 'the fear and the fury' that had erupted over the question of whether the Bill of Rights should apply horizontally or vertically were without foundation. One had only to consider the middle of the road position taken by the Constitutional Court in the *De Klerk* judgment[98] to see this was so.

Justice Didcott could not resist this opening. "Was that position reclining rather than vertical or horizontal?" he quipped.

Socio-economic rights/Court's power in relation to Parliament[99]*:* Then Justice Mahomed revisited the question of the court's powers should Parliament ignore an order. "Parliament is required to take reasonable legislative measures and it does not," he posited. "What do I do?"[100]

Victor: "Under s 38 the court can give a declaration or other appropriate relief. The court hearing the matter will be hearing all the interested parties and appropriate remedies will emerge."

---

[98]*Du Plessis and Others v De Klerk and Another* 1996 (5) BCLR 658 (CC)

[99]On socio-economic rights see above 55; on the court's power in relation to Parliament see above 55 and below 60.

[100]Compare this discussion with the court's predicament described and resolved in its judgment in *Minister of Justice v Ntuli* 1997 (6) BCLR 677 (CC), less than a year later.

Justice Mahomed: "Can we order Parliament to meet and pass a law? Can we declare that Parliament has failed to pass legislation and would the litigant then have the right to take action ... to have all the MPs arrested?"

The debate over whether the Constitutional Court should ratify a constitutional text if it contained a justiciable Bill of Rights incorporating horizontally-applicable and socio-economic rights, continued later in the day, this time with Loxton back at the microphone, although he now represented the South African Institute of Race Relations.

Like the Free Market Foundation the institute was concerned that such rights would inevitably lead the court to transgress into the sphere of power which rightfully belonged to the government.

Loxton took as his example one of the new rights in the draft text - the right to water. In a case involving this right, the court would be required to investigate and examine the budget put up by the government, he said. It would have to go through the budget to see what resources had been allocated to other parts of the budget such as defence, and check the total income from tax. It would inevitably involve the court in making political assessments. It was similar to marking an examination. It did not matter where you set the pass mark - 40 percent or 90 percent - but each response had to be individually evaluated. In this case the court would inevitably be infringing the domain of the government. And, commenting on remarks by the judges to Moore earlier in the day, he said it did not help to say there were other areas where the court infringed government prerogatives by striking down laws.

Justice Didcott commented that there might well be areas where, depending on the circumstances, the court might be unable effectively to grant an appropriate order. But there might be cases where it could do so.

Loxton said if the court was required to make decisions about where money should be spent and then tell Parliament where a dam should go, then it would be breaching the separation principle.

Justice Didcott: "It will never do that."

Justice Mahomed: "Of course when you assess whether something is reasonable you take into account all factors and they may include some political factors. How does that offend the Constitutional Principles?"

Justice Chaskalson: "There are any number of examples of enormous expenditure having to be incurred by the state because of a court order - disposal of atomic waste, provision of legal expenses and the like. It is inherent in the problem of the court ordering the state to do something."

Court's power in relation to Parliament[101]*:*

Loxton: "It is one thing to require of the state in its executive role to do something, but each member of Parliament has the right to vote or not. If Parliament decides not to vote for legislation, how can they comply with this court ... because they have to vote with their consciences. What if they place a bill before Parliament and Parliament doesn't pass it? The state, in the form of the government, has complied."

Justice Mahomed: "You can imagine the political cost if a government is told 'You have taken no legal measures and are in breach of your duty and the constitution', and Parliament says 'So what'. That would be a considerable risk to run. It may be enough if we say this. You must not under-estimate the moral power of such a declarator."

Loxton argued that because of the nature of the right and the kind of problems to which it gave rise, there would be an "invasion of the sphere". Judges would get involved in areas for which they were not qualified and it would put judicial independence at risk. The court "would be swamped" if the constitution married horizontal application with socio-economic rights. In his submission, compliance with the Constitutional Principles could be obtained by adopting national legislation on socio-economic issues, instead of putting them in the Bill of Rights.

---

[101]See above 55, 58.

Thursday July 11

The final day of the hearings began with the court's announcement of the tragic suicide the previous morning of Professor Etienne Mureinik from the University of the Witwatersrand law faculty. Mureinik had attended several sessions of the certification case and had been part of the legal team representing the Association of Law Societies. He was also author of a commentary on the Interim Constitution and its values[102] which has been among the works most frequently quoted by the courts in their debates and judgments.

Justice Chaskalson said members of the court had known him as an outstanding academic, a fine teacher, a distinguished lawyer and negotiator, a constitutional draftsperson and commentator on public affairs. Bizos, as the most senior member of the legal profession in court, replied with an impromptu eulogy and the whole court observed a minute's silence, but the "dreadful news" as Justice Chaskalson described it, hung over the court for the rest of the case.

The justices had specially agreed to add an extra day to the hearing, so as to ensure that all parties felt they had been given an adequate opportunity to state their case on the historic and politically crucial issue of certification.

A number of counsel asked to speak again.

Provincial powers/Solemn pact invoked[103]*:* Among them Heunis, for the National Party, once more invoked the "solemn pact" when he urged the court not to certify because the provisions dealing with the provinces did not satisfy the Constitutional Principles. He added, "The powers and functions defined in the new constitution may not be substantially less than in the Interim Constitution. That is the deal. When it comes to the powers and functions of the provinces, the

---

[102]"A Bridge to Where?: Introducing the Interim Bill of Rights", *South African Journal on Human Rights* 10 1994 (1) 31- 48.

[103] On provincial powers see above 20, 25, 26, 29, 30; on invoking the solemn pact see above 18, 25, 30 and below 61.

draft flirts subtly with the CPs. At first glance it would appear to comply but closer scrutiny reveals that by no stretch of the imagination, nor by having recourse to any kind of interpretation, can you certify. The (draft text) conjures up an image of nine well-harnessed provincial circus ponies that have all to perform in the ring, doing the bidding of their masters at the national level."

When it came to his turn, Hodes made a last pitch on behalf of the Inkatha Freedom Party for the text to be sent back. He once again held out the possibility of the party returning to negotiations if certification were refused. "It would be no disgrace for the Constitutional Assembly if the text was not certified. (Such a possibility) was presaged in the Interim Constitution. My clients did not take part in the Constitutional Assembly's deliberations. If on this occasion the draft were not certified, as we submit it should not be, there is a greater prospect of it being all-inclusive."

Re-statement of criticisms and objections by these and other counsel passed smoothly and soon it was the turn of Trengove for his last attempt at persuading the court that the text should pass muster.

Initially it seemed these final hours of the hearing would slowly run their course and it would all end, as court cases so often do, with a slight sense of let-down. But instead, the last submissions of the Constitutional Assembly and the resulting debate with the bench took on new life, providing important insights into some of the difficult problems with which the court had been wrestling, as well as moments of unexpected drama.

Extent of compliance necessary[104]*:* Trengove began by taking up the old question of how strictly each section had to comply with the Constitutional Principles. "Compliance does not necessarily mean rigid or absolute compliance. The court must ask in each case whether anything less than absolute compliance would nevertheless satisfy the Constitutional Principles. Some might require strict compliance; but if you come across a lack of absolute compliance you have to ask whether it nevertheless fulfils its purpose."

---

[104]See below 23.

Justice Chaskalson asked whether this meant that the certification process was therefore not a "purely mechanical exercise" and Justice Madala asked just how final and binding the court's decision would be. He and Trengove then discussed the question of a later court's interpretation of the certification decision in the light of the fact that once the text had been certified the issue was closed forever and certification could never be re-opened.

Future role of CPs/Binding a future court[105]*:* Trengove commented, "A future court would always have to use the same tools and methods that this court does. The Constitutional Principles will always remain a very important tool of interpretation of the final constitution."

Justice Madala again: "Are you suggesting that there will be life for the Constitutional Principles after certification?"

Trengove: "Yes, but only as a tool of interpretation. A future court will apply the *stare decisis* principle carefully since it will realise that the final constitution was given life only because of this interpretation."

But, he added, if a later court still came to the conclusion that this court had clearly been wrong in its interpretation, that a mistake had been made, it could not be bound by a mistake. The certification would stand, but this would not bind a future court to what might turn out to have been an error.

Justice Chaskalson: "Such a court would still have to find an interpretation within the Constitutional Principles?"

Trengove: "It would have to prefer (an interpretation within the Constitutional Principles) to one outside."

---

[105]On the future role of the CPs see above 52; on binding a future court see above 18, 19, 48.

Textual ambiguities[106]*:*

Justice Sachs: "What about the problem of certifying an ambiguous provision?"

Trengove: "What must the Constitutional Assembly do about it? Few sections are not capable of some interpretation that will not put them at odds with the Constitutional Principles. It is a well-known principle that you interpret subordinate legislation in a way that fits in with the legislation. The demand is not that the text be free of ambiguity. You are entitled to assume that compliance has been intended, and therefore make the appropriate interpretation. All future courts interpreting the text would yield the same results. You would not escape the problem by referring a few identifiable ambiguities back (to the Constitutional Assembly), because you may have overlooked some serious ambiguities discovered later."

Legislation given a constitutional shield[107]*:* The discussion then moved to the two controversial statutes which the draft text elevated to a higher status than conventional legislation by declaring their constitutionality in the constitution itself - the Labour Relations Act and the Promotion of National Unity and Reconciliation Act[108].

Justice Chaskalson said the problem lay not with the technicalities but rather with whether such a mechanism could conform with the Constitutional Principles, "one of which makes the Constitution supreme".

Trengove said the Constitutional Assembly did not contend that the "insulated" legislation should become part of the constitution, but Justice Chaskalson continued, "The space has been made part of the constitution and must be read as though it formed part of (it)."

After some further discussion between Trengove and the court, Justice Didcott broke in,

---

[106]See above 18, 19, 40, 43, 48, 64.

[107]See above 50.

[108]The Promotion of National Unity and Reconciliation Act 34 of 1995, as amended by the Promotion of National Unity and Reconciliation Amendment Act 87 of 1995. The Truth and Reconciliation Commission and its sub-committees were established under this Act.

apparently in disagreement with many of his colleagues. "They are not made part of the constitution. They are not. They are declared to be constitutionally valid. That does not extend to any future amendment. It covers only the text of the statute as it stands now. Therefore no problem arises about future amendments."

Justice Chaskalson: "How can you immunise it but say it is not really a part of the constitution? It is inconsistent with the concept of supremacy."

Trengove: "The assumption is not realistic. The equally sensible and historically more accurate explanation is that both were crafted and created under the Interim Constitution. There was a fear that under the new text they might be found to be in violation of the constitution. The drafters were anxious that this should not be so and to protect against this risk."

Justice O'Regan: "Or are they really trying to limit the scope of constitutional supremacy and to say that the court cannot investigate?"

Justice Goldstone: "Would it have been any different if it had said, 'Notwithstanding anything to the contrary in the constitution, the death penalty will be lawful'?"

Trengove: "No, but the court would still have to be satisfied that this complied with the Constitutional Principles."

Justice Goldstone: "Is this really a permissible way of drafting a constitution? What does it hold for the future? Can Parliament go on using this technique to include other Acts? If we certify this time, it seems we shall have to go on doing so."

Justice Kriegler: "Mr Trengove, your argument does not wash. Your clients did not have *carte blanche*. They have to stay within the lights of the runway as Justice Mahomed said ... it feels like four years ago."

Trengove: "Light years." (General laughter in court.)

Justice Mahomed: "Isn't this an ouster in effect?"

Justice Chaskalson: "There is a practical problem with the Labour Relations Act. Apart from the enormity of trying to assess each provision against the principles, it has to be done in the abstract. Very often trying to do so leads to 'it looks alright' or 'it looks wrong'. And having said it is alright then insulates them from challenge. It is a very-far reaching proposition."

Justice Kriegler: "I am sceptical about these assurances. The reason for this three card trick is that it (the problems caused by the labour provisions) could not be resolved by anyone else."

After a break, the court moved into its final session. The last words fell to Bizos who had to deal with objections to the state of emergency provisions, and in particular with a table of non-derogable rights contained in s 37 of the draft.

The judgment on this section proved particularly telling in the court's decision. It was perhaps the most strongly-worded part of a judgment generally devoid of any colour, and will be best seen and understood against the background of the debate which gave clear notice of what was to come.

Perhaps the deepest irony of the entire case was that it was Bizos, with his untarnished reputation as a fighter against the injustice perpetrated by the previous government particularly under emergency and security legislation, who had to face the ire of the judges over the emergency provisions proposed in the new constitutional text. In this session he was answering an unseen and unheard objector, since the group which had originally raised the problem - related to certain emergency provisions - was not in court. He had no advance warning of the additional issues to be raised and he was at a further disadvantage because he ultimately found himself arguing a position diametrically opposed to that of his instincts and his past court record.

Even though the court, like Bizos, had in a sense been warned by the letter from the objector, the issues which suddenly erupted appeared to have caught the judges by surprise, as much as

counsel.

Bizos began on a jovial note. "The objectors not having turned up, perhaps we should deal with (their objections) as with a default judgment." But his quip, intended to limit the debate to the questions canvassed on the papers, did not have this effect and the judges soon began to enter the arena with a number of wide-ranging comments.

During this debate, Bizos referred to the oppressive emergency legislation of the past. He invoked the history of opposition to these provisions in which he himself had shared, along with some of the other counsel in the court and several of the justices - "Many of us had to fight uphill battles on the question of the state of emergency" - and then he pointed out several protections contained in the draft text, intended to help avoid some of the previous horrors.

"The constitution lays down a simple majority by Parliament for the first declaration of emergency and 60 percent majority for any extension." He said a state of emergency usually came about when a country was divided. A substantial majority may not want to secede or commit seditious acts of wide-spread public violence, and against this background "one wants public representatives to confirm a state of emergency."

"There is nothing wrong with 60 percent," he said.

Justice Mahomed then sparked a side show in which Bizos and members of the court retold horror stories from past emergencies. "There has been an emergency in Transkei for the last 20 years," Justice Mahomed began. "Proclamation 400 of 1960 went on for ever and ever."

Possible misuse of constitutional powers[109]*:* Suddenly Justice Kriegler stepped in and really set the cat among the pigeons. He had not joined in the story swapping, but had been closely studying certain parts of the emergency provisions instead, paging backwards and forwards through the draft to cross-check the references in the table on non-derogable rights with the sections to which they referred. "Could I enter this exercise in nostalgia and ask something else about the state of emergency provisions?"

---

[109]See above 22, 43, 44.

"Section 37, read with the table of non-derogable rights, makes it possible to impose higher penalties for an offence (than would have obtained at the time an offence was committed). This is because one of the rights which can be derogated is s 35(3)(n). And s 35(5)[110] can be scrubbed during an emergency: you can have an unfair trial. Everyone gives (the right to a fair trial) a standing ovation when it is passed, and then it becomes derogable in an emergency."

Justice Didcott, after quickly checking through the table: "Apparently forced labour is also permissible during an emergency."

Justice Mahomed: "How can you ever permit, even during an emergency, an unfair trial? If it is unfair - tough luck. I think we had enough of that during the apartheid years."

Bizos: "There might be circumstances that arise during an emergency that require great urgency."

Justice Mahomed: "And allow an unfair trial?"

Bizos: "Let us take a more benign example. Suppose during an emergency a police officer has broken down a door without a warrant and seizes a cache of arms. Why shouldn't this be admissible?"

Justice Mahomed: "If the particular evidence would ordinarily have made a trial unfair, in an emergency - tough luck. Why?"

Bizos: "The difficulties of emergency situations ...."

Justice Didcott: "Even if it relates to an unfair trial for an offence committed when there was no emergency? (Justice) Mahomed is pointing out that s 35(5) does not necessarily apply only during an emergency - the trial could be related to an offence committed six months before the

---

[110]This is the provision in the draft text which deals with evidence obtained in a manner that violates any right in the Bill of Rights. It says that such evidence "must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice." According to the draft text, this right was not included in the table of rights which were non-derogable during an emergency.

emergency was declared."

Bizos: "A court has wide discretion to exclude evidence."

Justice Mahomed: "But there is no *right.* The answer is - tough luck."

Bizos: "If a door is broken down and a cache of arms found, the person should not be able to say, 'This evidence cannot be used against me because I acquired the cache before the state of emergency was declared.' One must, however great the dislike of any person may be to a state of emergency, agree that - I do not want to utter the words of P W Botha - it may be necessary effectively to restore law and order."

Justices Mahomed and Didcott in chorus: "I do not understand why we need unfair trials."

Justice Didcott: "I cannot see any reason why it should be there in a state of emergency. It creates a minefield of uncertainty."

Bizos: "In an appropriate case, evidence will be excluded."

Justice Mahomed: "Normally if they knock the hell out of me at the police station and get a confession it would be inadmissible. But now they can do it because it is an emergency. We had it so often under apartheid; so many abuses. We must be particularly careful."

Bizos: "Torture is not allowed ...."

Justice Mahomed: "But you can get inadmissible evidence."

Justice Kriegler, coming at last to the rescue of Bizos: "Don't you want to put in a note on this issue?"

To which suggestion Bizos rapidly agreed.

Then all that was left was for him to make a brief response to a couple of issues raised during

the day.

"Some of the arguments advanced today should be ignored," he said. In an obvious reference to the IFP submissions he added, "Your function is not to give a party that chose not to take part in the formation of the text another opportunity, or to give them an invitation to participate."

Then he closed with a reference to the image with which the case had begun. "This is the end - or it ought to be - of a long and difficult process. There is a grave responsibility on this court to see whether the front wheel of the plane is dead centre or whether, on landing, the fringes of the wings have gone over the limits."

Justice Chaskalson rounded off the fortnight. He thanked everyone who had participated by presenting the court with very extensive written and oral argument. "A great deal of thought has gone into the preparation," he said. "Now the court has the very arduous task of discharging the mandate given to us under the Constitution."

THE JUDGMENT

Almost exactly two months after the marathon hearing, the court issued its equally marathon judgment, declining to certify the draft text.[111]

---

[111]The *First Certification* judgment was handed down on the same day as the *KwaZulu-Natal Certification* judgment. The timing is hardly a coincidence, and is significant for two reasons. The court may or may not have had political considerations in mind, but the non-certification of the national draft would no doubt have made KwaZulu-Natal's own failure easier to bear in Ulundi (the heartland of the Inkatha Freedom Party). It would immediately have helped reduce any tension which might have arisen over the KZN disappointment. In theory, the nil:nil result opened the way for the IFP to return to the Constitutional Assembly, take up negotiations in that forum, and choose the collaborative path rather than the isolationist, go-it-alone route followed up to then. In purely legal terms, however, the timing was also important. Theoretically the court might have been ready to hand down the KZN decision before the national decision, since it had been argued a week earlier. However, to have done that would have allowed at least the remote possibility of KZN coming back with a revised text before the decision on the national text was announced. If the court had certified the national text, it would have been left with the problem of deciding with which constitution any KZN second draft would have had to comply. By handing them down together, this problem was avoided and the two texts were kept in step.

Notable for its length, its thoroughness and the clarity of its internal organisation, the judgment is also striking for its blandness of character.[112] After the colourful discussion of the hearing, which saw the judges debating in their highly individual styles, the judgment could not have been more of a contrast. This was a deliberate decision of the court which went out of its way to ensure uniform style and tone, even across the sections written by different judges. Its ruling is presented in the text as a single effort, written by "The Court", instead of the usual format adopted in the case of a unanimous ruling in non-certification matters, when the decision appears under the name of the individual judge who wrote it while the rest of the bench append their agreement.

The judgment begins with what amounts to a lengthy preface (Chapter I)[113] outlining the context in which the unique politico-legal experiment upon which the judges are embarked, is taking place. In doing so, the court gives its version (necessarily very brief) of South African history. That history culminates with the certification process and the new draft text, but *en route* the judgment first stresses the crucial role of the "solemn pact" in cementing the negotiations through which the country so narrowly avoided a "cataclysm",[114] and "imminent disaster".[115] The judges place the certification process, which was such a key element of the pact, against the background of disaster avoided: the deadlock which produced the certification mechanism, they note, was a "crucial one on which the negotiations all but foundered"[116]; the resolution of the impasse through the certification process "enabled both sides to attain their

---

For more detail on the *KwaZulu-Natal Certification* judgment, see Chapter Seven below.

[112]In both the first and second national certification cases as well as the KwaZulu-Natal certification case, the judges delivered their decision unanimously and in the name of the court, creating the expectation, confirmed in the court's judgment refusing to certify the Western Cape provincial constitution, that provincial constitutions will also be handled in this way. However, in the text of the KwaZulu-Natal provincial decision the judges allowed themselves more latitude of expression than in the national judgments. See for example, the *KwaZulu-Natal Certification* judgment at 1424 B.

[113]*First Certification* judgment at 1264 - 1275.

[114]At 1267 A.

[115]At 1267 C.

[116]At 1268 C.

basic goals without sacrificing principle";[117] it also enabled all parties "to keep faith with their respective constituencies".[118] The court cites the preamble of the Interim Constitution to demonstrate that the agreement was so important, and the solemn pact's role so pivotal, that the Interim Constitution was drafted in such a way as to acknowledge this - and to do so right at the start of the text.[119] The court further emphasises the significance of its role in the process of avoiding an impending cataclysm, by speaking of the certification task as one with which it had been "entrusted".[120] The task which the justices are carrying out, in other words, is not one of their own choosing: the country's political leaders had deliberately created the court, then given it the solemn responsibility of scrutinising the draft final text before certifying it if it satisfied the requirements previously agreed by all the parties. At the same time the court stresses that this task is not merely mechanical. While the duty - and the power - of the court in the case is "confined to such certification",[121] certification "means a good deal more than merely checking off each individual provision of the (draft text) against the (CPs)."[122] The court will have to engage itself fully: it will apply the CPs "purposively and teleologically"[123], read them "holistically with an integrated approach"[124], interpret them in a way conducive to reaching the goals spelt out in the Interim Constitution's preamble[125], and avoid any sense of mere "technically rigid" interpretation.[126]

Why this care to explain the background against which they were undertaking this experiment? And to spell out the intellectual approach to carrying out their function? Part of the answer is

---

[117]At 1268 G.

[118]At 1268 H.

[119]At 1269 D - E.

[120]At 1269 G.

[121]At 1270 F.

[122]Ibid.

[123]At 1275 E.

[124]At 1275 G.

[125]At 1275 E.

[126]At 1275 F.

that they were intensely aware that this undertaking was both extraordinary and historic, and wanted to explain to future generations exactly what had led up to it and the exact "nature" of their task. As the court says in the very first lines of the judgment, "Judicial 'certification' of a constitution is unprecedented and the very nature of the undertaking has to be explained."[127]

But the detailed preface serves another crucial function: it becomes an implicit answer to the dual problem raised on the first day of argument - how the court should respond to the countermajoritarian dilemma and what reply it should give those who say the judges ought not to be trespassing on what is essentially a political question. [128]

What the court does in the preface is to provide the historical background to its extraordinary task, and this background then becomes the justification for its radical departure from the normal role of a court. As Chaskalson and Davis remark, "Much of the introductory section can be seen as the response of the Court to the countermajoritarian dilemma which was raised in an acute form by the certification process."[129]

The preface anticipates two sets of problems: first, the problems of those, unfamiliar with the detailed political history of the negotiation period, who might have difficulties understanding the certification process generally; and second, the problems which those familiar with the process might have had about the court actually using the awesome powers with which it had been "entrusted". For the court did use its powers. It did not accept the argument of Bizos that the court's task was tightly constrained, and that it should defer to the Constitutional Assembly as the people's duly elected representatives. Instead, within the limits which it described, [130] the court closely examined every aspect of the draft text - and then used its powers to find important sections wanting.

Chaskalson and Davis argue that the court placed the certification process within its historical

---

[127]At 1264 G.

[128]For references to occasions on which the court dealt with these linked issues during oral argument see above 16, 19, 26, 31, 55, 57.

[129]Chaskalson and Davis, 4.

[130]*First Certification* judgment at 1273 - 1275.

context to show that the "particular countermajoritarian problem of constitutional certification was the political price which had to be paid for the introduction of democracy into South Africa."[131] But I would go further: retelling the story of the multi-party negotiations and the crucial, deadlock-breaking function given to the court by the negotiators allows the court to indicate that the problem can be turned on its head and viewed more positively - that within the "broader framework of constitutional democracy"[132], the court is playing a legitimate role by helping to usher in the new democratic order.

Against the background of this arguably polemical preface, the rest of the judgment now takes on a slightly different meaning. For in the second section we see how the court uses the power which it so carefully justifies in the first part of its decision. In other words, the two parts of the judgment form counterweights to each other. In the second the judges use their massive powers to reject the product of the Constitutional Assembly's deliberations; therefore the first section is necessary to justify, in advance, the decision they are about to make.

Given this analysis of the judgment, the section which the judges call "The Nature of the Court's Certification Function"[133] is particularly significant. Here they spell out the limits they believe are placed on their power. They stress that their function is not political but legal and that they are not mandated to go beyond the CPs or judge the matters dealt with in the draft text according to their own views or preferences. This delineation of the restraints under which they have operated helps stress the legitimacy of their function, and underlines that the court is acting within the boundaries of the agreement between the negotiating parties. Without these limits on their power, the judges would have found it far more difficult to defend the task which they had undertaken. By acknowledging these limits openly they added another layer of justification for their legally unprecedented mission.

Bearing all this mind, the passage in the judgment dealing with objections to certain state of

---

[131]Chaskalson and Davis, 5

[132]Chaskalson and Davis, 6.

[133]*First Certification* judgment at 1273 - 1274.

emergency provisions and the accompanying table of non-derogable rights[134] is remarkable.[135]

The judges do not mince their words in criticising this table and its explanatory s 37(5): the court holds that they "introduced a differentiation between the importance of various rights which seems invidious and, in some instances at least, so inexplicable as to be arbitrary."

"We can think of no reason why some of the rights that are said to be derogable in states of emergency should be treated as such. Although we accept that it is in accordance with universally accepted fundamental human rights to draw a distinction between those rights which are derogable in a national emergency and those which are not, this should be done more rationally and thoughtfully than ... in ... 37(5)."

It is not only the sharp language of this section which stands out in the context of the rest of the judgment. It should also be seen against the complaint by the court that the public, and some counsel, misunderstood the nature of the certification process and the function of the court in that process.[136]

As we have seen, the court stresses that its role is not to express any view on the political choices made by the Constitutional Assembly. Its task is simply to measure the text against the Constitutional Principles and ensure that the text complies with the principles. However, in its comments on the state of emergency provisions the court goes a good deal further, and this is the only example in the judgment where it did so.[137]

---

[134]At 1295 F - H.

[135]For detailed notes on the court's comments on these provisions during oral argument see above 66 - 69.

[136]*First Certification* judgment at 1273 particularly H.

[137]An example, perhaps similar in a limited sense, can be found in Chapter VI of the judgment: "Local Government Issues". In this chapter, the court finds that the local government provisions do not satisfy the CPs, and are therefore cause for certification to be refused. Having concluded that the local government provisions generally do not pass muster, the court adds that "strictly speaking" it is unnecessary to consider objections to s 229(1) of the draft text, found in the chapter dealing with finance. This provision deals with municipal rates and taxes, and in particular, authorises municipalities to impose "excise taxes". Although the court stated that in the circumstances - namely that local government provisions (of which the municipal power to impose excise taxes may be one) have already been found not to comply with the CPs - it is

The court points to no Constitutional Principle which the emergency sections it criticises could be said to infringe. It cannot declare this section "uncertifiable" since it accepts that according to universally accepted fundamental rights, a distinction may be drawn between those rights which may and which may not be suspended during an emergency. Nevertheless, the justices obviously feel they cannot keep quiet about such a troubling provision. They step in and give their opinion, despite their avowal, just 20 pages earlier in the judgment, that "the wisdom or otherwise of any provision of the (draft text) is not this Court's business."

That the court makes the emergency provisions its business - even though they were strictly speaking outside its mandate - is highly significant. The judges who took issue with Bizos over the problem of rights derogable under an emergency included members of the bench who, during the apartheid years, had presided over or fought cases involving just such issues as the right to a fair trial under emergency or security legislation. Although some commentators have criticised the court's remarks on the derogability issue for implying - wrongly, it is claimed - that there were not enough protections during a state of emergency[138], the words of the judges will have sent a clear message to the public and to Parliament that the court will exercise special vigilance in relation to the guarantees in the Bill of Rights and emergency legislation in particular. Given that the court is the ultimate watchdog over the rights of the public, these are welcome reassurances particularly coming in a text of the gravity of the certification judgment.

"unnecessary" to consider objections to the excise tax, it then proceeds to do so, giving as its justification that the court's view on this objection "may be helpful to the CA". This example shows the court going out of its way to give guidance to the CA about how the text can be redrafted so as to satisfy the CPs (and therefore the justices) next time round. It differs from the example of state of emergency provisions in that the court found the Bill of Rights generally complied with the CPs, yet singled out the emergency clauses for criticism; in the municipal taxes example by contrast, the judges had already decided that the local goverment provisions should be referred back, and within that context added some remarks about appropriate taxing powers of municipalities before adding this section to the list of "faults" causing the text not to be certified. It could be argued that the court was obliged to make its views on the municipal excise tax issue known since the Interim Constitution required (in terms of s 73A) that if the court refused to certify, it should refer the draft back to the CA "together with the reasons for its finding". There could be no such justification for its remarks on the emergency provisions. Quite the reverse.

[138]Robin Palmer, "Declaration of a State of Emergency: Section 37 of the Constitution of South Africa, 1996" *The Human Rights and Constitutional Law Journal of Southern Africa* 1 1997 (6) 24.

Perhaps what we are seeing here is evidence of a compromise among the judges, between those who felt that the section was so bad that it ought to have been listed among the reasons for the text being rejected, and those who took the view that the provisions were acceptable, possibly because of the other safeguards in the Bill of Rights. It may be that the judges who found these emergency provisions anathema did not form a strong enough lobby (or could not find grounds related to non-compliance) to have them included on the list of sections which "failed" the certification test, but were able to insist that some straight talking about their objections was included in the judgment. Of course it may be that there was no division and that the judges were united in wanting to criticise the provisions, but could not refuse certification because they could find no grounds.

Whatever the case, the court creates the impression that the justices are so determined to make their views on this section known, and to announce the court as guardian of constitutionalism and of the fundamental rights of the people, that, in the name of the unanimous court, they knowingly step over the line the court has drawn for itself in defining its legitimate role as certifier of the constitutional text.

The court did not make up its mind whether to certify during the course of oral argument; that is not how it operates. And even afterwards as the decision-making process began, the judges did not decide immediately that the text should be sent back. As they worked through the draft in the light of the argument they had heard it seems that for some time the question whether to certify remained open. On some issues, the problems of non-compliance appeared relatively minor. Then a point was reached at which it became clear that certification was no longer an option - judging from the court's response during oral argument this could have been over the constitutional shield given the Labour Relations Act and the Promotion of National Unity and Reconciliation Act. The approach then shifted; if the text were to be sent back anyway, it would make sense to include on the list of provisions which did not make the grade even those which had been of less importance. And to throw in the chiding reference to the state of emergency provisions for good measure.

Through its lengthy judgment the court was doing more than simply carrying out a formal legal

exercise[139] and in the process of its complex task a strong theme emerges which its comments on the emergency sections underscore: that the judges will defend the values of constitutionalism and the mechanisms intended to safeguard them, against invasion from any quarter. And, as they did in the case of the "invidious and arbitrary" emergency provisions, they will speak up even if to do so goes beyond the task at hand.

Provisions found to be unsatisfactory

In summary, the court found that nine provisions of the draft text failed to satisfy the Constitutional Principles and referred the document back to the Constitutional Assembly for further work on these sections.

*As expected, the court had a problem with the section on labour provisions.[140] The judges said that the right of individual employers to engage in collective bargaining was not recognised and protected, although in terms of CP XXVIII it should have been. But objections to the exclusion of the lockout were not upheld - a major victory for Cosatu. In its judgment, the court clarified some of the ambiguity which Wallis had predicted, by spelling out its interpretation of employers' rights against the background of the Cosatu anti-lockout campaign: "The effect of including the right to strike does not diminish the right of employers to engage in bargaining, nor does it weaken their right to exercise economic power against workers. Their right to bargain collectively is expressly recognised by the text."[141] The court added, "The fact that the (draft text) expressly protects the right to strike does not mean that a legislative provision permitting a lockout is necessarily unconstitutional, or indeed that the provisions of the Labour Relations Act permitting lockouts are unconstitutional."[142] In spelling out its preferred reading of an apparently ambiguous text, the court was also here putting into practice two decisions dealt with elsewhere in the judgment, and discussed more fully below: the approach which the

---

[139]"Certification means a good deal more than merely checking off each individual provision of the (draft text) against the several CPs." *First Certification* judgment at 1270 F.

[140]Section 23 of the draft text.

[141]*First Certification* judgment at 1284 D.

[142]At 1285 B.

court should adopt to ambiguities in the text,[143] and the problem of ensuring that a later court accepted the present court's interpretation of important sections of the draft.[144]

*The court also objected to the two statutes which were given a constitutional shield by being included in the text of the draft constitution[145], ruling that this mechanism offended the principle that the constitution was the supreme law.[146] The court's decision on these statutes was another example of the assurance contained in the judgment that the bench would strongly defend constitutionalism and the rule of law. The mechanism by which the two Acts would have been enshrined in the constitution would not only have threatened the supremacy of the constitution, but also appeared to be an attempt at curbing judicial review by preventing the court from adjudicating on the two laws. Most of the court had had first hand experience of the effect of ouster clauses under the old system. The judges would have none of it in the new democratic order.

* The court continued to illustrate its commitment to protecting the values of constitutionalism when it complained of the section[147] setting out procedures for amending the text. It said that these provisions infringed the principle that amendments required "special procedures involving special majorities", as well as the principle that the Bill of Rights should be "entrenched". "We regard the notion of entrenchment 'in the Constitution' as requiring a more stringent protection than that which is accorded to the ordinary provisions of the (draft text). In using the word 'entrenched', the drafters of CP II required that the provisions of the Bill of Rights, given their vital nature and purpose, be safeguarded by special amendment procedures against easy abridgement. A two-thirds majority of one House does not provide the bulwark envisaged by CP II. That CP does not require that the Bill of Rights should be immune from amendment or practically unamendable. What it requires is some 'entrenching' mechanism ...

---

[143]For references to this problem, raised during oral argument, see above 18, 19, 40, 43, 48, 64.

[144]For references to this problem, raised during oral argument, see above 18, 19, 48, 63.

[145]The Labour Relations Act in s 241(1) of the draft text and the Promotion of National Unity and Reconciliation Act in Schedule 6 s 22(1)(b).

[146]*First Certification* judgment at 1309 A - G.

[147]Section 74 of the draft text.

which gives the Bill of Rights greater protection than the ordinary provisions of the (draft text). What that mechanism should be is for the Constitutional Assembly and not us to decide."[148]

*The judges also said they were unhappy about the lack of provisions ensuring the independence of the Public Protector[149], the Auditor General[150] and the Public Service Commission.[151] [152] Of the Public Protector, for example, the judges wrote, "The independence and impartiality of the Public Protector will be vital to ensuring effective, accountable and responsible government. The office inherently entails investigation of sensitive and potentially embarrassing affairs of government. It is our view that the provisions governing the removal of the Public Protector from office do not meet the standard demanded by CP XXIX."[153] It added that, "(l)ike the Public Protector, the Auditor-General is to be a watch-dog over the government."[154] The Auditor-General's function was central to ensuring that there is openness, accountability and propriety in the use of public funds. Such a role required a high level of independence and impartiality, but in the view of the court, the draft text did not adequately recognise this independence by suitable dismissal procedures.[155]

---

[148]At 1311 F - H.

[149]Section 194 of the draft text.

[150]Ibid.

[151]Section 196 of the draft text.

[152]For references to the issue of the independence of these three institutions and role-players, raised during oral argument, see above 42, 44.

[153]*First Certification* judgment at 1313 B.

[154]At 1313 E.

[155]At 1313 E - I. Section 194 of the draft text says that the Public Protector, the Auditor General and certain other officials can be dismissed on the grounds of "misconduct, incapacity or incompetence". Dismissal requires a "finding" of misconduct, incapacity or incompetence by a committee of the National Assembly, followed by the "adoption by the Assembly of a resolution, calling for that person's removal from office and adopted by a majority of the members of the Assembly." During oral argument, the judges had expressed concern that a "simple majority" in parliament could secure the dismissal of key watchdogs, saying that if important roleplayers in the democratic process could be dismissed so easily, it might affect the ability of these individuals to play the impartial, independent and fearless role which the constitution gave them. In the judgment, the court found that the dismissal mechanisms in relation to both the Public Protector and the Auditor-General were inadequate to safeguard their independence and impartiality.

* The provisions for local government[156] were held to be inadequate because they did not provide the "framework for the structures" of this level of government as demanded by CP XXIV, nor the financial powers and functions as stipulated in Constitutional Principle XXV, nor the formal legislative procedures as set out in CP X.[157]

* A lack of proper "fiscal arrangements"[158] scuttled another section of the draft text dealing with municipal rates and taxes.[159]

* Finally, after extensive agonising over a complex and minutely detailed balance sheet, the court concluded that the powers and functions of the provinces, as set out in the draft text, did not match the requirement of the Constitutional Principles that these powers and functions should not be "substantially less than or inferior to" their powers and functions under the Interim Constitution.[160]

At only one moment in the judgment does the court appear to have a slight sense of discomfort about its task.[161] It occurs as the justices weigh the provincial powers and functions to determine under which constitutional regime they were heavier. The judges say that after giving a particular weight to each of the factors they had listed as significant, and then working through the process as carefully and diligently as possible, they had concluded that the provincial powers and functions under the draft text were less than and inferior to those under

---

[156]Chapter 7 of the draft text.

[157]At 1349 - 1350.

[158]Section 229 of the draft text.

[159]At 1350 C - D.

[160]The exercise of weighing up the provincial powers and functions under the Interim Constitution and comparing the result with the powers and functions under the draft text was the largest single task undertaken by the court. The computations are spread across the judgment including 1331 - 1396. For references to debate on provincial powers during oral argument, see above 20, 25, 26, 29, 30, 61.

[161]Interestingly, as far as the writer can establish, the court did not express any sense of disquiet let alone complain about the nature of its task at any other point, either during oral argument or in the judgment. While clearly aware of the enormity of its task, the court was undaunted by it, and on occasion seemed rather to enjoy the undertaking even though it involved so much hard work.

the Interim Constitution.[162]

But that was only the first part of the exercise. It was the second step which the court found so difficult and of which it believed the Constitutional Assembly might have been the better judge.

"The question then is whether they (the provincial powers and functions under the draft text) can be said to be substantially less than or substantially inferior to such powers. This has been the most difficult of all the questions that we have been required to address in these proceedings. We are acutely conscious of the fact that in some respects the evaluation must necessarily be subjective and that the CA may be better placed than we are to make such a judgment.... We are, however, required to make this judgment ourselves, and to be satisfied that there has been compliance with CP XVIII.2."[163]

This hint that, after all the discussion and soul-searching of the debate during oral argument, the court was still not at ease with some aspects of the political nature of its task picks up from its initial remarks outlining how it saw its function. "First and foremost it must be emphasised that the Court has a judicial and not a political mandate: to certify whether all the provisions of the (draft text) 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 powers 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 (text), save to the extent that such choices may be relevant either to compliance or non-compliance with the CP. Subject to this qualification, the wisdom or otherwise of any provision of the (draft text) is not this Court's business."[164]

A little later the court added, perhaps as much for the judges to clarify their role to themselves as for the public: "(The draft text) may not transgress the fundamental discipline of the CPs; but within the space created by those CPs, interpreted purposively, the issue as to which of several

---

[162]*First Certification* judgment at 1396 D.

[163]At 1396 E - F.

[164]At 1273 G - H.

permissible models should be adopted is not an issue for adjudication by the Court. That is a matter for the political judgment of the CA and therefore properly falling within its discretion. The wisdom or correctness of that judgment is not a matter for decision by the Constitutional Court. The Court is concerned exclusively with whether the choices made by the CA comply with the CPs, and not with the merits of those choices."[165]

The court had more to say on some of the issues raised during oral argument and recounted above.

Textual ambiguities[166]*:* On the problem, raised early in the debate, of how to resolve apparent ambiguities, the court held that if more than one meaning could be given to a section, and if one of these meanings complied with the Constitutional Principles and the other did not, it was "proper to adopt the interpretation that gives to the (draft text) a construction that would make it consistent with the CPs."[167]

Binding a future court[168]*:* On how or whether to bind a future court to the present court's interpretation of a particular section - another problem with which the court wrestled throughout the hearing - the judges opted for a solution which they had at times appeared to reject during argument. They appealed to subsequent courts to consider themselves bound by the present court's interpretation whenever possible. The judges wrote, "A future court should approach the meaning of the relevant provision of the (draft text) on the basis that the meaning assigned to it by the Constitutional Court in the certification process is its correct interpretation and should not be departed from save in the most compelling circumstances."[169]

Invoking the solemn pact/Legislative history/Relative weight of CPs[170]*:*During argument, the

---

[165]At 1275 I - 1276 A.

[166]See above 18, 19, 40, 43, 48, 64.

[167]At 1276 D.

[168]See above 18, 19, 48, 63.

[169]*First Certification* judgment at 1276 F.

[170]See above on the solemn pact 18, 25, 30, 61; on legislative history 25, 47.

court had been referred repeatedly to the "solemn pact" concluded between the parties which enabled the negotiated settlement to be reached. Counsel for some of the objectors also urged the justices to give special attention to the legislative history of the settlement and to accord special weight to certain Constitutional Principles when deciding whether the draft text complied.

The court reviewed the significance of the solemn pact in the course of its historical outline as well as some of the history of the CPs and included, in footnotes, a number of amendments related to the CPs.[171] The court did not make any final ruling on the weight it would give legislative history in a certification case, but the fact that it included so much of the detail in its judgment, and acknowledged the significance of the CPs for the contending parties, is perhaps noteworthy.[172] In the result, however, it held that none of the principles was more important than any other and that even if one was introduced later than the others this did not mean that it counted for more. "Together they constitute the solemn pact .... Some of their provisions will have been of particular importance to certain political formations; but other provisions will have been of equal importance to others."[173] All the principles had to be interpreted "holistically" and none was entitled to special treatment simply because it was a late addition.

Extent of compliance required[174]: This issue, raised in debate with counsel, is dealt with in the judgment on several occasions as the court spells out how it had approached the problem of compliance.[175] The court eventually concluded that "the test to be applied is whether the provisions of the (draft) comply with the CPs. That means that the provisions of the (draft) *may*

---

[171]At 1351 A - E and n 219 and 220 of the judgment.

[172]See *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC), 677 F - 682 B, particularly 679 F and 680 B - E. Dealing with the question of the weight which the court may give to the legislative history of constitutional provisions, Chaskalson P wrote, "(W)here the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court interpreting the Constitution." (680 E) These rules presumably held good during the certification case as well.

[173]*First Certification* judgment at 1351 C - D.

[174]See above 23, 62.

[175]*First Certification* judgment at 1207 E - F; 1274 F - G; 1275 C - 1276 H and 1276 H - 1278 D.

not be inconsistent with any CP and must give effect to *each and all* of them."[176] [177] Whatever this means - and it is not entirely clear - it would appear that the court did not demand absolute compliance.

Horizontal application/Socio-economic rights[178]*:* The court rejected the argument against the inclusion of horizontally applicable rights and socio-economic rights. Summing up the objections to a horizontal application of the Bill of Rights, the court noted that objectors claimed it would breach the CPs which required a separation of powers between the legislature, the executive and the judiciary. Objectors claimed that horizontality permitted the courts to encroach on the sphere of the legislature, because it allows the court to alter legislation and in particular the common law.[179] The judges said this argument was flawed since the judiciary had always been the only arm of government charged with the development of the common law. But, they added, this argument also failed to recognise that even under the proposed text the court would not have the power to "alter" legislation. "The power of the judiciary in terms of the (draft text) remains the power to determine whether provisions of legislation are inconsistent with the (draft text) or not, not to alter them in ways which it may consider desirable.[180] Some objectors had complained that the inclusion of horizontal application in the draft meant the courts would have to adjudicate on competing rights and that this was not a proper judicial role. Not so, said the judges. Courts often have to balance competing rights.

Dealing with related objections to the inclusion of socio-economic rights, said by critics to infringe the separation of powers doctrine, the judges conceded that adding these rights to the constitution might result in the courts making orders with direct implications for budgetary matters. "However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be

---

[176]At 1276 C.

[177]Emphasis added.

[178]See above on horizontal application 40, 57; on socio-economic rights 55, 58.

[179]At 1280 G - H.

[180]At 1280 H.

said that by including socio-economic rights within a Bill of Rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a Bill of Rights that it results in a breach of the separation of powers."[181] As to the problem that such rights might not be justiciable, whereas the draft text apparently required that all universally accepted fundamental rights should be protected by justiciable provisions, the court held that socio-economic rights were not "universally accepted fundamental rights" since many countries did not include them in such a list. This implied that socio-economic rights did not have to be justiciable, even if included in the Bill of Rights. On the other hand, the judges said they believed that these rights were justiciable, at least to some extent. "At the very minimum, socio-economic rights can be negatively protected from improper invasion."[182]

Basic structure doctrine/Central core values of the Constitution[183]*:* The question whether the court could hold that future amendments of the constitution were unconstitutional on the basis of the basic structure doctrine or some similar argument, was not dealt with overtly in the judgment. During oral argument, debate on this issue involved only a couple of the justices. It could well be that the court did not believe this the appropriate occasion to raise another enormously complicated and controversial issue, particularly since the justices were already trying to deal with potential criticism that their role in the certification process went too far. However, the clear commitment to constitutionalism, exemplified perhaps by the court's comment on the emergency provisions, could indicate that the court would at least be prepared to entertain argument based on the basic structure doctrine. In dealing with the question of amending the constitutional text, the court said it was appropriate that provisions "which are foundational to the new constitutional state" should be less vulnerable to amendment than ordinary legislation.[184] It may be reading too much into such a phrase, but the language here is close to that used in the Indian judgments from which the basic structure doctrine is derived.[185] Finally, the court has already raised the question of the basic structure doctrine in one of its

---

[181]At 1289 F - G.

[182]At 1290 B - C.

[183]See above 52-55.

[184]*First Certification* judgment at 1310 B.

[185]See above n 87 and n 91.

earlier decisions, so the issue is at least on the table even if it has not yet been resolved.[186]

The question argued as an issue related to the "basic structure" doctrine, namely what the role should be of the Constitutional Principles once the text was certified and signed into law, is also not dealt with in the judgment. That does not mean of course that the judges thought it unimportant, merely that they did not need to settle or even canvass the question in the certification judgment. It is clearly an issue ear-marked for future litigation if potential litigants believe fundamental values of the Constitution, as articulated in the CPs, are threatened by proposed constitutional amendments.

And what of the complaint by traditional leaders that the horizontal application of the Bill of Rights would outlaw the patriarchal principles underlying much of customary law? The justices summarised the problem raised by the chiefs. They were concerned that the horizontal application of the Bill of Rights would nullify the protection given to traditional law under the draft constitution. This in turn, the traditional leaders feared, would put "such hallowed institutions as lobola (bride wealth) in jeopardy, open the way to allowing women to succeed to the monarchy on the same basis as men and prevent a father from claiming damages for the seduction of his daughter."[187] But the court decided there was little they could do to help since the Constitutional Principles clearly stated that indigenous law shall be recognised and applied by the court, *subject to the fundamental rights contained in the (draft text)*[188]. Thus, the judges concluded, the chiefs' real quarrel appeared to be with the Constitutional Principles themselves, rather than with the draft text. The problem therefore fell outside the competence of the court.[189]

---

[186] *Premier of KwaZulu-Natal and Others v President of the Republic of South Africa and Others*, the decision which mentions, in passing, the possibility of a court declaring amendments of the constitution, unconstitutional, was written (albeit with the court's unanimous consent) by Mahomed DP. It was also Mahomed DP who raised this issue with counsel during the certification case. Following his elevation to the position of Chief Justice, it is not clear what attitude the rest of the Constitutional Court would have to this argument. See above 52 - 55.

[187] *First Certification* judgment at 1324 D.

[188] Emphasis added.

[189] *First Certification* judgment at 1324 E.

Finally, in this brief survey, what happened to the objection raised by Beema Naidoo and his Concerned South African Indians?[190] The judges began by acknowledging that language was a sensitive issue in South Africa where there had been two official languages prior to the Interim Constitution. They said the objector had claimed that the language provisions in the draft text had infringed a number of Constitutional Principles; however, in the view of the court "no tenable argument was presented relating to the CPs".[191] CP XI was the only principle which might have had some relevance but even in the case of this principle "no cogent argument in support of the objections *can be* presented".[192] [193] This was because the CP aimed to provide protection for the "diversity of languages, not the status of any particular language or languages." Quite whether these remarks were also intended to make Naidoo feel that his cause would have fared no better had the organisation been able to employ experienced legal counsel is not clear. At any rate, the court went on to say that the granting of official language status was a matter for which the CA bore sole responsibility. The judges added that it was true that the Indian languages spoken by communities had been marginalised in the past. But they had been better protected through community schools than had indigenous languages such as San and Khoi. And if Indian languages were to die out in South Africa, this would not make them extinct as they would continue to flourish in their countries of origin. South African indigenous languages on the other hand were threatened with extinction. It was therefore neither unreasonable nor discriminatory to set up special mechanisms to protect "these specially vulnerable indigenous languages".[194]

The judgment ended with two observations. First, the court repeated that although some sections of the text did not comply, the overwhelming majority of clauses had met the requirements of the CPs. Second, the court noted that the instances of non-compliance were singly and collectively important, but "should present no significant obstacle to the formulation

---

[190]See above 34

[191]At 1326 C.

[192]Ibid.

[193]Emphasis added.

[194]At 1327 A.

of a text which complies fully with those requirements."[195]

At various places in its ruling, the court had spelt out exactly how the text could be amended so as to satisfy the CPs, and these final remarks were a clear encouragement to the drafters to keep going. Now the stage was set for the Constitutional Assembly to reconvene and refine the original document in the light of the court's remarks. By mid October 1996, the CA had completed its revision and the new draft was back before the court a month later, ready for the second certification case to begin.

THE SECOND CERTIFICATION CASE

From 18 November 1996, for almost three days, the Constitutional Court heard the CA's second application for certification. It was an altogether less substantial affair: the judges had to consider written objections from just 18 private individuals or interest groups,[196] while the Inkatha Freedom Party (jointly with the province of KwaZulu-Natal) and the Democratic Party were the only objectors who presented oral argument to the court. There was also less media coverage and less speculation - even among insiders - about the outcome. As far as the public was concerned it seemed almost certain that the Constitutional Court would not refuse certification a second time, particularly since the CA had apparently noted and acted on the court's comments.

Even the imagery of judicial comments reflected a different mood from that in the first case.

During the previous hearing, for example, during the discussion on provisions for cooperation between provinces and the central power, Justice Mahomed did not mince his words, "I think it is apple pie." His colleague, Justice Kriegler retorted, "It is not apple pie. It is moonlight and roses." The second time round everyone suffered from a noticeable staleness, including Justice Sachs, one of many judges frustrated when counsel for the Inkatha Freedom Party and

---

[195]At 1399 G.

[196]Compared with 84 private parties and groups in the first case.

KwaZulu-Natal, tried to re-open the old question of provincial powers. Justice Sachs could have been speaking for most in the court when he said he had a profound sense of *déjà vu* and told Inkatha's counsel David Unterhalter, "You are boiling the cabbages twice."

Among other subjects revisited by Unterhalter were the controversial emergency provisions. The non-derogable rights in the amended text included those guaranteeing equality - but only on the grounds of "race, colour, ethnic or social origin, sex, religion or language." Unterhalter said that the exclusion of sexual orientation from this list (although it is protected in the Bill of Rights) perpetuated anti-homosexual prejudice, a submission perhaps indirectly acknowledged in the judges' decision.[197]

At the end of the second day, Justice Chaskalson outlined the order to be followed by counsel in completing their argument the next morning, the last day of the hearing. Justice Didcott, who had clearly watched a television interview on the certification case broadcast the previous evening with Nicholas Haysom, special adviser to President Mandela, then broke the strain of a rather tedious session. After counsel had finished the following day, he quipped, all that remained would be, "as Professor Haysom had put it, to wait until the fat lady sings".

None of the judges fits that description literally, but it was less than a month before the curtain rose for the court's aria on the amended text.

On December 4 its decision was announced: this time the text had complied. Finally, South Africa had its own democratic Constitution.

The judges' historic order read, "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."[198]

But it was a closer call than many people realise. There are signs that in its approach to the

---

[197] *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (1) BCLR 1 (CC) (the *Second Certification* judgment) at16 E - H.

[198] *Second Certification* judgment at 60 H.

amended text, the court might have been more deferential than the first time round, perhaps applying less strict standards for the CA to meet.[199] Yet even so, the key question of provincial powers came close to failing the court's second test.

In addition to its anticipated task of scrutinising amendments made to sections which the court had previously found fatally flawed, the judges were presented with a completely new problem in the second certification case. This problem, and the court's resolution of it, proved particularly interesting. The text being examined was basically the same as it had been during the first hearing, apart from the amendments made in response to the court's judgment and a number of "editorial and other minor changes"[200]. What, in that case, was to be the court's view if objectors raised problems with sections of the text which had not been targeted for objection in the previous round?

The court decided that it was open to such objectors to attempt to persuade the court of the validity of their criticisms. It warned, however, that persuading the court would be a difficult - it used the word "formidable"[201] - task. This was because the first hearing and the court's response had been very thorough and detailed. There had been extensive participation by the parties, the CA and "from the broad spectrum of South African society as a whole".[202] It was possible but "unlikely"[203] that some important feature had been overlooked. It was also possible that the court had erred and wrongly concluded that a section had complied: "(m)any of the questions raised at the time were difficult and we have no claim to infallibility."[204]

"We cannot vacillate," the justices declared. "The sound jurisdictional 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

---

[199]See below 94 - 100.

[200]At 7 C.

[201]At 8 B.

[202]At 8 C.

[203]At 8 D.

[204]At 8E.

certification process and in view of the virtually identical composition[205] of the Court that considered the questions barely three months ago, that policy is all the more desirable here."[206]

Moreover, the procedure for certification as laid down in the Interim Constitution[207] and the expectations to which it had led, also needed to be considered. These procedures set up an "interaction" between the Constitutional Assembly and the Constitutional Court in terms of which the court would give reasons for any finding of non-compliance. For its part, the CA was to respond by passing amendments to its earlier draft that took these reasons into account. This dialogue in turn had created an expectation that if the CA made the changes to which the court had pointed, and if the court found these changes satisfied its earlier complaints, the CA could then legitimately anticipate that the revised text would be certified. The judges would not lightly dash this expectation. However, the finality of certification, which closed the door to future contests over the validity of the text, demanded that the court "make assurance doubly sure" and the bench had therefore carefully examined even those objections which related to sections of the text not previously challenged.[208]

Against this clear warning that success was unlikely, objectors were free to raise new issues. One of these was the Black Sash Trust which took issue with s 22 of the amended text.[209] The relevant portion of the section to which the Trust objected reads, "Every citizen has the right to choose their trade, occupation or profession freely." According to the Black Sash Trust, this infringed CP II which requires that "Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties." The trust argued that "everyone" was a broader concept than "every citizen", and the right ought to be extended to all, irrespective of citizenship.

---

[205]The only difference was that Justice Ackermann, who had become ill during the hearings in the first certification case and took no part in the deliberations of the court after that, was back on the bench for the second certification case.

[206]At 8 F.

[207]Section 73 A.

[208]*Second Certification* judgment at 8 H - 9 A.

[209]This was also the only private objector whose objection was dealt with fully by the court in its judgment. The court (at 10 C - D) said that it had studied all of the submissions made by private parties but had not considered it necessary or desirable to address them all in its written decision.

Given its earlier comments, it came as no surprise that the court rejected this objection, calling it "foundationally flawed". Primarily the "fatal flaw" lay in the fact that the right contended for by the trust was not a "universally accepted fundamental right" since a number of international instruments as well as "exemplary constitutional democracies" either have no such right or limit it to citizens.[210]

In the second judgment as in the first, discussion of the powers of the provinces takes up most space, with the judges closely examining each change made by the CA to check whether it added anything to the weight of provincial powers, took power away, or made no obvious difference.

Previously the court had found that the powers and functions of the provinces as provided in the draft text were less than in the Interim Constitution on four matters: provincial police powers, tertiary education, local government and traditional leadership.[211] On their own, however, these diminutions were insufficient grounds to refuse certification.[212] Provincial powers and functions may have been "less than" the interim Constitution, but they were not "substantially less". What finally brought the scale down against the first draft text was the "override" clause which meant that national legislation could rather more easily prevail over provincial legislation than was possible under the Interim Constitution. The judges found that this tilted the balance, and meant that the draft text infringed CP XVIII.2.[213]

In the court's second judgment, therefore, the key question was whether the judges would find the CA's reworking gave enough power back to the provinces to satisfy CP XVIII.2. After minute examination and once more "weighing the baskets", the judges concluded that this had been achieved. But only just. As the court put it, under the amended draft the powers and functions of the provinces were still less than or inferior to those of the Interim Constitution, "but not substantially so".[214] The difference is crucial since the court would have had to refuse

---

[210]*Second Certification* judgment at 11 D - 13 C.

[211]*First Certification* judgment at 1398 A.

[212]Ibid.

[213]At 1398 E.

[214]*Second Certification* judgment at 60 G.

certification if the draft failed to satisfy even one of the principles: the Constitution therefore just scraped by on the weight of "not substantial".

After examining the other amendments made by the CA in the wake of the first certification judgment, the court was still not completely happy with certain provisions. While the justices' comments on these sections bordered on criticism, however, they did not withhold certification on account of these difficulties.

On the amended emergency provisions, for example, the judges commented that while objections to them were "not without substance",[215] these provisions still passed the test of compliance with the CPs.

In its earlier judgment, the court found the table of non-derogable rights reflected choices which needed to be made more thoughtfully and rationally. During argument in the second case, objectors said that the selection was still not rationally made. For example, counsel for KwaZulu-Natal accepted that there might be aspects of the right to freedom of conscience, religion and thought which could legitimately be curtailed during an emergency. The court noted, however, that counsel had added 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".[216]

Similarly, while discrimination on some grounds such as race and sex was made non-derogable, discrimination on other grounds such as gender and sexual orientation, was still not given this (non-derogable) protection in the amended text. It was contended by counsel that there was "no rational basis for these exclusions".[217]

This lack of rational basis was exactly the reason for the court's criticisms of the comparable section in the first draft. In its second judgment the court commented, perhaps with some

---

[215]At 16 E.

[216]At 16 C.

[217]At 16 B.

feeling, that counsel had a point in their complaints. However, the court's problem with the lack of a rational basis for the exclusions had not weighed heavily enough the first time round to become a reason for withholding certification. Now that the drafters had taken out the specific grounds (relating to a fair trial) which the court had criticised earlier, it was hardly likely that the lack of rational basis for the other exclusions would, on its own, merit rejection of the entire text.

Interestingly, the court appears to come to the defence of the CA at this point in the judgment, explaining the particular problems which the drafters had experienced with the section, as though by listing these reasons the "lack of rational basis" for the exclusions would be mitigated. The court said it had to be acknowledged that there were difficulties in defining, in the abstract, precisely what rights or what "core" aspects of particular rights should be made non-derogable[218]. Also the CA had had to compile its draft "at a time when the parameters of the rights referred to were uncertain and had not yet been the subject of judicial determination."[219]

In addition, the court pointed out, "CP II does not require that any particular rights or category of rights be made non-derogable under an emergency." [220] This, of course, was the crucial issue and the reason that the table of non-derogable rights had not been included in the list of sections causing certification to be refused in the first case.

On the other hand, the court seemed to feel it had to acknowledge - and then allay - the anxiety expressed over these provisions by the objectors. "It is understandable," the justices said, that people falling into categories protected by the anti-discrimination clause in the Bill of Rights should "express concern" over their exclusion from the categories listed as non-derogable.[221] The court appeared to offer some comfort to such people by pointing to provisions in the section which would provide "extensive protection" of all the rights in the Bill of Rights during an emergency. One such protection was that any derogation be "strictly required" by the

---

[218]At 16 E.

[219]Ibid.

[220]At 16 H.

[221]At 16 G.

emergency, which the court described as imposing a "stringent test".[222]

The court then concluded that in neither certification case had objectors been able to point to any universally accepted principle concerning the protection of rights under a state of emergency that has not been met by the state of emergency provisions in the Bill of Rights. (The court could have added that it, too, had been unable to find such a universally accepted principle, although it must obviously have looked for one.) "It was for this reason that in our previous judgment we declined to hold that (the emergency provisions relating to non-derogable rights) did not comply with the CPs. For the same reason we must reject the objection raised in the present proceedings."[223]

The redrafted provisions for entrenching the Bill of Rights also resulted in an inconclusive semi-complaint, as we shall see below. However, this Bill of Rights issue was more significant than the question of derogable rights since (unlike the state of emergency section) it had been one of the reasons that certification had been refused in the first judgment. This meant it was a "live" problem and an issue over which the court could well have refused to certify if the amendment failed to satisfy the standards demanded by the justices.

In their first certification decision, the justices had spoken strongly about the need to "secure" any new constitution as the supreme law of the land, against "political agendas of the ordinary majorities in the national Parliament".[224] They added, "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."[225] As for entrenchment protection for the Bill of Rights, the court said that because of the "vital nature and purpose" of the Bill of Rights, this should be "a more stringent protection than that which is accorded to the ordinary provisions of the (constitution)."[226]

---

[222]At 16 H.

[223]At 17 D.

[224]*First Certification* judgment at 1310 B.

[225]At 1310 C.

[226]At 1311 G.

These remarks were of a piece with the theme, evident throughout the first judgment, of judicial determination to be the ultimate guardian of constitutionalism and the rule of law. But the standards of the guardians seem to have undergone a change by the second judgment and in some respects were no longer as strict.

In the first judgment, the court had given heavy-handed hints to the CA about how to deal with the requirement for "special procedures" to amend constitutional provisions, and also gave some indication about what might satisfy its demand for greater protection of the Bill of Rights.

On the "special procedures" question, the judges say it is "of course" not their function to decide what would be appropriate. However, they immediately add: "but it is to be noted that only the (National Assembly) and no other House is involved in the amendment of the ordinary provisions of the (constitution); no special period of notice is required; constitutional amendments could be introduced as part of other draft legislation; and no extra time for reflection is required. We consider that the absence of some such procedure amounts to a failure to comply with CP XV."[227]

When the CA came to revise these sections, it not surprisingly added "special procedures" for constitutional amendment along the lines suggested by the court.

On the entrenchment of the Bill of Rights the justices also had a number of suggestions. The court noted, "A two-thirds majority *of one House*[228] does not provide the bulwark envisaged by CP II .... What (that CP) 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 (draft constitution). What that mechanism should be is for the CA and not for us to decide."[229]

In the end, the CA did not follow up the option it was given of stipulating a "greater majority in the NA" for changes to the Bill of Rights, but instead brought the National Council of

---

[227]At 1311 B.

[228]Emphasis added.

[229]At 1311 H.

Provinces (NCOP) into the entrenchment mechanism - an option offered to it by the court. Under s 74(2)(b) of the amended text, at least six provinces in the NCOP must support any amendment to the Bill of Rights, as well as at least two thirds of the members of the National Assembly (as had been laid down in the previous text).

I would argue that the CA's decision to choose this option flowed from political considerations, rather than from a concern to make changes which would *in fact* significantly increase the level of protection given to the Bill of Rights. It could be contended that stipulating a threshold of two-thirds for both chambers has the advantage of consistency, and that it also involves a second chamber, thus following one of the suggestions put forward by the court. But on the other hand, the ANC which is by far the largest party in the CA, holds a majority in seven of the nine provinces. If the party wished to amend the Bill of Rights, it would be quite certain of obtaining the support of six provinces - far more certain than it could be of obtaining a majority higher than two-thirds within the National Assembly where its majority stands at 63 percent.

From this point of view then, the CA's option to involve the NCOP as a second chamber rather than raising the majority required to pass an amendment to the Bill of Rights can hardly be said to increase the degree of entrenchment afforded the Bill of Rights in any practical way.

Secondly, while the NCOP is given a limited role in matters not relating to the provinces, its main function is to act as a representative of provincial interests and to provide a forum where such issues are discussed. It would thus not seem a particularly appropriate body for its new task which is to wield the crucial casting vote on whether to amend the Bill of Rights.

There was at least one other potential weakness in the new arrangement. The section providing that the NCOP has to support a Bill of Rights' amendment by at least six provinces has no additional entrenchment or special procedure. It may therefore be amended - or even scrapped altogether - simply by the normal two-thirds majority required for constitutional amendments. If this happened, the court's attempt to ensure additional protection for the Bill of Rights would come to nothing. The mechanism which could prevent this taking place is found, by implication, in s 74(3)(b)(i). A move by the National Assembly to do away with the requirement that the NCOP approve changes to the Bill of Rights by at least six provinces would surely fall into the category of an issue "(relating) to a matter that affects the council",

and the approval of at least six provinces in the NCOP for such a change would then be required.

The presumed requirement that six members of the NCOP must consent to a change in the National Assembly's voting majority is, however, not spelt out in s 74(2) or (3). Commenting on this aspect of the amended text, the justices say that if the CA had included an express requirement that the NA's voting majority (needed to change the Bill of Rights) could not be amended without the consent of six of the nine provinces in the NCOP the Chapter 2 rights "would have been even more securely entrenched." The court adds, "This may well have been desirable. However we cannot say that it was necessary."[230]

In all, the amendment seems to have made little difference to the quality of entrenchment of the Bill of Rights. Perhaps in its first certification decision, the court ought not to have been as specific about what it would regard as acceptable protection mechanisms for the Bill of Rights by pointing the CA in the direction of the NCOP as an alternative to higher majorities. And it could also have been more rigorous in applying the standards of compliance demanded in the first judgment to this proposed amendment in the second draft. Overall, the court's decision to certify despite the CA's rather ineffective mechanism ostensibly intended to give greater protection to the Bill of Rights, tends to create the impression that the court was more deferential the second time round.

In its first certification judgment, the court praised the CA for a difficult task well done, calling it a "monumental achievement".[231] In the later case it noted that the CA had "conscientiously addressed"[232] the shortcomings identified in the earlier judgment, had made a concerted effort to rectify them (as guided by the court) and had so clearly eliminated many of the original grounds that no renewed objection could be raised.[233]

However well deserved these compliments, the narrow margin by which the text passed in the

---

[230] *Second Certification* judgment at 25 B.

[231] *First Certification* judgment at 1275 A.

[232] *Second Certification* judgment at 10 F.

[233] Ibid.

case of provincial powers is a reminder that this issue continues to be a matter of potential conflict. The courts have already heard several cases related to this question, and there are no signs that the problem will go away just because a new Constitution is now in place. Indeed, both draft provincial constitutions so far submitted to the court for certification have failed primarily because of difficulties relating to this still unresolved issue.

THE FOUR CERTIFICATION JUDGMENTS

While the certification process carried out by the Constitutional Court is clearly unique in the world, it is no longer unusual in the repertoire of the court. Already[234] the court has given four certification decisions,[235] two concerning the national constitutional text and two dealing with proposed provincial constitutions (submitted by KwaZulu-Natal[236] and the Western Cape[237]).

A detailed comparison of the judgments in the four certification cases will not be undertaken here, but a few general points can be made about the judgments in the four cases.

All certification decisions have been unanimous and delivered in the name of the "The Court". They all appear to have been edited to ensure uniformity of language and tone throughout the judgment.

Within the confines of its chosen certification linguistic style, the court has given clear and sometimes very detailed reasons for its decisions not to certify, so that the drafters may rework

---

[234]October 1997.

[235]A fifth judgment, in which the court certified the Western Cape provincial constitution in an amended form, was handed down by the court too late to be considered for this work. It is reported as *Certification of the Amended Constitution of the Western Cape 1997* 1997 (12) BCLR 1653.

[236]The *Kwa-Zulu-Natal Certification* judgment.

[237]The first judgment on the Western Cape's provincial constitution was handed down on September 2 1997. It is reported as *In re: Certification of the Constitution of the Western Cape 1997* 1997 (9) BCLR 1167.

the text according to these guidelines and re-submit it. As has already been mentioned, however, the KwaZulu-Natal judgment is to some extent an exception in this regard.

It is also noteworthy that the historical background[238] in the first national certification case is not repeated in any of the other decisions. It has been argued[239] that this section forms the court's justification for the process it is undertaking and its response to the countermajoritarian dilemma; clearly this first statement contextualising and implicitly justifying the court's role is meant to apply in all subsequent certification cases. The dilemma implicit when unelected judges overturn decisions made by democratically elected representatives continues to present itself even in the case of provincial constitutions. But perhaps the problem is lessened, at least in the case of the Western Cape and any other provincial constitution which the court might consider from now onwards. The Western Cape case was brought under the final Constitution, and this would also apply in other provincial certification cases. This means the court's mandate to consider, and grant or refuse certification, comes from a constitution drawn by a democratically elected constitutional assembly - not, as with its first certification case, from a group of political leaders whose support had yet to be properly tested.

The most obvious lesson to be learnt from the four cases is that obtaining certification is not an easy matter. No-one has so far managed to pass on the first attempt. The Western Cape had a second try on November 18 1997, but it is still unclear whether KwaZulu-Natal will submit another text, or if any other provincial government intends drafting a provincial constitution.[240]

In all four certification cases, provincial powers and the relationship between the central and provincial governments were pivotal in the court's judgment. The question of this relationship has been raised, however, from different perspectives. In the two national certification cases, the court was concerned to ensure that the provinces were given enough power to satisfy the CPs. But just because the provincial powers were found lacking in the first national judgment, does not mean that the court will allow the provinces to help themselves to more.

---

[238]*First Certification* judgment, Chapter I.

[239]See above 72 - 74.

[240]See Carmel Rickard 'Government Two, Provinces Nil: Regional autonomy will not be won on the battle ground of the Constitutional Court' *Sunday Times* 7 September 1997 in which it is suggested that other provinces are unlikely to do so.

As with the first national draft text, that submitted by KwaZulu-Natal was approved by several parties which later raised objections at the certification hearings. In the case of KwaZulu-Natal all parties involved in the negotiation of the KwaZulu-Natal text voted in favour so that it was passed unanimously by the legislature. This anomaly - of a party (in this case the ANC) supporting the draft in the legislature or the Constitutional Assembly, yet opposing it in the Constitutional Court - was raised during argument in the KwaZulu-Natal case, but in its judgment the court merely noted this fact, adding that it (the court) did not know why the ANC had acted in this way and that counsel "were not in a position to enlighten us". Moreover, the judges added, the fact that the text was passed unanimously "cannot in any way influence the duty imposed on this Court".[241]

The KwaZulu-Natal draft was dismissed out of hand by the court which found large sections completely unacceptable as they purported to usurp powers and functions of the national government. At one stage the court commented, "This (section) bears all the hallmarks of a hierarchical inversion. The provincial Constitution is presented as the supreme law recognising what is or is not valid in the national Constitution. It has no power to do so."[242] There were other problems too such as the popularly termed "sunrise clauses" (suspensive clauses) in terms of which certain sections, giving the provincial government significantly more powers, would come into effect only once these powers had been conferred on the provinces by the central government. In a sense, therefore, these clauses represented a provincial "wish list", and were a reminder of the strength of federal feelings among some sections of the province. The judges, however, found this device another reason to refuse certification. The court said that if it were to certify a constitution containing these clauses in the text, it would create confusion. Moreover, it was clear that "merely to suspend part of the text of a provincial constitution that is inconsistent with the interim Constitution, cannot save the (provincial) constitution from the consequences of such inconsistency."[243]

So much else was wrong with the draft that the court makes a point of noting that it had identified problems in certain areas only. Lack of comment on other sections did not

---

[241] *KwaZulu-Natal Certification* judgment at 1425 F - G. See n 19 above.

[242] *KwaZulu-Natal Certification* judgment at 1430 G.

[243] At 1435 G.

necessarily mean those sections were certifiable.

The court's response prompted officials of the province's majority Inkatha Freedom Party to complain that there was clearly no point in drafting provincial constitutions, since the space defined for developing provincial powers - or even, as with the "sunrise clauses", the aspiration of such powers - was so circumscribed.[244] However, judgment in the KZN case might not have been the best source from which to draw such a conclusion as the provincial text was so extreme in its demands for increased power. Perhaps a province adopting a more temperate approach would fare better. With this in mind, observers took a keen interest in the outcome of the Western Cape certification attempt.

By the time the draft of the Western Cape provincial constitution was considered for certification, the final Constitution was in place and the provincial text had to meet a slightly different standard than would have been the case under the Interim Constitution.

This text, too, was turned down by the court. But although the justices declared they could not certify it, they were able to provide clear guidelines to the province for exactly how the faults could be rectified (unlike the KwaZulu-Natal judgment in which the court found the text "widely flawed" and appeared hardly to know where to begin). The Western Cape drafters had clearly learnt from the KwaZulu-Natal experience, and the temptation to incorporate more provincial powers than are accorded under the national Constitution was more firmly held in check.

Despite this self-restraint, however, all three fatal flaws detected by the court relate, directly or indirectly, to the Western Cape taking more power than it was allowed as a province. The most contentious of these related to the provision that the province would operate an electoral system that "results, in general, in proportional representation" (as demanded by s 105(1)(d) of the Constitution) but within that framework would use geographic multi-member constituencies rather than the single list system used for national elections.[245]

---

[244]See Peter Smith 'Provincial Constitutions a Waste of Paper' *Business Day* 19 March 1997.

[245]Schedule 6 of the 1996 Constitution, read with Schedule 2 of the Interim Constitution, stipulates a list system for both provincial and national elections.

The court found that this difference amounted to an impermissible inconsistency and that a province has to adopt the same list system as operates at the national level.

The effect of this judgment is to give notice to supporters of greater provincial powers: they should abandon any belief that these powers can be significantly developed by the mechanism of provincial constitutions. Through its first *Western Cape* decision the court has so clearly narrowed the gap for federal development via provincial certification, that the Inkatha Freedom Party in particular must be wondering if it made a mistake in strategy.

The party's space to lobby for federal changes has become ever more restricted since it walked out of Constitutional Assembly talks which formulated the first draft constitutional text - and never returned. As a result of this walk-out, it effectively lost the capacity to act as a pro-federal lobbyist during the drafting and negotiation phase, the period when it could have had most impact. Instead, party strategists appeared to pin their hopes on the Constitutional Court and the certification process. The IFP thinking seems to have been that, through the application of the relevant CPs, the court would ensure the final text embodied more provincial power than the CA proposed. The court did in fact rule that the provincial powers in the first draft were insufficient and sent back the text for these powers to be increased. At the same time, however, the Inkatha Freedom Party's provincial aspirations as articulated in the draft KwaZulu-Natal provincial constitution were dealt a severe blow when its own draft text was also rejected. The warning bells must have been sounding. After the first judgment, Inkatha negotiators approached key committees of the CA to request that the assembly re-open discussions on a broader range of issues than those identified by the Constitutional Court as needing amendment. Their request was turned down as the dominant groups in the CA were determined to limit negotiations to the matters listed by the judges. Inkatha therefore announced it would not return to negotiations: it would be a waste of time to go back to the CA since the party's complaints went beyond the nine provisions found by the court to be unsatisfactory.[246] In other words, from the perspective of the Inkatha Freedom Party, they had been squeezed out of the negotiating process. The space for them to press their federal position had thus decreased significantly - and it was to narrow even further.

---

[246]This is the Inkatha Freedom Party viewpoint as explained by IFP negotiator Peter Smith in an interview with the writer, October 23 1997.

Once the court certified the amended text in its second certification decision, the Inkatha Freedom Party had lost its battle: as a mechanism to increase provincial powers in the final constitutional text, the CPs (on which Inkatha had pinned some hope) had become a spent force; the CA, which at least to some extent was fuelled by the impetus of negotiation, had completed its work; in parliament, where the federalists are hopelessly outnumbered, the dictating force is, increasingly, power politics and no longer, as in the past, consideration for negotiation partners or pressure to finalise a mutually agreeable text. As far as the National Council of Provinces is concerned, it has not yet tested its strength, but it is unlikely to provide either the platform or the leverage which the federalist lobby needs. The ANC has a strong majority in the council and the NCOP has in any case chiefly been cast as a kind of consultative body/discussion forum. Its restricted powers mean that on most issues it lacks clout to challenge the centre. Whether it has the will to do so even on those issues where it has the power, remains to be seen. The court's first *Western Cape* decision reveals that provincial constitutions will not be allowed to play the role of challenger to centralised power either (that is, provincial constitutions may not be the vehicle through which provincial powers are increased nor may they deviate from national constitutional requirements so as to develop regional variants). As far as the IFP is concerned, the court has proved disappointing as a means to boost provincial powers. The party might well have come to believe that it could have gained more by staying in the CA and negotiating for the constitution to include additional provincial powers, than through quitting the CA and taking the fight to the court instead.

A few possibilities for extending provincial powers still remain to be tested, but they will not necessarily vindicate the IFP decision to stay out of the original negotiations in the CA. Several ANC-held provinces have indicated some level of dissatisfaction with the extent of powers the provinces may exercise and, ironically, had been closely watching the two provincial certification cases to see whether constitution-making was a viable method of increasing provincial powers. Following the failure of the Western Cape and KwaZulu-Natal to make significant inroads through provincial constitutions, some elements within these ANC provinces might resort to internal party bargaining to push the ANC for greater provincial powers. It is possible that, if this were to happen, the ruling party would be more accommodating than it has been when faced with similar demands from political opponents. Such a scenario could also see attempts to change the NCOP, with its ANC members trying to shape it into becoming an aggressive champion for increased provincial powers. Both these

possibilities are, however, put forward somewhat tentatively, and there is no evidence that any ANC provincial dissatisfaction which might exist has yet reached the stage at which action along these lines is being considered.

Another possible and more likely source of increased provincial power is the courts, although not through the mechanism of provincial constitutions. Rather, the courts could become important as they begin to interpret the over-ride clauses, particularly s 146(2)(b) and 146(4). These clauses, dealing with the procedure to be adopted when national and provincial legislation clash, remove the first draft's presumption in favour of the central government and make the dispute "objectively justiciable in a court without any presumption in favour of ... national legislation".[247] Quite what the court's approach will be, and whether the provinces will benefit from the changes to the over-ride provisions made in the final text, remains to be seen.

CONCLUSION

Driven to desperation, negotiators at talks over South Africa's political future took the great risk of casting one of their own creations, the Constitutional Court, in the role of lifesaver. The parties believed this stratagem could prevent what appeared to be the imminent wreck of negotiations and the resulting likely capsize of hopes for a peaceful future. The risk was great but the alternative too ghastly to contemplate.

The success of their stratagem can largely be judged by whether the risk paid off and this must be measured, ultimately, by public perception. Would the public accept a decision by the court not to certify the text; and would the public accept the constitution which the court finally approved?

Three years after the negotiators had agreed on the court's certifying role, the Constitutional Assembly had completed its draft constitutional text and was ready to present it for approval. By then the risk, if anything, had grown. The fragile democracy and its important component,

---

[247] *Second Certification* judgment at 47 A.

the Constitutional Court, had begun to work well and this made the stakes even higher.

It was possible that if the CA's first draft text was not certified, the court could be exposed to criticism on the grounds that it, an unelected body, had rejected the document negotiated by democratically elected representatives of the people. Rejection might take on even more popular significance since the text was the first democratically drawn constitution in South Africa's history. If that criticism were strong enough and jeopardised public acceptance of the outcome, several consequences could have followed. Had the CA, or a significant number of parties represented in it, decided to ignore the court's decision, the state and court would have found themselves in conflict and created a constitutional crisis. This would also have threatened the foundation on which the peace settlement rested, since parties could then legitimately have pulled out of the deal. Ramifications for the Constitutional Court itself could have been fatal, with its authority in other spheres of its work undermined.

Up to that point judgments of the court appeared to have been fully accepted by the public. Even when it had ruled that the death penalty was unconstitutional, undoubtedly its most controversial and unpopular decision, critical public response was mainly directed at the politicians, rather than the court. By the time the first certification case was argued, the credibility of the 11 judges, initially questioned by some,[248] was high. However, whichever way the court ruled, the certification judgment could have changed this. If the judges were to decide against certification there was always the possibility that their decision would be rejected. If they were to vote in favour - particularly if the public gained the perception during the hearing that the text in fact did not satisfy the Constitutional Principles - they ran the risk of appearing to be too close to the majority party. Since its establishment, the court had proved itself a key element in the new democracy, and popular rejection of the court's certification finding on whatever grounds would have been disastrous not only for the court but also for the governance of the country.

Even apart from all these considerations, however, the sheer magnitude and responsibility of the task made it a daunting exercise for the bench. Members of the court were embarking on a unique judicial and political experiment in which traditional legal guidelines would inevitably

---

[248]See above n 6.

prove less than adequate and the justices would have to find their own way. During the hearing, the judges occasionally gave the impression of being uncertain about the role in which they had been cast. Their questions about the approach they should adopt, the nature of the task they were carrying out and the extent of their latitude to check the will of the Constitutional Assembly, combined to convey a sense of the stress under which they were working.

And they did not even have the option of declining the task. However incompatible with the proper role of a court they may have believed it to be, it was one of the functions for which this particular court had been created.

Against this background, why were the judgments - particularly the first which went against the draft - so widely accepted?

Strong public participation in the certification process was a helpful way of ensuring support for the outcome of the hearing, and of reducing the likelihood that the worst case scenarios outlined above would become reality. This might have been one of the many considerations which prompted an early decision by the court to broaden its invitation beyond the political parties. The court might also have had the countermajoritarian dilemma in mind when it decided to extend a general invitation to the public. Either way, the policy bore fruit. Scores of individuals and lobby groups made written submissions, and a request from the court to present oral argument was highly prized. Such an invitation represented an opportunity to lobby for the cause which the individual represented, and also, as Naidoo explained, it was seen as a chance to participate in making history.

Among the responses to the court's invitation for written submissions, the politically most important came from the IFP and a cluster of white right-wing groups including the Conservative Party and various religious, farming and other organisations. They were significant because all of them might have been expected to stay aloof from the process.

As already discussed,[249] the IFP's decision to make submissions was important because of that party's boycott of negotiations over the proposed constitutional text, and the strong sense of

---

[249]See above 8 - 9 as well as Chapter Seven of this work.

disaffection which it projected.

Similarly, the Conservative Party's decision to participate in the certification process was noteworthy. Following the growth of white extremist groups over the last years of apartheid in particular, the decision of the CP and others to stay at arm's length from the new constitutional order had been a cause for some concern. During transition, the CP had walked out of negotiations over the new political dispensation, and had refused to participate in the 1994 elections. When the equally conservative, but more pragmatic Freedom Front made a different choice and opted to stay in the system, the CP called their former colleagues "traitors". The CP appeared determined to retain its ideological purity by having nothing to do with the new constitutional order. Just a couple of years later, however, when the Constitutional Court invited submissions on the draft constitution, among the objectors queuing up for a say on the text was the Conservative Party. Also in line were the Volkstaatraad and the Transvaalse Landbou-Unie, conservative cultural and agricultural organisations respectively.[250]

All three, along with a number of fundamentalist religious organisations which propagate "traditional" family relationships and are strongly opposed to abortion and gay rights among others, made written submissions and were then invited to present oral argument during the two week long hearing.

CP spokesman on law and order, and on prisons, Daan du Plessis, said subsequently[251] that when the party participated in the certification process or invokes the Bill of Rights in court action, it is merely using the structures provided by the Constitution to safeguard the interests of the Afrikaner people, something the party would do "whenever possible". He denied that this meant the CP was becoming part of the new constitutional order. If he is correct, the CP's policy is similar to that which was used by many anti-apartheid activists under the previous

---

[250]Among the key concerns of these three groups was the issue of language rights, and in particular, special protection for Afrikaans. They also argued that the Constitutional Principles should be interpreted as requiring stronger entrenchment of property rights and more security of farm land ownership against government land restitution policies. Their third major argument was that the constitution should have a far stronger federal character than provided for in the draft.

[251]See Carmel Rickard 'Defending the rights of the nation's Right: the new order safeguards everyone including those whose past political activities might have put them beyond the pale' *Sunday Times* 5 October 1997.

regime: they frequently took issues to court in the hope of achieving some improvements in the lives of people living under apartheid laws. This strategy by anti-apartheid activists and their lawyers did not indicate that those involved in the litigation accepted either these laws or the apartheid system itself.

However, other right wing politicians belonging to parties inside parliament, commenting on the nature and extent of the Conservative Party's use of the new Constitution, said it was inevitable that if a party used the system it was "being brought on board".

This view is shared by other commentators who do not support the right wing, for example, the deputy director of the Centre for Human Rights at the University of Pretoria, Christof Heyns. Heyns has said[252] that conservative groups initially reluctant to have anything to do with the system now had "one leg in it". They could clearly be said to be working within the system since they so often invoked their rights under the new Constitution. He said that during the apartheid era some black people facing charges in court had refused to put up any defence or even to speak in court, claiming the laws, the court and the trials were all illegitimate. This was not the path chosen by the conservatives under the new Constitution. "They are using the courts and thus, in a way, they are buying into the system", Heyns said. He added that it was "almost a human rights dream come true" that conservative groups like the Volkstaatraad and the CP were starting to rely on the Constitution and its fundamental rights.

Speculation Heyns and others that the Conservative Party was increasingly accepting and even becoming part of the new constitutional order has been given added weight with the decision taken at the party's congress on October 3 1997, to contest the 1999 general elections.[253]

The invitation from the Constitutional Court for submissions from any group or individual thus had the significant spin-off that apparently disaffected groups applied to participate, effectively engaged in a dialogue with the new constitutional order, and so obtained first hand experience

---

[252]Ibid.

[253] Commenting on the resolution, Conservative Party secretary Wouter Hoffman told the author that the party regarded participation in the elections "in a particular light", and would be trying to work with other groups and parties to form "a new movement for self determination" to contest the elections.

of participation in it. Through their participation, these groups might well have intended to achieve the limited aim of ensuring the text was refused certification. They presented fully argued, proper legal opposition to the draft and clearly accepted the authority of the court. But it can be argued that, in doing so, they tacitly approved and set the scene for further participation by right wing organisations and individuals in the new legal order which they had originally spurned.

As it transpired, there was no significant opposition to the outcome of the court's certification judgments. In fact, the only public criticisms were made on the basis that more people would have liked to participate, but because of the court's time limits and other constraints, were unable to do so.[254]

When the negotiating parties mandated the court to certify the draft constitutional text, they were fully aware that it was a highly unusual task. They had deliberately set the court as an arbiter over the CA in the exercise of the Assembly's legitimate political role, giving the court the power to override the decisions of the democratically elected CA on this issue. Logically, therefore, the parties could not have had any quarrel with the court when it exercised this mandate. Moreover, all the parties may well have concluded - although for different reasons - that it was in their best interests to accept the two decisions.

The parties which had objected to aspects of the first text were pleased that they had convinced

---

[254]See Michael O'Dowd, "Right to object to constitution nothing more than a sham" *Business Day* 9 July 1996. O'Dowd, executive director of the influential Anglo American company, but writing in his personal capacity, says the court should have given people "at least two months in which to lodge their objections, and that the court should have been prepared to take another two months to hear them." As far as the court (and the rest of the country) was concerned, however, hearings lasting two months were never an option.

The author is also in possession of correspondence between the Constitutional Court and Nils Dittmer, executive director of the Organisation of Livestock Producers. This concerns Dittmer's allegations, based on the criticisms raised in the O'Dowd article, that insufficient time had been given to individuals and groups other than the political parties, to participate by submitting written objections. A year after the hearing, however, Dittmer told the author that despite his initial complaints about not being able to participate he was now satisfied, on the basis of correspondence with the court and its refusal to certify the first draft text, that the objections of his organisation had been dealt with, albeit they were raised by other parties during the hearing. "We feel that our objections were actually put to the court, and that the constitution as it now stands is as strong as we can get it," he said.

the court to send the draft back for revision, and they welcomed the second opportunity to negotiate for their particular position in the CA. In addition, even though the ANC had technically "lost" the first certification case, its majority in the CA still operated on the basis that an all-inclusive solution was the best option. Its representatives therefore raised no challenge to the political validity of the first judgment.

By the time of the second case, it was clear that the opposition parties had won as much ground as they could from the process of certification. Fewer objectors asked to make submissions and the National Party, for example, threw in its lot with the Constitutional Assembly and the ANC, and made no separate representations. Only the Democratic Party and the Inkatha Freedom Party (together with the KwaZulu Natal government) made oral submissions. Although these two parties might have been disappointed in the outcome of the second case, it would not have been in their best interests to challenge the validity of the decision: the Democratic Party does not appear to believe in boycott politics, while the Inkatha Freedom Party (which, as discussed above, had some experience of the consequences of going it alone) may well have felt that there was little point in isolating itself further. On the other hand, the opposition parties had much to gain by accepting the outcome: they could stay in the mainstream political process, increase their own legitimacy and project themselves as parties which believed in constitutionalism and which would press for the changes they believed in, through constitutional means.

As far as the public was concerned, most people seemed to understand and accept that events unfolding at the court were part of the political development to which their representatives had committed the country during the multi-party talks. There was, as we have seen, wide-spread participation in the process, it was given good media coverage and there was a general sense of the process being sufficiently transparent.

The court's decision was clearly neither arbitrary nor poorly considered. The judgment was widely publicised and many people were able to see its reasoning for themselves: it was so obviously meticulously weighed and balanced that it would have been difficult to dismiss it. Perhaps the court was consciously trying to create an impression of having carried out its task and reached its conclusions with scrupulous, almost scientific, care and exactitude. If the justices were indeed concerned to create this impression, it could help explain the judgment's measured tones and why the text is carefully stripped of the colour and imagery which formed

so noticeable a part of the oral argument.

The question of language, tone and scrupulous fairness would also have been important for the right wing groups. Already opposed to the draft text, they did not question the decision of the court. But it is difficult to imagine them accepting such a decision if it had gone the other way and if the body adjudicating the matter had not been the court, but a politically-appointed tribunal. It could well be that for these groupings as for others, the reason the negotiators' "great experiment" worked was at least in part that the adjudicating function was given to a court with a growing reputation for independence, and that the question whether to certify or not was seen as essentially a legal decision, rather than a political one. If this is so, then the trappings of the court take on new significance: the dignity and reputation of the court, the reasoning of the judgment and its language and style, all become important factors in ensuring that the certification process was acceptable even to those who might otherwise have been alienated by it and by the rest of the new legal order of which it formed part.

The language of the document could also have been selected for another reason. It has drawn comment from several authors including Chaskalson and Davis[255] who speak of its "often sparse language", and Devenish,[256] who says that the technical challenges of the process and the decision to write it *en bloc* "did not lend (themselves) to a judgment which is jurisprudentially and linguistically interesting".[257] It could well be argued, however, that the court adopted this particular linguistic approach precisely because it is so "sparse" and will therefore not pre-empt development of the law in this field.

None of this, however, would have counted for much if the public had not already begun to form a view of the court as a credible, reliable and independent body. Neither linguistic

---

[255]Chaskalson and Davis, 3 n8.

[256]G Devenish "Certification of the Constitution of the Republic of South Africa 1996", (1997) 8. This unpublished manuscript is to form the concluding chapter of a book on the South African constitution.

[257]Devenish, at 8, continues that the judgment "could have been presented in a more imaginative way, reflective of the intensely fascinating era of exciting and profound jurisprudence that the new Constitution is responsible for inaugurating into our legal system."

strategies nor decisions which appeared to be based on quasi-scientific methods would have helped ensure public acceptance if people had been convinced (or had been persuaded to believe) that the court was biased.

The political parties did not attempt to persuade their supporters to reject the outcome: instead they presented the first decision as democracy, constitutionalism and the independence of the court at work, while the second decision was portrayed as the court validating the voice of the people.

Some of the remarks by the justices during oral argument as well as in the first certification judgment itself, appear to reflect a slight sense of discomfort about certain aspects of the certification task and in particular, their power to overturn the decisions of the CA. Ironically, however, their decision to exercise these powers in the initial judgment may well have helped enhance the court's reputation for independence. Certainly, that is how a number of politicians and newspaper editorial writers projected the outcome.

The undoubted success of the certification process was due to many factors: public belief in the court and its members as credible, fair and independent; the media's crucial role in explaining events, monitoring the process and conveying a sense that the process was transparent; the political leaders and negotiators who played an important part in educating their supporters, and who worked across party lines to draft the constitutional texts. Perhaps it was due most of all, however, to the overwhelming majority of ordinary people who approved the negotiation process - including certification which they came to accept as a necessary part of it - apparently because they saw it as the best option to resolve South Africa's political problems and avoid the disaster which had so often seemed imminent.

At the start of the first certification hearing Justice Mahomed used an aviation metaphor. He described the CPs as the lights of the runway, within which the plane was operated. "You can choose the speed and the angle, but it must be between its lights." At the end of the hearing Bizos took up the image. "There is a grave responsibility on this court," he said, "to see whether the front wheel of the plane is dead centre or whether, on landing, the fringes of the wings have gone over the limits." But with the successful completion of the certification process this metaphor can be extended: the plane was partly operated by instruments never tested before, in

a manoeuvre never yet attempted. However, after a failed first attempt at landing, it was put down safely within the lights of the runway. While members of the court may devoutly wish to be spared such an experience ever again, the negotiators' risk had paid off handsomely.

BIBLIOGRAPHY

BOOKS AND ARTICLES

Cachalia A, Cheadle H, Davis D, Haysom N, Maduna P and Marcus G (eds) *Fundamental Rights in the New Constitution: An overview of the New Constitution and a commentary on Chapter 3 on Fundamental Rights* Cape Town: Centre for Applied Legal Studies, Wits and Juta 1994

Chaskalson M and Davis D "Constitutionalism, the Rule of Law, and the *First Certification judgment: Ex Parte Chairperson of the Constitutional Assembly in Re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC)" Unpublished manuscript due to be published in the *South African Journal on Human Rights* later this year.

Chaskalson M, Kentridge J, Klaaren J, Marcus G, Spitz D and Woolman Stuart (eds) *Constitutional Law of South Africa* Cape Town: Juta 1996

Davis D, Cheadle MH and Haysom NRL (eds) *Fundamental Rights in the Constitution: Commentary and Cases. A Commentary on Chapter 3 on Fundamental Rights of the 1993 Constitution and Chapter 2 of the 1996 Constitution* Cape Town: Centre for Applied Legal Studies, Wits and Juta 1997

Devenish G "Certification of the Constitution of the Republic of South Africa 1996" (1997) Unpublished manuscript to form the concluding chapter of a book on the South African constitution.

Govender K "Holding the line on Constitutional Supremacy" *Human Rights and Constitutional Law Journal* 1 1996 (3) 2

Govender K "The Virtues of Balancing" *Human Rights and Constitutional Law Journal* 1 1997 (6) 2

Mureinik E "A Bridge to Where?: Introducing the Interim Bill of Rights" *South African Journal on Human Rights* 10 1994 (1) 31

Palmer R "Declaration of a State of Emergency: Section 37 of the Constitution of South Africa, 1996" *The Human Rights and Constitutional Law Journal of Southern Africa* 1 1997 (6) 24

Van Wyk D, Dugard J, de Villiers B and Davis D (eds) *Rights and Constitutionalism: The New South African Legal Order* Cape Town: Juta 1994

In addition, much of this work, particularly Chapter Four, is based on shorthand notes taken by the author during the nine days of oral argument heard by the court. See Chapter Four, 12 - 69.

TABLE OF CASES

Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (1) BCLR 1 (CC)

Certification of the Amended Text of the Constitution of the Western Cape, 1997 1997 (12) BCLR 1653

Du Plessis and Others v De Klerk and Another 1996 (5) BCLR 658 (CC)

Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others 1995 (10) BCLR 1289 (CC)

Gupta v Union of India (1982) SC 149

Indira Nehru Gandhi v Raj Narain (1975) SC 2299

In Re: Certification of the Constitution of the Province of KwaZulu-Natal, 1996 1996 (11) BCLR 1419 (CC)

In Re: Certification of the Constitution of the Republic of South Africa, 1996 1996 (10) BCLR 1253 (CC)

In Re: Certification of the Constitution of the Western Cape, 1997 1997 (9) BCLR 1167

Kesavananda v The State of Kerala (1973) SC 1461

Minerva Mills Ltd v Union of India (1980) SC 1789

Minister of Justice v Ntuli 1997 (6) BCLR 677 (CC)

Premier of KwaZulu-Natal and Others v President of the Republic of South Africa and Others 1995 (12) BCLR 1561 (CC)

S v Makwanyane and Another 1995 (6) BCLR 665 (CC)

State of Rajasthan v Union of India (1977) SC 1361

CONSTITUTIONAL TEXTS

Constitution of the Republic of South Africa Act 200 of 1993

Constitution of the Republic of South Africa 1996 (as adopted by the Constitutional Assembly on May 8 1996)

Constitution of the Republic of South Africa 1996 (as adopted by the Constitutional Assembly on May 8 1996 and as amended on October 11 1996) Act 108 of 1996