1/19/16

Constitutional Assembly

Certification Judgement

Opinion

9 September 1996

CONSTITUTIONAL ASSEMBLY

CERTIFICATION JUDGEMENT

OPINION

INTRODUCTION

1. The Constitutional Court gave judgement on 6 September 1996 on the certification of the New Text. It held that certain provisions did not comply with the Constitutional Principles. The purpose of this opinion is to identify the provisions concerned and the reasons for which they were held to fall short of the Constitutional Principles. We will also comment on the way in which these deficiencies might possibly be cured.

2. We will refer to the Interim Constitution as "IC", the Constitutional Principles as "CP" and the new text as "NT".

NT 23: THE RIGHT TO COLLECTIVE BARGAINING[1]

3. CP XXVIII requires that the right to engage in collective bargaining be conferred on

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[1] Judgement 42:69

"employers and employees". NT 23(4)(c) confers this right on trade unions and employers' organisations. The court held that it fell short of the requirement of CP XXVIII in that the right is not conferred on individual employers[2].

4. This shortcoming could be cured by amending NT23 to confer the right to engage in collective bargaining on individual employers.

NT 241(1): IMMUNITY OF THE LABOUR RELATIONS ACT[3]

5. NT 241(1) immunises the Labour Relations Act against constitutional review. The court held that it was in conflict with CP IV which provides that the constitution shall be supreme and CP's II and VII which provide that the fundamental rights contained in the constitution shall be justiciable[4].

6. This shortcoming could be cured by deleting NT 241(1)[5]. The deletion would remove the limited protection afforded by NT 241(1) to employers' right to lock-out. It would

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[2] Judgement 43:69

[3] Judgement 86:149

[4] Judgement 87:149

[5] It could theoretically also be cured by incorporating the whole of the Labour Relations Act into the constitution itself. But that would be wholly impractical. It would mean that the act could only be amended by constitutional amendment.

however not offend the CP's because the court held that they do not demand that employers' right to lock-out be constitutionally protected[6].

ITEM 22(1)(b) OF NT SCH 6: IMMUNITY OF THE TRUTH ACT[7]

7. Item 22(1)(b) of NT Schedule 6 similarly immunises the Promotion of National Unity and Reconciliation Act against constitutional review. It was held to offend the CP's on the same grounds as the immunisation of the LRA[8].

8. This shortcoming could be cured by deleting Item 22(1)(b) of NT Schedule 6.

NT 74: AMENDMENT OF THE CONSTITUTION[9]

9. CP XV provides that amendments to the constitution shall require "special procedure involving special majorities". The court interpreted this requirement to mean that both "special procedures" and "special majorities" were required. It held that whilst NT 74

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[6] Judgement 40:68

[7] Judgement 87:150

[8] Judgement 87:150

[9] Judgment 88:152-156

prescribed "special majorities" for constitutional amendment, it did not require "special procedures" and accordingly fell short of the demand of CP XV[10].

10. This shortcoming may be cured by prescribing "special procedures" for constitutional amendment in NT 74. These procedures may of course take many different forms. They might for instance be of the kind envisaged by the court in coming to its conclusion that NT 74 lacked any special procedures.

> "It is of course not our function to decide what is an appropriate procedure, 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 NT; no special period of notice is required; constitutional amendments could be introduced as part of other draft legislation; and no extra time for reflection is required."[11]

NT 74: ENTRENCHMENT OF THE BILL OF RIGHTS[12]

11. CP II requires that the Bill of Rights be "protected by entrenched and justiciable provisions" in the constitution. The court interpreted this requirement to mean that more stringent protection of the Bill of Rights was required than that which was accorded to the ordinary provisions of the NT. It held that "in using the word

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[10] Judgement 90:156

[11] Judgement 91:156

[12] Judgement 91:157-159

"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"

and added that "a two thirds majority of one House does not provide the bulwark envisaged by CP II"[13].

12. This shortcoming could be cured by building into NT 74, a more stringent requirement for amendment of the Bill of Rights than that required for ordinary constitutional amendment. The court said the following in this regard:

> "What it requires is some "entrenching" mechanism, such as the involvement of both Houses of Parliament, or a greater majority in the National Assembly or other reinforcement which gives the Bill of Rights greater protection that the ordinary provisions of the NT."[14]

NT 194: THE PUBLIC PROTECTOR AND AUDITOR-GENERAL[15]

13. CP XXIX requires that the independence of the Auditor-General and Public Protector

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[13] Judgement 92:159

[14] Judgement 92:159

[15] Judgement 92:161-165

"be

provided for and safeguarded by the constitution". In terms of NT 194(1) these functionaries may be removed from office by ordinary resolution of the National Assembly on the grounds if misconduct, incapacity or incompetence after a finding to

that effect by a committee of the National Assembly. The court held that although these requirements provide some protection of the independence of these functionaries, it was inadequate because only a simple majority was required for the National Assembly resolution[16].

14. This shortcoming could be cured by introducing in NT 194, a requirement of a special majority for the removal from office of the Public Protector and Auditor-General.

NT 196: THE PUBLIC SERVICE COMMISSION[17]

15. The court found that the provisions of NT 196 relating to the PSC were lacking in the following respects:

15.1 They do not sufficiently define the powers and functions of the PSC. NT 196(1) merely says that it shall "promote the values and principles of public

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[16] Judgement 95:163 and 96:165

[17] Judgement 198:170-177 and 153: 275-278

administration in the public service". The court contrasted this provision with IC 210 which defines the powers and functions of the PSC in much greater detail. It held that although the CP's did not expressly require the powers and functions of the PSC to be defined, it was nonetheless necessary to enable the court to

determine whether the NT complied with the requirement of CP XXIX that the independence and impartiality of the PSC be provided for and safeguarded; the requirement of CP XX that each level of government shall have appropriate and adequate legislative and executive powers and functions; and the requirement of CP XVIII(2) that the powers and functions of the provinces shall not be substantially less than or substantially inferior to those provided for in the IC[18].

15.2 The court left open the question whether the NT complied with the requirement of CPXXIX that the independence and impartiality of the PSC be provided for and safeguarded. It held that it could not come to any conclusion in this regard "without knowing what the functions and powers of the PSC will be and what protection it will have in order to ensure that it is able to discharge its constitutional duties independently and impartially"[19].

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[18] Judgement 103:177

[19] Judgement 103:176

16. These deficiencies could be cured by,

16.1 defining the powers and functions of the PSC and

16.2 building in greater protection of the independence and impartiality of the PSC than that provided in NT 196(2).

17. The powers and functions of the PSC have an effect on the powers and functions of the provinces in relation to their own administrations. The definition of the powers and functions of the PSC may accordingly impact on the requirement of CP XVIII(2) that the powers and functions of the provinces shall not be substantially less than or substantially inferior to those provided for in the IC. Care should thus be taken in the definition of the powers and functions of the PSC to avoid any unnecessary diminution of provincial power and to compensate for any diminution that might be unavoidable.

NT CH 7: LOCAL GOVERNMENT[20]

18. The court held that the provisions of NT Chapter 7 fell short of the requirements of the CP's in the following respects:

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[20] Judgement 165:299-305

18.1 CPXXIV requires "a framework for local government powers, functions and structures". Chapter 7 does not create such a framework[21].

18.2 CPXX requires that formal legislative procedures be adhered to by legislative organs at all levels of government. NT Ch7 fails to provide for formal legislative

procedures at local government level[22].

18.3 CPXXV prescribes that the framework for local government "shall make provision for appropriate fiscal powers and functions for different categories of local government". The court held that NT Ch 7 did not comply with this demand[23]. It held in particular that the provision of NT 229(1) which authorises municipalities to impose "excise taxes", violated the CP because the concept of "excise taxes" included taxes inappropriate for municipalities to impose[24].

19. These shortcomings may be cured as follows:

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[21] Judgement 166:301

[22] Judgement 167:301

[23] Judgement 167:302

[24] Judgement 167:303-305

19.1 Chapter 7 should provide for a framework for local government powers, functions and structures. The court described the minimum requirements for such a framework as follows:

> "At the very least the requirement of a framework for local government structures necessitates the setting out in the NT of the different categories of local government that can be established by the provinces and a framework for their structures...A structural
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> framework should convey an overall structural design or scheme for local government within which local government structures are to function and provinces are entitled to
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> exercise their establishment powers. It should indicate how local government executives are to be appointed, how local governments are to take decisions, and the formal legislative procedures demanded by CPXX that have to be followed."[25]

19.2 The framework should prescribe formal legislative procedures for local government in compliance with CPX.

19.3 The framework should provide for appropriate fiscal powers and functions for different categories of local government in compliance with CP XXV.

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[25] Judgement 166:301

NT CH 6 : PROVINCIAL POWERS[26]

20. The court held that the powers and functions of the provinces under the NT were substantially less than and substantially inferior to those in the IC in violation of CP XVIII(2). It dealt at length with the areas in which provincial powers have been enhanced, have remained unchanged and have been diminished. It would not serve any useful purpose to summarise all its findings in this regard. The areas of diminution of power which moved it to conclude that there had been a violation of CP XVIII(2) were

the following:

20.1 NT 146(4) which creates a rebuttable presumption in favour of national legislation passed by the NCOP[27].

20.2 NT 146(2)(b) which allows national legislation to prevail over provincial legislation in the "interests of the country as a whole" by the provision of uniform norms, standards, frameworks or national policies[28].

20.3 NT Schedules 4 and 5 which endow the provinces with "marginally less"

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[26] Judgement 168:306-481

[27] Judgement 185:336

[28] Judgement 186:337

legislative power than that under IC Schedule 6[29].

20.4 The powers of the provinces in relation to local government matters[30].

20.5 Provincial powers in relation to police matters (described as a "significant reduction"[31]).

20.6 Provincial powers in relation to traditional leadership (described as a "small" diminution which is "not marked"[32]).

21. This deficiency may of course be cured in very many different ways. The court's final summary of its conclusions on this issue does however suggest one way which should carry the court's blessing:

21.1 In its final summary of its conclusions on CP XVIII(2), the court referred[33] to the curtailment of provincial power in four respects and then continued as

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[29] Judgement 186:338-341 and 251:457

[30] Judgement 201:364, 207:374 and 254:463

[31] Judgement 223:401 and 247:448

[32] Judgement 227:409 and 250:456

[33] Judgement 261:478

follows:

> "Seen in the context of the totality of provincial power, the curtailment of these four aspects of the IC Sch 6 powers, would not in our view be sufficient in themselves to lead to the conclusion that the powers of the provinces taken as a whole are substantially less than or substantially inferior to the powers vested in them under the IC"[34].

21.2 The court then went on to hold that the balance was tipped by the diminution of provincial power by NT 146(2)(b) which creates new ground of national legislative override and NT 146(4) which creates a presumption in favour of national legislation[35].

21.3 It seems clearly to follow that, but for NT 146(2)(b) and NT 146(4), the court would have held that the NT complied with CPXVIII(2). The deficiency may be cured by,

- deleting NT 146(2)(b) and replacing it with a provision comparable to IC 126(3)(b) and (c) and

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[34] Judgement 261:479

[35] Judgement 262:480-481

- deleting NT 146(4).

22. There is one important qualification to this conclusion. The court held that it could not give a firm or final answer to the question of compliance with CP XVIII(2) "until the issues relating to the powers of the provinces in regard to the appointment of their own employees, as well as the powers and functions of the PSC, have been clarified[36]. It follows that care should be taken in the formulation of the powers and functions of the PSC in relation to the provinces, not to bring about any unnecessary diminution of provincial power and to compensate for any diminution that might be unavoidable.

NT 37: STATES OF EMERGENCY[37]

23. The court dismissed the objections to the provisions of NT 37 relating to states of emergency but voiced strong criticism concerning the lack of logic in the classification of rights as derogable and non-derogable:

> "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. A clear example is the derogability of NT 35(5). Derogation from such a right cannot be justified even in an emergency. Any attempt at such justification would fail in terms of NT 37(4). No purpose is therefore served by this attempt to render derogable what can in practice never be justified.

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[36] Judgement 259:473

[37] Judgement 58:91-95

Although we accept that it is 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 is done in NT 37(5)."[38]

24. We would suggest that this matter be rectified even though it is not necessary to do so for the sake of compliance with the CP's.

WIM TRENGOVE SC

CHAMBERS

JOHANNESBURG

9 SEPTEMBER 1996

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[38] Judgement 60:94-95