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Constitutional Assembly

Memorandum on Constitutional Court Decision on Certification: Remedying the Defects

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MEMORANDUM ON CONSTITUTIONAL COURT DECISION ON CERTIFICATION: REMEDYING THE DEFECTS

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1. The Constitutional Court identified in paragraph 482 of its judgment that the following provisions of the NT[1] do not comply with the CPs[2]. They are -

1.1. NT 23 - The individual employer's right to bargain collectively;

1.2. NT 241(1) - The shielding of the LRA from constitutional review;

1.3. NT Sch 6 s22(1)(b) - The shielding of the Promotion of National Unity and Reconciliation Act from constitutional review;

1.4. NT 74 - Constitution amendment procedures;

1.5. NT 194 - The Public Protector and Auditor-General;

1.6. NT 196 - The Public Service Commission;

1.7. NT Ch7 - Local government;

1.8. Provisions relating to the powers and functions of the provinces.

2. We deal with each of the Court's decisions in this order. At the end of each section we propose ways to remedy the defects.

NT refers to the new constitutional text which was referred to the Constitutional Court for certification.

CP refers to the Constitutional Principles in the interim constitution (the "IC").

NT 23 - THE RIGHT OF INDIVIDUAL EMPLOYERS TO BARGAIN COLLECTIVELY

3. CP 28 provides that "the right of employers and employees to engage in collective bargaining shall be recognised and protected". NT 23 specifically only entrenches the right of employers' associations to engage in collective bargaining, and does not specifically entrench the right of individual employers to bargain collectively. In a very literal reading of the Constitutional Principle, the Court held that "the failure by the text to protect such a right represents a failure with the language of CP XXVIII which specifically states that the right of employers to bargain collectively shall be recognised and protected" (paragraph 69). The brief reasoning upholding the objection is oblivious to the complex ramifications associated with the formulation of a constitutional right to bargain collectively.

4. The impugned text of NT 23 sought to give individual employers the right to bargain collectively through their organisations. This was done in order to give effect to CP 28 but also to ensure that the constitutional entrenchment of the rights to collective bargaining did not constitute a basis for limiting the legislature's choice as to what the appropriate collective bargaining forums and levels should be. The Court held that the text must protect and guarantee an individual employer's right to bargain collectively.

Remedying the Draft Text

There are several options to remedy the defect.

Option 1:

Remedy: To include the right to bargain collectively as one of the employer's rights in section 23(3).

Motivation: This will remedy the failure identified by the Constitutional Court. It will not however address the concerns that motivated the specific formulation of the rights to collective bargaining in NT 23 - namely the potential for an implied constitutional choice in favour of plant level bargaining to the exclusion of industry level bargaining. This concern may be addressed by option 2.

Option 2:

Remedy: To include the right to bargain collectively as one of the employer's rights in NT 23(3) and to protect centralised bargaining by reformulating NT 23(5) to include the following:

> "(5) The provisions of the Bill of Rights do not prevent legislation -
>
> (a) recognising union security arrangements contained in collective agreements;
>
> (b) promoting collective bargaining at industry level[3]."

Motivation: This is the change proposed in option 1 together with an amendment to NT 23(5). The amendment to NT 23(5) seeks to address the concern that the formulation of a right of an individual employer to bargain collectively may include an implied constitutional choice in favour of plant level bargaining.

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[3] This conveys the idea. The exact formulation requires further work.

Option 3:

Remedy: To delete the right to bargain collectively in section 23(4)(c) and to insert a new clause:

> "(6) Collective bargaining is hereby protected and guaranteed."

Motivation: This option seeks to avoid the pitfalls of identifying the bearers of the right and the consequential implications for a constitutional choice of one collective bargaining regime over another.

SECTION 241(1) - THE SHIELDING OF THE LRA FROM CONSTITUTIONAL REVIEW

5. Section 241 shielded the LRA from constitutional review. It was introduced as a compromise to meet the concerns raised by business that the failure to specifically include the right to lock-out in the Bill of Rights would render the lock-out provisions in the LRA unconstitutional. Labour objected strenuously to isolating those provisions for constitutional protection. Accordingly the whole LRA was shielded. The Court held that this offended CPs 2, 4 and 7 which require that statutory provisions be subject to the supremacy of the constitution unless they are made part of the constitution itself. To be part of the constitution the provisions have to comply with the CPs and be subject to amendment by special procedures. It was clear that section 241 did not intend to make the provisions of the LRA part of the constitution. Accordingly by shielding statutory provisions from constitutional review, section 241 offended the three CPs.

6. The Court rejected the argument that the exclusion of a right to lock-out in NT 23 would render the lock-out provisions in the LRA unconstitutional. In

paragraph 64 the Court also rejected the argument that the failure to include a right to lock-out in NT 23 would not leave employers without the right to exercise economic powers against their adversaries: "Once a right to bargain collectively is specifically recognised, implied within it will be the right to exercise some economic power against partners in collective bargaining." Accordingly there is no longer a need for NT 241.

Remedying the Draft Text

7. Delete NT 241 in its entirety.

NT SCH 6 S22(1)(b): THE SHIELDING OF THE PROMOTION OF NATIONAL UNITY AND RECONCILIATION ACT FROM CONSTITUTIONAL REVIEW

8. NT Sch 6 s22(1)(b) was introduced in order to prevent constitutional challenges to the radical inroads that the Act needs to make in respect of fundamental rights in order to advance reconstruction and reconciliation, and to prevent the disruptive consequences of constitutional litigation in respect of a commission that has to complete its work within a specified timetable.

9. The Constitutional Court held that CPs 2, 4 and 7 read together require such provisions to be subject to the supremacy of the constitution unless they are made part of the constitution itself. The intention of NT Sch 6 s22(1)(b) was to protect the provisions of the Act from constitutional review without making it part of the constitution. The NT accordingly offended the three CP's.

10. Before considering how to remedy the defect, it is useful to consider the Constitutional Court decision in AZAPO and Others v The President of the

Republic of South Africa and Others[4] concerning the constitutionality of s20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995. S20(7) provides that persons granted amnesty in respect of any act, omission or offence are not "criminally or civilly liable in respect of that act, omission or offence".

11. The constitutionality of s20(7) was attacked on the grounds that it violated the fundamental right to access to courts contained in s22 of the IC[5]. A unanimous[6] decision of the court held that s20(7) of the Act was constitutional. The reasons for arriving at this decision are important for assessing the possible response to the Court's refusal to certify NT Sch6 s22(1)(b). The reasons in brief are:

11.1. a fundamental right in Chapter 3 may be limited by s33(1) (the "limitations clause") or by "any other provision of the constitution" (s33(2) of the IC);

11.2. the epilogue authorises a law to advance reconciliation and reconstruction;

11.3. the epilogue is part of the IC and ranks equally with the rest of it;

11.4. the essential features of the Act[7] were carefully considered and held to be authorised by the epilogue;

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4 Unpublished judgment, Case CCT 17/96 dd 25 July 1996.

5 NT 34 grants a similarly worded right to access to courts

6 Judge Didcott filed different reasons but arrived at the same conclusion as the other judges.

7 The essential features are the wide scope of the amnesty in respect of both criminal and civil liability and the limited quantum of the reparations.

11.5. accordingly the Act has constitutional sanction to limit the right to access to courts.

12. The reasons motivating for the inclusion of this sub-section have fallen away because:

12.1. the Constitutional Court has upheld[8] the constitutionality of the core provisions of the Act under the IC;

12.2. the textual base for that decision is reproduced in the NT namely:

12.2.1. s33(2) of the IC which permits fundamental rights to be limited by "any other provisions of the constitution" is retained in NT 36(2);

12.2.2. Sch 6 s22(1)(a) adds the text of the epilogue of the IC to the text of the NT. This provision was specifically addressed in the Court's decision in paragraphgraph 150. That paragraphgraph reads:

> "NT Sch 6 s22(1)(a) is not in breach of the CPs. This provision adds the text of the epilogue of the IC to the NT. As such, that provision is rendered part of the NT and subject to constitutional amendment in the ordinary course. It was not argued and it could not have been argued that the text of the epilogue was in breach of the CPs on any other ground."

The AZAPO decision referred to above.

12.2.3. the epilogue is therefore a "provision of the constitution" for the purposes of NT 36(2);

12.2.4. accordingly the constitutionality of the Act will be upheld under the NT for the same reasons that it was upheld under the IC.

Remedying the Draft Text

13. The remedy is to delete NT Sch 6 s22(1)(b).

NT 74 - CONSTITUTION AMENDMENT PROCEDURES

14. Here the Court identified the need to provide for "special procedures involving special majorities" in NT 74. The Court found that while a special majority is required by s74 of the NT, no special procedure other than the majority is envisaged or certainly no procedure different from that for passing national legislation.

15. The Court does not specify what such additional procedural steps should be but indicated notice periods as an example.

16. The Court also adopted the view that CP 2, in requiring that the fundamental rights be "entrenched", envisages that this "entrenchment" would involve some additional procedural or other requirements than that applying to ordinary constitutional amendments. Again the Court was unwilling to propose what these procedures should be. They did suggest, however, that the involvement of the NCOP would meet the requirement - <u>provided</u> that the NCOP is not also similarly implicated in ordinary amendments to the constitution.

Remedying the Draft Text

17. Amend s74 so that for example special notice periods apply and/or that special advance publications of constitutional amendments be required and/or that presiding officers of all legislatures and the NCOP receives notice of the amendment and/or it be required that such amendments not be dealt with as part of ordinary legislation.

18. Amendment to s74 so as to require, when amending any provision of Chapter II of the NT, that the NCOP also be required to approve of the amendment by the endorsement of 5 provincial delegates (simple majority) or of 6 delegates (special majority).

NT 194 - THE PUBLIC PROTECTOR AND AUDITOR-GENERAL

19. The Court specifically identifies the provision governing the removal of the Public Protector and the Auditor-General as failing to meet the standards of impartiality and independence that the NT must guarantee. Given the "emphatic wording" of CP 29, the Court found that the capacity of the NA to remove this official by simple majority is inadequate (paragraphs 163, 165).

Remedying the Draft Text

20. Amend s194 of the NT so as to provide that the removal of the Public Protector can be effected by Parliament only with a two-thirds majority of its members or with a simple majority of its members only after another independent body or official (eg. the Chief Justice) has so recommended.

NT 196 - THE PUBLIC SERVICE COMMISSION

21. The nub of the decision, other than its interconnection with the issue of provincial powers, is that Chapter 10 of the NT does not -

21.1. spell out the powers and functions of the PSC;

21.2. provide for the protection of the PSC in order to ensure its independence and impartiality.

22. Powers and Functions

22.1. The Court gives some indication in its judgment of what might be included in order to satisfy the CPs -

22.1.1. in paragraph 170 it states that it is "implicit in CP 29 that an independent PSC should have some role in the process of appointing, promoting, transferring and dismissing members of a public service, but what the role should be is not defined";

22.1.2. from other parts of the judgment it suggests different roles for the PSC in respect of the matters referred to above - the supervision of recruitment, the monitoring of prescribed procedures, advice to government, setting of public service examinations, etc;

22.1.3. the Court refers to IC 210 which incorporates many of the points referred to above.

Remedying the Draft Text

23. Accordingly, it seems that a provision along the lines of IC 210 is necessary in order to comply with CPs XXIX and XXX. The essential elements that have to be contained in such a provision are:

(a) a role in the process of appointing, promoting, transferring and dismissing members of the public service;

(b) the role may be to advise on, be consulted on, to monitor or to supervise the process;

(c) the PSC ought to ensure that any deficiencies in the organisation and the administration of the public service or the application of fair employment practices are made public.

24. Decisions therefore will have to be made as to -

(a) the advisory role, if any, the PSC will play, the matters in respect of which advice may be given, and the legal consequences of the advice[9];

(b) the monitoring role, if any, of the PSC and the powers for performing such a role;

(c) the consultation role, if any, and the matters in respect of which the PSC must be consulted;

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[9] The Court refers to IC 210 which requires implementation of the recommendations of the PSC on the occurrence of certain events but it also refers to the Namibian constitution which does not contain any provision obliging the government to follow the advice of its PSC.

(d) the supervisory role, if any, and the matters in respect of which the PSC has supervisory powers.

25. Such a role must not compromise the power of provinces, subject to national norms and standards, to appoint their own staff.

26. Protection

26.1. In paragraph 176 the Court states that "without knowing ... what protection it (the PSC) will have in order to ensure that it is able to discharge its constitutional duties independently and impartially, we are unable to certify that this requirement has been complied with".

26.2. The Court seems to suggest that the wording in NT 196(2) is not sufficient protection for the PSC. That section reads as follows:

> "(2) The Commission is independent and must be impartial and regulated by national legislation."

And yet the protection afforded in similar terms in respect of the Reserve Bank was not held to be in breach of the CPs (paragraphs 166 and 167).

26.3. The possible argument that there are no provisions relating to the appointment, tenure and removal of commissioners should have been met by the same response adopted by the Court in respect of the Reserve Bank. In paragraph 168 the Court states in respect of the bank:

> "Given the purpose and nature of the institution, however, it is

unnecessary to place such provisions in the constitution. If national legislation were to include provisions concerning the appointment, tenure and removal which compromised the independence and impartiality of the institution, then such provisions could well be challenged in terms of the constitution."

Remedying the Draft Text

27. In view of the explicit statement in paragraph 176, it may be necessary to -

27.1. adopt wording similar to that used in respect of both the Reserve Bank[10] and the state institutions supporting constitutional democracy[11] such as -

"(2) The Commission is independent and impartial and must exercise its powers and perform its functions without fear, favour and prejudice.

(3) The Commission must be regulated by national legislation."

27.2. include provisions providing for the appointment, tenure and removal from office along the lines spelt out in NT 193 and NT 194 in as much as they apply to institutions like the Electoral Commission and the Human Rights Commission. It does not appear to us to be

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NT 224(2).

NT 181(2).

necessary to provide for the super majorities suggested in respect of the removal of the Public Protector or the Auditor-General.

NT CH 7 - LOCAL GOVERNMENT

28. After scrutinising the NT against the injunctions in CP 24, 25 and 10, the Court held that the CA omitted to deal with certain matters that it was required to deal with. In dealing with those matters it must *inter alia* do the following:

28.1. Provide a "framework for the structures", not merely the powers and functions of local government;

28.2. Set out the fiscal powers and functions for local government, and review and remove the allocation of the power to impose "excise tax" to local government;

28.3. Set out the formal legislative procedures local government legislatures must comply with.

29. The Court said that "at the very least" what is required is the setting out of the different categories of local government and a framework for their structures such a framework should indicate:

29.1. the overall structural design within which local government operates - "a broad design of the municipal typology";

29.2. how local government executives are to be appointed;

29.3. the formal legislative procedures that are to be followed;

29.4. the appropriate fiscal powers in respect of each category of local government (which section must remedy the allocation of excise taxation powers to local government).

30. It needs to be emphasized that apart from the question of "excise tax", the Court was not concerned with the content of the existing provisions. It was more concerned with what was not in the NT than what was.

Remedying the Draft Text

31. Introduce new provisions in Chapter 7 which would set out the categories of local government, and in respect of each category: the procedures for appointment of executives; the procedure for the making of by-laws; and the fiscal powers and functions.

32. Delete "and excise taxes" in s229(1) or replace the words "excise tax" with the words "municipal user charges in respect of utilities supplied by or through municipalities".

PROVISIONS RELATING TO THE POWERS AND FUNCTIONS OF THE PROVINCES

33. CPs other than CP 18.2

33.1. It needs to be stated that the whole section on provinces was tested against CPs 18(1), 18(3), 18(4), 18(5), 19, 20, 21(1), 21(2), 21(3), 21(4), 21(5), 21(6), 21(7), 21(8), 22, 23, 25, 26 and 27. The Court found that the text complied with all 19 Principles above.

33.2. The CPs traverse the full range of concerns and issues relating to the structure and division of powers as between national government and

provincial government including such issues as: the sufficiency of fiscal executive and legislative powers; the protection of and establishment of "legitimate provincial autonomy"; the allocation of special powers to either level including appropriate powers of intervention; and provincial constitution making powers (paragraphs 230 to 272). In general, the Court was able to expressly confirm that there was "provision for extensive legislative and executive provincial competencies" in a manner which complies with the overall requirements of the CPs, and in which those powers are safeguarded from undue encroachment even though national government was given the right to intervene in provincial affairs under defined circumstances.

33.3. In this sense, subject to the test in CP 18.2, the current framework of provincial powers has passed the many and varied hurdles which were constituted by the 19 CPs set out above.

33.4. It needs to be stressed that during the negotiations, and during the Court hearing, numerous objections were raised against the framework and detail of provincial powers. All these have now been disposed of and the CA has the benefit of this knowledge.

34. Provincial Powers and the Public Service

34.1. Before dealing with the single outstanding CP on which the constitutional text failed, it is necessary to refer to one matter which the Court identified and commented on in its general survey of the provisions of the NT dealing with provinces. While holding there was nothing impermissible in the creation of a single public service and a single Public Service Commission ("PSC"), and even in the absence

of provincial public service commissions, the Court stated that provinces should have the right to make appointments to the "public services in the provincial administrations". The Court assumes the provinces have such powers under the IC, and suggests that these powers can in any event be inferred under the NT.

34.2. To the extent that the PSC could impose national norms and standards, this right to make appointments was not compromised. However, the powers of the PSC were not adequately set out, and if they were to be filled in by the text or by statute under authority given by the text and in a manner which deprives provinces of the power to make their own appointments it would infringe upon their legitimate autonomy (paragraphs 274 to 278).

Remedying the Draft Text

35. The CA, in dealing with the Court's objections regarding the NT failure's to properly specify the powers and functions of the PSC, must do so in a way that recognises, or at least does not compromise or remove, the powers of the provinces to make the appointments to their administrations.

36. CP 18.2

36.1. CP 18.2 requires that the powers of the provinces in the NT shall not be substantially less or inferior to those they possess under the interim constitution.

36.2. While all the other CPs direct the CA to cast provincial powers in a particular way, CP 18(2) involves a qualitatively different test. It does not require any particular power to be allocated to the provinces. In

this regard the Court accepted the CA's contention that the correct approach to measure compliance with this CP was to weigh the two "baskets" of powers. In one basket would be all the provincial powers under the IC. In the other basket would be all the powers under the NT. The Court also accepted that in conducting this exercise it should take into account both individual and "collective" powers (such as the powers of the provinces through the NCOP). The Constitutional Court would then have to determine:

36.2.1. whether the powers were inferior or less diminished under the NT;

36.2.2. if the answer to 36.2.1 was "yes", whether the diminution was "substantial".

36.3. At the end of the day the Court's judgment is no help in determining the answer to the second question i.e. what is the meaning of "substantial". It simply states that the two sub-clauses relating to the override powers (see below), render a diminution which was otherwise not substantial, substantial. This appears to be a matter of subjective judgment (see paragraph 472), and the Court implies if the above two sub-clauses are amended, the text would comply with the Principles (paragraphs 479 to 481).

36.4. Two points should be made at the outset. Firstly, the Court nowhere suggests that a particular functional area or power (eg. police) must be allocated to a province, although it does, in weighing the baskets, resolve debates as to whether there has been a particular enhancement or diminution. Secondly, in many, if not most cases the Court found little or no material diminution where this was argued,

and equally, little or no enhancement where this was argued. The Court finally identified only four areas of curtailment, which in themselves were not substantial when seen against the full range ("totality") of provincial powers. These were: operational control over police; concurrent powers over training colleges (tertiary education other than universities and technikons); some concurrent powers over local government; setting of a national framework for salaries of traditional leaders.

36.5. In summary, the Court expresses the view that overall there was no significant difference in:

(i) the fiscal and financial powers of provinces;

(ii) the collective powers of the provinces;

(iii) the constitution making powers of the provinces;

(iv) the executive powers of the provinces;

(v) the functional areas of legislative competence (save for what is said below). The Court does emphasize how extensive the powers of the provinces are (paragraphs 475 and 476) but stressed that the question to be answered is whether they have been diminished.

36.6. In reaching these conclusions the Court tested numerous objections that individual provisions substantially reduced a provincial power or powers and mostly concluded that the provision did not have that effect. The Court was also reluctant to accept that enhancements of

provincial powers were significant enough to measurably counter any diminutions. In this regard the Court's findings can be summarised as follows:

36.7. NCOP

The Court held that the NCOP may be a more effective chamber for articulating or serving provincial interests (paragraphs 330, 331 and 333). It stated that there may be substantial enhancement as a result but this would be a speculative assessment, and accordingly the Court did not take it into account where measuring the differences in powers. This is a little startling given that it recognises this enhancement elsewhere (paragraph 413).

36.8. Exclusive Powers

There is "some" increase in provincial powers by virtue of NT Schedule 5. The Court did not rate it as a "very significant" increase (see paragraph 355 but compare paragraph 465).

36.9. Concurrent Legislative Powers

There is a marginal increase for provinces in the range of functional areas, which is, however offset by certain decreases (paragraph 340). The Court concludes that overall, in regard to both NT Schedules 4 and 5, there is a "marginal" decrease (paragraph 457).

There is an overall decrease in concurrent legislative powers because of the formulation of the "conflict of laws" clause (see NT 146(1) and 146(2)(b)). It is these two sub-clauses, apparently, which render the

legislative powers of provinces under the NT substantially inferior (paragraphs 336, 337 and 341).

36.10. Constitution Making Powers

These are substantially the same. (See paragraph 449 and Chapter 8 D).

36.11. Local Government

Local government structures are given more autonomy in the new text. This is however irrelevant as far as the test in CP 18(2) is concerned, which simply looks to the changes in provincial powers. The Court did, however, observe that the powers granted under the NT "include everything that a province, while respecting the autonomy of local government, can do in practice in the exercise of its powers under the IC." However they cannot go outside the areas specified in the NT which they could notionally do under the IC. It is not clear from the judgment whether the Court considers this diminution to be very substantial, and much of the judgment is concerned to point out that the NT powers remain substantial, and that the NT "attenuates" those powers rather than removes them (paragraphs 374, 376, 377, 380 and 462).

36.12. Fiscal and Financial Powers

There is no diminution of provincial powers in the NT, either generally or in relation to the allocation of revenue, budgetary controls, taxation, etc. In paragraph 439, the judgment suggests an increase in taxing powers for provinces, but it appears not to have included

this in the "weighing" exercise. There was a "justifiable" but discernible diminution resulting from Parliament's power in the NT to set upper limits to the salaries of members of the provincial legislature and municipal councils.

36.13. Select Individual Powers

It was clear that the express power to appoint provincial service commissions and to exercise operational policing powers possessed by the provinces under the IC have been diminished (although in the former case it would be unclear whether this was significant until the PSC powers have been elaborated). It was also uncontested that provinces, to the extent that they possessed them, have lost concurrent powers over training colleges, and their power to set wages for traditional leaders has been made potentially subject to a national framework. The loss of the power to establish a public protector is a diminution of "limited ambit and effect".

36.14. Executive Powers

The Court determined that there is no decrease in executive powers. However it also, surprisingly, rejected the submission that NT 125(2)(b), which gives the provinces the right to administer national legislation unless this power is specifically reserved, made any meaningful difference to the position that applies under the IC provisions. It appears from the judgment that the Court may have misconstrued the provision.

36.15. Other Objections

The Court canvassed numerous others objections but ruled that they did not have relevance or did not apply, or did not have the effect contended for (paragraphs 464, 467. See also Chapters VII D, H, I.)

Remedying the Draft Text

37. It appears from the judgment that it would be possible for the constitution to comply with 18(2) if:

37.1. Section 146(2)(b) is amended as follows:

replace the words "in the interests of the country as a whole" with the words "the national legislation deals with a matter that, to be performed effectively,"

37.2. Sub-section 146(4) is deleted;

37.3. Section 196 is amended to make it clear that the provinces, subject to the national norms and standards laid down, are responsible for appointing staff to the provincial departments of the public service.

38. It appears that if these amendments are effected no other changes may be necessary. Any other changes which might serve to further diminish provincial powers could lead to a fresh examination of the "baskets" and should be avoided. On the other hand, it should be borne in mind that some of the diminutions identified by the Court are marginal diminutions and in respect of which the remedial removal would not, in isolation, substantially alter the scheme or the Court's appraisal thereof.

39. Because of the inter-relatedness of the provisions governing local government, and the general tenor of the judgment on these provisions, it may be advisable to leave this chapter alone, save for the remedying of the other defects identified by the Court but which are unrelated to Principle 18(2).