

Draft Edited (4) Report on the workshop on the Constitutional Review Committee's mandate

1. Opening and Welcome

The Co-Chairpersons welcomed all present and introduced the Committee members, staff and the two invited experts to each other. They further outlined the purpose of the Workshop.

2. Objectives of the workshop

2.1 Background to the establishment of the Committee.

The Joint Constitutional Review Committee (CRC) was established in terms section 45(1) (c) of the Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution'). The establishment of the CRC was agreed upon towards the conclusion of the constitution-drafting process, in order to facilitate the reaching of some agreement on issues over which there were difficulties in finding consensus among all the political parties involved on all of the provisions of the draft Constitution. The idea was that every year opportunity would be availed to all citizens to make submissions to parliament expressing themselves over provisions they believed should be dealt with in certain ways other than as already formulated in the final Constitution. The CRC is, therefore, constitutionally mandated to review the Constitution at least annually. For that purpose, the CRC calls for public submissions as a method by which to identify constitutional matters/provisions that may require amendment. The Joint Rules of Parliament (specifically rule 102) grant the CRC the powers and functions to give expression to this constitutional mandate. Rule 102, in addition, requires the CRC to report to both the National Assembly and the National Council of Provinces on the review process undertaken in terms of the time schedule outlined in rule 102(2), namely, a media notice in May each year calling for the public to make written submissions within 30 days.

2.2 Rationale for conducting the workshop

The rationale for the workshop was to get the views of the experts on what they believed to be the actual mandate of the CRC, as well as how such a mandate was to be discharged. The Committee has always had to grapple with the fact that while it had the mandate to review the Constitution, even deciding whether or not public submissions warranted the amendment of the Constitution, Bills which sought to amend the Constitution were never brought to the CRC, but were dealt with by the Parliamentary committees dealing with justice matters. Clarity on the role of the CRC vis-a-vis that of the Committees was therefore sort through the Workshop.

3. Modus operandi

The workshop was held on 23 June 2012, at the Villa Via Hotel in Gordons Bay. To inform the workshop discussions, the assistance of two constitutional law experts was obtained: Professors Hugh Corder, from the University of Cape Town, and Shadrack BO Gutto, from the University of South Africa. The CRC

also invited officials from the Table Division of both Houses, Legal Services Unit, Committees, as well as the research unit to provide advice where necessary.

4. Presentations by experts

4.1 Presentation by Professor SBO Gutto

The presentation focussed on the meaning of constitution review and amendment, as well as the relationship between them.

4.1.1 Constitutional supremacy

The presenter reflected on the importance of understanding the founding value of supremacy of the Constitution, as enshrined in section 1(c) of the Constitution and the supremacy of the Constitution in section 2, which emphasises the obligation for all to respect the supremacy of the Constitution. Such obligation is reinforced by the provision in section 237 of the Constitution

4.1.2 Interpretation of 'constitutional review' and 'constitutional mandate'

Understanding the meaning of the supremacy of the Constitution and diligent performance of Parliament's obligations when interpreting the constitutional meaning of a 'review' and 'amendment' in the context of Parliament's constitutional powers enshrined in sections 45(1)(c) and (d), and 44(1)(a)(i) as well as section 74, respectively. These provisions should be read together to provide a holistic understanding of the meaning of 'review' and 'amend'. As such a purposive and contextual interpretation of 'review' and 'constitutional amendment' is required. In explaining the two concepts, Prof Gutto drew examples from various old and new constitutions, such as the Constitution of India that allows for constitutional amendment through addition, variation or repeal for different purposes.

It was also noted that the constitutions of Ghana (1992), Uganda (1995), Nigeria (1999), Swaziland (2005) and Kenya (2010) do not provide for continuous and regular review, but provide for amendments. Specific mention was made of the Kenyan Constitution (with noted similarities to the South African Constitution), which requires amendment of some key provisions by national referendum. It further allows for amendment by popular initiative signed by at least a million registered voters. Prof Gutto noted that annual review, as found in the South African Constitution, was not a general international constitutional principle, the purpose of which must be discerned from its position in the constitutional text and in relation to provisions allowing for constitutional amendment.

The observation was made that annual review could likely be aimed at the continued evolution of constitutionalism – i.e. the implementation and impact of the Constitution in society, including identifying the necessity for the amendment of the Constitution because of fundamental changes of circumstances.

In light of the above, Prof Gutto opined that amendments to the Constitution ought to inform the CRC understanding of the review process. It was noted that

a regular review of the constitution ensures that constitutionalism, the legal justice system and the rule of law are not at odds with the public interest.

To give effect to the principle of participatory democracy, it is necessary for the constitutional review and amendment to the Constitution to be a consultative process. Since any review or amendment of the Constitution affects the citizens, the processes associated with such steps should be more participatory than simply interpreting the constitution.

4.1.3 Proposals by Prof Gutto are as follows:

- The work of the CRC ought to be critically analysed, debated in Parliament and where there is need for improvement, proposals be made to the relevant committee for consideration.
- Section 74 of the Constitution does not prescribe that the Parliamentary Committee on Justice and Constitutional Development should enjoy monopoly over the steering of constitutional amendments.
- The CRC is a committee which, in terms of the Constitution, is constitutionally prescribed to review the Constitution.

The following two options were proposed as a possible way forward:

1. The CRC could first consider proposed constitutional amendments, and then hand over their findings to the Portfolio Committee on Justice and Constitutional Development to process the Bill.
2. The CRC and the PC on Justice and Constitutional Development could consider proposed constitutional amendments jointly before the Portfolio Committee on Justice and Constitutional Development processes the Bill.

4.2 Presentation by Prof Corder

The presentation by Prof Corder focused on

- the relevant context;
- the amendment of the Constitution;
- areas of the Constitution that were protected against amendment;
- section 45(1) (c) and the meaning of 'review'.

He also touched on foreign and comparative practices in respect to the constitutional review process.

4.2.1 The context

Prof Corder highlighted section 1 of the Constitution and commented (with reference to the difference between the concepts '–secular' and 'sanctity') that the South African Constitution is a secular document. As such it is the ultimate authority of government and subject to interpretation by various people, institutions and ultimately, the Constitutional Court. He explained that the Constitution is, therefore, a document that should develop in line with a corresponding culture of good governance. Such development requires that both

the citizens and those who deal with public authority should be able to anticipate, with confidence, the requirements of the Constitution.

With reference to the relevant context, he reflected on the manner in which agreement on the Constitution was reached, covering the process from the transitional phase up to certification of the final text by the Constitutional Court. Prof Corder pointed out that the Constitutional Court tested the constitutional provisions against the 34 Constitutional Principles entrenched in the transitional constitution of 1993. He noted that the founding values of the Constitution (in section 1), to some extent reflect the spirit of these principles and therefore form the basis of the Constitution.

Reference was further made to the principles of constitutional democracy and participatory democracy, as well as the fundamental character and values of the Constitution. Emphasis was also placed on the importance of section 1(d) of the Constitution, as it qualifies a multiparty democracy that aims to enhance the principles of accountability, responsiveness and openness.

The CRC, viewed in this context, was described as exemplifying the continuation of multipartyism and the spirit of inclusivity and compromise, which made the constitution-making process a success.

4.2.2 Amending the Constitution

Section 74 deals with the processing of bills amending the Constitution. There are amendments to the Constitution that would require a special majority and special procedures, as outlined in section 74.

Different methods to amend the Constitution were highlighted:

1. A section 1 constitutional amendment is the least flexible, as it requires 75% majority in the NA and the supporting vote of 6 provinces in the NCOP.
2. A Bill of Rights amendment requires a two-thirds majority in the NA and the supporting vote of six provinces in the NCOP
3. Any other constitutional provision can be amended with a two-thirds majority vote in the NA, and also with the supporting vote of six provinces in the NCOP if the amendment –
 - a) relates to a matter that affects the NCOP;
 - b) alters the boundaries, powers, functions or institutions of the provinces; or
 - c) amends a constitutional provision that specifically deals with a provincial matter.

Special processes that must be part of the constitutional amendment procedure:

1. A bill amending the Constitution may not include any provisions other than constitutional amendments, and matters connected to those amendments.

2. A proposed amendment to the Constitution should be published in the Gazette for public comment at least 30 days before it is introduced to Parliament.
3. The provincial legislatures should be given an opportunity to express their views on the amendment.
4. The proposed amendment must be submitted in the NCOP for public debate, if the proposed amendment is not one that is required to be passed by that House.
5. Furthermore, comments from the public and the provincial legislatures must be tabled in the NA and where necessary to the NCOP.
6. A Bill that proposes amendments to the Constitution may not be put to a vote in the NA within 30 days of its introduction or tabling, depending on whether the house is in session or in recess.
4. The NA cannot override the NCOP where a Constitutional amendment is at stake in which it has an interest. Also, with regard to voting in the NCOP, each province gets one vote.

Prof Corder contended that due to the fact that any process of constitutional amendments should be relatively difficult, although not impossible, There is a need for a long-lasting framework for purposes of good governance, and for that reason public participation is mandatory.

Aspects of the Constitution that are protected against amendment:

In responding to the question, whether there were any parts of the Constitution that may never be amended, Prof Corder made reference to a judgment of former Deputy Judge President Ismail Mohamed of the Constitutional Court during the interim constitution period in which he made a remark in a case involving the KwaZulu-Natal Provincial Constitution to the effect that the basic structure and underlying values of any particular constitutional democracy may not be amended at all. He had relied for his authority on the approach of the Indian Supreme Court, but this had not been central to his decision in the case (it was not part of the *ratio* of his judgment).

4.2.3 Lawmaking process

The presenter touched on section 73(2) of the Constitution, which talks to the introduction of a Bill in the NA, and to section 73(4) of the Constitution on the introduction of a Bill in the NCOP. Prof Corder's suggestion on section 73(2) is that, since the joint committee is a committee of Parliament, there is no reason why it could not initiate legislation. He stated that although it is possible to argue that a 'committee' in both provisions could also include a reference to a joint committee, it may be better for the CRC (when considering possible amendments as a consequence of its review process) to channel the product of its extensive public consultation process to the Portfolio Committee on Justice and Constitutional Development, through the relevant Minister.

4.2.4 Section 45(1) (c) of the Constitution and the meaning of review

In respect of section 45(1) (c) and the existence of this committee, reference was made to the legal source – the *Constitutional Law of SA (CLOSA)*, under

editorship of Professor Stuart Woolman and others. Prof Corder expressed concern that there was, to his knowledge, no real in-depth legal analysis of section 45(1) (c) within this four-volume book nor the rest of South African legal literature.

4.2.5 Foreign and Comparative Practice

Reference was made to the book, *Constitutional Review and Reform*, published by OSISA (2007), as a comparative analysis of constitutional review and reform in Kenya, Uganda, Zimbabwe, Zambia, Swaziland, Nigeria, Tanzania and Eritrea, as well as South Africa. It was noted that none of these countries has any structure which is the equivalent of the CRC. It was opined that the CRC, therefore, had the potential to set an example for those countries, if not the world, in the type of work it performs. An important question was, however, raised: Who leads the process of constitutional review and reform? Should it be Parliament, the executive, an independent body, or civil society/ the people?

Therefore, according to Prof Corder, the CRC is an example of the continuation of the multi-party spirit of inclusivity and compromise, which made the constitution-making process such a success.

4.2.6 Proposals by Prof Corder

1. The committee should have dedicated research and other support staff available, in order to keep the process of annual review on-going.
2. It was also proposed that amendments to the Constitution thus far, and so the work of the committee, could be divided into the following three phases:
 - a) **Phase 1:** Post constitutional adoption phase (after 4 February 1997), focussing on the transitional phase in order to iron out transitional matters and unforeseen operational issues. Most amendments thus far fall within this category.
 - b) **Phase 2:** Technical or formal changes of, for example, the Chief Justice instead of the President as the head of the Constitutional Court, and provincial name changes.
 - c) **Phase 3:** Grappling with substantive issues (including historical compromises) which call for (re)consideration in the current South African context.

With reference to phase 3, it was noted that the authority to propose substantive changes should be exhaustively canvassed and sparingly exercised with great caution, as the Constitution comprises 'complex interlocking, inter-relating provisions' and a 'change in one area may unleash unanticipated consequences elsewhere'.

5. Discussion

The Committee, having received the input from the presenters, deliberated on the content as follows:

- (5.1) Members wanted to know whether it could be that the mandate of the Committee at its inception was to address issues that were not addressed during the constitution-making process, such as the “sunset clauses”.
- (5.2) The mandate of the Committee might have to be expanded to allow it to consider Bills that seek to amend the Constitution.
- (5.3) Alternatively a Bill that seeks to amend the Constitution which is referred to Parliament, be referred to the Constitutional Review Committee to determine whether such a proposed amendment was justified.
- (5.4) If the Constitutional Review Committee, upon considering the proposed Bill, feels that it does require an amendment, it should hand it over to the Portfolio Committee on Justice and Constitutional Development for processing.
- (5.5) Members further wanted to know whether the Committee, on an annual basis, would look at certain chapters of the Constitution to establish whether there was a need for a review.

Comparative International perspective

The committee commissioned Dr Loots, from the Parliamentary Legal Services to conduct a study on comparative international perspective, looking at countries such as Ireland and Finland, which had committees that were similar to the Constitutional Review Committee. The findings on the study are as follows:

Constitutional Law Committee of Finland

Finland has a Constitutional Law Committee (the Committee), whose mandate is to examine legislative issues under its jurisdiction, which include issues dealing with enacting, amending or repealing the Constitution. The Committee further holds a central role in enforcing the constitution when laws are enacted. It gives statements on the constitutionality and conformity to international human rights treaties of all draft bills and other issues.

Joint Committee on the Constitution of Ireland

The Irish Parliament (Oireachtas) established the Joint Committee on the Constitution on the 24 October 2007. The Committee's mandate was to complete a full review of the Constitution in order to provide focus on the place and relevance of the Constitution and to establish those areas where constitutional change may be desirable.

The Committee's Order of Reference¹ provides that, in considering such matters (of constitutional review) it may decide which matters it refers to both Houses of the Oireachtas.

Both the committees in Finland and Ireland are different from the Constitutional Review Committee as established by section 45 (1) (c) of the Constitution of the Republic of

¹ <http://www.oireachtas.ie/parliament/>

South Africa. However the work, scope and mandates of the said committees could assist the CRC, in determining its mandate.

6. Recommendations

There was consensus among the Committee members present that the mandate of the CRC was vague. The following recommendations emanated from further deliberation on this issue:

- (6.1) Consideration should be given to a review of the relevant Rules of Parliament to accommodate the possible expansion of the CRC's mandate. It was noted that the Rules Committee was currently in the process of a complete review of the Rules of Parliament, and that now might be the appropriate time to submit a memorandum requesting a review of the rules regulating the powers and functions of the CRC.
- (6.2) Parliament should consider dedicating August of each year for the Constitutional Review Committee to fulfil its constitutional obligation of considering all public submissions.
- (6.3) The Rules should be amended to facilitate scrutiny by the CRC of any Bills that seek to amend the Constitution. In the event that the CRC is of the view that the amendment is warranted, the Bill would be referred to the portfolio committee on justice and constitutional development. If the CRC is of the view that such an amendment is unwarranted such Bill would be referred back to the drafters to consider the grounds of the rejection.

Report to be considered.