PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

SUMMARY OF 2012 PUBLIC SUBMISSIONS AND LEGAL OPINIONS

1. Submission 1: by Lebohang Lance Nawa

Ms SS Isaac gave an overview on the submission by the submitter. The submission requests a review of the following provisions:

Inclusion of a provision that will promote African identity

The submitter is of the view that from a developmental and social perspective, the Constitution undermines the role that culture could play in building a new South Africa. The impact of this is negatively felt on the creation of a national identity and the lack of a role for local government in developing culture. The submitter asserts that the Constitution does not, except symbolically in reference to the national anthem, locate South Africa within the African continent. Such argument is demonstrated in sections 232 and 233 of the Constitution, which endorses the relevance of international laws at the expense of African influenced laws.

Extension of the powers of local government to include culture

The submitter argues that the Constitution displays a certain degree of indifference towards government's role in culture. He opines that although specific on culture appear in schedules in a scattered manner in relation to departments and supportive institutions, there is no reference to it in the entire Chapter 7 of the Constitution.

Furthermore, the submitter argues that Schedules 4B and 5B which provides for the functional areas of concurrent national and provincial competence and the functional areas of exclusive provincial legislative competence respectively, does not allocate responsibility to arts and culture. However, as municipalities do not have specific legislative competence over culture, the latter has been sidelined from local government service delivery or development agenda.

Analysis of the submission

African identity

The Preamble of the Constitution, among other things, strives to establish a new South African national identity that unifies the nation. Sections 232 and 233 which the submitter refers to are part of the provisions that set out the relationship between the Constitution and international law. Section 232

Furthermore, while local government may not have original legislative power in respect of culture, it may seek to promote culture in terms of the Constitution, as well as utilize its existing competencies to promote culture.

Opinion

The decision to extend the authority of local government to include culture as a direct competency is a policy that may be decided by the Committee.

2. Submission 2: by Mr Gcuma

Adv. Rhoda gave an overview on the submission. The submission proposes amendments to the following sections of the Constitution:

* In section 9 (2) : to replace the word 'includes' with 'means' ;including 'by all people' at the end of the first sentence; and replace 'may' with 'must' in the last sentence.

* Section 38 (c) to be remove as it promotes sectoral interests

* Section 88 (2) to be clarified as it was not clear whether the section refers to two consecutive terms, or any two terms in office, even if they were not in a row

* Section142 be done away as South Africa is not a federal state

* The deletion of words 'may God protect our people' from the Preamble to the Constitution because South Africa is a secular.

The submitter further proposes the decriminalization of sex trade, the legalization of polyandry and the reduction of Provinces from 9 to 4.

Analysis of the submission

Amendment to section 9(2) of the Constitution

The inclusion of 'by all people' would be tautologous. As a rule of legislative interpretation, section 9 of the Constitution should be read in its entirety in order to ascertain its true meaning. Section 9(1) of the Constitution reads:' everyone is equal before the law and has the right to equal protection and benefit of the law'. As section9 (2) of the Constitution is part of the supreme law of South Africa, the rights enumerated therein relate to 'all the people'. Also, the suggestion to substitute 'may' for 'must' in section 9(2) of the Constitution would create a binding obligation on government to take such measures.

Opinion

The aforementioned proposed amendments would limit the scope of equality, as envisaged by the Constitution. The existing constitutional provision is

Opinion

The proposal therefore, is a matter of policy that should be decided by the Committee.

The decriminalization of sex-trade

In regard to the proposal by the submitter for the decriminalization of sex-trade, section 20(1A) of the Sexual Offences Act, No.23 of 1957 prohibits the 'sale ' of 'carnal intercourse' or committing acts of indecency, with any other person for reward. Moreover, purchasing carnal intercourse is prohibited in terms of section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, No.32 of 2007.

Opinion

The submission does not propose an amendment to a provision of the Constitution and may be addressed through amendments to ordinary legislation.

Legalization of polyandry

In respect to above mentioned, it would seem the submission relates to an amendment of the Marriage Act, No 25 of 1961, the Recognition of Customary Marriages Act, and No.120 of 1998 and the Civil Union Act, No.17 of 2006. These Acts set out the grounds of marriage between persons. Therefore, while it can be assumed that the submission is based on gender equality between men and women in customary unions, it does not require an amendment of a constitutional provision.

Opinion

The submission does not propose an amendment to a constitutional provision and may be addressed through amendments to ordinary legislation.

The reduction of provinces from 9 to 4

In regard to the proposal on the reduction of provinces from 9 to 4, the submitter does not provide reasons for his submission. The number of provinces and the demarcation is governed by section 103(1) of the Constitution, which states that the Republic shall have 9 provinces. The geographical demarcation of those provinces is set out in Schedule 1A of the Constitution. However, while the reduction of provinces from 9-4 would require a constitutional amendment, the provinces are a political creation. And as such were created by virtue of historical, demographic, economic and social factors.

Opinion

The reduction of provinces is a policy matter to be decided by the Committee.

Analysis of the submission

Sections 7(1), 8 (1) and 10 of the Constitution provides for the protection of human rights, including the right to dignity. The carrying of people at the back of goods vehicles is regulated by the National Road Traffic Act, 1996 (Act 93 of 1996). In addition, the regulations to the National Road Traffic Act prohibits people from being carried at the back of a goods vehicle unless the back is enclosed to the specific height requirements, is made of material that will prevent a person from falling off the vehicle and that people are not conveyed in the same compartment with any tools or goods. The laws that allow for people to be transported at the back of eth goods vehicles must be assessed to determine if they adequately protect the lives of people, especially the most vulnerable in society.

Opinion

Any decisions to further prohibit the carrying of people at the back of goods vehicles must be made in light of the various constitutional provisions, including an obligation on the state to respect the dignity of people. The Committee may, therefore, consider referring this submission to the relevant committee that deals with transport, to determine if eth existing regulations are adequate to address the submitter's concern and uphold the constitutional right to dignity.

In conclusion, the Constitution provides a framework for the protection of human dignity. Furthermore, the existing legislation sets out safety requirements for transporting people at the back of a goods vehicle. However, in light of the constitutional right to dignity, the Committee may consider whether the existing prohibitions and are adequate to protect. Any further criminalization of eth prohibitions does not require a constitutional amendment, but may require an amendment to the National Road Traffic Act. Such amendment is a policy decision to be taken by Parliament and the Committee

6. **Submission 6: by Mr Bonga Mthembu**

Adv. Gordon gave a background and summary, as well as an opinion on the submission. The submitter expresses concern around the construct of the South African government, which he feels needed to change.

The submission proposes as follows:

* An absolute unitary state should be replaced the role of provinces in government
* Parliament should only have one House i.e. the National Council of Provinces be removed
* The amount of Members of the National Assembly should be reduced
* the electoral system of proportional representation should be changed to a constituency based electoral system, and
* A hybrid of parliamentary supremacy and constitutional supremacy should be adopted.

amendment to the Constitution, as it deals with aspects between the voters and their political party representatives in Parliament.

Opinion

It is recommended that the committee does not consider the submission for the purpose of an amendment to the Constitution.

The removal of "the Stem" from the national anthem

In respect to the above mentioned, the submitter proposes an amendment to the national anthem, not necessarily an amendment to section 4 of the Constitution. However, on the basis that the President determines the national anthem by proclamation, the committee does not have the necessary jurisdiction to amend the national anthem. The submission should be directed to the office of the President.

Opinion

It would be recommended that the committee should not consider the submission for the purpose of an amendment to the Constitution.

Inclusion of the Khoi and San languages to Constitution

On the proposal for the inclusion of the Khoi and San languages to Constitution, both languages are perceived to be part of the category of indigenous languages that is covered in section 6(2) of the Constitution, whose status must be advanced. However, although Khoi and San languages are not official languages in terms of section 6(1) of the Constitution, they are prioritized for advancement in its usage in terms of section 6(2) of the Constitution and the Use of Official Languages Bill [B23B-2011] (the Bill). Clause 4(3) of the Bill reiterates section 6(2) of the Constitution. This demonstrates a commitment by the National Government in the development of the languages. Therefore, an amendment to section 6(1) of the Constitution would not be required to elevate the Khoi and San languages.

Opinion

It is recommended that the Committee does not consider the submission for the purpose of amending the Constitution.

Amendment to section 25 of the Constitution

The submitter proposes an amendment on section 25 of the Constitution to allow for the fast tracking of land redistribution and that expropriations should take place even without the necessary requirements embodied in section 25(2)(b) of the Constitution.

However, Section 25 of the Constitution is a right which encompasses the attempt by the Government to make right the colonial land imbalance of the past

the electorate, they could lose their electoral support in the next election. This position was echoed in United Democratic Movement v The President of the Republic of South Africa and Others CCT 23/02.

Opinion

It is clear that the Constitutional Court in the Certification of judgement, fully considered the electoral system of proportional representation. However, if the submission to change the electoral system is to be considered, such a move would require a policy decision.

Inclusion of an independent institution in Chapter 9 of the Constitution

In regard to the inclusion of an independent institution that would regulate the media in South Africa in Chapter 9 of the Constitution. And that, the recommendations set out in the Press Freedom Commission Report should set the framework for that model. The institutions that are included in Chapter 9 of the Constitution are institutions that strengthen constitutional democracy. These institutions are independent and perform their powers and functions without fear, favour or prejudice. Section 192 of the Constitution also makes provision for an independent authority to regulate broadcasting that is within the public interest, fair and diverse in respect of the South African society. It is noteworthy that an independent authority that regulates the print media was not included in Chapter 9 during the adoption of the Constitution. However, although the Report, among other things, recommends an independent co-regulated system that should be accountable to the public, the aspect of accountability does not give credence to the design of Chapter 9 of the Constitution.

Opinion

It is clear that the reason why a regulatory print media council cannot be housed in Chapter 9 of the Constitution is because it would not be accountable to the National Assembly, and would want to be free of any State involvement. This would be in conflict with section 181(5) of the Constitution. The submission would not meet the provisions of Chapter 9 of the Constitution for the purpose of an amendment.

7. **Submission 7: by Mr Brian Carr**

Adv. Rhoda gave an overview of Mr Carr's submission in which the submitter expresses his concern around the failure of local authorities in responding to any written requests, queries or concerns of transgression. The submitter also submits that he was not aware of a particular section in the Constitution that would govern the failure of local authorities in responding to written requests, queries or concerns, but that it was his right, in terms of the Constitution to receive a reply within a given period.

The legislation referred to in section 32(2) of the Constitution is the Promotion of Access to Information Act, No.2 of 2000 (PAIA). In terms of this provision, a national legislation must be enacted to give effect to this right. Further, section 29(1) of PAIA sets out the timeframes within which the public body has to

Concerning the second, which is around an alleged labour dispute, it seems the submission does not request the Committee to amend the Constitution. The current law provides sufficient mechanisms in term of which the submitter may pursue relief that she is seeking.

Opinion

It would be recommended that that Committee refers the submission to the Committees on Women, Children and People with Disabilities or on Basic Education.

In respect to the alleged dispute, the submitter would have to be advised to seek the assistance of an attorney or if she is unable to afford legal services, it would be suggested that she approach Legal Aid South Africa, one of the University Campus Law Clinics and or the nearest Legal Resources Centre for assistance.

10. **Submission 10: by John Price**

Dr Loots gave an overview and gave an advice on the submission by Mr Price, which relates to the appointment and term of the President. The submitter recommends an amendment of section 42(3) of the Constitution, which deals with among other things, the appointment of the President. The submitter suggests that such provision should be amended to allow for a new system by which a President could be appointed through the creation of an Executive Council. In support of the proposed amendment, the submitter makes reference to the "Switzerland model" (explanation on the latter is in the submission and opinion document).

Analysis

Amendment to section 42(3) of the Constitution

The submitter concedes that the presidential appointment and the term system currently contained in the Constitution is a generally accepted model. However, he is of the view that the proportional representation system places excessive power in the hands of one individual. The concept of proportional representation, in our constitutional system is closely related to the electoral system, of which the choice is a political matter. If the current system of proportional representation is amended as per the submission, it will alter the nature of the model of electoral system, which South Africa has. Therefore, such an amendment will potentially call for additional amendments beyond the proposed amendment of section 42(3) of the Constitution as it potentially alters the democratic electoral system that underlies the Constitution.

Opinion

As alternative models of government can be found in other jurisdictions, the proposed amendment is not a question of law, but rather one of policy. The Committee would therefore, be required to take a policy decision as to whether it wishes to recommend or oppose the proposed amendment.

Opinion

Therefore, the proposal for the formation of a new chapter 9 body, namely, "the Eagles", is thus a policy decision.

Analysis

The deletion of section 47(3) (c) of the Constitution

Regarding the proposal for the deletion of section 47(3)(c) of the Constitution, the submitters argues for a different electoral system, that will improve accountability mechanisms and responsiveness, as well as create more transparency in the relationship between the elected and the electorate. However, any change to the electoral system in the Houses of Parliament, as well as an amendment of section 47(3) (c), would constitute a policy decision. Also, the legal question that arises from this request is whether a change in the electoral system of Parliament can be effected through an amendment of the Constitution.

Opinion

The decision whether to change the electoral system of Parliament is a policy decision.

Analysis

Amendment of membership of the Judicial Services Council (JSC)

The submitters propose that either the membership of the JSC be amended, or that the numbers of non-political appointees be increased. And, that the once the JSC is properly composed, the appointments of senior NPA officials should be conducted through the JSC so as to depoliticize these appointments. However, the Constitutional Court, in the First Certification - judgement, held that the composition of the JSC was a political choice made by the Constitutional Assembly within the framework of the constitutional principles against which the court must test it. Accordingly, the court could not interfere with that decision.

Opinion

As stated in the First Certification – judgement, the composition of the JSC is a political or policy decision that would have to be taken by both Houses.

12. **Submission 12: by Inkatha Freedom Party (IFP)**

Ms Ngema gave an overview on the IFP submission. The submission suggests amendments to the following constitutional provisions:

* Chapter 3, section 41(2), which deals with the establishment of structures and institutions that promote and facilitate intergovernmental relations. The IFP proposed the inclusion of Houses of Traditional Leaders and Traditional Councils as intergovernmental structures, to facilitate intergovernmental relations.

Analysis

Amendment to Chapter 7, sections 151 and 155 of the Constitution

In respect to a proposed amendment to Chapter 7, sections 151 and 155 of the Constitution, in terms of section 155(2), (3), (5|), (6) and (6A) of the Constitution, national and provincial legislation is obliged to determine and establish different types of municipalities. Currently, traditional councils are not elected bodies, but bodies established in terms of section 3 of the Traditional Leadership and Governance Framework Act. Furthermore, traditional leadership is according to Customary Law. However, customary law, like common law and any other law, is governed by the Constitution. The proposal for the dis-establishment of local municipalities and their replacement by traditional council within traditional communities was dealt with extensively in the previous opinion that was prepared for the Committee. The Committee is then referred to the view, which has been reduced to the current policy by Christiaan Keulder in which she argues that traditional authorities should be fully incorporated into formal local government structures under the control of the elected structures in line with the Constitution. Further that, traditional leaders should not have legislative powers and should not be turned into a politically elected office, The White Paper on Traditional Leadership published in July 2003, afforded traditional leadership and traditional councils an advisory role in any of the government programmes, which impact on traditional communities.

Opinion

The proposal which suggests that traditional councils in traditional communities should have the local municipalities' competences is a policy decision that can be made by either Parliament of the executive.

Analysis

The submitters also suggest that the Houses of Traditional Leaders should be regarded as departments run by Parliament and Provincial Legislatures, or that traditional community should be run by traditional councils instead of local municipal councils. In considering this submission, the committee should take note of eth fact that departments are established by the President in terms of the Public Service Act, 1994 (Proclamation No.103 of 1994) and not in terms of the Constitution. However, if traditional leadership and traditional councils prefer to be departments of part of the legislatures, that is a policy consideration which requires an adopted policy.

Opinion

It is the committee or the executive that may consider policy proposals in this regard. Such proposals may alter the Constitution or be accommodated through the Public Service Act.

executive obligations in terms of the Constitution. The submission also proposes an inclusion of the concept of "ubuntu" into section 10 of the Constitution.

Analysis

Amendment to section 139(1) of the Constitution

In analyzing the proposal by the submitter, it seems the submission is more in the nature of criticism against the executive of the relevant provinces for not intervening in the affairs of poor performing municipalities, than addressing a *lacuna* in the Constitution. However, there are sufficient measures in the Constitution to ensure that municipalities perform and if they fail to do so, for provincial and national government to intervene. Furthermore, section 155(7) of the Constitution gives legislative and executive authority to the national and provincial governments to see to the effective performance of municipalities' executive functions. Section 133 provides that members of the executive council of a province are collectively and individually accountable to the legislature. However, should a municipality thus be found to be a poor performer, the relevant provincial legislature should pursue the matter to ascertain the reason for the provincial executive not intervening in the affairs of that municipality, and may recommend that it does so.

Section 139 (4) and (5), provides for the peremptory intervention by the provincial executive in the affairs of the municipality. However, should the provincial executive be unable to exercise these functions, as set out in the aforementioned provisions, subsection 139(6) of the Constitution obligates the national executive to intervene. Therefore, provision for intervention is thus provided for up to the level of the national sphere.

Opinion

Although the decision to amend the discretionary intervention provided for in section 139(1) is a policy decision, it is not an amendment that will address a lacuna in the Constitution. The Constitution already provides for the performance of municipalities, and failing performance for intervention, as well as for measures to ensure that intervention is executed. However, changing discretion to an obligation means that intervention becomes an absolute and will no longer be one of the possible solutions. Therefore, should a finding be made that a municipality cannot or did not fulfill an executive obligation in terms of the Constitution or legislation and section 139 is worded as an obligation, the provincial executive must intervene.

Analysis

Ubuntu as part of the right to dignity

The submitter's argument is that a Constitution 'with western legal norms and values should also incorporate African norms and values such as ubuntu. He also suggests that such an inclusion would obligate courts to view the rights enshrined in the Constitution through 'the lens of an African cultural perspective'.

Opinion

The opinion is, therefore, limited to consideration of the proposed amendments of sections 42, 60, 76 and 212 of the Constitution.

Analysis

Amendments to section 42 and 60 of the Constitution

In terms of section 42(4), the NCOP's composition and structure is designed to give effect to its participation 'in the national legislative process...by providing a national forum for public consideration of issues affecting the provinces'. The NCOP's representative composition is the product of an electoral system, whereas members of the National House of Traditional Leaders are nominated as per the requirements of the Traditional Leadership and Governance Framework Act, No.41 of 2003. Abolishing the House of Traditional Leaders and including that forum within a scope of the NCOP would call for the NCOP's role, composition and interest focus to be altered to allow for the voice of both these houses to still be heard within such a collective. This will not only require the amendment of sections 42 and 60 , but also of section 212 , as that section allows for the establishment of national and provincial house of traditional leaders. Furthermore, incorporating the National House of Traditional Leaders into the NCOP would result in the National and Provincial structures no longer aligning, if a similar step is not taken at provincial level

Opinion

The proposed amendments to section 42 and 60 of the Constitution would require a restructuring of the legislative authority, as all provisions speaking to the NCOP and its functioning would have to be considered.

However, such amendments require a policy decision to be taken by the legislature, as it does not amount to a legal question. It is therefore for the committee to take a policy decision whether to recommend or oppose the proposed amendment.

Amendment to section 212 of the Constitution

The submitter proposes an amendment to this provision in order to, among other things, give content to the functions and duties of traditional leaders.

The Constitutional Court in the Certification judgement had the opportunity to comment from a legal perspective on the relevant constitutional provisions dealing with traditional leaders. Also, judicial interpretation to date has focused on the legislation enacted in an attempt to give effect to section 212 of the Constitution.

Opinion

The proposed amendment is not a legal question, but rather requires the legislature to make policy decision whether the inclusion of the specific functions

Section 47(3) (c) therefore, provides one method in which membership of the NA ceases, with a provision that if a member defect to a represented party in the NA, such membership will not cease.

Opinion

The electoral system as well as section 47(3) (c) of the Constitution is a policy consideration aligned to a political decision.