



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

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CONSTITUTIONAL REVIEW COMMITTEE

DRAFT REPORT ON 2009 PUBLIC SUBMISSIONS

1. Introduction

In terms of section 45 of the Constitution, Parliament has to establish a joint committee to review the Constitution at least annually.

In giving effect to this provision, the Constitutional Review Committee placed advertisements in the media on 17, 18 and 19 July 2009 inviting public submissions regarding changes to the Constitution. In all, 15 submissions were received.

The Committee requested the Parliamentary Legal Services office to consider each of the submissions in the light of current jurisprudence.

Hereunder are brief summaries of the submissions of the public, as well as the Committee's views and its recommendations.

2. Summaries of public submissions

Submission 1 by Mr Jerome Veldsman

The submitter suggests that "the value of human dignity, the achievement of equality and the advancement of human rights and freedoms" require that "the Constitution ought to be sanitised of bias in favour of religious persons to the disadvantage of persons who do not hold supernatural or deity beliefs." He proposes the review of sections 6(5)(b)(ii), 15(2), 16(2)(c), 35(2)(f)(iii), the first item in the Table of Non-Derogable Rights in section 37, and Schedule 2 of the Constitution.

Section 6(5)(b)(ii)

Section 6 (5) (b) (ii) requires that the Pan-South Africa Language Board (Pansalb) "promote and ensure respect for Arabic, Hebrew, Sanskrit and other languages for religious purposes in South Africa." The submitter argues that Pansalb is an organ of state funded by public resources. Therefore the use of public resources "is repugnant to the rule of separation of State and Church". He suggests that section 6(5) (b) (ii) to be deleted in its entirety.

The Committee feels that the suggestion that section 6 (5)(b)(ii) be deleted would not be necessary. The rule which the submitter uses as a premise; namely, the rule of separation of state and church is not part of South African constitutional jurisprudence.

Conclusion

The Committee is of the opinion that the proposal made does not warrant a review of the Constitution.

Section 15(2),

Mr Veldsman argues that the provision in section 15(2), which allows "religious observances" at state or state-aided institutions, is logically inconsistent. He submits that the practice at any state or state-aided institutions is to integrate religious observances into meetings where attendance is not free and voluntary. Further he holds that the national policy on religion and education is "intellectually dishonest" in its provision that pupils may be excused on grounds of conscience from attending a religious observance component. He suggests that the inclusion of sub-clause (d) to section 15(2) in order to provide that "no religious observances may be conducted at state or state-aided institutions at any meeting or activity at which attendance is not free and voluntary".

The Committee acknowledges that the argument by Mr Veldsman is a constitutional matter. However, it is of the view that the suggestion is tautologous, as section 15(2) (c) already provides for this. Furthermore, the Constitution is not opposed to religion, but values the role it plays in the society.

Conclusion

The Committee is of the opinion that the submission does not warrant a Constitutional amendment.

Section 16 (2) (c),

Mr Veldsman suggests that section 16 (2) (c), which provides that "the right to freedom of expression does not extend to advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm" is deficient, as it does not include the full ambit of human contemplation. He argues that advocacy of hatred based on conscience, thought, belief and opinion is as repulsive as the advocacy of hatred based on religion. He suggests that the omission of these words in section 16(2)(c) might even be construed as permitting advocacy of hatred based on conscience. He therefore suggests that the terminology used in section 15, namely: "conscience, thought, belief and opinion" should be included in section 16(2) (c).

The Committee is of the view that section 16(2)(c) circumscribes the right to freedom of expression. However, developing the inherent limitation contained in section 16(2)(c), as suggested by the submitter, would limit the right to freedom of expression..

Conclusion

The Committee is of the opinion that the suggestion by the submitter is a policy matter and does not warrant any review of the Constitution.

Section 35(2)(f)(iii)

Mr Veldsman argues that there is no logical or rational reason to restrict the nature of counselling in section 35(2)(f)(iii), which permits everyone who is detained , including every sentenced prisoner, to communicate with, and be visited by, the persons "chosen religious counsellor". He suggests that section 35 (2)(f)(iii) ought to be amended by omitting the word "religious" and substituting it with the insertion of the word "contemplation".

The Committee, in deciding on its position on this matter, considered the approach of the Constitutional Court in the Christian Education case, in which the Constitutional Court found that the right to freedom of religion, belief and opinion in an open and democratic society contemplated by the Constitution is important. Further it decided that, although the rights of non-believers and minority faiths must be fully respected , the religious beliefs held by the great majority of South Africans must be taken seriously" (at par [89]).

Conclusion

The Committee is of the opinion that there is no need to amend section 35(2)(f)(iii), if the view of the Constitutional Court is accepted that not all religions are deistic.

Table of Non-Derogable Rights found in section 37

Me Veldsman argues that there exists no logical or rational reason to distinguish between the protection of the right to equality "with respect to unfair discrimination solely on grounds of ...religion" in the first item in the Table of Non-Derogable Rights found in section 37, from "any derogation " under a state of emergency, and contemplation that does not include supernatural/deity beliefs. He therefore suggests that the word "religion" be replaced with the words "conscience, religion, thought, belief and opinion".

The Committee does not agree with the proposal of replacing the word "religion" with "conscience, thought, belief and opinion". Developing the non-derogable

rights as suggested by the submitter would allow less scope to achieve the aims of the state of emergency, which is to restore peace and order. The Committee views this as a policy matter that does not warrant a review of the Constitution.

He further argues that the inclusion of the words "(In the case of an oath: So help me God.)" in the oaths found in Schedule 2 is not necessary and contradicts the Constitutional Court's view that the Constitution is secular. He therefore suggests that those words in Schedule 2 should be deleted.

The Committee is of the view that the approach applied in the two cases, namely *Christian Education South Africa v Minister of Education (2000 (10) BCLR 1051 (CC)* at par [36] and *Minister of Home Affairs and Another v Fourie and Others; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others (2006 (3) BCLR 355 (CC))* , in which the Constitutional Court indicated the importance of religion, should be applied here.

In reading the two cases, the Committee is of the view that it does not appear that the Constitutional Court regards protection of religious communities in the Constitution as contradictory to the secular nature and legal interpretation of the text.

Conclusion

The Committee is of the opinion that the submission made does not warrant a review of the Constitution.

Submission 2 by NABCAT Limpopo

The submission proposes a review of the Construction Industry Development Board Act 38 of 2000. NABCAT alleges that the Construction Industry Development Board (CIDB) was established to groom emerging contractors and capacitate them to participate in government projects, but has failed to do so. It further alleges that the CIDB's rating of construction companies disadvantages black-owned construction companies and perpetuates past imbalances in the construction industry.

Conclusion

The Committee is of the view that the NABCAT submission does not propose the review of a constitutional provision, but rather the possible review of an Act of Parliament relevant to this particular issue.

The Committee recommends that matter be referred by it to the Portfolio Committee on Public Works and/or the relevant Department, and the submitter be advised as such.

Submission 3 by Rashid Patel & Company

The submission is on the infringement of Constitutional rights. The submitter proposes that the Constitution should be amended to incorporate a provision which will give subjects a right to lay criminal charges against officials when they infringe Constitutional rights.

The Committee is of the view that the submission does not specify the Constitutional right(s) that officials allegedly breach. However, section 38 of the Constitution deals with the enforcement of rights.

The Committee is therefore of the view that the proposal does not warrant any amendment to the Constitution.

Conclusion

The Committee has recommended that this matter be referred to the relevant Parliamentary Committee and/or the Director-General of the Department of Public Service and Administration - the submitter should be advised as such.

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Submission 4 by Mr McLeod

It was submitted that all references to God be removed from the Constitution to confirm the secular nature of the Constitution. It was also suggested that the Constitution should establish and include basic rights in accordance with the precepts of Ubuntu for sentient beings, including animals.

The Committee is of the opinion that the Constitution is founded on the equality principle and is the supreme law. As such there is no confusion or conflation of the Constitution with 'God's law'. Section 15(2) indicates that the state has a strong interest in religious bodies. Further it found that the Constitution is not opposed to religion, but values the role it plays in the society.

On the proposal on the establishment and inclusion of basic rights in accordance with the precepts of Ubuntu for sentient beings, including animals, the Committee does not support the suggestion for the inclusion of positive rights for animals in the Constitution. It draws its conclusion on this matter from the judgements in the cases of *Port Elizabeth Municipality v Various Occupiers 2004 (12) BCLR 1268 (CC)* and the *Azanian Peoples Organisation and Others v President of the Republic of South Africa and Others 996 (8) BCLR 1015 (CC)*, as well as the judgment of Mokgoro J in *S v Makwanyane and Another 1995 (6) BCLR 665 (CC)* which recognized that fundamental rights were already infused with the precepts of Ubuntu. It feels that legislation that guarantees the protection of animals is sufficient.

Conclusion

The Committee is of the view that the submission does not warrant a constitutional review..

Submission 5 by Sekwele Centre for Social Reflections (SCSR)

The submissions by the SCSR are as follows:

(1) Children's Rights: section 28

The proposal is for the limitation of section 28 of the Constitution so as to "restrict the conditions in which termination of pregnancy should be performed". The submitter recommended that abortion should be limited to instances where pregnancy poses a health risk to the baby or the mother, and where pregnancy was a result of rape.

The Committee is of the view that section 28(2) of the Constitution provides that the child's best interests are of paramount importance in every matter that concerns the child. This section does not regulate abortion. The Choice of Termination of Pregnancy Act, 1996 (Act No.92 of 1996) deals with the termination of pregnancy. It would seem that the submitter proposes for the amendment of the Constitution, bypassing legislation that gives effect to a Constitutional right. The Committee notes the legal principle applied in the case of *NAPTOSA and others v Minister of Education, Western Cape and Others* 2001 (4) BCLR 388 (C).

Conclusion

The Committee recommended that this matter be referred to the Portfolio Committee on Health. Further, it recommended that the submitter be advised to seek legal opinion on how to proceed should it wish to challenge the provisions of the Choice of Termination of Pregnancy Act, 1996.

(2) Education Rights: section 29(1)(a)(b) and section 29(3)

The SCSR proposes that an amendment should be made to section 29 (1) to provide for free basic education at least up to a Grade 12 level. The Committee is of the opinion that it would not be necessary to amend the relevant section, as it already places a positive obligation on the state to take reasonable measures to progressively make both basic and further education available and accessible to everyone.

SCSR also suggested that section 29(1)(b) should be amended so as to relieve graduates of the legal obligation of repaying a loan obtained through the National Student Financial Aid Scheme (NASFAS).

Conclusion

The Committee decided that these should be referred to the Parliamentary committees on Basic and Higher Education respectively, and the submitter should be advised as such.

(3) Section 25 : Property

The SCSR proposes the scrapping of section 25 of the Constitution in its entirety. The argument is that this section is serving the interest of the rich at the expense of the poor. It further holds that section 25 is the cause of the widening gap between the rich and the poor.

Conclusion

The Committee has decided that the submission be deferred pending further consultation by the political parties.

Submission 6 by Dr M Pheko

The submission proposes an amendment in section 25(7) of the Constitution. The proposal concerns the effectiveness of section 25 of the Constitution in addressing past injustices.

Conclusion

The committee decided that the submission be deferred pending further consultation by the political parties.

Submission 7 by Mpumalanga Provincial House of Traditional Leaders (MPHTL)

The submission by the MPHTL suggests the following:

- (1) The roles and functions of Traditional Councils must be defined in Chapter 12 of the Constitution.
- (2) The status of the House must be defined - whether it is a public entity or part of Parliament.
- (3) Recognition of traditional leadership must include all layers of traditional leadership.
- (4) Intergovernmental relations must be amended to include the institution of Traditional Leadership.

(5) The House's financial management must be regulated by the Financial Management of Parliament Act.

The submission by the MPHTL is still under consideration.

Submission 8 by Mr or Ms Ruiters

The Committee could not consider the submission as it was not legible and the submitter could not be traced.

Submission 9 by Anne-Marie Robb

The submitter requests the Committee to address the issue of legal capacity, especially in relation to mental health care users. She suggests that the Constitution should make it clear that legal capacity of persons cannot be taken away from them arbitrarily. She also submits that the term "conscience" may seem to suffice, but including "psychosocial/physical disability" will enrich the Constitution in line with the United Nations Convention on the Rights of People with Disabilities.

The Committee is of the view that the request by the submitter is sufficiently addressed in the Constitution, the Mental Health Care Act and in general in the South African law of persons.

Conclusion

The Committee recommends that the submitter should approach the Registrar of any High Court or the Director-General of the Department of Justice and Constitutional Development for further explanation on issues of legal capacity status.

Submission 10 by Mr Thamsanqa Robert Ncube

The submission deals with the connections between material and political inequality. However, while the submission makes reference to the inter-relationship between "material and political inequality and how protests formed around demands to address the former may have positive consequences", the submitter does not propose an amendment to the Constitution as such.

Conclusion

The committee is of the view that the matter does not warrant a review of the Constitution.

Submission 11 Advocates for Transformation (AFT) - Gauteng

The submission recommends that Parliament should amend sections 168(3), and 172, as well as sections 8 and 38 of the Constitution. In regard to section 168(3), the

proposal is for the exclusion of all matters which fall within the jurisdiction of the Labour Appeal Court from the jurisdiction of the Supreme Court of Appeal.

The AFT also argues that section 8 has been interpreted to mean that common law or legislation must be relied on to invoke right in the Bill of Rights. They argue that this is an incorrect interpretation and that Parliament should amend this clause to make it clear that this is not what is intended.

The AFT is of the view that section 38 of the Constitution has to be dealt with in conjunction with section 172, which makes it clear that, once a court has found that the law or conduct is inconsistent with the Constitution, it has to declare such law or conduct invalid to the extent of its inconsistency.

Conclusion

The Committee decided that the matter should be referred to the Portfolio Committee on Justice and Constitutional Development and advises the submitters to make a submission when the Superior Courts Bill and the Constitution 19th Amendment Bill are tabled.

Submission 12 by Mr Mkhali

The submission is on the distortions in the copies of the Constitution which mark 10 years of freedom. The submitter questions whether the significance of the Constitution is appreciated in respect of the manner in which the text is distributed and its value is promoted. The submission indicates that the "most recent copies of the Constitution in circulation contain several embarrassing errata" and argues that the "oversight authority", which is Parliament, might need to proof-read and certify all updated editions of the Constitution.

The Committee is of the view that the issue is not a "Constitutional matter" that would require a Constitutional review.

Conclusion

The Committee recommends that the matter needs to be referred to the Director-General of the Department of Justice & Constitutional Development and the publishers.

Submission 13 by the National House of Traditional Leaders (NHTL)

The submission proposes amendments to Chapter 12 of the Constitution. The NHTL also argues that the chapter of the Constitution, which deals with Local Government, deprives traditional leaders of their right to govern their own communities. It proposes that the powers, functions and duties of any Local Government be performed by traditional leaders to ensure that service delivery and development in

traditional communities take place rapidly. It further suggests that, where an organ of state has allocated a role or function to traditional councils or traditional leaders, the organ of state must monitor the implementation of the function and ensure that the implementation of the function is consistent with the Constitution. Where a traditional council does not perform an allocated function, any resources given to a traditional council to perform that function may be withdrawn. The NHTL also suggests that traditional leaders should be represented in all legislative-making bodies, including Parliament.

The submission by the NHTL is still under consideration.

Submission 14 by IDASA

The submission proposes an amendment to section 47(1) of the Constitution.

Conclusion

The Committee has decided to defer the submission for further consultation by parties.

Submission 15 by Mr Ismail

The submission by Mr Ismail is not a submission in respect of a Constitutional amendment, but rather a request for legal advice on the legal remedies available to restitution claimants who are dissatisfied with compensation paid to them in respect of their land claims.

Conclusion

Committee has decided that the submission should be referred to the justice centre for advice on the legal remedies.

Index of submissions received:

Number	Submitter
1	Mr Jerome Veldsman
2	NABCAT Limpopo
3	Rashid Patel & Company
4	H Mcleod
5	Sekwele Centre for Social Reflection
6	Dr M Pheko
7	Mpumalanga House of Traditional Leaders
8	Mr or Ms Ruiters
9	Ms Anne-Marie Robb
10	Thamsanqa Robert Ncube
11	Advocates for Transformation-Gauteng
12	Mr Mkhalihi
13	National House of Traditional Leaders
14	IDASA
15	Mr M Ismail