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CONSTITUTIONAL REVIEW PROCESSES IN KENYA & GHANA

1. Introduction

The Joint Constitutional Review Committee (JCRC) is a bilateral Committee, consisting of both representatives from both chambers of the South African Parliament¹. It is established under Section 45 (1) (c) of the Constitution, which states that:

The National Assembly and the National Council of Provinces must establish a joint rules committee to make rules and orders concerning the joint business of the Assembly and Council including rules and orders...to establish a joint committee to review the Constitution at least annually....and to regulate the business of...the constitutional review committee

In line with its strategic plan for the 2009-2014 term, the JCRC is undertaking a process of crystallising its mandate, which, it feels, goes beyond the narrow public submissions driven template that has developed since the Committee's inception. The present JCRC is of the view that a pro-active review of the Constitution resonates with an 'activist Parliament' approach.

The JCRC intends to seek inputs from neighbouring countries on how best to promote debate on the improvement of our constitution. It strongly feels that the African continent holds many valuable lessons and will provide a unique pool of knowledge and expertise gathered over time. To that end, the constitutional review processes being undertaken in Kenya and Ghana will be discussed below.

2. Committee of Experts on the Constitutional Review; Kenya

2.1. Background

The process of reviewing the Constitution in Kenya needs to be understood against the background of previous constitutional milestones in Kenyan history, which include the early constitutions of 1963 and 1964, the shift from a one-party state to a multi-party democracy in 1991, the dissolution of the Constitution of Kenya Review Commission and a referendum.

All these events did nothing to provide the country with the best institutional and governance structures and failed to enable Kenya to achieve its full potential in fostering peace, economic growth and social harmony. The new clamour by the Kenyan people for a new constitutional dispensation, greater democracy, respect for human rights and accountability

¹ The National Assembly and the National Council of Provinces



on the part of Government resulted in a process started by the Constitution of Kenya Review Commission, which yielded three draft constitutions².

2.2. The Committee's mandate and scope

The Committee of Experts is the main technical organ in the constitution review process, and consists of nine experts and two ex officio members who were nominated by the National Assembly and appointed by the President in terms of the Constitution of Kenya Review Act of 2008. Six members of the Committee, which comprises of experts in various fields, are from Kenya, and the other three are from South Africa³, Zambia and Uganda. The Secretariat of the Committee is headed by the director appointed by the Parliamentary Select Committee, who is responsible for the day-to-day running of the Secretariat. The Committee of Experts is expected to finish its work within twelve months.

The Committee of experts is required, amongst other things, to do the following in the execution of their mandate:

- Identify issues already agreed on in the existing draft constitutions.
- Identify issues which are contentious or not agreed upon in the existing draft constitutions.
- Solicit and receive from the public written memorandum and presentations on the contentious issues.
- Undertake thematic consultations with caucuses, interest groups and other experts.
- Carry out studies, research and evaluations concerning the Constitutions and other constitutions or constitutional systems
- Articulate the respective merits and demerits of proposed options for resolving contentious issues.
- Make recommendations to the Parliamentary Select Committee on the resolution of contentious issues in a manner that will be for the greater good of the Kenyan people.
- Prepare a harmonised draft Constitution for presentation to the National Assembly.
- Liaise with the Interim Independent Electoral Commission to hold a referendum on the Draft Constitution.

The Committee of Experts' s role is to facilitate the completion of the constitution of Kenya. Kenyans hope to have a new constitution before the next presidential elections scheduled for 2012. As much as the process is driven by public participation, it is predominantly in the hands of the politicians, and the fears of a post-election violence of 2008, following the rejection through a referendum of a constitution that restored the president's extensive powers, continue to lurk in the background. The Law Society of Kenya' s Select Committee on Constitutional Review highlights the necessity of using the a Constituent Assembly driven process to provide legitimacy to possibly avoid what happened in 2008.

² The CKRC draft submitted to the Bomas Constitutional Conference, the Constitution Conference Draft and the Proposed New Constitution 2005

³ Professor Christina Murray of the Department of Public Law at the University of Cape Town



3. Constitution Review Commission; Ghana

3.1. Background

Ghana has had almost two decades of uninterrupted constitutional rule, an important feat given the African political landscape characterised by instability. The Constitution Review Commission was set up by a Constitution Instrument 2010 (C.I.) 64 as a Commission of Inquiry to conduct a review of the 1992 Constitution. The review of the constitution is premised on the understanding that the constitution is a living document and that constitutional democratic experiences need to be reviewed, with the current exercise being nothing other than good housekeeping. The review is meant to give the people of Ghana a platform to express opinions on the fundamental law which governs their lives: a true expression of democracy through fair, credible and transparent review exercise. The nine member Commission was inaugurated by the President of the Republic of Ghana, John Atta Mills, on the 11th January 2010.

3.2. Mandate

The Commission was given a three-pronged mandate to:

- Ascertain from the people of Ghana, their views on the operation of the 1992 Constitution, and in particular, the strengths and weaknesses of the Constitution.
- Articulate the concerns of the people of Ghana as regards the amendments that may be required for the a comprehensive review of the 1992 Constitution.
- Make recommendations to the Government for consideration and provide a Bill for possible amendment of the Constitution.

3.3. The Commission's work

The Commission's work has included soliciting members of the public, both at home and abroad, to submit proposals on the 1992 Constitution review, and since the conclusion of the National Constitution Conference in March 2011, the Commission has been busy with the following tasks:

- Analysing and synthesising the eighty five thousand submissions received.
- Conducting appropriate and relevant research into the areas covered by the submission.
- Testing the legal and factual integrity of the submissions.
- Eliciting best international comparative practices for consideration and adaptation to that Ghanaian situation.
- Drafting the Bills for the recommended amendments to the Constitution.
- Preparing an indicative list of laws that need to be reviewed.
- Putting together a comprehensive list of recommendations for administrative reforms in governance and



- Engaging the Commissioners in a consensus building approach to their decision making process across the 12 thematic areas as well as other areas of noted concerns of the Constitution.

The exercise has resulted in long hours of deliberation, and the Commission has reported substantial progress, predicting that its work will be finished within its given timeframe. The Commission advises that it will then submit a Final Report on its recommendations and findings, with draft amendment Bills to the Government of Ghana, within the time allotted to it. The remaining life of the Commission will be spent on administrative processes for phasing out the constitutional review project.

References

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Constitution Review Commission: Ghana

Constitution Review Commission