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**JOINT
CONSTITUTIONAL REVIEW COMMITTEE
REPORT**

28 October 2005

REPORT

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 Joint Constitutional Review Committee placed advertisements in the media on 9 May 2005 inviting from the public submissions regarding changes to the Constitution. The submissions had to reach the Committee by 30 May 2005. In all, 17 submissions were received.

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The Committee requested the Parliamentary Legal Services Office to consider each of the submissions in the light of current jurisprudence. Where necessary the Legal Services Office engaged the assistance of legal specialists such as Professor Julian Hoffman from the University of Cape Town as well as the Parliamentary Information Services Section.

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

1. Property: Section 25

It was submitted that section 25 of the Constitution should be amended to allow for land redistribution to take place without subjecting the process to rigid legislative requirements; to reform the tax system for the introduction of a land tax system; to amend the circumstances for determining the amount of compensation paid for the expropriation of property; and to impose positive obligations on the legislature and executive to implement the amendments.

The Committee noted that the redistribution of land is on-going and that a positive right to property was not included in the Constitution for the specific purpose of allowing redress of past injustices as well allowing for measures to ensure equitable access to property, including land. The

Committee is further of the view that the regulation of a land tax is a matter to be dealt with in ordinary legislation and not the Constitution.

Recommendation

The Committee accordingly does not support an amendment to section 25 of the Constitution.

2. Traditional Leaders: Sections 211 and 212

It was submitted that sections 211 and 212 of the Constitution should be amended to make provision for the effective functioning of institutions of traditional leadership and that traditional communities must be specifically recognized in sections 211 and 212. Also, that section 212 be amended to provide a role for traditional communities and leaders in legislative and executive decision making; that the section fails to recognise a role for traditional communities other than at local government level and that the wording of section 212(2) should be in the peremptory form.

The Committee is of the opinion that the recognition of specific traditional communities in the Constitution would require a drastic deviation from current policies and conflicts with democratic principles.

*Summament
committee positive*

Recommendation

The Committee is satisfied with the current construction of sections 211 and 212 and accordingly recommends that no amendment to these sections is needed.

3. Equality Clause: Section 9

It was proposed that an element of "prejudice" should be incorporated into the test for "discrimination" in section 9 of the Constitution. It is submitted that the wording of section 8(4) of the interim Constitution sets a better requirement for discrimination than the wording in section 9(5) of the final Constitution.

The Committee is of the opinion that the Constitutional Court has clearly pronounced itself on the "equality" clause and in this respect the Committee does not support the submission.

↙ **Recommendation**

The Committee recommends that no amendment to section 9 is warranted.

4. Interpretation Clause: Section 39

It was proposed that the Constitution should contain interpretation guidelines additional to section 39 of the Constitution because without such interpretation guidelines and methodologies "the understanding of justice seems to be within the particular bosom of the judges."

The Committee does not agree that the interpretation of the Constitution should be subjected to rigid principles as proposed.

Recommendation

The Committee recommends that no amendment to the Constitution in this regard is needed.

5. Limitation Clause: Section 36

It was submitted that because the rights in the Bill of Rights do not enjoy the same status, the Constitution should make provision for a hierarchy of rights.

The Committee notes that the Constitutional Court has in the case of **S v Makwanyane and Another [1995 (3) SA 391 (CC)]** recognized that certain rights do enjoy greater status than others. However, the Committee is of the view that it is not necessary to amend the Constitution to give effect to the proposal.

Recommendation

The Committee recommends that no amendment to the Constitution is needed.

6. Marriage

Separate submissions were received for the inclusion of a definition of "marriage" in the Constitution.

The Committee is of the opinion that a definition of "marriage" should not be included in the Constitution.

Recommendation

The Committee does not recommend any amendment to the Constitution in this regard.

7. Innocent until proven guilty

It was submitted that the slogan used by the Drive Alive Project, i.e. "If you as a motorist hit, run over or injure a Pedestrian, you will be guilty of an offence and pay the penalty" is contrary to the Constitution because it reverses the presumption of "innocent until proven guilty".

The Committee is of the opinion that the presumption of innocence is a pillar of our criminal justice system and that the submission was not requesting a constitutional amendment.

Recommendation

The Committee recommends that no amendment to the Constitution in this regard is needed.

8. Prisoners' right to vote

It was submitted that prisoners should not be allowed to vote.

The Committee is not in favour of an amendment to the Bill of Rights and does not agree that prisoners should be disenfranchised.

Recommendation

The Committee recommends that no amendment in this regard is needed.

9. Provision of Old Age Homes

A submission was received that motivates for Old Aged Homes to be provided for aged people in order to protect such persons from abuse.

The Committee is of the view that the submission does not require a constitutional amendment but that it is a proposal that should be directed to the Department of Social Services.

Recommendation

The Committee recommends that no amendment is warranted.

10. Right to Life and the Death Penalty: Section 11

It was submitted that the death penalty should be re-instated as a sentence for certain serious crimes, for example, murder and rape.

The Committee does not support the re-introduction of the death penalty.

Recommendation

The Committee recommends that no amendment be considered in this regard.

11. Health Care Services: Section 27

It was proposed that a woman's right to reproductive health care services should not be extended to abortions, except in cases of rape, where the pregnancy poses a serious health risk or where the foetus is extremely disfigured.

The Committee is of the view that the suggested amendment would impact negatively on the fundamental rights of women.

Recommendation

The Committee does not support the submission and recommends that no amendment to section 27 is needed.

12. Care of Children's rights: Section 28

It was proposed that section 28 of the Constitution should be amended as follows-

- section 28(1)(b) - to entrench a right for every child to family care, parental care, or guardian care, or to appropriate alternative care when removed from the family environment;
- section 28(1)(f) – to include the following words after the word “service”, namely, “or be subjected to any cultural, ethnic, social or religious practices or acts”;
- section 28(1)(g) – to provide for the constant supervision of a child who is detained by an appointed and qualified person.

The Committee is of the view that section 28(2) of the Constitution entrenches the right that a child's best interest is of paramount importance in every matter concerning the child. The Committee is further of the view that the proposed amendments would not result in additional protection for children.

Recommendation

The Committee recommends that the existing provisions are adequate and that no amendment is needed.

13. The independence of the Judiciary - Section 165(2)

It was proposed that the independence of the judiciary should be suspended so as to allow it to be monitored by a parliamentary organ. Also, that monitoring should be in place until the entire justice system is

transformed and that "immoral court verdicts" should be addressed. Further, that a mechanism should be introduced that holds the judiciary accountable to the State and to the citizenry at large.

The Committee acknowledges that judicial independence is entrenched in the Constitution and that the independence of the judiciary is essential to the doctrine of separation of powers. However, the Committee notes that a mechanism that provides for complaints against judicial officers is currently being addressed in legislation.

Recommendation

The Committee recommends that no amendment in this regard is needed.

14. Section 184(2)(d)

A submission proposed that the South African Human Rights Commission should be empowered and obliged to educate people on human rights from primary school level and to every family in the country.

The Committee is aware that the functions of the Commission are dependent on its resources and that the proposal does not require an amendment to the Constitution.

Recommendation

The Committee recommends that no amendment in this regard is warranted.

15. Chapter 9 of the Constitution

It was submitted that section 192 of the Constitution should be amended to make provision for the inclusion of telecommunications and that the Broadcasting Authority should be included in section 181 of the Constitution as an institution supporting constitutional democracy.

The Committee acknowledges that there is uncertainty between what is understood to fall within the realms of broadcasting and telecommunications. The Committee notes that the Portfolio Committee on Communications is currently deliberating on the Convergence Bill that covers the merging of broadcasting and telecommunications. The Committee is of the view that the Department of Communications and the Portfolio Committee on Communications should be called upon to make further presentations on this topic to the Committee. (included)

Recommendation

The Committee recommends that the matter should be more fully considered.

16. Section 146(6) *no change*

It was submitted that section 146(6) of the Constitution should be amended because it makes a distinction between national delegated legislation made in terms of section 101 and provincial delegated legislation made in terms of section 140. It was further submitted that provincial delegated legislation may not be referred to the National Council of Provinces (NCOP) in terms of section 146(6).

The Committee is of the view that section 146(6) does not prohibit provincial delegated legislation from being referred to the NCOP.

Recommendation

The Committee recommends that no amendment in this regard is warranted.

17. Animal Rights and Section 24

It was proposed that the "protection" of animal rights should be included in the Constitution because current animal rights legislation is inadequate. Further, that provision should be made in the Constitution for an

obligation to be imposed on government to take reasonable steps to ensure the protection of the environment and animals.

The Committee acknowledges that the Bill of Rights only deals with human rights and does not support the inclusion of positive rights for animals. Also, because section 7(2) of the Constitution places a duty on the State to amongst others, fulfil the rights in the Bill of Rights, the Committee is of the opinion that section 24 does not have to be amended to specifically place an obligation on the State to protect animals and section 24(b) may be a conduit for the "protection" of animals legislation.

Recommendation

The Committee recommends that no amendment is warranted in this regard but that the submission be referred to the Portfolio and Select Committees dealing with Environmental Affairs for comment as to whether the existing animal protection legislation is adequate.

18. Religion: Section 15

It was submitted that section 15 of the Constitution should be amended to specifically recognize the fundamental principles of the religion of Islam.

The Committee holds the view that an amendment to section 15 that recognizes a particular religion will be contrary to the principles of the constitutional order, especially in respect of freedom of religion.

Recommendation

The Committee recommends that no amendment in this regard is warranted.

19. Labour Relations: Section 23

It was recommended that labour legislation should be reviewed to ensure it is consistent with section 23 of the Constitution.

The Committee notes that the submission does not require an amendment to the Constitution, but an enactment of ordinary legislation.

Recommendation

The Committee recommends that no amendment to section 23 is warranted.

20. Co-operative Government: Section 40 (1)

no change

A submission was received that proposes that the reference to "provincial" government in section 40(1) of the Constitution should be removed and that provincial government should be merged with national government because national government constantly intervenes in the affairs of provinces.

The Committee notes that the provincial sphere of government forms an integral sphere in respect of the constitutional order and therefore its removal would require drastic amendments to the Constitution and other legislation.

Recommendation

The Committee recommends that no amendment to section 40(1) is needed.

21. Parliament and Local Government

completely new inclusion

It was submitted that local government should not be represented in the National Council of Provinces (NCOP) by organized local government. It is argued that section 163 should be deleted and that local government should be allowed to associate along the lines of labour legislation in terms of section 23 of the Constitution.

The Committee is of the opinion that section 67 of the Constitution adequately provides for local government to be represented in the NCOP. Further, the representation of local government in the NCOP is not