

Draft 1

Constitutional landscape of the constitutional provisions dealing with the interrelated themes of oversight, accountability, transparency and responsiveness in respect of Parliament's functions

1. Introduction

In July 1999 the commissioned Report on Parliamentary Oversight and Accountability (Corder Report) was handed to Parliament. After considering the Corder Report the Ad Hoc Joint Sub-Committee on Oversight and Accountability, made certain recommendations in the Final Report of the Ad Hoc Joint Sub-Committee on Oversight and Accountability (Final Report), one of which was to compile this document. The Joint Rules Committee decided that that recommendation is part of the tasks of the Projects Component of the Task Team on Oversight and Accountability.

2. Terms of reference

The Final Report recommended that Parliament, through the Joint Rules Committee, compiles a document landscaping the constitutional provisions dealing with the interrelated themes of oversight, accountability, transparency and responsiveness, and outlining international trends. The Sub-Committee further recommended that such a document may be a compilation of inputs in the form of essays from key constitutional negotiators or in the form of commissioned research or both.

The Sub-Committee further recommended that following the tabling of the abovementioned document, debates, workshops and discussions should be programmed and organised within Parliament, first amongst Members themselves, and then later on expanded to include other stakeholders with the objective to

develop a broad understanding of the oversight role and functions of Parliament within our constitutional democracy.

3. Context of recommendations

The Sub-Committee made the abovementioned recommendations within the context of chapter 3 of the Final Report entitled “Accountability, Oversight and the Constitutional Imperative: The Role of the National Assembly”. Chapter 3 of the Final Report discusses the findings of the Corder Report in respect of section 55(2) of the Constitution.

The Sub-Committee observed that the chapter in the Corder Report does not adequately deal with all of the constitutional provisions relating to oversight. It was felt that in order to appreciate the full import of any single clause relating to oversight it is necessary to develop an understanding of the entire oversight theme in the Constitution. In addition to looking at section 55(2) the Sub-Committee considered that an audit of the references in the Constitution to oversight and accountability would necessarily entail specific references to oversight such as the provision that parliamentary committees must have oversight of all security services (section 199 (8)).

The Sub-Committee also referred to other less specific sections, which have profound oversight implications, including section 231. Section 231 provides broadly that although the negotiating and signing of all international agreements is the responsibility of the national executive, an international agreement binds the Republic only after it has been approved by resolution of both the National Assembly and the National Council of Provinces. The Sub-Committee considered that this is an example of a provision that provides for parliamentary oversight over what previously was considered the exclusive terrain of the executive, i.e. the executive prerogative.

Furthermore, the Sub-Committee considered that ministerial accountability, usually a matter of convention, is in our instance, peculiarly located in the Constitution, and for this reason reference should also be made to section 92.

The Sub-Committee was of the view that the above and other sections relating to Parliament's oversight responsibilities would have to be read with the 'super-entrenched' section 1, which captures the essence of the values underpinning our democratic state.

These values underpin the notion of oversight and accountability and the Executive's action is ultimately measured against these.

The Sub-Committee also thought it useful to make a comparison between the Interim Constitution and the 1996 Constitution to further provide insight into the manner in which issues of oversight had been fine-tuned during the two phases of our constitutional evolution.

This document attempts to build on the view of the Sub-Committee that oversight is not only the responsibility of the National Assembly based on section 55(2) as an "obligatory minimum standard". Instead, oversight should be based on a broad approach based on the underlying values of the Constitution with the idea of building a strongly entrenched democratic culture operating within the ambit of these underlying values and spirit of the Constitution.

Finally, to fit its purpose and as referred to in Sub-Committee's Final Report, this document must take cognisance of the vision of Parliament:

4. What is a landscaping document?

Generally, landscaping refers to a broad view with the purpose of planning and designing. This can be contrasted to the meaning of mapping, which refers to a flat diagrammatical representation showing the arrangements or components of a thing.

Both the Corder Report and the Sub-Committee's Final Report map out and landscape, to a great extent, some of the constitutional provisions relating to the interrelated themes of oversight, accountability, transparency and responsiveness. Furthermore, the NA Table recently published an Audit of Statutes, 2004: Guide to

Parliament's obligations under the Constitution and Legislation, which maps out statutes mandating oversight.

This document aims to provide a perspective on these provisions, without repeating the mapping exercise. This perspective can be discussed and refined for use pursuant to Parliament's constitutional functions relating to the interrelated themes of oversight, accountability, transparency and responsiveness.

5. The interrelated themes of oversight, accountability, transparency and responsiveness

Interrelatedness

The separation of powers doctrine is central to the understanding of the interrelated themes of oversight, accountability, transparency and responsiveness. This doctrine is based on the notion of checks and balances inherent in the relationship between different arms of government.

In light hereof, the national executive is accountable to Parliament, and the National Assembly must maintain oversight over all organs of state, pursuant to the specific functions set out for the Assembly and Council in the Constitution. Oversight and accountability is designed to encourage open government. It serves the function of enhancing public confidence in the government and ensures that the government is close and responsive to the people it governs. These interrelated themes also find expression in the rights to information and just administrative action in the Bill of Rights.

Interpretation

It is generally accepted that constitutional interpretation must aim to give expression to the fundamental values and purposes of the Constitution and so locate the meaning in the Constitution's historical context. In other words, the Preamble and Founding Provisions are important interpretative tools that inform and give substance to all the provisions of the Constitution.

The central argument of this paper is that the above statement of purpose and value, informs the constitutional requirements pertaining to the interrelated themes of oversight, accountability, transparency and responsiveness.

Oversight purpose

Accountability generally refers to account for money spent. It is a specific form of oversight. However, whereas accountability must be measured against objectives required in terms of the Public Finance Management Act, 1999, very few measurable objectives are provided for in legislation pertaining to oversight generally. That being said, the purpose of general oversight must be found in the Constitution and specifically with reference to the values set out in the Preamble and Founding Provisions, which includes healing the divisions of the past, social justice, human dignity, equality, supremacy of the Constitution, and democracy to ensure accountability, responsiveness and openness.

The oversight and accountability roles of Parliament, Assembly and Council

A contextual interpretation of the constitutional provisions relating to oversight and accountability indicates that the Constitution provides oversight roles for Parliament as a unit as well as the National Assembly and the National Council of Provinces separately.

Sections 92 and 93 provide that members of the Cabinet and Deputy Ministers are accountable to Parliament for the exercise of their powers and the performance of their functions and must provide Parliament with full and regular reports concerning matters under their control.

The Constitution further sets out that Parliament must perform oversight of the security services (section 199(8)), approve a state of national defence (section 203), approve the stopping of provincial funds (section 216); and, the Houses must

approve international agreements (section 231). There are also many examples of legislation requiring state institutions to report to Parliament.

The question that arises is whether the Constitution requires the Assembly and the Council to perform the same function in respect of oversight? The answer is found in the general functions of the National Assembly set out in sections 42(3) and 55(2), and the general functions of the National Council of Provinces set out in section 42(4).

Section 42(3) provides that the National Assembly is elected to represent the people and to ensure government by the people under the Constitution by passing legislation, scrutinizing and overseeing executive action, and electing the President.

Section 55(2) of the Constitution specifically requires the National Assembly to provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it and to maintain oversight of the exercise of national executive authority and any organ of state. Although the responsibility relating to accountability pertains only to executive organs of state in the national sphere of government, the oversight responsibility pertaining to all organs of state is very broad. An organ of state means any department of state or administration in the national, provincial or local sphere of government; or any other functionary exercising a power or performing a function in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, but does not include a court or judicial officer (section 239). It follows that the Assembly enjoys concurrent responsibility for oversight over provincial organs of state with provincial legislatures, as section 114(2)(b) empowers provincial legislatures to maintain oversight over provincial organs of state.

The scope of the Council's oversight function should be seen in the context of section 42(4), which specifically sets out the function of the Council as representing the provinces to ensure that provincial interests are taken into account in the national sphere of government by participating in the national legislative process and by providing a national forum for the public consideration of issues affecting

provinces. Section 66, which provides that the Council may require a Cabinet member, a Deputy Minister or an official in the national executive or a provincial executive to attend a meeting of the Council, should also be interpreted in this context.

Examples of specific oversight functions provided for in the Constitution includes its role in approving interventions under section 100 and 139, and disputes about provincial administrative capacity under section 125(4).

Therefore, the Council's oversight role is complementary and focused on the relationship between the spheres of government, rather than duplicating the functions of the Assembly, except where the Constitution specifically provides otherwise.

Accountability of Chapter 9 institutions

State institutions supporting constitutional democracy, commonly referred to as Chapter 9 Institutions, are accountable to the Assembly (section 181(5)). In accounting to the Assembly, these institutions are subject to the provisions of the Public Finance Management Act, 1999.

Furthermore, these institutions (Public Protector, South African Human Rights Commission, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, Commission for Gender Equality, Auditor-General, and Electoral Commission) must report on their activities and performance to the Assembly at least once a year. In other words, the Assembly maintains oversight of these institutions. It can be mentioned that there are other institutions similar by nature to the Chapter 9 Institutions; e.g. the Public Service Commission, which reports to the Assembly (section 196); and the Financial and Fiscal Commission, which reports to Parliament (section 222).

Although the President appoints the Public Protector, Auditor-General and members of the South African Human Rights Commission, Commission for Gender Equality and Electoral Commission, this is done on recommendation of the

Assembly (section 193(4)). Furthermore, the President must remove the Public Protector, the Auditor-General or any member of a Commission established by Chapter 9 from office or a councillor of the Independent Communications Authority of South Africa, upon adoption by the Assembly of a resolution calling for such removal (section 194 and section 8 of the Independent Communications Authority of South Africa Act).

The interpretation of the oversight function over the Chapter 9 Institutions is informed by the provision that these institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice (section 181(2)). Furthermore, the Constitution requires other organs of state, through legislative and other measures, to assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions (section 181(3)). No person or institution may interfere with the functioning of these institutions (section 181(4)).

In other words, the Chapter 9 Institutions must account for their budget spending to the Assembly and report to the Assembly on their activities and performance at least once a year. In respect of the South African Human Rights Commission, an annual enquiry into the realisation of socio-economic rights is also required (section 184(3)).

Oversight by the Assembly therefore involves approving the budget of the Chapter 9 Institutions and establishing whether the constitutional and other legislative functions of the institutions have been complied with. In light of their independence, the Assembly cannot interfere in the way these institutions perform their functions.

The reason for the limited oversight role over Chapter 9 Institutions is because these institutions act, amongst others, in a supporting role *vis-à-vis* Parliament's oversight function. However, should these institutions fail to fulfil their functions, nothing prevents Parliament from exercising its oversight powers, including not approving the relevant budget votes pertaining to these institutions.

Conclusion

The Interim Constitution did not clearly outline parliamentary oversight functions. However, the 1996 or final Constitution refers to oversight and accountability in specific detail.

The Constitution provides that all spheres of government and all organs of state within each sphere must provide effective, transparent, accountable and coherent government for the Republic as a whole (section 41(1)(c)). In this regard the Constitution provides specific oversight functions for the Assembly and the Council, as well as for Parliament acting as a unit. As a rule these functions must be performed in public.

The central argument of this paper is that Parliament must maintain oversight with reference to the Preamble and the Founding Provisions of the Constitution, including democratic values, social justice and human rights.

Way forward

At the outset it was indicated that the Sub-Committee considered that inputs from key constitutional negotiators would be crucial to this document. Furthermore, political direction from within Parliament would in my view also facilitate the development of this document. It is therefore suggested that this document is considered a draft for discussion and further development.

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