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**LEGAL OPINION**

**[Confidential]**

**To: The Co-Chairperson of the Joint Committee on Constitutional Review**

**cc: Ms PN Tyawa**

 **Acting Secretary to Parliament**

**From: Adv Z Adhikarie**

 **Chief Legal Adviser**

**Date: 20 January 2021**

**REF No: 141/2020**

**SUBJECT: ANNUAL REVIEW OF THE CONSTITUTION – THE NEED TO CLARIFY THE ROLE OF THE JUDICIAL SERVICE COMMISSION (JSC) IN THE APPOINTMENT OF JUDICIAL OFFICERS AND MANAGE THE APPARENT PREJUDICE AGAINST SOLE PRACTITIONERS AND INDEPENDENT ADVOCATES IN FAVOUR OF THE ORGANISED LEGAL PROFESSION**

**Introduction**

1. Our Office was requested to advise the Joint Committee on Constitutional Review (‘’the Committee’’) on the submission received from Dr Ramola Naidoo. Dr Naidoo describes himself in his submission as a sole practitioner, who specialises in Alternative Dispute Resolution (“ADR”), and a writer.
2. The submission concerns the amendment to several sections of the Constitution to provide for a fair and equal opportunity for sole legal practitioners and Independent Advocates to be appointed as judicial officers. It seeks to clarify the role of the Judicial Service Commission’s (“JSC”) screening committee on nominations for judicial interviews by the JSC, to enhance freedom of association, trade, occupation or profession by amending the Bill of Rights so as to provide for equity and fairness in judicial appointments. It also seeks to facilitate access to courts, clarify court procedures and inherent powers of the courts. Dr Naidoo also proposes an amendment to the composition of the JSC, appointment process of judicial officers, provisions relating to state of emergency and the Bill of Rights in as far as it relates to health care, food, water, social security, environment and housing.
3. Dr Naidoo has included proposed amendments to most of the sections for which he proposes amendments.

 **Background**

1. On 06 January 2020, in response to a public invitation, the Chairperson of the Committee received a submission from Dr Ramola Naidoo, among others, proposing amendments to various sections of the Constitution as outlined above.
2. In essence the submission states that “*the process of the appointment of judicial officers is not fair and equitable as it favours the organised legal profession to the detriment of sole practitioners and Independent Advocates”*. Dr Naidoo cites numerous examples to illustrate his assertion, which include:
	1. the role of the screening committee of the JSC in the shortlisting of candidates for interviews, which he alleges is not transparent, fair and equitable. He cites an example wherein his name was removed from the list of nine (9) shortlisted candidates without any reasons for the removal. Dr Naidoo proposes that the role of the organised legal profession in the appointment of judicial officers is the main reason that sole practitioners and Independent Advocates are marginalised from appointment to the bench by the JSC. He mentions that he has been a constitutional law and public interest lawyer for nearly 40 years, yet he has never been invited to represent the state in any capacity, including to provide a legal opinion, act as a judge, or even serve on a commission of inquiry, even though the law does not prohibit the appointment of sole practitioners. In addition, Dr Naidoo alludes to the fact that the state procurement regulatory framework allows for deviations from policy in order to provide fair opportunity, however the Office of the State Attorney has not engaged this option to benefit sole practitioners and Independent Advocates. He believes that all the aforementioned is systematically aimed at isolating and marginalizing sole practitioners and Independent Advocates.
3. The following are the proposed amendments by Dr Naidoo:
	1. **Section 174(4)(a)** to clarify whether a screening committee can, without public scrutiny, remove a nominee from the list of nominations, including clarifying the role of the President;
	2. **Section 18 or 22** to provide that everyone has a right not to be compelled to join an association in order to practise their trade, occupation, or profession;
	3. **Section 34** to include private arbitration;
	4. **Sections 34, 171 and 173** to deal with issues relating to the clogging up of the Court roll, which makes it impossible to comply with relevant Uniform Rules on an urgent basis;
	5. **Section 178(1)(e) and (j**) to provide for fairness in relation to sole practitioners and independent advocates and not only members of the bar; and (j) to be amended to provide that the President and Parliament may appoint members of civil society to those four positions as commissioners of the JSC;
	6. **Section 174(5**) to provide that the President can appoint other recommended appropriately qualified persons (with no judicial experience) as judges of the Constitutional Court;
	7. **Section 37** to be amended by deleting the connecting word “and” between section 37(1)(a) and (b) and be replaced with “or”;
	8. **Section 42(6)** to provide clearly for members of Parliament to be able to sit in person separately in different Provinces, as well as meet via a remote digital platform;
	9. **Section 195(2)** to have an added subsection (d) to include judicial officers;
4. Section 27(1)(b) to have an added provision that the state must ensure, within one year that pit latrines are eradicated everywhere in South Africa.
	1. **Section 24 and 26** to provide guidelines for protecting the environment against air pollution, hunting and poaching of wildlife;
5. In the main, the submission is that the process of shortlisting of nominees for interviews and recommendation for appointment by the JSC must be reviewed to ensure fair, equitable and just process for all legal practitioners.

**Regulatory framework**

1. Sections 174 to 178 of the Constitution deal with the appointment, term of office and removal of judicial officers. First, the Judicial Service Commission draws up a list of candidates that must consist of three more names than the number of vacancies. The Commission does this after calling for nominations and holding public interviews. Subsequently, the President, after consultation with the Chief Justice and the leaders of political parties represented in the National Assembly, chooses the judges through this selection process.
2. Section 174(7) of the Constitution states that judges other than those contemplated in section 174 (4) of the Constitution, must be appointed in terms of an Act of Parliament and such appointments must be done without favour or prejudice.
3. Section 178(1)(e) provides for two advocates, nominated from within the advocates profession, to represent the profession as a whole in the Judicial Service Commission, and appointed by the President;
4. Section 178(1)(f) provides for two attorneys, nominated from within the attorney’s profession, to represent the profession as a whole in the Judicial Service Commission, and appointed by the President,
5. Section 178(4) provides that the JSC has the powers and functions assigned to it in the Constitution and national legislation. The JSC may determine its own procedure, but decisions of the Commission must be supported by the majority of its members.

**Discussion**

**Judicial Appointments**

1. Dr Naidoo asserts that the process for nominations, shortlisting and conducting of interviews by the JSC for judicial appointment by the President is not fair as it is biased in favour of the organised legal profession to the detriment of the sole practitioner and Independent Advocates.
2. It is trite that the JSC is the constitutional body that is tasked with facilitating nominations, interviews and recommendations to the President, of persons to be appointed as judicial officers. The process is clearly set out in section 178 of the Constitution. The JSC has constitutional powers to determine its own internal mechanisms, and this includes forming a screening committee to conduct its shortlisting process. It is also evident that the screening committee in question is a sub-structure of the JSC. Substructures are not empowered to make decisions, but they often conduct their work on the basis of criteria given by the deciding body and required to report to it on activities. In the instant circumstances, it is the JSC which decides on the final list of recommendations on the advice of the screening committee. Therefore, the final decision on who makes it onto the list for interviews remains the preserve of the JSC as directed by the Constitution.
3. The submission contains contentious allegations of bias and unfairness by the JSC, the organised legal profession, the Minister of Justice and Correctional Services, among others, against sole practitioners and Independent Advocates. It is alleged in the submission that there is a systematic isolation and marginalization of the latter category of legal professionals from judicial appointments. On the face of it, these allegations go against the spirit and letter of the Constitution as judicial appointments should be based on equity and fairness. Notwithstanding, the submission does not mention that Dr Naidoo or any other sole practitioner has approached the JSC with a complaint on the matters raised by the submission and sought reasons and where reasons were not provided, applied for access to information in terms of the Promotion of Access to Information Act (“PAIA”) or approached a court for review of any of the JSC processes
4. The organised legal profession is currently governed by the Legal Practice Act (“the Act”). The Act, in section 4, creates the Legal Practice Council as a statutory body that is tasked with regulating the affairs and who exercises jurisdiction over Attorneys, Advocates and Candidate Attorneys. The allegations of bias against certain practitioners (sole practitioners) by other practitioners, who are members of voluntary bodies such as the General Council of the Bar, among others, may be referred to the Council for investigation. The submission does not mention that this matter has been referred to the Legal Practice Council.
5. It is evident that the matters raised by the submission, contentious as they are, are more related to challenges which can be managed by invoking (this was for choosing one of the two) statutory remedies as provided in PAIA or the Legal Practice Act, among others. The amendment of the Constitution should not be considered lightly if the mischief can be cured by laws and remedies that are in place to protect the constitutional rights that are allegedly infringed.
6. We are of the view that sole practitioners should exhaust all the remedies available to them in law, before the Committee should consider amending the Constitution to address some of the challenges raised in the submission. Furthermore, we are also of the view that this matter could be referred to the relevant Portfolio and Select Committee for further investigation. These Committees could, through their oversight powers, inquire into the veracity of the challenges as raised by the submission and intervene where necessary.

**Section 24 of the Constitution**

1. In respect of the proposal by Dr Naidoo to amend section 24 of the Constitution, we are of the view that the proposed amendment is not warranted because the environmental right in section 24 of the Constitution has been given effect to by the environmental management framework legislation known as the National Environmental Management Act No 107 of 1998 (NEMA). NEMA is a sector specific legislation to govern various adverse impacts as outlined by Dr Naidoo.

**Access to Courts**

1. On the proposal to amend section 34 of the Constitution, to add private arbitrations to section 34 has not been substantiated as the section in question already includes all Tribunals. The recommendation relating to introducing technology in court processes is not a matter for constitutional amendment. In essence the entire issue on this section relates to process and not constitutional rights.

**Court Procedures, Inherent Power & Court Roll**

1. Furthermore, the issue of court procedures, inherent power of the High Courts and management of the court roll is not a matter of constitutional amendment and falls outside of the jurisdiction of the Committee and would offend the principle of separation of powers. This too is an issue of systems and processes and are not matters for constitutional amendment.

**Composition of the JSC**

1. The recommendation to amend section 178(1)(j) of the Constitution to provide for the inclusion of civil society in the composition of the JSC remains a policy decision for the Committee to consider.

**Proposed Amendment to Section 37**

1. The proposal to amend section 37 of the Constitution to delete “and” and replace with “or” and to clearly outline the powers of the President in a state of emergency is also one of policy which the Committee may consider. It is however important to note that the submission has not fully substantiated the basis for the deletion and it is difficult to make the connection between the examples he cited and their relevance to the recommendation for the proposed amendment.

**Proposed Amendment to Section 42(6)**

1. The proposal to amend section 42(6) of the Constitution to provide for Parliament to meet via digital platforms is moot as Parliament has already been conducting its meetings in this manner without requiring an amendment to the Constitution. As such, matters of systems and processes do not need to be articulated in the Constitution. The matter of virtual meetings has now been addressed by means of the Rules of the National Assembly and the NCOP respectively, as envisaged by the Constitution which empowers Parliament to determine its own internal procedures.

**Proposed Amendment to Section 195(2)**

1. The proposal to amend section 195(2) of the Constitution, to include judicial officers, is not properly substantiated. We are of the view that it would offend against the principle of separation of powers which is inherent in the scheme and design of the Constitution. Matters relating to administration of courts are regulated by Chapter 8 of the Constitution. Section 195 deals with the public administration of which courts are not part of.

**Proposed Amendment to Section 27(1)(b)**

1. The proposed amendment to section 27(1)(b) of the Constitution, to ensure the eradication of pit latrines is not properly substantiated. It is one which is governed by policy, legislation and implementation. The Constitution sets out the principle which is outlined in detail in policy and/or legislation. We are of the view that an amendment of the said section is both unnecessary and unjustified. It is a delivery issue which can be referred to the relevant committees.

**Conclusion**

1. If the Committee is in agreement with our views expressed above, we would recommend that the Committee writes to Dr Naidoo and inform him that the matters he raised in his submission (save for the two issues that the committee may wish to consider) would be referred to the relevant parliamentary committees for further processing and possible resolution.
2. We note that our advice is intended to guide the Committee on possible options that we have suggested above which the Committee may wish to consider and deliberate upon.

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**Adv Z Adhikarie**

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