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**LEGAL OPINION**  
[Confidential]

**TO:** Adv S P Holimisa, MP  
Mr B A Mnguni, MP  
Co-Chairpersons of the Constitutional Review  
Committee

**COPY:** Secretary to Parliament

**DATE:** 15 September 2009

**SUBJECT:** Submission by Idasa for the amendment of section  
47(1)(e) read with section 47(3) of the Constitution

**LEGAL ADVISER:** Adv A Gordon

**COMMITTEE REFERENCE:** 14

**REFERENCE NUMBER:** 136/09



## MEMORANDUM

**To:** Adv S P Holomisa, MP  
Mr. B A Mnguni, MP  
Co-Chairpersons of the Constitutional Review Committee

**Copy:** Secretary to Parliament

**From:** Constitutional and Legal Services Office  
Adv A Gordon

**Date:** 15 September 2009

**Subject:** Submission by Idasa for the amendment of section 47(1)(e) read with section 47(3) of the Constitution

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1. Idasa forwarded a request for the amendment of section 47(1)(e) read with section 47(3) of the Constitution. The sections provide as follows:

"47(1) Every citizen who is qualified to vote for the National Assembly is eligible to be a member of the Assembly, except-

(e) anyone who, after this section took effect, is convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, but no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined, or until the time for an appeal has expired. A disqualification under this paragraph ends five years after the sentence has been completed.

47(3) A person loses membership of the National Assembly if that person-

(a) ceases to be eligible;

- (b) is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership; or
- (c) ceases to be a member of the party that nominated that person as a member of the Assembly."

### **Background**

2. The request is made in the light of the recommendations by the Panel who conducted an independent assessment of Parliament. At page 79 of the Report of the Independent Panel Assessment, the ethics of Parliament is considered in the context of the travel scandal that gripped the institution over the tenure of the 3<sup>rd</sup> Parliament from 2004 to 2009. Relating to ethics, the Panel observed that greater detail is required and that guiding principles need to be developed in order to obtain clarity regarding the ethical standard in Parliament.

### **Parliament**

3. Members' ethics are governed by the Joint Rules of Parliament and the Schedule on the Code of Conduct for Assembly and Permanent Council Members more fully sets out the powers of the Committee on Ethics to address transgressions by MP's. It should be observed that "ethics" in Parliament is a joint competence between the two Houses of Parliament as the operation thereof relates to members of the Assembly and permanent delegates of the Council. Further, any anticipated re-working of the rules and schedule relating to members ethics may be best suited and referred to the Joint Rules Committee for its consideration and deliberations.

### **National Assembly**

4. Section 47(1)(e) is the section that Idasa proposes for an amendment. It relates only to the National Assembly. Idasa states that Parliament is unable to remove MP's who are convicted and sentenced within the limitation of section 47(1)(e) and in such cases the political parties should step in to remove the MP in terms of section 47(3)(c).

5. Idasa further submits that any member of Parliament who is convicted of corruption, fraud or similar offence involving dishonesty should be ineligible to serve as a Member of Parliament. Therefore, Idasa proposes an amendment to section 47(1) of the Constitution to specifically make provision for certain categories of crimes that seem to erode the ethical standing of MP's.

**Current Position:**

6. The submission by Idasa mirrors the recommendation contained in the Report of the Independent Panel Assessment of Parliament. The Report was tabled and referred to the Joint Rules Committee and the Parliamentary Oversight Authority on 21 August 2009 "for consideration and report in terms of their respective mandates". Therefore, the submission by Idasa is by default already before the relevant "policy" making committees of Parliament.



**ADV A J GORDON  
PARLIAMENTARY LEGAL ADVISER**



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**LEGAL OPINION**

[Confidential]

**TO** : Honourable SP Holomisa, MP  
: Honourable BA Mnguni, MP  
: Co-Chairperson of the Joint Constitutional  
Review Committee

**COPY** : Secretary to Parliament

**DATE** : 17 September 2009

**SUBJECT** : Submission by Mr M Ismail to the Joint  
Constitutional Review Committee

**LEGAL ADVISER** : Mr N Vanara

**COMMITTEE REFERENCE** : 15

**REFERENCE NUMBER** : 149 / 09





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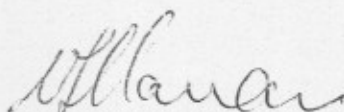
**LEGAL OPINION**  
[Confidential]

**TO** : Honourable SP Holomisa, MP  
: Honourable BA Mnguni, MP  
: Co-Chairperson of the Joint Constitutional  
Review Committee

**DATE** : 17 September 2009

**SUBJECT** : Legal Opinion on the submission by Mr M  
Ismail to the Joint Constitutional Review  
Committee

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1. Our Office was requested to advise on the submission by Mr M Ismail.
  2. The letter dated 17 August 2009 from 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.
  3. In my view since the matter therefore does not fall within the jurisdiction of the Committee, Mr Ismail should be advised to approach the nearest Justice Centre for advice on his legal remedies.

  
Mr NJ Vanara

Parliamentary Legal Adviser

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2009-08-17  
The Co-Chairpersons  
Constitution Review Committee  
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#### SUBMISSION: REVIEW OF THE CONSTITUTION

Your call for submission, advertised in the print media on 19-07-2009, refers.

I am not so sure what the broad term "review" entails, in so far as your mandate is concerned. From this input you may probably deal with only those matters which are pertinent to the Committee.

Hereto is my abridged submission:

#### 1 RESPOSIBILITY FOR PRINTING

The most recent copies of the Constitution in circulation, contain several embarrassing errata:

- a. In the preamble, the word "secn" Suid-Afrika is misspelt.
- b. In Section 4, the word "President" is misspelt.
- c. The said copies still reflect the Constitution as Act 108 of 1996, despite the amendment which uplift the Constitution above all other pieces of legislation.

The copies referred to here are the ones bearing the "10 Years of Freedom" emblem. The emblem implies that these copies were printed in 2004.

The printing errors highlighted above, appear on the first few pages. A logical question arises: Are there perhaps more of such errors as one delves deeper? Well, the printers may have benefit of the doubt.

The concern remains though: why is the supreme law of the country printed and circulated while it contains such errors as might be obvious to even lay-persons? Many nations use our Constitution as a guide to develop their own.

The Departments of Home Affairs (Government Printer), Justice and Constitutional Development were not eager to take up this matter when contacted.

This scenario might point out to a need for an oversight authority tasked with, amongst others, the proof-reading and certification of all updated editions of the Constitution.

## 2 ADVANCEMENT OF THE CONSTITUTION

a) It might be necessary to ponder whether there is need to focus on certain "incomplete" sections where the Constitution envisages enactment of national legislation to elaborate or regulate certain stipulations. Examples ; Section 77 (3) – already dealt with by Parliament while Section 139 (8) has not been complied with directly, yet that legislation could assist in easing tensions among the spheres of government during an intervention, so that well-deserving cases of intervention are not misconstrued as politically-motivated interference.

A question arises whether the national legislature is at liberty to 'cherry-pick' sections it prefers to comply with and to keep other sections in abeyance even if trends in governance indicate urgency for new legislation.

b) The annual celebration of Constitution Day, May 10, seems to be disappearing on the national calendar over the years. This year could be the exception since the date fell within the period when the fourth democratic government was being formed. In other years the day was characterised by a mere photo-shoot of members of parliament and very little activity, if any, in provincial and local governments. As citizens we rue the lost opportunity to interact with our lawmakers and others, especially those forefathers (even among yourselves) who were present during the initial constitution-writing so that they could impart to us the actual spirit of the Constitution.

c) I view the advancement of the Constitution as an on-going national project that guides our democracy and enhances our efforts on nation-building. If we are casual about this project, we might not achieve our objective. I therefore suggest that on-going programmes (including, but not limited, to public hearings) on the advancement of the Constitution be embarked upon, with May 10 being the apex of these activities. I am aware that responsibility for such actions might not entirely fall within the mandate of this Committee. Nevertheless, you might be the crucial conduit in this regard.

Thank you for the opportunity for this input.

Yours sincerely

BJ Mkhalihi

Mobile: 0837080632